

# CPI Antitrust Chronicle

## September 2015 (2)

### Getting Ready: The First Two Years of the Competition Commission in Hong Kong

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Competition Commission (Hong Kong)

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### I. INTRODUCTION

When an economy-wide competition law finally commences in Hong Kong in December 2015, a fully operational competition authority will be ready to begin enforcing the law. More than two years will have passed between the first appointments to Hong Kong's Competition Commission ("HKCC") and the proposed commencement of the substantive competition rules in the Competition Ordinance ("Ordinance") on December 14, 2015.

As this article outlines, this phased introduction of the law has given the HKCC an invaluable opportunity to become fully prepared for Hong Kong's entry into the growing ranks of Asian competition regimes. It has also afforded the business sector the chance to review and adjust their commercial arrangements in order to ensure compliance from day one.

### II. HONG KONG'S COMPETITION LAW

As an autonomous Special Administrative Region of the People's Republic of China, Hong Kong has its own law-making powers and remains within the common law system. The Ordinance, Hong Kong's first cross-sector competition law, was passed by Hong Kong's Legislative Council on June 14, 2012.

Hong Kong has had a competition regime applying to the telecommunications and broadcasting sectors since 2000. In 2006, after many years of debate, a policy review by the Government recommended the introduction of a generally applicable competition law. Following public consultation on draft provisions during 2008, a Competition Bill was introduced into the Legislative Council in 2010. The Bill's passage through the Legislative Council was hotly contested. The Competition Bills Committee held a total of 38 meetings and received submissions from over 350 organizations and individuals.

The Ordinance is similar to competition laws around the world with provisions drawn to varying extents from the laws of the European Union, United Kingdom, Singapore, and Australia. The Ordinance contains (i) the three typical prohibitions on anticompetitive agreements (First Conduct Rule), (ii) prohibition on the abuse of substantial market power (Second Conduct Rule), and (iii) restrictions against mergers that substantially lessen competition (Merger Rule). At present the Merger Rule applies only to certain undertakings in the telecommunications sector.

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However, the Ordinance also contains a number of features unique to Hong Kong, some of which reflect various refinements made during the course of the Legislative Council debate.

The Ordinance also provides for the establishment and operation of the HKCC as an independent statutory body and the formation of a Competition Tribunal within the Hong Kong court system. Hong Kong's Communications Authority is given concurrent jurisdiction in respect of anticompetitive conduct in the telecommunications and broadcasting sectors.

The HKCC will not have the power to impose pecuniary penalties directly, but will be required to bring a case to the Competition Tribunal and prove that a contravention has occurred. In this respect the Hong Kong regime is similar to that of other common law jurisdictions such as the United States, Canada, Ireland, Australia, and New Zealand. However, unlike these jurisdictions, only the HKCC has standing to bring alleged contraventions to the Tribunal in the first instance. A "follow-on" action is available to those who have suffered loss or damage as a result of anticompetitive conduct. A range of other remedial tools, such as a commitments mechanism, are also available to the HKCC.

### III. THE FORMATION OF THE HKCC

The provisions of the Ordinance relating to (i) the establishment of the HKCC, (ii) the short title, (iii) the commencement, (iv) the interpretation, and (v) the issue of guidelines by the HKCC came into operation on January 18, 2013.

The Chief Executive of Hong Kong appointed the Chairperson, the Hon Anna Wu Hung-yuk, and 13 other Members of the HKCC for three-year terms commencing in May 2013. The Chairperson and the Members are all non-executive appointments drawn from professions and sectors such as law, economics, consumer protection, financial services, commerce and industry, and small and medium enterprises ("SMES").

To support the setting up of the HKCC a group of civil servants was temporarily seconded to the HKCC. They found offices for the HKCC and established governance, financial, and personnel systems. Most crucially they assisted the Chairperson and Members in recruiting permanent staff for the HKCC.

In line with Hong Kong's outward looking and international character, the HKCC's recruitment is not restricted to residents of Hong Kong. Following a global recruitment exercise, the HKCC's staff includes those with experience in overseas competition agencies and in the practice of competition law in other jurisdictions. Local employees were found from Hong Kong law firms, other enforcement agencies, and government service.

