

C L I F F O R D
C H A N C E



GUIDE TO HONG KONG COMPETITION LAW

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INTRODUCTION

This Guide provides an overview of the Competition Law regime in Hong Kong.

The cross-sector regime, which is still relatively new having come into full force and effect in December 2015, seeks to prohibit and deter undertakings in all sectors from adopting abusive or other anti-competitive conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong.

As outlined by this Guide, the regime provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule, the second conduct rule and the merger rule). We explain the prohibitions, as well as defences and exclusions, the investigation and enforcement process of the Competition Commission (the investigative and prosecutorial authority), the pecuniary and non-pecuniary sanctions for contraventions that may be imposed by the Competition Tribunal (the adjudicative authority), and the programme for leniency in exchange for cooperation.

As we mark the fifth anniversary of the Competition Law regime in Hong Kong, there have been many firsts such as the first (two) Competition Tribunal findings of contravention in May 2019, first decision on pecuniary penalties in April 2020, first director disqualification order in October 2020 and first abuse of substantial market power proceedings in December 2020. Whilst Hong Kong is beginning to build its own body of precedents in competition law, practitioners are venturing into uncharted areas and seeking guidance from other jurisdictions. With our breadth of experience in most common law jurisdictions, Clifford Chance is well placed to support you.



SUMMARY

Key agencies and institutions	Investigative and prosecutorial: <ul style="list-style-type: none"> • Competition Commission (Commission) • Communications Authority (telecommunications and broadcasting sectors) (CA) Adjudicative: <ul style="list-style-type: none"> • Competition Tribunal (a specialist division of the Court of First Instance (CFI)) (Tribunal) • Court of Appeal • Court of Final Appeal (CFA)
Key legislation	<ul style="list-style-type: none"> • Competition Ordinance (Cap 619) (CO)
Key prohibitions	<ul style="list-style-type: none"> • Anti-competitive agreements or practices (First Conduct Rule) • Abuse of market power (Second Conduct Rule) • Merger Rule (see below)
General exclusions to First Conduct Rule	<ul style="list-style-type: none"> • Agreements enhancing overall economic efficiency (a block exemption order can be issued in respect thereof) • Agreements made for the purpose of complying with a legal requirement • Undertakings entrusted by the government to operate services of general economic interest • Merger agreements • Agreements of lesser significance
General exclusions to Second Conduct Rule	<ul style="list-style-type: none"> • Compliance with legal requirements • Undertakings entrusted by the government to operate services of general economic interest • Conduct resulting in mergers • Conduct of lesser significance
Extra-territorial effect?	<ul style="list-style-type: none"> • The CO covers agreements and conduct that take place outside Hong Kong if they have the effect of preventing, restricting or distorting competition in Hong Kong.
Examples of Sanctions	<ul style="list-style-type: none"> • Fines not exceeding 10% of the turnover of the undertaking obtained in Hong Kong for each year of infringement up to a maximum of three years • Costs of the Commission's investigation • Disqualification of directors for up to five years • Other non-financial sanctions • Criminal offences relating to obstruction of the Commission's investigations
Leniency programme	<ul style="list-style-type: none"> • The Commission may enter into leniency agreements in exchange for cooperation in investigations or proceedings.
Private rights of action?	<ul style="list-style-type: none"> • There is no standalone private action. The CO does provide for a right to bring a follow-on private action. It is also possible to transfer to the Tribunal proceedings involving an allegation of contravention of a conduct rule as a defence.
Merger control	<ul style="list-style-type: none"> • There is no general merger control regime in Hong Kong. However, the Merger Rule in the CO applies to telecommunications carrier licensees, which is a voluntary notification regime. This replaced section 7P, Telecommunications Ordinance, which regulated change in control.

