truly allows the Chief Executive in Council to *exempt* anyone from the most important sections of the Ordinance.

4.002 This level of political intervention, with the clarity and the frankness of s.4, is rarely seen in modern jurisdictions. Applications for block exemptions, or exemptions for particular conducts or agreements, are common and are also found in the Ordinance. In the case of Hong Kong, the Chief Executive in Council does not intervene in applications for block exemptions or individual exemptions (individual applications are discussed at s.9, and applications for Block Exemption Orders are discussed at s.15). In Singapore, for instance, the government may, in the "public interest", intervene in merger applications and effectively clear a merger despite the Competition and Consumer Commission of Singapore's (CCCS) opinion that a merger would be anti-competitive.[20] In Hong Kong, under the securities regulation regime, the Chief Executive in Council can hear appeals against certain decisions by the Securities and Futures Commission (SFC).[21] This shows that the level of intervention provided for in s.4 of the Ordinance is not unusual in Hong Kong. Nonetheless, this unprecedented (by international standards) level of displacement of the scope of the law results in a sharp reduction of the effectiveness of the Hong Kong competition regime, as well as a reduction in the independence of the Competition Commission.

5. Regulations

(1) The Chief Executive in Council may, by regulation—

(a) apply the provisions referred to in section 3(1) to—

(i) any statutory body; or

(ii) any statutory body, to the extent that it is engaged in an activity specified in the regulation; and

(b) disapply the provisions referred to in section 3(1) to—

(i) any person; or

(ii) any person, to the extent that the person is engaged in an activity specified in the regulation.

(2) The Chief Executive in Council may only make a regulation under subsection (1)(a)(i) or (ii) with respect to a statutory body if he or she is satisfied that—

(a) the statutory body is engaging in an economic activity in direct competition with another undertaking;

[20] Singapore Competition Act 2004 (Cap.50B) s.57.

[21] Securities and Futures Ordinance (Cap.571) (SFO) s.33.

(b) the economic activity of the statutory body is affecting the economic efficiency of a specific market;

(c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and

(d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

(3) In subsection (1), a reference to a statutory body or a person includes an employee or agent of the statutory body or person, acting in that capacity.

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5.001 Section 5 gives the Chief Executive in Council the power to either re-impose the provisions listed at s.3(1) onto specified statutory bodies exempt under the previous section.

5.002 The Chief Executive in Council reapplied the key provisions of the Competition Ordinance to six statutory bodies, through the Competition (application of provisions) reg.619C, and exempted seven persons from the same provisions, through the Competition (application of provisions) reg.619B.

5.003 Section 5 imposes four cumulative conditions on the Chief Executive in Council before it can re-impose the competition provisions on an exempt statutory body. The statutory body must be engaged in an economic activity, and this activity must be affecting the economic efficiency of a specific market, whilst not being directly related to the provision of an essential public service or the implementation of public policy. Finally, there must be no other exceptional and compelling reason of public policy against re-applying the provisions to this statutory body. These restrictions are a testament of the Legislature's intent to ensure that statutory bodies remain, as much as possible, exempt from the bulk of the Ordinance.

5.004 The restrictions of s.5(2) also seem to indicate that the Chief Executive in Council must, prior to re-applying the competition provisions, conduct a genuine, if no thorough, legal analysis. However, the process has shown to be entirely non-transparent, and to arrive at questionable results. Non-transparent, as there has been no publication of the Chief Executive in Council's deliberations, little public explanation or summary of the authority's reasoning to re-apply the provisions to six statutory bodies, nor any evidence or hint that any analysis has been conducted. Predictably,

the results are surprising: a list of six statutory bodies which seemingly lacks logic. The Matilda International Hospital, for instance, is subject to the competition provisions of the law, but the Tung Wah Group of Hospitals is not. The Tung Wah Group of Hospitals, also a statutory body, is arguably a much larger economic player on the market for medical services. The rest of the list does not make a lot more sense: the "Kadoorie Farm and Botanic Garden Corporation" is a conservation and education centre based in the New Territories. It is unclear what market the Kadoorie Farm is involved in. This perhaps demonstrates that the Chief Executive in Council may not have followed the restrictions of s.5(2) — which would have required a market analysis. The same remark applies to "The Helena May", a relatively small club for women established in 1916. The Helena May is certainly active in some market, as it organises classes, lectures and recreational activities. But it is difficult to see how it represents more of a threat for competition in any of these markets than the hundreds of statutory bodies still exempt from the law. The inclusion of the Ocean Park Corporation (a large theme park on Hong Kong Island) and of two organisations linked to the Hong Kong Federation of Industries (an industrial lobby) make more sense: these bodies are active on a high number of markets, and arguably have sufficient market power or opportunities to impact these markets. The inclusion of these three statutory bodies in the scope of the law show that the Chief Executive in Council is able to identify which organisations should be subject to the law — however this effort is insufficient, and marred by a serious lack of transparency.

5.005 More importantly and more surprisingly, s.5 also enables the Chief Executive in Council to disapply the same provisions to any person. In effect, this means that the Executive branch can, without any form of debate or check, exempt any entity from the remit of the law. This is exceptional, and almost appears as a loophole when considering where in the law this exceptional power is found (in a provision enabling the Executive to restrict the large exemption granted to statutory bodies). Where ss.3 and 4 appear to be focussed on statutory bodies, the inclusion by the Legislature of a wide and unchecked power to exempt any person under s.5 seems out of place, and of course out of measure with the other powers of the Executive under the Ordinance.

5.006 Before the law came into force, seven persons were exempted by regulation under s.5, namely the Stock Exchange of Hong Kong Limited, Hong Kong Futures Exchange Limited, Hong Kong Securities Clearing Company Limited, HKFE Clearing Corporation Limited, the SEHK Options Clearing House Limited, OTC Clearing Hong Kong Limited, and Hong Kong

Exchanges and Clearing Limited. These seven entities effectively make up what is generally referred as the "Hong Kong Stock Exchange". In terms of persons exempted under sub-s.(2), the list is shorter, more logical, and the process followed by the authority is more transparent and thorough than the re-application of provisions to some statutory bodies under sub-s.(1). This is surprising, considering that the Chief Executive in Council did not have, under sub-s.(2), to justify its decision to exempt persons, let alone to give the Legislative Council an opportunity to discuss it. Following an application by the Hong Kong Stock Exchange, the Chief Executive in Council disapplied the key provisions of the Ordinance to the seven entities listed above. In a paper submitted to LegCo for discussion on the regulation made under s.5, the Administration explained that it "considers that it is in the public interest for the key provisions of the CO to be disapplied to seven non-statutory bodies."[22] The LegCo paper details the Administration's reasoning for exempting the Stock Exchange. In short, the government considers that these bodies are already required by law to act in the public's interest, "and must, in discharging their duties, ensure that the interest of the public prevails where it conflicts with their own interest".[23] The LegCo paper goes on to describe the various ways these bodies are regulated under the SFO, and the numerous objectives of the regulatory regime in place. This litany of rules does not bear an obvious link to the need to exempt these persons from competition rules. Overall, the government's argument in favour of an exemption is that the regulation of the Stock Exchange under the SFO should continue and that their exemption "will ensure this and prevent any regulatory ambiguity that might otherwise arise as a result of their activities being subject to regulation under both the SFO and the [Competition Ordinance]."[24] The paper adds that the SFC is "establishing a regular dialogue with the Competition Commission to discuss competition matters relating to [the Stock Exchange]."[25] There are relatively few lessons to be drawn from the exemption granted to the Stock Exchange. First, the process is more transparent and seemingly more the result of a reasoning on the part of the government than for the application of provisions to otherwise exempted statutory bodies. The same LegCo paper merely mentions that the government has decided to include the six above-mentioned statutory bodies in the scope of the law "on the ground that they meet the criteria

[22] Commerce and Economic Development Bureau, Legislative Council Brief, the Competition Ordinance, Competition (Application of Provisions) Regulation, Competition (Disapplication of Provisions) Regulation, File Ref.: CITB CR 05/62/25/14, 16 February 2015, available at: <https://www.legco.gov.hk/yr14-15/english/subleg/brief/36_37_brf.pdf>.

[23] *Ibid.*, para.7.

[24] *Ibid.*, para.10.

[25] *Ibid.*

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"qualitative".[158] On the other hand, minimum turnover requirements are quantitative, and fall outside of the safe harbour for selective distribution systems.[159]

The concept of "single overall agreement"

6.095 Cartel activity is not linear and is rarely simple. A cartel can last several years, evolve, accept new members whilst others merge, disappear, exit the market (on their own or as part of the cartel activity in question). A large part of the agreements between the relevant firms may be unwritten, their contours and scope shrouded in secrecy and convenient vagueness.

6.096 If it was not possible to simplify the relevant practices, the regulators or the courts would have to assess every single separate element of the practice individually, perhaps in separate investigations, and possibly with the imposition of several, relatively small fines. This, the ECJ said, would "would lead to an artificial fragmentation of comprehensive anti-competitive conduct, capable of affecting the market structure [...], into a collection of separate forms of conduct."[160] Enforcers and the courts in Europe have resolved to find a "single overall agreement" encompassing several practices, arrangements and agreements which took place over a certain period of time.

