HERBERT SMITH FREEHILLS

ASIA-PACIFIC COMPETITION LAW GUIDE

LEGAL GUIDE
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Contents

Introduction

Welcome to the fourth edition of the Herbert Smith Freehills Asia-Pacific Competition Law Guide. There have been a number of significant developments since the last edition, including amendments to the Australian, Thai and Indonesian competition law regimes, and the first cases brought before the Hong Kong Competition Tribunal, to name but a few.

As with the previous edition, the Guide covers jurisdictions in which Herbert Smith Freehills and its associated offices have an established presence, namely: Australia, Mainland China, Hong Kong, Indonesia, Japan, Singapore and Thailand. It is intended to provide clients, business people and lawyers with concise information on the competition law regimes, both antitrust and merger control, in these key jurisdictions across the region. The Guide also provides some commentary on the status of competition law in the increasingly active ASEAN member states of the Philippines, Malaysia, Myanmar, Vietnam and Laos.

The format of this Guide follows the format of existing Herbert Smith Freehills Guides with which you may be familiar.

We hope that the Guide will prove to be a useful resource. As always, we welcome any feedback from readers. Please contact me if you have any suggestions or comments.

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Hong Kong

1. Introduction

Overview of regime

1.1 What is the applicable competition legislation and who enforces it?

The Competition Ordinance (Chapter 619 of the Laws of Hong Kong) (the **Ordinance**) implements a cross-sector antitrust regime, and a merger control regime for the telecommunications sector in Hong Kong. The Ordinance was approved by the Legislative Council on 14 June 2012 and was fully implemented on 14 December 2015 (the "**Implementation Date**"). The Ordinance has many similarities to the EU, and in particular the UK, competition law regimes.

The Hong Kong Competition Commission (the **Commission**) is responsible for investigating alleged or potential infringements of the Ordinance and, if appropriate, initiating enforcement action. The Competition Tribunal (the **Tribunal**), comprising judges of Hong Kong's Court of First Instance (the **CFI**), will act as the adjudicative body for a number of applications and proceedings, including proceedings brought by the Commission alleging an infringement of the Ordinance. The Tribunal has wide-ranging powers to impose administrative, financial and other penalties for infringements.

Under the Ordinance, the Communications Authority (the **CA**) and the Commission exercise concurrent jurisdictions in relation to: (i) potential competition law infringements in the telecommunications and broadcasting sectors; and (ii) the regulation of mergers involving an undertaking that directly or indirectly holds or controls a "carrier licence" within the meaning of the Telecommunications Ordinance (Chapter 106 of the Laws of Hong Kong) (**Telecommunications Ordinance**). References to the Commission in the Ordinance are to be read as including the CA for these sectors.

On 27 July 2015, the Commission published six guidelines (the **Guidelines**) which set out how it proposes to interpret the Ordinance. These Guidelines cover both substantive matters (the First Conduct Rule, Second Conduct Rule, and Merger Rule), and procedural matters (complaints, investigations, and applications for exemption decisions) under the Ordinance.

1.2 What are the current enforcement priorities of the competition authority (in headline terms)?

On 19 November 2015, the Commission published its Enforcement Policy. This policy reiterated the Commission's focus on competition law compliance, and identified the following enforcement priorities: (i) cartel conduct; (ii) other First Conduct Rule contraventions; and (iii) exclusionary conduct under the Second Conduct Rule.

Definitions of the First Conduct Rule (**FCR**) and the Second Conduct Rule (**SCR**) can be found in sections 2.1 and 2.12 below respectively.

1.3 Is the protection and promotion of competition the only policy aim of the regime, or does the competition authority take into account other policies, such as industrial policy or the protection of national interests?

Given that the regime has been in effect for a relatively short time and the substantive hearings for the cases which have been brought before the Tribunal to date have not yet taken place (see section 5 "Hot topics and developments on the horizon" below), it is difficult to tell whether the protection and promotion of competition will be the only policy aim of the regime. The Ordinance itself does not suggest that other policy aims will be taken into account.

