

November 3, 2015

THE FINAL COUNTDOWN BEGINS FOR HONG KONG'S COMPETITION REGIME: TIME TO COMPLY

To Our Clients and Friends:

Hong Kong recently commenced the final countdown towards implementing its new competition regime, many elements of which are inspired by competition rules in Western jurisdictions. On July 17, it issued a "*Commencement Notice*" for the introduction of a Competition Ordinance (the "Ordinance") which is scheduled to come into force in six weeks' time, on December 14, 2015.

The Hong Kong Competition Commission (the "HKCC") has indicated that there will not be an additional grace period after this date.^[1] Thus, businesses and trade associations have approximately six weeks to take appropriate steps to comply with the Ordinance. In the meantime, as the date for full implementation of the competition regime approaches, the HKCC will, in appropriate cases, contact businesses and other relevant parties directly if the HKCC considers their conduct or practices may be considered anti-competitive and, therefore, likely to contravene the Ordinance post full commencement.^[2] Gibson Dunn answers some frequently asked questions on the new Hong Kong competition regime below:

1) What competition laws presently exist in Hong Kong?

Sector-specific competition rules exist in Hong Kong that are applicable to the telecommunications and broadcasting sectors,^[3] but the Ordinance is Hong Kong's first cross-sectoral competition law. The Ordinance will introduce a new, economy-wide competition regulation, intended to "*enshrine established values for competition*" and to provide a legal framework to curb potential anticompetitive conduct.^[4] After a transitional period some of the competition provisions of the Telecommunications Ordinance and all of the competition provisions of the Broadcasting Ordinance will be repealed.

2) When will the Ordinance come into force?

The Ordinance was enacted in June 2012 setting in motion a phased-in approach of its provisions by the government. The institutional provisions of the Ordinance came into force in 2013, establishing the HKCC and a Competition Tribunal. The substantive prohibitions of the Ordinance are scheduled to take effect on December 14, 2015.

Over the past two years, the HKCC drafted and consulted on a set of six guidelines, the final versions of which were issued on July 27, 2015.^[5] These six guidelines are intended to give general guidance on how the HKCC will interpret and apply relevant provisions of the Ordinance and can be accessed [here](#).

3) What sorts of conduct will be prohibited under the new Ordinance?

The Ordinance regulates two broad types of conduct (the "Conduct Rules"):

- **Anti-competitive Agreements:** The "*First Conduct Rule*" of the Ordinance prohibits anti-competitive agreements, concerted practices and decisions of members of associations of undertakings (such as industry associations).[6] The Rule applies to contractual conduct; however, a contract is not a prerequisite to a finding of an infringement, *i.e.*, the Rule may also apply where cooperation is non-binding or not legally enforceable.[7] The Rule applies to both horizontal (between competitors) and vertical (between undertakings at different levels of the production or distribution chain) agreements and arrangements, having either the object or effect of harming competition in Hong Kong.[8] The Guideline on the First Conduct Rule recognizes that vertical agreements are generally less harmful (but may nonetheless cause harm), whereas horizontal agreements may be particularly more harmful to competition. For the most harmful types of conduct, namely cartels, the Ordinance creates a category of "*Serious Anti-Competitive Conduct*" which encompasses horizontal arrangements that seek to fix prices, share markets, restrict output or rig bids.
- **Abuses of Substantial Market Power:**[9] Under the "*Second Conduct Rule*", an undertaking which has a "*substantial degree of market power*" must not abuse that power by engaging in conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. The Second Conduct Rule does not prohibit the possession or desire to achieve a "*substantial degree of market power*", but rather is directed against how a company uses that power. It is understood that the "*substantial degree of market power*" test will largely be developed by the Competition Tribunal on a case-by-case basis.[10] It was a conscious decision during the legislative process not to use a dominance test (applicable in the EU), but to elect for the potentially lower threshold of "*substantial market power*", in keeping with other jurisdictions such as Australia and New Zealand.[11] Specific examples of the types of conduct falling under the Rule include predatory pricing, tying and bundling, margin squeezes, refusals to deal and exclusive dealings. It is unclear whether so-called "*exploitative conduct*" will fall under the Ordinance. The Ordinance gives a non-exhaustive list of factors to be taken into account in determining whether an undertaking enjoys "*a substantial degree of market power*," including high market shares and barriers to entry.[12]

4) How is the Ordinance enforced?

