

What you need to know about Hong Kong Competition Law

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☞ Abuse of dominant position; Anti-competitive practices; Enforcement; Hong Kong; Investigatory powers; Mergers; National competition authorities; Telecommunications

Introduction

Prior to 14 December 2015, only the telecommunications and broadcasting sectors were subject to competition provisions under the Telecommunications Ordinance (Ch.106 of the Laws of Hong Kong) (the Telecommunications Ordinance)¹ and the Broadcasting Ordinance (Ch.562 of the Laws of Hong Kong) (the Broadcasting Ordinance).² The Hong Kong Communications Authority (the Communications Authority) is vested with powers of investigation and adjudication in enforcing these provisions.

On 14 June 2012, the Competition Ordinance was enacted as a general and cross-sector competition law to curb anti-competitive conduct. Its main objectives include the prohibition and deterrence of anti-competitive conduct, the establishment of a merger control regime (only applicable to the telecommunications industry for the time being)³ and also the provision of extensive investigative powers to regulatory authorities as regards suspected breaches.

On 27 July 2015, the Competition Commission and the Communications Authority jointly issued six guidelines⁴ (collectively the Guidelines) to provide guidance on how they intend to interpret and apply the provisions of the Competition Ordinance. The

Competition Commission also published its *Enforcement Policy* and its *Leniency Policy for Undertakings Engaging in Cartel Conduct* on 19 November 2015 to provide further details of how it intends to carry out its enforcement function under the Competition Ordinance.

The Competition Ordinance came into full effect on 14 December 2015, and on the same date the Competition Commission and the CA released a Memorandum of Understanding⁵ on how the two bodies will cooperate and pursue enforcement actions.

The Competition Ordinance prohibits three major areas of anti-competitive conduct, dubbed the First Conduct Rule, the Second Conduct Rule (collectively referred to as the Conduct Rules) and the Merger Rule. The Conduct Rules and the Merger Rule will collectively be referred to as the Competition Rules.

- *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.⁶
- *The Second Conduct Rule*—prohibits 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.⁷
- *The Merger Rule*—prohibits a merger involving a carrier licensee under the Telecommunications Ordinance that (whether directly or indirectly) creates the effect of substantially lessening competition in Hong Kong.⁸

Now that the Competition Ordinance has come into operation, the competition provisions in the Telecommunications Ordinance and the Broadcasting Ordinance have been repealed (subject to transitional arrangements) and replaced by the Conduct Rules, and a new s.7Q prohibiting exploitative conduct (the Telco Rule) has been added to the Telecommunications Ordinance. The new Telco Rule only applies to holders of licenses under the Telecommunications Ordinance, and prohibits licensees who are in a dominant position from engaging in conduct which may be exploitative.

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¹ For the telecommunications sector, the relevant provisions include s.7K (anti-competitive practices), s.7L (abuse of position) and s.7N (non-discrimination) of the Telecommunications Ordinance.

² For the broadcasting sector, the relevant provisions include s.13 (prohibition on anti-competitive conduct) and s.14 (prohibition on abuse of dominance) of the Broadcasting Ordinance.

³ Under the current regime, the merger rule only applies to the telecommunications sector. The Competition Commission is targeting to expand the merger-control provisions to more sectors in 2–3 years' time.

⁴ Namely, *Guideline on Complaints*, *Guideline on Investigations*, *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders*, *Guideline on the First Conduct Rule*, *Guideline on the Second Conduct Rule*, and *Guideline on the Merger Rule*.

⁵ See http://www.compcomm.hk/en/about/inter_agency/files/MoU_e_final_signed.pdf [Accessed 21 December 2015].

⁶ This mirrors art.101 TFEU in the EU and s.1 of the Sherman Act in the United States.

⁷ This mirrors art.102 TFEU in the EU and s.2 of the Sherman Act in the United States.

⁸ Under the current regime, the merger rule only applies to the telecommunications sector. The Competition Commission has indicated in media comment that it is targeting to expand the merger control provisions to more sectors in 2–3 years time.