6.097 In fact, when the European Commission finds a single overall agreement, it is bound to find so.[161] In one occasion, the enforcer's findings were overturned on appeal, when the court found that the European Commission had not clearly established whether the parties to the alleged cartel activity were engaged in a single overall agreement, or in several cartels.[162] The European Commission is required to make such finding, even where the classification of the conduct as a single overall agreement would have been more severe for the undertaking.[163]

[158] *Grundig* OJ [1985] L 233/1.

[159] Case T-19/92 *Groupement d'Achat Edouard Leclerc v European Commission* EU:T:1996:160, [148]. It should be noted here, however, that although a minimum turnover requirement will probably fail to be qualified as "quantitative", it may still form part of a distribution scheme which generates economic efficiencies, mostly because it allows the supplier to concentrate its distribution effort onto distributors most likely to drive up demand for its products. This was recognised by the European regulator in the decision which was then appealed in the above case: *Yves St Laurent* OJ [1992] L 12/24.

[160] Case C-413/14 P *Intel Corp v European Commission* EU:C:2017:632, [57]. The ECJ's comment is made in relation to unilateral conduct and to the single overall agreement's equivalent, the concept of single and continuous abuse. For a discussion of the single and continuous abuse concept, see s.21.

[161] Cases T-373/10 *etc Villeroy & Boch Austria GmbH v European Commission* EU:T:2013:433, [36].

[162] Case T-62/11 *Martinair v European Commission* EU:T:2015:984.

[163] Cases T-373/10 *etc Villeroy & Boch Austria GmbH v European Commission* EU:T:2013:433, [36].

6.098 The concept of a single overall agreement is a double-edged sword: on the one hand, the regulator needs the concept to capture conduct which is too old[164] or too complex to be divided into separate agreements. Once established, a single overall agreement means that all undertakings are responsible for the entire cartel — regardless of whether they attended all meetings or participated in all decisions made by the cartel.

6.099 In terms of fines, the European regulator can only impose one fine, one all participants to a single overall infringement — but this fine may be higher than it would have been without a finding of a single overall agreement, since the time period taken into account may be longer than for a single infringement as a result of taking into account events which would otherwise be time-barred.[165] Damages may also be affected, as the General Court found that all participants are jointly and severally liable for all damages.[166]

6.100 On the other hand, if the regulator fails to identify a single overall agreement when it is bound to, it may lose on appeal.

6.101 The General Court set three cumulative conditions for the finding of a single overall agreement. First, the regulator must find that the cartel participants has an overall place to pursue a common objective. Second, the undertakings participated intentionally into the plan. Third, the participant must be aware that the other participants are participating in the offensive conduct. This third part can be either proved or presumed.[167]

6.102 In its guidelines, the regulator indicated that "it is not necessary to show that an undertaking participated in or agreed to each and every aspect of an anti-competitive agreement for the undertaking to be held responsible for the agreement as a whole."[168]

7. "Object" and "effect" of agreement

(1) If an agreement, concerted practice or decision has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.

(2) An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted

[164] *Vitamins* OJ [2003] L 6/1, [645]–[649].

[165] *Ibid.*

[166] Cases T-373/10 *etc Villeroy & Boch Austria GmbH v European Commission* EU:T:2013:433, [57].

[167] Case T-204/08 *International removal services* EU:T:2011:286, [37].

[168] First Conduct Rule Guideline, para.2.26.

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practice that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.

(3) If an agreement, concerted practice or decision has more than one effect, it has the effect of preventing, restricting or distorting competition under this Ordinance if one of its effects is to prevent, restrict or distort competition.

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7.001 The Competition Commission's view is that it must prove at the Competition Tribunal that an agreement has either an anti-competitive object or an anti-competitive effect. It adds that "[w]here an agreement has an anti-competitive object, it is not necessary for the Commission to also demonstrate that the agreement has an anti-competitive effect."[169] In negative, to prove that an agreement has an anti-competitive effect, the regulator must do exactly this: establish, at the Competition Tribunal, that competition is harmed, and that the harm can be traced back to the agreement, concerted practice or decision of an association subject to the proceedings.

7.002 So far this is uncontroversial. In *Competition Commission v Nutanix Hong Kong Ltd (No 3),* the Competition Tribunal confirmed that "[i]t is common ground that an anti-competitive object and an anti-competitive effect are alternative conditions in determining whether certain conduct is prohibited by the first conduct rule".[170] This follows the European case-law: in the long-established ruling *Societé Technique Minière v Maschienebau Ulm*, the court confirmed that where it is established that an agreement is anti-competitive by object, it is unnecessary to look at its effects.[171]

7.003 The concept of *object/effect* comes from the language of the European treaties,[172] and has been one of the most hotly debated topics in competition law, with few signs of abating.

7.004 The discussion in Europe, in the United States and in other jurisdictions, will doubtlessly spill over in Hong Kong, The questions raised over the past 60 years of case-law can broadly be put into categories:

[169] *Ibid.*, para.3.2.
[170] [2019] 3 HKC 307, [35], citing Case C-56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38, [249].
[171] Case 56/65 EU:C:1966:38.
[172] TFEU, art.101(1).

7.005 First, what makes an agreement or practice anti-competitive "by object", as opposed to "by effect", or not at all? Is an agreement anti-competitive by object because the law the guidelines say so, or is it "by object" because of its perceived severity, or even because the terms of the deal or the behaviour of the parties themselves point at an anti-competitive intent — either objectively or subjectively?

7.006 Second, in the case of the "by effect" category, how far must the regulator go when demonstrating an anti-competitive effect? Is a hypothetical effect sufficient? What economic evidence is required? Are some economic effects so obvious that a mere qualitative explanation suffices?

7.007 A third, less fundamental question concerns the application of the concept of object and effect to the Second Conduct Rule.

7.008 The Competition Commission's First Conduct Rule Guideline brings clarity and answers the first set of questions. For the second set of questions, in turn, it is necessary to rely on the European case-law.

The hesitations of the case-law with regards to how serious should objects contraventions be

7.009 The guidelines first outline the reason behind the classification of some agreements and conducts as "object": these are "object" because they are "so harmful to the proper functioning of normal competition in the market that there is no need to examine their effects".[173] The regulator then goes on to explain how to determine whether an agreement is sufficiently harmful. This is made of three elements: "the content of the agreement, the way it is implemented and its context (including both the economic and legal context)".[174] Further, the objective aims of the agreement "refers to the purpose or aim of the agreement viewed in its context and in light of the way it is implemented".[175] Importantly, the regulator did not reject the subjective intent of the parties as a relevant factor, but simply clarified that the regulator will not look merely at this single element.[176] In *Competition Commission v Nutanix Hong Kong Ltd (No 3),* the Competition Tribunal noted that "[a]greements can be restrictive of competition by object even if the parties are able to show that restricting competition was not their aim or primary aim, or that they had other laudable motives".[177]

[173] First Conduct Rule Guideline, para.3.3.
[174] *Ibid.*, para.3.4.
[175] *Ibid.*, para.3.4.
[176] *Ibid.*, para.3.4.
[177] [2019] 3 HKC 307, [431], citing Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* EU:C:2008:643.

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21.038 Market power exists, according to the regulator, "where an undertaking does not face sufficiently effective competitive constraints in the relevant market".[279] This can mean pressure from inside the market, or from outside the market. An undertaking's ability to raise prices above competitive prices, which the regulator considers is the clearest sign of an undertaking having market power, is not restricted to prices. It can manifest itself through an ability to affect quality, range of products, customer service, innovation, or "any other parameter of competition in the market".[280] Finally, a buyer can also have market power as a buyer of products, a situation referred to as a "monopsony". In this case, market power manifest itself in the below-competitive prices which a buyer is able to secure. An undertaking may be found to have a substantial degree of market power even if it faces *some* constraints: the guidelines make clear that it is not necessary for an undertaking to be entirely free to act, as a real monopoly would be. Instead, the test for the regulator is whether an undertaking lacks a "sufficiently effective constraint".[281]

21.039 The second reason why market shares are an insufficient factor to determine market power is that "a high market share does not necessarily imply a substantial degree of market power".[282] Market shares are an important factor for the Commission Commission's assessment of market power. However, this factor is neither necessary not sufficient to establish a substantial degree of market power. For instance, very low barriers to entry into an industry, or a very strong countervailing buyer power, could mean that an undertaking is unable to exercise market power — even if it has consistently high market shares. Therefore, the regulator will not look solely at market shares, but will look at a range of additional factors, in order to determine whether an undertaking has market power. This in effect recognises that market shares is an inherently limited and imperfect metric. For example, market shares alone do not capture the fact that potential entrants may be eyeing the market, or that the rest of the market may be made of a small number of equally strong or even stronger competitors (*ie* a very concentrated market).

