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Competition Law Handbook

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COMPETITION ORDINANCE

(CAP 619)

Introduction

The Competition Ordinance (Cap 619) (the 'Ordinance') was enacted in 2012 to introduce a cross-sector competition law regime in Hong Kong. A phased-in approach saw the institutional provisions enter into force in 2013, allowing for the establishment of the Competition Commission and the Competition Tribunal and commencement of work on enforcement guidelines and other implementing regulations. These were published in July 2015, paving the way for the Ordinance's entry into force on 14 December 2015.

The main features of the Ordinance are as follows:

(1) a prohibition on restrictive agreements and concerted practices (the first conduct rule);

(2) a prohibition on the abuse of a substantial degree of market power (the second conduct rule);

(3) a prohibition on anti-competitive mergers involving undertakings active in the telecommunications sector (the merger rule);

(4) a judicial enforcement model, where sanctions and remedies can only be imposed by the Competition Tribunal;

(5) a standard exclusions regime (including for practices enhancing overall economic efficiency and for services of general economic interest); and

(6) limited exclusions for small and medium-sized enterprises, a broad exclusion regime for most statutory bodies, and some limited public interest exemptions.

Entry into force and application to existing agreements

The Competition Ordinance (Cap 619) was entered into force on 14 December 2015. See s 1 of the Competition Ordinance.

The Government opted for a phased-in approach: the institutional provisions of the Ordinance came into force in 2013 to allow for the establishment of the Competition Commission and the Competition Tribunal. The Commissioners were appointed in 2013 and the key staff members of the Commission were hired in 2014. The Commission then jointly drafted six guidelines with the Communications Authority, which were published in July 2015.

The institutions

The Competition Ordinance (Cap 619) established two new dedicated competition institutions in Hong Kong, namely the Competition Commission and the Competition Tribunal.

The Competition Commission

The Commission is a statutory body currently comprising of 15 members appointed by the Chief Executive. The first Chairperson, Ms Anna Wu Hung-yuk, was appointed in April 2013. Her successor, Mr Samuel Chan Ka-yan, JP, a barrister-at-law, has assumed the office of the Chairperson on 1 May 2020. See ss 129–133 and Sch 5 of the Competition Ordinance (Cap 619).

One of the Commission's principal tasks is to investigate possible infringements. It has wide-ranging investigation powers, including the power to order the production of documents and other information, and to require any person to attend before it to answer questions relating to any matter it reasonably believes to be relevant to the investigation. It also has the power to conduct unannounced on-site inspections ('dawn raids') after obtaining a warrant from the Court of First Instance. See ss 37–59.

The Commission's role is not limited to carrying out investigations. The Commission is vested with some enforcement powers: it can accept commitments from undertakings in return for the Commission's agreement not to bring proceedings before the Competition Tribunal or to withdraw on-going proceedings. See ss 60–65.

The Commission is also tasked with the responsibility of issuing implementation guidelines that indicate the manner in which it will seek to enforce the Ordinance. It adopted six guidelines to that effect in July 2015, jointly with the Communications Authority. It can also adopt decisions (in individual cases) and orders (applying to broad categories of agreements) concerning the availability of exclusions or exemptions. Finally, it plays an important role in promoting public understanding of competition law and in advocating the adoption of compliance mechanisms by businesses. See ss 9, 15, 24, 35, 38, 40, 59, 130 as well as s 17 of Sch 7.

The Commission has no powers to impose sanctions or remedies. Where an alleged infringement is not resolved by way of a warning/infringement notice or a commitments procedure, the Commission may choose to seek a decision from the Competition Tribunal. See ss 92–105.

The Commission relies on its executive arm, whose Chief Executive Officer is charged with responsibility to manage the administrative affairs of the Commission and to which the Commissioners are expected to delegate some of their powers. Under the Ordinance, significant powers of investigation and enforcement can be delegated. Whereas the first category includes powers to initiate investigations, to hear witnesses, and to apply for search-and-seizure warrants, the latter category includes powers to issue decisions relating to individual exemptions or exclusions, to issue warning notices, to accept commitments, and to apply for interim orders. See s 31 of Sch 5.

