



THE NEW COMPETITION ORDINANCE IN HONG KONG - ISSUES FOR THE TRANSPORT & COMMODITIES INDUSTRIES

After many years of negotiation and much deliberation, the Hong Kong Competition Ordinance has been enacted. Parts of the Ordinance with respect to the establishment of the new Competition Commission commenced operation on 18 January 2013. The key operative provisions of the legislation are expected to come into effect some time in the next 12-18 months.

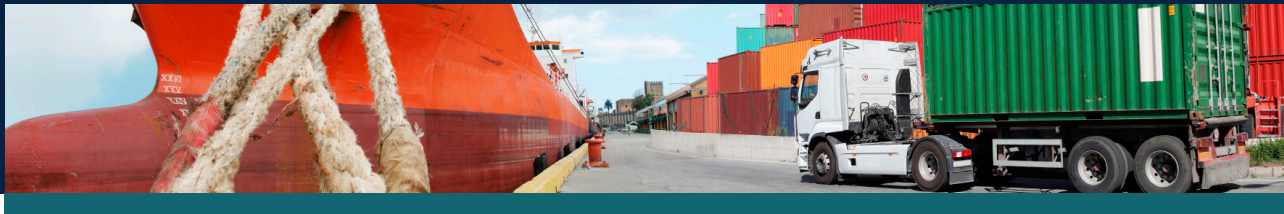
Businesses operating in Hong Kong need to act now in order to ensure that they comply with the new rules when they come into force. An important feature of the legislation is that there will be no grandfathering of existing contracts or arrangements – contracts entered into before the commencement of the legislation will not be protected from the full effects of the Ordinance. Early action should be taken to mitigate the risks involved in operating in the new regulatory environment.

In this Briefing, we explain the key provisions of the Ordinance. We also explain how the Ordinance may affect the transport and

We invite you to hear how the HK Competition Ordinance will affect businesses in the transport and commodities sectors, at a seminar we will be holding in May 2013 in Hong Kong.

Industry participants will be able to ask questions of our competition law experts from HK and Europe concerning the effect of the Ordinance and learn from the experience drawn from the application of similar competition rules in other jurisdictions.

If you are interested in attending this seminar, please email events@hfw.com



commodities industries, by reference to experience in other jurisdictions.

Overview

The Ordinance prohibits “*undertakings*” (entities that engage in economic activity) from engaging in two types of anti-competitive behavior - anti-competitive agreements and abuse of market power. Unlike other jurisdictions, there is no general merger control regime (with the exception of telecommunications-related merger provisions to replace the existing regime). The main rules which businesses need to be aware of are the First Conduct Rule and the Second Conduct Rule.

First Conduct Rule

The First Conduct Rule prohibits agreements, decisions and concerted practices if the object or effect is to prevent, restrict or distort competition in Hong Kong. Co-operation arrangements and “*gentlemen’s agreements*” falling short of contractual agreements that have the object or effect of restricting competition will be caught under the new provisions.

A distinction is made between two different kinds of conduct:

1. **Serious anti-competitive conduct** – price-fixing, market sharing, output controls and bid rigging.
2. **Other agreements** – for example, restrictions on advertising, collective refusal to supply, standardisation of agreements.

Multi-party arrangements falling under the serious anti-competitive conduct category will attract more serious

penalties, evidencing the legislature’s intent to capture so called “*hard core*” cartel conduct.

Second Conduct Rule

The Second Conduct Rule provides that an undertaking that has a substantial degree of market power must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. The Ordinance prohibits the abuse of a substantial degree of market power, but does not prohibit undertakings from having a substantial degree of market power or striving to achieve it through legitimate means.

Conduct which may constitute such an abuse of market power will include:

- Predatory behaviour towards competitors.
- Limiting production, markets or technical development to the prejudice of consumers.
- Making the purchase of one product or service conditional on the purchase of another product or service.
- Requirements that a buyer only purchase goods or services from the seller.

