

International **Comparative** Legal Guides



Competition Litigation **2020**

A practical cross-border insight into competition litigation work

12th Edition

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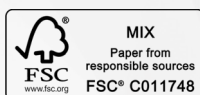
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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The Competition Ordinance (Cap. 619) (the “**Ordinance**”) is the principal competition legislation in Hong Kong. Claims can be brought in respect of the contravention of any of the following provisions contained in the Ordinance:

Conduct rules

- a. The first conduct rule prohibits agreements or concerted practices by undertakings or decisions of trade associations if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong. The following practices constitute serious anti-competitive conduct under the Ordinance, and are likely to invite more severe sanctions:
 - (i) fixing, maintaining, increasing, or controlling the price for the supply of goods or services;
 - (ii) allocating sales, territories, customers or markets for the production or supply of goods or services;
 - (iii) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services; and
 - (iv) bid rigging practices.

The following general exclusions apply in respect of the first conduct rule:

 - (i) agreements enhancing overall economic efficiency;
 - (ii) compliance with legal requirements;
 - (iii) services of general economic interest;
 - (iv) mergers; and
 - (v) agreements of lesser significance.
- b. The second conduct rule prohibits the abuse of market power by undertakings that have a substantial degree of market power, where the object or effect of the abuse is to prevent, restrict or distort competition in Hong Kong. Predatory behaviour towards competitors or limiting production, markets or technical development to the prejudice of consumers is likely to constitute abusive conduct under the Ordinance. The following general exclusions apply in respect of the second conduct rule:
 - (i) compliance with legal requirements;
 - (ii) services of general economic interest;
 - (iii) mergers; and
 - (iv) conduct of lesser significance.

Merger rule

- c. The merger rule prohibits direct or indirect mergers that have the effect of substantially reducing competition in Hong Kong. This

rule is restricted to undertakings that hold telecommunications carrier licenses or which directly or indirectly control such licensees. The following general exclusions apply in respect of the merger rule:

- (i) mergers enhancing overall economic efficiency;
- (ii) exceptional and compelling reasons of public policy;
- (iii) statutory bodies, unless otherwise specified in a regulation made by the Chief Executive of Hong Kong; and
- (iv) persons specified as being exempt in a regulation made by the Chief Executive.

The concept of ‘undertakings’ in each of the above rules captures all entities irrespective of their legal organisation, as long as they are involved in an economic activity.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Ordinance serves as a comprehensive code for bringing an action for breach of competition law.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from national law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The Competition Tribunal is a specialised tribunal constituted under the Ordinance (the “**Tribunal**”) with primary jurisdiction to hear and adjudicate competition-related cases.

The Ordinance bars the jurisdiction of the Court of First Instance even in private actions where the cause of action is solely the contravention or involvement in contravention of conduct rules.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

The Ordinance empowers the Competition Commission (the “**Commission**”) to bring proceedings before the Tribunal where it has

a reasonable cause to believe that there is a breach of the competition rules.

There are no stand-alone rights of action. Persons wanting to complain against contravention of the competition rules can lodge a complaint with the Commission or bring a follow-on claim (for any loss or damage suffered) before the Tribunal, either after a final determination in respect of the contravention or a formal admission of the contravention accepted by the Commission.

Hong Kong does not have a class action regime. Whilst it is possible to bring representative actions under the Rules of the High Court, they are yet to feature in a competition law context.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Ordinance has an effects-based approach conferring extra-territorial jurisdiction so long as the effect of the conduct is in Hong Kong.

- a. The first conduct rule applies even if:
 - (i) the agreement or decision is made or given effect to outside Hong Kong;
 - (ii) the concerted practice is engaged in outside Hong Kong;
 - (iii) any party to the agreement or concerted practice is outside Hong Kong; or
 - (iv) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.
- b. The second conduct rule applies even if:
 - (i) the undertaking engaging in the conduct is outside Hong Kong; or
 - (ii) the conduct engaged in is outside Hong Kong.
- c. The merger rule applies even if:
 - (i) the arrangements for the creation of the merger take place outside Hong Kong;
 - (ii) the merger takes place outside Hong Kong; or
 - (iii) any party to the arrangements for the creation of the merger, or any party involved in the merger is outside Hong Kong.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Hong Kong has not garnered any such reputation and the Ordinance is relatively new to draw any conclusions.