Exploitative behaviour includes, inter alia, fixing and maintaining prices at an excessively high level and also setting unfair trading terms and conditions.

The First Conduct Rule

The First Conduct Rule⁹ concerns *agreements, decisions and concerted practices* among *undertakings* which have *the object or effect of preventing, restricting or distorting competition* in Hong Kong. It applies to both horizontal and vertical agreements, and even if the impugned conduct occurs outside Hong Kong or if any party to the conduct is outside Hong Kong.

Key terms used in the First Conduct Rule

Undertaking

- Any entity (including a natural person), regardless of its legal status or the way in which it is financed, which is engaged in economic activity is considered an undertaking.
- Does not apply to conduct involving two or more entities if the relevant entities are part of the same undertaking or corporate group.
- Employees and trade unions not considered as undertakings within the scope of the First Conduct Rule

Agreement

- Broadly defined in the Competition Ordinance and is considered to exist once there is a “meeting of minds” between the parties concerned. For example, an exchange of letters, emails, telephone calls and instant messages would be sufficient.
- May be found to be a party to an anti-competitive agreement if it can be shown that it knew, or should have known, that the collusion in which it participated was part of an overall plan intended to harm competition.
- Applies to both horizontal and vertical agreements.

Concerted practice

- A form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition.

- Typically involves an exchange of commercially sensitive information between competitors without a legitimate business reason.

Decision of an association of undertakings

- Trade associations, cooperatives, professional associations or bodies, societies, associations without legal personalities, associations of associations, etc. are examples of associations.
- A decision of an association includes its constitution, rules, resolutions, rulings, decisions, guidelines, recommendations, etc., even if it is non-binding;

Anti-competitive object or effect

- Not necessary for the Competition Commission to also demonstrate that the agreement has an anti-competitive effect for an agreement having an anti-competitive object.
- Determining the object of an agreement requires an objective assessment of its aims/purposes viewed in context and in light of the way it is implemented. The parties’ intention may also be taken into account. Examples include cartel agreements and, possibly, resale price maintenance agreements.
- For an agreement to have an anti-competitive effect, it must have, or be likely to have, an adverse impact on one or more parameters of competition in the market (for example price, output, product quality, product variety or innovation).
- Restrictions contained in an agreement (which is not in itself harmful to competition) that are necessary for the agreement to be workable (i.e. ancillary restrictions) fall outside the prohibition of the First Conduct Rule.

Serious anti-competitive conduct—the “hard core” infringements

Where the Competition Commission has reasonable cause to believe that a contravention of the First Conduct Rule has occurred, in general, it must issue a warning notice to the undertaking concerned before bringing proceedings in the Competition Tribunal.

⁹ Section 6(1) of the Competition Ordinance provides that “an undertaking must not (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.”

However, this procedure may be bypassed in cases of serious anti-competitive conduct (Serious Anti-Competitive Conduct), which is defined as “conduct that consists of any of the following or any combination of the following:

- (a) fixing, maintaining, increasing or controlling the price for the supply of goods or services (i.e. price fixing);
- (b) allocating sales, territories, customers or markets for the production or supply of goods or services (i.e. market sharing);
- (c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services (i.e. output limitation);
- (d) bid-rigging”.¹⁰

Further, the general exclusion for agreements of lesser significance¹¹ does not apply to cases of Serious Anti-Competitive Conduct.

Exclusions and exemptions from the First Conduct Rule

The First Conduct Rule does not apply to statutory bodies unless they are specifically brought within the scope of this Rule, nor does it apply to persons or activities specified in a regulation made by the Chief Executive in Council.

Further, sch.1 to the Competition Ordinance sets out the following general exclusions in respect of the First Conduct Rule:

- 1) agreements enhancing overall economic efficiency;
- 2) compliance with legal requirements;
- 3) services of general economic interest;
- 4) mergers; and
- 5) agreements of lesser significance.¹²

The Competition Ordinance also provides for block exemption orders and public policy and international obligations exemptions.