Exemptions and exclusions

Various exemptions will be available, including:

- An exemption from the First Conduct Rule may be granted for an agreement or conduct that enhances or promotes economic

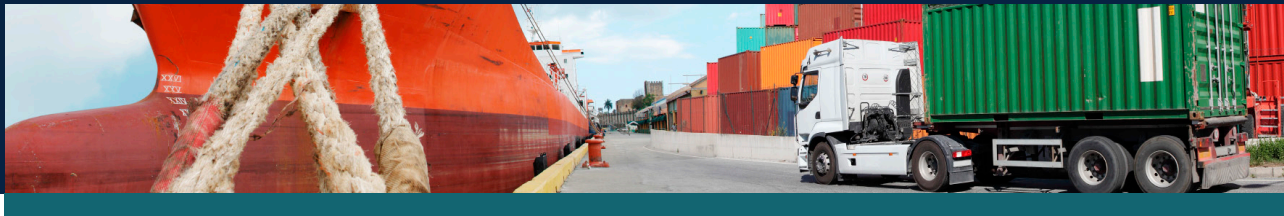
efficiency or technical progress (subject to compliance with other statutory conditions).

- The Ordinance will not apply to government or statutory bodies (unless otherwise specified).
- Block exemption orders may be granted in respect of the First Conduct Rule, whereby the Competition Commission confirms that a particular category of agreements meets the conditions for a general exemption.
- There will also be exemptions in respect of both the First Conduct Rule and the Second Conduct Rule where the Chief Executive considers there are exceptional or compelling public policy grounds.
- There will also be a “*de minimis*” rule exempting small and medium undertakings from certain provisions of the legislation who would otherwise be in breach.

Advice should be sought to assess whether there are any exclusions or exemptions that could benefit your Hong Kong operations.

Investigative powers and penalties

Regulators will have extensive powers to investigate suspected breaches of the legislation. This will include the power to require production of documents and information, to require individuals to attend interviews and, potentially, to enter and search premises in unannounced dawn raids. The legislation provides for significant penalties for breach including, in serious cases, pecuniary penalties of up to ten percent of Hong Kong



total turnover for each year (up to a maximum of three years) during which the contravention occurred. Other sanctions include damages awards, interim injunction orders, disqualification orders, confiscation of illegal profits, and the declared termination or variation of agreements.

Private rights of action are also contemplated by the Ordinance, whereby a person who has suffered loss or damage as a result of conduct found to be in breach of the First Conduct Rule or Second Conduct Rule may take action against those involved in the contravention. However, such private actions may only 'follow on' from actions by the Competition Commission against that person.

Implications for the transport and commodities industries

In the transport industry, competitors have often argued that co-operation agreements are justified by the need to ensure security of supply and stability of prices when demand is fluctuating. However, competition authorities in different jurisdictions have adopted varying attitudes to the competition law treatment of such co-operative arrangements.

In the European Union, liner conferences involving price fixing between competing shipping lines have not been permitted since October 2008. However, co-operative arrangements which do not involve price fixing, but (for example) which permit capacity sharing, pooling of vessels and joint scheduling, are automatically exempted from the competition rules within strict market share limits and provided other conditions are satisfied.

The Hong Kong government will need to decide whether to follow the EU law practice in this regard, or whether to adopt the more lenient practices of competition authorities in jurisdictions such as Singapore, Japan, Korea, Australia, the United States and Canada.

Similarly, in air transport, whereas the European Union previously had in place various block exemptions permitting co-operation between airlines, no such block exemptions remain in place. Again, the Hong Kong government will need to decide what stance to adopt.

Regarding commodities, there have been many EU law cases regarding membership of commodity exchanges, and related exclusive dealing arrangements, where these control access to an economic activity. Thus, membership criteria must be objective, reasonable and non-discriminatory, and there must be an independent right of appeal against refusals to admit to membership or to suspend or terminate membership. Similarly, members must not be prevented from leaving. A recent case focused on load out rates for regulated warehouses.

In summary, the new Competition Ordinance may have a significant impact on the transport and commodities industries. It is particularly important for companies in these industries to ensure that their practices are fully compliant with the Competition Ordinance when it comes into force.

Our Competition & Regulatory team

HFW's Competition & Regulatory practice covers a broad spectrum of competition law and our lawyers have extensive experience in advising on breaches of competition laws. The team is recommended in both Chambers and Legal 500 for competition advice. The team is able to assist the transport and commodities industries to comply with the new regime, drawing from considerable experience from the application of competition rules in other jurisdictions worldwide, including preparing for and responding to dawn raids by competition authorities. The team's leading reputation will provide you with the necessary platform to serve your needs and comply with the new rules.

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