1.8 Is the judicial process adversarial or inquisitorial?

Like most common law jurisdictions, the judicial process in Hong Kong is adversarial. That said, the Ordinance encourages proactive case management by the Tribunal in the conduct of the proceedings.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available in case of existing and likely violations of the conduct rules and the merger rule.

2.2 What interim remedies are available and under what conditions will a court grant them?

The Ordinance does not contain a list of specific interim measures that the Tribunal can make, nor does it provide for any prerequisites other than that the Tribunal must be 'satisfied' that a person is engaged in or proposing to engage in an infringement.

The Tribunal essentially enjoys a vast discretion to decide on the types of interim orders to be made, including cease and desist orders, injunctions, etc. The Tribunal would, however, consider proportionality and effectiveness principles, depending on the types of orders it intends to make and the seriousness of the allegations.

The Tribunal can make interim orders either on application or on its own motion. In case of the merger rule, the application can only be made by the Commission.

An interim order remains in force for a period not exceeding 180 days and is extendable for a maximum period of 180 days.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The following final remedies are available for contravention or involvement in the contravention of any competition rule.

Pecuniary penalty

The Tribunal can impose a pecuniary penalty on a person or undertaking if it is satisfied of the alleged contravention. In determining the amount of the penalty, the Tribunal will take into account factors including but not limited to:

- a. the nature and extent of the conduct that constitutes the contravention;
- b. the loss or damage, if any, caused by the conduct;
- c. the circumstance in which the conduct took place;
- d. whether the person has previously been found by the Tribunal to have contravened the Ordinance;
- e. the size of the contravening undertaking;
- f. the degree of market power it has;
- g. the seniority of the managers involved;
- h. the existence of a compliance culture as evidenced by a compliance programme;
- i. cooperation with the competition authority;
- j. financial position; and
- k. the deterrent effect of any penalty.

Other orders

The Tribunal is empowered to make any of the following orders it considers appropriate, including for the purposes of bringing an infringement to an end, restoring effective competition, compensating a party's losses and ensuring that a person does not benefit from its infringement:

- a. a declaration that a person has contravened a competition rule;
- b. an order restraining or prohibiting a person from engaging in any conduct that constitutes the contravention or the person's involvement in the contravention;
- c. an order requiring a person who has contravened a competition rule or been involved in the contravention to do any act or thing, including the taking of steps for the purpose of restoring the parties to any transaction to the position in which they were before the transaction was entered into;
- d. an order restraining or prohibiting a person from acquiring, disposing of or otherwise dealing with any property specified in the order;
- e. an order requiring a person to dispose of such operations, assets or shares of any undertaking specified in the order, in the manner specified in the order;

- f. an order appointing a person to administer the property of another person;
- g. an order prohibiting a person from making or giving effect to an agreement;
- h. an order requiring the parties to an agreement (the making or giving effect to which constitutes the contravention of the competition rules) to modify or terminate that agreement;
- i. an order declaring any agreement (the making or giving effect to which constitutes the contravention of the competition rules) to be void or voidable to the extent specified in the order;
- j. an order prohibiting the withholding from any person of:
 - (i) any goods or services; or
 - (ii) any orders for any such goods or services;
- k. an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention;
- l. an order prohibiting requiring as a condition of the supply of goods or services to any person:
 - (i) the buying of any goods or services;
 - (ii) the making of any payment in respect of goods or services other than the goods or services supplied; or
 - (iii) the doing of any other similar thing or the refraining from doing of anything mentioned in subparagraph (i) or (ii) or any other similar thing;
- m. an order prohibiting a person from exercising any right to vote that is exercisable by virtue of the holding of any shares, stock or securities;
- n. an order requiring that any person or class of person be given access to goods, facilities or services specified in the order on the terms specified in the order;
- o. an order requiring that any person or class of person be given the right to use goods, facilities or services specified in the order on the terms specified in the order;
- p. an order requiring any person to pay to the Government or to any other specified person, as the Tribunal considers appropriate, an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention; or
- q. for the purpose of securing compliance with any other order made under this section, an order requiring any person who has contravened or been involved in the contravention to do or refrain from doing anything specified in the order.