The Competition Tribunal

The Competition Tribunal is a specialised tribunal established by the Competition Ordinance (Cap 619). The Tribunal is a superior court of record. The provisions of the Ordinance concerning the establishment of the Competition Tribunal came into effect on 1 August 2013 when Mr Justice Godfrey Lam was appointed as the President and Madam Justice Queeny Au-Yeung was appointed as the Deputy President of the Competition Tribunal. On 1 August 2024, Mr Justice Jonathan Harris was reappointed as President of the Tribunal for a term of three years with effect from 16 August 2024, upon expiry of his previous term. All other Judges of the Court of First Instance are members of the Competition Tribunal. The Competition Tribunal may appoint one or more specially qualified assessors and may dispose of the proceedings, wholly or in part, with the assistance of such assessor or assessors, but the decision of the Tribunal is that of the members of Tribunal only. Every Registrar, temporary registrar, senior deputy registrar, temporary senior deputy registrar, deputy registrar, temporary deputy registrar and any other officer such as a Bailiff of the High Court, by virtue of that appointment, holds the corresponding office or position in the Tribunal. See ss 134–158A.

The Tribunal hears cases brought before it by the Commission. The court has very extensive powers to impose sanctions and order redress in these cases. See ss 92–105. The Tribunal also has the power to hear appeals, which extends to certain limited aspects of decisions from the Commission relating to exemptions, exclusions, commitments, and leniency. See ss 83–89.

Finally, the Tribunal adjudicates private follow-on damages actions and makes compensation orders in favour of those persons who can establish that they have suffered losses as a result of infringements of the conduct rules. See ss 106–121.

Other institutions involved in the enforcement of the Competition Ordinance (Cap 619)

The Communications Authority has concurrent jurisdiction with the Commission to investigate cases in the broadcasting and telecommunications sectors. The two authorities have signed a memorandum of understanding for the purpose of coordinating the performance of their functions under the Competition Ordinance (Cap 619) on 14 December 2015. See ss 159–161 and Sch 6.

The Ordinance also grants certain powers to the Chief Executive in Council and to the Legislative Council. The Chief Executive in Council is empowered to subject any statutory body to the substantive provisions of the Ordinance. He or she can also exclude any specified persons from the application of the substantive rules and related liabilities under the Ordinance through subsidiary legislation. Based on grounds of public policy or international obligations, the Chief Executive in Council can also issue administrative orders to grant individual exemptions, which are subject to the Legislative Council's negative vetting. See ss 4, 5 and 31–33. The Legislative Council has the right to be consulted before the Commission issues any guidelines. See ss 35 and 59 as well as s 17 of Sch 7.

Persons subject to the Competition Ordinance (Cap 619)

Entities involved in economic activities

The Competition Ordinance (Cap 619) applies to 'undertakings', ie, any entity, regardless of its legal status or the way in which it is financed, that engages in economic activity.

The notion of undertaking is widely used by foreign competition regimes, including in the EU. It has been defined very broadly in EU competition law, and Hong Kong is likely to follow this broad interpretation. Trade associations, mutual insurance funds, banks, law societies, professional associations, sole proprietors and natural persons engaged in independent business activities, even governments, have all been found to constitute undertakings under EU competition law when they engage in economic activities. Separate businesses and companies under common control may be considered as constituting a single undertaking. See s 2.

Entities wholly excluded from the Competition Ordinance (Cap 619)

Statutory bodies

The Competition Ordinance (Cap 619) excludes all 'statutory bodies' from the scope of application of the substantive conduct rules, except for those statutory bodies listed in the Competition (Application of Provisions) Regulation (Cap 619A). Statutory bodies are persons, corporate or unincorporate, established under an ordinance, or constituted or appointed by an ordinance, but do not include companies, trustees, societies, co-operatives and trade unions. According to the Competition (Application of Provisions) Regulation, the competition rules are applicable to six statutory bodies, namely, Ocean Park Corporation, Matilda and War Memorial Hospital, Kadoorie Farm and Botanic Garden Corporation, the Helena May, Federation of Hong Kong Industries, and the general committee of the Federation of Hong Kong Industries. See ss 3 and 5.

