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I. INTRODUCTION

The Hong Kong Competition Ordinance ("Ordinance") is scheduled to come into force on December 14, 2015, providing the first comprehensive competition regime in Hong Kong. Prior to its enactment, competition provisions in Hong Kong only covered the broadcasting and telecommunications sectors and were overseen by the Communications Authority.²

Since the Ordinance was passed into law in 2012, the Government and the newly established Hong Kong Competition Commission ("HKCC") have gazetted the Competition Tribunal Rules and other subsidiary legislation relating to the procedure and operation of the Competition Tribunal ("Tribunal"). The HKCC and Communications Authority have jointly published six guidelines on their general approach of the Ordinance. At the time of writing, it is expected that additional guidance will be published soon on leniency policies, enforcement priorities, and the Memorandum of Understanding between the HKCC and the Communications Authority on how the two authorities will coordinate their concurrent enforcement powers.

In this article, we examine the different stages of enforcement for the new law; we will consider the investigation process, formal enforcement proceedings, and finally private damages actions. We will not cover the substantive provisions of the law in detail.

We highlight at the outset some of the most salient distinguishing features of the Hong Kong regime:

- There are two phases of the investigation process: the "initial assessment phase" and the "investigation phase."
- The Hong Kong enforcement regime comprises two separate bodies: the HKCC and the Tribunal. In contrast to many other jurisdictions whereby the competition authority itself decides on the imposition of penalties, the HKCC only has the power to investigate alleged contraventions (with limited enforcement powers). If the HKCC believes the alleged contravention justifies a pecuniary or other penalty, it will have to prove its case before the Tribunal, a separate specialized court of superior record with primary jurisdiction to hear and adjudicate competition cases.

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² The HKCC is now the principal authority responsible for enforcing the Ordinance but shares concurrent jurisdiction with the Communications Authority in relation to competition matters in the broadcasting and telecommunications sector. The Communications Authority also regulates mergers of undertakings that hold a carrier licence under the Telecommunications Ordinance.

- The Ordinance explicitly provides for follow-on private actions only. There is no express provision for stand-alone actions.
- There are no criminal penalties for contravention of the conduct rules. Criminal penalties are only provided for non-compliance with investigations and breach of specified provisions of the Ordinance.

II. INVESTIGATION PROCESS

A. *Power to Conduct Investigation*

Under Section 39 of the Ordinance, the HKCC may initiate an investigation either on its own motion or if an alleged anticompetitive conduct has been referred for investigation by the Court of First Instance, Competition Tribunal, Government, or a complainant. The HKCC may only initiate an investigation if it has reasonable cause to suspect that anticompetitive conduct has been committed.

If the HKCC decides to investigate an alleged contravention of the competition rules, it will generally do so in two phases: the initial assessment phase and the investigation phase.

At the initial assessment phase, the HKCC will seek information from the relevant parties on a voluntary basis or review publicly available information such as market surveys and industry reports to decide if there is sufficient evidence to establish reasonable cause to suspect a contravention of the competition rules, and whether it is reasonable to initiate an investigation. In determining whether or not to investigate an alleged conduct, the HKCC will exercise its discretion under the Ordinance and will consider a range of factors, including the potential impact of the alleged conduct on competition and consumers, as well as its own resources and enforcement priorities.

After the initial assessment phase, the HKCC may choose to close the investigation, refer the matter to another agency, or accept a voluntary resolution of the matter. It may also decide to proceed to the investigation phase where it can exercise its compulsory document and information gathering powers under the Ordinance. The HKCC may first invite parties to make voluntary submissions, which will include the background facts as well as legal and economic arguments with evidence in support of those arguments.

At any stage of the investigation, the HKCC and the parties may approach each other to discuss the matter and propose a resolution to the HKCC's concerns. The HKCC may accept a commitment under Section 60 of the Ordinance for a company to alter its behavior on the condition that it will not launch proceedings before the Tribunal.

This two-stage process of handling investigations was adopted by the Communications Authority for investigations into possible contraventions of the Telecommunications and Broadcasting Ordinances. Similar to the HKCC, at the first stage, the Communications Authority will first look at whether there is a case to answer and take into account its enforcement priorities before proceeding to the formal investigation stage. At the investigation stage, the Communications Authority can use its information gathering powers, which are similar to the powers given to the HKCC (as will be discussed in detail below).

