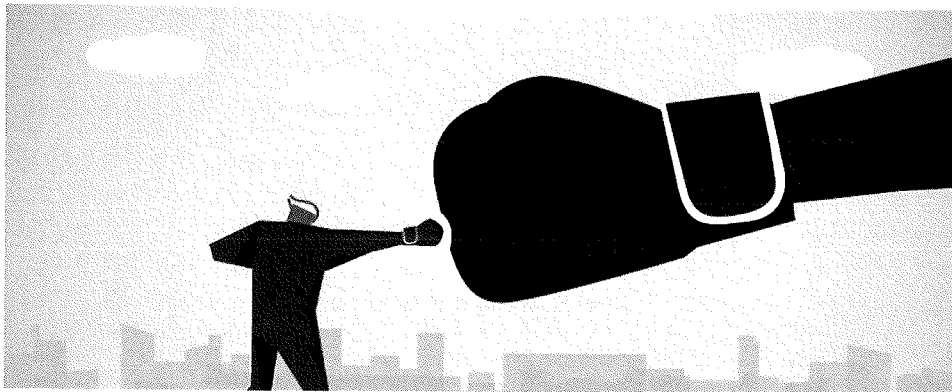


Creating a culture of competition – Hong Kong's competition regime two years on

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International competition law expert Suzanne Rab talks to CSj about the challenges facing Hong Kong's fledgling competition regime.

Could we start by discussing why Hong Kong's new competition regime is necessary – what are the benefits for Hong Kong?

'Economic theory suggests that, generally speaking, free market competition is the best way of ensuring that high-quality goods and services are available to consumers at the lowest possible price. The basic idea is that, if a market is competitive, producers will not be able to charge excessive prices because they will lose customers to other businesses offering similar products and services. This means that producers and service providers have to deliver value for money in order to increase their profits. Competition therefore tends to increase social welfare by maximising society's overall wealth through the efficient allocation and distribution of resources. The purpose of competition law, simply stated, is to remedy some of the situations in which the free market system breaks down.

The enactment of the Competition Ordinance in 2012, which came into force in December 2015, itself followed years of consultation and resistance among industry and government. For a time, Hong Kong defended its pre-existing sector-specific model of competition control as responsive to the needs of its economy. Indeed, for some time, it was questioned whether there was a need for a general competition law in Hong Kong at all.

The constant efforts of the Consumer Council since the early 1990s have revealed the existence and consequences of anti-competitive conduct and monopolistic or oligopolistic market structures in Hong Kong. Furthermore, as Hong Kong transitioned into a service economy, there was a growing recognition that an open and free economy is not a guarantee of fair competition. It was recognised that in a market with high entry barriers, price-inelastic demand, limited product differentiation, predictable demand and market shares and vertical integration, anti-competitive behaviours would be possible, regardless of the size of the economy.

Over time, a changing economic structure has made Hong Kong a costly place for business, gradually eroding Hong Kong's competitiveness as a destination for investment and trading partners. Hong Kong felt increasing peer pressure from its neighbouring regions such as Singapore, Taiwan, South Korea, Japan and Mainland China. These factors gave impetus to the enactment of the Competition Ordinance.'

Hong Kong has come rather late to this game – how does Hong Kong's competition regime compare with the regimes of other jurisdictions and are there lessons to be learned from overseas experience?

'Hong Kong may be regarded as a relatively late adopter of competition law. Despite the introduction of competition law in other prominent Asian economies much earlier, including in Mainland China in 2007, it was not until 2012 with the passage of the Competition Ordinance that Hong Kong put competition law on a legislative footing across all economic sectors. Among the matters that appear important in considering the appropriate structure of competition law in Hong Kong are the relatively small size of the economy, the limited number of players in some industries, the prospects for trade with other countries and the relationship with other trade partners, particularly Mainland China.

The structure and content of Hong Kong's competition law is heavily influenced by the competition laws in other jurisdictions, principally the European Union (EU). Specific influences can also be inferred from the competition and anti-trust laws applicable in Australia, Malaysia and Singapore, the UK, the US and other jurisdictions. Most countries across the Asia-Pacific region have had legislation on competition law in place before Hong Kong.

