

IN-DEPTH

Cartels And Leniency

HONG KONG

LEXOLOGY



Cartels and Leniency

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In-Depth: Cartels and Leniency (formerly The Cartels and Leniency Review) provides a practical overview of the laws and policies aimed at combating cartel activity across key jurisdictions worldwide. It addresses major emerging and unsettled issues surrounding unlawful agreements with competitors, and analyses recent enforcement trends and regulatory changes – offering valuable insights to practitioners and corporates alike.

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Hong Kong

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Introduction

Historical background

Hong Kong has long been regarded as one of the freest economies in the world. One of the features of Hong Kong attracting international and local consumers is the natural and healthy competition among different business entities or sectors that protects consumers' benefits by enabling them to enjoy their rights to access and choose from various goods and services at competitive prices.

Enacted in June 2012, the long-awaited Competition Ordinance (the Ordinance)^[1] came into full force in Hong Kong on 14 December 2015. The Ordinance is one of the most important economic legislations in recent years and its significance lies in the fact that it established the first cross-sector competition law regime in Hong Kong. In the past, only the telecommunications and broadcasting sectors were subject to competition law. Hailed as an encouraging development for the international business and financial hub, this is still a much-belated initiative compared to its counterparts in the Asia-Pacific region. For instance, Australia's earliest competition legislation dates back to the 1970s, Singapore adopted a full competition regime in 2006 and the Anti-Monopoly Law took effect in mainland China in 2008.

Features of Hong Kong's competition regime

The Ordinance draws international influence from the competition legislation of the European Union, the United Kingdom, Australia and Singapore. In particular, the provisions concerning the First Conduct Rule (governing anti-competitive agreements) and the Second Conduct Rule (governing abuse of substantial market power) are largely based on Articles 101 and 102 of the Treaty on the Functioning of the European Union.

In terms of enforcement structure, Hong Kong adopts a prosecutorial model akin to that of the United States, Canada and Australia. This means that while the Competition Commission of Hong Kong (the Commission) has the powers to investigate and prosecute, it must bring enforcement actions before an independent Competition Tribunal (the Tribunal) to seek pecuniary penalties and other sanctions. This is in stark contrast with the administrative model adopted by the European Union and most of the Asian jurisdictions, where the competition authorities assume both prosecutorial and adjudicative functions.

Another remarkable feature is that Hong Kong has not criminalised cartel offences, unlike the United States and the United Kingdom.

Current trends

The Commission has indicated that it will focus on three key areas in its future enforcement initiatives.^[2]

- anti-competitive behaviours that affect people's livelihood, especially low income or grassroot groups;
- cartels that aim to take advantage of government funding or subsidy schemes; and

- cases involving the digital economy.

Year in review

The major enforcement actions by the Commission and the most notable Tribunal proceedings in 2024 are summarised as follows.

Operation against Funeral Service cartel

In January 2024, the Commission executed a search warrant against various funeral service companies and a trade association office. These entities were suspected of having engaged in anti-competitive conduct including price-fixing when providing funeral services, in contravention of the First Conduct Rule of the Ordinance.

This was the sequel to the Commission's joint operation with the Hong Kong Police Force against a mortuary in Shatin in August 2023 for suspected market sharing by coordinating their customers' solicitation efforts.

Leniency policy under judicial review in the Estate Agencies' price-fixing cartel case

Earlier in November 2023, the Commission filed Competition Tribunal Proceedings (CTEA 3/2023) against two major real estate agencies in Hong Kong for alleged involvement in a price-fixing cartel with two other competitors. On 18 March 2024, while the competition proceedings were still ongoing, the respondents commenced the very first judicial review application in Hong Kong against the Commission for its irregularities in implementing the Leniency Policy for Undertakings Engaged in Cartel Conduct (Leniency Policy for Undertakings). The gist of the judicial review grounds was that the Commission had deprived the respondents of the opportunity to render full cooperation in competition investigation via the leniency route and denied them procedural fairness. The judicial review application was heard in August 2024.

In the judicial review application, the following chain of events was not disputed between the respondents and the Commission, that:

- in around March 2023, the legal representatives of the respondents approached the Commission to apply for a leniency marker;
- on the same day, the Commission replied to the respondents' legal representatives that the leniency marker was not available; and
- it was not until May 2023 (seven weeks after the respondents' application for leniency marker) that the competitors in the alleged cartel applied for leniency without securing a marker in advance. The Commission subsequently granted leniency to these competitors instead of the respondents.

In response to the challenge, the Commission defended its position by asserting that the respondents had allegedly provided 'misleading information' during the initial investigation

stage, as a result of which the Commission was entitled to refuse them a leniency marker. Furthermore, the Commission claimed that the respondents were not the 'first cartel member' to provide 'substantial assistance' since their competitors (albeit being the latecomers in leniency application) had provided useful information to assist the investigation.

The respondents rebutted that, as a matter of law, the Commission was not entitled to disclose the representations made by the respondents during the genuine 'without prejudice' settlement negotiations, and subsequently rely on these materials in rejecting a leniency marker. Further, the Commission's interpretation of 'first cartel member' and 'substantial assistance' would lead to absurd and unjust outcomes, and defeat the spirit of the Leniency Policy for Undertaking which was originally designed to ensure transparency and predictability.

The judgment is still pending and will likely be available sometime in 2025. This judicial challenge marks the very first time that the Commission's interpretation and implementation of its own leniency policies are being put to the test, and its outcome will carry considerable ramifications on the future operation of the Commission's leniency regime. As a side note, the respondents took out a parallel application to permanently stay the main action of CTEA 3/2023 on similar grounds, which means that the most high-profile Tribunal proceedings since the inception of the Ordinance may potentially be halted indefinitely given the Commission's potential abuse of process in handling the leniency marker application.