The HKCC is tasked with enforcing the Ordinance. Since the adoption of the Ordinance, the HKCC has hired staff, including senior officials with decades of experience in foreign jurisdictions. It is therefore expected that enforcement will be in line with other Western jurisdictions.

The HKCC does not have the power to impose any order or fine on undertakings. Rather it must apply to the newly established Competition Tribunal for any sanction to be imposed. Where the contravention concerns the First Conduct Rule, but does not amount to "*Serious Anti-Competitive*

Conduct," the HKCC must first issue a "*Warning Notice*" providing the undertaking with a specified period in which to comply. Such warning notices will also be published on the HKCC website.[13]

As regards all other conduct (Serious Anti-Competitive Conduct or Second Rule Conduct involving an alleged abuse of substantial market power), the HKCC may commence proceedings by issuing an "*Infringement Notice*", without issuing a Warning Notice. Note that, as regards cartel conduct, it will not be possible to apply for leniency under the Draft Cartel Leniency Policy (see below), if an Infringement Notice has already been issued. The HKCC is not required to issue an Infringement Notice before commencing proceedings in the Competition Tribunal. However, if the HKCC elects to issue an Infringement Notice, it will offer not to bring proceedings before the Competition Tribunal on the condition that the undertaking(s) under investigation commit to comply with the requirements set out in the notice within a specified period of time. If an undertaking fails to comply with the requirements set out in an Infringement Notice within the specified period, the HKCC may bring proceedings before the Competition Tribunal.[14]

The HKCC has indicated that it will publish a document setting out its enforcement priorities in the coming weeks and that this document will not be sector-specific.[15] Given the limitations in resources and costs in bringing a case before the Competition Tribunal, it is likely that the HKCC's priority will be to act against price-fixing cartels.

5) Has the HKCC followed the International norm of introducing a leniency program to encourage self-reporting of cartel conduct?

On September 23, the HKCC published for consultation (deadline - October 23) a copy of its *Draft Cartel Leniency Policy* (the "*Draft Policy*") further to Section 80 of the Ordinance. The HKCC may decide to amend the terms of the Draft Policy following the outcomes of its consultation.

According to the HKCC, the Draft Policy is designed to assist in the detection of cartels and, in particular, to "*provide a strong and transparent incentive for a cartel member to stop its cartel conduct and to report the cartel*" to the HKCC.[16] Section 80 of the Ordinance permits the HKCC to enter into a "*leniency agreement with a person*" under which, in exchange for cooperation, the HKCC can agree (on terms it considers appropriate) not to bring or continue proceedings before the Competition Tribunal for a pecuniary penalty (the "*Leniency Agreement*"). Leniency will be available under the Draft Policy where the applicant is an undertaking, is the first to report the cartel conduct and is prepared to sign "*a statement of agreed facts admitting to its participation in the cartel conduct*" (the "*Statement of Facts*").[17]

The Statement of Facts requirement may potentially attract some criticism during the consultation, particularly from stakeholders outside Hong Kong. The requirement may be viewed as being at odds with the paperless process in other jurisdictions (e.g., the EU and the USA) and as risking placing the leniency applicant at a significant disadvantage *vis à vis* other members of the same cartel, leaving the former potentially vulnerable to civil claims in courts outside Hong Kong, in particular, in the context of class actions in the USA. For example, private plaintiffs in U.S. civil litigation can be expected to argue that a written Statement of Facts is subject to discovery and admissible against the leniency

applicant (although not against other cartel members). Furthermore, in proceedings in Hong Kong, on the basis of the Statement of Facts, it will be open to the Competition Tribunal to issue an order pursuant to Section 94 of the Ordinance declaring that the leniency applicant contravened the First Conduct Rule. Such an order may thus also facilitate follow-on claims (see below) against the leniency applicant in Hong Kong under Section 110 of the Ordinance.