21.040 Having said that, market shares remain a useful indicator of an undertaking's position, and although it needs to be completed with other, often market-related metrics, market shares are a good starting point to a market power analysis. The absence of a market share threshold means that there is no "safe harbour" or "de minimis" level below which undertakings are safe from the Second Conduct Rule. In Europe, for instance, the European Commission takes the view that "low market shares are generally a good proxy for the

[279] *Ibid.*, para.3.2.
[280] *Ibid.*, para.1.7.
[281] *Ibid.*, para.3.28.
[282] *Ibid.*, para.3.10.

absence of substantial market power. The European Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market."[283] In Singapore, the regulator "will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. However, this starting point does not preclude dominance being established at a lower market share."[284] If anything, the Hong Kong regulator may be able to rely on the government's statement during the debates over the drafting of the Competition Bill, during which it was mentioned that in a market with four participants, in which each participant has a 25% market share, it would be possible for all of them to be subject to the Second Conduct Rule.[285] The Hong Kong regulator clearly contemplates in its guidelines "the possibility of more than one undertaking having a substantial degree of market power in a relevant market, particularly if the market is highly concentrated with only a few large market participants".[286] There are several ways to express and calculate market shares. In general, competition authorities accept market shares as calculated by reference to sales by volume and sales by value — particularly in the case of homogenous products (*ie* when products cannot be distinguished from the products of competitors in a meaningful way). In the alternative, market shares may also be expressed as an undertaking's capacity to supply (*ie* a share of the market's supply), especially in markets characterised by capacity requirements (*ie* markets in which firms determine in advance how much of a product their need to produce). Finally, in certain cases, the share of customers may be the relevant unit in which to express market shares. This is the case for instance in the air passenger market, where market shares are often based on the number of seats controlled by an airline between two cities.[287]

21.041 Bidding markets represent a particular situation, where the traditional markers of market power may not be effective in evaluating the respective position of bidders. In general, the less frequent the tenders, the more competitive the process is, especially if potential bidders are not subject to capacity constraints. As a result, high market shares are less likely to indicate a substantial degree of market power — since all potential bidders are likely to participate in all call for tenders. The guidelines mention a number of

[283] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), para.14.
[284] Competition and Consumer Commission of Singapore, *Guidelines on the Section 47 Prohibition* (2016), para.3.8.
[285] Secretary for Commerce and Economic Development's concluding speech for the resumption of the Second Reading debate of the Competition Bill (6 June 2012, p.14610).
[286] Second Conduct Rule Guideline, para.3.3.
[287] See for instance, Competition Commission of Singapore, "Proposed conduct between Qantas Airways Limited and Emirates in relation to their Coordination Agreement", CCS/400/006/12, 12 October 2012, paras.40–48.

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factors which the regulator will take into account to assess market power, including the number of participants, whether it was possible to predict who the winning bidder was, and the tender factors such as price and innovation.[288]

21.042 Another marker of market power is vertical integration, particularly when vertically integrated firms are competing against non-integrated firms. Vertically integrated firms benefit from a number of advantages, including the commercial stability that comes with the ability to serve its own downstream needs. For instance, a group active in the real estate development market, with a presence in the building management and the facilities maintenance sector can easily align its services, margins and capacity so that its building management and facilities maintenance businesses are selected to serve the properties put on the market by its development arm. In this example, the vertically integrated group can also use its downstream activities to contain its competitors in the building management and facilities maintenance sectors, by outbidding them on external projects and putting pressure on their fee structure — thus preventing other providers of such services from acquiring a substantial degree of market power.[289] Vertically integrated firms which are part of conglomerates (groups active in multiple, diversified sectors) also benefit from economies of scale and scope, risk sharing, sharing of group goodwill, and an easier access to capital, both internal and external.[290]

21.043 In Europe, the court confirmed that an undertaking's large network of commercial representatives, and its wide range of products, were valid relevant factors in the enforcer's finding that a tyre manufacturer was dominant.[291]

21.044 Temporary unprofitability, or temporary losses, are not incompatible with a finding of dominance.[292]

21.045 Finally, some markets are characterised by capacity constraints, meaning that sellers only have a limited number of goods to sell, or that they can only serve a limited number of customers over a certain period. Restaurants for instance face a strong capacity constraint (space) as they can only serve a certain number of customers per lunch or dinner period. A private clinic is another example, where another constraint (time) forces doctors to see only a certain number of patients per day. These constraints prevent existing players from reacting

[288] Second Conduct Rule Guideline, para.3.34.
[289] *Ibid.*, para.3.35.
[290] Thomas K. Cheng, *Sherman v Goliath?: Tackling the Conglomerate Dominance Problem in Emerging and Small Economies—Hong Kong as a Case Study*, 37 *Northwestern Journal of International Law and Business*, 35 (2017).
[291] Case 322/81 *Michelin v European Commission* EU:C:1983:313, [58].
[292] *Ibid.*, [59].

to the exercise of market power of one of their competitors: it is not possible for a hotel which is already at capacity to increase its number of rooms. In these cases, the regulator will be forced to recognise that it is not possible for other players to react by increasing capacity, and therefore an incumbent with a strong degree of market power may easily be able to act independently from other players.[293]

21.046 In Europe, the Court of Justice has found several times that an undertaking's conduct could be taken into account to decide whether it is dominant.[294] For instance, the fact that a supplier is able to price-discriminate may be a sign of market power.[295]

Dominance under European law may equate the concept of substantial degree of market power under Section 21

21.047 A large number of comments focused on the supposed difference between dominance under European law, and Hong Kong's substantial degree of market power. However, European rules sometimes refer to degrees of competitive constraints to explain the notion of "independence" found in the *United Brands* judgment.[296]

21.048 The notion of dominance can therefore be explained as the legal version of the economic concept of substantial degree of market power.

21.049 On this basis, the European case-law, which creates a presumption of dominance for an undertaking with a 50% market share, may be relevant in Hong Kong.[297] In any event, this needs to be counterbalanced by the instances where undertakings were found to be dominant, with a market share below that threshold. This was so in *United Brands v European Commission*,[298] and importantly in *Virgin/British Airways* case, with a market share below 40%.[299]

21.050 Importantly, in Europe as in Hong Kong, the notions of dominance and of substantial degree of market power are binary: a firm either falls, or does not fall, within this category.

[293] Second Conduct Rule Guideline, para.3.36.
[294] Case 26/27 *United Brands v European Commission* EU:C:1978:22, [67]–[68].
[295] Case 322/81 *Michelin v European Commission* EU:C:1983:313.
[296] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), para.10.
[297] Case C-62/86 *AKZO v European Commission* EU:C:1991:286, [60].
[298] Case 26/27 EU:C:1978:22.
[299] OJ [2000] L 30/1.

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A finding of dominance is not binding on subsequent courts

21.051 In Europe, where the regulator or the courts are addressing a case featuring an undertaking that has been found to be dominant in a previous case, they must re-assess this undertaking's market power.[300]

The fact that an undertaking has a substantial degree of market power does not constitute a contravention of the Second Conduct Rule

21.052 A finding of a contravention of the Second Conduct Rule is twofold: once it is established that an undertaking has a substantial degree of market power in a market, the regulator must prove that this undertaking *abused* its market power.[301]

21.053 Another way of thinking about this is that the Second Conduct Rule creates a special category of responsibilities for undertakings with a substantial degree of market power.

21.054 The market strength of an undertaking is relevant to the assessment of the effect of that undertaking's abuse.[302] This was confirmed in a later case, *Tomra*,[303] and absorbed by the European Commission in its *Guidance on Article 102 Enforcement Priorities*[304] (Article 102 contains the equivalent in European law of the Second Conduct Rule). However, in general, the undertaking's degree of market power is not relevant as to whether a certain practice *is an abuse*. This is discussed in greater detail under s.22, which deals with the object and effect of unilateral conduct.

The standard of proof at the Competition Tribunal is the criminal standard of proof

21.055 A contravention of the Second Conduct Rule is established when the Competition Tribunal finds that an undertaking with a substantial degree of market power has engaged in an abusive behaviour.

21.056 In *Competition Commission v Nutanix Hong Kong Ltd (No 3)*, the Competition Tribunal ruled, based on *Koon Wing Yee v Insider Dealing Tribunal*,[305] that the

[300] Cases T-125/97 *etc Coca-Cola v European Commission* EU:T:2000:84, [82].
[301] Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports v European Commission* [2000] ECR I-1365, [37], and Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, [24], and Second Conduct Rule Guideline, para.1.8.
[302] Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, [81].
[303] Case C-549/10 P *Tomra* EU:C:2012:221, [39].
[304] Communication from the Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*.
[305] (2008) 11 HKCFAR 170.

standard of proof for contraventions of the Conduct Rule is the criminal standard of proof — *ie* that the court must find *beyond a reasonable doubt* that an undertaking has contravened the Ordinance.[306] In doing so, the court agreed that the criminal standard of proof applies in competition proceedings because these involve the determination of a criminal charge for the purpose of art.11(1) of the Hong Kong Bill of Rights, which provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[307] The court concluded that it could not distinguish *Koon Wing Yee*, despite the fact that the standard of proof in competition cases is the civil standard of the balance of probabilities in most jurisdictions.[308] Overall, the Competition Tribunal's position that the standard of proof follows the application of art.11 of the Hong Kong Bill of Rights is understandable, but nonetheless surprising. It makes it much more difficult for the regulator to win cases in court. Competition cases are complex, and often hinge on technical and complicated points, such as economic evidence. A requirement that the regulator proves these matters beyond reasonable doubt could seriously hamper enforcement. In the UK, this was cited as one of the reasons to apply the civil standard of proof.[309] At the time of publishing, the regulator has not yet announced whether it intends to appeal this point at the Court of Appeal.

21.057 The implications of this requirement for Second Conduct Rule cases are unclear. However, it is fair to assume that the Competition Tribunal must be satisfied beyond a reasonable doubt that (1) an undertaking has a substantial degree of market power, and (2) this undertaking engaged in a conduct which has the object or effect of harming competition.