It is noteworthy that the Ordinance does not exempt Government-owned undertakings unless these are statutory bodies. Commercial undertakings that are wholly or partly owned by the Government or by statutory bodies will only benefit from the exclusion if they fall within the definition of 'statutory bodies'. Furthermore, third parties involved in conduct jointly with statutory bodies will still be subject to the general competition rules.

Other excluded persons

The Chief Executive in Council may, by regulation, disapply the main substantive provisions of the Competition Ordinance (Cap 619) in relation to all or part of the activities of any other person. See s 4. By way of the Competition (Disapplication of Provisions) Regulation (Cap 619B) adopted in 2015, the Chief Executive in Council decided to exclude seven persons from the substantive provisions of the Ordinance. These are the recognised exchange companies (The Stock Exchange of Hong Kong Limited and Hong Kong Futures Exchange Limited), the recognised clearing houses (Hong Kong Securities Clearing Company Limited, HKFE Clearing Corporation Limited, The SEHK Options Clearing House Limited and OTC Clearing Hong Kong Limited) and the recognised exchange controller (Hong

Kong Exchanges and Clearing Limited). All of these companies are regulated under the Securities and Futures Ordinance (Cap 571).

Undertakings partially excluded from the Competition Ordinance (Cap 619)

Some undertakings are excluded from certain substantive provisions of the Competition Ordinance (Cap 619) on account of their size. Small enterprises benefit from a full exclusion from the prohibition on the abuse of a substantial degree of market power when their turnover does not exceed HK$ 40 million. They benefit from a partial exclusion from the prohibition on restrictive practices when specific conditions of size and conduct are met. These are explained further below.

Other undertakings will be partially excluded on account of their tasks. Undertakings entrusted with the operation of a service of general economic interest will also benefit from a partial exclusion from the two conduct rules. The exclusion will only apply to the extent it is necessary for the performance of such service. The conditions for this exclusion are explained further below.

The prohibition on restrictive agreements

The first conduct rule

The first conduct rule prohibits agreements and concerted practices among undertakings, as well as undertakings' involvement in decisions of trade associations which have as their object or effect the prevention, restriction or distortion of competition in Hong Kong. The rule applies irrespective of whether the conduct took place in Hong Kong or abroad, as long as its object or effect is to prevent, restrict, or distort competition in Hong Kong. See ss 6–8.

Horizontal and vertical restrictive agreements are subject to the rule

The notion of agreement is broadly defined to include any arrangement or understanding, whether express or implied, written or oral. The Competition Ordinance (Cap 619) does not define the notion of concerted practice but it will likely be interpreted broadly, in line with EU precedent.

The Competition Commission in its guideline confirms that the first conduct rule is of general application: it applies not only to arrangements between competitors (so-called horizontal agreements) but also to agreements between undertakings active at a different level in the production or distribution chain (so-called vertical agreements). The Commission considers that restrictions in vertical agreements are generally less harmful, except as regards resale price maintenance. It will ultimately be up to the Competition Tribunal to decide how the first conduct rule applies to vertical agreements.

Serious anti-competitive practices

Agreements and practices will infringe the first conduct rule only if their restrictive object or effect can be shown. In line with other jurisdictions, and with a view to enhance legal certainty, the Competition Ordinance (Cap 619) already signals that the following practices will be considered as serious anti-competitive conduct:

(1) fixing, maintaining, increasing, or controlling the price for the supply of goods or services;

(2) allocating sales, territories, customers or markets for the production or supply of goods or services;

(3) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services; and

(4) bid-rigging practices. See s 2.

While the legal test remains the same for these serious anti-competitive practices, the procedure for sanctioning parties involved in this type of conduct is simplified, and sanctions are likely to be more severe.

By adopting a different procedure for serious anti-competitive practices, the legislator's intention is clearly to capture hardcore cartel conduct. However, there is no express reference in the Competition Ordinance (Cap 619) itself that serious anti-competitive conduct is limited to horizontal agreements. Therefore, it cannot be ruled out that certain vertical agreements (such as resale price maintenance arrangements) might qualify as such. This is the view expressed by the Commission in its Guideline on the first conduct rule.