Undertakings are not required to apply to the Competition Commission in order to secure the benefit of a particular exclusion or exemption. Nevertheless, they may elect to apply to the Competition Commission for a decision as to whether an exclusion or exemption applies.

The Second Conduct Rule

The Second Conduct Rule¹³ prohibits an undertaking that has a *substantial degree of market power* from *abusing* that power by engaging in conduct that has as its *object or effect* the *prevention, restriction or distortion* of competition in Hong Kong. This rule applies to unilateral conduct by an undertaking, regardless of whether the undertaking itself is, or the abusive conduct takes place, inside or outside of Hong Kong. Abusive conduct which takes the form of an agreement may also contravene the First Conduct Rule.

Key terms used in the Second Conduct Rule

Undertaking

- Same as the term used in the First Conduct Rule.

Market

- Has both a product dimension and a geographic dimension.
- Definition depends on the specific facts of the case based on (i) market structure; (ii) buyers’ preference; and, (iii) particular competition concern.

Substantial degree of market power

- No statutory definition of “substantial degree of market power”, but the following matters may be taken into consideration in determination include (i) market share; (ii) power to make pricing and other decisions; (iii) barriers to entry; and, (iv) other relevant factors specified in the Guidelines.
- Substantial market power can be thought of as (i) the ability to charge prices above competitive levels, or to restrict output or quality below competitive levels, for a sustained period of time (the length of which depends on the facts, in particular with regard to the product and the circumstances of the market in question)¹⁴; or (ii) the ability and incentive to harm the process of competition by, for example, weakening existing competition, raising entry barriers or slowing innovation.¹⁵

¹⁰ Section 2(1) of the Competition Ordinance.

¹¹ Pursuant to s.5, Sch.1 to the Competition Ordinance, the First Conduct Rule does not apply to (a) an agreement between undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed HK\$200 million; (b) a concerted practice engaged in by undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed HK\$200 million; or (c) a decision of an association of undertakings in any calendar year if the turnover of the association for the turnover period does not exceed HK\$200 million.

¹² See fn.11 above.

¹³ Section 21(1) of the Competition Ordinance.

¹⁴ See Guideline on the Second Conduct Rule, para.3.2.

¹⁵ See Guideline on the Second Conduct Rule, para.3.4.

- According to the Competition Commission, small undertakings are unlikely to have a substantial degree of market power.¹⁶ However, the definition does not preclude the possibility of more than one undertaking having a substantial degree of market power in a relevant market, particularly if the market is highly concentrated with only a few large market participants.¹⁷

Abuse

- Any conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong may constitute abusive conduct.
- Conduct may, in particular, be abusive if it involves (i) predatory behaviour towards competitors; or (ii) limiting production, markets or technical development to the prejudice of customers.¹⁸

“Substantial degree of market power”—different from “market dominance”

Under the Competition Ordinance, the degree of market power that would render an undertaking liable to possible charges of abusive conduct is “substantial”, which is a lower threshold than that of the “dominance” test adopted in some jurisdictions such as Europe (where there is a presumption of dominance at 50 per cent of market share). The legislation does not specify what percentage threshold of market share amounts to “substantial”.

During the consultation process of the Guidelines, it was suggested that some form of market share-based threshold, including a specific percentage as a “safe harbour” or a presumptive threshold, be included to assess whether an undertaking has a substantial degree of market power.

This was not adopted for the various reasons as set out in the *Guide to the Revised Draft Guidelines issued under the Competition Ordinance*¹⁹. In particular, it is noted that market share is only one of the factors for assessing an undertaking’s market power. Other factors such as ease of entry and expansion, availability of supply-side substitution and buyer power may prevent an undertaking with a high market share from having a substantial degree of market power and engaging in abusive conduct. Applying a specific market share threshold across sectors

may not accurately reflect the competitive structure in a particular sector, resulting in an incomplete and potentially incorrect assessment as to the degree of substantial market power in that sector.