The progression of competition law across Asia has created a complex regulatory environment for international businesses seeking to navigate the different systems, often with their local idiosyncrasies.'

Can we discuss the challenges faced by Hong Kong's Competition Commission, particularly in view of the fact that Hong Kong's competition law is still relatively new?

'The implementation of a new competition law requires a long-term investment in building awareness of the role of competition law and a tough approach to anti-competitive practices. The complexities of competition law and the introduction of unfamiliar technical concepts mean that the authorities and courts need to be equipped with the necessary legal, financial and economics skills to apply the law intelligently and effectively.

Hong Kong's Competition Commission has drawn from the experience in other jurisdictions and the EU when considering how similar issues have been treated in similar contexts. It is essential, however, to appreciate the limits of international comparisons.

Different policy objectives may apply. The First Conduct Rule and the Second Conduct Rule (which deal with restrictive agreements and abuse of substantial market power, respectively) contain substantively equivalent provisions to Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU). It can be expected that the Competition Commission and the Competition Tribunal will look to EU precedents for guidance on how similar concepts and issues have been approached by the European Commission and the EU Courts. Nevertheless, it is important to bear in mind that EU competition cases are often decided with internal market integration objectives in mind and that this EU policy does not have an equivalent in Hong Kong. On the other hand, it is likely that the question of the correct geographic scope of reference is going to be increasingly important when evaluating competition cases in

Hong Kong. Although Hong Kong is a compact territorial unit, that should not necessarily lead to a geographical market being confined to that territory.

Procedural rules may be assessed in their historical context. For example, Hong Kong has adopted a procedure whereby a party may apply to the Competition Commission for a decision as to whether or not the conduct in question is excluded or exempted from the First Conduct Rule. This resembles the early EU procedure whereby parties to an agreement could notify any agreement, decision or practice to the European Commission with an application for negative clearance, that is to say, a ruling that, on the basis of the facts in its possession, there were no grounds under Article 101(1) TFEU for action on its part in respect of the agreement, decision or practice. This possibility ceased, as a matter of EU law, in 2004 and was replaced by a self-assessment procedure.

It should not be overlooked, however, that the practices in the EU, the UK and the US have been developed after lengthy experience and drawing on insights from established competition regimes. In some circumstances, however, it may be more appropriate to seek guidance from the smaller Southeast Asian economies, such as Malaysia and Singapore, or Australia, where economic or legal conditions may be closer to those in Hong Kong.'

How do you think Hong Kong's competition regime will evolve in the future? In particular, do you expect Hong Kong to plug the rather glaring gaps you mentioned in your seminar – for example the limited merger control and the limitation of private actions for damages to follow-on actions after the Tribunal has ruled?

'Hong Kong does not have general merger control at present outside the telecommunications sector. Transactions that have, or are likely to have, the effect of substantially lessening competition in Hong Kong are prohibited. Merger control is voluntary in that there is no obligation to notify the Competition Commission of a transaction before or after its implementation. However, the Competition Commission may investigate a merger that falls within the scope of the Merger Rule so it may be advisable to discuss a relevant transaction with it. The need for industry-wide merger control is expected to be revisited in a few years.

Private actions based on infringement of the Competition Ordinance can only be brought after the Tribunal has ruled that there has been a violation following an application by the Competition Commission for the imposition of a fine or an order to stop the infringing practices.

This represents a significant limitation on the right of victims of anti-competitive activity to claim compensation for their losses. This is mitigated in part by the ability of the Tribunal on the application of the Competition Commission to make an order for damages payable to any person who has suffered loss or damage as a result of the anti-competitive conduct. However, the government is understood to be considering the need for a standalone competition law private action in the future. In principle, this right of action would be available regardless of whether the Competition Commission or the Tribunal has ruled on the matter.

It remains to be seen whether the current legal framework for private actions will achieve a proper balance between public and private enforcement. In this respect, the approach in Hong Kong goes against the general policy trend in this area internationally.'

What message would you have for businesses still unconvinced about the need to change behaviour?

'It sounds obvious, but from the outset it is important to know that what you are doing is legally compliant. Knowing what you can do without breaking the law, whatever your sector, is essential.

The Competition Commission has broad investigatory powers, including the power to require an undertaking to provide documents or information. It may also conduct unannounced inspections of premises ('dawn raids') under warrant.