The Communications Authority may also conduct a public consultation if an issue is expected to significantly impact the broadcasting industry as part of its investigation and to give an opportunity for stakeholders to express views. This contrasts with the HKCC, which has stated that it intends to investigate in private to protect the interest of the parties involved. The HKCC may also have considered that publicizing a matter under investigation will impede its ability to investigate.

B. Information Gathering Powers

At the investigation phase, the HKCC has a range of tools at its disposal to collect evidence, including the power to:

- issue notices under Section 41 of the Ordinance requiring a person to provide documents or information,
- issue a notice under Section 42 of the Ordinance requiring a person to give evidence before the HKCC on any matter reasonably believed to be relevant to the investigation, and
- apply for a warrant under Section 48 of the Ordinance to enter and search any premises to obtain documents and any other materials relevant to the investigation.

Section 41 and 42 notices may be directed not only to the party under investigation but can extend to their competitors, suppliers, and customers or any other third parties. The information sought under the Section 41 notices can be recorded in any form (e.g. metadata, correspondence, databases, and draft documents) and will often include questions or other requests to provide the HKCC with information in a particular format. Any person will not be excused from providing further particulars of a document or answering a question on the grounds of self-incrimination.

Section 48 of the Ordinance allows the HKCC to apply to the Court of First Instance for a warrant to enter and search any premises to obtain documents and any other materials relevant to the investigation. A warrant will be issued if the judge in the Court of First Instance is satisfied that there are reasonable grounds that the premise in question contains, or is likely to contain, materials relevant to the investigation. The search warrant can apply to a premise not directly related to the party under investigation, such as a supplier or customer.

Upon obtaining a warrant from the Court of First Instance, HKCC officials may conduct dawn raids and confiscate documents. They may use reasonable force to enter the premises and take measures to preserve evidence that it considers may be tampered with or destroyed. Despite its power to conduct dawn raids, the HKCC has stated that it will normally conduct search and seizure activities during office hours.

If there is no one present at the premises, the HKCC officers will try to contact the occupier and will wait a reasonable amount of time for someone to arrive. The Ordinance does not require that legal representatives be present during a search, but upon a party's request and where no in-house legal representative is at the premises, the HKCC officials will wait a reasonable amount of time for external legal advisers to arrive. If the officials feel that the search will be compromised or that the legal advisers cannot arrive in a timely manner, it will begin its

search immediately. Failure to comply with Sections 41, 42, and 48 of the Ordinance without reasonable excuse is a criminal offense.

The concept of dawn raids is not foreign in Hong Kong. Other enforcement authorities, such as the Independent HKCC Against Corruption, the Police, and the Securities and Futures Commission ("SFC") conduct dawn raids on a frequent basis. We expect that dawn raids conducted by the HKCC in the future will be similar to dawn raids conducted by other authorities in Hong Kong. When a company faces a dawn raid, it should immediately contact its legal adviser, review the terms of the search warrant carefully, and seek to agree with the authority on the scope of the search before proceeds.

In past cases, blanket claims of privilege were frequently used and parties usually agreed on a protocol for dealing with privileged materials which would, until recently, typically involve sealing the documents and bringing the documents to a judge to determine whether the materials are privileged. In certain circumstances, a magistrate may issue a search warrant with imposed conditions on the seizure of legal professional privileged materials. Due to parties routinely claiming privilege over a large volume of documents covering images of computer hard drives and emails, the Court of Appeal has set down guidelines on how a party should bring claims of privilege, which will be discussed in the section below.

C. Legal Privilege

Section 58 of the Ordinance allows the HKCC's investigation powers to extend to privileged materials. Nonetheless, the party under investigation can claim that the materials are subject to legal professional privilege and refuse to provide the materials. This right and entitlement under the Ordinance is mirrored in many other ordinances and is enshrined in Hong Kong's Basic Law.