Exclusions and exemptions from the Second Conduct Rule

As with the First Conduct Rule, there are certain situations where the Second Rule does not apply. Schedule I sets out the following general exclusions in respect of the Second Conduct Rule:

- (i) compliance with legal requirements;
- (ii) services of general economic interest;
- (iii) mergers; and
- (iv) conduct of lesser significance (i.e. conduct engaged in by an undertaking the turnover of which does not exceed HK\$40 million for the turnover period).²⁰

There is no comparable exclusion for efficiency-based conduct within the scope of the Second Conduct Rule. The Guidelines suggest²¹ that undertakings may, however, argue that the conduct does not contravene the Second Conduct Rule because it entails efficiencies sufficient to guarantee no harm to customers. The key considerations include whether:

- 1) the conduct concerned is indispensable and proportionate to the pursuit of some legitimate objective unconnected with the tendency of the conduct to harm competition;
- 2) the claimed efficiencies are in fact passed on to consumers notwithstanding the market power of the undertaking; and
- 3) the undertaking can demonstrate no net harm to consumers.²²

Further, as with the First Conduct Rule, there are certain additional statutory exemptions such as public policy exemptions and international obligations exemptions.

The Merger Rule

Under the current regime, the Merger Rule only applies to the telecommunications sector.²³

¹⁶ See Guideline on the Second Conduct Rule, para. 1.5.

¹⁷ See Guideline on the Second Conduct Rule, para. 3.3.

¹⁸ Section 21(2) of the Competition Ordinance.

¹⁹ See Competition Commission and Communications Authority, *Guide to the Revised Draft Guidelines Issued under the Competition Ordinance*, para. 79.

²⁰ Pursuant to s.6, Sch.1 to the Competition Ordinance, the Second Conduct Rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed HK\$40 million for the turnover period.

²¹ See *Guideline on the Second Conduct Rule* paras 4.4 and 4.5.

²² See Guideline on the Second Conduct Rule, paras 4.4 and 4.5

²³ The current regime in relation to mergers is set out in Sch.7 to the Competition Ordinance, which specifically provides that the Merger Rule only applies to a merger involving a carrier licensee under the Telecommunications Ordinance (see s.4 of Sch.7). In August 2014, the Chairperson of the Competition Commission commented publicly that the Competition Commission may seek to expand the merger control provisions so as to apply to more sectors, in 2-3 years' time. This will require a new legislative process.

The Merger Rule²⁴ prohibits a *merger* involving a carrier licensee under the Telecommunications Ordinance that (whether directly or indirectly) creates the effect of *substantially lessening competition* in Hong Kong. This rule applies even if:

- the arrangements for the creation of the merger take place outside Hong Kong;
- the merger takes place outside Hong Kong; or
- any party to the arrangements for the creation of the merger, or any party involved in the merger is outside Hong Kong.

In general, changes in the control of undertakings which are not of a lasting nature are less likely to have any effect on competition in the relevant market, and the Competition Commission will be less concerned about these changes.

Key terms used in the Merger Rule

Merger

- A merger takes place if (i) two or more undertakings previously independent of each other cease to be independent; (ii) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings (including creation of a joint venture to perform on a lasting basis one or more of the functions of an autonomous economic entity); or (iii) an acquisition by one undertaking (the Acquiring Undertaking) of the whole or part of the assets (including goodwill) of another undertaking (the Acquired Undertaking) that results in the Acquiring Undertaking being in a position to replace (or substantially replace) the Acquired Undertaking in the business (or part thereof) concerned.

Substantially lessening competition

- Matters that may be taken into consideration include (i) the extent of competition from competitors outside Hong Kong; (ii) whether the acquired undertaking, or part of it, has failed or is likely to fail in the near future; (iii) the extent to which substitutes are available or are likely to be available in the market; (iv)

the existence and extent of any barriers to entry into the market; (v) whether the merger would result in the removal of an effective and vigorous competitor; (vi) the degree of countervailing power in the market; and (vii) the nature and extent of change and innovation in the market.

