

Competition review – what should I know?

Hong Kong's competition law has been in full force as of 14 December 2015. This has important and wide ranging implications on the way business is conducted in Hong Kong as the Hong Kong Competition Commission (Commission) has powers to investigate and enforce breaches.

Simply put, when dealing with your competitors (even if the conduct occurs outside of Hong Kong) there are four key “Don'ts”. These rules apply even if a party or conduct takes place outside of Hong Kong. The key factor that the Commission will look at is whether the relevant conduct affects competition in Hong Kong.

What should I know?

1 Don't fix prices

Agreeing on customer prices or price elements such as discounts or credit terms, including pricing formulas.

2 Don't restrict output

Agreeing with competitors to limit the volume or type of goods or services to drive up prices or otherwise maximise market positions.

3 Don't share markets

Allocating segments of the market amongst competitors such as by geography or customer type or agreeing not to enter or expand into a competitor's market.

4 Don't rig bids

Subverting the normal competitive nature of tenders and bid processes by agreeing with competitors who will make or refraining from making bids and on what terms.

These rules apply even if a party is or conduct takes place outside of Hong Kong. The key factor that the Commission will look at is whether the relevant conduct affects competition in Hong Kong.

These don'ts are based on the following rules:

First Conduct Rule

Prohibits conduct involving multiple parties that restricts competition

Agreements, decisions and concerted practice among undertakings that have an anti-competitive object or effect. This includes vertical and horizontal agreements but does not apply to conduct involving two or more entities if the relevant entities are part of the same undertaking or corporate group.

Second Conduct Rule

Prohibits conduct by a party with substantial market power that restricts competition

Conduct that has an anti-competitive object or effect. This includes unilateral conduct by an undertaking such as predatory behaviour towards competitors or limiting production, markets or technical development to the prejudice of customers. If it takes the form of an agreement this may also contravene the First Conduct Rule. There is no definition of 'substantial market power' but market share, power to make pricing, barriers to entry and other relevant factors will be taken into consideration.

Mergers Rule

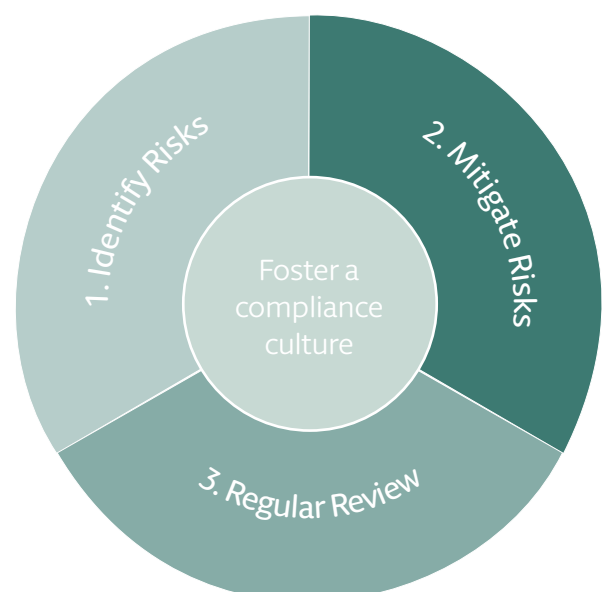
Prohibits telecommunications mergers and acquisitions that restrict competition

Hong Kong's competition laws currently only apply to mergers and acquisition in the telecoms sector.

What should I do?

Foster a compliance culture: If your company has not already done so, you should identify the risks, mitigate them and continue to review and monitor your business practices to comply with the new competition laws. In particular, care should be taken in any dealings with your competitors regarding cooperation, markets and pricing and your staff should be aware of the permitted practices when carrying out their day-to-day responsibilities.

Compliance checklists and guides: We have provided on our website key information on what you should do, how Commission investigations will happen and how to survive dawn raids.



Most frequently asked questions and answers (FAQs)

What are the penalties for breaches?

Penalties are broad ranging and may include:

- Monetary fine - individual fines up to HK\$1,000,000 and company fines up to 10% of the total gross revenues of the entity obtained in Hong Kong for up to three years of the period of contravention
- Imprisonment for individuals for up to two years
- Director disqualifications for up to five years
- Injunctions, other mandatory orders

What industries are the Commission targeting?

All industry sectors

- However, based on the complaints and enquiries received by the Commission and its market studies on certain sectors, we anticipate that the early target sectors will include:
 - Fuels (petrol, oil and gas)
 - Construction and building maintenance
 - Travel and tourism
 - Trade associations

Who is the Commission?

The Commission is an independent statutory body

- There are 15 Commission members (including the Chairperson) from a variety of backgrounds

Will the Commission investigate every complaint?

No, the Commission acts in the public interest:

- The Commission will consider any complaint regarding anti-competitive behaviour but it may not pursue all such complaints

What if I'm only a small and medium enterprise (SME)?

All businesses must comply with competition laws but:

- There is an exception for SMEs subject to thresholds - the First Conduct Rule will not apply to arrangements between businesses where their combined turnover is \leq HK\$200m so long as that arrangement is not 'serious anti-competitive conduct', and the Second Conduct Rule will not apply to businesses with turnover \leq HK\$40m
- SME information brochures are available on the Commission's website [click here](#)

Is there a leniency policy?

Yes, there is a cartel leniency policy

- In exchange for a cartel member's cooperation, the Commission will agree not to commence proceedings for a pecuniary penalty against the first cartel member reporting the cartel conduct to the Commission and meeting all the requirements under the policy
- To apply, call the Commission Leniency Hotline on +852 3996 8010 between 8 am and 6 pm, Monday to Friday (excluding public holidays)



Are there any exemptions or exclusions?

Yes, exemptions and exclusions may include:

- Economic: agreements enhancing overall economic efficiency
- Legal: agreements for the purpose of complying with a Hong Kong legal requirement
- Statutory bodies: most entities established by specific Ordinances are exempt – though undertakings dealing with such entities may still be liable
- Public service: certain companies providing services of general economic interest
- Government: statutory bodies and certain persons engaged in ‘specified activities’
- Block exemptions: for specific sectors
- SMEs: agreements and conduct of lesser significance (see SMEs above)

Exemption fees apply

- For certainty, businesses may apply to the Commission for a decision on the applicability of exclusions or exemptions.
- Fees range between HK\$50,000 – HK\$500,000 but can be waived or reduced in certain circumstances.



Adrian Emch
Partner, Beijing
T +86 10 6582 9510
adrian.emch@hoganlovells.com



Henry Wheare
Counsel, Hong Kong
T +852 2840 5087
henry.wheare@hoganlovells.com



PJ Kaur
Associate, Hong Kong
T +852 2840 5634
pj.kaur@hoganlovells.com



Stephanie Tsui
Associate, Hong Kong
T +852 2840 5071
stephanie.tsui@hoganlovells.com

www.hoganlovells.com

“Hogan Lovells” or the “firm” is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word “partner” is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2017. All rights reserved. 11110_Ab_0117