Exclusions and exemptions

The Competition Ordinance (Cap 619) provides for certain general exclusions from the first conduct rule. In addition, the Ordinance also provides for two specific exemption grounds whereby the Chief Executive may authorise otherwise restrictive agreements.

General exclusion grounds

Agreements fulfilling the specific conditions for exclusion set out in Sch 1 to the Competition Ordinance (Cap 619) will not be subject to the first conduct rule notwithstanding their possible restrictive effects. Parties may either self-assess whether their proposed agreements meet the conditions for exclusion or apply for a binding decision from the Commission. The Commission will, however, not be obliged to consider the application unless it raises novel questions of wider importance or public interest and for which there is no clarification in existing case law. The Commission also has the power to adopt block exemption orders, in which it confirms that a particular category of agreements meets the conditions to benefit from a general exclusion. However, unlike in the case of individual decisions, block exemption orders can only be granted for agreements enhancing overall economic efficiency. The other exclusion grounds described below cannot form the basis of a block exemption. See ss 9–20.

Sch 1 provides for five categories of general exclusions.

Agreements enhancing overall economic efficiency

According to s 1 of Sch 1 to the Competition Ordinance (Cap 619), the first conduct rule does not apply to agreements, concerted practices and decisions of trade

associations that enhance overall economic efficiency. This criterion will be met where three cumulative conditions are met:

(1) the agreement improves production, distribution or promotes technical or economic progress while allowing consumer a fair share of the resulting benefits;

(2) the agreement only imposes restrictions which are indispensable to reach the above objectives; and

(3) the agreement does not result in the possibility to eliminate competition in respect of a substantial part of the goods or services in question. See s 1 of Sch 1.

Most competition law jurisdictions have a similar rule in place whereby restrictive agreements with redeeming benefits are nevertheless permissible. The specific exclusion conditions described above are modelled on the EU standard. The standard is slightly different from other Asian jurisdictions such as Singapore and Malaysia, which do not require that a fair share of the benefits accrue to consumers.

Compliance with other legal requirements

The first conduct rule does not apply to agreements, concerted practices and decisions of trade associations, made for the purpose of complying with a legal requirement imposed by Hong Kong law or by or under any enactment in force in Hong Kong. This exclusion ground does not apply to agreements made to comply with a foreign or international law obligation or requirement. See s 2 of Sch 1.

Services of general economic interest

Schedule 1 to the Competition Ordinance (Cap 619) further provides that the conduct rules do not apply to an undertaking entrusted by the Government with the operation of services of general economic interest, but only in so far as these rules would obstruct the performance of the particular tasks assigned to it. See s 3 of Sch 1.

Merger agreements

The Competition Ordinance (Cap 619) does not provide for a cross-sector merger control regime. To rule out the possibility that merger activity might still be reviewed under the first conduct rule, Sch 1 expressly provides that agreements to implement a merger are not caught under the first conduct rule. The notion of merger is defined in Sch 7 to the Ordinance and refers to a situation where two or more undertakings cease to be independent of each other or where one undertaking acquires direct or indirect control over another undertaking or its assets. See s 4 of Sch 1.

Agreements of lesser significance

The Competition Ordinance (Cap 619) provides for a regime whereby certain restrictive agreements, concerted practices and decisions of trade associations involving small enterprises will be excluded from the scope of application of the first conduct rule. This exclusion aims to reduce the compliance costs for SMEs. Two conditions must be fulfilled to benefit from this exclusion:

(1) the agreement involves parties whose combined aggregate worldwide annual turnover is below HK$ 200 million; and

(2) the agreement does not involve serious anti-competitive conduct. The Government has committed to review the exclusion threshold periodically. See s 5 of Sch 1.