Indicative safe harbours

The Competition Commission has identified two safe harbour measures, which are based on (a) concentration ratios²⁵; and (b) the Herfindahl-Hirschman Index (HHI)²⁶ respectively. In general, for a horizontal merger, if the combined market share of the parties post-merger is 40 per cent or more, it is likely that the merger will raise competition concerns.

If a merger falls outside the safe harbour measures, the Competition Commission may make further inquiries to assess the extent of its potential anti-competitive effects. That said, whilst the Competition Commission is unlikely to further assess any mergers which fall below the thresholds, it does not categorically rule out intervention.

Exclusions and exemptions from the Merger Rule

The Merger Rule does not apply to statutory bodies unless they are specifically brought within the scope of the Rule, nor does it apply to persons or activities specified in a regulation made by the Chief Executive in Council.

Further, the Merger Rule does not apply to a merger if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong,²⁷ or if there are exceptional and compelling public policy reasons for granting an exemption.²⁸

The Merger Rule is a voluntary regime and it is not compulsory to notify the Competition Commission of a merger which falls within the Merger Rule. The Competition Commission may commence an investigation when it becomes aware (through monitoring the media and/or information or complaints from third parties such as competitors) that a merger has taken place and, if it has reasonable cause to believe that the merger contravenes the Merger Rule, bring proceedings in the Competition Tribunal to unwind/stop the merger. It may therefore be in the interest of the parties concerned to seek informal advice from the Competition Commission on a proposed merger which may fall within the Merger Rule to understand whether the Competition Commission has any concerns about the transaction.

²⁴ Section 3 of Sch.7 to the Competition Ordinance provides that “an undertaking must not, directly or indirectly, carry out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong.”

²⁵ Concentration ratios measure the aggregate market shares of leading firms in the relevant market.

²⁶ HHI measures market concentration by adding together the squares of the market shares of all firms in a market.

²⁷ Section 8(1) of Sch.7 to the Competition Ordinance

²⁸ Section 9 of Sch.7 to the Competition Ordinance

The Telco Rule

In addition to the Merger Rule, holders of licences under the Telecommunications Ordinance will also be subject to the Telco Rule²⁹, which prohibits *licensees* who are in a *dominant position* from engaging in conduct which may be *exploitative*. The exclusions and exemptions under the Competition Ordinance will not apply to this rule.

Key terms used in the Telco Rule

Licensee

- A holder of a licence under the Telecommunications Ordinance.

Dominant position

- A licensee is in a dominant position if, in the opinion of the Communications Authority, it is able to act without significant competitive restraint from its competitors and customers.
- Relevant factors for consideration include (i) the market share of the licensee; (ii) the licensee's power to determine pricing and other decisions; (iii) any barriers to enter into the relevant telecommunications market; (iv) the degree of product differentiation and sales promotion; and (v) any other relevant matters.

Exploitative

- The Communications Authority may consider the following conduct to be exploitative (i) fixing and maintaining prices or charges at an excessively high level; and (ii) setting unfair trading terms and conditions for or in relation to the provision of interconnection of the type referred to in s.36A(3D) of the Telecommunications Ordinance.

Relationship between “substantial degree of market power” and “dominant position”

The relevant factors for determining whether a licensee is in a dominant position under s.7Q(3) of the Telecommunications Ordinance are very similar to those for determining whether an undertaking has a substantial degree of market power under the Second Conduct Rule.

Clarification regarding the relationship between the two thresholds were sought during the consultation process on the Guidelines. Whilst it is generally

understood that a “substantial degree of market power” is a lower threshold than that of the “dominance” test adopted in other jurisdictions, the Competition Commission and the Communications Authority have not so far included any guidance on the interpretation of s.7Q of the Telecommunications Ordinance.