Notwithstanding this, the Ordinance sets out that the Chief Executive in Council (the **CE**) may give effect to two policy-type exemptions that could apply to arrangements or conduct that would otherwise infringe the Ordinance. The first is an exemption on public policy grounds; the second is an exemption to avoid conflict with international obligations.

2. Antitrust

Anti-competitive agreements: cartels and other horizontal arrangements between competitors

2.1 What is the substantive law applicable to horizontal arrangements?

Following the Implementation Date of the Ordinance, restrictive agreements and practices (whether horizontal or vertical) are regulated by the FCR at Section 6 of the Ordinance, which is a cross-sector rule prohibiting agreements, concerted practices, or decisions of associations that have the object or effect of preventing, restricting or distorting competition in Hong Kong.

The FCR covers both formal and informal agreements, and concerted practices. The term "agreement" is widely defined in the Ordinance and includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings.

The Commission published its Guideline on the FCR in July 2015. The Guideline states that a concerted practice may exist where there is cooperation between competitors, falling short of an agreement, where the parties knowingly substitute practical cooperation for the risks of competition. Competitors are precluded from direct or indirect contact where the object or effect of that contact is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question.

2.2 What types of arrangement are prohibited?

All arrangements which have the object or effect of preventing, restricting or distorting competition in Hong Kong are prohibited under the Ordinance. Where an agreement has an anti-competitive object, it is not necessary for the Commission to prove that the agreement has an anti-competitive effect.

Under the Ordinance, certain infringements by object can also be deemed "Serious Anti-competitive Conduct" (**SACC**). The Commission's Guideline on the FCR makes it clear that SACC involves conduct or practices that are "*inherently harmful to competition and are universally condemned*". SACC is conduct that involves any of the following:

- price fixing;
- market sharing;
- output limitation; and
- bid-rigging.

The implications of an agreement constituting SACC are:

- the general exclusion for "Agreements of Lesser Significance" does not apply (see section 2.3 below); and
- the Commission may institute proceedings directly before the Tribunal without issuing a "Warning Notice" to the undertakings involved in the conduct (see section 3.3 below).

2.3 Are there any applicable exemptions or defences?

The Ordinance provides for a number of exclusions and exemptions from the FCR. In order to benefit from such an exclusion/exemption, there is no requirement to make a notification/application to the Commission. However, undertakings may apply to the Commission for a decision to the effect that an agreement is excluded/exempted from the FCR (Section 9 of the Ordinance). The Commission is only required to consider such application if:

- it poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions;
- it raises a question for which there is no clarification in existing case law or Commission decisions; and
- it is possible to make a decision on the basis of the information provided.

The following exclusions to the FCR are available under the Ordinance:

- agreements enhancing overall economic efficiency;
- agreements entered into for the purposes of compliance with legal requirements (the Guideline on the First Conduct Rule states that the requirements must eliminate any margin of autonomy on the part of the undertaking concerned);
- an undertaking entrusted by the Government with the operation of services of general economic interest in so far as the First Conduct Rule would obstruct the performance of any assigned tasks;
- agreements that result in a merger; and
- *de minimis* agreements, i.e. Agreements of Lesser Significance. These are agreements or practices between or engaged in by undertakings, or decisions of an association of undertakings whose combined annual worldwide turnover does not exceed HKD 200 million (the exclusion does not apply where the arrangements involve SACC.

In terms of exemptions, the following bodies/persons are exempted from the FCR:

- statutory bodies other than those specified in a regulation by the CE; and
- persons specified or persons engaged in activities specified in a regulation by the CE.

Arrangements exempted from the FCR include:

- agreements or categories of conduct that are exempted by an order published in the Gazette by the CE either on public policy grounds or to avoid conflict with international obligations; and
- categories of agreement in respect of which the Commission has granted a block exemption order.