This exclusion to the benefit of SMEs is not as expansive as the *de minimis* regime found in other jurisdictions. Overseas competition legislation would also typically exclude practices that do not result in a substantial or appreciable restriction of competition. This is usually measured by reference to the market share of the parties involved. For example, non-hardcore horizontal restrictive practices involving parties whose combined market share is below 10% would generally be excluded; and non-hardcore vertical restrictive practices would typically be excluded when they involve parties with respective market shares of below 15–30%, depending on the jurisdictions. The Commission has not provided such safe harbours thresholds in its guideline on the first conduct rule but merely indicates that effects must be 'more than minimal'.

Specific exemption grounds

The Competition Ordinance (Cap 619) also provides for two specific exemption grounds. Unlike the general exclusions described above, these exemptions are not automatic. An order by the Chief Executive published in the Official Gazette is required for an exemption to apply. Such an order can be made subject to any conditions or limitations which the Chief Executive deems appropriate.

The first exemption ground allows the Chief Executive to exempt a specific agreement or a class of agreements from the scope of application of the first conduct rule if there are exceptional and compelling reasons of public policy for doing so. The second exemption ground is more specific and allows the Chief Executive to grant an exemption in order to avoid a conflict with an international obligation that directly or indirectly relates to Hong Kong. See ss 31 and 32.

The prohibition on the abuse of a substantial degree of market power

The second conduct rule

The second conduct rule prohibits undertakings that have a substantial degree of market power in a relevant market from engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

As with the first conduct rule, the prohibition also applies to conduct engaged in outside Hong Kong if it has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. See ss 21–23.

Substantial degree of market power

The Competition Ordinance (Cap 619) refers to a 'substantial degree of market power' test. During the legislative process, the Government resisted calls to use

the more commonly used 'dominance' test, as such a test would lead to an unduly high threshold for the Hong Kong economy. Arguing that several sectors of the economy have an oligopolistic structure, the Government stated that it wishes to retain a lower market power threshold in the Ordinance.

While the Competition Ordinance (Cap 619) does not define what a 'substantial degree of market power' means, it lists the factors which the competition authorities may take into account when determining whether an undertaking has such power:

(1) the market share of the undertaking;

(2) the undertaking's power to make pricing and other decisions; and

(3) any barriers to entry to competitors into the relevant market.

The inclusion of these factors is useful to confirm that the Commission and the Competition Tribunal are expected to adopt a methodology consistent with that used in other jurisdictions when assessing market power. However, these factors are not indicative of the legal threshold above which a 'substantial degree of market power' arises. Incidentally, the Ordinance mandates the use of the same factors when applying the dominance threshold, which is retained in the telecommunications sector.

While intent on adopting a lower threshold, the Government repeated during the legislative process that a market share of 40% may be indicative of a substantial degree of market power, and that undertakings with a market share below 25% should benefit from a safe harbour as they would be unlikely to possess market power.

The Commission did not provide guidance in the form of market share thresholds in its Guideline on the second conduct rule. Given the close proximity between the notions of substantial degree of market power under the second conduct rule and of substantial lessening of competition under the merger rule, it is noteworthy that the Commission does provide indicative quantitative thresholds as regards the latter, both in terms of market shares and of market concentration. The Commission refers in the Guideline on the merger rule to a 40% market share threshold above which merger transactions are likely to raise competition concerns; and sets out market concentration safe harbour thresholds below which transactions are unlikely to substantially lessen competition.

Abusive conduct

The Competition Ordinance (Cap 619) only prohibits the abuse of a substantial degree of market power. It does not prohibit undertakings from having market power or from striving to achieve it.

The Ordinance provides two examples of abusive conduct. An undertaking with a substantial degree of market power may commit an abuse by engaging in 'predatory behaviour towards competitors' or by 'limiting production, markets or technical development to the prejudice of consumers'. This list is non-exhaustive, but it is noteworthy that these examples involve exclusionary conduct, ie, practices which have the object or effect of foreclosing competitors from the market, to the ultimate detriment of consumers. All of the examples of abuses provided by the Commission in its guideline on the second conduct rule are also limited to exclusionary abuses. These include predatory pricing, tying, bundling, refusal to deal, margin squeeze practices, and exclusive dealing.