Although it will be the undertaking which will enter into the Leniency Agreement, leniency under the Draft Policy will "*ordinarily*" also extend to current (and where specifically named, former) directors, officers or employees of that undertaking (so long as those individuals provide complete, truthful and continuous cooperation with the HKCC).[18] The intended significance of the word "*ordinarily*" may raise potential questions of legal certainty for these individuals and thus may become the subject of criticism during the consultation process.

As regards subsequent applicants for leniency, according to the Draft Policy, the HKCC may recommend lower fines to the Competition Tribunal. However, it is the Tribunal that can solely decide on potential fines, raising a potential issue of legal certainty.[19]

The Draft Policy foresees a "*marker system*" establishing a leniency queue: the applicant will call the "*Leniency Hotline*" to request a marker and will be asked to provide sufficient details to identify the conduct for which leniency is sought. If the HKCC considers, on the basis of this information, that there is cartel conduct and that leniency is available, the applicant will be invited to make an application (usually within 28 days) for leniency by way of an oral or written proffer.[20] The proffer, which can be on a hypothetical and "*without prejudice*" basis, will need to include a detailed description of the cartel including: the entities involved; the role of the applicant; and of the evidence that can be provided. After considering the proffer, the HKCC may ask the applicant to provide access to "*some*" evidence in support of the proffer, for example, documentary evidence or making witnesses available for interview. The HKCC will provide assurances that it will not use this evidence against the leniency applicant.

If the HKCC then decides to make an offer of a Leniency Agreement, the applicant will be asked to agree (among other things) that:[21]

- it has provided and will continue to provide full and true disclosure to the HKCC;
- it did not coerce the other parties to engage in the cartel conduct;
- absent the HKCC's consent, it has terminated its involvement in the cartel;
- it will keep all aspects of leniency confidential (except as required by law);[22] and
- it will continue to cooperate with the HKCC in proceedings against other undertakings.

If an undertaking fails to abide by the terms of the Leniency Agreement or where there are reasonable grounds to suspect that the information on which the HKCC based its decision to enter into the

Agreement was incomplete, false or misleading "*in a material particular*", the HKCC may terminate the Leniency Agreement pursuant to Section 81 of the Ordinance.[23]

6) What's the HKCC's stance on resale price maintenance?

Resale price maintenance (also known as "RPM") is reported to be prevalent in Hong Kong.[24] According to the HKCC, RPM occurs whenever a supplier establishes a fixed or minimum resale price to be observed by the distributor when it resells the product affected by the RPM obligation.[25] Its treatment under the Ordinance has generated a lot of debate. According to the Guideline on the First Conduct Rule,[26] the HKCC does not exclude the possible application of an efficiency defense (see Question 11 below) to RPM. However, practically, the assumption should be that RPM is in most or all cases likely to be found in violation of the First Conduct Rule.

7) What sanctions can be imposed for substantive breaches of the competition rules?

The HKCC does not possess the power to impose sanctions. It must make an application to the newly established Competition Tribunal. The Competition Tribunal consists of judges from Hong Kong's Court of First Instance and is competent to hear and determine applications as regards alleged contraventions of the Conduct Rules.[27] The Competition Tribunal has wide-ranging sanctioning powers, including those relating to:[28]

- an order prohibiting or restricting conduct that constitutes a contravention;
- an order prohibiting a person from making or giving effect to an agreement;
- the imposition of fines ("*pecuniary penalties*") of up to 10% of an undertaking's total gross revenues generated in Hong Kong for the duration of the contravention (capped at three years);
- the issuing of interim orders to enjoin the conduct;
- an order to pay "*damages to any person who has suffered loss or damage as a result of the contravention*";
- an order to take "*steps for the purpose of restoring the parties to any transaction to the position in which they were before the transaction was entered into*" ; and
- the issuing of an order prohibiting a person from acquiring, disposing or otherwise dealing with property.

