## CPA Australia Workshop

# Competition Ordinance (Cap. 619)

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## Note

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our Mrs Koo.

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# The Competition Ordinance

The Basics

#### History

- Ordinance enacted in June 2012
- Came into force on 14 December 2015
- Applies to all sectors of the economy
- Previously only telecommunications and broadcasting were regulated

### Objective

"To prohibit conduct that <u>prevents</u>, <u>restricts</u>, <u>distorts</u> competition in Hong Kong, to <u>prohibit</u> mergers that substantially lessen competition in Hong Kong..."

- Specifically
  - Anti-competitive agreements (the First Conduct Rule or FCR)
  - Abuse of substantial market power (the Second Conduct Rule or SCR)
- Merger rule currently only applies to mergers involving one or more broadcasting or telecommunications licensees

### Enforced By

- **Prosecuted** by the **Competition Commission** (CC) which has extensive powers to investigate suspected infringements
- Cases heard by a newly-established **Competition Tribunal** which may order
  - Cessation of Conduct
  - Fines up to 10% of turnover in Hong Kong (max 3 years)
  - Disqualification of directors (max 5 years)

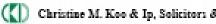
# Substantive Rules

# The First Conduct Rule

First Conduct Rule (Section 6(1) CO)

Prohibits agreements, concerted practices and decisions of associations of undertakings if the object or effect... is to prevent, restrict or distort competition in Hong Kong...

... unless exempted"



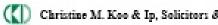
# The First Conduct Rule Examples of anti-competitive agreements

	Serious Anti-Competitive Conduct	Other agreements subject to review
Examples	Price fixing Sharing markets Output quotas Bid rigging Resale price maintenance?	Joint Production Joint R&D Joint purchasing Exclusive supply/purchase Resale price maintenance?
Consequences	The CC may issue proceedings in the Tribunal right away  (COPYRIGHT RESERVED)	The CC must issue a warning notice before issuing proceedings

## **Prohibited Effect**

#### **Anti-competitive effect?**

- Is an effect on competition *likely to flow* from the agreement (para 3.17 FCR Guidelines)
- See obiter Lam J in TVB v Communications Authority "no concrete effects required"
- Is the effect more than minimal (para 3.26 FCR Guidelines)?
- Requires an assessment of market power
- No safe harbours



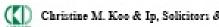
# The Second Conduct Rule Prohibited Conduct

#### Second Conduct Rule (Section 21 (1) CO)

An undertaking that has a **substantial degree of market power** ... must not **abuse** that power by engaging in conduct that has as its **object or effect** the prevention, restriction or distortion of competition in Hong Kong

## Substantial Degree of Market Power?

SDMP	The ability "profitably to charge prices above competitive levels"	
	arises where "undertaking does not face sufficiently effective competitive constraints"	



### What kind of conduct could be an abuse of market power?

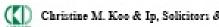
	Object of abuse	Effect of abuse
Examples	Predatory pricing Contractual exclusivity Loyalty-inducing rebates	Tying and bundling Margin squeeze Refusals to supply
Consequences	The CC may issue proceedings in the Tribunal right away	

#### **Exclusions**

#### **Undertaking must show**

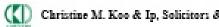
- Agreement contributes to improving production or distribution or promotes technical or economic progress
- Allows consumers a fair share of the resulting benefit
- The restrictions imposed are indispensable
- Do not afford the undertakings the possibility of substantially eliminating competition

# Enforcement



#### What cases will the Competition Commission investigate?

- CC can investigation where it has reasonable cause to suspect:
  - Anti-competitive agreements or
  - Abuse of a substantial degree of market power
- Leniency policy and complaints



# Powers of investigation What enforcement powers does the CC have?

- Where it suspects an infringement, the CC has the power to:
  - Require any person produce relevant documents (section 41)
  - Require any person to attend to answer questions (section 42)
  - Conduct unannounced inspections (dawn raids) under warrant (section 48)

#### Priorities?

- CC will prioritise investigation of
  - Cartel conduct
  - Abuses of substantial market power
  - Other agreements causing significant harm in Hong Kong
- CC will take into account the following "severity factors":
  - Deliberate conduct/blatant disregard for the law
  - Involvement of senior management
  - Previous infringement

# Case Study

# Q & A



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# Television Broadcasts Ltd v. Communications Authority (HCAL 176/2013)

#### Facts:

- Contractual clauses prohibiting singers in certain ways and restricting appearances for other HK television broadcasters
- •Communications Authority found TVB violated the Broadcasting Ordinance, saying that the policies "have the purposes and effect of preventing, distorting or substantially restricting competition"
- •Fined TVB HK\$900,000 and ordered TVB to rectify its practices
- TVB challenged Communications Authority

#### Issue

Whether Communications Authority's decisions infringe Art 10 HKBOR

#### Judgment

• **Held**: Communications Authority's decision is quashed for procedural unconstitutionality, specifically non-compliance with art. 10 of the HKBOR:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established by law..."

# Professional Accountant Body's Restriction of Accountant's Training

#### **Facts**

- In Portugal, Order of Chartered Accountants ("OTOC") adopted the following measures:
  - 1/3 of Members' CPD must be provided by OTOC
  - Remaining CPD must be obtained through training approved by OTOC
  - Details of training must be submitted 3 months in advance for approval

#### Issue

• Whether the measure infringe art. 101(1) TFEU (equivalent to the 1st Conduct Rule)

#### **Judgment**

- Held: The measures infringe art. 101(1) TFEU
- The measures distort and restrict competition
  - Distort competitions because training bodies need to obtain approval from OTOC while OTOC trainings are not subject to the same.
  - Restrict the offers by other training bodies and the advance approvals prevent them from offering up-to-date materials.
- •Reject that the measures are to guarantee the quality of the services because a monitoring system other than the approval procedure could be put in place.

# Partnership between Accountant and Barrister in Netherlands

#### Facts:

- Dutch Bar Council prohibited lawyers from entering into partnerships with nonlawyers.
- Council is concerned that lawyers cannot advise independently if they are in partnership.
- •Mr. Wouters challenged the prohibition

#### Issue

Whether the prohibition infringes art. 101(1) TFEU (equivalent to the 1<sup>st</sup> Conduct Rule)

#### **Judgement**

- Held: The prohibition did not infringe art. 101(1) TFEU
- The prohibition restricts the competition because it limits production and technical development
- However in the overall context, lawyers act in the sole interest of the client while accountants are not subject to comparable requirements of professional conduct.

# What has the Competition Commission done so far

#### (1) Hong Kong Newspaper Hawker Association

- The Association issued notice to its member to increase the recommended price at which they sold to certain branded cigarette.
- Rectified its conduct by withdrawing the notice
- The Commission decides not to take any actions.

#### (2) Hong Kong Association of Banks

- The Code of Banking Practice endorsed by the Hong Kong Monetary Authority
- The Authority decided to suspend certain provisions of the Code.
- However the Authority requires all banks that they should continue to comprehensively comply with the Code
- Now under discussion