Joint operations with ICAC against Building Maintenance cartel

In April and August 2024, the Commission conducted two joint operations with the Independent Commission Against Corruption (ICAC) against a syndicate for alleged acts of corruption and tender-rigging in building maintenance projects.

In these two operations, over 60 premises were searched with 25 persons arrested by the authorities. The Commission also exercised its compulsory power requiring the relevant companies and individuals to produce documents and to attend investigation interviews. The total value of the relevant renovation contracts was believed to be over HK\$18 billion.

First judgment concerning government subsidy scheme and rule 76 relief

In June 2024, certain respondents in the first cartel case relating to the government subsidy scheme (CTEA 1/2023) admitted liability before the Tribunal. These respondents were alleged of price-fixing, market-sharing, bid-rigging and/or sharing competitively sensitive information when providing quotations for IT solutions in government subsidy applications under the Distance Business Programme (D-Biz) from May 2020 to September 2021.

The Commission reached settlement with some of these respondents according to the Policy on Recommended Pecuniary Penalty. The Tribunal accordingly ordered the respondents to pay total pecuniary penalties of HK\$1.31 million, together with the investigation and litigation costs of the Commission.

This was also the first time the Tribunal granted the reliefs under rule 76 of the Competition Tribunal Rules^[3] (which is similar to default judgment relief in ordinary civil

proceedings) against two respondents who had failed to file a Response, which was a court pleading in reply to the Commission's Originating Notice of Application. As a result, these defaulting respondents (who were individuals) were ordered to pay pecuniary penalties of HK\$242,000 and HK\$160,000, respectively, together with the investigation costs and litigation costs of the Commission.

Enforcement policies and guidance

Statutory framework

The Ordinance prohibits three major forms of anticompetitive practices:

- the First Conduct Rule prohibits anticompetitive agreements and cartel activities;^[4]
- the Second Conduct Rule regulates the abuse of a substantial degree of market power; and^[5]
- the Merger Rule concerns the control of any merger that has or is likely to have the effect of substantially lessening competition.

Unlike regimes in other major jurisdictions, this is not an economy-wide merger control regime, and the application of the Merger Rule is limited to the telecommunications sector only.^[6]

Cartel conduct falls within the scope of the First Conduct Rule, which is the main focus of this chapter.

First Conduct Rule

The First Conduct Rule prohibits any agreement, concerted practice or decision between undertakings in which the object or effect is to prevent, restrict or distort competition in Hong Kong. This provision is largely similar to the equivalent prohibition in the European Union, namely Article 101 of the Treaty on the Functioning of the European Union. The First Conduct Rule comprises the following key concepts.

Agreements

Broadly speaking, all forms of written or oral agreements, arrangements, informal agreements and 'gentlemen's agreements' are caught by the First Conduct Rule.^[7] In addition to horizontal agreements between competitors, the First Conduct Rule covers vertical agreements (i.e., agreements between undertakings at different levels of the supply chain).

Concerted practices

Collusion falling short of an actual agreement may be regarded as a concerted practice,^[8] which effectively provides the Commission with a fall-back option to combat the more surreptitious and connived form of anticompetitive conduct.

Serious anticompetitive conduct

The Ordinance further defines certain hardcore activities as ‘serious anticompetitive conduct’ within the First Conduct Rule, which consists of classic cartel conduct between competitors such as price-fixing, bid-rigging, market allocation and output control.^[9] These are considered more serious violations and will be subject to stricter enforcement action. For instance, the de minimis exclusion^[10] is not applicable to serious anticompetitive conduct.

In addition, the importance of the distinction between serious and non-serious anticompetitive conduct lies in the fact that the pre-prosecution process would be different (to be discussed in Section VII Penalties below).

Undertakings

Both corporations and individuals may be liable for anticompetitive conduct under the Ordinance. The term ‘undertaking’ effectively covers limited companies, partnerships and small and medium-sized enterprises, as well as sole proprietorships.^[11]

Enforcement regime

The Ordinance established two specialist bodies for competition enforcement, namely the Commission and the Tribunal.

The Commission

The Commission is vested with a broad range of powers to investigate and prosecute suspected breaches, which include the power to require production of documents and information,^[12] to require individuals to attend interviews before the Commission^[13] and to enter and search premises with warrants issued by the Court of First Instance.^[14]

¹ The Commission also has the power to commence enforcement action and apply to the Tribunal for pecuniary penalty if it has reasonable cause to believe that a competition rule (including the First Conduct Rule) has been contravened.^[15]

While the Commission is the principal competition authority responsible for enforcing the Ordinance, the Communications Authority has concurrent jurisdiction with the Commission in regulating undertakings licensed in the telecommunications and broadcasting sectors.^[16] Both authorities have signed a memorandum of understanding to coordinate their functions and enforcement actions.

The Tribunal

The Tribunal is an independent adjudicating body that hears competition matters, including:-

- applications made by the Commission regarding any alleged contravention of the Ordinance;

- applications for the review of determinations by the Commission, including decisions relating to exemptions, exclusions, commitments and leniency;
- follow-on private actions after a violation of the Ordinance is established; and
- appeals against any interlocutory decisions, determinations or orders.