The Competition Commission does not have the power to determine whether a breach of the substantive provisions of the Competition Ordinance has occurred. It may issue an infringement notice where it suspects that an undertaking has breached the First Conduct Rule involving serious anti-competitive conduct, and in other cases it is required to issue a warning notice affording the business an opportunity to admit the breach and enter into commitments to remedy its unlawful conduct. If the business does not enter into the commitments or the

breach is continuing, the Competition Commission may bring proceedings before the Tribunal.

A business or any person who is found by the Tribunal to be in violation of the Competition Ordinance may face a range of penalties including:

- a financial penalty of up to 10% of annual turnover 'obtained in Hong Kong' (based on the gross turnover of the undertaking(s) concerned for each year of infringement, up to a maximum of three years), and
- disqualification for up to five years from acting as a director or being directly or indirectly involved in the management of a company.

The Tribunal may impose a wide range of sanctions including:

- a declaration that an infringement of the Conduct Rules has occurred
- an order prohibiting a person from engaging in conduct that infringes the Conduct Rules
- an interim injunction pending determination of proceedings under the Conduct Rules
- an order for damages payable to any person who has suffered loss or damage as a result of the anti-competitive conduct, and
- disgorgement of illegal gains (or avoided losses) as a result of the anti-competitive conduct.

The Court may impose criminal sanctions for failure to cooperate with a Competition Commission investigation.

Do not forget that it may be possible to use an understanding of competition law to commercial advantage. A party harmed by a competition law infringement may have grounds to complain to the competition authorities and ask them to investigate the matter or to take other action. You may be able to stop the practice and obtain compensation.

Below are some areas where you may be able to use competition law to advantage in your dealings with companies who occupy and abuse a position of substantial market power:

- challenging aggressive discounting by a dominant supplier
- challenging excessive prices by a dominant supplier
- challenging an anti-competitive tie-in, and

- challenging a refusal to supply.'

What message would you have for company secretaries in terms of their role in promoting competition compliance?

'As part of its competition law "advocacy", the Competition Commission has already emphasised the importance of competition law compliance. The Competition Commission states on its website Frequently Asked Questions that: "Businesses are encouraged to take proactive steps to understand the Ordinance, identify risk areas and set up self-compliance programmes in time".

However, creating a "culture of compliance" can be challenging, especially where business practices that previously escaped legal sanctions become competition law infringements for the first time. Such practices (for example, bid rigging) may be endemic across an industry and embedded in accepted business culture and it can be difficult for old habits to die.

I often get questions from small businesses that show owners aren't paying enough attention to working within the law. For example, an entrepreneur might get in touch with a "quick query", which turns out to be "Can I cooperate with a competitor on a new business venture?" In fact, it can be quite an involved query, and an important one, which might take some time to resolve as the answer will usually be fact-specific in areas that do not concern serious anti-competitive conduct such as price fixing. You might be surprised to find out after the legal due diligence that what you are doing right now is legally compliant, but you will be much better placed to develop your business when you know the legal implications.

The following are some steps that businesses can usefully take now to address competition law risk.

- Review existing agreements and commercial practices for compliance with the First Conduct Rule and the Second Conduct Rule (and, where relevant the Telco Rule).
- Update and implement competition compliance programmes to take account of Hong Kong's competition regime.
- Parties who consider that they have been harmed by the anti-competitive practices of their suppliers, customers or competitors

should consider making a complaint to the Competition Commission, who may investigate the matter.

- Parties who consider that their arrangements have efficiency benefits may want to apply to the Competition Commission to determine the applicability of the exclusions or exemptions set out in the Competition Ordinance to a particular agreement or type of agreement.'

Suzanne Rab, Barrister, Serle Court Chambers, UK, advises on the development, implementation and application of new competition laws and regulatory regimes in line with international best practices. She is the editor of Hong Kong Competition Law (Hart/Bloomsbury, 2016). She delivered the Institute's ECPD seminar ('Competition Law in the EU, the UK and Hong Kong') in Hong Kong in March 2018 and will be leading the Comparative Competition Law Summer School at Brunel University London (which includes a course on the emerging competition regime in Hong Kong) starting in mid-June 2018. More information is available at: www.brunel.ac.uk