The first permanent staff members, primarily in corporate roles, were employed from early 2014. From March 2014 the overseas members of the team started arriving in Hong Kong and joined their locally recruited colleagues. Additional staff joined during the course of the year. In early September, the HKCC's Chief Executive Officer, Dr. Stanley Wong, commenced duty. A further recruitment round conducted at the end of 2014 brought staff numbers up to 50 by the middle of 2015.

One early step taken by the HKCC was to join the International Competition Network ("ICN") in December 2013 and to attend OECD competition related activities. The HKCC also engaged closely with other competition authorities in Asia. The HKCC Members, and the staff

(once they came on board), found that participation in international fora and bilateral contacts with other competition agencies were invaluable in establishing the HKCC's operations.

#### IV. THE HKCC'S GUIDELINES

Drafting and consulting on the guidelines has been one of the HKCC's main pre-commencement tasks. The early commencement of those parts of the Ordinance requiring the issue of guidelines reflected the Government's undertaking that guidelines would be published by the HKCC prior to commencement of the competition rules. This arrangement is rather unusual when compared to most other jurisdictions where guidelines, especially those relating to the substantive interpretation of the competition rules, are usually based on actual enforcement experience and case law accumulated over time.

In October 2014, initial drafts of six guidelines—the *Guideline on the First Conduct Rule*, *Guideline on the Second Conduct Rule*, *Guideline on the Merger Rule*, *Guideline on Complaints*, *Guideline on Investigations*, and *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders*—were published for public consultation. Following consideration of the 64 submissions received, revised drafts of the guidelines were published in March 2015 and further comments invited. The March 2015 drafts were also presented to the Legislative Council for consultation as required by the Ordinance.

The final versions of the guidelines were published at the end of July 2015.

##### A. *The Approach to Guidelines on the Conduct Rules*

As general guidance on how the HKCC will interpret and apply the two conduct rules prohibiting anticompetitive agreements and abuse of substantial market power, the *Guideline on the First Conduct Rule* and the *Guideline on the Second Conduct Rule* provide detailed explanations on key concepts such as “undertaking,” “object or effect” of harming competition, “serious anti-competitive conduct,” and outline the HKCC's intended methodology for defining relevant markets and assessing (substantial) market power.

There was limited practical experience of competition law in Hong Kong to draw upon when preparing these guidelines. While influenced by foreign jurisprudence, the Ordinance is tailored to Hong Kong and does not precisely mirror competition law existing elsewhere. When interpreting the conduct rules, the HKCC drew upon international best practices wherever appropriate and consistent with the text of the Hong Kong legislation.

There were, however, certain difficulties in applying this approach where international practices are not settled, or where the Ordinance created new concepts that are specific to Hong Kong. For example, there are significant differences between jurisdictions in the treatment of resale price maintenance. During the public consultation, some offered the opinion that given the alleged pervasiveness of resale price maintenance in Hong Kong, the HKCC should consider giving a “light touch” to its enforcement, and that it should only be considered with reference to its effect on competition. Others submitted that the HKCC should use its guidelines to carve out vertical agreements, including resale price maintenance, completely from the First Conduct Rule.

After careful consideration and review of the comments received during the public consultation, the HKCC concluded that, without having yet established any enforcement

experience, it should give the statute its natural meaning which allows for resale price maintenance to be considered as either having the object or effect of harming competition.

This approach has been consistently applied throughout the guidelines.

It should also be remembered that the Competition Tribunal and other courts will be responsible ultimately for interpreting the Ordinance. The HKCC has refrained from broadening or narrowing natural interpretations until the Competition Tribunal or other courts have determinatively done so. For the same reason, the HKCC is of the view that it would be inappropriate to use the conduct rule guidelines to create any presumptions or new thresholds such as a market-share based level of appreciability or market-share safe harbors, which are not explicitly provided for in the Ordinance.

