



LC Paper No. CB(4)1196/17-18(01)

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1 June 2018

**By post**

The Hon. Jeffrey Lam Kin-fung  
4/F Eltee Building  
3 Ning Foo Street  
Chai Wan, Hong Kong

Dear *Hon Lam*,

**Re: Concerns from the Hong Kong General Chamber of Commerce regarding the investigation practices of the Competition Commission**

We refer to your letter to the Secretary for Commerce and Economic Development (the “Secretary”) dated 16 May 2018 communicating concerns from the Hong Kong General Chamber of Commerce (“HKGCC”) about investigation practices adopted by the Competition Commission (“Commission”). The Secretary has referred your letter to the Commission and we would like to respond as follows.

**Background**

Firstly, allow us to set out some background about the Commission’s practices that have given rise to the concerns raised in your letter.

The Commission is required to meet the statutory criteria in section 39 of the Competition Ordinance (“Ordinance”) before it can commence an investigation and exercise its statutory powers in sections 41 and 42 of the Ordinance.

The Commission can issue a notice under section 41 of the Ordinance (“section 41 Notice”) requiring a person to provide any document or a copy of a document or provide the Commission with specified information relating to a matter

the Commission reasonably believes to be relevant to its investigation. The Commission can issue a notice under section 42 of the Ordinance requiring a person to attend an interview and answer questions (“section 42 Notice”). It is important to point out that a failure by a person to comply with the requirements in a section 41 Notice or a section 42 Notice without a reasonable excuse can be a criminal offence. It is therefore important that the Commission only communicates about such notices with law firms when it is satisfied that the law firm has been properly authorized to represent the person subject to the Notice.

When the Commission becomes aware that a person has instructed a law firm to represent it, the law firm will be asked to have the person provide (in the case of a company, by its proper officer) a written authorization addressed to the Commission. The Commission’s standard request is as follows:

*“In order for us to direct all future communications addressed to [lawyer's client] to your firm, please provide us with a written confirmation issued by [lawyer's client], acting by its proper officer, that your firm is authorized to represent it in the present matter and that the scope of this authorization includes sending correspondence to, and receiving correspondence from, the Commission in the present matter.*

*For the purpose of future communications, please provide us with contact details of the individuals who are primarily responsible for dealing with this matter at your firm.”*

The Commission does not specify any wording for the person’s written authorization. Written authorizations addressed to the Commission have typically looked along the lines of the below:

*“Competition Commission*

*Dear Sirs,*

*Re: Letter of authorization*

*Case No. EC/XXXX*

*We, [name of company], hereby confirm that we have retained [name and address of law firm] to represent our company in handling your investigation relating to the captioned case. Further, we confirm that [name of law firm] is authorized to*

*send correspondence to, and receive correspondence from, the Commission on our behalf.”*

*Yours sincerely,*

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*XX XXX*

*On behalf of [name of company]”*

One can see from the above that what the Commission is seeking is nothing more than the kind of authorization that the law firm must have already received, either in writing or orally, when it was retained by the person. Reasonable time is always given to provide the written authorization, and it is only needed once during an investigation. Furthermore, the person can freely amend the scope of the authorization; change or add lawyers. As such, the requirement for written authorization does not restrict, hinder or impede a person’s ability to seek legal advice or to respond to the Commission’s communications.

In practice, law firms usually send the written authorization to the Commission by fax, with the original to follow in due course. So far, this has been followed without difficulty by almost all of the law firms that the Commission has been dealing with.

Were a person to refuse to provide the Commission with written authorization (which has not yet occurred), the Commission may continue to communicate directly with the person, but it would copy its communications to the law firm. That person is free to respond to Commission via its law firm, and the Commission will receive and consider the law firm’s communications.

The Commission’s practice of seeking a written authorization came about for a variety of reasons based on its experience in a number of investigations. One such reason is that the Commission has had cases in which more than one law firm has claimed to represent a person. While the Commission does not, per se, have any objection to a person having more than one law firm represent it, you will appreciate that this could lead to some confusion when the Commission receives a communication purporting to be on behalf of the person from one law firm, but not the other. A written authorization from the person ensures that the Commission communicates with the right law firm or firms as the case may be.