Collective dominance

The Hong Kong guidelines are silent on whether several undertakings can be considered dominant collectively. In Europe, the debate is not entirely closed. The initial confusion emanates from the vague language of art.102 of the TFEU, which refers to "*one or more undertakings…*". No such reference can be found in s.21, which only refers to "[a]n undertaking that has a substantial degree of market power…" This contrasts with the situation in Singapore, where the guidelines directly address the concept of collective dominance.[310]

[306] [2019] 3 HKC 307, [72].
[307] *Competition Commission v Nutanix Hong Kong Ltd (No 3)* [2019] 3 HKC 307, [61], citing *Ng Po On v HKSAR* (2008) 11 HKCFAR 91, [22].
[308] *Competition Commission v Nutanix Hong Kong Ltd (No 3)* [2019] 3 HKC 307, [70].
[309] *Napp Pharmaceutical Holding Ltd v Director General of Fair Trading* [2002] CAT 1, [106].
[310] Competition and Consumer Commission of Singapore, Section 47 Guidelines, paras.3.16–3.17.

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Based on the language of art.102 of the TFEU, the European found three Italian glass manufacturers to be collectively dominant, in *Italian Flat Glass* case, which was later upheld by the General Court.[311] A number of other cases followed the General Court's confirmation that more than one undertakings could be collectively dominant.

The other side of the "collective dominance" coin is the concept of "tacit collusion". When two or more undertakings act seemingly in concert, but without having entered into an agreement, regulators may in some cases rely on the concept of tacit collusion to establish a contravention of cartel rules. However, tacit collusion is difficult to establish, and may run contrary to the concept of "agreement".[312] In this situation, collective dominance is a tempting fall-back for enforcers trying to apply competition rules to a number of market players. However, given the language of s.21, the Competition Commission may have less difficulty convincing the Competition Tribunal on the concept of tacit collusion, than on the idea that more than one undertakings can be collectively dominant when any of them individually would not have been so.

The list of practices prohibited by the Second Conduct Rule is not finite

21.058 The practice of courts and regulators in Europe have shown that the prohibition against unilateral abuses can apply to a range of practices, the list of which is not definitive. The language of s.21 confirms this position: a conduct "may, in particular, constitute such an abuse, if it involves…"[313]

21.059 The Competition Commission, in its guidelines, mentioned numerous types of abuses which are not listed at s.21 of the Ordinance.

21.060 In Europe, the courts and regulators have expanded the range of abuses covered by the prohibition against unilateral abuses, to cover for instance repeated untruthful statements made to a patent office by an intellectual property owner.[314]

Examples of conduct which violates the Second Conduct Rule: predatory pricing

21.061 It constitutes an abuse for an undertaking with substantial market power to set prices below cost, if this is done in an attempt to force competitors

[311] Cases T-68/89 *etc Società Vetrol SpA v European Commission* EU:T:1992:38, [358].
[312] The concept of "agreement" is discussed under s.6.
[313] Section 21(2).
[314] Case T-321/0 *AstraZeneca v European Commission* EU:T:2010:266, [823]–[864]. Confirmed by the ECJ in Case C-457/10 P *AstraZeneca v European Commission* EU:C:2012:770.

out of the relevant market or to discipline competitors. Undertakings who engage in this behaviour typically do so after calculating that their smaller competitors cannot follow the price cuts imposed by the dominant undertaking, and cannot maintain a loss-making position for more than a short period of time.

21.062 Predatory pricing is intrinsically counter-intuitive. It involves offering sometimes deep discounts to consumers, in a move that seemingly benefits consumers. Price cuts and discounts are often rightfully interpreted as signs of a healthy level of competition in a market, where firms vie for customers and incentivise them to switch brands or suppliers, to attempt to solidify their existing customer base. However, predatory pricing must be considered not for its short term effects, but with a long-term perspective. In particular, the firm attempting to price its competitors out of the market will need to raise prices once these competitors are no longer supplying the market, in order to recoup the money lost when selling below costs.

21.063 In Europe, it is not necessary to prove that the dominant undertaking acted whilst having the certainty that it could recoup its losses post-exit. This has been rejected several times by the ECJ, including in *Tetra Pak International SA v European Commission*[315] and more recently in *France Télécom v European Commission*.[316]

21.064 In its guidelines, the regulator indicated that it considers that the predatory pricing to be anti-competitive by object, when it involves pricing below AVC. In these cases, the regulator considers that it does not need to establish that the practice has or is likely to have anti-competitive effects.

21.065 To determine whether predatory pricing is taking place, the regulator indicated that it will focus on two principal metrics: AVC and pricing below average total cost (ATC). The regulator considers that pricing below AVC is likely to be outright irrational, because the business selling below AVC would make a loss on every unit of product it sells. In Europe, the pricing below AVC creates a rebuttable presumption that a dominant undertaking acted abusively.[317]

21.066 In some cases, products have large fixed costs and low marginal costs per product. In these cases, the Competition Commission recognised that pricing below long-run average incremental cost and pricing below average avoidable cost may be suitable alternative ways of accounting for costs.

21.067 Contrary to pricing below AVC, pricing below ATC but above AVC can be rational, as businesses selling below ATC may be rational. In these cases,

[315] Case C-333/94 P *Tetra Pak International SA v European Commission* EU:C:1996:436, [44].
[316] Case C-202/07 P *France Télécom v European Commission* EU:C:2009:214.
[317] Case C-62/86 *AKZO v European Commission* EU:C:1991:286.

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of an authorised officer is linked to, and limited to, the search and seizure powers of the regulator.

47.002 The wording of s.47 appears to originate from s.14 of the Trade Description Ordinance (Cap.362). However, although the appointment mechanism is similar, the mechanism by which authorised officers conduct searches is different under the Trade Description Ordinance.[487] It should also be noted that the Legislature included a requirement that the appointment is made in writing. Such a requirement is not found in the Trade Description Ordinance, although other regulatory regimes provide that authorised officers be appointed in writing.[488] The requirement to appoint officers in writing is consistent with the regime of search and seizures under the Competition Act 1998, which provides that such officers must be authorised in writing by the regulator's Director.[489] In Singapore as well, authorised persons are appointed in writing by the regulator.[490]

47.003 Documentary evidence of an officer's authorisation under s.47 must be produced, if requested, as per s.49.[491]

48. Warrant to enter and search premises

(1) A judge of the Court of First Instance may issue a warrant authorizing a person specified in the warrant, and any other persons who may be necessary to assist in the execution of the warrant, to enter and search any premises if the judge is satisfied, on application made on oath by an authorized officer, that there are reasonable grounds to suspect that there are or are likely to be, on the premises, documents that may be relevant to an investigation by the Commission.

(2) A warrant under subsection (1) may be issued subject to any conditions specified in it that apply to the warrant itself or to any further authorization under it (whether granted under its terms or any provision of this Ordinance).

[487] This is discussed under s.48.

[488] See for instance, the authorised officers under the building regulation regime, under which officers authorized to enter premises to conduct inspections must be appointed in writing. Buildings Ordinance (Cap.123) s.22(5).

[489] UK Competition Act 1998 s.28(2).

[490] Competition Act (Cap.50B) s.64(a) — although appointments of other persons authorised for the search are not necessarily in writing when the investigation is conducted by an investigator, under s.62.

[491] This is discussed under s.49.

COMMENTARY

48.001 The power to search premises is probably the most powerful investigative tool of competition regulators. It can yield a substantive amount of documents and information, and is always a disruptive moment in the life of a company.

48.002 Warrants to enter and search premises are granted by judges of the Court of First Instance under s.48(1). Common law demands that the judge who delivers a warrant is then different than the judge who adjudicates the case at the Competition Tribunal, should the Competition Commission decide to bring proceedings under ss.92, 94, 99 and/or 101.[492] In this regard, the practice of the Competition Commission has been, in most cases where it sought a search warrant under s.48, to seek a warrant not from the Godfrey Lam J (President of the Competition Tribunal) but from a different judge — undoubtedly to ensure that the President of the Competition Tribunal could then hear the proceedings.

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Process to obtain a warrant and persons authorised to execute a warrant

48.003 The mechanism for the regulator to obtain and execute a warrant varies from other jurisdictions such as England or Singapore. In Hong Kong, the Competition Commission first appoints an employee as an "authorised officer" under s.47. The authorised officer then takes an oath in front of a judge of the Court of First Instance under s.48(1), and the judge, if the conditions are met, can issue a warrant "authorizing a person specified in the warrant, and any other persons who may be necessary to assist in the execution of the warrant" to conduct a search. Interestingly, s.48(1) does not require that the warrant is executed by the officer initially authorised in the first place by the Competition Commission. Instead, the warrant empowers "a person specified in the warrant, and any other person…". Thus it is possible that the officer authorised under s.47 and who takes an oath under s.48 is different from the *person authorised by the warrant*. However, s.49 obviously foresees the case where the officer authorised under s.49 is present during the search. This was discussed by the Hong Kong Court of Appeal, who recognised in a challenge to a search where the authorised officer was not present that the regime (in that case, the regime for police searches under the Mutual Legal Assistance in Criminal Matters Ordinance[493]) foresees an

[492] *Re Hong Kong Shanghai Banking Corp Ltd* [1992] HKDCLR 37, citing the *Hunter v Southam Inc* (1984) 11 DLR (4th) 641.

[493] Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525).

authorised officer applying for a warrant, and different officers executing it. The Court of Appeal said in this occasion that this was designed to ensure that a single application could be made for several searches to be executed simultaneously in several locations.[494] It is therefore not necessary that a named authorised officer is present at the premises during the search. It is however necessary that the named authorised officer remains "the officer in charge of the search and seizure operation and answerable for the due execution of the search warrant by those other authorised officers who assist him in this task."[495]

48.004 In England, the head of the regulator applies to the court for a warrant, and the warrant delivered by the court authorises "a named officer of the Director, and any other of his officers whom he has authorised in writing to accompany the named officer."[496] There is no requirement that the regulator first appoints an "authorised officer" as it is the case in Hong Kong.