1. What types of anti-competitive conduct are prohibited?

The CO prohibits three categories of conduct:

- a) The First Conduct Rule prohibits undertakings from making, giving effect to or engaging in agreements, concerted practices or decisions with the object or effect of preventing, restricting or distorting competition in Hong Kong.
- b) The Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing that power by engaging in conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong.
- c) The Merger Rule prohibits undertakings from directly or indirectly carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong. The merger control regime applies only to undertakings that hold telecommunications carrier licences.

The First Conduct Rule and Second Conduct Rule are discussed further below.

First Conduct Rule

The First Conduct Rule governs arrangements both between competitors and undertakings at different levels of the supply chain. This rule applies where the Commission demonstrates an agreement has either an anti-competitive object or an anti-competitive effect.

Under the “by object” test, agreements found to have an anti-competitive object entail such a degree of harm to competition that no additional examination needs to be made on whether they have anti-competitive effects. Examples of agreements which typically have the object of harming competition are price fixing, market sharing, output restriction and bid rigging, as well as exchange of future price and quantity information, group boycotts and resale price maintenance agreements. There is no exhaustive list of categories of agreements that have the object of restriction of competition.

Other agreements are to be analysed under the effects test. An agreement which has an anti-competitive effect on competition must have (or likely have) an adverse impact on a parameter of competition such as price, output, product, quality, product variety or innovation. This requires an extensive examination of the market involved and evidence of what effect the relevant conduct has or is likely to have on the market.

The Commission has published a Guideline on the First Conduct Rule, which can be found [here](#).

Serious anti-competitive conduct under the First Conduct Rule

Serious anti-competitive conduct under the First Conduct Rule includes:

- a) price fixing (including an agreement on a formula to calculate price or elements of price such as discounts, rebates, promotions or credit terms);
- b) market sharing (including allocating customers by geographic area, agreeing not to compete for each other's customers and agreeing not to enter or expand into a competitor's market);
- c) output restrictions (including restricting the volume or type of particular goods or services); and
- d) bid rigging (including agreements on who should win a bid and conduct such as supporting the designated winner by refraining from bidding, withdrawing bids or submitting bids with higher prices/ unacceptable terms).

The distinction between serious and non-serious anti-competitive conduct is important because the pre-prosecution process is different (see discussion under question 4

below). Further, the exemption for agreements of lesser significance is not available in relation to serious anti-competitive conduct.

Second Conduct Rule

The Second Conduct Rule applies where the following elements are present:

- a) the entity engaged in the relevant conduct is an undertaking;
- b) this undertaking has a substantial degree of market power in a market; and
- c) the undertaking abuses its substantial degree of market power by engaging in conduct that has as its object or effect, the prevention, restriction or distortion of competition in Hong Kong.

The lower threshold of substantial degree of market power is used in Hong Kong rather than the dominance threshold commonly used in other jurisdictions, which requires a market share of over 50%, to engage rules against abuse of market power. Neither the law or guidance in Hong Kong sets a minimum market share percentage threshold for engaging the Second Conduct Rule, which enables the Commission to retain flexibility in enforcement amidst changing market circumstances and differing market structures of differing sectors.

The most obvious manifestation of market power is the ability of an undertaking to profitably raise prices above competitive levels for a sustained period. Market power can, however, be manifested in other ways. For example, an undertaking with market power may be able to, below or relative to competitive levels for a sustained period: (a) reduce the quality of its products; (b) reduce the range or variety of its products; (c) lower customer service standards, or (d) impair innovation or any other parameter of competition in the market.

The Commission considers that potentially any conduct, which has the object or effect of preventing, restricting or distorting competition in Hong Kong, may constitute abusive conduct where the conduct is attributable to an undertaking with a substantial degree of market power.

Abusive conduct is thus an open category. Examples of types of abusive conduct include predatory pricing, tying and bundling, margin squeeze, refusals to deal and exclusive dealing.