Decisions made by the Tribunal may be appealed to the Court of Appeal.^[17]

While the Ordinance is silent on the burden of proof in competition proceedings, the Tribunal held in May 2019 that the standard of proof to be applied is the criminal standard, namely, beyond reasonable doubt. However, it is not necessary for every item of evidence produced to satisfy this standard. It is sufficient if the body of evidence relied on, viewed as a whole, satisfies the burden.^[18]

Guidelines, policies and enforcement focus

To date, the Commission and the Communications Authority have issued six guidelines relating to substantive and procedural matters of each of the Conduct Rules (the Conduct Rules Guidelines), which provide guidance on how these authorities intend to interpret and apply the provisions of the Ordinance and how the Commission handles complaints and investigations.

The Commission has also published five policy documents to elaborate its enforcement policies (the Enforcement Policy and the Recommended Pecuniary Penalties Policy), leniency applications (the Leniency Policies), cooperation policies (the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct and the Section 60 Commitments Policy), as well as other guidance notes concerning the investigation powers of the Commission, and legal professional privilege.

The Commission currently prioritises enforcement against conduct that is clearly harmful to competition and consumers in Hong Kong. In the context of the First Conduct Rule, this includes cartel conduct and other agreements causing significant harm to competition, such as retail price maintenance.

Cooperation with other jurisdictions

The Ordinance does not contain any express provisions on cooperation with competition authorities in other jurisdictions. Nevertheless, the Commission has indicated that it will consider the competition precedents of other jurisdictions, especially in the early days of enforcement. The Commission has also started to establish working relationships with many overseas competition agencies, both bilaterally and through intergovernmental bodies. To date, the Commission has worked with enforcers from Indonesia, mainland China, Singapore, the Philippines, Ireland, Colombia and Kenya, and reached memoranda of understanding with the Competition Bureau of Canada, the Philippine Competition Commission and Guangdong Administration for Market Regulation. In particular, the Commission and the Guangdong Administration for Market Regulation have recently co-published the Competition Compliance Manual for Businesses in Guangdong and Hong Kong in 2024 following the signing of the Memorandum of Understanding in 2023. These

initiatives are intended to assist cross-border enterprises to gain better understanding of the competition law regimes in both jurisdictions.

As an active member of the International Competition Network comprising over 130 competition authorities and a participant in the Organisation for Economic Co-operation and Development/Korea Policy Centre Competition Programme, more international exchange and further establishment of working relationships with overseas agencies are expected in the future.

Jurisdictional limitations, affirmative defences and exemptions

Extraterritoriality

Section 8 of the Ordinance provides a far-reaching extraterritorial application of the First Conduct Rule – so long as the anticompetitive conduct may affect competition in Hong Kong, it could be caught by the Ordinance regardless of where the conduct takes place, where the agreement is entered into and where the undertakings are located or incorporated.

Exclusions and exemptions

The Ordinance provides for a range of exclusions and exemptions, which are designed to screen out market conduct that would benefit consumers and the community as a whole or activities that are unlikely to have a material adverse effect on competition, or where legal or policy considerations outweigh the relevant anticompetitive effects. The more important of these are as now described.

Economic efficiency exclusion

The Ordinance excludes agreements that can enhance overall economic efficiency, such as those that would contribute to improving production or distribution or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.^[19]

De minimis exclusion

The Ordinance also contains a general exclusion for ‘agreements of lesser significance’, which excludes application of the First Conduct Rule from agreements between undertakings with a combined worldwide turnover not exceeding HK\$200 million in the preceding financial year. This exclusion is not applicable to serious anticompetitive conduct.^[20]

Statutory body exclusion and other general exclusions

The blanket exclusion afforded to statutory bodies^[21] is one of the most controversial features of the Ordinance. The exclusion means that statutory bodies such as the Airport Authority, the Housing Authority and the Trade Development Council in Hong Kong are not subject to the Conduct Rules or other enforcement provisions of the Ordinance, even if their activities would cause harm to competition.

Block exemption

Furthermore, the Commission has the authority to grant block exemption orders to exclude a particular category of agreements from the application of the First Conduct Rule because of the economic efficiencies and policy considerations involved.^[22]

On 8 August 2017, the Commission issued its first block exemption order for vessel sharing agreements (VSAs) between liner shipping companies, on the condition that the parties to a VSA do not collectively exceed a market share of 40 per cent.^[23] VSAs are made between carriers within a shipping consortium to operate a liner service along a specified route using a specified number of vessels. The Commission is of the view that the economic efficiencies generated by a VSA outweigh the potential restriction of competition. The block exemption order has been renewed and remains effective until 8 August 2026.

Leniency programmes

Cartel activities are economically harmful yet difficult to detect because of their secretive and organised nature. A leniency programme is a key investigative tool used by competition authorities around the world to combat cartel conduct and to encourage cooperation in investigations.

Section 80 of the Ordinance empowers the Commission, in exchange for a person's cooperation in an investigation or in proceedings, to enter into a leniency agreement with the person that it will not bring or continue proceedings in the Tribunal for a pecuniary penalty. However, a leniency agreement does not preclude follow-on private actions by persons who have suffered loss or damage as a result of the cartel.

Key elements of the leniency programmes

The mechanics of the leniency programmes adopted by the Commission are detailed in its revised Leniency Policy for Undertakings Engaged in Cartel Conduct (the Leniency Policy for Undertakings) and its new Leniency Policy for Individuals Involved in Cartel Conduct (the Leniency Policy for Individuals).^[24]

Leniency is available only in respect of cartel conduct that contravenes the First Conduct Rule. The essential elements are as follows:-

Undertakings

Leniency is available only for the first undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency, but not for the ringleader of the cartel conduct.