Note that while the new regime does not seem to envisage criminal sanctions for substantive breaches of the competition rules, individuals may face criminal sanctions for procedural breaches under the Ordinance (see Question 10 below).[29]

8) Are there any consequences for directors of undertakings which have contravened the Conduct Rules?

The HKCC considers directors to be the driving force behind commercial strategy and thus recognizes that directors play an important role in ensuring compliance. For this reason the Ordinance provides for director disqualification, by empowering the Competition Tribunal to disqualify a director of a company which has contravened the Conduct Rules, if it considers that person to be unfit to manage the company. The Ordinance does not appear to distinguish between non-executive and executive directors.[30]

9) How does the Ordinance treat private litigation?

One of the peculiarities of the Ordinance is that it is not possible to bring a private lawsuit (*i.e.*, a "*stand-alone action*"). The only exception is that any party can raise a competition law defense, for example, in a contractual dispute before the courts (see Question 11 below). The case may then be transferred to the Competition Tribunal. By contrast, follow-on claims before the Competition Tribunal will be permissible after there has been a ruling from the Competition Tribunal on the legality of the conduct in question (and where a person has suffered loss or damage as a result of the conduct).[31]

10) Does the Ordinance create sanctions for procedural breaches?

The Ordinance contemplates criminal sanctions for individuals (such as fines and/or imprisonment) for conduct that threatens the integrity of a HKCC investigation, which may include for example: providing false information; destroying, concealing or falsifying evidence; retaliating against an employee for assisting the HKCC; and breach of confidentiality.[32]

11) What defenses may be raised to an alleged infringement of the Conduct Rules?

The Ordinance allows for "*general exclusions or exemptions*" to the Conduct Rules for specific types of behavior. When considering whether or not an undertaking's conduct is permissible under the Conduct Rules, companies will need to self-assess the likelihood of whether or not such exclusions or exemptions may be available. It will also be possible to seek to raise such exclusions or exemptions as defenses before the HKCC and the Competition Tribunal. Depending on the circumstances, it may be possible to invoke the following:

- **Overall "Economic Efficiencies" Defense:** This defense may be available for conduct encompassed by the First Conduct Rule. However, according to the Guideline on the First Conduct Rule, as a practical matter, cartel conduct is "*unlikely to be justifiable*" on the basis of this exclusion. The exclusion will apply (among other things) where the net effect of the practice at issue is to either: (a) improve production or distribution or (b) promote technical or economic progress, while allowing consumers a fair share of the benefits. The "Economic Efficiencies" exemption is not available as a defense to an allegation that an undertaking engaged conduct in violation of the Second Conduct Rule.[33]

- **De Minimis Exceptions:** The Ordinance creates separate exemptions for conduct or agreements "*of lesser significance*" involving small and medium-sized enterprises. The First Conduct Rule will not apply where an agreement or concerted practice is between undertakings with a combined annual turnover below HK\$ 200 million, unless the practice involves Serious Anti-Competitive Conduct. The Second Conduct Rule will not apply where the company alleged to be abusing its market power generates turnover not exceeding HK\$ 40 million.[34]
- **Other General Exclusions:** The Conduct Rules will not apply where the undertaking(s) involved were merely complying with legal requirements, where the undertaking(s) provide services of general economic interest (*e.g.*, public services), or in the case of a merger (see Question 16).[35]

12) Does the Ordinance contemplate any block exemptions for specific types of agreements?

The HKCC is empowered under Section 15 of the Ordinance to issue "*Block Exemption Orders*" for certain categories of agreements under the First Conduct Rule which enhance overall economic efficiency. The HKCC may issue such an order either of its own volition or as a result of an application by a third party. The HKCC will consider whether it is proportionate to issue such an Order, balancing the expected public benefit against the resources required.[36] According to recent press reports, it is understood that the Hong Kong Liner Shipping Association has recently called for a block exemption order to be created for the container liner shipping industry. The EU has historically provided block exemptions in this sector and recently renewed its Consortia Block Exemption as regards certain categories of agreements, decisions and concerted practices between liner shipping companies.[37]

13) What is the extraterritorial reach of the HKCC's enforcement of the Conduct Rules?

