

Hong Kong competition law shows its teeth: enforcement becomes real

When the Competition Ordinance was introduced in Hong Kong at the end of 2015, some hailed it as a life buoy for small players in Hong Kong's market suffering from the dominance of a few big conglomerates. Others saw it as a nail in the coffin of Hong Kong's laissez-faire policies, which had made it such an attractive place to do businesses. The Competition Ordinance's main objective was to protect the competitive environment in Hong Kong by proscribing certain conduct that affects competition as well as by prohibiting mergers which could substantially reduce competition.

In this article we give a brief overview of the rules introduced under the Competition Ordinance as well as provide an update on enforcement practices.

The Competition Ordinance's principal areas of concern

The Competition Ordinance patrols three areas of possible anti-competitive conduct. The first two areas relate to certain actions or conduct of players in the market. The rules developed in this area are referred to as the First Conduct Rule and the Second Conduct Rule. The third area of concern is to ensure that the merger of businesses will not materially affect competition. This is covered by the Merger Rule.

- **The First Conduct Rule**

This rule essentially addresses all forms of collusion between businesses whether by agreement, acting in concert or through decisions of business associations, which are aimed at, or result in, less competition in Hong Kong. This type of anti-competitive conduct does not require any formal agreement. For instance, if a representative of a supermarket would meet up with some other representatives at a social dinner and would tell them about his intention to increase the price of peanut oil and following the dinner the relevant supermarkets would increase the price of their peanut oil, there will have been a violation of the First Conduct Rule.

- **The Second Conduct Rule**

This rule prohibits businesses with a substantial degree of market power from abusing that power by engaging in conduct that has the object or effect of harming competition. The type of conduct falling under this rule is not closed and ranges from maintaining prices above competitive level to anti-competitive practices such as bundling of products and services against the consumers' wishes. Businesses with an annual turnover of not more than HK\$40 million for the relevant turnover period are exempted from this rule. Even an undertaking with an annual turnover over this threshold will not be automatically deemed to have a substantial degree of market power as the situation is assessed based on the particularities of the sector and market.

- **The Merger Rule**

This rule prohibits mergers that have or are likely to have the effect of substantially reducing competition in Hong Kong. The rule is not enforced if the economic efficiencies resulting from a merger are expected to outweigh the harm it would cause to competition. The rule currently only applies to mergers between those who hold, or control a holder of, a carrier licence issued under Hong Kong's Telecommunications Ordinance. In other words, at the moment it applies only to licensed telecoms operators in Hong Kong. The rule's application may be extended to other business sectors in the future.

Enforcement bodies

Under the Competition Ordinance two organisations were created to enforce compliance with its rules and to punish those businesses who engage in non-competitive practices:

- the Competition Commission (the Commission): it plays at the same time the role of the promoter of the

competition rules and of the regulatory and investigative authority; and

- the Competition Tribunal (the Tribunal): it forms part of Hong Kong's judiciary. It has jurisdiction to hear and decide on competition-related cases as well as review the decisions of the Commission. It is the Tribunal and other courts, rather than the Commission, which hold the ultimate power to interpret the Competition Ordinance.

The Commission is granted wide powers to investigate any conduct, which its suspects contravenes the Competition Ordinance, including the power to:

- require anyone to provide documents and information;
- require anyone to appear to answer questions; and
- enter and search premises under a warrant.

The Commission can itself take the initiative to commence an investigation as well as decide to investigate the merits of a complaint filed by a member of the public.

The Commission has the discretion to apply a leniency policy to persons who have contravened the Competition Ordinance. The Commission may, for instance, offer not to commence proceedings for a pecuniary penalty against the first cartel member who reports cartel conduct to it.

Sanctions

Despite its wide investigative powers, the Commission does not have the power to make a determination as to whether the Competition Ordinance has been contravened or to impose sanctions. These powers vest in the Tribunal, which has a wide range of options at its disposal to deal with those who contravene the Competition Ordinance. The Tribunal can issue interim injunctions and disqualification orders and impose a pecuniary penalty of up to 10% of the annual Hong Kong turnover of an undertaking for a maximum period of three years. Other sanctions include awards of damages,

confiscation of illegal profits and the declared termination or variation of agreements.

Enforcement practice to date

The Competition Ordinance has now been in effect for more than a year. Statistics of the Commission show that as at the end of February 2017 it had received and processed over 2,000 complaints and enquiries. About 50% of these related to the First Conduct Rule and about 20% related to the Second Conduct Rule. Around 130 cases have been escalated for further assessment, of which 13% have proceeded to the in-depth investigation phase. These cases involve operators in a wide range of business sectors including professional and technical services, transport, logistics and storage, food and groceries, real estate and property management and construction and infrastructure.

The Commission launched its first ever proceedings in the Tribunal in March 2017. The action was directed against five information technology companies, which are suspected of having colluded with each other in a tender issued by the Hong Kong YWCA. The Commission has alleged that the companies contravened the First Conduct Rule by engaging in bid-rigging. The companies are accused of having submitted 'dummy' bids so that the tender would satisfy the minimum requirement of having five tenderers. The Commission is seeking sanctions including pecuniary penalties and a declaration by the Tribunal that each company contravened the First Conduct Rule of the Ordinance.

Compliance with the Competition Ordinance

As the Commission has taken its maiden steps in the enforcement against those who violate the Competition Ordinance by commencing legal action before the Tribunal, it is important for companies to understand the competition rules and review their business conduct to ensure compliance with the Competition Ordinance. Where necessary, they should adopt appropriate preventative and remedial measures.

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