

# COUNTDOWN TO FULL IMPLEMENTATION OF THE HONG KONG COMPETITION ORDINANCE

## What's happening and how you should prepare for its arrival

The Hong Kong Competition Ordinance (Ordinance) was passed on 14 June 2012 by the Legislative Council. Since then, the Competition Commission and the Competition Tribunal were established in 2013 and other preparatory works were carried out to pave the way for implementation of the Ordinance. In particular, on 9 October 2014, the Competition Commission and the Communications Authority (which has regulated competition issues in the telecommunication industry since the 1990s and will continue to do so) jointly issued six draft Guidelines under the Ordinance for public consultation. That consultation closed in December 2014. A report on the consultation will soon be published and the draft Guidelines will be revised. The Competition Commission plans to consult with the Legislative Council on the revised draft Guidelines by mid 2015. The finalised Guidelines will then be published. Certain subsidiary legislation under the Ordinance were also published in the Gazette for review by the

public in February 2015. The momentum towards full implementation of the Ordinance is strong and the Government aims to announce the date for implementation in the third quarter of 2015.

In this briefing, we recap the key provisions of the Ordinance and summarise some of the responses to the latest consultation on the draft Guidelines. We also highlight some actions which businesses operating in Hong Kong should consider taking in anticipation of the Ordinance coming into force.

## Overview of the Ordinance

The Ordinance contains three prohibitions:

1. The First Conduct Rule targets anti-competitive agreements, concerted practices and decisions which adversely impact competition. There are two categories of anti-competitive conduct defined under the Ordinance: serious anti-competitive conduct and other anti-competitive conduct.



The most serious conduct are hard-core cartels which engage in price-fixing, market allocation, output restriction or bid-rigging. An exclusion from application of the First Conduct Rule is provided for agreements, concerted practices and decisions not involving serious anti-competitive conduct, and between undertakings with combined annual turnover not exceeding HK\$200 million. Also excluded from the application of the First Conduct Rule are agreements, concerted practices and decisions which enhance overall economic efficiency, or made for the purpose of complying with a legal requirement, or for services of general economic interest entrusted by the Government.

2. The Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing their power to prevent, restrict or distort competition. Undertakings with an annual turnover not exceeding HK\$40 million are deemed not to have substantial market power and will not be subject to the Second Conduct Rule. As for the First Conduct Rule, there are exclusions from the application of the Second Conduct Rule for practices made for compliance with a legal requirement and those relating to provision of services of general economic interest.
3. The Merger Rule prohibits mergers that have, or are likely to have, the effect of substantially reducing competition in Hong Kong. The scope of application of the Merger Rule is limited at present to mergers relating to telecommunication carrier licence holders.

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Starting from the date of implementation of the Ordinance, undertakings will be able to apply for decisions from the Competition Commission on whether their agreements are exempt or otherwise excluded from application of the prohibitions. The Competition Commission may also issue block exemptions to exempt a particular category of agreements or practices if they satisfy specific criteria.

### Sanctions

In case of contravention of the above prohibitions, the Competition Commission may (subject to the rules of application under the Ordinance):

- Issue warning notices, infringement notices and/or seek commitments in response to conduct which may contravene the Ordinance.
- Commence proceedings before the Competition Tribunal seeking remedies such as fines, damages (to any person who has suffered loss or damage as a result of the contravention), cease and desist orders and/or disqualification of directors.

Directors, managers, company secretaries or other persons in the management of a body corporate may also commit an offence under the Ordinance if the offence was

committed with their consent or connivance, or was attributable to their neglect or omission.

Further, any person who has suffered loss or damage as a result of any act that has been determined to be a contravention of the First Conduct Rule or the Second Conduct Rule may bring a claim against the infringer.

### Draft Guidelines

The draft Guidelines outline how the Competition Commission expects to interpret and give effect to the Ordinance with the use of real-life examples. The draft Guidelines cover six aspects of the application of the Ordinance relating to: (i) complaints, (ii) investigations, (iii) applications for decisions and block exemption orders, (iv) the First Conduct Rule, (v) the Second Conduct Rule, and (vi) the Merger Rule. Key points to note include:

- The draft Guidelines do not have the force of law and will not bind the Competition Tribunal or Courts in administering the Ordinance.
- The draft Guidelines do not introduce additional exclusions or exemptions.
- The draft Guidelines draw on international best practices for guidance purposes.





- The draft Guidelines set out the Competition Commission's current view, which may be updated from time to time.

### Consultation responses on the draft Guidelines

During the consultation period, consultation respondents from various industries (including airlines, banks, builders, consumers, insurers, lawyers, manufacturers, media, politicians, real estate developers, retail managers and the shipping industry) submitted a total of 64 submissions on the draft Guidelines.

The submissions relate mostly to enhancing certainty of the prohibitions (and the applicable exclusions and exemptions) as well as the timeframe within which certain applications or decisions may or shall be made under the Ordinance. The submissions include:

- The liner shipping industry requests the Competition Commission to consider accepting block exemption applications before the First Conduct Rule becomes effective or granting interim block exemption orders pending final determination of applications.
- The airlines propose that the Competition Commission take into account the decisions and interpretation of foreign competition authorities.

- Lawyers request more indications of the Competition Commission's priorities and clarification with respect to, for example, the types of complaints the Competition Commission will investigate, the possible exemption of ordinary vertical arrangements and severance of parts of an agreement which are anti-competitive to allow the remainder to operate.

We anticipate that the authorities will revise the draft Guidelines in view of the consultation submissions.

### Actions to be taken

Businesses operating in Hong Kong must act early so as to ensure that they comply with the Ordinance. This is especially important because:

- The Ordinance applies to agreements and practices made before and after the commencement of the Ordinance.
- The Competition Commission may, in exchange for a person's co-operation in an investigation or proceedings, make a "leniency agreement" with the person not to bring or continue proceedings against him.

A number of key questions for businesses to reflect on include:

- Do you have a strategy to assess and manage the risk of breaching competition law?

- Do you know if your sector has been a subject of competition infringement proceedings in other jurisdictions? If yes, does your company engage in similar practices in Hong Kong?
- Have you reviewed your agreements, business practices and relationships to identify any area(s) that need(s) to be changed?
- If you have a compliance strategy, have you disseminated it throughout your company explicitly?
- Is there mechanism in place that allows staff to enquire about or report on competition concerns?

### Our Competition and Regulatory team

HFw's Competition and 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 the leading legal directories Chambers and Legal 500 for competition advice. The team is able to assist companies 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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