More serious are the cases where a law firm represents several different persons who are relevant to a Commission investigation. This has occurred on

multiple occasions. A law firm may in principle represent more than one person in an investigation. Concerns arise when the interests of these persons may conflict. The Commission has encountered cases in which a law firm represents both a company and the company's employees where there is a real risk of a conflict. Even in these cases, the Commission accepts that it is for the person to decide and it is ultimately the lawyer who bears the legal and professional responsibility of representing persons whose interests may conflict. However, Commission investigations are time and resource intensive and some conflicts only change from potential to real at a later stage of the investigation. Where a law firm represents multiple persons, there is a real risk that the Commission's investigation will be delayed when one or all persons are required to obtain new legal representation. Obtaining a written authorization from all persons helps to protect the Commission's investigation. This is also relevant to the point that we have made above. There is potentially a serious consequence to a person for failing to comply with a requirement and the risk of this increases when there is uncertainty that a law firm can represent multiple parties.

These issues have not been isolated and have arisen frequently enough in the Commission's investigations to warrant a general, consistent and easily-applied practice that is now in place. As mentioned, it is a practice that does not impose any undue or disproportionate burden on persons subject to the Commission's investigations, let alone impeding their ability to seek legal advice.

### **Concerns**

#### a. Written authorization

One concern that was raised in your letter was that the Commission's practice seems to be at odds with practices followed by other law enforcement agencies. The Commission is aware that some other law enforcement agencies do not follow the procedure of seeking written authorization but we are also cognizant of the fact that some of these agencies often have a pre-existing supervisory, regulatory or licensing relationship with the persons that they investigate. The Commission does not have such relationships with any of the persons that it investigates and therefore we consider that requesting a written authorization is appropriate. Moreover, and as highlighted above, the multiparty aspect of the Commission's investigations presents unique opportunities for conflict between the persons involved, thus requiring the Commission to adopt the appropriate procedures to protect its investigations.

As to how this practice could affect an urgent requirement for legal assistance (as in the course of a dawn raid) when it may not be practically feasible to provide the written authorization to the Commission, the Commission adopts a pragmatic

approach in such circumstances. The occupiers of the premises that are the subject of a Commission search warrant can always call their lawyers, and the Commission is always prepared to speak to such lawyers, over the telephone and in person at the premises, with a written authorization to follow in due course. Indeed, the fact that the search is occurring on the premises of the person generally facilitates obtaining the written authorization expeditiously.

As you note, barristers and solicitors are subject to the standards of the Law Society and Bar Association. Having a law firm provide written authorizations from all of the persons that it represents ensures that there is no uncertainty on the part of the Commission, which also protects the law firm. As stated above, the Commission is only asking for the same authorization that the person must already have given to the law firm and as such readily available. The Commission, therefore, did not consider this routine practice to be a matter that required consultation with the Law Society.

b. Providing information through a proper officer

It is not a new Commission practice to require a company, through its proper officer, to produce any document or copy of any document or provide the Commission with specified information relating to any matter the Commission reasonably believes to be relevant to the investigation. It is well established in Hong Kong law that a company subject to a legal requirement to provide information must comply with the requirement through its proper officer. Indeed, there is no other way for a company to comply with such a requirement. In doing so, the proper officer responding to the requirement must make the appropriate inquiries as to the documents or information required to be provided or produced. The officer is not verifying the documents or information provided to the Commission and therefore section 43 of the Ordinance is not relevant in this context.

Concerning the potential risk of liability to officers, section 92 of the Ordinance provides that the Commission may apply to the Competition Tribunal for a pecuniary penalty to be imposed on a person for his contravention, or involvement in a contravention, of the Ordinance's competition rules. The mere provision of documents or information to the Commission would not attract personal liability under Section 92 of the Ordinance.

In sum, the Commission wishes to confirm that requiring a law firm to provide written authorization of its instructions in no way restricts, hinders or impedes the ability of persons to seek legal advice, and is indeed a necessary practice for Commission investigations and provides benefits to everyone involved in an

investigation. We hope this letter has addressed the HKGCC's concerns. Finally, we would like to emphasize that we remain open to engagement with all business chambers, professional bodies and other stakeholders.

We sincerely thank you for bringing the concerns of the HKGCC to our attention and we would be very happy to discuss with you or any parties that you see fit any of the points raised in this letter.

Yours sincerely,



Rasul Butt

Senior Executive Director

**Competition Commission, Hong Kong**

c.c.:

Ms Leona Law

Principal Assistant Secretary for Commerce and Economic Development, Commerce and Economic Development Bureau

Panel on Economic Development, Legislative Council