



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會 LEGISLATIVE COUNCIL
林健鋒 議員
Hon. Jeffrey Kin-fung Lam GBS, JP

16 May 2018

Mr Edward Yau Tang-wah, GBS, JP
Secretary for Commerce and Economic Development
23/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear *Edward,*

**RE: Concerns from the Hong Kong General Chamber of Commerce regarding
new practices in investigations introduced by the Competition Commission**

We understand that the Competition Commission is introducing new practices whereby:

- It refuses, in the context of investigations as to whether a party has breached the Ordinance, to receive communications from businesses via their lawyers, unless and until the business produces a letter, signed by a "proper officer" of the business, confirming that it has appointed the law firm to represent it, and identifying the scope of the law firm's appointment ("Practice 1"). This is at odds with existing procedure in Hong Kong, where it has generally been regarded as sufficient to establish that a party is legally represented for a law firm to state, either orally or in writing to law enforcement agencies, that it is acting for a particular client.
- It requires a business when responding to a Notice issued under section 41 of the Competition Ordinance to provide information and/or documents "acting by its proper officer" ("Practice 2"). Until now, it has been regarded as sufficient for a business to provide information and/or documents to the Commission, usually via its lawyers, without any company officer having to be involved (indeed company officers may be unaware of the alleged facts that are the subject of investigation). To the extent that some form of verification may be sought, the proper procedure is laid out in section 43 of the Competition Ordinance, where no mention is made of officers or "proper officers".



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Given all of the above, we believe these may seriously impact the interests of the industry for the reasons as set out under:

- The Guideline on Investigations (on which LegCo was consulted, as required by section 59 of the Competition Ordinance) makes no mention of these practices, and the Ordinance itself makes no provision for them.
- In many cases it will be necessary for the business to seek immediate and unforeseen assistance from a law firm (such as in a "dawn raid"), and it will be impracticable to produce such a letter in time. In these circumstances, a refusal to accept communications from a law firm, unless and until the business produces such a letter, with the inevitable delay that this can involve, conflicts with Article 35 of the Basic Law, which states that HK residents shall have the right (*inter alia*) to "...choice of lawyers for *timely protection of their legal rights*" (emphasis added).
- The requirement for the business to be "acting by its proper officer" for the purpose of providing documents or information to the Commission is inappropriate, as officers of a company may have no knowledge of the alleged facts that are the subject of the investigation. Given that there is a real risk of personal exposure to a penalty under section 92 of the Ordinance, it is harsh and unfair to require an officer of the company to verify information of which he or she may have no knowledge.

Given the concerns set out above, we should be grateful if you would consider the following:

1. The Competition Commission may not need to continue with Practices 1 and 2, as the procedures that were in operation prior to these practices being introduced are sufficient.
2. The expression 'proper officer' is not defined in the Commission's Investigation Guidelines or the Competition Ordinance. Please clarify what is meant by the expression.
3. In many cases it will be necessary for the business to seek immediate and unforeseen assistance from a law firm (such as in a "dawn raid"), and it will be impracticable to produce a letter from a 'proper officer' in time. There are concerns from the industry as to whether refusal to accept communications from a law firm, unless and until the business produces such a letter, with the inevitable delay that this can involve, is consistent with Article 35 of the Basic Law, which states that HK residents shall have the right (*inter alia*) to "...choice of lawyers for *timely protection of their legal rights*" (emphasis added).



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Please clarify why, and how this practice is consistent with the rights granted under Article 35.

4. One assumes that the purpose of Practice 1 is to avoid the risk that a law firm might falsely claim that it is representing a particular business. What are the main reasons for the Commission to believe this a real risk, or a risk of such magnitude, to justify any change in the *status quo*, in circumstances where lawyers are subject to stringent professional and ethical standards, enforced by the Law Society and Bar Association, and other regulators might also be involved in such circumstances? Has the Law Society been consulted on this issue and, if not, why not?
5. It seems that, if Practice 1 were to remain in place, the business in question would have to specify in the letter the scope of the instruction that it has given to the law firm. Please clarify that this is consistent with the principle under the Basic Law and Common Law that communications between lawyer and client are confidential and legally privileged? If so, why? Has the Law Society been consulted on this issue and, if not, why not?
6. The scope of an instruction to lawyers can suddenly change, which under Practice 1 would require new letters from the business confirming the changes. We see that this could potentially add to the burden and delays to which the business is subject.
7. Please clarify the legal basis for the Competition Commission to require a company to act through a "proper officer", rather than through its legal advisers, as is usual in Hong Kong.
8. Please clarify why the Competition Commission, if it requires verification of particulars, answers or statements made to the Commission in respect of section 41 Notices, is not using the power it has under section 43 of the Competition Ordinance and is, instead, seeking to compel officers of the company to speak to matters in respect of which they may not be well informed on.

We look forward to receiving your reply.

Yours sincerely,

Jeffrey Lam

cc: Panel on Economic Development, Legislative Council