Instead, the HKCC used hypothetical examples that reflect market situations likely to be found in Hong Kong to explain the relevant theories of harm and the HKCC's intended analysis. The inclusion of these hypothetical examples in the guidelines was welcomed during the public consultation as a helpful way to demonstrate the practical application of the Ordinance.

Unlike the conduct rules, which will apply to undertakings in all sectors, the Merger Rule will only apply to mergers involving licensees under the Telecommunications Ordinance. The *Guideline on the Merger Rule* inherited some of the tested analytical and procedural approaches from the Telecommunications Authority's (now Communications Authority) *Guidelines on Merger and Acquisition in Hong Kong Telecommunications Markets* published in 2004.

While the analytical framework in respect of issues such as (i) what constitutes a merger, (ii) market definition, and (iii) competition assessment has now been aligned with the conduct rule guidelines, indicative safe harbors that have been proved pertinent to the telecommunications sector in Hong Kong are retained in the new guideline. Safe harbors like these, however, do not replace the need for case-by-case analysis in light of the prevailing market conditions.

## ***B. The Approach to Guidelines on Procedural Matters***

In addition to releasing guidelines on the substantive competition rules, the Ordinance required the HKCC to release guidelines on a range of its procedures. These are found in the *Guideline on Complaints*, *Guideline on Investigations*, and *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders*.

The *Guideline on Complaints* emphasizes that the HKCC encourages parties to complain about possible contraventions of the Ordinance. Complaints may be made in various forms, including anonymously, and do not require complainants to meet specific formal requirements for their complaints to be considered. However, if a complainant does not provide sufficient information or promptly respond to HKCC requests for information, it is unlikely that the complaint will proceed to further assessment.

During the consultation process, some businesses were concerned that this may place an undue burden on them (as the subject of a complaint), and suggested the HKCC should impose more stringent evidentiary requirements. Others proposed that there be some "legitimate interest" between the complainant and the conduct of concern. This response may have been

influenced by a misapprehension that the HKCC receiving a complaint inevitably means that the subject of the complaint would be drawn into an investigative process, regardless of the merits of the complaint. Both the Ordinance and the guidelines make it clear this is not the case.

The Ordinance is quite prescriptive on how investigations are to be conducted. Accordingly the *Guideline on Investigations* supplements the Ordinance only where the HKCC considers it necessary.

One area where the HKCC has clarified its approach is that, wherever possible, it will conduct investigations in confidence while making the outcomes of investigations public. Tribunal proceedings will usually, subject to the Tribunal Rules, be conducted in hearings open to the public. However the Ordinance allows for resolution of enforcement matters other than by commencing Tribunal proceedings. Publicizing outcomes such as issuing a Warning Notice or accepting a commitment will allow stakeholders to understand and scrutinize the HKCC's reasoning in these other cases.

The Ordinance contains a number of exclusions and exemptions. Once the Ordinance is fully operational the HKCC will have the power to issue Block Exemption Orders, either on application by undertakings or on the HKCC's own initiative, and to make decisions on the applicability of other statutory exclusions and exemptions to an undertaking's specific circumstances ("Decisions").

There is no need for a prior HKCC Decision or Block Exemption Order for undertakings to take advantage of the Ordinance's exclusions or exemptions. Undertakings to whom these exclusions and exemptions apply do not contravene the Ordinance. This differs from some other jurisdictions, where a competition authority must issue a block exemption or make some other decision before undertakings may rely on an exclusion or exemption.

The *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders* deals with the process by which the HKCC will consider applications for Decisions or Block Exemption Orders, and how the HKCC will consider issuing a Block Exemption Order on its own initiative.

As the HKCC is the initial decision maker in these circumstances, the guideline emphasizes that its consideration of whether to make a Decision or issue a Block Exemption Order will be a public process where relevant stakeholders will be consulted and applications, submissions, and decisions are published wherever possible.

## V. OUTREACH AND EDUCATION

As a jurisdiction where many people are new to the concept of competition law, one of the primary tasks of the HKCC over the past two years has been promoting the benefits of competition and helping the Hong Kong business community become ready, willing, and able to comply with the Ordinance.