The Commission commenced the first abuse of substantial market power proceedings in the Tribunal in December 2020. The Commission alleges that between October 2015 and January 2018, Linde HKO Limited and Linde GmbH (collectively, Linde) leveraged its de facto monopoly position in the medical gases supply market into the downstream medical gas pipeline system (MGPS) maintenance market by ceasing or limiting the supply of medical gases to MGI (Far East) Limited, the only other potential MGPS maintenance service provider for public hospitals. Further, it is alleged that Linde engaged in various exclusionary acts, for example, imposition of various arbitrary and/or unreasonable trading terms such that MGI could not compete and/or perform MGPS maintenance services contracts.

The Commission has published a Guideline on the Second Conduct Rule, which can be found [here](#).

2. What types of defences/ exclusions are available?

Defences/ exclusions to First Conduct Rule

Five categories of general exclusion are set out in Schedule 1 to the CO:

- a) Agreements enhancing overall economic efficiency;
- b) Agreements made for the purpose of complying with a legal requirement;
- c) Undertakings entrusted by the government to operate services of general economic interest;
- d) Merger agreements;
- e) Agreements of lesser significance (between undertakings with a combined annual turnover not exceeding HK\$200 million in the relevant year; not available in relation to serious anti-competitive conduct). This exemption is sometimes referred to as the de minimis threshold and intended for the protection of SMEs.

Parties can either self-assess whether their proposed agreements meet the conditions for exclusion or exemption or apply for a binding decision from the Commission under section 9 of the CO.

The following section 9 applications have been considered by the Commission:

a) Decision in respect of the Code of Banking Practice

On 11 December 2017, 14 banks jointly applied for a decision from the Commission confirming that the First Conduct Rule does not apply to the Code of Banking Practice (Code) by virtue of the exclusion in section 2 of Schedule 1 to the CO (exclusion for compliance with a legal requirement). The Code is issued by The Hong Kong Association of Banks and The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies, which sets out practices to be adhered to by authorised institutions in dealings with individual customers and the standards of acceptable and required banking practices. In some areas, the Code prescribes that there should be no or reasonable fees for banking products and the methodology for how banking products should be priced, as well as certain trading conditions.

On 15 October 2018, the Commission published a decision to the effect that the Code is not excluded from the application of the First Conduct Rule. That said, the Commission stated that it has no present intention to pursue investigative or enforcement action in respect of the current version of the Code.

b) Decision in respect of the proposed pharmaceutical survey

On 31 January 2019, the Hong Kong Association of the Pharmaceutical Industry (Association) applied for a decision from the Commission confirming that the First Conduct Rule does not apply to a proposed pharmaceutical sales survey (Proposed Survey) by virtue of the exclusion in section 1 of Schedule 1 to the CO (agreements enhancing overall economic efficiency). To carry out the proposed survey, the Association was to ask its pharmaceutical company members to provide data relating to their sales in Hong Kong on a voluntary basis each quarter. Such data would be processed by the Association to produce a report indicating sales value grouped by company, by therapeutic area and by product, which would be available for purchase.

On 22 October 2019, the Commission published a decision to the effect that the Proposed Survey was not excluded from the First Conduct Rule by or as result of the efficiency exclusion. Nevertheless, the Commission expressed the view that in any event, the sharing of some of the data intended to be included in the Proposed Survey would unlikely give rise to competition concerns under the First Conduct Rule.

However, the sharing of data which permitted product-specific data to be directly or indirectly discerned or robustly estimated could give rise to such concerns.

The Commission's decisions can be found [here](#).

Economic efficiency and block exemptions

The test for meeting the economic efficiency defence consists of four elements: (a) the agreement generates efficiencies; (b) it allows consumers a fair share of the resulting benefit; (c) it does not impose restrictions that are dispensable to the attainment of the objective; and (d) it does not afford the undertakings concerned the possibility of eliminating competition. In *Competition Commission v W Hing Construction Company Limited and Others* [2019] 3 HKC 486, some of the defendants elected to advance an economic efficiency defence but were unsuccessful.

