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SPEECH

by the Hon. Mr Justice Godfrey Lam
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on

*THE ROLE OF THE
HONG KONG COMPETITION TRIBUNAL*

1. It is a pleasure to address you today in this 10th annual conference of the Asian Competition Forum. Ten years is a long time. It is particularly long in comparison to the history of the Hong Kong Competition Tribunal, which has only been in existence for 16 months and which has yet to hear its first case. It is on the role of this Tribunal in Hong Kong's competition law regime that I wish to address you today.

2. The Competition Ordinance of Hong Kong was enacted in June 2012. The part of the Ordinance that establishes the Competition Tribunal came into force later, and in August 2013 my colleague Queeny Au-Yeung and I were appointed Deputy President and President of the Tribunal respectively.

3. The Tribunal exercises judicial functions. As and when the substantive provisions of the Ordinance come into force, the Tribunal will be vested with jurisdiction to adjudicate upon a host of competition-related matters. Broadly speaking these matters may be divided into three main types:

- Enforcement proceedings brought by the Commission for financial penalties or other orders against respondent undertakings¹
- Applications for review of certain decisions of the Commission²
- Private “follow-on” actions brought by victims of infringing conduct against the undertakings concerned³

4. In each case, the role of the Tribunal is to act as a competent, independent and impartial tribunal⁴ in adjudicating on the issues between the parties before it. I shall say a word on each of these types of proceedings.

5. First, enforcement proceedings. The competition law enforcement model that Hong Kong has adopted is such that, whilst the Competition Commission, of which Anna Wu who addressed you yesterday is Chair, has been created to promote and police compliance with the Ordinance, it does not have the function of adjudicating on whether the competition rules have been infringed.

6. Under the Ordinance it is for the Commission to bring a complaint to the Tribunal and for the Tribunal to adjudicate on whether a competition rule has been infringed and, if so, to award the appropriate penalties or remedies. The orders that the Tribunal can impose include a pecuniary penalty up to 10% of the turnover

¹ S. 92, 94

² S. 84

³ S. 110

⁴ Art. 10 of Bill of Rights, s. 8 Bill of Rights Ordinance (Cap. 383)

of the undertaking for three years,⁵ injunctive orders requiring the undertaking concerned to do any act or refrain from doing any act.⁶

7. A government committee report published in 2006 suggests that one of the reasons for adopting this judicial enforcement model is to “provide a check against over-zealous regulation (for example, through the setting of aggressive quantitative targets for investigation and sanctioning of anti-competitive conduct) by a government-appointed regulator”.⁷

8. The procedure for enforcement in the Tribunal, it appears, is intended to be essentially adversarial in nature, in the sense that it is, primarily, for the Commission to decide what charges to bring, what evidence to adduce in support and what reliefs and orders to seek, and for the respondent to decide what grounds and evidence to rely on in opposition. The Tribunal assesses the evidence and determines which party succeeds on the issues arising, by reference to the applicable burden and standard of proof.

9. However, in this day and age, an adversarial procedure does not mean the Tribunal is wholly passive. On the contrary, one can expect the Tribunal to be active in its case management and the parties should expect to have to respond to the Tribunal’s questions and interventions at any stage of the proceedings.

10. Second, applications for review. The Commission is entrusted with the power to make certain decisions under the Ordinance such as block exemption orders,⁸ decisions that specific agreement or conduct is exempted or excluded from the application

⁵ S. 93

⁶ S. 94 and Schedule 3

⁷ *Report on the Review of Hong Kong’s Competition Policy* (June 2006), para 57(b)

⁸ S. 15

of the competition rules,⁹ and decisions to terminate leniency agreements.¹⁰

11. With the permission of the Tribunal,¹¹ these specified decisions may be taken by the persons affected to the Tribunal for review. On a review, the Tribunal may confirm or set aside the whole or part of the Commission's decision and, in the case of setting aside, refer the matter back to the Commission for it to determine the matter afresh in accordance with the decision of the Tribunal.¹² The Ordinance says little, however, about the nature of and possible grounds for the review. It remains to be seen what the precise scope of review and what the appropriate intensity of review should be.

12. The Tribunal only has jurisdiction to review certain specified decisions, called "reviewable determinations", of the Commission.¹³ These are exhaustively listed in the Ordinance. To challenge any other acts or decisions of the Commission, a person will have to pursue other avenues.

13. Third, follow-on actions. These are private actions brought by persons who have suffered loss or damage as a result of an act already determined, or admitted, to be a contravention of a conduct rule.¹⁴

14. The nature of follow-on action is little different from an ordinary civil action, with the exception that infringement of competition law will already have been established so that the issues that arise will mainly evolve around causation of damage and the quantification of damages.