48.005 In Singapore, the regulator or any investigator appointed by the regulator may apply for a warrant. If the court delivers a warrant, it authorises "a named officer, and (a) in the case of an investigation conducted by the Commission, such other officers or persons as the Commission has authorised in writing to accompany the named officer; and (b) in the case of an investigation conducted by an inspector, such other persons as the inspector may require." Here as well, there is no requirement that the regulator first appoints an "authorised officer" as it is the case in Hong Kong, but the regulator *can* appoint an investigator to apply for a warrant. If the regulator uses an investigator, this offers the advantage of allowing other persons the investigator requires to attend to be authorised under the warrant, without the need for these people to be appointed in writing.

48.006 Further, the law in Singapore and in the UK provides for a warrantless search procedure, aside from the possibility of getting a warrant. It allows the regulator to enter premises without a warrant, if it gives the occupier of the premises a written notice with two days of advance notice.[497]

Threshold to obtain a warrant

48.007 The court may issue a warrant if it is satisfied that "there are reasonable grounds to suspect that there are or are likely to be, on the premises, documents that may be relevant to an investigation." The threshold to

[494] *Chan Mei Yiu Paddy v Secretary for Justice (No 2)* [2012] 3 HKLRD 65, [69].
[495] *Ibid.*
[496] UK Competition Act 1998 s.28(2).
[497] Singapore Competition Act 2004 (Cap.50B) s.64; and UK Competition Act 1998 s.27.

obtain a warrant under the Ordinance is overall consistent with the many different search warrant regimes under Hong Kong law.[498]

48.008 Under Hong Kong law, three cumulative conditions must be reunited for a search to be reasonable: (a) there must be a search warrant or a form of authorisation; (b) the warrant or authorisation must be issued by a person with the ability to act judicially and who must not be involved in the investigation; and (c) the warrant may only be issued after the judicial authority has established upon oath that reasonable and probable grounds exist to believe that, first, an offence has been committed and that, second, evidence linked to this office is located in the place to be searched.[499] If these three conditions are met, a search does not violate a person's right to privacy, family, home and correspondence under the Hong Kong Bill of Rights.[500] The European Court of Human Rights also found that a warrant is issued in violation of a person's privacy right if it is drafted in general terms, without information about the investigation, in a way that results in wide seizure powers being granted to the person executing the warrant.[501]

48.009 A search warrant does not need, in order to be valid, to recite the further fact that the officers, having lawfully gained entry, proposed to exercise their power of seizure.[502]

48.010 The information in support of a warrant application is protected by Public Privilege Immunity.[503]

48.011 A judge is not required by law to place on the warrant conditions for its execution designed to protect legal professional privilege. The ability to place such conditions is discretionary for the judge, and the absence of conditions does not invalidate the warrant.[504] This is particularly relevant in the context of the Ordinance, since s.48(2) allows the judge to issue a warrant subject to conditions.[505]

48.012 Section 48 does not provide for a limited duration for search warrants. If it possible to argue that a warrant is only valid for one day, absent any mention to the contrary in the warrant itself. This contrasts with the UK

[498] See for instance, Police Force Ordinance s.50(7); Independent Commission Against Corruption Ordinance (Cap.2014) ss.10 and 17, and Serious and Organised Crime Ordinance (Cap.455) s.5.
[499] *Re Hong Kong Shanghai Banking Corp Ltd* [1992] HKDCLR 37, citing the *Hunter v Southam Inc* (1984) 11 DLR (4th) 641.
[500] Hong Kong Bill of Rights art.14.
[501] *Modestou v Greece* 51693/13, [46].
[502] *Apple Daily Ltd v Commissioner of Independent Commission Against Corruption* (2000) 3 HKCFAR 26.
[503] *Cham Kam Ching John Barry v Commissioner of Police* [2014] 4 HKLRD 263, [4].
[504] *Philip KH Wong, Kennedy YH Wong & Co v Commissioner of Independent Commission Against Corruption (No 2)* [2009] 5 HKLRD 379, [92]–[93].
[505] The scenario of the case cited above in this paragraph appears to be the most likely case of conditions on a warrant, *ie* conditions for the respect of legal professional privilege when the regulator searches the house or the office of a lawyer.

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and Singapore, where a search warrant has a statutory validity period of one month beginning with the day on which it is issued.[506]

48.013 Internationally, the threshold to obtain a warrant is lower in Hong Kong than in other jurisdictions. A judge may issue a warrant under s.49 if he or she is satisfied "that there are reasonable grounds to suspect that there are or are likely to be, on the premises, documents that may be relevant to an investigation by the Commission". In England, a judge may only deliver a warrant if documents were requests under another power but were not produced, or if the judge is satisfied that "if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed", or that an investigative officer attempted to enter the premises under the regulator's warrantless search but was unable to do so. The law in Singapore is essentially the same as the UK Competition Act on this point.[507] This difference is likely due to the Legislature's intent to align the regime of warrants under the Competition Ordinance with that of other investigation regimes in Hong Kong, such as by the customs or the anti-graft agency. As a result, any challenge to a warrant search in Hong Kong will likely be dealt with under the existing rules and precedents of Hong Kong law, identified above in this section. Whilst this is likely to result in predictability, it also means that the fairly low threshold to obtain a warrant under s.48 and the relatively regulator-friendly rulings of Hong Kong courts on this topic will make any challenge to a warrant search difficult.

49. Duty to produce evidence of authority

(1) An authorized officer executing a warrant must, if requested, produce for inspection—

(a) documentary evidence of his or her identity;

(b) documentary evidence of his or her authorization under section 47; and

(c) the warrant.

COMMENTARY

49.001 Section 49 forces authorised officers to produce a number of documents (Documentary evidence of identity, s.47 authorisation and warrant) for inspection by the undertaking targeted by the Competition Commission.

[506] Singapore Competition Act 2004 (Cap.50B) s.65(7)(b); and UK Competition Act 1998 s.28(6).
[507] Singapore Competition Act 2004 (Cap.50B) s.65.

49.002 As discussed under ss.47 and 48, not all persons participating in a search under s.48 are "authorised officers". The authorised officer is the person appointed by the Competition Commission to take an oath at the Court of First Instance and obtain a warrant for the search — whilst the warrant will simply authorised the "persons necessary to assist" (as per the language of s.48(1)) to enter the premises. As a result, undertakings receiving the visit of the Competition Commission will not be able to obtain documents from every Competition Commission employee participating in the search under s.49. Instead, such information can only be obtained from the "authorised officers".

49.003 In practice, the documentary evidence of an officer's authorisation under s.47 will be redacted to protect the information relating to other undertakings and other simultaneous searches that may take place under the same s.47 authorisation.

49.004 Obtaining information under s.49 is not only allowed, it is often useful. In one of its first searches under the Competition Ordinance, the Competition Commission's warrant notoriously failed to mention the correct name of the undertaking targeted, and the regulator was forced to obtain a new warrant before its staff could enter the premises.

49.005 The Competition Commission's practice has been to allow undertakings to make a copy of the documents identified in s.49.

50. Powers conferred by a warrant

(1) A warrant issued under section 48 authorizes the persons specified in it—

(a) to enter and search the premises specified in the warrant;

(b) to use such force for gaining entry to the premises and for breaking open any article or thing found on the premises as is reasonable in the circumstances;

(c) to make use of such equipment as is reasonable in the circumstances;

(d) to remove by force any person or thing obstructing the execution of the warrant;

(e) to require any person on the premises to produce any document that appears to be a relevant document, in the possession or under the control of that person;

(f) to make copies of or take extracts from any document that appears to be a relevant document found on the premises or produced to a person executing the warrant;

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in the normal course of business or in relation to a company's business is the conduct of this director.

103. Unfitness to be concerned in management of company

(1) For the purpose of deciding under section 102(b) whether a person is unfit to be concerned in the management of a company, the Tribunal—

(a) must have regard to whether subsection (2) applies to the person; and

(b) may have regard to the conduct of the person as the director of a company, in connection with any other contravention of a competition rule.

(2) This subsection applies to a person if as a director of the company—

(a) the person's conduct contributed to the contravention of the competition rule;

(b) the conduct of the person did not contribute to the contravention, but the person had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it; or

(c) the person did not know but ought to have known that the conduct of the company constituted the contravention.

COMMENTARY

103.001 Section 103 sets the parameters for the Competition Tribunal to declare that a person is unfit to be concerned in the management of a company.

103.002 Under s.103(1)(a), the Competition Tribunal must take into account the three factors of s.103(2). Section 103(1) states that the Competition Tribunal "must have regard to..." these factors. This does not mean that it must automatically disqualify a person who meets any of the criteria of s.103(2). It means that the Competition Tribunal cannot ignore these three factors in its assessment of whether the person is unfit to be concerned in the management of a company. If, for instance, the Competition Tribunal was to deny a disqualification order application whilst ignoring any of the criteria of s.103(2), the Competition Tribunal ruling would be exposed to an appeal by the regulator.

