

HONG KONG

Laura Patrick

Hogan Lovells,
Hong Kong

laura.patrick@
hoganlovells.com

Stephanie Tsui

Hogan Lovells,
Hong Kong

stephanie.tsui@
hoganlovells.com

Competition law implementation approaches in Hong Kong

Introduction

Over two years ago, in June 2012, the Legislative Council enacted Hong Kong's first cross-sector competition law, the Competition Ordinance ('Ordinance'). To date, progress to implement the Ordinance has been relatively slow. In particular, the Ordinance itself has come into effect only in part; full entry into force is only expected in 2015.

Nonetheless, recently important steps to implement the Ordinance have been taken. First, the Competition Tribunal ('Tribunal') has been empowered to act as a superior court of record with primary jurisdiction to hear and adjudicate competition-related cases. In addition, the Competition Commission ('Commission') has started its work to provide practical guidance for businesses.

Highlights of the Competition Ordinance

The Ordinance mainly targets two types of anti-competitive conduct:

- The 'first conduct rule' prohibits agreements and concerted practices between businesses that restrict competition. This prohibition targets both anti-competitive horizontal and vertical agreements. In addition, the Ordinance distinguishes between 'serious' anti-competitive conduct – mainly cartels – and other conduct.
- The 'second conduct rule' prohibits businesses with a 'substantial degree of market power' from abusing that power to restrict competition.

Unlike in most other jurisdictions, cross-sector merger control is not governed under the Ordinance. The 'merger rule' applies only to holders of telecommunications carrier licences in Hong Kong, as already reflected under the Telecommunications Ordinance.

Empowering the Competition Tribunal

Enforcement of the Ordinance looks set to be a two-step process, with both an administrative

procedure before the Commission and judicial proceedings before the Tribunal. The main task of the Commission as an administrative body is to investigate suspected conduct and, if it believes the conduct is anti-competitive, bring proceedings in the Tribunal, although the Commission may also accept commitments on the part of the companies under investigation.

On 9 May 2014, the Competition (Amendment) Bill 2014 ('Bill') was published in the *Official Gazette*. The Bill tables the provisions necessary for the full operation of the Tribunal as a superior court of record with primary jurisdiction to hear and adjudicate competition-related cases. It endows the Tribunal with all the powers, rights and privileges of the Court of First Instance, in particular:

- the power to make orders prohibiting persons from leaving Hong Kong;
- the power to award simple interest on debts and damages for which judgment is given and to provide that judgment debts are to carry simple interest;
- provision for the payment of penalties and fines imposed by the Tribunal to be enforced by the Tribunal in the same manner in which a judgment of the Court of First Instance may be enforced;
- provisions regarding the Tribunal's registrars, their jurisdiction and powers, and the privileges and immunities they enjoy; and
- the power for members of the Tribunal to order the reimbursement of expenses incurred by witnesses by reason of their attendance at the proceedings.

Providing guidance to market players

On 26 May 2014, the Commission invited any interested stakeholders to submit their views and to provide information on trade practices in Hong Kong markets. The information gathered in that process will assist the

Commission in drafting practical guidelines on the implementation of the Ordinance. The Commission's paper *Getting Prepared for the Full Implementation of the Competition Ordinance*, published on 26 May 2014, requests in particular feedback from stakeholders on the following issues:

- common trade practices in Hong Kong which may have anti-competitive risk;
- experiences of vertical agreements, in particular resale price maintenance, and their efficiencies and risks;
- views on how to analyse market power and factors to take into account;
- experiences of information sharing and joint purchasing agreements;
- experiences of tying and bundling practices; and
- concerns on the application of the merger rule in telecommunications markets.

From September 2014 onwards, the Commission aims to publish the draft guidelines and consult with the Legislative Council, stakeholders and the public on the text of those draft guidelines. It plans to have finalised the guidelines and have developed education and compliance tool kits by the first half of 2015, although it is possible that the timing will slip.

The Commission's objective is to publish practical guidelines that assist businesses

in analysing their own market practices, with a view to determining whether their conduct may contravene the Ordinance. The guidelines will not form part of the legislation as such and will not be binding on the Tribunal or the Hong Kong courts, but could prove to be influential in practice.

The Commission's paper has also provided an indication of the areas in which the Commission considers that it is likely to focus its energies, at least in the early period of its mandate. Those areas cover types of conduct that:

- result in, or are likely to result in, substantial harm to consumers or businesses;
- have a substantial impact on the Hong Kong economy;
- take place in concentrated markets in Hong Kong and restrict new entry or expansion in those markets;
- blatantly contravene the law; and
- are performed by companies with a history of previous contraventions of the Ordinance.

Once enacted, the guidelines will hopefully give the much-needed predictability and legal certainty for companies to ensure their business practices are fully in line with the requirements of the Ordinance after its complete entry into force, which is expected to be in 2015.