

What you need to know about HK's Competition Bill

Are you ready for the financial risks associated with the competition bill?



JOHN HICKIN
PARTNER
MAYER BROWN JSM



GERRY O'BRIEN
SENIOR ASSOCIATE
MAYER BROWN JSM

A comprehensive cross-sector Competition Bill is currently before Hong Kong's Legislative Council. The Proposed Law contains two main 'conduct rules' - being a generally worded prohibition of anti-competitive agreements as well as a prohibition against unilateral conduct that constitutes abuse of substantial market power.

According to the Proposed Law, any contravention of the conduct rules will expose the concerned company to penalties amounting up to 10% of global turnover. Additionally, new Competition Tribunal will be empowered to impose a wide range of orders against the company, including orders requiring that it divest assets or exit markets.

These penalties are obviously significant enough to demand the Proposed Law be given the full attention of boardrooms across Hong Kong. However, in addition to threats to a company's finances and permitted scope of operations, company directors and senior executives need to be aware that they may also face significant financial and other risks as individuals if they are involved in the operation or management of a company that contravenes the law. This is explained below.

Pecuniary penalty

According to section 91 of the Proposed Law, the Competition Tribunal's power to impose pecuniary penalties in response to identified contraventions of the conduct rules extends to fining any person 'involved' in such a contravention. This clearly includes company directors and executives.

In particular, directors and executives may be at risk where they aid or abet, or are knowingly concerned in (directly or indirectly), a contravention. This may include, for example, where a director personally oversees, takes part in, or signs off on an arrangement that the Competition Tribunal later deems to be contrary to the conduct rules, or perhaps even wilfully ignores information that suggests a contravention is occurring.

Importantly, the Proposed Law makes it clear that directors and senior executives will not be able to receive indemnification from their employers in respect of any liability they may incur to pay a pecuniary penalty for contraventions - or the costs of defending an action in relation to the law where such a penalty is imposed or conviction recorded.

Disqualification orders

Section 99 of the Proposed Law empowers the Competition Tribunal to make an order disqualifying a person from being a director of a company or from otherwise being concerned in the affairs of a company for up to 5 years, if the company has contravened a conduct rule and the Competition Tribunal considers that the person's conduct as a director makes the person unfit to be concerned in the management of the company.

Disqualification powers are not new to Hong Kong's regulatory environment, however it is arguable that the broad nature of the Proposed Law's conduct rules may give rise to a greater level of compliance uncertainty than will usually be the case with legislation such as

Directors and executives need to ensure they are properly educated on all aspects of the Proposed Law.

the Securities and Futures Ordinance, and this will make many directors and executives nervous about their capacity to mitigate risk in this area.

Risks of being sued by the company?

Directors also potentially face the risks of being sued by their company if they are relevantly involved in a breach of law that exposes the company to penalty or loss. However, a recent English decision suggests this risk may be narrowed in a competition law context. In *Safeway Stores v Twigger & Ors* [2010] EWHC 11 (Comm), England's Court of Appeal ruled that Safeway's liability for competition law fines was personal to it as a company and could not be passed to its employees (even if they were largely responsible for the infringement).

How should directors and executives be preparing?

Directors and executives need to ensure they are properly educated on all aspects of the Proposed Law. Additionally, they should ensure their companies implement comprehensive compliance policies and compliance programs, specifically tailored to reflect the major risks likely to arise in their industry sector and with regard to the structure of their business.