103.003 In addition, under s.103(1)(b), the Competition Tribunal *may* take into account the targeted person's conduct "as a director of a company, in connection with any other contravention of a competition rule." In this subsection, a "contravention" clearly signifies a case in which the Competition Tribunal, or a superior appeal court, has ruled that a contravention took place — therefore a "previous" contravention.

104. Applications for disqualification order and for leave under an order

(1) An application for a disqualification order may be made only by the Commission.

(2) An application for leave of the Tribunal to participate in the affairs of a company in one of the ways prohibited under section 101(2) (Disqualification order) may be made only by or on behalf of the person against whom the order was made.

COMMENTARY

104.001 Section 104 deals with two types of applications.

104.002 Section 104(1) makes clear that only the Competition Commission can apply for a disqualification order. This is already clear from the wording of s.101(1).

104.003 In addition, s.104(2) deals with applications for "exemptions" for disqualified persons, which the Ordinance names "leave of the Tribunal to participate in the affairs of a company in one of the ways prohibited under s.101(2)". The Ordinance is silent on this type of application, save for s.104(2). This subsection makes clear that such an application may only be made by or on behalf of the person against whom an order was made.

105. Contravention of disqualification order

A person who contravenes a disqualification order commits an offence and is liable—

(a) on conviction on indictment, to a fine of $1,000,000 and to imprisonment for 2 years; or

(b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

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108.005 In addition, this point was discussed in more detail *Taching Petroleum Co Ltd v Meyer Aluminum Ltd.* The case is still going through the courts at the time of printing. It concerns a contractual debt for unpaid fuel, and a defence of illegality by the debtor, who claims that the plaintiffs (the fuel suppliers) fixed prices, making the contract debts unenforceable. The defendant also raised a defence of set-off, seeking to reduce the debt by the amount corresponding to the overcharging following the alleged price-fixing. The case is partially transferred from the Court of First Instance to the Competition Tribunal.[689] In the transfer ruling, where the Court of First Instance transferred part of the case to the Competition Tribunal, the court noted that it is not clear whether a defendant raising a competition defence would have a right to claim damages directly in the same action, should the competition defence be successful (*ie*, should the plaintiff be found in contravention of a competition rule).[690] The Court of First Instance noted that it was not necessary to immediately solve the question of whether a claim for damages under s.94 could be made together with a competition defence. However, it added that a follow-on action under s.110 remains possible, "after a judicial finding of contravention has been made not only in the context of an enforcement action brought by the Commission, but also in the context of a defence in an action raising a contravention of a conduct rule".[691]

108.006 In this case, the defendant is claiming a loss linked to a contravention of a competition rule. However, the defendant is not asking for *damages* but instead is claiming that this loss either makes the contracts unenforceable, or that the contractual claim of the plaintiffs should be thus reduced. The defendant did not file a counterclaim, did not ask for relief, not even a declaration. As a result, this defence does not in itself violate s.108, which would preclude the same person from simply asking for damages in court in a tort action. In its ruling following the Case Management Conference, the Competition Tribunal noted that "[Section 108] appears to prohibit the bringing of any private actions in reliance of contravention of competition rules."[692] The court added that "[the defendant] would not have a right to seek any relief under s 94 and s 1(a) Sch.3 to CO, but instead may seek 'follow-on' relief under s 110 after the Tribunal has found contravention of a conduct rule."[693]

108.007 Overall, the unanswered questions on the full impact of s.108 all centre around whether actions for damages are entirely restricted to follow-on actions under s.110. The fact that s.108 is located in Part 7, which deals exclusively with

[689] The transfer aspects of the case are discussed under s.113.
[690] [2018] 2 HKLRD 1284, [40].
[691] *Ibid.*, [41].
[692] *Ibid.*
[693] *Ibid.*

follow-on actions, seems to indicate that damage actions by individuals and businesses are indeed limited to follow-on actions. Both the Court of First Instance and the Competition Tribunal seem to agree with this. However, it remains to be seen whether in some exceptional cases (such as in a competition defence) the Competition Tribunal could not issue an order to pay damages.

109. Pure competition proceedings not to be brought in Court of First Instance

No person may bring any proceedings in the Court of First Instance under this Part if the cause of action is only the defendant's contravention, or involvement in a contravention, of a conduct rule.

COMMENTARY

109.001 Section 109 is the corollary of s.108. It bars private actions (including follow-on actions under s.110) in the Court of First Instance, "if the cause of action is only the defendant's contravention, or involvement in a contravention, of a conduct rule."

109.002 The effect of s.109 is to force potential plaintiffs to file all private actions to the Competition Tribunal. In turn, the Competition Tribunal will not entertain private actions outside of follow-on actions, and outside of transfer cases.[694]

109.003 The wording of s.109, "if the cause of action is *only* the defendant's contravention…" leaves the door open to actions at the Court of First Instance where one of several causes of actions is the defendant's contravention, or involvement in a contravention, of a competition rule.

109.004 This was the situation in the *Loyal Profit International Development Ltd v Travel Industry Council of Hong Kong.* The plaintiff, a travel agent, filed an action at the Court of First Instance to declare that two directives published by the TIC, a non-statutory regulatory body for the industry, were, among others, contrary to the Competition Ordinance. The action also relied on the defendant's alleged multiple violations of the Companies Ordinance.[695] As such, the action was not automatically barred by s.109, and could be heard by the Court of First Instance.[696]

[694] Transfers are discussed at ss.113–121.
[695] (HCMP 256/2016, [2017] HKEC 836), [1].
[696] The Court of First Instance ultimately ruled that the plaintiff did not make a sufficient good case for the competition aspects of the case to be transferred to the Competition Tribunal. This is discussed in detail at s.113.

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Division 2—Follow-on Action

110. Follow-on right of action

(1) 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 has a right of action under this section against—

(a) any person who has contravened or is contravening the rule; and

(b) any person who is, or has been, involved in that contravention.

(2) Subject to section 113, a claim to which this section applies may only be made in proceedings brought in the Tribunal, whether or not the cause of action is solely the defendant's contravention, or involvement in a contravention, of a conduct rule.

(3) For the purpose of subsection (1), an act is taken to have been determined to be a contravention of a conduct rule if—

(a) the Tribunal has made a decision that the act is a contravention of a conduct rule;

(b) the Court of First Instance has decided, in any proceedings transferred to it by the Tribunal under section 114(3), that the act is a contravention of a conduct rule;

(c) the Court of Appeal has decided, on an appeal from a decision of the Tribunal or the Court of First Instance, that the act is a contravention of a conduct rule;

(d) the Court of Final Appeal has decided, on an appeal from a decision of the Court of Appeal, that the act is a contravention of a conduct rule; or

(e) a person has made an admission, in a commitment that has been accepted by the Commission, that the person has contravened a conduct rule.

COMMENTARY

110.001 Section 110 creates a direct right of action for follow-on actions. The wording of s.110 is close to that of the provisions of the Singapore Competition Act which creates a right to follow-on actions for damages.[697] As with the Hong

[697] Singapore Competition Act 2004 (Cap.50B) s.86.

Kong regime, standalone actions for damages, and actions by third parties, are barred under the law. However, to date, no follow-on action has ever been filed in Singapore.

Which court

110.002 Under s.110(2), follow-on actions for damages can only be brought at the Competition Tribunal. This is the case "whether or not the cause of action is solely the defendant's contravention, or involvement in a contravention, of a conduct rule." Therefore, any follow-on action for damages must be brought to the Competition Tribunal, even when it is combined with other demands such as damages for non-competition losses, or a request for an injunction not related to the Competition Ordinance.

110.003 One qualification here is the mention in s.110(2) that the rule stating that follow-on actions can only be brought in the Competition Tribunal is "[s]ubject to Section 113." However, s.113 is concerned with transfers of proceedings from the Court of First Instance to the Competition Tribunal. Therefore, despite the express qualification of s.110(2), it is not clear how s.113 can limit the above-mentioned rule.

110.004 The Registrar of the Competition Tribunal must publish a notice as soon as practicable after the receipt of a claim brought under s.110(1).[698]

The ruling or admission containing the contravention

110.005 As stand-alone actions are prohibited under ss.92 and 108, the plaintiffs are dependent on a finding by the Competition Tribunal, the Court of Instance, a higher appeal court, or an admission, before a follow-on action can be filed.

110.006 As per s.119, in proceedings under Part 7 (which encompasses follow-on actions), the Court of First Instance and the Competition Tribunal are bound by an earlier decision of the other court that the act in question is a contravention, or involvement in a contravention, of the conduct rule.[699] This is in line with the UK regime: under the Competition Act 1998, the decisions on which follow-on actions can be based expressly bind the Competition Appeal Tribunal in these actions.[700]

110.007 In addition, as per s.149, a finding of fact by the Competition Tribunal, which is relevant to an issue arising in any other proceedings, either in

[698] Competition Tribunal Rules (Cap.619D, Sub.Leg.) r.19(1)(c).
[699] This is discussed in detail under s.119.
[700] UK Competition Act 1998 s.47A(9).

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the Competition Tribunal or in the Court of First Instance, relating to a contravention of a conduct rule, is evidence of that fact in those proceedings if the decision is final.

110.008 The Competition Tribunal rules provide that "[t]he originating notice of claim must specify the decision of the specified court or admission in a commitment on which the plaintiff relies to establish a contravention of a conduct rule."[701] In addition, "[t]he statement of claim must specify the particular part of the decision or commitment [...] which determines or admits that a relevant act is a contravention of a conduct rule."[702]

110.009 Finally, s.110 is silent on whether a claim can be brought for loss or damage suffered as a result of a breach of competition rules in another jurisdiction. However, the clear reference to "a conduct rule" in sub-s.(1), and the finite list of acts taken to have been determined to be a contravention of a conduct rule in sub-s.(3) narrowly restrict follow-on actions to a loss or damage established in a court.