From the middle of 2014, the HKCC actively reached out to the Hong Kong public and businesses. In the early days of direct engagement there were clearly a number of misconceptions about the Ordinance and what types of conduct it was designed to prevent. For example, many small businesses thought that they would be accused of abusing market power. In one seminar provided by the HKCC for SMEs an attendee expressed concern that the Ordinance would



prohibit “bundling,” thereby preventing the combined sale of coffee with cake. However, it was also clear that there were a number of very sophisticated players in the market, with a long history of interaction with competition laws in other Asian jurisdictions and globally.

In short, there was a very wide variance in understanding the purpose of competition law and role of the HKCC. While at this stage the results are anecdotal, the HKCC considers this gap has now narrowed following its extensive outreach and consultation efforts.

First, the HKCC has directly engaged with key stakeholders to provide detailed information about the benefits of competition, the Ordinance, and the HKCC itself. In the 2014 financial year, HKCC staff conducted 130 briefings and meetings and held five major seminars targeting groups such as SMEs in a mix of Cantonese and English. Through this direct engagement, some 4,500 representatives of major chambers, industry associations, SMEs, professional bodies, and consumers were reached. Based in part on feedback from these engagements, the HKCC also released education material to supplement the guidelines, such as brochures directed at SMEs and trade associations.

Second, to tie in with this engagement and consultation strategy, TV and radio advertisements were broadcast from October 2014 to educate the public about the benefits brought by competition law to both consumers and businesses. An educational video on cartels was also produced to explain the key concepts of common anticompetitive conduct and the importance of compliance.

This coincided with an extensive advertising campaign on print, bus, mass-transit, and online platforms including Yahoo, Facebook, and YouTube from October 2014 to January 2015. A second media campaign conducted solely on public transport (which is used by 90 percent of the Hong Kong population) using an educational video on cartels was launched to tie in with the release of the revised draft guidelines in March 2015. In July 2015, a ten-part series of one-minute educational spots starring well known Hong Kong television personalities aired at prime time on Hong Kong’s largest free to air television network. This series dramatized examples of potential anticompetitive conduct, such as price-fixing, based on the examples provided in the HKCC’s guidelines. The 10 episodes are also available on the HKCC website ([www.compcomm.hk](http://www.compcomm.hk)).

These promotions have been supplemented by an active and engaged local media. The HKCC has held various media briefings and interviews to keep local and international media abreast of latest development and progress of the HKCC’s work. These updates have led to significant reporting about the Ordinance and the HKCC. For example, the publication of the HKCC’s draft and revised draft guidelines made the prime time evening news, with a major news broadcaster animating examples from the guidelines to explain issues such as market definition, market power, and concerted practices.

The HKCC has launched a Distinguished Speaker Lecture Series to provide a platform for outstanding thinkers on competition law and policy to share their views with the growing Hong Kong competition law community, Government, business leaders, and the general public. This series has hosted talks from Mr. Eduardo Pérez Motta and Sir Christopher Bellamy QC, with a further lecture planned for late 2015.

The improved awareness of the Ordinance and the HKCC has led to increasing contacts enquiring about conduct that people are concerned may contravene the Ordinance. So far the HKCC has limited its response to assisting these people where possible and recording these queries. As the date of full commencement approaches, the HKCC will, in appropriate cases, contact businesses and other relevant parties directly if the HKCC considers that their conduct or practice may be considered anticompetitive and, therefore, likely to contravene the Ordinance after full commencement.

## **VI. ENGAGING IN THE POLICY DEBATE**

During this pre-commencement phase the HKCC has already actively participated in wider Government policy debates that have a competition dimension. The HKCC's statutory functions include "to advise the Government on competition matters in Hong Kong and outside Hong Kong]" and "to conduct market studies into matters affecting competition in markets in Hong Kong."

