

# Hong Kong Competition Ordinance Takes Effect: The Latest Jurisdiction Regulating How Companies Compete

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On December 14, 2015, Hong Kong became the latest jurisdiction to prohibit anticompetitive agreements and unilateral conduct. The Competition Ordinance (Ordinance) is Hong Kong's first cross-sector competition law for this international financial hub. For the first time, the Hong Kong government and private parties have the opportunity to seek damages for anticompetitive conduct under an all-embracing competition law.

The Ordinance was signed into law by the Chief Executive of the Hong Kong Special Administrative Region on June 21, 2012. That act created the Hong Kong Competition Commission (Commission). The law provided a three-year transition period during which the Commission has been preparing for implementation of the Ordinance's substantive provisions and consulting with the public on enforcement objectives. With the Ordinance now in effect, the Commission has stated its intent to begin investigating cartel and anticompetitive conduct by dominant businesses.

## Legislation

The Ordinance's structure is similar to other major competition law regimes, comprising rules prohibiting cartel conduct, abuses of market power and other conduct in restraint of competition. The Ordinance also provides a number of exclusions and exemptions, including those based on efficiencies, block exemptions, and minimum turnover thresholds for coverage. The Ordinance is sector-neutral and governs all industries, except for the merger control rule, which is limited in application to the telecommunications sector.

The new law introduces the following competition rules:

- *First Conduct Rule*: prohibits competitors who enter into an agreement, or who engage in a concerted practice, that has the object or effect of restricting competition in Hong Kong. The Commission is expected to initially focus on horizontal conduct among competitors, specifically:
  - Fixing prices or other price related items;
  - Allocating market shares by customer or region;
  - Rigging bids to destroy competitive nature of tender processes; and
  - Restricting manufacturing capacity or sales outputs to manipulate prices or market shares.

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For vertical agreements and unilateral conduct, the Commission has indicated it may issue a “warning notice” to infringing parties and then pursue enforcement actions for conduct that is repeated or continued.

- *Second Conduct Rule*: prohibits businesses with substantial market power from abusing that power by engaging in conduct with the object or effect of restricting competition. The Commission has indicated that the Second Conduct Rule will only apply to a single entity with substantial market power, rather than collective dominance. The Commission has issued Guidance explaining how the Commission will assess market power, and the conduct that may constitute an abuse of such power.
- *Merger Rule*: prohibits certain mergers and acquisitions between firms that hold a telecommunications carrier license. The Merger Rule is, therefore, not a law of general application.

The Ordinance also provides for various exclusions and exemptions. Notably, the Conduct Rules do not apply to an agreement or conduct that:

- Enhances overall economic efficiencies (First Conduct Rule only);
- Is made in compliance with legal requirements (First and Second Conduct Rule);
- Is performed by enterprises entrusted by the Government to serve the general economic interest (First and Second Conduct Rule);
- Results in a merger or acquisition (First and Second Conduct Rule); or
- Is between enterprises whose combined annual revenue does not exceed certain volume<sup>1</sup> (First and Second Conduct Rule).

Under the First Conduct Rule, the Commission may grant a Block Exemption Order if it finds that a particular type of agreement may be justified by one of the above-mentioned five exclusions. The Ordinance further provides exemptions due to public policy, international obligation, statutory bodies, specific persons and activities under both Conduct Rules.

The Merger Rule, likewise, is subject to several exemptions. As noted above, it does not apply to mergers that do not involve a telecommunications company. It also does not apply where the merger:

- Promotes economic efficiencies outweighed adverse effects;
- Is justified by exceptional and compelling reasons of public policy; or
- Involves statutory bodies, specified persons or persons engaged in specified activities.

## Enforcement

The Ordinance created a competition-specific enforcement agency and a separate tribunal. Actions brought by the Commission are civil in nature. In addition, the Ordinance creates a path to seek leniency and, for private parties seeking remedies, a limited right of action for civil damages.

### The Hong Kong Competition Commission

The Ordinance establishes the Commission as a statutory body that is independent of the executive, legislative and judicial branches. Chairwoman Anna Wu and 13 other members were officially appointed to the Commission on May 1, 2013.

The Commission’s primary responsibility is the investigation and prosecution of potential violations of the Ordinance. It is also tasked with educating and advising the Government, stakeholders and interest groups to promote compliance.

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<sup>1</sup> First Conduct Rule: not to exceed HK\$200 million; Second Conduct Rule: not to exceed HK\$40 million.

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To date, the Commission has focused on soliciting public input on enforcement guidelines and policy. Going forward, the Commission can be expected to conduct wide-ranging investigations under the Ordinance based on recent Commission statements. Specifically, Chairwoman Wu has warned that the Commission will actively investigate and prosecute violations of the First and Second Conduct Rules. She further notes that the Commission will pursue an expansion of the Merger Rule to cover all industries within the next two to three years.

## **The Hong Kong Competition Tribunal**

The Ordinance also created a Competition Tribunal (Tribunal) to adjudicate cases brought by the Commission and impose penalties for violations. It will have the authority to review the Commission decisions to grant or deny applications for block exemptions. Additionally, the Tribunal is entitled to handle private follow-on actions, as described below.

The Tribunal may impose a pecuniary penalty up to ten percent of the total gross revenue earned by an alleged breaching party in Hong Kong in the last fiscal year and, in the case of a private action, award damages. In addition to the pecuniary penalty, individuals involved in breaches may be disqualified from acting as directors or being involved in affairs of their companies for up to five years. The Tribunal has injunctive powers and is entitled to modify or terminate an agreement, as well as prohibit an entity from entering into or giving effect to an agreement.

## **Private Litigation**

The Ordinance guarantees a right of action to seek civil damages, whereby a person who has suffered loss may take actions against someone who violates the Ordinance. The damages must be due to the violation. Nevertheless, such a right of action can only be exercised as a follow-on action. If the Commission has not sought and obtained a judgment against or an admission from a person for a violation of the Ordinance, then a private person may not seek relief under the Ordinance.

## **Leniency Program**

Hong Kong also follows the trend of many other jurisdictions in adopting a leniency program. Issues remain as to how the program will be applied and its effect on private follow-on litigation.

Importantly, the Ordinance provides that only the first leniency applicant is eligible to receive leniency. How this would be applied remains to be seen. Also unclear is how the Commission will engage with parties who are not the first to apply for leniency in connection with a potential violation. Currently, the Commission has stated it will exercise its discretion to grant certain – as yet, undefined – benefits to cooperating parties other than the first applicant. In the absence of further clarity and certainty, potential applicants can be expected to be reluctant to disclose their identities and confidential information.

The treatment of leniency applications also has implications for follow-on private litigation. It remains unclear to what extent the Commission's leniency program will force applicants to make an admission. It is also unclear whether the Commission will continue to pursue a determination of a violation by a person that has sought leniency. An admission or a judgment finding a violation, even without an order to pay monetary penalties, may create a potential private right of action, as noted above. How this provision is applied in practice is, therefore, likely to significantly impact the feasibility of antitrust civil lawsuits in Hong Kong. Without an adjudication order or an admission of an infringement, leniency applicants may effectively become immune from private suits.

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The Hong Kong Competition Commission is a new enforcement agency, but is gaining more expertise and political support within Hong Kong. Given its limited experience and resources, the Commission is expected to prioritize investigations into potential violations of the First and Second Conduct Rules – especially *prima facie* anticompetitive agreements – over the next several years. Therefore, multinational businesses with operations in Hong Kong should monitor developments under the Ordinance for implications for their business and regulatory compliance efforts.

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