Quantifying damages

110.010 As the previous court ruling or admission can be used as evidence that a contravention of a competition rule has taken place, the plaintiff in a follow-on action for damages must only prove that it suffered or loss or damage as a result. The Competition Ordinance and the Competition Tribunal Rules are silent on the calculation of damages.

110.011 Competition law being grounded in economic theory, the calculation of quantum damages is, unsurprisingly, a topic that stirred a substantial amount of debate. A number of methods can be used to calculate damages, and courts often resort to a combination of methods rather than a single approach. The starting point, in most cases, is the data gathered on commercial activity (such as sales, demand, prices) for the duration of the contravention. The most conventional way to calculate damages consists in calculating the amount overcharged as a result of the anticompetitive activity, multiplied by the volume of products bought for the relevant period, minus any amount passed on down to consumers or buyers, plus interest. This is simplistic, with the biggest criticism of this method being that any amount overcharged also results in a loss of competitivity (unless all other market players were similarly affected), and therefore the deduction of all amounts passed on down the supply chain misses part of the damage done to a business. Nonetheless, the above formula remains a

[701] Competition Tribunal Rules (Cap.619D, Sub.Leg.) r.93(4).
[702] *Ibid.*, r.93(5).

pervasive way to estimate a person's loss as a result of a price-fixing cartel (the most common type of anticompetitive activity), and therefore are likely to be at least a starting point for the Competition Tribunal to determine compensatory damages.

110.012 In addition, the general principles of damages remain valid, including the fact that the Competition Tribunal can order the payment of exemplary damages, in addition to the compensatory damages discussed above.

110.013 In *Taching Petroleum Co Ltd v Meyer Aluminium*, the court clarified that the follow-on right of action exists "after a judicial finding of contravention has been made not only in the context of an enforcement action brought by the Commission, but also in the context of a defence in an action raising a contravention of a conduct rule".[703]

Right to follow-on actions for damages against non-appealing cartelist when one member of the cartel successfully appealed

110.014 In a recent case, the UK Supreme Court ruled that a claim for damages is not precluded against the non-appealing cartelist in a decision concerning several cartelists, even when one of the members of the cartel successfully appealed the ruling.[704] In this case, rail operator Deutsche Bahn had filed a complaint against Morgan Crucible, a company targeted by a European Commission in the 2003 carbon and graphite cartel. Several other members of the alleged cartel in the European Commission decision had appealed the decision. However, the defendant did not, having successfully applied for immunity.

111. Commencement of follow-on actions

(1) The periods during which proceedings for a follow-on action may not be brought are—

(a) in the case of a decision of the Tribunal, the period during which an appeal may be made to the Court of Appeal under section 154;

(b) in the case of a decision of the Court of First Instance, the period during which an appeal may be made to the Court of Appeal; and

[703] [2018] 2 HKLRD 1284, [41].
[704] *Deutsche Bahn AG v Morgan Advanced Materials Plc* [2014] UKSC 24, [22].

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(b) the members and parties have agreed to proceed under subsection (2),

the Tribunal as so constituted is to be regarded as properly constituted.

COMMENTARY

146.001 Section 146 deals with the absence of a member during the course of proceedings. The central element of s.146 is that the consent of the parties is always required, either for the continuation of proceedings, or for the replacement of an absent member.

147. Rules of Evidence

In proceedings under this Ordinance, other than proceedings in which the Commission applies for an order for—

(a) a pecuniary penalty under section 93; or

(b) a financial penalty under section 169,

the Tribunal is not bound by the rules of evidence and may receive and take into account any relevant evidence or information, whether or not it would be otherwise admissible in a court of law.

COMMENTARY

147.001 The Competition Tribunal is not bound by the rules of evidence, except in proceedings for which the Commission applies for an order for (a) a pecuniary penalty under s.93, or (b) a financial penalty under s.169.

147.002 The Competition Tribunal's ability to admit evidence that would otherwise not be admissible in a court of law remains, however, bound by considerations of due process and by the rights of the parties. It is therefore unclear whether, for instance, hearsay evidence or anonymous testimonies would be admissible in the Competition Tribunal, as those could potentially harm the other parties' right to a fair hearing,[827] and contrary to the rights of persons charged with or convicted of criminal offence.[828]

[827] Hong Kong Bill of Rights art.10.
[828] *Ibid.*, art.11.

147.003 Difficulties may arise in mixed proceedings. If, in proceedings falling within the proceedings specifically mentioned at s.147, a party seeks to bring evidence that would normally nor be admissible, but with regards to a different aspect of the proceedings, it is unclear whether these would be barred by s.147. However, a strict reading of s.147 seems to imply that evidence normally not admissible is barred in mixed proceedings.

148. Evidence that might tend to incriminate

(1) A person appearing before the Tribunal to give evidence, other than in proceedings in which the Commission applies for an order for—

(a) a pecuniary penalty under section 93; or

(b) a financial penalty under section 169,

is not excused from answering any question on the grounds that to do so might expose the person to proceedings referred to in subsection (3).

(2) No statement or admission made by a person answering any question put to the person, in any proceedings to which subsection (1) applies, is admissible in evidence against that person in proceedings referred to in subsection (3).

(3) The proceedings referred to in subsections (1) and (2) are—

(a) proceedings in which the Commission applies for an order for—

(i) a pecuniary penalty under section 93; or

(ii) a financial penalty under section 169; and

(b) any criminal proceedings, other than proceedings for—

(i) an offence under section 55 (Providing false or misleading documents or information);

(ii) an offence under Part V (Perjury) of the Crimes Ordinance (Cap.200); or

(iii) an offence of perjury.

COMMENTARY

148.001 Section 148 complements the Ordinance's limit on the privilege against self-incrimination inscribed at s.45. Where, under s.45, a person is not excused from making self-incriminating statements, but also is protected against

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direct use of these statements against himself or herself, s.148 extends the same "direct use prohibition" to evidence.

148.002 The discussion under s.45 on the privilege against self-incrimination in the context of the Ordinance is applicable here under s.148.

149. Findings of fact by Tribunal

(1) A finding of fact by the Tribunal, which is relevant to an issue arising in any other proceedings, either in the Tribunal or in the Court of First Instance, relating to a contravention of a conduct rule, is evidence of that fact in those proceedings if—

(a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or

(b) the final decision of a court on such appeal has confirmed the finding.

(2) In this section—

relevant party (有關一方) means—

(a) in relation to the first conduct rule, a party to the agreement which is the subject of the alleged contravention; and

(b) in relation to the second conduct rule, the undertaking whose conduct is alleged to have contravened the conduct rule or any other person involved in the contravention.

COMMENTARY

149.001 Section 149 ensures that issues litigated once in the Competition Tribunal are not excessively re-litigated in subsequent competition proceedings. A finding of fact by the Competition Tribunal, which is relevant to an issue arising in any other proceedings, either in the Competition Tribunal or in the Court of First Instance, relating to a contravention of a conduct rule, is evidence of that fact in those proceedings if the decision is final. It is likely to be mainly relevant in follow-on actions for damages under s.110. Evidence that a contravention as taken place may also be relevant in proceedings concerning an alleged contravention similar to, or connected with, a previous contravention which was the subject of earlier litigation.

149.002 Section 149 is similar to s.62 of the Evidence Ordinance, which posits that previous convictions are admissible in evidence for the purpose of proving that a person has committed an offence. In discussing s.62 of the Evidence Ordinance, the Court of First Instance noted that the provision's effect was to shift the burden of proof onto the defendant, to prove that the earlier conviction was wrong and/or inapplicable in the circumstances.[829] The weight to be given to a previous conviction, the court reminded, is for the trial judge to decide "since it is for him to evaluate the probative force of such conviction".[830] Section 62 of the Evidence Ordinance effectively abolishes the common law rule which says that a factual finding in a judgment of another court or tribunal in earlier civil or criminal proceedings "is inadmissible in subsequent proceedings, unless the party against whom the finding is sought to be deployed is bound by it by reason of an estoppel per rem judicatam".[831]

150. Finding of facts by Court of First Instance

(1) A finding of any fact by the Court of First Instance in any proceedings transferred to it by the Tribunal under section 114(3), which is relevant to an issue arising in any other proceedings, either in the Court or in the Tribunal, relating to a contravention, or involvement in a contravention, of a conduct rule, is evidence of that fact in those other proceedings if—

(a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or

(b) the final decision of a court on such appeal has confirmed the finding.

(2) In this section—

relevant party (有關一方) has the meaning given by section 149(2).

COMMENTARY

150.001 Section 150 makes findings of fact by the Court of First Instance admissible as evidence in transfer cases under s.114(3). Section 114(3) allows the

[829] *Chan Shek Ho v Shiu Ho Chi* [2018] 3 HKC 536, [19].
[830] *Ibid.*
[831] *Capital Century Textile Co Ltd v Li Dianxiao* [2018] HKCFI 729, [23], citing *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

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Competition Tribunal to transfer back so much of the proceedings transferred to it by the Court of First Instance that the Competition Tribunal considers should, in the interests of justice, be transferred back.