Two types of leniency can be granted:

1. Type 1: leniency for an undertaking that discloses its participation in a cartel in which the Commission has not started an investigation; or
2. Type 2: leniency for an undertaking that can provide substantial assistance to the Commission's investigation and enforcement action of a cartel it is already assessing or investigating.^[25]

If an undertaking meets the conditions for leniency, the Commission will enter into an agreement with that undertaking not to take proceedings against it for a pecuniary penalty in exchange for cooperation in the investigation of the cartel conduct. However, Type 2 leniency applicants might be issued with an infringement notice if victims of the anticompetitive conduct initiate follow-on actions against them.^[26]

Leniency ordinarily extends to any current officer or employee of the undertaking cooperating with the Commission, as well as any former officer or employee or partner and any current or former agent of the undertaking specifically named in the leniency agreement.

The undertaking receiving leniency will, to the satisfaction of the Commission, agree to and sign a statement of agreed facts admitting its participation in the cartel. On this basis, the Tribunal may make an order under Section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in the cartel.

Individuals

The Leniency Policy for Individuals was implemented in April 2020. In September 2022, the Commission further published a revised Leniency Policy for Individuals to offer clearer guidance and enhanced incentives for individuals to cease their involvement in cartel conduct and report to the Commission. With the revision, leniency is available for the first individual who either discloses their involvement in cartel conduct of which the Commission has not commenced an initial assessment or investigation, or provides substantial assistance to the Commission's investigation and subsequent enforcement action of cartel conduct which the Commission is already assessing or investigating. The revision also opens up the possibility of leniency for the first individual who reports a cartel to the Commission, even if leniency has already been granted to an undertaking in the same case.

First to report

Because leniency is available only for the first cartel member who reports the cartel conduct to the Commission and satisfies all the stipulated requirements, there is, therefore, a strong incentive for a cartel member to be the first leniency applicant under the Commission's marker system (discussed below).

Leniency application procedures

The procedures for both undertakings and individuals^[27] are essentially the same, except that there is an additional element in Step 5 below for undertakings.

Step 1: application for leniency marker

Under the leniency policies, an applicant may apply for leniency by contacting the Commission via the leniency telephone hotline or by email. The Commission adopts a marker system to record the date and time of the communication to establish a queue for determining the priority of a particular leniency application.

To obtain a marker, an applicant is required to provide sufficient information to identify the cartel conduct, including:

1. the identity of the undertaking applying for the marker;
2. general information about the suspected cartel;
3. the participants in the cartel conduct; and
4. the contact details of the caller.

If the above conditions are satisfied, the Commission will grant a marker for the applicant to perfect.

Step 2: perfection of the leniency marker

The applicant has to perfect a marker by providing the following information to the Commission:

- a detailed description of the cartel conduct and its operation;
- the entities, services or products involved;
- the role of the applicant;
- documentary evidence; and
- witnesses to be interviewed.

The proffer will be made on a 'without prejudice' basis, either orally or in writing, within a specific period, ordinarily within 30 calendar days. The applicant cannot perfect a marker on hypothetical terms.

Should the undertaking fail to submit its proffer within the specified period, or any extension to this period as might be agreed by the Commission, its marker will automatically lapse and the next undertaking in the marker queue will be invited by the Commission to make an application for leniency.

Step 3: entering into a leniency agreement

If the applicant satisfies the conditions of leniency, the Commission will invite the applicant to enter into a leniency agreement to confirm that it:-

1. has provided and will continue to provide full and truthful disclosure to the Commission;
2. has not coerced others to engage in the cartel conduct or acted as the single ringleader of the cartel conduct;
3. has taken prompt and effective action to terminate its involvement in the cartel conduct;
4. will keep the leniency application and process confidential unless with the Commission's prior consent or the disclosure is required by law;
5. will provide continuing full and truthful cooperation, at its own cost, to the Commission, including in proceedings against other undertakings; and
6. is prepared to continue with, or adopt and implement, at its own cost, an effective corporate compliance programme to the satisfaction of the Commission.

Step 4: continuing compliance with the terms of the leniency agreement

So long as the applicant and its current officers continue to cooperate with the Commission in the investigation and enforcement process, no proceedings will be commenced against the applicant in respect of the cartel conduct.

Step 5: follow-on litigation

For undertaking applicants, the Commission will not issue an infringement notice against them unless and until victims have commenced follow-on action against them with respect to cartel conduct covered by the Leniency Agreement.

Step 6: issuance of a final letter

At the end of any proceedings before the Tribunal or other courts, the Commission will issue a final letter to confirm that the applicant has fulfilled all the conditions under the leniency agreement.

Subsequent leniency applicants (for undertakings only)

In April 2019, the Commission published a Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (the Cooperation Policy), which supplements the Leniency Policy for Undertakings.

The Cooperation Policy states the following:-

1. undertakings that are not eligible for leniency may choose to admit their wrongdoings and cooperate with the Commission in the investigation,^[28]
- 2.

the Commission may grant a discount of up to 50 per cent of the pecuniary penalty to be recommended to the Tribunal;^[29]

3. alternatively, the Commission may agree not to initiate proceedings against the individuals of the cooperating undertaking if they cooperate fully;^[30] and
4. the Cooperation Policy also provides a leniency plus programme: if an undertaking comes forward to disclose the existence of another cartel, it can receive an additional discount of up to 10 per cent of the recommended pecuniary penalty for the first cartel it was involved in.^[31]

Cooperation application procedures

Step 1: application for marker

Under the Cooperation Policy,^[32] an undertaking subject to investigation may indicate its willingness to cooperate with the Commission. The Commission has full discretion to determine whether it will engage in cooperation with the undertaking.