The Commission may issue a block exemption order if it is satisfied that a particular category of agreement enhances overall economic efficiency. Such orders may be made either on the Commission's own initiative or on application by an undertaking or an association of undertakings. The Commission indicates in its Guideline on the FCR that the issue of a sector-specific block exemption will be viewed as an 'exceptional measure'. To date, the Commission has issued only one such order, being a block exemption order in relation to vessel sharing arrangements by liner shippers. It should be noted that the application for this block exemption order also extended to a further class of agreements, so called 'vessel discussion agreements', which was rejected by the Commission.

Notably, the Commission has stated in an announcement dated 28 October 2015 that it may, in specific cases and subject to certain conditions, indicate to block exemption order applicants that it would be unlikely to initiate enforcement action in respect of conduct or arrangements already existing at the date of full commencement of the Ordinance while it is considering an application in respect of that conduct or the relevant arrangements. Further, when refusing to grant the block exemption order in relation to vessel discussion agreements, the Commission implemented a 6 month grace period from enforcement under transitional measures.

Singapore

1. Introduction

Overview of regime

1.1 What is the applicable competition legislation and who enforces it?

The legislation

The principal piece of competition legislation in Singapore is the Competition Act 2004 (Cap 50B) (the **Competition Act**), which came into force in stages from 1 January 2005 and is intended to protect consumers and businesses from the anti-competitive practices of private entities. The Competition Act is largely modelled on the equivalent UK legislation.

The Competition Act is supplemented by various regulations and orders, issued by the Minister of Trade and Industry (**MTI**) and/or the Competition Commission of Singapore (the **CCS**) – the regulatory body established on 1 January 2005 by the Competition Act. There are currently six regulations and two orders in force dealing with, amongst other things, fees, appeals and exemptions. In addition to the regulations and orders, the CCS has also issued various detailed guidelines (**Guidelines**), intended to "*outline how CCS will administer and enforce the provisions under the [Competition] Act*", and which provide a useful and detailed indication of how the CCS will interpret the legislation in carrying out its duties and exercising its powers. Following a comprehensive review and a public consultation on proposed changes, the CCS published a revised set of Guidelines which took effect on 1 December 2016. Taking into account 10 years of experience by the CCS and international best practice, this was the first major revision since the original Guidelines were published in 2007. Notably, the revised Guidelines contain:

- a new Fast Track Procedure for shorter and faster investigation process;
- more clarity and guidance on how the CCS will calculate financial penalties; and
- simplified processes to increase efficiency and save time for businesses.

These Guidelines have been referred to and drawn on throughout this chapter.

The regulatory bodies

The CCS is responsible for administering and enforcing the provisions of the Competition Act. It has the power to investigate, prosecute, judge and enforce decisions in competition investigations.

Section 72 of the Competition Act established the Competition Appeal Board (the **CAB**) – an independent body made up of members appointed by the MTI – as the body with exclusive jurisdiction to hear appeals against the decisions of the CCS. It is a specialist tribunal, modelled on the UK's Competition Appeal Tribunal and intended to provide the necessary checks and balances in a system where the CCS holds extremely broad powers. The CAB similarly has broad powers, enabling it to confirm or set aside all or part of a CCS decision; remit a matter to the CCS for reconsideration; repeal or vary the amount of a penalty; give any direction, take any other step or make any other decision which the CCS itself could have made.

The MTI (under whose ministry the administration of the Competition Act falls) also has various powers under the Competition Act, including: issuing Block Exemption Orders (see section 2.3 below); excluding a specific category of agreements from the application of the provision of the Competition Act prohibiting anti-competitive agreements; and the exclusive power to exempt a merger from the statutory prohibition on public interest grounds.

1.2 What are the current enforcement priorities of the competition authority (in headline terms)?

In general, the role of the CCS is to maintain and enhance efficient market conduct, promoting overall productivity. In doing so, it focuses on enforcing the three key prohibitions under the Competition Act, being:

- the prohibition against agreements, decisions and practices which prevent, restrict or distort competition under section 34 of the Competition Act (the **Section 34 Prohibition**);
- the prohibition against abuse of a dominant position under section 47 of the Competition Act (the **Section 47 Prohibition**); and
- the prohibition against mergers and acquisitions that substantially lessen competition under section 54 of the Competition Act (the **Section 54 Prohibition**).