If an undertaking's conduct is determined to harm competition in Hong Kong, the Conduct Rules will apply and the undertaking may be subject to sanctions, regardless of whether the undertaking is located in Hong Kong or where the practice was carried out.[38]

14) Can private parties lodge a complaint with the HKCC?

Anyone who suspects that the Conduct Rules have been, are being or are about to be contravened may contact the HKCC to express concerns, make queries and/or lodge a complaint. It will be possible to lodge a complaint directly to the HKCC or through a legal advisor. Complaints can be made anonymously and either over the telephone, by email, in person or through an online form on the HKCC's website (not yet available). Complainants are asked to keep their complaints confidential, on the grounds that disclosure may impede the HKCC's ability to investigate a complaint effectively. Therefore, if a complainant wishes to disclose its complaint publicly, it should inform the HKCC in advance.[39] There may, however, be an additional motive behind this: to render it difficult for complainants to place public pressure on the HKCC to conduct investigations into their complaint and to use competition laws as a means to challenge rivals.

The HKCC is not required to conduct an investigation into a complaint where it does not consider it reasonable to do so (for example, if it considers the complaint to be frivolous, vexatious, misconceived or lacking in substance). If it does decide to investigate, it will carry out an initial assessment of the complaint (the "Initial Assessment Phase"). If (after, the Initial Assessment Phase) it considers that there is reasonable cause to suspect that there has been a contravention of the competition rules, the HKCC will pass to the "*Investigation Phase*". During the Investigation Phase, the HKCC may obtain further evidence. It also will endeavor to keep complainants "*generally informed as the matter progresses*" during this phase of the investigations.

15) Can the HKCC conduct unannounced inspections at a business' premises?

Under Section 48 of the Ordinance, the HKCC may, during the Investigation Phase, obtain a warrant from the Court of First Instance to enter and inspect premises, without prior notice, if it possesses reasonable grounds to suspect that documents of potential relevance to its investigation are located on the premises. The HKCC's Guideline on Investigations indicates that it will be more likely to conduct unannounced inspections where the practice under investigation is conducted in secret.^[40] According to Section 50 of the Ordinance, a warrant may specifically authorize the HKCC to use reasonable force to gain entry to premises. According to the Guideline on Investigations, agents of the HKCC will be under no obligation to wait for a company's legal advisers to arrive before commencing the search; however, the HKCC has indicated that its officers will wait "*a reasonable*" amount of time for external counsel to arrive if no in-house counsel is present on-site.^[41] A warrant may also authorize HKCC agents pursuant to Section 50 of the Ordinance to search, copy and confiscate relevant documents (including electronic documents) and equipment (such as computers and devices) during inspections. Evidence found during unannounced inspections will be retained by the HKCC "*for as long as necessary*" for the purposes of the investigation and subsequent legal proceedings.^[42]

16) We are considering an M&A transaction: will we need to notify to the HKCC?

The Ordinance prohibits an undertaking from carrying out a merger if the merger has or is likely to have the effect of substantially lessening competition in Hong Kong (the "Merger Rule"). At the present time, the scope of application of the Merger Rule is limited to the telecommunications sector: according to Section 4 of Schedule 7 of the Ordinance, the Merger Rule only applies where an undertaking that directly or indirectly holds a carrier license within the meaning of the Telecommunications Ordinance is involved in a merger, *i.e.*, carrier licenses issued under the Telecommunications Ordinance.^[43]

[1] HKCC "*Seminar: Getting Ready for the Full Implementation of the Competition Ordinance*", dated October 23, 2015 advertised at <http://www.compcomm.hk/en/seminarsworkshops.html#>

[2] http://www.compcomm.hk/en/pdf/press/20150721_PressRel_Handling_Comp_Matters_eng.pdf.

[3] Enshrined, respectively, in the Telecommunications Ordinance and Broadcasting Ordinance.

