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The New Kid on the Block: Hong Kong's New Competition Law Regime Has Come into Full Effect

Today, Hong Kong's Competition Ordinance has come into full effect. The commencement comes three and a half years after the Ordinance was enacted by Hong Kong's Legislative Council. The Ordinance gives Hong Kong its first general competition law that applies to all sectors of the economy. Understanding and complying with the city's new set of rules will not only be important for businesses that have a focus on the Hong Kong market, but many other businesses with global operations.

Among the developed economies, Hong Kong was one of the last that did not have a cross-sectoral competition regime. Hong Kong's competition law originally covered the broadcasting and telecommunications sectors only. This has changed today, with the Competition Ordinance (Ordinance) coming into full effect. Understanding and complying with the city's new set of rules is not only important for businesses that have their focus on the Hong Kong market, but many other businesses with global operations. Hong Kong is one of the world's key trading hubs and the largest re-export centre globally, with more goods passing through its territory than that of any other country. As one of Asia's leading financial centres, Hong Kong hosts the regional headquarters of some of the largest financial institutions. Given the Ordinance's broad geographical scope—an adverse effect on competition in Hong Kong is sufficient to trigger the new law¹—the authorities in Hong Kong have the power to reach beyond the city's borders and go after companies that have their headquarters or principal operations outside of Hong Kong.

Conduct Rules

The Ordinance is Hong Kong's first competition law that, as far as anti-competitive agreements and other conduct is concerned, applies to all sectors of the economy. The relevant provisions in the Competition Ordinance, the Conduct Rules, prohibit two types of anti-competitive conduct:

- The First Conduct Rule prohibits agreements or concerted practices between undertakings and decisions of an association of undertakings that have the object or effect of preventing, restricting or distorting competition in Hong Kong.
- The Second Conduct Rule prevents an undertaking that has a substantial degree of market power in a market from abusing its power through engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

¹ The Ordinance, for example, applies if an agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if: (i) the agreement or decision is made or given effect outside Hong Kong; (ii) the concerted practice is engaged in outside Hong Kong; (iii) any party to the agreement or concerted practice is outside Hong Kong; or (iv) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

There are, albeit limited, exemptions from the Conduct Rules: agreements or other conduct can be exempted if, for example, they are performed by an undertaking entrusted by the government with the operation of services of general economic interest² or are made in compliance with a legal requirement. Conduct can be exempted on the basis that there are exceptional and compelling reasons of public policy that justify an exemption. The Ordinance also provides for exemptions based on the size of the company involved in the offensive conduct. For agreements among companies with a combined annual turnover not exceeding HKD 200 million (approx. USD 26 million), the First Conduct Rule only applies in relation to serious anti-competitive conduct (price fixing, market allocation, output control and bid-rigging), but not other anti-competitive conduct. For businesses with a turnover of less than HKD 40 million (approx. USD 5.2 million) in the preceding calendar or financial year, a *de minimis* defence applies in relation to the Second Conduct Rule. In addition, parties can defend agreements or other conduct in relation to the First Conduct Rule on the basis that they enhance economic efficiency, a defence that is generally available also in other jurisdictions such as the EU and the United States. Last but not least, the CC can make a block exemption order where it is satisfied that a particular category of agreement falls within the scope of the exclusion for agreements enhancing overall economic efficiency.

Merger Rule

The Ordinance includes provisions prohibiting mergers and acquisitions that have or are likely to have the effect of substantially lessening competition in Hong Kong (the Merger Rule). However, Hong Kong's merger control regime remains sectoral. The Merger Rule only applies to concentrations that involve an undertaking directly or indirectly holding a telecom carrier licence issued under the Hong Kong Telecommunications Ordinance (Cap. 106). Until such time, as the Hong Kong government may determine that it is appropriate to widen the scope of application of the Merger Rule, transactions outside the telecoms sector are not subject to any merger control review in Hong Kong.

Two New Enforcement Bodies

The Hong Kong Competition Commission (CC) and the Competition Tribunal (Tribunal) have the principal responsibility for investigating and sanctioning anti-competitive conduct in Hong Kong. Both the CC and the Tribunal have only been established recently.

The CC is the main investigative body. The CC comprises 14 Members, including Chairperson the Honourable Anna Wu Hung-yuk, as well as several senior executives, many of whom previously worked in private practice or joined from other competition authorities. In respect of anti-competitive conduct of companies operating in the telecommunications and broadcasting sectors, the CC has concurrent jurisdiction with the Communications Authority. The Communications Authority has been and will continue to be the principal regulator for the telecoms and broadcasting sector.