In the landmark decision *CITIC Pacific Limited v Secretary of Justice and Commissioner of Police*,³ the Hong Kong Court of Appeal rejected the narrow definition of "client" adopted in *Three Rivers (No.5)*,⁴ the leading but controversial English Court of Appeal case, and extended the meaning of "client" from the core client team (typically in-house lawyers and certain directors) to all employees in the company. It was confirmed that as long as the dominant purpose of the document was for legal advice, the document would be considered privileged.⁵

This has broad implications for companies who regularly handle internal investigations. Prior to July 2015, these early stages of enquiry might not necessarily be covered by legal advice privilege, yet it is these materials (i.e., internal interviews, correspondences on possible contraventions, and internal reports) that tend to be most sensitive and are part of a necessary process required prior to determining whether legal advice is needed. The Court of Appeal noted the reality of today's corporations, where necessary information may have to be acquired by management from employees in different departments or various levels of a corporate structure, in order to provide suitable instructions to lawyers. Privilege should cover documents created by

³ *CITIC Pacific Limited v Secretary of Justice and Commissioner of Police*, CACV No. 7 of 2012, 29 June 2015.

⁴ *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556.

⁵"Serious anti-competitive conduct" is conduct such as price-fixing, market allocation, limiting production, or supply- and bid-rigging.

a client for the purpose of obtaining advice even though it contains factual information, including preparatory material.

Further, the *CITIC Pacific* case sets out guidelines on how a company should claim privilege for documents seized by a regulator. CITIC Pacific was under investigation by the SFC in relation to a profit-warning announcement issued in October 2008. The SFC obtained 27 search warrants, which resulted in a large amount of documents and computer hard drives seized. CITIC made a blanket claim of legal professional privilege in respect of all the materials. In this instance, the Court was asked to examine and assess a large number of documents over which privilege was disputed, without proper assistance of the parties. On account of the unsatisfactory nature of the procedure, the Court set out guidelines for future disputes. The guidelines include:

- a requirement that the person claiming privilege ("Claimant") to properly identify the materials, specify the nature of the privilege claimed, and provide a supporting statement setting out the basis of the claims and the full factual context. Any blanket claim of privilege will be rejected by the Court;
- the Claimant must consider giving a limited waiver for specified personnel from the other side and/or an independent lawyer to examine the documents; and
- further detailed steps to be followed in the event the Court is asked to give a determination.

The HKCC intends to publish a procedure for handling claims relating to legal professional privilege resulting from the HKCC's use of its investigation powers, including its power to search and seize under Section 48 of the Ordinance, which we expect will be very similar to the guidelines set out in the *CITIC Pacific* judgment.

D. Confidentiality

Section 125 of the Ordinance imposes a general obligation on the HKCC, and persons appointed to assist the HKCC, to preserve the confidentiality of any confidential information provided to or obtained by the HKCC. However, under Section 126, the HKCC may disclose confidential information if necessary when carrying out any of its functions authorized by the Ordinance. The Ordinance gives the opportunity for parties to make claims of confidentiality, although in certain circumstances, the HKCC may disclose confidential information without the consent of the parties. This approach is similar to that adopted by the Communications Authority.

Under Section 378 of the Securities Futures Ordinance ("SFO"), SFC investigations are subject to secrecy obligations. As a result, generally parties subject to an SFC investigation notice are prohibited from disclosing even the fact that they are recipients of such notice. This is a useful tool that SFC relies on to ensure that their investigations are not made known to the public. The HKCC has stated a preference to keep its investigations confidential in order to protect the interests of all persons involved and to complete its investigation in an expeditious manner. Yet, interestingly, the confidentiality obligation under the Ordinance is worded differently to the secrecy obligation under Section 378 of the SFO. It will be interesting to see what tools the HKCC will employ to ensure their investigations remain confidential.

E. Leniency and Immunity

As in many other jurisdictions, Section 80 of the Ordinance provides that leniency can be granted to an individual, cooperation, or partnership in exchange for cooperation in an investigation. The HKCC can enter into a leniency agreement with companies under investigation, committing not to bring or continue proceedings before the Tribunal on any terms it considers appropriate.

Unlike many other jurisdictions, the leniency program in Hong Kong is not limited to only cartel cases, and can be granted in respect of other types of conduct. The Ordinance also does not provide an automatic benefit of leniency for the first person who informs the HKCC of a contravening conduct, as is common in some jurisdictions. It is at the discretion of the HKCC whether it will offer leniency. As competition authorities around the world, especially in Europe, rely heavily on whistleblowers and leniency applicants to detect anticompetitive conduct, the lack of clear legal guarantees to protect the content of leniency applications can be a deterrent for parties to report anticompetitive conduct. Furthermore, the lack of employee protection laws could also discourage whistleblowers from coming forward for fear of losing their jobs.