If the Commission is satisfied that a particular category of agreement is excluded from the application of the First Conduct Rule for enhancing overall economic efficiency, it may issue a block exemption order. An example of a block exemption issued by the Commission is in respect of vessel sharing agreements used in liner shipping services. These agreements are usually reached between various partners within a shipping consortium who agree to operate a liner service along a specified route using a specified number of vessels. The block exemption order allows carriers to jointly operate liner shipping services by engaging in activities such as coordinating or fixing sailing timetables; exchange, sale or cross-charter of space or slots on vessels; polling of vessels and/or port installations.

The Commission's block exemption orders can be found [here](#).

Defences/ exemptions to Second Conduct Rule

Defences/ exemptions to the Second Conduct Rule available include:

- a) Compliance with legal requirements;
- b) Undertakings entrusted by the government to operate services of general economic interest;
- c) Conduct resulting in mergers;
- d) Conduct of lesser significance (by an undertaking with an annual turnover not exceeding HK\$40 million in the relevant year).

The CO provides that an undertaking may elect to apply to the Commission under section 24 as to whether or not the conduct in question is excluded or exempted from the Second Conduct Rule, which will give the undertaking greater legal certainty.

Separately, the CO provides for two grounds under which the Chief Executive of the Hong Kong Special Administrative Region in Council may make an order (which may be subject to conditions and may be retrospective) for a specific exemption from the conduct rules to apply: (i) for exceptional and compelling reasons of public policy; or (ii) for avoidance of a conflict with an international obligation that directly or indirectly relates to Hong Kong (sections 31 and 32).

3. What is the process of investigation?

Where the Commission investigates an alleged contravention of a competition rule, it will generally do so in two phases: (a) Initial Assessment Phase, and (b) Investigation Phase.

Initial Assessment Phase

During the Initial Assessment Phase, the Commission generally has not formed a view as to whether it has reasonable cause to suspect that a contravention of the competition rules has occurred. Any information it requires will, therefore, be sought on a voluntary basis, such as by:

- a) contacting parties in writing or by telephone;
- b) meeting and interviewing persons who may have knowledge of the conduct;
- c) reviewing publicly available information including market surveys and industry reports; and
- d) conducting market studies.

After the Initial Assessment Phase, the Commission might take no further action; commence the Investigation Phase; refer the matter to another appropriate agency, or the Commission may accept voluntary resolution of the matter such as a commitment under section 60 of the CO.

Investigation Phase

After forming a view that it has reasonable cause to suspect a contravention of the competition rules, the Commission enters the Investigation Phase, which may involve the use of its investigation powers including:

- a) issuance of a section 41 notice requiring any person to produce documents or provide specified information;
- b) issuance of a section 42 notice requiring any person to attend before the Commission to answer questions relating to any matter the Commission reasonably believes to be relevant to an investigation; and
- c) conducting an unannounced onsite inspection (dawn raid) after obtaining a warrant from the CFI under section 48.

Dawn raids

In a dawn raid, the Commission is not required by the CO to wait for a person's legal advisers to attend the premises before commencing its search. However, where parties have requested that their legal advisers be present during a search, and there is no in-house lawyer already on the premises, Commission officers will wait for external legal advisers to arrive if within a reasonable committed time or unless waiting will adversely impact the efficacy of a search. Whilst waiting, Commission officers may take necessary measures to prevent tampering with evidence such as instructing employees and other persons at the premises to move away from their workspaces, requesting that computer/ IT system access or email accounts be blocked, stopping external communications and sealing offices and/ or filing cabinets. Where compliance with such directions or requirements cannot be assured, the Commission will immediately commence its search.

Legal advisers will be able to provide advice on issues such as legal professional privilege, obligations of confidence and privilege against self-incrimination. The Guideline on Investigations also provides guidance, and can be found [here](#).

After the Investigation Phase, the Commission may take no further action or the steps discussed in answer to question 4 below.



4. What happens after an investigation?

First Conduct Rule - serious versus non-serious anti-competitive conduct

Where no serious anti-competitive conduct is involved, the Commission must issue a Warning Notice before bringing proceedings to the Tribunal. The Warning Notice provides parties under investigation with the opportunity to cease the conduct within a specified warning period in order to avoid such proceedings.

