



Competition Ordinance

Hong Kong competition law

Briefing

January 2016

An overview of the key features of the Hong Kong Competition Ordinance

The Hong Kong Competition Ordinance

The Competition Ordinance (Cap 619) 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 enforcement authorities and preparation of the enforcement guidelines and other implementing regulations. These were finalised in July 2015, paving the way for the Ordinance's entry into force on December 14, 2015.

The main features of the Ordinance are:

- a prohibition on restrictive agreements and concerted practices (first conduct rule);
- a prohibition on the abuse of a substantial degree of market power (second conduct rule);
- a prohibition on anticompetitive mergers involving undertakings active in the telecommunications sector (the merger rule);
- a judicial enforcement model, where sanctions and remedies can only be imposed by the Competition Tribunal;
- a standard exclusions regime (extending to practices enhancing overall economic efficiency and services of general economic interest); and
- 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 Ordinance entered into force on December 14, 2015.

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 key staff members of the Commission were hired in 2014. The Commission then jointly drafted enforcement guidelines with the Communications Authority, which were finalised in July 2015.

The Ordinance applies to any conduct that continues to produce ‘effects’ and there is no grandfathering of existing agreements and practices. For example, long-term cooperation agreements, trade association decisions to collectively raise prices or non-compete covenants that were already in place or adopted before the Ordinance’s effective date are subject to the new law if they still had effects on December 14, 2015.

The institutions

The Competition Ordinance established two new dedicated institutions in Hong Kong, namely a Competition Commission and a Competition Tribunal, with investigation powers and adjudicative powers, respectively.

The Competition Commission

The Commission is a new authority currently comprising 14 members appointed by the Chief Executive. The Chairperson of the Commission, Ms Anna Wu Hung-yuk, was appointed in April 2013 together with 13 other Commissioners, many of whom are drawn from Hong Kong’s business and academic circles.

One of the Commission’s principal tasks is to investigate possible infringements. It has wide-ranging investigation powers, including the power to order production of documents and other information and require relevant persons to attend hearings before it. It also has the power to conduct unannounced on-site inspections (‘dawn raids’) after obtaining a warrant from the Court of First Instance.

However, the Commission’s role is not limited to carrying out investigations; it also has some enforcement powers: it can agree not to bring proceedings or withdraw on-going proceedings before the Competition Tribunal, in return for commitments from undertakings.

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. Together with the Communications Authority, it adopted six guidelines to that effect in July 2015. It can also adopt decisions (in individual cases) and orders (applying to broad categories of agreements) concerning the availability of exclusions or exemptions. Finally, the Commission will play an important role in promoting public understanding of competition law and in advocating the adoption of corporate compliance mechanisms.

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

The Commission relies on its executive arm, whose Chief Executive Officer is charged with the responsibility of managing 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 will include powers to initiate investigations, to hear witnesses, and to apply for search-and-seizure warrants, the latter category will include powers to issue decisions relating to individual exemptions or exclusions, to issue warning notices, to accept commitments, and to apply for interim orders.

The Competition Tribunal

The Competition Tribunal is a specialised tribunal established by the Ordinance. Judges of the Court of First Instance sit on the Tribunal's panel and exercise jurisdiction within the purview of the Ordinance. Although the Tribunal is expected to follow the practice and procedure of the Court of First Instance in civil cases, the conduct of proceedings is expected to be less formal, and the rules of evidence may be relaxed. Judges may seek the assistance of specially qualified assessors when hearing competition cases. The President and the Deputy President of the Competition Tribunal were appointed in July 2013.

The Tribunal, which hears cases initiated by the Commission, has very extensive powers to impose sanctions and order redress. The Tribunal also has the power to hear appeals, which extend to certain limited aspects of the Commission's decisions relating to exemptions, exclusions, commitments, and leniency.

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.

Other institutions involved in the enforcement of the Competition Ordinance

Under the Ordinance, the Communications Authority has concurrent jurisdiction with the Commission to investigate cases in the broadcasting and telecommunications sectors. Given the Communications Authority's specific function of regulating these two sectors, the authorities have agreed in a Memorandum of Understanding that the Communications Authority will ordinarily take the lead on matters which fall within their concurrent jurisdiction. In practice the Communications Authority has delegated enforcement of the Competition Ordinance to its administrative arm, the Office of the Communications Authority (OFCA).

