

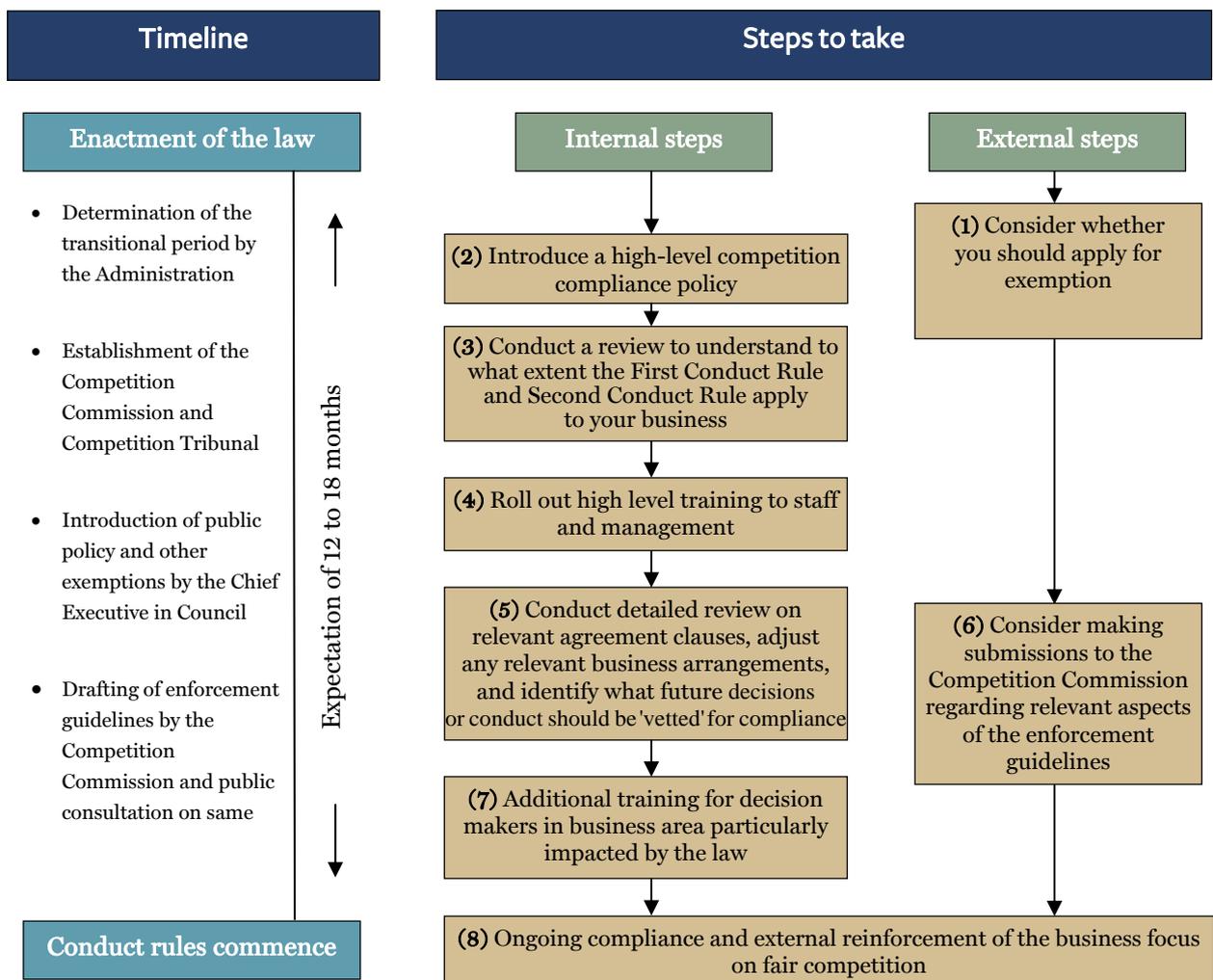
Further Information on Hong Kong's New Competition Law

What you should know and what you should do - a 2 part Legal Update

Part II of II - What you should do

This is the second of a two-part legal update regarding Hong Kong's new competition law, which received its third and final reading last night (14 June) in the Legislative Council today, paving the way for enactment. In our earlier legal update on this topic [here](#), we highlighted key aspects of the law that all businesses who operate or sell into Hong Kong should be aware of. In this Part II, we provide high-level recommendations regarding the steps that businesses should now take in advance of enforcement of the law's key prohibitions - the keys aspects of which are referenced in the diagram below and then further explained in subsequent pages.