In cases involving serious anti-competitive conduct, the Commission may bring proceedings to the Tribunal directly, namely, without a Warning Notice. However, in some cases, the Commission may issue an infringement notice providing an opportunity to admit liability and enter into a commitment under section 60 of the CO. If the undertaking is able to effectively respond to or comply with the requirements of the infringement notice, the investigation can be concluded without the need to bring proceedings in the Tribunal. For example, infringement notices were issued to two potential defendants in the Commission's investigation of the alleged bid rigging conduct that took place in Ocean Park Corporation's procurement of the IT services based on Nintex technology.

Infringement notices are published by the Commission and can be found [here](#).

Second Conduct Rule

No Warning Notice will be issued before prosecution under the Second Conduct Rule. The Commission may, however, issue an infringement notice allowing an opportunity to admit liability and enter into a commitment under section 60 of the CO.

Commitment under section 60 of the CO

Under section 60, the Commission may accept from a person a commitment to take or refrain from taking any action as it considers appropriate to address its concerns about a possible contravention of a competition rule. Upon acceptance, the Commission may agree not to commence an investigation or bring proceedings, or to terminate an existing investigation or proceedings. Commitments may subsequently be enforced, or otherwise withdrawn, varied, substituted or released in certain circumstances.

In May 2020, the Commission accepted the commitments by three online travel agents (OTAs), which are channels through which hotels and other accommodation providers advertise and sell accommodation (namely, Booking.com, Expedia.com and Trip.com). The commitments aim to address the Commission's concerns around clauses in contracts between OTAs and accommodation providers in Hong Kong that require accommodation providers to always give the OTA the same or better terms as those they offer in other sales channels, as regards room prices (wide price parity), room conditions (wide conditions parity) and / or room availability (room availability parity).

On 30 October 2020, the Commission accepted the commitments offered by four terminal operators, in relation to the Hong Kong Seaport Alliance (Alliance). The Alliance is a joint venture between the four terminal operators, whereby they jointly operate and manage berths across eight terminals at Kwai Tsing port in Hong Kong. Commitments were offered to address the Commission's concerns that the Alliance could result in (i) increase in prices or decrease in service levels for the parties' customers, or (ii) withholding of "overflow" services from the remaining operator, which is not a party to the Alliance; (iii) the potential anti-competitive information flows between the Alliance and its competitors in the Mainland as a result of cross-directorships held by one of the parties.

The Commission publishes accepted commitments, which can be found [here](#).

5. What are the potential sanctions?

In Hong Kong, sanctions for breach of the CO may only be imposed by the Tribunal. Except for offences such as obstructing a Commission investigation or providing false information, violations of the CO attract no criminal sanction. Sanctions range from financial and non-financial sanctions to director disqualification orders and sanctions for offences in relation to CO investigations. The orders that may be made by the Tribunal are set out in Schedule 3 of the CO.

Financial Penalties

Fines

The Commission may ask the Tribunal to impose a financial penalty on any person who has contravened or been involved in a contravention of a competition rule. The fine is statutorily capped at a maximum of 10% of the annual turnover obtained in Hong Kong for each year of infringement, up to a maximum of three years. If the infringement period exceeds three years, the penalty may be based on the three years with the highest turnover.

Turnover is defined as the total gross revenues of an undertaking obtained in Hong Kong. The fact that the definition is limited to Hong Kong turnover is in marked contrast to many other jurisdictions, including the EU, where global turnover is usually used as a basis for calculating fines for breach of antitrust laws. Despite this limitation to Hong Kong turnover, such turnover does appear to include both export sales (made to customers located outside Hong Kong) and import sales (made from outside Hong Kong to customers located inside Hong Kong).

In other competition law regimes, the notion of undertaking for the purpose of fines is often applied at the group level (including parent companies) and not limited to the level of the subsidiary or business that is guilty of the contravention. The CO and subsidiary legislation are silent on this issue.