- [4] <http://www.compcomm.hk/en/faq.html>
- [5] <http://www.compcomm.hk/en/guidelines.html>
- [6] See Guideline on First Conduct Rule at paragraphs 1.6 - 1.8.
- [7] See Guideline on First Conduct Rule at paragraphs 1.6.
- [8] See Section 6 of the Guideline on the First Conduct Rule.
- [9] Sections 21-22 of the Ordinance.
- [10] *Ibid*, HKCC Seminar, dated October 23, 2015.
- [11] See http://compcomm.hk/en/pdf/speeches/Global_Comp_Law_Forum_Asia-20140627.pdf. For example, "*Substantial Degree of Market Power*" has been interpreted in Australia to mean the ability of a firm to act without competitive constraint.
- [12] See Guideline on Second Conduct Rule at paragraphs 5.1.
- [13] See Section 82(1) of Ordinance and paragraphs 7.14 and 7.15 of the Guideline on Investigations.
- [14] See Sections 67 to 79 of the Ordinance.
- [15] *Ibid*, HKCC Seminar, dated October 23, 2015.
- [16] See http://compcomm.hk/en/pdf/speeches/Fighting_Cartels_20150327.pdf. See also draft "*Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct*" available at http://www.compcomm.hk/en/pdf/consultations/Guide_to_Draft_Leniency_Policy_Eng.pdf.
- [17] See Section 2.1 of the Draft Policy.
- [18] See page 1 of the Draft Policy.
- [19] See Section 4 of the Draft Policy.
- [20] See Sections 2.15 – 2.20 of the Draft Policy.
- [21] See Sections 2.21 – 2.22 of the Draft Policy.
- [22] According to 2.14 of the Draft Policy, the applicant will be required to sign a non-disclosure agreement.
- [23] See Sections 2.25 – 3.2 of the Draft Policy.

- [24] See for example, CPI Antitrust Chronicle, September 2015 (2), "*Resale Price Maintenance Under the Hong Kong Competition Ordinance – An Uneasy Compromise.*"
- [25] See paragraph 6.71 of the Guideline on the First Conduct Rule.
- [26] At paragraphs 6.71 – 6.78.
- [27] See Sections 134, 135 and 142 of the Ordinance.
- [28] See Sections 87, 90 – 93 and Schedule 3 of the Ordinance.
- [29] *Ibid*, HKCC Seminar, dated October 23, 2015.
- [30] http://compcomm.hk/en/pdf/speeches/HKIoD_20150325.pdf. See also Section 2 on interpretation of "Director" and Sections 102-103 of the Ordinance.
- [31] See Section 110 of the Ordinance.
- [32] See Sections 52 – 55 and 173 of the Ordinance.
- [33] See Guideline on Exclusions and Exemptions at paragraph 2.3 and Schedule 1(1) of the Ordinance.
- [34] See Guideline on Exclusions and Exemptions at paragraph 2.3, Annexes to the Guideline on the First and Second Rules and Schedule 1(5) and (6) of the Ordinance. Note that turnover for the purpose of this exclusion is based on total gross revenues, whether obtained in or outside Hong Kong.
- [35] See Schedule 7 of the Ordinance.
- [36] See Guidelines on Applications for a Decision under Section 9 and 24 (exclusions and Exemptions) and Section 15 Block Exemption Orders.
- [37] Commission Regulations No 906/2009 and 697/2014.
- [38] See Section 8 of the Ordinance and Guidelines on the First and Second Conduct Rules at paragraphs 1.13 and 1.16 respectively.
- [39] See Section 37 of the Ordinance and the Guidelines on Complaints.
- [40] See paragraph 5.25 of the Guideline on Investigations.
- [41] See paragraph 5.31 of the Guideline on Investigations.
- [42] See Guideline on Investigations at paragraphs 5.22 to 5.35. See also Sections 48 – 50 of the Ordinance.

[43] See the Guideline on the Merger Rule at paragraph 1.1. See also http://www.compcomm.hk/en/pdf/press/20150721_PressRel_Handling_Comp_Matters_eng.pdf.



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