Timing expectations for implementation of the law and how this impacts prudent compliance steps:



Further explanation of our recommendations:

Step (1):	<p>Consider whether you should apply for an exemption - An automatic exemption from the Conduct Rules applies to most statutory authorities, and ‘SMEs’ whose annual turnover falls below specified thresholds¹ also qualify for an automatic (but only partial) exemption. However, there are other forms of exemption/exclusion that may be applied at the discretion of the Chief Executive in Council or Competition Commission. For example, the CE in Council can exempt businesses wholly or partly from the Conduct Rules where he or she believes there are compelling reasons of public policy to do so. Additionally, the Competition Commission can introduce ‘block exemptions’ for certain arrangements or types of contractual provisions that are considered to not materially restrict competition as a general matter (or to achieve beneficial effects that outweigh any detriment to competition), and in other jurisdictions it has been common for businesses such as insurance companies, car dealerships and shipping lines to receive the benefit of such exemptions. Accordingly, business operators should consider whether they may benefit from liaising with the CE in Council or the Competition Commission to try and secure relevant exemptions, or to determine whether other forms of automatic exemption, such as one which will apply to providers of services that are deemed to be ‘of general economic interest’, will apply in their favour.</p>
Step (2):	<p>Introduce a high-level competition compliance policy - Adoption of a high-level competition compliance policy, which is commonly a short statement of a company’s intention to conduct its operations in a manner compliant with competition law, can help set the agenda for a businesses’ activities relating to this area of law. A compliance policy is usually signed off by the company’s CEO or other senior executives, and this helps to reinforce to staff that any compliance principles communicated to them under such policy have the full support and attention of management. Additionally, when the compliance policy is made public, for example by posting on the company’s webpage, this is a statement to the world at large (including the Competition Commission) that the company is treating this area of law as a priority. In addition to helping the company to develop a culture of compliance, this could also assist in the event of a Competition Commission investigation, as a number of competition regulators around the world - such as the Singapore Competition Commission - provide leniency to companies that have adopted competition compliance policies and procedures but become involved in an infringement due to the unsanctioned actions of a small number of employees.</p>

¹ In relation to the First Conduct Rule, the exemption applies to agreements/practices between businesses with a combined global turnover not exceeding HKD 200 million in the preceding financial year (but the exemption does not apply to price-fixing, bid-rigging, market-sharing or output limitation conduct). In relation to the Second Conduct Rule, the exemption applies if the relevant business’ global turnover was below HKD 40 million in the preceding financial year.

<p>Step (3):</p>	<p>Conduct a review to understand to what extent the First Conduct Rule and Second Conduct Rule apply to your business - Although the Conduct Rules can potentially impact a very broad scope of business activities, many businesses will find that only certain aspects of these rules will be of particular importance to their day-to-day trading. For example, if a business does not enjoy substantial market power in any market in which it participates, then the Second Conduct Rule will not be relevant to it (except to the extent that it can use the rule as a ‘sword’ to curb relevant anti-competitive activities of trading partners or competitors who do possess such power). Meanwhile, businesses in oligopoly sectors and thus facing only a handful of competitors may find that any competition-related scrutiny of their sector may largely focus on whether any cartel activity exists. Recognising which rules are most relevant to a company will assist in determining the types of compliance guidance and training that need to be rolled out to staff, and thus should be a priority step in this area.</p>
<p>Step (4):</p>	<p>Roll out high-level training to staff and management - As competition law will be a new area of regulation for many business people, training is essential to ensure they understand the law and how it will impact their day-to-day activities. Ideally, training will be tailored to the specific issues most likely to arise for the company, as identified in the context of Step 3.</p>
<p>Step (5):</p>	<p>Conduct detailed review on relevant agreement clauses, adjust any relevant business arrangements, and identify what future decisions or conduct should be ‘vetted’ for compliance - Once the key issues likely to be faced by a business are understood, and staff have some basic knowledge of competition law principles, the appropriate groundwork will be in place to identify what agreements and arrangements the company has in place that may need to be closely reviewed for compliance. For example, if a company has identified that cartel risks in the context of the First Conduct Rule may be considered a priority area for review, staff can then be engaged to identify what contracts (i.e. joint venture, joint production, joint buying, etc) and arrangements (i.e. regular cross-competitor meetings, etc) are in place between the company and its competitors that may need some legal review and, if necessary, adjustment before the Conduct Rules commence. Additionally, some protocols can be put in place to ensure any new contract or arrangements with competitors are legally-vetted before implementation.</p>
<p>Step (6):</p>	<p>Consider making submissions to the Competition Commission regarding relevant aspects of enforcement guidelines -The competition law is broadly worded, and some key aspects of the law and how it will be applied will only be better understood after the Competition Commission has adopted enforcement guidelines. Companies will therefore want to ensure they are across these guidelines, and may even want to participate in the public consultation process that will occur as they are drafted. For example, companies that regularly participate in industry forums where competitors are represented or who are involved in the joint setting of industry standards may want to have a say in the guidelines that the Commission can be expected to prepare regarding information-exchange between competitors.</p>