The examples provided in the Competition Ordinance do not involve exploitative conduct, such as excessive pricing or other practices which involve the 'exploitation' of customers. It will be up to the Competition Tribunal to decide whether such conduct also falls under the second conduct rule. The Commission has stated that its enforcement priority will be on exclusionary rather than exploitative conduct, but has nevertheless left the possibility open.

Defences, exclusions and exemptions

General exclusion grounds

Grounds for exclusion from the scope of the second conduct rule are the same as those available under the first conduct rule, save for two differences. As with the exclusion grounds under the first conduct rule, parties may either self-assess whether the conditions for exclusion are met or apply for a binding decision from the Commission. The Commission will, however, not be obliged to consider the application unless it raises novel or otherwise unclear issues of wider interest. See ss 24–29.

The differences are as follows:

(1) the exclusion for enhancing overall economic efficiency is not available. While the Competition Ordinance (Cap 619) does not provide for a specific exclusion ground for enhancing overall economic efficiency, the Commission mentions two causes of justification in its guideline on the second conduct rule. Consistent with EU guidance, the Commission suggests that parties can justify their actions based on practical reasons (for example, a refusal to sell may be justified by the poor creditworthiness of a customer) or reasons of economic efficiency.

(2) conduct of lesser significance. Undertakings whose worldwide annual turnover does not exceed HK$ 40 million during the last financial year will not be subject to the prohibition on the abuse of a substantial degree of market power. According to statements made by the Administration during the legislative process, with the proposed threshold, nearly 95% of all SMEs would be excluded from the application of the second conduct rule. The Government has committed to review the exclusion threshold periodically. See s 6 of Sch 1.

Specific exemption grounds

The same two specific exemption grounds already available under the first conduct rule are also available with respect to the second conduct rule. The first exemption ground allows the Chief Executive in Council to exempt a specific conduct or a class of conduct from the scope of application of the second conduct rule if there are exceptional and compelling reasons of public policy for doing so. The Chief

Executive in Council can also grant an exemption in order to avoid a conflict with an international obligation that directly or indirectly relates to Hong Kong. See ss 31 and 32.

Enforcement and investigation

Public enforcement

(1) Competition Commission leads investigations

As explained, the Commission investigates and prosecutes infringements before the Competition Tribunal. In the telecommunications and broadcasting sectors, the Commission has concurrent jurisdiction with the Communications Authority. See ss 159–161 and Sch 6.

(2) Investigation and enforcement procedures

As already mentioned, the Commission has wide-ranging investigation powers, including the power to request the production of information and documents, the power to require the attendance of relevant persons at hearings before it and, after obtaining a warrant from a judge of the Court of First Instance, the power to enter and search premises.

The enforcement procedure varies depending on the type of infringements.

(3) Serious anti-competitive practices and alleged violations of the second conduct rule

If, upon completing its investigation, the Commission has reasonable cause to believe that a serious contravention of the first conduct rule has occurred (ie, the parties were involved in one or more of the four types of serious anti-competitive practices), or that a contravention of the second conduct rule has occurred, it has the choice between:

(1) bringing infringement proceedings before the Competition Tribunal and seeking the imposition of sanctions and any other redress that it sees fit. See ss 92–105; and

(2) issuing an infringement notice to the person against whom it proposes to bring proceedings, offering not to bring those proceedings on condition that person makes a commitment to comply with the requirements of the notice. See ss 66–78.

Note that the Commission can accept commitments resolving its concerns at any time, in which case it will terminate its investigation or withdraw court proceedings. See ss 60–65 and Sch 2. Where an infringement notice is issued, and if the parties under investigation accept the requirements of such notice (which may include admission to a contravention of the relevant conduct rule), the investigation may also be resolved by way of commitments.

(4) For other violations of the first conduct rule, the Commission must first issue a warning notice

If the Commission has reasonable cause to believe that a contravention of the first conduct rule has occurred but that the conduct does not involve one of the four types of serious anti-competitive practices, it must first issue a warning notice to the parties under investigation. See s 82.

