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The Hon. Dennis KWOK
Legislative Council
1 Legislative Council Road
Central
Hong Kong
(Attn. Ms. Mary SO)

30 March 2015
(by email: vnmyuen@legco.gov.hk
and by fax no. 2840 0716)

Dear Mr. Kwok,

**Subcommittee to Study the Proposed Subsidiary Legislation on the Procedures
to be Adopted by the Competition Tribunal**

I refer to the letter dated 20 March 2015 from Ms Mary So on behalf of the Subcommittee requesting the Competition Commission (“**Commission**”) to respond to an issue raised by Members at the Subcommittee meeting of 17 March 2015. Namely, whether the Commission would provide legal assistance to claimants under the Competition Ordinance (“**Ordinance**”) wishing to file a collective claim in the Competition Tribunal (“**Tribunal**”) so as to reduce their legal costs.

Private litigation under the Competition Ordinance

Section 110 of the Ordinance provides that claimants have a right of “follow-on” action for damages resulting from a contravention of a conduct rule where:

- either the Tribunal or other courts have made a prior determination that the act which caused the claimants’ loss is a contravention of the conduct rules; or
- a person has previously made an admission, in a commitment (see section 67 of the Ordinance) that has been accepted by the Commission, that the person has contravened a conduct rule.

Unlike the approach in a number of other jurisdictions (such as the UK, US, Canada and Australia) so-called “standalone” claims which may be brought without any prior determination of a court that there has been a contravention of the competition rules or an admission by a person that the person has contravened the competition rules are not possible in Hong Kong.

The Commission notes that in civil proceedings in the Hong Kong courts, there is at present only a limited right of “collective actions” whereby persons harmed by the same conduct may file a multi-party or collective claim. The Ordinance does not alter this situation and introduces no new group action mechanism for the

purposes of allowing claimants to pursue a collective damages action. As noted below, the availability of multi-party litigation in civil proceedings in Hong Kong courts is, however, currently being considered.

Given that only follow-on actions are possible in the Hong Kong context, where claimants seek relief in the Tribunal, the Commission will have previously devoted its resources to establish a contravention or obtain a commitment from a party. This means that there is no need for a claimant in a competition case to obtain or submit evidence to prove the contravention itself – this would be required in a standalone action. From this perspective, it might be argued that the Ordinance has an inbuilt mechanism that reduces significantly the burden on claimants. Claimants are required only to evidence those matters which they are best placed to evidence, namely, causation (proving the contravention of the conduct rules caused them loss) and the assessment of damages (proving the amount of loss suffered).

As the Subcommittee is aware, the Commission is the only party who may bring proceedings in the Tribunal in order to determine a contravention of the Ordinance. Parties who have suffered loss or who may be otherwise aggrieved by potentially anti-competitive conduct have the ability to submit a complaint to the Commission. If the Commission concludes that there is a contravention, the Ordinance gives the Commission the ability to seek a range of orders from the Tribunal against those parties which contravened the conduct rules, including orders requiring the contravening parties to pay pecuniary penalties, orders for the disqualification of directors and orders facilitating the payment of damages by the contravening parties (including, for example, an order to establish a fund for the payment of damages). The Ordinance also allows the Commission to require a person providing a commitment to agree to pay damages to persons harmed by a contravention of the conduct rules and/or to agree to take other steps which might facilitate the payment of damages.

The Commission's assistance to claimants filing damages actions

The Commission notes the provision of direct legal assistance by the competition authorities in other jurisdictions, whether in relation to collective damages actions or other private actions, is not a common feature of those systems. This is reflective of the independent role that competition authorities play in promoting the wider public interest, rather than supporting the narrower interests of certain private parties. Additionally, as a statutory body funded by Government subvention, the Commission cannot act as a legal representative of, or provide litigation funding to private parties.

However, the Commission may provide assistance to claimants in the following ways:

- **Promoting awareness of anti-competitive conduct.** The Commission will remain transparent in publicising the outcomes of its cases. Where the Commission is aware of specific parties suffering harm as a result of a contravention of the Ordinance, it will, to the extent possible, encourage dialogue between those parties and opposing parties whose conduct

contravened the Ordinance for the purposes of facilitating the settlement of a collective claim.

- **The Commission may seek damages/compensation for potential claimants.** Under section 94 of the Ordinance, the Commission may seek an order requiring a party to pay damages to potential claimants as a remedy where the Tribunal makes a finding that a person has contravened the Ordinance whether by way of contested proceedings or consent proceedings. In appropriate cases, the Commission may resolve its concerns without commencing Tribunal proceedings through a commitment where the Commission as a condition of accepting a commitment requires a party to pay damages to persons harmed by a contravention of a conduct rule. The Commission will consider the specific nature of a case when deciding whether proceedings in the Tribunal or a commitment process would be the preferred approach to assisting claimants. If a party is required by an order of the Tribunal or through a commitment to pay damages, action by the Commission may obviate the need for a follow on claim, and enable potential claimants to seek a satisfactory outcome without the normal costs associated with making a claim.

There are a number of instances of such remedies being implemented in other jurisdictions. By way of example, in the United States, orders were made against a number of international airlines requiring them to compensate victims of anti-competitive practices relating to air-cargo and fuel surcharges.¹ Novel remedies can also be sought, as shown in the United Kingdom where a number of private schools which had engaged in anti-competitive conduct agreed that they would establish a £3 million educational trust fund for pupils of the schools.² In such scenarios, individuals and smaller businesses affected by illegal conduct are compensated without the need for launching their own litigation.

- **Provision of evidence to assist claimants.** The Commission recognizes that in order to substantiate its claim in a follow-on action, a private claimant may need to seek documents that the Commission has in its possession as a result of its investigations. The Commission may therefore be the subject of an order for document discovery by the Tribunal to assist claimants in accessing relevant materials.
- **Commission involvement in follow-on actions.** The Ordinance grants the Commission the ability, with leave of the Tribunal/court, to intervene or otherwise participate in proceedings (sections 120 and 121 of the Ordinance). The Commission's potential involvement in such proceedings will be a matter for case by case consideration.

¹ http://www.justice.gov/atr/public/press_releases/2007/224928.htm

²

<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofc.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools>

Collective damages actions in Hong Kong

The Commission is aware that a range of issues relating to collective damages actions more generally in Hong Kong is subject to on-going work by the Government. We note in that regard the Law Reform Commission's report of 28 May 2012 and the subsequent actions undertaken by the Department of Justice. The ability of claimants to file collective claims in the Tribunal may be assisted in the future by these general developments.

We trust the above comments will assist in the work of the Subcommittee and remain available to address any other issues relevant to the Commission's role and functions under the Ordinance. We confirm that the Commission agrees to the distribution of this letter to the media and the public, and it being made available on the website of the Legislative Council.

Yours sincerely,



Dr. Stanley WONG
Chief Executive Officer