<p>Step (7):</p>	<p>Additional training for decision-makers in business areas particularly impacted by the law -Senior management, and staff who are involved in key decision-making (such as those charged with making pricing decisions, liaising with competitors on relevant -legitimate- matters, and/or negotiation of contractual terms of supply or purchase, etc) may need additional specialised training beyond the 'high-level' guidance provided to all staff. This will ensure they are armed with all the knowledge they need to maximise compliance, and to identify where additional guidance from the company's legal advisors is prudent. As any such training should build on initial 'high-level' training provide to all staff, and could also be timed to take into account the specific enforcement approach advised by the Commission in its enforcement guidelines when published (this it is considered prudent to position this as 'step 7' in the overall compliance implementation process).</p>
<p>Step (8):</p>	<p>Ongoing compliance and external reinforcement of the business focus on fair competition -This step applies once the Conduct Rules take effect. Assuming completion of all of the relevant proceeding steps, the company should be well-positioned to maximise compliance in this area. However, it will also need to continue to refine its compliance procedures to adapt to legal developments and new guidance that will be published by the Competition Commission (or new principles reflected in decisions of the Tribunal) from time to time. Periodic review of the existing compliance procedures in place at the company should also have the aim of ensuring that the business is not unduly restricted or 'slowed down' by the checks-and-balances that have been put in place - and that a continuous cycle of learning and refinement occurs. Additionally, once the basic steps for competition compliance are in place, consideration can be given as to whether implementation of any additional procedures may be advantageous - such as documented procedures for responding to Competition Commission investigations (particularly where they take the form of a so-called 'dawn raid').</p>

BUT there is no ‘one size fits all’ approach...

Of course, different businesses will need different forms of, and approaches to, competition law compliance. Some businesses that have been operating in or selling into foreign jurisdictions with actively enforced competition laws for many years may already be very familiar with relevant compliance requirements, and may already have some appropriate policies and procedures in place within their corporate group. For these businesses, the priority may be to tailor pre-existing compliance principles, policies and guidance documents to ensure they reflect the unique aspects of the Hong Kong law. For other businesses, such as Hong Kong-focused businesses whose trading activities have never previously been subject to a competition law, a more comprehensive ‘ground up’ approach comprising many or all of the above steps will be more appropriate.

Who can help?

Mayer Brown JSM’s Antitrust & Competition Team is experienced in conducting competition law training and implementing trade practices compliance programs for all levels of business management and employees. Team members have worked in a number of existing competition law regimes across Asia, and in the Hong Kong context have been actively involved in discussions with the Administration and business sector regarding the region’s emerging competition regime for many years. Accordingly, we are uniquely positioned to assist in this area. We would be pleased to assist in relation to any competition law questions or issues.

Additionally, the Team benefits from a close working relationship with antitrust lawyers in Mayer Brown’s European and U.S. offices in particular, allowing the Team to bring an important additional perspective to issues such as expectations for the interpretation and enforcement approach in Hong Kong based on learnings from jurisdictions that are clearly influencing Hong Kong’s developing competition law regime.

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