On 29 April 2020, the Tribunal handed down its **first decision on pecuniary penalties** in the case of *Competition Commission v W Hing Construction Company & Others* (CTEA 2/2017) and imposed a total fine of HK\$3.97 million on ten contractors for making and giving effect to a market sharing arrangement and a price fixing arrangement. It set down a structured and methodological four-step approach for assessing the same, which is based very closely on EU and UK approaches. The steps comprise: a) determining the base amount; b) making any adjustment for aggravating, mitigating and other factors; c) applying the statutory cap (as discussed above), and d) applying a reduction for any cooperation or successful plea of inability to pay.

The base amount is calculated as: Value of Sales x Gravity Percentage x Duration Multiplier. The Value of Sales is the value of the undertaking's sales related to the contravention in the relevant geographic area within Hong Kong in the financial year in question (contrast this to the calculation of the statutory cap which is based on gross revenues). As for the Gravity Percentage, guidance has been given that for serious anti-competitive conduct such as price fixing, market sharing and bid-rigging, the range of 15% to 30% is applicable. The Duration Multiplier is intended to provide an incentive for an infringing undertaking to cease its contravention as soon as possible. For example, in the case at hand, the Tribunal adopted a Duration Multiplier of 1, though the misconduct only lasted 5 months.

Subsequently, on 22 June 2020, the Commission published a **Policy on Recommended Pecuniary Penalties** for anti-competitive conduct in line with the decision above. The said policy seeks to ensure consistency across cases and provide transparency on the determination process of the Commission's pecuniary penalty

recommendations. That said, it is ultimately for the Tribunal to determine the appropriate penalty amount.

Individuals

According to section 93 of the CO, fines may be imposed on a person who has contravened or been involved in the contravention of a competition rule. Section 91 of the CO provides that a person “involved in a contravention” includes any person who has attempted, aided, abetted, counselled, procured, induced or attempted to induce, or conspired with another person to contravene a competition rule, or is, in any way, knowingly concerned in or party to a contravention of a competition rule.

The reference to person rather than undertaking in section 93 suggests that fines may be imposed not only on companies or businesses, but also individuals. This is in contrast to European anti-trust law which does not provide for liability for individuals.

In fact, a number of the Commission’s cases seek pecuniary penalties against individuals, for example, *Competition Commission v Kam Kwong Engineering Company Limited & Others* (CTEA 1/2018); *Competition Commission v Fungs E&M Engineering Company Limited & Others* (CTEA 1/2019), and *Competition Commission v Quantr Limited and Cheung Man Kit* (CTEA 1/2020). All three of these cases have since been resolved. Since the statutory cap provided under the CO is defined by reference to an undertaking’s turnover, it does not appear to apply to pecuniary penalties against individuals. It is worth noting section 168 of the CO provides that it is unlawful to indemnify a person comprising a director or other officer, employee or agent against liability for payment of pecuniary penalties or costs.

Order to pay the Commission’s investigation costs

The Tribunal may order a person who has contravened a competition rule to pay the government an amount equal to the Commission’s costs reasonably incurred for carrying out its investigation. The threshold for the Commission to justify such a costs order may not be very high so long as it is supported by some evidential basis.

Non-financial sanctions

As well as imposing financial penalties, the Tribunal has wide powers to impose non-financial sanctions, including:

Under section 95 of the CO, if the Tribunal is satisfied that a person is or proposing to engage in conduct contravening the competition rules, it may make an interim order pending its determination of final relief. The maximum period for which an interim order may remain in force is 180 days, extendable for a further 180 days.

- a) declaring that a person has contravened a competition rule;
- b) prohibiting a person from making or giving effect to an agreement;
- c) requiring the parties to an agreement to modify or terminate that agreement;
- d) declaring agreements void or voidable;
- e) prohibiting conditions being imposed on the supply of goods or services;
- f) requiring that any person or class of person be given the right to use goods, facilities or services;
- g) requiring disposal of operations, assets or shares;
- h) restraining or prohibiting a person from engaging in conduct that contravenes the CO.