The warning notice invites parties to cease the contravening conduct within a prescribed period of time. It is only if the parties refuse to modify their conduct, or if they repeat the infringing conduct after the expiration of the warning period, that the Commission will be allowed to bring proceedings before the Competition Tribunal (or possibly to issue an infringement notice). In any event, in these circumstances the Competition Commission can only bring proceedings in respect of conduct occurring following the start of the warning period.

(5) Leniency

The Competition Ordinance (Cap 619) contemplates the introduction of an immunity regime where undertakings, in exchange for their co-operation in an investigation, would not face pecuniary penalties. See ss 79–81. The Commission has published three policies in this regard, namely, the Leniency Policy for Undertakings Engaged in Cartel Conduct, the Leniency Policy for Individuals Involved in Cartel Conduct, and the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct.

Private enforcement

Persons who have suffered loss or damage as a result of a contravention of the conduct rules will have a right of action. However, proceedings may only be brought after a contravention has been established ('follow-on actions'). Under the Competition Ordinance (Cap 619), parties to a contractual dispute can also invoke a violation of the Competition Ordinance in support of their claim that a contractual clause (for example, an exclusivity provision) is void or voidable. See ss 106–121.

Beneficiaries of Type 2 leniency will not be shielded from private enforcement; nor will parties who have admitted to an infringement as part of a commitments procedure.

Sanctions

A range of remedies are available to the Competition Tribunal for contraventions of a competition rule, including pecuniary penalties, awards of damages, and interim injunctions during investigations or proceedings. See ss 93–105 and Sch 3 and Sch 4. The Commission has no power to impose sanctions.

Fines and other orders

The maximum penalty in relation to a 'single contravention' can be as high as 10% of the annual turnover obtained by the undertaking concerned in Hong Kong for each year the infringement lasted, with a maximum of three years. The Competition Tribunal's sanctioning powers are not limited to fines: it may also order the disqualification of responsible directors for up to five years, award

injunctions, declare agreements to be void, award damages, confiscate illegal profits, and order the payment of costs of the Commission's investigation.

Extraordinary features of the sanctions regime

Three features of the sanctions regime under the Competition Ordinance (Cap 619) are uncommon in foreign competition law regimes:

(1) The Competition Tribunal may, on its own motion, award damages to any person who has suffered losses as a result of a contravention. The Competition Tribunal can also confiscate any illegal profits or any 'loss avoided' and order their transfer to the Government or to any other person it sees fit.

(2) Sanctions for 'non-serious' anti-competitive agreements and concerted practices can only be imposed if parties ignore a warning notice issued by the Commission. It is only if the parties continue their involvement in the infringing practice after the expiry of the warning period, or if they repeat the conduct at a later stage, that the Commission may seek the imposition of sanctions by the Competition Tribunal. In any case, proceedings may only be brought before the Competition Tribunal in relation to the conduct which continued after the start of the warning period and not in respect of that which preceded it.

(3) Finally, while the Competition Ordinance (Cap 619) concentrates on the behaviour of economic undertakings, pecuniary sanctions may also be imposed on any persons, including corporates and individuals that were concerned or involved in the infringement.

Rules specific to the telecommunications sector

Mergers restrictive of competition

The Competition Ordinance (Cap 619) comprises a merger control regime that applies to undertakings that hold telecommunications carrier licenses or which directly or indirectly control such licensees. These undertakings are prohibited from carrying out a merger that has or is likely to have the effect of substantially lessening competition in Hong Kong. See ss 3–7 of Sch 7.

Exempted mergers

Mergers that fall within the regime under the Competition Ordinance (Cap 619) and that substantially lessen competition in Hong Kong will still be allowed to proceed if the economic efficiencies that arise from the merger outweigh the merger's restrictive effects. See s 8 of Sch 7. Mergers that would otherwise be prohibited can still be exempted by the Chief Executive in Council for 'exceptional and compelling reasons of public policy'. See ss 9 and 10 of Sch 7.

Dominance and exploitative conduct in the telecommunications industry

The Competition Ordinance (Cap 619) introduces a provision specifically prohibiting abusive exploitative conduct by dominant telecommunications carrier licensees. See s 13 of Sch 8.

CHAPTER 619

COMPETITION ORDINANCE

ARRANGEMENT OF SECTIONS