Step 2: cooperation in the investigation

The undertaking is required to provide documents and information through a proffer process on a 'without prejudice basis'. This includes a detailed description of the cartel conduct and its functioning as well as the provision of access to evidence.

Step 3: entering into a cooperation agreement with an agreed factual summary

If the undertaking and the Commission are able to reach an agreement on the draft agreed factual summary and the draft cooperation agreement, the Commission will indicate the maximum recommended pecuniary penalty it would be willing to recommend to the Tribunal, as well as any other orders sought.

Step 4: ongoing compliance and issuance of the final letter

The undertaking is required to ensure continued compliance with the terms of the Cooperation Agreement.

Policy on Section 60 Commitments

On 10 November 2021, the Commission published the Policy on Section 60 Commitments in which the Commission may accept a Commitment from a party to take any action, or refrain from taking any action, that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule.^[33] One of the special features of Section 60 Commitments is that the Ordinance does not require the parties offering commitments to make any admission of a contravention. If the Commission accepts a Commitment, it will not commence or continue any investigation or proceedings before the Tribunal. Considerations include.^[34]

1. seriousness of the conduct;
2. ability to address competition concerns;
3. effective implementation and monitoring;
4. severity factors and remedial goals;
5. good faith; and
6. timing considerations.

In the event a party fails to comply with a Commitment or there has been a material change of circumstances, the Commission may withdraw it and may commence an investigation or bring proceedings in the Tribunal against the party pursuant to Section 61 of the Ordinance.^[35]

Confidentiality issues concerning leniency applications

The Ordinance imposes a general obligation on the Commission to preserve confidentiality of information provided to the Commission, including that submitted by unsuccessful leniency applicants.^[36]

In a decision handed down on 14 March 2018,^[37] the Tribunal confirmed that communications between the Commission and parties who unsuccessfully seek leniency are privileged and need not be disclosed in later proceedings, bearing in mind the public interest considerations of encouraging leniency applicants. Mr Justice Godfrey Lam of the Tribunal held that the public interest in non-disclosure of communications between the Commission and unsuccessful leniency applicants outweighs the contrary interest in disclosure. Any other approach would place unsuccessful leniency applicants in a 'worse position than those who have not applied for leniency at all'.

The above ruling on preservation of secrecy is particularly crucial because private litigants may wish to seek discovery of materials surrendered as part of a leniency programme for pursuing follow-on private actions against cartel members.

On the contrary, with respect to successful leniency applicants, the leniency agreement together with all communications in that connection are disclosable to the defence under the 'warts and all' principle as a matter of fairness, since the defence is entitled to know everything about the accomplice witness in order to challenge the relevant evidence.^[38]

Cooperation with overseas authorities

Because cartels may operate in multiple jurisdictions, leniency applicants in Hong Kong are expected to provide the Commission with details of other leniency applications that they have submitted to competition authorities in other jurisdictions. In appropriate cases, the Commission may require a leniency applicant to authorise the Commission to exchange confidential information with those overseas authorities.

Potential Impacts of judicial review proceedings

As discussed above, the interpretation and implementation of the Leniency Policy for Undertakings are currently subject to unprecedented challenge by way of judicial review. Crucial issues to be decided by the court include:

1. What constitutes 'substantial assistance'?
 - Whether information and/or documents provided by an undertaking under compulsion (e.g. section 42 interview) would constitute 'substantial assistance' under the Leniency Policy for Undertakings; and
 - whether the Commission is entitled to rely on denial of liability by an undertaking during bona fide 'without prejudice' settlement negotiations in concluding that the undertaking is unable to provide 'substantial assistance', and thus rejecting its leniency marker application?
2. What constitutes 'first cartel member' providing substantial assistance under the leniency marker system?
 - Whether the Commission is precluded from granting a marker to someone else after receiving 'substantial assistance' from an undertaking (where that undertaking has not applied for leniency at all)?

It is anticipated that these vital issues will be addressed by the Court of First Instance in the judicial review judgment, with significant impact on the future operations of the leniency regime.

Penalties

The Commission: warning notices and infringement notices

Following an investigation, in accordance with Section 82 of the Ordinance, a warning notice must be issued before bringing proceedings where the Commission has 'reasonable cause to believe' that a contravention of the First Conduct Rule has occurred and the contravention does not involve serious anti-competitive conduct.

Should the undertaking fail to comply with the warning notice or repeat the anticompetitive conduct,^[39] the Commission may commence Tribunal proceedings against the undertaking.-

If the conduct concerns 'serious anticompetitive conduct', no warning notice is required to be issued. This was confirmed in a judgment where the Tribunal found that when the agreements in question constituted bid-rigging and, thus, serious anticompetitive conduct, no warning notice was required before the commencement of Tribunal proceedings.^[40]

The Commission has the option of directly bringing proceedings in the Tribunal or issuing an infringement notice describing the infringing conduct, setting out the evidence gathered by the Commission and stipulating the terms on which the Commission would be willing to settle the matter without resorting to Tribunal proceedings.^[41]

In February 2021, the Commission issued infringement notices to six hotel groups and a tour counter operator for rigging ticket prices for tourist attractions and transportation tokens that were sold at various hotels in Hong Kong. This marks the first time that the Commission has pursued enforcement actions against facilitators of cartel conduct, sending out a clear message that not only cartelists but also third parties who facilitate anticompetitive conduct may be subject to scrutiny.

The Tribunal: pecuniary and non-pecuniary sanctions

Under the Ordinance, the Tribunal may impose a wide array of pecuniary and non-pecuniary penalties for cartel activities or other infringements of the First Conduct Rule.