The market studies function is used in three main ways: first, as an opportunity to study markets of interest; second, to identify markets, conduct, or parties that may raise competition concerns and to inform future enforcement priorities; and third, to identify systemic competition risks that are best resolved by Government policy and to inform the HKCC's policy advice to the Government. The HKCC has commenced generating a commensurate range of work products, ranging from targeted public submissions of Government to confidential internal studies, and it will in due course issue a comprehensive public market studies report where appropriate.

Because of this proactive approach, the HKCC has been able to make contributions to several policy debates even before substantive commencement of the Ordinance. Based on the study of the market for building management services in Hong Kong's many large housing estates, a submission was made to the Government's public consultation in support of proposed changes to relevant laws, as the HKCC judged these changes to be likely to enhance competition in that market. The HKCC also made a submission to the Government's public review into the future of the electricity market, supporting the Government's stated objective of introducing competition into this market and outlining the ways in which this could be achieved.

Substantial and ongoing competition research is being conducted into a number of markets that are the subject of public interest, including automotive fuels markets and the tender markets for housing estate renovation. The HKCC, as an independent statutory authority, will continue to give independent policy advice to arms of Government on matters related to competition.

## **VII. OTHER STEPS TOWARDS COMMENCEMENT**

As noted above, the Ordinance provides for the HKCC to have concurrent jurisdiction with the Communications Authority in respect of undertakings in the telecommunications and broadcasting sectors. As soon as practicable after commencement of the Ordinance, the HKCC and the Communications Authority are required to enter a Memorandum of Understanding ("MOU") for the purpose of coordinating the performance of their functions. The HKCC has worked closely with the Communications Authority on a number of the preparatory steps,



including the joint publication of the guidelines. Drafting of the MOU is well advanced so as to have it ready for formal signing soon after commencement.

In addition to the Communications Authority, the HKCC has used this pre-operational phase to develop relationships with other Hong Kong agencies, including the Consumer Council, the Securities and Futures Commission, the Urban Renewal Authority, and the Hong Kong Monetary Authority.

The Ordinance specifically empowers the HKCC to enter leniency agreements where, in return for co-operation, the HKCC will agree not to bring proceedings for a pecuniary penalty. As part of its preparatory work, the HKCC has been formulating its approach to entering into leniency agreements and has recently published a draft policy for public comment. The HKCC has also been considering its enforcement priorities, and a document explaining these will also be published before commencement of the Ordinance.

### **VIII. CAPACITY BUILDING**

In addition to drafting the guidelines and engaging with the public and business community, the HKCC has focused on internal capacity building.

Effective investigations require a range of skill sets, procedures, and, in the Hong Kong context, language abilities. To this end, much time has been devoted to developing internal procedures, work processes, and software to handle complaints, case-work flows, documents, and evidence in multiple languages.

Staff development and training have also been a key focus. Members of the HKCC's staff team have been provided support to study, attend domestic and international workshops, and work within other competition authorities. Visiting lawyers, economists, academics, and competition authority members have regularly presented to staff and HKCC Members on their areas of expertise. Finally, internal training focusing on core skills is being rolled out to promote a consistent and considered approach to every matter that comes before the HKCC.

As noted above, the HKCC has received excellent assistance from other competition authorities and international bodies such as the ICN and OECD in developing and implementing its policies and procedures.

The flipside of course is that expectations on the HKCC are, probably appropriately, high. The maturity of analysis and process that may have taken other (now established) competition authorities decades to achieve will be expected in a much shorter timeframe in Hong Kong.

### **IX. CONCLUSION**

The relatively long period between formation of the HKCC and full commencement of the Ordinance has been used to good effect by the HKCC to prepare Hong Kong for the introduction of competition law. Businesses have had time to familiarize themselves with the law, and have benefitted from comprehensive guidelines and the HKCC's outreach activities. The public's understanding of the purpose and benefits of competition law has increased. Media commentary is increasingly focusing on competition-related issues.

Importantly, the HKCC itself has been able to use this preparatory phase to prepare itself for the implementation of the law. Just as it has sought to have Hong Kong ready, willing, and

able to comply with the Ordinance, the HKCC will be fully prepared to undertake the task of ushering in a long anticipated change to Hong Kong's economic and legal environment.