In considering the types of orders it deems appropriate to impose, the Tribunal may consider proportionality and effectiveness principles, depending on the types of orders it intends to make and the seriousness of the allegations.

The Tribunal can also make disqualification orders disqualifying any person for a maximum period of five years from being a director or liquidator or receiver or being directly or indirectly involved in promotion, formation or management of a company.

Such order will be made only if the Tribunal finds the company to be in contravention of the competition rule and if the person's conduct would make him unfit to be involved in management of the company.

With a view to securing enforcement of an order or persuasion of a civil claim, the Tribunal can also issue prohibition orders to prevent a person from leaving Hong Kong. The Tribunal can only make such an order when satisfied that there is a probable cause to believe that the person is about to leave Hong Kong due to which the judgment or order is likely to be obstructed or delayed. The order is valid for one month unless extended or renewed.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

The remedy of damages prescribed under the Ordinance is compensatory in nature, not punitive. In determining the amount of the award, the Tribunal is guided by the prerequisites for the grant of damages under the laws of tort, including causation and remoteness.

We are yet to see a case in Hong Kong where an award of damages has been made by the Tribunal.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The Ordinance does not contain specific provisions for considering fines and/or redress schemes when calculating an award. The level of fine or pecuniary penalty will not have any bearing on the amount of damages, which will be determined on the basis of the loss or damage suffered by the claimant.

There are, however, no limits on the factors that the Tribunal may have regard to while imposing pecuniary penalties.

4 Evidence

4.1 What is the standard of proof?

The Tribunal has recently clarified in *Competition Commission v. Nutanix Hong Kong Limited & Ors* [2019] HKCT 2 that in cases involving determination of a criminal charge (such as cartel and tender-rigging arrangements), where pecuniary penalties are sought, the applicable standard of proof required of the Commission would be that of beyond reasonable doubt. In all other proceedings, the civil standard of balance of probabilities would be applicable.

4.2 Who bears the evidential burden of proof?

The Commission or the party initiating the action bears the evidential burden of proving its case. However, the burden would shift onto the respondent undertaking seeking to rely on a particular exclusion (such as the economic efficiency defence) to establish their defence on the balance of probabilities.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

There is no presumption of loss in damages claims. Claimants are required to prove both the loss and quantum of damages.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In proceedings under the Ordinance, other than proceedings where a pecuniary or financial penalty is sought, the Tribunal is empowered to take into account any relevant evidence or information, whether or not it would be otherwise admissible in a court of law (including hearsay evidence).

In cases involving pecuniary penalties or other stringent orders which can have far-reaching consequences for the respondents, the Tribunal is bound by the rules of evidence and is expected to be careful in admitting and assessing any evidence.

Expert evidence is admissible before the Tribunal, as long as the parties ensure that they serve no more expert evidence than is

necessary. The parties can also expect directions for the parties' respective experts to communicate with each other and produce a joint report specifying matters agreed and matters not agreed and the reasons for any non-agreement.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

(i) Before proceedings have begun: The Commission, as an investigation authority, is empowered to obtain any document or information that is relevant to the investigation from any person.

Private claimants can seek pre-action disclosures from the Courts by demonstrating the relevance and necessity of the document in question, and the necessity of discovery before commencement of the action.