Unlike jurisdictions such as the United Kingdom and the United States, these penalties are civil in nature and no criminal sanctions are provided for with respect to cartel infringement.

Fines

The Commission can apply to the Tribunal to impose a financial penalty of up to 10 per cent of the Hong Kong turnover of the undertaking concerned for each year in which the contravention took place, for a maximum of three years.^[42]

Damages

The Tribunal can order a person to pay damages to aggrieved parties who have suffered loss or damage as a result of a contravention of the competition rules.^[43]

Disgorgement of profits

The Tribunal can order any person to pay to the government, or to any other specified person, the illicit profit gained, or loss avoided, by that person as a result of the contravention.^[44]

Order to pay the Commission's investigation costs

In addition, an offender may be liable to pay to the government the investigation costs reasonably incurred by the Commission in connection with proceedings for the contravention.^[45]

Contractual and behavioural sanctions

In addition to financial penalties, the Tribunal has powers to impose a series of contractual and behavioural sanctions to restore healthy competition in the market. These sanctions are set out in Schedule 3 of the Ordinance and include:

1. a declaration that a person has contravened a competition rule;
- 2.

an injunction restraining or prohibiting a person from engaging in conduct that contravenes the Ordinance;

3. restoring parties to the position they were in prior to the contravention;
4. restraining or prohibiting from dealing with property; and
5. declaring the whole or part of the agreement void or voidable.

Director disqualification orders

The Tribunal may also, upon application by the Commission, impose a director's disqualification order against a person for up to five years.^[46] The first director disqualification order for contravention of the Ordinance was issued in January 2021, pursuant to which a director of a firm of decorating contractors that participated in anticompetitive conduct was disqualified for one year and 10 months.^[47]

Sentencing principles

The Tribunal first ruled on the methodology for determining the amount of pecuniary penalties in *Competition Commission v. W Hing Construction Company Limited & Others*,^[48] where the judge considered the frameworks adopted in overseas jurisdictions and outlined a four-step approach to deal with this matter in Hong Kong.

In June 2020, the Commission issued a Policy on Recommended Pecuniary Penalties to provide guidelines on the four-step approach in formulating the recommended penalties for undertakings and associations of undertakings. The steps include:

1. determining the base amount: value of sales times gravity percentage times duration multiplier;
2. making adjustments for aggravating, mitigating and other factors;
3. applying the statutory cap; and
4. applying any cooperation reduction and considering the respondent's inability to pay.^[49]

'Day one' response

Investigative powers of the Commission

As mentioned above, the Commission has extensive powers to investigate suspected cartel activities and other suspected breaches of the Ordinance, including:-

1. issuing written notices requiring the production of documents or specific information^[50] (commonly referred to by the Commission as a Section 41 Notice);
- 2.

- compelling individuals to attend interviews to answer questions and to give a declaration confirming the accuracy of the answers (a Section 42 Notice),^[51] and
3. conducting dawn raids (i.e., entering and searching premises upon obtaining search warrants from the Court of First Instance to seize evidence and documents relevant to the investigation).^[52]

The Commission has indicated in its Guideline on Investigations that it does not need to exercise the powers of issuing Section 41 and Section 42 Notices before applying for a search warrant for dawn raid purposes.^[53]

Right against self-incrimination

Under the Ordinance and the Guideline on Investigations, a person cannot remain silent at investigation interviews or refuse to produce documents or offer explanations based on the right against self-incrimination.

Nonetheless, the evidence obtained by the Commission under compulsion by Section 41 and Section 42 Notices is not admissible against that person in any criminal proceedings or proceedings concerning financial or pecuniary penalties.^[54]

Legal professional privilege

A search warrant issued by the courts empowers the Commission to seize and copy relevant documents, computers and other electronic devices found on the premises. Both the Ordinance^[55] and the Commission's Guideline on Investigations^[56] contain provisions on the protection of legal professional privilege (LPP) enshrined in the laws of Hong Kong.^[57] The Commission has also published Guidance Notes on the Investigation Powers of the Competition Commission and Legal Professional Privilege (the LPP Guidance Notes) with respect to handling privilege claims during dawn raids.

Definition of LPP

LPP applies to confidential communications between lawyers and clients made for the dominant purpose of obtaining legal advice. Privilege extends to communications with in-house counsel where they are providing independent legal services.

Privilege also applies to communications between a lawyer and a third party that come into existence after litigation is contemplated or commenced and made with a view to the litigation. This is commonly known as litigation privilege.

Procedures for claiming LPP

An investigated party may assert a claim for LPP during the execution of a search warrant and the Commission is not allowed to review materials for which this protection is claimed unless and until the issue is resolved in the manner detailed below.

If the Commission agrees that a document is privileged, and the privileged document can be separated from non-privileged materials, the Commission will not copy or seize the

document. If the Commission disputes the privilege claim, or if the document is only partly privileged, the Commission will seal the document in an envelope or other container and remove it from the premises.

The investigated party must then, within seven days, prepare an index of the materials and provide a supporting statement setting out the basis for its privilege claim in relation to each item.

The Commission will return an item if satisfied that the item is privileged, based on the supporting statement. If only part of a document is privileged, arrangements will be made for privileged information to be redacted.