The Ordinance grants 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 specified persons from the application of the substantive rules and relieve them of related liabilities under the Ordinance through subsidiary legislation. Based on grounds of public policy or international obligations, the Chief Executive-in-Council can, subject to negative vetting by the Legislative Council, issue administrative orders to grant individual exemptions. The Legislative Council has the right to be consulted before the Commission issues any guidelines.

Authorised officers from the Commission who have obtained a court warrant to enter and search premises may call upon such other persons as they consider necessary to assist them. While the Ordinance is silent on this point, the Commission may rely on this provision to require the assistance of the Hong Kong Police.

Persons subject to the Competition Ordinance

Entities involved in economic activities

The Competition Ordinance applies to 'undertakings', i.e. 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 are likely to be considered as constituting a single undertaking.

Entities wholly excluded from the Competition Ordinance

Statutory bodies

The Ordinance excludes all 'statutory bodies' from the scope of application of the substantive conduct rules, except for those statutory bodies listed in a separate regulation to be adopted by the Chief Executive-in-Council. 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. By way of a Regulation adopted in 2015, the Chief Executive-in-Council decided to subject the activities of six statutory bodies to the Ordinance, leaving the activities of 581 remaining statutory bodies out of scope.

It is noteworthy that the Ordinance does not exempt Government-owned undertakings unless they are statutory bodies. Commercial undertakings that are wholly-owned 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 general competition rules.

Other excluded persons

The Chief Executive-in-Council may, by regulation, disapply the main substantive provisions of the Ordinance in relation to all or part of the activities of any other person. By way of a Regulation adopted in 2015, the Chief Executive-in-Council decided to exclude seven persons from the substantive provisions of the Ordinance, all of whom are companies regulated under the Securities and Futures Ordinance (Cap 571). 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).

Undertakings partially excluded from the Competition Ordinance

Some undertakings are excluded from certain substantive provisions of the Ordinance 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. Furthermore, these small enterprises 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 needed to allow 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 their 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.

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 Ordinance 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 different levels in the production or distribution chain (so-called vertical agreements). With the exception of resale price maintenance arrangements, the Commission considers that restrictions in vertical agreements are generally less harmful. It will ultimately be up to the Competition Tribunal to decide how the first conduct rule will apply to vertical agreements.

Serious anticompetitive 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 Ordinance already stipulates that the following practices will be considered as serious anticompetitive conduct:

- fixing, maintaining, increasing, or controlling the price for the supply of goods or services
- allocating sales, territories, customers or markets for the production or supply of goods or services
- fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services
- bid-rigging practices.

While the legal test remains the same for these serious anticompetitive practices, the procedure for sanctioning parties involved in this type of conduct is simplified, and sanctions are likely to be more severe. The Commission has stated that its enforcement of the first conduct rule will concentrate on these practices.

By adopting a different procedure for serious anticompetitive practices, the legislation's intention is clearly to capture hardcore cartel conduct. However, there is no express reference in the Ordinance itself that serious anticompetitive 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.

Exclusions and exemptions

The Ordinance 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 Schedule 1 to the Ordinance 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 not, however, be obliged to consider the application unless it raises novel questions of wider importance or public interest and there is no clarification is provided by existing case law. The Commission 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 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.

Schedule 1 provides for five categories of general exclusions.

Agreements enhancing overall economic efficiency. According to Schedule 1 to the Ordinance, 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 the following three cumulative conditions are met:

- the agreement improves production, distribution or otherwise promotes technical or economic progress while allowing consumers a fair share of the resulting benefits
- the agreement only imposes restrictions which are indispensable to the aforesaid objectives
- the agreement does not afford the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Most competition law jurisdictions adopt a permissive approach to restrictive agreements which generate redeeming benefits. 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.

Services of general economic interest. Schedule 1 to the Ordinance 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 may obstruct its performance of the particular tasks assigned.

Merger agreements. The Ordinance 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, Schedule 1 expressly provides that agreements to implement a merger are not caught under the first conduct rule. The notion of merger is defined in Schedule 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.

Agreements of lesser significance. The Ordinance provides for a regime whereby certain restrictive agreements, concerted practices and decisions of trade associations involving small enterprises will not be caught by the first conduct rule. This exclusion aims to reduce the compliance costs for SMEs. The fulfilment of two conditions gives entitlement to benefit from this exclusion: (i) the agreement involves parties whose combined aggregate worldwide annual turnover is below HK\$200 million; and (ii) the agreement does not involve ‘serious anticompetitive conduct’. The Government will review the exclusion threshold periodically.