Relationship between “abusive conduct” and “exploitative conduct”

During the consultation process on the Guidelines, there were queries on whether “exploitative conduct” as used in the Telco Rule, such as the imposition of unfair prices or other unfair trading conditions, also falls within the scope of the Second Conduct Rule.

As explained above, the category of abusive conduct is an open one, and any conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong may be regarded as abusive. Hence, if an exploitative conduct has an anti-competitive object or effect (for instance, the imposition of unfair prices or other unfair terms leading to anti-competitive foreclosure in the market), this may also fall within the scope of the Second Conduct Rule.

Whilst an exploitative conduct may fall within the scope of the Second Conduct Rule, the Competition Commission has clarified that its main enforcement focus under the Second Conduct Rule will be abusive conduct which is exclusionary, i.e. conduct which may result in competitors, actual or potential, being denied access to buyers of their products or to suppliers³⁰. Accordingly, if an exploitative conduct does not have an exclusionary effect, then it is unlikely that such conduct will be caught by the Second Conduct Rule.

Investigation and enforcement

The Competition Ordinance provides for judicial enforcement through the Competition Commission and the Competition Tribunal. The Competition Commission and the Communications Authority³¹ are the investigation authorities responsible for and tasked with, inter alia, investigating competition-related complaints and bringing enforcement actions before the Competition Tribunal in respect of anti-competitive conduct, whereas the Competition Tribunal is responsible for adjudicating competition cases brought by the Competition Commission, private actions, as well as reviews of determinations of the Competition Commission. Any appeals in relation to decisions of the Competition Tribunal on competition matters will be referred to the Court of Appeal and/or the Court of Final Appeal.

²⁹ Section 7Q of the Telecommunications Ordinance provides that “a licensee in a dominant position in a telecommunications market must not engage in conduct that in the opinion of the Authority is exploitative.”

³⁰ See Competition Commission and Communications Authority, *Guide to the Revised Draft Guidelines Issued under the Competition Ordinance*, para.94.

³¹ Under the Competition Ordinance, competition matters can be transferred between regulators with concurrent jurisdictions. In this regard, pursuant to Pt 11 of the Competition Ordinance, the Communications Authority has been given concurrent jurisdiction with the Competition Commission to enforce the Competition Ordinance in respect of the telecommunications and broadcasting sectors, including merger and acquisition activities involving carrier licensees.

Typical phases of investigation

The Competition Commission may launch an investigation on an alleged infringement of the Competition Rules (i.e. the First Conduct Rule, the Second Conduct Rule and/or the Merger Rule) either: (i) on its own initiative; or (ii) where information about a possible infringement is provided to the Competition Commission by another party. The sources of such information may include:

- 1) complaints or queries made by the public;
- 2) the Competition Commission's own research and market intelligence gathering;
- 3) referrals by the Government, the courts or other statutory bodies or authorities; and
- 4) whistle-blowing by a cartel member or a former employee.

The Competition Commission will generally carry out the investigation in two phases:

- 1) initial assessment phase; and
- 2) investigation phase.

Phase 1—Initial Assessment Phase

During this phase, the Competition Commission does not start with a fixed view on whether a contravention of the Competition Rules has taken place. In determining whether there is reasonable cause to suspect an infringement and whether the matter warrants further investigation, it may seek information on a voluntary basis, for example by contacting parties by telephone or in writing, and meeting and interviewing persons who may have knowledge of the conduct.

The Competition Commission will then determine whether or not to further investigate the matter by taking into account the following factors³²:

- the specific facts of the relevant case;
- availability of evidence suggesting an infringement of the Competition Ordinance;
- the potential impact of the alleged conduct on competition and consumers;
- the Competition Commission's enforcement strategy, priorities and objectives, and other matters currently under its and the courts' consideration;
- the likelihood of a successful outcome resulting from further investigation; and,
- whether the resources that would be used for further investigation would be proportionate to the expected public benefit.