(ii) During proceedings from the other party: Unlike in the Court of First Instance, automatic general discovery is not available in competition law proceedings. Discovery is at the discretion of the Tribunal, and the following factors may be taken into account by the Tribunal in determining an application for discovery:

- the need to secure the furtherance of the purposes of the Ordinance;
- whether the information in the document is confidential;
- balance between the interests of the parties and other persons; and
- the extent to which the document is necessary for the fair disposal of the proceedings.

(iii) From third parties (including competition authorities): Parties may apply for discovery and production of specific documents from non-parties and the Commission.

It has been recently held that discovery in Tribunal proceedings should approach the standard applicable to the prosecution in criminal proceedings, i.e. the Commission would be expected to disclose all relevant material which may undermine its case or advance the respondent's case.

In the context of the Commission, the following communications have been held to be protected from disclosure:

- communications between the Commission and parties who unsuccessfully seek leniency;
- complaint forms containing the complainant's details;
- reports to and minutes of the Commission concerning the results of the investigation and the enforcement steps to be taken;
- internal communications and notes relating to the execution of the search warrants showing the methods, procedures and tactics of the Commission; and
- other internal communications insofar as the Commission is able to justify withholding of the content.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

The Tribunal has all the powers of the Hong Kong Court of First Instance with respect to attendance, swearing and examination of witnesses, and can summon any person to give evidence relevant to the proceedings. The Commission too has the power to call upon any person to answer questions that are reasonably believed to be relevant to the investigation.

Parties are able to cross examine another party's witnesses before the Tribunal.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The Ordinance has provisions for follow-on claims by persons who have suffered loss or damage due to an act adjudged as a contravention of a conduct rule. However, there is no suggestion of relaxation of the standard of proof, thereby requiring the claimant to ultimately prove its case on a balance of probabilities.

The Ordinance does not recognise a follow-on action in respect of an infringement decision by an international competition authority or an authority from another country. In such cases, a contravention of the Ordinance will first have to be established before parties can pursue a follow-on claim.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

The Tribunal is particularly attentive to the protection of confidential commercial or personal information. Parties are expected to use their best efforts to agree as to whether documents or parts of documents are to be given confidential treatment.

Where appropriate, suitable confidentiality undertakings may be used to limit any further disclosure by the recipients of the information in question.

In considering a request for confidential treatment of any information, the Tribunal may take into account:

- the public interest;
- the legitimate business interests of the undertaking;
- the interests of the natural person; and
- the interests of justice.

Confidential treatment is only accorded to information that genuinely requires to be protected. In general, confidentiality cannot be claimed for the entire or whole sections of a document as it is normally possible to protect confidential information with limited redactions.

The Tribunal may also make orders prohibiting disclosure or publication of any material the Tribunal receives during the proceedings. A person who fails to comply with an order may be held liable to an imprisonment up to six months and a fine at level 6.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Where proceedings involving a contravention, or involvement in a contravention, of a conduct rule are brought by a person other than the Commission, the Commission is entitled to:

- apply to be a party to those proceedings with the leave of the Tribunal (so that it can call evidence, cross-examine witnesses and seek any relief); and
- make representations either on its own application or on invitation by the Tribunal.

Ever since the Ordinance has come into force, the majority of the cases have been initiated by the Commission, and privately initiated cases have not involved any intervention or participation by the Commission.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no specific defence of justification/public interest available under the Ordinance. However, the Ordinance does provide for a specific exclusion ground for enhancing overall economic efficiency in the case of the first conduct rule.

In respect of the second conduct rule, the Commission has indicated two causes of justification in its guidelines, suggesting that parties can justify their actions based on practical reasons (for example, a refusal to sell may be justified by the poor creditworthiness of a customer) or reasons of economic efficiency.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

An application of the passing-on defence is yet to be seen in Hong Kong.