If a dispute on the privilege claim remains, the Commission will confer with the party claiming privilege on a mutually agreeable approach; for instance, instructing an independent third-party lawyer to review the LPP claim. If the dispute cannot be resolved, either party may apply to the court for the matter to be determined.^[58]

Handling a dawn raid

The key to handling a dawn raid is to have trained staff on the premises to assist with the investigations and to expeditiously engage external legal counsel, particularly on contentious matters such as LPP claims. It is crucial to appoint an in-house counsel or a compliance officer ready to act as a dawn raid coordinator and to train key employees in handling the investigating authorities, who may include the receptionist, heads of various departments, information technology (IT) staff and the in-house legal team.

Criminal sanctions in relation to commission investigations

Individuals and corporations are under a duty to cooperate with the Commission in competition investigations, failing which they may be liable to criminal sanctions.

The Ordinance stipulates criminal offences for providing false and misleading information, destroying or falsifying documents, obstructing a search or disclosing confidential information provided by the Commission, which are punishable by fines of up to HK\$1 million and imprisonment for up to two years.^[59] The first relevant criminal conviction of an individual recently took place in February 2025. The defendant was convicted of disposing and concealing documents during the Commission's search of office premises and was sentenced to two months' imprisonment.

Private enforcement

No stand-alone private action

Unlike many other jurisdictions, the Ordinance does not permit private stand-alone actions for contravention of competition rules. In other words, in the absence of a Tribunal determination on an alleged infringement of the Ordinance, victims cannot commence court actions to pursue damages for the offenders' breaches. This position was confirmed by a judgment handed down by the Court of First Instance in April 2017.^[60] In this case,

the court dismissed the claim on grounds that stand-alone or private litigation is not envisaged by the Ordinance and the only court that can make a ruling on contravention of the Ordinance is the Tribunal.

The implications of this judgment are that parties suffering loss or damage from a breach of the Ordinance only have one realistic remedy: lodging a complaint before the Commission. Once a contravention is established by the Tribunal, the victim can bring a follow-on action under the Ordinance against the offender or any party involved in that contravention.^[61]

No class action available

Currently, no class action procedure is available in Hong Kong generally and with respect to competition claims.

Liability, quantum and limitation period

The Tribunal's ruling as to liability will be binding in any follow-on actions^[62] and the claimant is only required to prove causation and quantum. Further, the limitation period for such actions is three years from the expiry of the appeal period following a Tribunal decision that the Ordinance has been contravened.^[63]

Leniency provides no immunity

A leniency agreement does not provide immunity from follow-on actions. The signed statement of agreed facts and declaration of contravention made by the Tribunal during the leniency application process could provide the evidential basis for victims to pursue follow-on actions.

Outlook and conclusions

In 2020, the Commission signed a memorandum of understanding with the Securities and Futures Commission^[64] to enhance cooperation and facilitate the exchange of information. The agencies have agreed to inform and consult each other on competition-related matters that may have a significant implication for the other agency. Where appropriate and permissible by law, they will exchange information pertaining to the other agency's functions or objectives regarding relevant market participants in the securities and futures industry.

Further, in addition to the executing two joint operations with the ICAC against the building maintenance syndicate in 2024, the Commission also signed a Memorandum of Understanding with the ICAC^[65] to strengthen cooperation and exchanges between the two agencies. Both regulators have agreed to proactively refer to each other matters that may fall within the other's functions, and may commence joint investigation to optimise the use of resources and enhance investigation effectiveness.

It is anticipated that the Commission will more frequently employ joint operations with other law enforcement agencies in competition investigations particularly in cases involving multi-faceted allegations.

To date, the Commission only filed one case before the Tribunal on abuse of substantial market power^[66] in relation to the medical gases supply market in Hong Kong, alleging contravention of the Second Conduct Rule in 2020. The trial took place in August 2024 and the judgment will likely be delivered sometime in 2025. We are yet to see more Second Conduct Rule cases to be brought to the Tribunal by the Commission.

As discussed above, the judicial review proceedings against the Commission may bring about much-needed clarity and potentially sweeping impact on the interpretation and implementation of the leniency policies.

Finally, although the Ordinance has now been in force for nine years, the Commission has yet to decide whether further aspects of the Ordinance need to be reviewed. It is thought that more controversial issues may yet provide the subject matter for review, such as introducing an economy-wide merger control scheme, establishing the right to bring stand-alone litigation under the Ordinance, removing the exemption for statutory bodies and expanding leniency protection to cover subsequent applicants.

Endnotes

- 1 Cap 619, Laws of Hong Kong. ^ [Back to section](#)
- 2 The Chairman's Statement of the Commission's Annual Report of 2023/24:
https://www.compcomm.hk/en/media/reports_publications/files/2023_24_HKCC_Annual_Report.pdf.
^ [Back to section](#)
- 3 Cap 619D Laws of Hong Kong. ^ [Back to section](#)
- 4 Section 6, the Ordinance. ^ [Back to section](#)
- 5 Section 21, the Ordinance. ^ [Back to section](#)
- 6 Paragraphs 3 and 4, Schedule 7, the Ordinance; 'carrier licence' and 'carrier licensee' as defined in Section 2, Telecommunications Ordinance (Cap 106, Laws of Hong Kong). ^ [Back to section](#)
- 7 Section 2(1), the Ordinance. ^ [Back to section](#)
- 8 Although not defined in the Ordinance itself, a 'concerted practice' means 'a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition', according to Paragraph 2.27 of the Commission's Guideline on the First Conduct Rule. ^ [Back to section](#)
- 9 Section 2(1), the Ordinance. ^ [Back to section](#)