The HKCC's approach to leniency will also have a direct effect on potential plaintiffs' right to bring a private damages action (discussed further below). Where the HKCC chooses not to pursue an enforcement action before the Tribunal, and there is no formal finding of a contravention of the conduct rules, private parties will effectively be prevented from bringing a follow-on action. It will be necessary to balance the need for an effective whistleblowing and leniency regime, as well as an early resolution process in the form of commitments, against access to justice for plaintiffs who have suffered damage.

In the European Union, leniency recipients are generally addressees of the competition authority's decision, so follow-on claims can still be made against them. It remains to be seen whether the HKCC envisages that the leniency applicant will be a party to Tribunal proceedings and be an addressee of the Tribunal's decision.

There may also be a risk of judicial review proceedings being initiated against the HKCC if it decides not to pursue an investigation, or to accept a leniency application/commitment without a determination or admission of a breach of a conduct rule, and private parties are thereby barred from making a follow-on claim. To address this risk, the HKCC will need to adopt a consistent and well-reasoned approach in its decision whether or not to pursue complaints.

The Ordinance is unclear whether the HKCC will apply a "sliding scale" of penalty reductions for subsequent leniency applicants, as is the case in Europe and other parts of the world. However, the strict wording of the Ordinance appears to only permit the HKCC to enter into leniency agreements and forego its right to initiate proceedings.

It is also unclear whether a leniency agreement will be available once an investigation has commenced. At the time of writing, the HKCC is expected to publish a guideline on leniency agreements in the coming months, which will hopefully clear up the unpredictability of the leniency program.

III. ENFORCEMENT POWERS OF THE HKCC

After conducting its investigation, the HKCC may choose to take no further action. This is more likely to occur if the party immediately ceases the allegedly contravening conduct.

If the HKCC finds that a company has engaged in anticompetitive conduct, it may issue warning notices, infringement notices, or accept a commitment under Sections 82, 67, and 60 of the Ordinance respectively. Warning notices and infringement notices impose a specified amount of time for the party under investigation to cease its contravening conduct or follow certain requirements issued by the HKCC. A warning notice must be given for conduct that is not considered "serious anti-competitive conduct" before the HKCC can initiate proceedings before the Tribunal. If the party fails to comply with the warning notice, infringement notice, or commitments, the HKCC will commence proceedings before the Tribunal.

Unlike the Communications Authority under the Telecommunications Ordinance or Broadcasting Ordinance, the HKCC does not have the power to impose fines or other punishments for breaches of the Ordinance. At the conclusion of an investigation, the Communications Authority can publish a decision; impose warnings, directions, and penalties; and suspend or revoke licenses. The HKCC may only bring proceedings before the Tribunal, which is empowered to determine breaches of the Ordinance and to impose sanctions.

IV. ENFORCEMENT PROCEEDINGS IN THE TRIBUNAL

A. *The Tribunal*

The Tribunal is a specialized superior court of record established under the Ordinance, which sets out the basic rules for the operation and powers of the Tribunal and the appointment of its President and Deputy President.⁶ It has primary jurisdiction to hear and adjudicate on (i) cases of alleged breaches of the competition rules, (ii) reviews of certain determinations of the HKCC and the Communications Authority,⁷ (iii) follow-on private actions, and (iv) alleged breaches raised as a defense in proceedings before the Court.

The Tribunal may impose a broad-range of sanctions, including pecuniary penalties, director disqualification orders, awards of damages in follow-on actions, and various other ancillary orders. Under Section 93 of the Ordinance, the Tribunal may impose a pecuniary penalty of up to 10 percent of the turnover of the companies involved for up to three years in which the contravention occurred.

The establishment of the Tribunal as part of Hong Kong's independent judicial framework demonstrates the prosecutorial nature of competition law enforcement in Hong Kong. If the HKCC 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 order for the appropriate

⁶ With effect from August 1, 2013, the Hon. Mr. Justice Godfrey Lam Wan-ho was appointed as the President and the Hon. Madam Justice Queeny Au-Yeung Kwai-yue as the Deputy President, each for a term of three years.

⁷ Reviewable determinations are in respect of: (i) exemptions or exclusions; (ii) rescission of a decision regarding exemptions or exclusions; (iii) issue, variation or revocation of a block exemption order; (iv) variation of commitments made by undertakings to take or refrain from taking action that may contravene a competition rule; (v) release of commitments; and (vi) termination of a leniency agreement.

penalties to be imposed. This is in contrast with certain other jurisdictions, including in Europe, that follow an inquisitorial approach to enforcement whereby the competition authority itself decides on the imposition of penalties.