The Ordinance does not contain an express limitation on the types of person that can sue for damages on account of a contravention of the conduct rules. Accordingly, indirect purchasers would have legal standing to sue provided they have suffered loss or damage as a result of the infringement.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes, a defendant can join other cartel participants as co-defendants to the claim by issuing a third-party notice with the leave of the Tribunal. The third party may be joined on the basis that the defendant:

- seeks to claim contribution or indemnity from the party;
- seeks to claim any relief or remedy relating to the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- requires that any question or issue relating to the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and the third party.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

For contravention of the conduct rules, the limitation period is five years, and it starts running either after the day on which the contravention ceases or the Commission became aware of it, whichever is later.

For contravention of the merger rule, the limitation period is six months, and it starts running either after the completion of merger or the Commission becoming aware of it, whichever is later. The period can be extended by the Tribunal in the case of imposition of pecuniary penalties if it considers it reasonable to do so.

For follow-on actions, the limitation period is three years after the earliest date on which the action could have been commenced, following the expiry of the period within which an appeal can be brought, and if an appeal has been brought, until it has been determined.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Subject to the complexity of the case, the average time taken from the commencement of the proceedings to judgment is typically two years.

There are no specific provisions on expedition of proceedings, except in cases of urgent interim orders, where applications for relief can be made by the applicants on an *ex parte* basis.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Permission of the Tribunal is generally not necessary to discontinue a private action. Where, however, the Commission seeks to discontinue or settle a claim (for example, in exchange for the defendant's co-operation in the investigation), the Tribunal's endorsement will be required on the specific orders that are sought by way of consent.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As mentioned above, Hong Kong does not have a class action regime. Whilst representative actions are permissible under the Rules of the High Court, a settlement in a competition law context is yet to be seen.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Any person who has contravened a competition rule can be ordered to pay to the Government the costs reasonably incurred by the Commission in connection with the investigation and the proceedings for the contravention.

As for the costs incurred by other parties to the proceedings, costs follow the event, i.e. a successful party is entitled to recover its costs against the unsuccessful party in accordance with the Rules of the High Court.

8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fees are illegal in Hong Kong and considered a criminal offence.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition claims is not permitted in Hong Kong, as the prohibition against maintenance and champerty still applies. Although third party funding has now been permitted in arbitration, competition claims remain non-arbitrable in Hong Kong.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes, an appeal lies before the Court of Appeal against any decision of the Tribunal on both points of fact and points of law (except for interlocutory decisions where leave is required).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Hong Kong is one of the few jurisdictions which provides a statutory basis for a leniency policy, whereby the Commission seeks to induce co-operation in investigation or proceedings *in lieu* of immunity from continuation or commencement of pecuniary proceedings.

The regime only envisages immunity from pecuniary proceedings. Beneficiaries of leniency agreements are not shielded from private enforcement actions.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Yes, communications between the Commission and applicants seeking leniency (whether successful or unsuccessful) are privileged and can be withheld in subsequent proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

This is not applicable.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The competition regime is relatively new in Hong Kong and a large part of the interpretation of the Ordinance by the Tribunal is yet to be seen.

There are currently no formally proposed reforms in the pipeline. However, the Tribunal has recently handed down judgments in Hong Kong's first two competition cases involving bid rigging, market sharing and price-fixing.

In the first (bid rigging) case, the Tribunal found the four respondent information technology (IT) companies, namely Nutanix Hong Kong Limited, BT Hong Kong Limited, Innovix Distribution Limited and Tech-21 Systems Limited, liable for contravening the first conduct rule of the Ordinance by engaging in bid rigging concerning a tender related to the supply and installation of a new IT system for the Hong Kong Young Women's Christian Association.

In the second (market sharing and price-fixing) case, the Tribunal found the 10 respondent construction companies liable for contravening the first conduct rule of the Ordinance by engaging in market sharing and price-fixing in relation to the provision of renovation services at a public rental housing estate.

Not only are these decisions important in setting legal precedents and providing helpful guidance on important aspects of the Ordinance, they also send a powerful warning to businesses against cartel conduct, which remain an enforcement priority for the Commission.



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