

Kluwer Competition Law Blog

Hong Kong's cross-sector competition law: In effect now

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Hong Kong's first cross-sector competition law – the Competition Ordinance (“Ordinance”) – finally came into full force on 14 December 2015.

The Ordinance became law in June 2012, initially bringing into effect only the provisions allowing for the regulatory framework to be put into place. Over the two and a half years run up to the full commencement date, the Hong Kong Competition Commission (“HKCC”) and Competition Tribunal (“Tribunal”) have been set up, and practical guidelines and procedures have been issued.

Scope of the Ordinance

The substantive provisions of the Ordinance are largely modelled on international competition practice, essentially prohibiting two types of anti-competitive conduct:

- The First Conduct Rule: prohibits anti-competitive agreements and concerted practices by businesses, including horizontal agreements between competitors (such as cartels) and vertical agreements (such as resale price maintenance in a distribution agreement).
- The Second Conduct Rule: prohibits businesses with a “substantial degree of market power” from abusing that power by acting anti-competitively. Examples of potentially abusive conduct include predatory pricing, refusal to deal and exclusivity arrangements.

However, unlike in most other jurisdictions, cross-sector merger control is not governed under the Ordinance except for holders of telecommunications carrier licenses in Hong Kong, as already reflected under the Telecommunications Ordinance.

In line with international practice, the Ordinance provides general exclusions for agreements enhancing overall economic efficiency (from the First Conduct Rule only), agreements in compliance with legal requirements and services of general economic interest (from the application of both conduct rules). Aimed at SMEs, it also excludes “agreements and conduct of lesser significance”, where the combined annual turnover of the businesses concerned does not exceed HK\$200 million and in the case of the second conduct rule to “conduct of lesser significance” where the turnover of the business does not exceed HK\$40 million.

“Statutory bodies”, and certain “specified persons” and persons engaged in “specified activities” as designated by the Chief Executive, are also excluded from certain parts of the Ordinance including the conduct rules. Specific exemptions from either or both of the conduct rules may be ordered by the Chief Executive on the grounds of public policy or international obligations.

Institutions and procedures

While the substance of competition regime under the Ordinance largely follows the European model, enforcement of its provisions is more inspired by the US model, in particular by providing for a system of judicial enforcement.

The HKCC, as an administrative body whose main task is to investigate suspected conduct, will be required to bring proceedings in the Tribunal if it believes the alleged contravention of the conduct rules justifies a pecuniary or other penalty. It will need to prove its case before the Tribunal in a prosecutorial manner, in proceedings resembling High Court litigation. If the Tribunal finds in favour of the HKCC, it can make a variety of decisions including imposing a fine of up to 10% of the perpetrator's annual turnover in Hong Kong (for a maximum of three years).

During the administrative process, the HKCC has various means to “settle” a case by accepting a commitment from a party under investigation. However, if the party resists settlement, the HKCC has no direct enforcement powers – for example, it cannot directly impose sanctions – but must instead initiate proceedings in the Tribunal.

The Ordinance does not enable entities or persons other than the HKCC to bring actions before the Tribunal or other courts in Hong Kong. Nevertheless, “follow-on actions” are possible under which a third party is entitled to bring proceedings in the Tribunal to seek compensation for damages as a result of conduct held (or admitted in a commitment) to be anti-competitive by the Tribunal (or on appeal) in prior proceedings initiated by the HKCC.

In addition to the Ordinance and its subsidiary legislation, the HKCC has issued six sets of Guidelines setting out its approach, an Enforcement Policy, a Leniency Policy for Undertakings Engaged in Cartel Conduct, and its policy on Investigation Powers and Legal Professional Privilege. The Judiciary has issued two practice directions dealing with the general conduct of proceedings before the Tribunal and the confidential treatment of information.

Comment

After decades of debate and drafting, the implementation of Hong Kong's competition law will be a major change to market practices in Hong Kong, one of the last developed economies to not be covered by a comprehensive competition regime.

The Ordinance and the HKCC's guidelines are extensive and well structured, and there are many commonalities with established competition laws in other jurisdictions. In particular, the European experience will provide some much needed guidance in the early days of Hong Kong's competition regime.

Nonetheless, Hong Kong's regime has its distinguishing features. The system is unique in the sense that its enforcement regime comprises of two separate bodies, namely the HKCC and the Tribunal. Unlike in many other jurisdictions, the HKCC can only conduct investigations and cannot impose penalties. Instead, the HKCC will have to prove its case and justify any penalty before the Tribunal. This will likely pose a significant burden on competition law enforcement, especially when the HKCC is still establishing its footing. Yet, the benefit of a neutral tribunal would no doubt provide greater transparency and credibility to the enforcement process.

In addition, as the Ordinance explicitly provides for follow-on private actions only with no express

provision for stand-alone actions, it will take some time before we see these private actions being initiated in Hong Kong. As there will be no statutory limit on the level of damages that may be awarded to a private litigant, this may prove to be the real sting in the tail.

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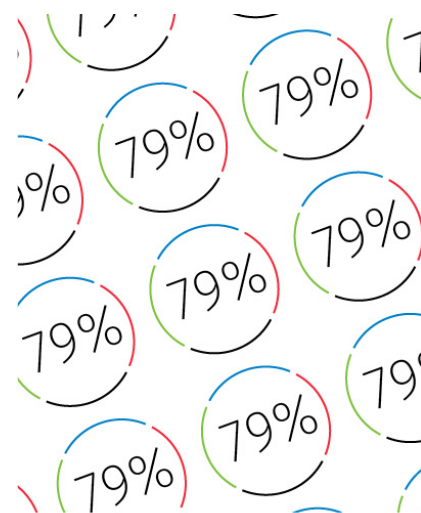
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