The requirement of court proceedings in competition enforcement will likely prove to be costly, and enforcement procedures lengthy. This may pose a significant burden on competition law enforcement, particularly in the early days of the competition regime when there are few established legal principles in Hong Kong. Nonetheless, putting the decision-making power in the hands of a neutral tribunal under the prosecutorial approach may provide greater transparency and credibility, and improve due process generally.

The general approach adopted by the Ordinance is that the Tribunal will largely have the same powers and procedure as the Court of First Instance of the High Court. The Tribunal will in function essentially be a part of the High Court, particularly in light of the transfer of cases between the Tribunal and the High Court in certain circumstances as contemplated in the Ordinance.

B. Rights of Audience

As in the High Court, a party may act in person in Tribunal proceedings and a corporate litigant may be represented by its director with the Tribunal's leave. The Judiciary has also proposed a reserve power for the Tribunal to allow any other person to appear on the party's behalf. Although not entirely clear on the point, and unlike in proceedings before the Communications Authority, this does not appear to allow representation by solicitors without higher rights of audience. Moreover, barristers appearing from overseas (who are likely to have valuable experience in this area) will still be required to go through the hoops of case-by-case admission with no fast-track procedure.

C. Procedural Rules

To cover procedure, the Tribunal has its own set of procedural rules, the Competition Tribunal Rules ("Rules"), in addition to other subsidiary legislation.

The Judiciary's approach has been to harmonize the Rules with the existing Rules of the High Court where appropriate. Where neither the Ordinance nor the Rules address a particular matter, the relevant Rules of the High Court will apply as the default position. Proceedings before the Tribunal should therefore largely resemble litigation proceedings in the High Court.

It may be queried whether the modeling of the Rules on existing High Court procedure is consistent with Section 144(3) of the Ordinance, which states that proceedings before the Tribunal are to be conducted with "as much informality as is consistent with attaining justice." In this regard, the policy behind the Rules has been to balance the need for informality in proceedings with the need for certainty in procedure and the desire for a set of rules that will be familiar to most users of the Tribunal.

D. Overview of the Rules

Part 1 of the Rules sets out the general provisions of procedure for proceedings before the Tribunal, including for the commencement of proceedings, service of proceedings, discovery and inspection of documents, case management, hearings, and appeals.

Parts 3 to 6 of the Rules set out specific provisions for actions arising under the Ordinance, namely for reviews of reviewable determinations, enforcement cases brought by the HKCC, private follow-on actions, and cases transferred from the High Court (where, for example, the alleged contravention of a conduct rule is raised as a defense to an action).

The schedule to the Rules sets out prescribed forms for various applications and summonses under the Ordinance, including forms for general originating notice of application, notice of appeal, leave to intervene in proceedings, and other applications.

E. Distinguishing Features of the Rules

Although modeled on High Court practice, there are certain features of proceedings before the Tribunal that distinguish them from the Rules of the High Court.

The desire for expediency in competition cases—due to their commercial nature and importance—is reflected in particular under Rule 18, which provides for the validity of originating documents filed for commencing proceedings to be six months, compared to 12 months for writs issued by the High Court.

Similarly, under Section 111(3) of the Ordinance, the time limit for commencing private follow-on actions is three years after the relevant decision by the Tribunal or the High Court was made, in contrast to the six-year limitation period for actions founded in contract or tort in the High Court. This also reflects the fact that there will have been an enforcement stage where the relevant determinations were made, during which a plaintiff would have been able to consider the merits of a follow-on action.

Another feature of the Rules is that they specifically make provision for the handling of confidential documents, which is very likely to be an area of concern in competition cases. The relevant provisions are:

- Rule 24(3), which allows the Tribunal to refuse an order for discovery and production of a document having regard to all the circumstances of the case, including whether the information contained in the document is confidential; and
- Rule 37, which allows a party to apply for an order to treat a document as confidential.

Section 88(1) of the Ordinance states that an application for the review of a reviewable determination of the HKCC must be made within 30 days of the relevant determination. Such reviewable determinations are set out in Section 83 of the Ordinance, and include, for example, a decision relating to the issue of a block exemption order.