The Tribunal is responsible for adjudicating competition cases, private actions, as well as reviews of determinations of the CC. It is the Tribunal that ultimately determines whether a violation of the Ordinance has occurred. The Tribunal is constituted by judges of the Court of First Instance of Hong Kong's High Court and is presided by the Honourable Mr. Justice Godfrey Lam. The Ordinance foresees that the Tribunal will largely

² Relevant conduct is exempted in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to the company.

have the same powers and be subject to similar procedural rules as the Court of First Instance, save a few distinguishing features in relation to time limits, for commencing private follow-on actions and handling of confidential documents.

Any appeals in relation to decisions of the Tribunal will be referred to the Court of Appeal and/or the Court of Final Appeal, the two most senior courts in the judiciary of Hong Kong.

Enforcement Procedures and Priorities

The Conduct Rules are enforced in three phases under the Ordinance, including a two-phase investigation process and a prosecution phase:

- Initial assessment phase: The CC seeks information from the parties on a voluntary basis or uses publicly available sources to decide if there is sufficient evidence to establish reasonable cause to suspect a contravention of the competition rules.
- Investigation phase: The CC has been granted a wide range of investigative tools, including the power to issue requests for information or documents, to conduct interviews and, if armed with a court warrant, to undertake dawn raids. The CC may initiate an investigation either on its own motion or if an alleged anti-competitive conduct has been referred for investigation by a complainant, the Tribunal, the Hong Kong government or the Court of First Instance. At any stage of the investigation, the CC and the parties may approach each other to discuss the matter and propose a resolution to the CC's concerns.
- Prosecution phase: If the CC has reason to believe that an infringement of the Ordinance has taken place, it can initiate proceedings before the Tribunal. The Tribunal has the power to adjudicate infringements of the Ordinance and to impose fines and other sanctions. The proceedings before the Tribunal are adversarial in nature. Importantly, the CC does not have the power to determine itself whether the Ordinance has been contravened; this competence is reserved for the Tribunal.

On 19 November 2015, the CC published its enforcement policy, setting out its intention to prioritise taking action against (i) cartel conduct;³ (ii) other violations of the First Conduct Rule which cause significant harm to competition in Hong Kong; and (iii) abuses of substantial market power involving exclusionary behaviour by incumbent businesses. The CC's enforcement policy acknowledges that the CC does not have the resources to conduct detailed investigations into every complaint or competition issue it becomes aware of. It will therefore need to focus on investigating and enforcing those matters that provide the greatest overall benefit to competition and consumers in Hong Kong. The enforcement policy is, however, not as specific as some businesses may have hoped and does not indicate the sectors in which the CC will be concentrating its efforts.

There is the expectation that the new law will be robustly enforced. The Ordinance provides for several forms of penalties and remedies. A company found to have infringed the First or Second Conduct Rule can be fined up to 10% of the turnover the undertaking generated in Hong Kong for a maximum of three years of infringement.

³ Pursuant to the Ordinance, cartel conduct encompasses anti-competitive behaviour such as price-fixing (i.e. agreeing on customer prices or price-elements such as discounts or price ranges), market-sharing (i.e. allocating segments of the market amongst competitors such as by territory or customer type), bid-rigging (i.e. subverting the normal competitive nature of tender processes by agreeing with competitors who will make what bids) and output restrictions (i.e. agreeing with competitors to limit production or sales output to drive up prices or otherwise maximize market positions).

In addition, the Tribunal has broad powers to disqualify directors and issue prohibition, damage and other orders.

Leniency

The Ordinance gives companies that have participated in cartel activity the opportunity to escape or at least get their fine reduced if they self-report their involvement in the cartel and hand over evidence to the authorities.

Leniency programs are a key element of antitrust enforcement regimes around the world. They can help destabilize cartels by creating strong incentives for companies to self-report. The main features of Hong Kong's leniency policy are:

- Leniency is only available for cartel conduct. Leniency is not available for any other form of anti-competitive conduct.
- Immunity from fines is generally only available to the first company reporting the cartel to the authority. Other parties that cooperate may otherwise receive beneficial treatment, including a reduction in fines, but will not qualify for immunity from fines under the leniency policy.
- In any event, it is at the discretion of the CC to decide whether to grant leniency.
- A prospective applicant can obtain a marker securing the applicant's position ahead of any subsequent applicant while it gathers the information and evidence necessary to secure immunity. In order to obtain a marker, the applicant needs to disclose certain minimum information to the authority, including its identity and contact details, the nature of the cartel and its main participants.
- If the CC has granted leniency to an applicant, leniency will usually extend to its directors, officers and employees. This is subject to the relevant individuals' cooperation with the CC throughout the investigation and any subsequent proceedings.