The CCS has confirmed that it is likely to impose the most severe financial penalties in cartel cases (such as price fixing, market sharing and bid rigging) and also abuses of dominance, since it considers these to be among the most serious examples of infringements of competition law.

1.3 Is the protection and promotion of competition the only policy aim of the regime, or does the competition authority take into account other policies, such as industrial policy or the protection of national interests?

The CCS also advises the Singapore Government and other public authorities on national policies on competition-related matters and acts internationally as Singapore's representative body with regard to such matters.

The CCS takes account of the impact that regulatory intervention can have on markets and thus seeks to balance regulatory and business compliance costs against the benefits from effective competition. The CCS will therefore give due consideration when considering intervention as to whether its action will promote innovation, productivity, or longer-term economic efficiency.

The Third Schedule of the Competition Act also lists exclusions to the Section 34 Prohibition and Section 47 Prohibition. These are wide enough to include activities relating to national security, defence and other strategic interests.

2. Antitrust

Anti-competitive agreements: cartels and other horizontal arrangements between competitors

2.1 What is the substantive law applicable to horizontal arrangements?

Section 34 of the Competition Act came into effect on 1 January 2006. It prohibits:

- agreements between undertakings;
- decisions by associations of undertakings; or
- concerted practices,

which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they fall under one of the exemptions, Block Exemptions or exclusions (see section 2.3 "Are there any applicable exemptions or defences?" below). The Section 34 Prohibition has extra-territorial application and will, therefore, cover agreements entered into outside Singapore and/or by one or more parties that are outside Singapore.

The CSS has specifically clarified that the words "object" and "effect" within the Section 34 Prohibition are alternative, not cumulative, requirements. Once it has been established that an agreement has as its object the appreciable restriction of competition, the CCS need not go further to demonstrate anti-competitive *effects*. On the other hand, if an agreement is not restrictive of competition by object, the CCS will examine whether it has appreciable adverse effects on competition.

The assessment of whether the "object" of an agreement is the restriction of competition is based on a number of factors, including:

- the content of the agreement and the objective aims pursued by it;
- the context in which the agreement is (to be) applied; and
- the actual conduct and behaviour of the parties on the relevant market(s).

In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.

Prohibited agreements, decisions or concerted practices include, amongst other things: price fixing, bid rigging, market sharing or output limitations.

"Agreement" has a similarly broad meaning in this context and includes both legally binding and non-binding agreements, whether written or verbal. An agreement may be reached by any means (physical meeting, exchange of letters, telephone calls etc.) – all that is required is that the parties arrive at a consensus on the actions they will, or will not, take.

The Section 34 Prohibition applies equally to agreements and "concerted practices" (section 34(1) of the Competition Act). The Guidelines explain that concerted practices differ from agreements in that they may exist where there is only informal co-operation. There need not be any official agreement or decision.

"Undertaking" has a wide meaning and encompasses any person including individuals, bodies corporate, unincorporated bodies of persons, or any other entity capable of carrying on commercial or economic activities.

2.2 What types of arrangement are prohibited?

A non-exhaustive list of the various types of agreements which might appreciably adversely affect competition is set out by the CCS, as follows:

- directly or indirectly fixing prices;
- bid-rigging (collusive tendering);
- sharing markets;
- limiting or controlling production or investment;
- fixing trading conditions;
- joint purchasing or selling;
- sharing information;
- exchanging price information;
- exchanging non-price information;
- restricting advertising; and
- setting technical or design standards.

The factors considered in determining whether an agreement has an appreciable effect include the market shares of the parties to the agreement; the content of the agreement; the structure of the market affected by the agreement, such as entry conditions or the characteristics of buyers; and the structure of the buyers' side of the market.

However, the Guidelines confirm that the first four of the examples above (i.e. price-fixing, bid-rigging, sharing markets, and limiting or

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