⁹ Ss. 11 and 26

¹⁰ S. 81

¹¹ S. 84(2)

¹² S. 87

¹³ S. 83

¹⁴ S. 110

15. It is to be noted that in matters that fall within its purview, the Tribunal has virtually exclusive jurisdiction. Moreover, insofar as civil proceedings in the High Court raise issues concerning contravention of the Competition Ordinance, they must, in general, be transferred to the Tribunal.¹⁵

16. Leaving appeals aside for the time being, the Tribunal practically has a monopoly of all judicial functions emanating from the Competition Ordinance. What kind of tribunal is the Competition Tribunal then? And what will its procedures be like?

17. The Competition Tribunal is a superior court of record.¹⁶ That means it is a court that is not subject to the supervisory jurisdiction of any other court (otherwise than by way of appeal), and has unlimited jurisdiction within its sphere of operation.¹⁷

18. The Tribunal is part of the Judiciary of Hong Kong ultimately under the Chief Justice. Its membership consists of all the judges of the Court of First Instance of the High Court,¹⁸ excluding recorders and deputy judges, of whom one is appointed the President¹⁹ and another the Deputy President.²⁰ This provides assurance to the community that the Tribunal is independent from the executive government and from any business interests.

19. In the exercise of its jurisdiction, the Tribunal has the same jurisdiction to grant remedies and reliefs, legal or equitable, as the Court of First Instance.²¹ It has the same general powers as the

¹⁵ S. 113

¹⁶ S. 134(2)

¹⁷ *Jowitt's Dictionary of English Law* (3rd ed) p 584

¹⁸ S. 135(1)

¹⁹ S. 136

²⁰ S. 137

²¹ S. 142(2)

Court of First Instance in dealing with contempt of its own proceedings wherever committed.²²

20. The Competition Tribunal will in many ways be very close to the High Court. Judges of the Court of First Instance will sometimes wear the hat of a High Court judge and sometimes the hat of a member of the Competition Tribunal. Under the current arrangement, at least until it finds a new home, the Tribunal will be sitting in the court rooms of the High Court Building.

21. You will have noted that the Tribunal has no lay members. This is a departure from the original proposal of the Government under which the Tribunal would sit as a three-member panel with a judicial chairman and at least one non-judicial member.²³ In this respect the Hong Kong Competition Tribunal differs from the UK Competition Appeal Tribunal,²⁴ the Australian Competition Tribunal,²⁵ and Singapore's Competition Appeal Board,²⁶ all of which have lay members. The Tribunal also differs from the US Federal Courts, which try private antitrust damage actions with a jury. In this same respect, however, the Tribunal is similar to the Federal Court of Australia and the General Court of the European Union, both of which exercise jurisdiction in competition enforcement proceedings through judges only without lay members.

22. Conscious of the fact that competition law is, for many lawyers and judges, a new area of law in Hong Kong, we are continuously building up expertise within the Judiciary via our own education programme.

²² S. 144(2)

²³ *Detailed Proposals for a Competition Law – A Public Consultation Paper* (CEDB, May 2008), paras 17-18

²⁴ where cases are decided by a panel consisting of the President or a Chairman, and two Ordinary Members

²⁵ which consists of judges of the Federal Court of Australia and lay members

²⁶ Which consists of “not more than 30 members appointed, from time to time, by the Minister on the basis of their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment”: s. 72 of the Competition Act (Chapter 50B)

23. Moreover, in cases necessitating specialised knowledge of economics, of the industry in question and indeed of any other relevant area, it may be expected that the parties will seek to adduce expert evidence. Expert evidence, such as on economics, is not uncommon in competition cases. It will be important however for the Tribunal to hold a firm rein and not let expert evidence to proliferate unnecessarily. Parties may expect modern practices for dealing with experts will be adopted by the Tribunal, such as requiring experts to meet and produce a joint report on their agreements and differences. Other possibilities include receiving the oral evidence of the experts concurrently (sometimes called “hot-tubbing” of experts), or the Tribunal having a general meeting with the experts in which uncontroversial concepts and underlying approaches are explained.