Possible outcomes of the Initial Assessment Phase

There are four possible outcomes of the Initial Assessment Phase—the Competition Commission may:

- 1) take no further action;
- 2) commence an investigation (see *Phase 2—Investigation Phase* below);
- 3) address the issue through alternative means, such as, for example, referring the matter to another agency; or conducting a market study;
- 4) accept a voluntary resolution of the matter, i.e. a commitment under s.60 of the Competition Ordinance (see below).

Phase 2—Investigation Phase

If the Competition Commission proceeds to the Investigation Phase, it will have formed a view that there is reasonable cause to suspect an infringement of the Competition Rules.

The investigation powers of the Competition Commission include:

- Power to obtain documents and information through, (i) issuing written requests for documents and information (s.41 of the Competition Ordinance); (ii) requiring attendance before the Competition Commission to answer questions (i.e. interviews) (s.42 of the Competition Ordinance); and, (iii) requiring information to be verified by statutory declaration (s.43 of the Competition Ordinance).
- Power to obtain search warrants (i.e. dawn raids), which authorise entry into premises to execute searches; and, require production, make copies and/or take possession of relevant documents including computers, electronic files and storage devices.

Criminal consequences for non-compliance with the Competition Commission's investigation powers

The Hong Kong courts have powers to impose criminal sanctions on undertakings and individuals for non-compliance with the investigation powers of the Competition Commission

- Failure to comply with a requirement or prohibition imposed under the Competition Commission's investigation powers³³—the

³² See Guideline on Investigations, paragraph 3.6

³³ Section 52 of the Competition Ordinance.

- maximum penalty for a conviction on indictment is a fine of HK\$200,000 and imprisonment for up to one year.
- Destruction/falsification/concealing of documents³⁴, obstruction of search³⁵, provision of false or misleading documents/information³⁶ and disclosure of confidential information received from the Competition Commission³⁷—the maximum penalty for a conviction on indictment is a fine of HK\$1 million and imprisonment for up to two years.

Possible outcomes of the Investigation Phase

Where the Competition Commission determines that contravention of a Competition Rule has occurred, it has a range of options at its disposal. These include:

- 1) *No further action*—however, this does not prevent the Competition Commission from revisiting the matter at a later date;
- 2) *Voluntary resolution under s.60 of the Competition Ordinance (s.60 Commitment)*—the Competition Commission may accept a commitment from a person to take such action (or refrain from taking such action) as it considers appropriate to address its concerns about a possible contravention of the Competition Rules, and agree to terminate its investigation and not bring proceedings in the Competition Tribunal (or terminate such proceedings where already brought);
- 3) *Issue a warning notice*—a warning notice will be issued where the Competition Commission has reasonable cause to believe that the *First Conduct Rule* has been breached, but the infringement does not involve “Serious Anti-Competitive Conduct”. The warning notice will stipulate that contravening undertakings should cease the anti-competitive conduct within a specified period of time;
- 4) *Issue of infringement notice*—an infringement notice will be issued when the Competition Commission has reasonable cause to believe that an infringement of (a) the *First Conduct Rule* involving “*Serious Anti-Competitive Conduct*”; and/or (b) the *Second Conduct Rule* has occurred. Whilst not bound to do so, the Competition Commission will generally offer the relevant undertaking an opportunity to comply with requirements of the notice

within a specified period as a condition for not bringing proceedings in the Competition Tribunal; and,

- 5) *Commencement of proceedings before the Competition Tribunal*—the Competition Commission may initiate proceedings before the Competition Tribunal under ss.92, 94, 99 and/or 101 of the Competition Ordinance.

Other possible actions that may be taken by the Competition Commission include an application for a consent order from the Competition Tribunal, referral to a Government agency and further market studies.

Sanctions and follow-on right of action

When competition rules are infringed, the Competition Tribunal has broad powers to impose penalties and remedies on undertakings and individuals and to impose costs orders against contravening parties:

- a) *For the company*—fines up to 10 per cent of the gross Hong Kong turnover of the company/group for up to three years in which the contravention occurred; and, imposition of behavioural or structural remedies including, for example, injunctions and restoration orders etc.
- b) *For the individual*—fines and (for Directors) disqualification for a period of up to five years.