150.002 The same limitations as for s.149 findings of facts apply (mainly, that the provision on affects admissibility, no weight). This is discussed in detail under s.149.

151. Order not to disclose material

(1) The Tribunal may order a person not to publish or otherwise disclose any material the Tribunal receives.

(2) A person who fails to comply with an order made under subsection (1) commits an offence and is liable to a fine at level 6 and to imprisonment for 6 months.

COMMENTARY

151.001 Section 151 allows the Competition Tribunal to order a person not to disclose any material the Competition Tribunal receives. Section 151(2) creates steep penalties for the breach of an order not to disclose.

151.002 It is notable that the Legislature did not clearly indicate whether disclosures mandated by law were a defence to a disclosure contrary to a s.151 order. Pursuant, a person who must by law publish or disclose a material covered by a s.151 order should apply to the Competition Tribunal for a variation of that order.

Criminal proceedings for offences created under the Ordinance

151.003 Criminal proceedings cannot be brought in the Competition Tribunal, as per s.171.

151.004 Criminal proceedings for offences created under the Ordinance are discussed at s.52.

151A. Order prohibiting departure from Hong Kong

(1) The Tribunal may make an order prohibiting a person from leaving Hong Kong (***prohibition order***)—

(a) to facilitate the enforcement or to secure the compliance of—

(i) a judgment or order against the person for the payment of a specified sum of money;

(ii) a judgment or order against the person for the payment of an amount to be assessed; or

(iii) a judgment or order against the person requiring the person to deliver any property or perform any other act; or

(b) to facilitate the pursuance of a civil claim (other than a judgment)—

(i) for the payment of money or damages; or

(ii) for the delivery of any property or the performance of any other act.

(2) The Tribunal must not make a prohibition order against a person under subsection (1)(a)(ii) or (iii) unless it is satisfied that there is probable cause for believing that—

(a) the person is about to leave Hong Kong; and

(b) because of the circumstance mentioned in paragraph (a), satisfaction of the judgment or order concerned is likely to be obstructed or delayed.

(3) The Tribunal must not make a prohibition order against a person under subsection (1)(b) unless it is satisfied that there is probable cause for believing that—

(a) there is a good cause of action;

(b) the person—

(i) incurred the alleged liability, being the subject of the claim, in Hong Kong while the person was present in Hong Kong;

(ii) carries on business in Hong Kong; or

(iii) is ordinarily resident in Hong Kong;

(c) the person is about to leave Hong Kong; and

(d) because of the circumstance mentioned in paragraph (c), any judgment or order that may be given against the person is likely to be obstructed or delayed.

(4) The Tribunal may make a prohibition order against a person subject to any conditions that it thinks fit, including the condition that the prohibition order is to have no effect if the person—

(a) satisfies the judgment, order or claim concerned; or

(b) provides the security that the Tribunal orders.

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Definition of "merger"

Sch.1.4.02 Mergers are defined at s.3 of Sch.7, which must be read together with s.5 of Sch.7.

Sch.1.4.03 The definition is summarised in the Merger Guideline: "the merging of two or more undertakings into one, the acquisition of one (or part of an) undertaking by another, the forming of a joint venture and the acquisition of assets by one undertaking from another"[963] amounts to a merger.

Some merger agreements are subject to the Merger Rule

Sch.1.4.04 Merger agreements which fall within s.4 of Sch.1 are not subject to the conduct rules, but are instead subject to the merger rule.

Sch.1.4.05 This is the case for merger agreements, between certain undertakings,[964] and which qualify as merger agreements under Sch.7. This is discussed in detail under Sch.7.

Joint ventures not "fully functional" fall outside of the definition of "mergers" and therefore are subject to the conduct rules

Sch.1.4.06 Joint ventures which are not "fully functional" are not considered mergers. As a result, they are subject to the conduct rules. A fully functional joint venture is a joint venture which performs all the functions of an autonomous economic entity on a lasting basis.[965]

5. Agreements of lesser significance

(1) The first conduct rule does not apply to—

(a) an agreement between undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed $200,000,000;

(b) a concerted practice engaged in by undertakings in any calendar year if the combined turnover of the

[963] Merger Rule Guideline, para.2.1.

[964] These undertakings are licensees under the Telecommunications Ordinance or the Broadcasting Ordinance, other persons whose activities require them to be licensed under the Telecommunications Ordinance or the Broadcasting Ordinance, or persons who have been exempted from the Telecommunications Ordinance or from specified provisions of the Telecommunications Ordinance pursuant to s.39 of the Telecommunications Ordinance.

[965] Merger Rule Guideline, paras.2.8–2.12.

undertakings for the turnover period does not exceed $200,000,000; or

(c) a decision of an association of undertakings in any calendar year if the turnover of the association for the turnover period does not exceed $200,000,000.

(2) Subsection (1) does not apply to an agreement, a concerted practice, or a decision of an association of undertakings, that involves serious anti-competitive conduct.

(3) Subject to subsection (4), the turnover period of an undertaking is—

(a) if the undertaking has a financial year, the financial year of the undertaking that ends in the preceding calendar year; or

(b) if the undertaking does not have a financial year, the preceding calendar year.

(4) The turnover period of an undertaking is the period specified as such for the purpose of this subsection in the regulations made under section 163(2) if—

(a) for an undertaking that has a financial year—

(i) the undertaking does not have a financial year that ends in the preceding calendar year; or

(ii) the financial year of the undertaking that ends in the preceding calendar year is less than 12 months; or

(b) for an undertaking that does not have a financial year—

(i) the undertaking is not engaged in economic activity in the preceding calendar year; or

(ii) the period in which the undertaking is engaged in economic activity in the preceding calendar year is less than 12 months.

(5) In this section—

"preceding calendar year" (對上公曆年) means the calendar year preceding the calendar year mentioned in subsection (1)(a), (b) or (c);

"turnover" (營業額)—

(a) in relation to an undertaking that is not an association of undertakings, means the total gross revenues of the undertaking whether obtained in Hong Kong or outside Hong Kong; and

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(b) in relation to an association of undertakings, means the total gross revenues of all the members of the association whether obtained in Hong Kong or outside Hong Kong.

COMMENTARY

Sch.1.5.01 Agreements, concerted practices and decisions of associations which do not constitute "serious anti-competitive conduct", between undertakings whose combined turnover is lower than HK$200 million are excluded from the First Conduct Rule.

Meaning of "serious anti-competitive conduct"

Sch.1.5.02 The Competition Ordinance makes the distinction between serious anti-competitive conduct and non-serious anti-competitive conduct. The consequences between these two types of conduct are mostly procedural.[966] In addition to the procedural impact of the notion of "serious anti-competitive conduct", the notion is relevant for the purposes of this exclusion, which is only available to concerted practices and decisions of associations which do not constitute "serious anti-competitive conduct".

Sch.1.5.03 Price-fixing, market allocation, output restriction and bid-rigging are also all considered to be serious anti-competitive conduct. In addition, resale price maintenance (the determination of a resale price by an undertaking higher up the distribution chain than the undertaking selling it, such as a manufacturer) can potentially fall within the serious anti-competitive conduct category, since it can constitute price-fixing.[967]

Sch.1.5.04 The notion of serious anti-competitive conduct is discussed in detail under s.6.

Calculation of turnover to take into account activities outside of Hong Kong

Sch.1.5.05 When calculating turnover for the purpose of assessing whether an agreement or a conduct is of "lesser significance" under s.6 of Sch.1, the activities entering into account are the undertaking's activities "whether in Hong Kong or outside Hong Kong". This greatly undermines the effect of the "lesser significance" exclusion, since a larger turnover is more likely to result in an agreement or conduct falling outside of the scope of the exclusion.

[966] Serious anti-competitive conduct is defined at s.2(1), and is discussed in detail under s.6.

[967] Section 2(1) defines "fixing, maintaining, increasing or controlling the price for the supply of goods or services" as serious anti-competitive conduct.

Sch.1.5.06 This contrasts with the calculation of turnover for the purpose of determining pecuniary penalties. Under the Competition (Turnover) Regulation, the turnover of an undertaking is the total amount of its ordinary activities "in Hong Kong", minus sales rebates and taxes directly related to the revenues.[968]

Exclusion the result of political pressure by small businesses

Sch.1.5.07 In the long battle to win acceptance by the business community for competition law, the government conceded this narrow exclusion to small businesses. However, the low turnover threshold, and the calculation method for the turnover of undertakings seeking to benefit from this exclusion, mean that very few businesses will effectively manage to benefit from it.

6. Conduct of lesser significance

(1) The second conduct rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed $40,000,000 for the turnover period.

(2) Subject to subsection (3), the turnover period of an undertaking is—

(a) if the undertaking has a financial year, the financial year of the undertaking that ends in the preceding calendar year; or

(b) if the undertaking does not have a financial year, the preceding calendar year.

(3) The turnover period of an undertaking is the period specified as such for the purpose of this subsection in the regulations made under section 163(2) if—

(a) for an undertaking that has a financial year—

(i) the undertaking does not have a financial year that ends in the preceding calendar year; or

(ii) the financial year of the undertaking that ends in the preceding calendar year is less than 12 months; or

(b) for an undertaking that does not have a financial year—

(i) the undertaking is not engaged in economic activity in the preceding calendar year; or

(ii) the period in which the undertaking is engaged in economic activity in the preceding calendar year is less than 12 months.

[968] Competition Tribunal Rules (Cap.619C, Sub.Leg.) s.2(2). This is discussed under s.163.

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