A major concern for leniency applicants is that documents submitted to the authority in connection with the application for leniency could become available to private damages claimants. The CC's leniency policy foresees that the CC will not disclose material (whether or not it is confidential) provided in connection with a leniency application. The CC's leniency policy provides that the CC will use its "best endeavours" to protect leniency materials and "firmly resist" requests for disclosure, including in connection with private civil proceedings in Hong Kong or elsewhere, unless the applicant consents to such disclosure, the relevant information or document is already in the public domain, the CC has terminated the leniency agreement or the CC is compelled to make disclosure by court order or otherwise by law. The CC apparently shares the concern other antitrust authorities have, that disclosing leniency documents can place the efficacy of a leniency program in jeopardy.

Distinctive Features of the New Regime

While the Ordinance and the implementing guidelines clearly draw on precedents from other jurisdictions, in particular the European Union and the UK, the new regime has a few distinctive features that are noteworthy, in particular:

- Warning notice: The CC issues a "warning notice" where it has reasonable cause to believe that there has been a violation of a Conduct Rule, but the infringement does not involve serious anti-competitive conduct (price fixing, market allocation, output control and bid-rigging). A warning notice must be given in these cases

before the CC can initiate proceedings before the Tribunal. The warning notice will stipulate that the contravening company must cease the alleged anti-competitive conduct within a specified period of time.

- Prosecutorial nature of competition law enforcement: The establishment of an independent tribunal shows the prosecutorial nature of competition law enforcement in Hong Kong. If the CC believes the alleged violation of a Conduct Rule justifies a fine or other form of penalty, it will need to prove its case before the Tribunal. This is in contrast with jurisdictions that have an inquisitorial enforcement system, for example the EU, where the investigating antitrust authority itself decides on the imposition of fines.
- Follow-on actions: Where the Tribunal, the Court of First Instance or any higher court has determined, or a company or person has admitted, that an infringement of competition rules has occurred, a claimant who has suffered loss or damage can rely on that finding or admission in bringing a claim against the company or person that committed the infringement or has been involved in the infringement. Follow-on damage claims must be brought before the Tribunal. Follow-on actions can significantly increase the financial risk for companies involved in infringing behaviour. At the same time, proving that damage has actually occurred and quantifying the incurred loss is a significant challenge for the claimant. In Hong Kong, there are generally no punitive or exemplary damages. The level of damages is generally assessed based on actual loss suffered. Currently, the Ordinance does not include an express provision of “stand-alone” cartel damages actions. The right to bring stand-alone actions was included in the original draft law, but was removed at an early stage in response to concerns by SMEs that larger companies could use damages actions to harass and pressure SMEs. However, the Hong Kong government has stated that it will reconsider the introduction of a stand-alone right of action after the Ordinance has been in effect for a few years.
- Personal liability of executives: The regulator can take actions against officers and directors of a company who have “contravened or been involved in a contravention of a competition rule.” While there are no criminal penalties for contravention of the Conduct Rules, the Ordinance empowers the Tribunal to impose severe penalties on directors and officers. Directors and officers can be liable to fines, payment of damages, restitution orders and prohibitory or mandatory injunctions. Directors may be disqualified for up to five years from being a director, liquidator or provisional liquidator, receiver or manager of a company or in any way be concerned or take part in the promotion, formation or management of a company. In addition to penalties imposed by the Tribunal, directors and officers may potentially be exposed to private follow-on actions.
- Criminal penalties: There are no criminal penalties for violation of the Conduct Rules. However, providing false or misleading information or obstructing the CC’s investigations (which includes the destruction of evidence or causing employees to suffer certain disadvantages because employees had assisted the CC in its investigation), may expose individuals or businesses to criminal sanctions under the Ordinance.

Practical Implications

Hong Kong’s new competition law shows many similarities to the well-established enforcement regimes of other jurisdictions. This means that global compliance programs, where they are in place, will most likely already address conduct that could raise competition concerns under Hong Kong’s new rules. Companies should then ensure that there is regular training and effective due diligence, particularly in relation to the company’s activities in Hong Kong.

The CC stated in a press release in July this year that it has the “internal infrastructure now in place” and is “ready to be an effective enforcer of the competition law which will support Hong Kong’s open economy by

ensuring fair and free markets for all.”⁴ While some initial teething troubles will be unavoidable, we expect Hong Kong's competition law enforcement to soon become a force to be reckoned with. The CC will no doubt want to flex its muscles and have the first scalps sooner than later to show it is a serious player in competition law enforcement.

⁴ CC Press Release of 17 July 2015, available at:

https://www.compcomm.hk/en/media/press/files/20150717_PressRel_Commencement_Notice_Eng.pdf.

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