24. Furthermore, the Tribunal has the power to appoint specially qualified assessors. The function of an assessor is to assist and advise the Tribunal on the technical questions arising. There is no strict rule, and the Tribunal has a wide discretion, on whether assessors are to be appointed, who will be appointed, and the kind of assistance assessors can give. It depends on the type of case and what justice requires. In the High Court,²⁷ assessors have been used in construction disputes,²⁸ in Admiralty cases on questions of a nautical nature,²⁹ and in the taxation of liquidators’ fees.³⁰ It should be borne in mind, however, that assessors are not members of the Tribunal and that the decision is that of the members alone.³¹

25. We are keenly aware of the important role to be played by the Tribunal in the development of competition law in Hong Kong.

²⁷ Pursuant to the power in s. 53 of the High Court Ordinance (Cap. 4)

²⁸ *Chevalier (Construction) Co Ltd v Tak Cheong Engineering Development Ltd* [2011] 2 HKLRD 463

²⁹ *The ‘He Da’* [2011] 5 HKLRD 126

³⁰ *Lehman Brothers Securities Asia Ltd (No. 2)* [2010] 1 HKLRD 58

³¹ S. 141(1)

To succeed in that role the Tribunal must establish itself as a fair, efficient and effective forum for the resolution of competition law disputes in which the public can repose confidence.

26. The practice and procedure of the Tribunal must be designed with the same end in mind. Under the Ordinance, the Tribunal is master of its own procedures, and may, so far as it thinks fit, follow the practice and procedure of the Court of First Instance in its civil jurisdiction.³² Rules may be made by the Chief Judge of the High Court prescribing the practice and procedure to be followed in the Tribunal,³³ and directions may be given by the President as to the arrangement of the business of the Tribunal.³⁴

27. The rules and practice directions that the Tribunal is at present preparing seek to ensure that the conduct of business in the Tribunal is marked by active case management. The features of that system include the following:

- We hope to be able to docket a case with a specific judge as early as possible, who may be the President, Deputy President or a member of the Tribunal. It is intended that as far as possible the same judge will see the case through and deal with all interlocutory matters (except perhaps certain less substantial matters that can be dealt with by the Registrar). This will save the time required for the Tribunal to “get up to speed” every time a dispute arises in a case that requires determination, enhances consistency in the conduct of the case, and facilitates robust case management.
- We aim at setting dates at an early stage for the substantive final hearing of the proceedings as far as is

³² S. 144(1)

³³ S. 158

³⁴ S. 136(3)

realistically practicable. Once the trial dates are fixed, other steps will have to be conducted at a pace in keeping with those dates. Timetables may have to be set by working backwards from that milestone date. This will focus the parties' minds on the ultimate event and reinforce the need to justify any deviation from the timetable on substantial grounds.

- In enforcement proceedings and follow-on actions, there will be case management conferences to identify necessary directions and generally to manage the conduct of the case.
- The Tribunal will, as far as possible, eschew formality. It is required by statute to do so as far as is consistent with attaining justice.³⁵ Informality is however a question of degree and there is a balance to be struck. The business of the Tribunal is serious. Its decisions can have substantial effect on the parties and ramifications for the community as a whole. Litigants and practitioners must bear in mind that informality is not to be equated with sloppiness or taking a cavalier approach.
- The key here is flexibility and the need and ability to respond to the individual circumstances of the case. The degree of informality and the precise detailed procedure to be adopted will depend, for example, on the nature of the hearing and the nature of the issues in question. Case management conferences, legal argument on an interlocutory point, and even experts' testimony may be suitable for more informal practices, such as what you find in arbitration. However, where

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S. 144(3)

an order for a pecuniary penalty is sought by the Commission,³⁶ the rules of evidence, by statute, have to be applied.³⁷ Likewise, where oral evidence of fact is being given on oath and it is likely the witness will be accused of outright lying, one has to be wary of being too informal.

It is important that the rules and practice of the Tribunal vest in it sufficient discretion and flexibility to deal with the different needs of various kinds of proceedings.

28. Finally, a word on appeals. Unlike many other tribunals, from which an appeal only lies on a point of law, there is a right of appeal from the Competition Tribunal to the Court of Appeal on both fact and law (as regards non-interlocutory decisions),³⁸ in the same manner as appeals lie from the Court of First Instance to the Court of Appeal. A further appeal to the Court of Final Appeal is possible provided the necessary conditions are satisfied.

29. With the substantive provisions of the Competition Ordinance yet to come into effect and with the first case yet to be brought in the Tribunal in the future, the precise volume and nature of the cases in the Tribunal is unknown. I am optimistic nevertheless that the Tribunal will be able to provide an independent and impartial forum for the just and efficient resolution of competition law disputes in Hong Kong.

³⁶ S. 93

³⁷ S. 147

³⁸ S. 154. Appeals from interlocutory decisions require leave.