Under section 95 of the CO, if the Tribunal is satisfied that a person is or proposing to engage in conduct contravening the competition rules, it may make an interim order

pending its determination of final relief. The maximum period for which an interim order may remain in force is 180 days, extendable for a further 180 days.

Director disqualification order

The Tribunal may disqualify, on an application by the Commission, a person from being a director, liquidator or provisional liquidator of a company; a receiver or manager of a company's property, or a person concerned in the promotion, formation or management of a company. The disqualification order can continue for five years or less. Since 2018, the Commission has applied in various enforcement proceedings for director disqualification orders against individuals.

The first disqualification order made by the Tribunal was in the case of *Competition Commission v Fungs E&M Engineering Company Limited & Others* (CTEA 1/2019). The Tribunal made a disqualification order against the director in question for 1 year 10 months. It is relevant to note that the director was aged 74 and had limited reading ability; further, the Tribunal accepted that the director had not directly known or contributed to the company's contravention, though he had reasonable grounds to suspect of the same and took no steps to prevent it.

Criminal offences in relation to Commission investigations

The CO introduces four criminal offences in respect of obstructing an investigation carried out by the Commission. These offences will not be tried in the Tribunal, but instead fall under the jurisdiction of the District Court.

Destroying or falsifying documents

A person committing the offence of destroying or falsifying documents is liable on conviction on indictment to a fine of HK\$1 million and imprisonment for two years, or on summary conviction, to a fine of HK\$100,000 and imprisonment for six months.

Failure to comply with a requirement or prohibition imposed by the Commission

It is an offence to fail to attend before the Commission, verify the truth of any information given to the Commission by statutory declaration, or comply with any of the powers granted to the Commission pursuant to a warrant granted to it in order to carry out an investigation.

A person committing the offence is liable on conviction on indictment to a fine of HK\$200,000 and imprisonment for one year, or on summary conviction, to a fine of HK\$50,000 and imprisonment for six months.

Obstructing a person acting under a warrant

A person may not obstruct any person exercising a power under a warrant issued to the Commission in order to carry out an investigation.

A person committing the offence is liable on conviction on indictment to a fine of HK\$1 million and imprisonment for two years, or on summary conviction, to a fine of HK\$100,000 and imprisonment for six months.

Providing false or misleading documents or information

A person committing the offence of providing false or misleading documents or information is liable on conviction on indictment to a fine of HK\$1 million and imprisonment for two years, or on summary conviction, to a fine of HK\$100,000 and imprisonment for six months.



6. How does the leniency programme work?

Section 80 of the CO provides that the Commission may, in exchange for a person's co-operation in an investigation or in proceedings, make a leniency agreement with the person that it will not bring or continue proceedings.

Cartel Leniency Policy for Undertakings

In this respect, the Commission published a **Leniency Policy for Undertakings Engaged in Cartel Conduct** (Undertaking Leniency Policy) in November 2015 and revised the same in April 2020, which contains the following key elements:

- a) Leniency is available only for the first undertaking that either (i) discloses its participation in a cartel of which the Commission has not opened an initial assessment or investigation (Type 1), or (ii) provides substantial assistance to the Commission's investigation and subsequent enforcement action (Type 2).
- b) An undertaking that is the ringleader of the cartel or has coerced other parties to participate in cartel conduct will be disqualified from obtaining leniency.
- c) The Commission uses a marker system to establish a queue in the order of the date and time the Commission is contacted. An undertaking or its legal representative may contact the Commission on an anonymous basis to ascertain if a marker is available for particular cartel conduct.
- d) For both successful Type 1 and Type 2 leniency applicants, the Commission will agree not to commence proceedings before the Tribunal for the reported conduct including proceedings for an order declaring the applicant has contravened the CO.
- e) The Commission will enter into an agreement with the undertaking in question to give effect to the leniency made available.
- f) For Type 2 leniency applicants only, in the event of follow-on action for damages being initiated in relation to the conduct covered by the leniency agreement, the Commission may issue an infringement notice to them, requiring a commitment to admit a contravention of the First Conduct Rule, in order to permit the initiation of follow-on proceedings against them.