It is worth noting that Rule 60 of the Rules requires that an application for leave to review a reviewable determination be supported by affidavit. Where the evidence is substantial or involves complex economic issues, the requirement to prepare an affidavit within the 30-day time limit may prove to be onerous. In such cases, the intended applicant may consider an application to the Tribunal to extend time to apply for leave.

It is expected that the Judiciary will issue practice directions for proceedings before the Tribunal, which should shed further light on the practical aspects of Tribunal procedure and clarify provisions of the Rules.

V. PRIVATE ACTIONS

The provisions for private damages are contained in Part 7 of the Ordinance. Section 110 provides a follow-on right of action for any person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule.

Follow-on claims must be brought in the Tribunal, whether or not the cause of action is solely the defendant's contravention, or involvement in a contravention, of a conduct rule. Where proceedings are commenced in the High Court, the High Court must transfer full or part of the proceedings to the Tribunal, except in the case where the Court considers such transfer not to be in the interests of justice. Equally, the Tribunal must transfer part of the proceedings to the High Court if not all of the case relates to competition but falls within the jurisdiction of the Court.

A. No Explicit Right to Stand-Alone Action

In the context of a growing consensus in many jurisdictions that private damages actions should play a significant role in competition law enforcement, complementing the public enforcement regime, it may be surprising that Hong Kong has not chosen to introduce an express right to stand-alone damages actions into its new regime. In particular, the relatively cumbersome prosecutorial enforcement process may pose additional challenges for the public enforcement process.

The right to bring stand-alone actions was contained in the original draft law, but was removed at an early stage in response to a fear by SMEs that large players would use private actions to harass and pressure them. However, the Government has stated that it will reconsider the introduction of a stand-alone right of action after the Ordinance has been in action for a few years.

Sections 118-121 of the Ordinance cover circumstances where a contravention has been alleged but no infringement decision has been made. We consider that these sections may be viewed as a possible route by practitioners and plaintiffs to bring stand-alone actions, or to force the HKCC to investigate a particular market sector. Section 118 allows the High Court or the Tribunal to refer an alleged contravention or alleged involvement of a contravention to the HKCC for investigation. The High Court or Tribunal may do this of its own motion or on application by a party to the proceedings. Sections 120-121 apply to proceedings involving an alleged contravention that are brought by a person other than the HKCC and allow the HKCC to intervene in such proceedings. Irrespective of whether this will in practice provide a route for stand-alone actions, it is clear that follow-on actions will be much more likely.

The High Court and Tribunal are bound by earlier decisions of the High Court and the Tribunal as to whether there has been a breach of the conduct rules. This will be helpful to plaintiffs, because liability is already established and they will need to prove only the level of damages and causation. However, there is an issue as to which parts of an earlier decision is binding, as the English Courts have held that the binding part of the decision is restricted to the finding of the infringement itself. Findings of fact are not binding and can in theory be challenged in follow-on damages proceedings. However, re-litigating findings of fact on which the decision was based may be an abuse of process.

B. Level of Damages

In Hong Kong, damages are generally awarded to compensate for loss and damages and are not on a punitive or exemplary basis. This is to be contrasted with the position in the United States, and comparable to the position in the United Kingdom.

Unlike the pecuniary penalties for enforcement proceedings initiated by the HKCC, the level of damages will not be limited to a percentage of total gross revenues but will be assessed on a commercial basis based on actual loss suffered.

Under common law principles, claimants will need to prove causation and loss on a "but for" basis (i.e., the loss would not have been caused "but for" the defendant's breach of competition law) and show that the type of loss suffered was reasonably foreseeable. Quantification of the loss will also be a challenging area and will result in a battle for the best economic arguments.

VI. CONCLUSION

After decades of debate and drafting, the Hong Kong competition law will finally come into full effect on 14 December 2015. 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 a lot of commonalities with established competition laws in other jurisdictions. In particular, the competition regime in Europe will provide some much needed guidance in the early days of the Hong Kong competition regime.

Nonetheless, there are a still few distinctions in Hong Kong. The Hong Kong 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, the Ordinance explicitly provides for follow-on private actions only and there is no express provision for stand-alone actions. It will take some time before we see these private action proceedings being brought in Hong Kong. As there will be no statutory limit on the level of damages awarded to a private litigant, this may prove to be the real sting in the tail.