- 10 Paragraph 5, Schedule 1, the Ordinance. [^ Back to section](#)
- 11 Under Section 2(1) of the Ordinance, ‘undertaking’ is defined as ‘any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity’. [^ Back to section](#)
- 12 Section 41, the Ordinance. [^ Back to section](#)
- 13 Section 42, the Ordinance. [^ Back to section](#)
- 14 Section 48, the Ordinance. [^ Back to section](#)
- 15 Section 92, the Ordinance. [^ Back to section](#)
- 16 Section 159, the Ordinance. [^ Back to section](#)
- 17 Sections 154 and 155, the Ordinance. [^ Back to section](#)
- 18 *Competition Commission v. Nutanix Hong Kong Limited & Others*, CTEA 1/2017 and [2019] HKCT 2, 17 May 2019. [^ Back to section](#)
- 19 Paragraph 1, Schedule 1, the Ordinance. [^ Back to section](#)
- 20 Paragraph 5, Schedule 1, the Ordinance. [^ Back to section](#)
- 21 Section 3, the Ordinance. [^ Back to section](#)
- 22 Section 15, the Ordinance. [^ Back to section](#)
- 23 Competition (Block Exemption for Vessel Sharing Agreements) Order 2017 (version of 7 July 2022). [^ Back to section](#)
- 24 Published on 8 September 2022. [^ Back to section](#)
- 25 Paragraph 1.3(d), Leniency Policy for Undertakings. [^ Back to section](#)
- 26 Paragraph 2.17, Leniency Policy for Undertakings. [^ Back to section](#)
- 27 Paragraphs 2.1 to 2.18, Leniency Policy for Undertakings and Paragraphs 2.1 to 2.17, Leniency Policy for Individuals. [^ Back to section](#)
- 28 Paragraph 1.1, Cooperation Policy. [^ Back to section](#)
- 29 Paragraphs 3.1 to 3.7, Cooperation Policy. [^ Back to section](#)
- 30 Paragraph 3.2, Cooperation Policy. [^ Back to section](#)

- 31 Paragraphs 4.1 to 4.4, Cooperation Policy. [^ Back to section](#)
- 32 Paragraphs 2.1 to 2.12, Cooperation Policy. [^ Back to section](#)
- 33 Paragraph 1.2, Policy on Section 60 Commitments. [^ Back to section](#)
- 34 Paragraph 2.2, Policy on Section 60 Commitments. [^ Back to section](#)
- 35 Paragraph 5.3, Policy on Section 60 Commitments. [^ Back to section](#)
- 36 Section 125, the Ordinance. [^ Back to section](#)
- 37 *Competition Commission v. Nutanix Hong Kong Limited and others*, CTEA 1/2017, 14 March 2018. [^ Back to section](#)
- 38 *Competition Commission v ATAL Building Services Ltd*, CTEA 2/2023 and [2023] HKCT 9, 25 October 2023. [^ Back to section](#)
- 39 Section 82, the Ordinance. [^ Back to section](#)
- 40 *Competition Commission v. Nutanix Hong Kong Limited and others*, CTEA 1/2017 and [2019] HKCT 2, 17 May 2019. [^ Back to section](#)
- 41 Sections 67 and 69, the Ordinance. [^ Back to section](#)
- 42 Section 93, the Ordinance. [^ Back to section](#)
- 43 Paragraph 1(k), Schedule 3, the Ordinance. [^ Back to section](#)
- 44 Paragraph 1(p), Schedule 3, the Ordinance. [^ Back to section](#)
- 45 Section 96, the Ordinance. [^ Back to section](#)
- 46 Section 101(2), the Ordinance. [^ Back to section](#)
- 47 *Competition Commission v. Fungs E&M Engineering Company Limited and Others* [2020] HKCT 9. [^ Back to section](#)
- 48 CTEA 2/2017 dated 29 April 2020. [^ Back to section](#)
- 49 Paragraphs 2.2 to 2.23 of the Policy on Recommended Pecuniary Penalties. [^ Back to section](#)
- 50 Section 41, the Ordinance. [^ Back to section](#)
- 51 Section 42, the Ordinance. [^ Back to section](#)

- 52** Section 48, the Ordinance. ^ [Back to section](#)
- 53** Paragraph 5.26, Guideline on Investigations. ^ [Back to section](#)
- 54** Section 45, the Ordinance; Paragraphs 5.41 and 5.42, Guideline on Investigations. ^ [Back to section](#)
- 55** Section 58, the Ordinance. ^ [Back to section](#)
- 56** Paragraph 5.38, Guideline on Investigations. ^ [Back to section](#)
- 57** Article 35, Basic Law of Hong Kong; *Citic Pacific Ltd v. Secretary for Justice and Another* [2015] 4 HKLRD 20. ^ [Back to section](#)
- 58** Paragraphs 4 and 5 of the LPP Guidance Notes. ^ [Back to section](#)
- 59** Sections 52 to 55, the Ordinance. ^ [Back to section](#)
- 60** *Loyal Profit International Development Ltd v. Travel Industry Council of Hong Kong* (HCMP 256/2016), 27 April 2017. ^ [Back to section](#)
- 61** Section 110, the Ordinance. ^ [Back to section](#)
- 62** Section 119, the Ordinance. ^ [Back to section](#)
- 63** Section 111, the Ordinance. ^ [Back to section](#)
- 64** Memorandum of understanding between the Securities and Futures Commission and the Competition Commission, dated 16 April 2020. ^ [Back to section](#)
- 65** Memorandum of understanding between the Independent Commission against Corruption of the Hong Kong Special Administrative Region and the Competition Commission, dated 18 December 2024. ^ [Back to section](#)
- 66** *Competition Commission v. Linde HKO Limited, Tse Chun Wah and Linde GmbH*, CTEA 3/2020, 21 December 2020. ^ [Back to section](#)

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