The Competition Ordinance allows a person who has suffered loss or damage as a result of any act that has been *determined* to be an infringement of a conduct rule to bring an action against (a) any person who has contravened or is contravening the rule; and (b) any person who is, or has been, involved in that contravention. In this regard, a “contravention of a conduct rule” includes an admission made in a s.60 Commitment that a person has contravened a conduct rule.

Currently, the Competition Ordinance does not provide for private “stand-alone” actions to be brought by persons for relief and remedies arising from particular conduct. The Hong Kong government will review the need for stand-alone rights of private action after the business community acquires more experience with the new competition regime.

³⁴ Section 53 of the Competition Ordinance.

³⁵ Section 54 of the Competition Ordinance

³⁶ Section 55 of the Competition Ordinance

³⁷ Section 128(3) of the Competition Ordinance

Practical compliance with the Competition Ordinance

In view of the broad powers of the Competition Tribunal to impose penalties and remedies on undertakings and individuals, it is very important to understand and comply with competition law principles. One practical compliance tip in this regard is "READ":

- Review current and future business operations;
- Educate officers and employees about business practices or conduct that may constitute unlawful anti-competitive activity;
- Additional training for management and employees whose businesses and/or operations may be impacted by the Competition Ordinance; and,
- Devise on-going systems, procedures and policies to comply with the Competition Ordinance.

Risk identification—review current and future business operations

Companies must first conduct a thorough review of their existing operations, business practices, business arrangements and contracts to identify aspects of the Competition Ordinance that are of particular relevance. Such a review will assist with the determination of an appropriate compliance strategy and the priority of compliance measures to be undertaken.

As a starting point, companies should be wary of and avoid “high risk” conduct as set out below:

For all undertakings

- Price fixing;
- Market sharing;
- Output limitation;
- Bid rigging;
- Joint buying;
- Information exchange with competitors and at trade association meetings;
- Group boycotts; and,
- Resale price maintenance.

For undertakings with substantial degree of market power:

- Predatory pricing;
- Tying and bundling;
- Margin squeeze;
- Refusal to deal; and,

- Exclusive dealing arrangements (including the imposition of exclusive purchasing obligations or provision of conditional or loyalty rebates).

For companies that are holders of carrier licenses under the Telecommunications Ordinance, they should be alert whenever they are in a “*dominant position*” and/or considering a merger transaction.

Risk mitigation—educate, additional training and design compliance systems

Given the difference in nature and size of each business, companies will need to consider the actual impact of the Competition Ordinance on their practices and formulate a compliance strategy suitable to the size and risk profile of their business. Non-exhaustive measures that companies can adopt in order to mitigate and manage potential or identified risks include:

- Cessation or modification of business practices;
- Provision of training;
- Implementation of a compliance policy and manual;
- Appointment of a compliance officer; and
- Seeking legal advice for issues that are unclear or complex.

Regular reviews

Competition compliance is an on-going process. Companies should regularly review their policies and practices (which, in light of changing market conditions or new legal developments, may change from time to time) and where necessary, update and refine their compliance measures to ensure continuing compliance with the Competition Ordinance.

Outlook

This recent implementation of Hong Kong's Competition Ordinance marks a significant step in the evolution of its fledgling antitrust regime. Multinational enterprises doing business in Hong Kong can no longer afford to dismiss the Special Administrative Region as a jurisdiction that has no competition regime or antitrust enforcement.

The new Hong Kong antitrust rules follow international norms, with a marked similarity in particular to EU law. Further, officials appointed to the Competition Commission include many recruits with experience of the application of comparable rules in other jurisdictions. It can be safely assumed that the new Hong Kong rules will be interpreted and developed with an eye to international practice, with cooperation and dialogue between the Competition Commission and its international counterparts.