Cartel Leniency Policy for Individuals

In April 2020, the Commission published a **Leniency Policy for Individuals Involved in Cartel Conduct** (Individual Leniency Policy), which contains the following key elements:

- a) Leniency is available only for the first individual involved in cartel conduct who reports the cartel to the Commission, before the granting of a marker to an undertaking under the Undertaking Leniency Policy.
- b) Leniency is not available to individuals whose involvement in the cartel conduct was as the ringleader of the cartel conduct or that coerced other parties to participate in the cartel conduct.
- c) In circumstances where the marker relating to cartel activity has been granted to an individual, it may be appropriate to have an additional marker for the first

undertaking to apply for it. However, in contrast, where the marker has been taken by an undertaking, a marker for individuals will not be available. In these circumstances, the Commission may still, in its discretion, offer not to initiate proceedings before the Tribunal against an individual in return for that individual cooperating with the Commission's investigation.

- d) The Commission will enter into an agreement with the individual in question to give effect to the leniency made available.

Cartel Cooperation Policy

The Commission has also published the **Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct** (Cartel Cooperation Policy). If an undertaking is engaged in cartel conduct and cannot benefit from the Cartel Leniency Policy, it can enter into a cooperation agreement with the Commission and receive benefits under the Cartel Cooperation Policy. Under the Cartel Cooperation Policy, where undertakings engaged in cartels choose to cooperate with the Commission, the Commission will recommend a discount of up to 50% on any pecuniary penalty. In addition, the Cooperation Policy provides for a Leniency Plus programme - in the event that an undertaking cooperating with the Commission in relation to its participation in one cartel, enters into a leniency agreement with the Commission in respect of a second cartel, the Commission will apply an additional discount of up to 10% of the recommended pecuniary penalty for the first cartel.

The Tribunal, as an independent tribunal, is not bound by the Commission's recommendation. The Tribunal, may, however, properly have regard to the Commission's recommendation bearing in mind the policy justifications.



7. What private rights of action are there?

Follow-on action

Pursuant to Section 110 of the CO, a person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule can bring a follow-on action against the infringing party on the basis of:

- a) a decision by the Tribunal, CFI or appeal courts that the act is a contravention of a conduct rule; or
- b) an admission made by a person, in a commitment that has been accepted by the Commission, that the person has contravened a conduct rule.

Absence of standalone right of private action

There is no standalone right of private action to bring a competition law claim before the Tribunal. Section 108 of the CO makes it clear that no person may bring any proceedings independently of the CO if the cause of action is the defendant's contravention, or involvement in a contravention, of a conduct rule.

Raising contravention of a conduct rule as a defence

Section 113(1) of the CO provides that the CFI must transfer to the Tribunal so much of the proceedings before the court that are within the jurisdiction of the Tribunal. Further, section 113(3) of the CO states that if, in any proceedings before the CFI, a contravention, or involvement in a contravention, of a conduct rule is alleged as a defence, the court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are within the jurisdiction of the Tribunal.

Although section 113(3), using the word “must”, might suggest a transfer to the Tribunal is mandatory, there is nevertheless scope for the CFI to examine the quality of the defence so that if it can be summarily seen to be of no substance with the result that it can be struck out or summary judgment can be entered, then no defence remains that calls for a transfer. An example of a CFI case transferred to the Tribunal is *Taching Petroleum Company Limited v Meyer Aluminium Limited* [2018] 2 HKLRD 1284.

CONTACTS



Helen Wang
Consultant
Hong Kong
T: +852 2826 3524
E: helen.wang@cliffordchance.com



Yong Bai
Partner and
Head of Antitrust
Greater China
T: +86 10 6535 2286
E: yong.bai@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

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