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 per cent would generally be excluded; and non-hardcore vertical restrictive practices will typically be excluded when they involve parties with respective market shares of below 15 to 30 per cent, depending on the jurisdictions concerned. The Commission has not provided such safe harbour thresholds in its Guideline on the first conduct rule but merely indicates that effects must be ‘more than minimal’.

Specific exemption grounds

The Ordinance also provides for two specific exemption grounds which, unlike the general exclusions described above, are not automatic. An order by the Chief Executive published in the Official Gazette is required for such specific exemptions 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 public policy reasons 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.

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.

Substantial degree of market power

The Ordinance 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, on grounds that it 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 its desire to apply a lower market power threshold in the Ordinance.

While the Ordinance does not define what a ‘substantial degree of market power’ means, it lists the factors which may be taken into account when determining whether an undertaking has such power:

- the market share of the undertaking
- the undertaking's power to make pricing and other decisions
- any barriers to entry into the relevant market faced by competitors.

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 as in the telecommunications sector.

While intent on adopting a lower threshold, the Government repeated during the legislative process that a market share of 40 per cent may be indicative of a substantial degree of market power, and that undertakings with a market share below 25 per cent 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 per cent 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 Ordinance 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 only exclusionary conduct, i.e. 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 Ordinance do not involve exploitative conduct, such as excessive pricing, price discrimination 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 it has nevertheless left open the possibility of investigating and challenging exploitative abuses.

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.

The differences are as follows:

- **The exclusion for enhancing overall economic efficiency is not available.** While the Ordinance does not provide for a specific exclusion ground for conduct 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.
- **Conduct of lesser significance.** Undertakings whose worldwide annual turnover during the last financial year does not exceed HK\$40 million 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 per cent of all SMEs would be excluded from the application of the second conduct rule. The Government has committed to review the exclusion threshold periodically.

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 public policy reasons 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.

Enforcement and investigation

Public enforcement

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, which is expected to take the lead in enforcing the Competition Ordinance in these sectors.

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 relevant persons to attend 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 infringement.

Serious anticompetitive 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 (i.e. the parties were involved in one or more of the four types of serious anticompetitive practices), or that a contravention of the second conduct rule has occurred, it has the choice between:

- bringing infringement proceedings before the Competition Tribunal and seeking the imposition of sanctions and any other redress that it sees fit

- issuing an infringement notice to the person against whom it proposes to bring proceedings, offering not to bring those proceedings on condition that such person makes a commitment to comply with the requirements of the notice.

The Commission can accept commitments resolving its concerns at any time, in which case it may terminate an investigation or withdraw court proceedings. 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.

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 anticompetitive practices, it must first issue a warning notice to the parties under investigation.

The warning notice gives parties the opportunity 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, these circumstances permit the Competition Commission to bring proceedings only in respect of conduct occurring following the start of the warning period.

Leniency

The Ordinance contemplates the introduction of an immunity regime where undertakings, in exchange for their co-operation in an investigation, can escape pecuniary penalties. At present, the Competition Commission has formulated a leniency policy in respect of cartel conduct. Under the policy, in exchange for a cartel member's cooperation, the Commission will undertake not to commence proceedings for a pecuniary penalty or for other redress against the first cartel member who reports the cartel conduct. The Commission will extend leniency to current and former officers and employees of the cartel participant.

The Communications Authority has not formulated a leniency policy. However it will, in accordance with the actual circumstances of the cases on which it has concurrent jurisdiction with the Commission, consider making leniency agreements with telecommunications and broadcasting licensees on a case-by-case basis.

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. While the Ordinance is not entirely clear in this respect, proceedings will likely be limited to actions brought after a contravention has been established ('follow-on actions'). Under the Ordinance, 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.

Beneficiaries of leniency agreements 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. 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 per cent 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 are uncommon in foreign competition law regimes:

- 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.
- Sanctions for 'non-serious' anticompetitive 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.
- Finally, while the Ordinance 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 Ordinance 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. While there is no formal pre-clearance notification procedure under the Ordinance, the Commission and the Communications Authority encourage merging parties to approach them to discuss their transaction and seek informal advice on a confidential basis.

Exempted mergers

Mergers that fall within the regime under the Ordinance 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. Mergers that would otherwise be prohibited can still be exempted by the Chief Executive-in-Council for 'exceptional and compelling reasons of public policy'.

Dominance and exploitative conduct in the telecommunications industry

The Ordinance introduces a provision specifically prohibiting abusive exploitative conduct by dominant telecommunications carrier licensees.

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