

Competition Commission (Hong Kong): Overview

by [Hannah Ha](#), Mayer Brown

Law stated as of 13 Dec 2023 · Hong Kong - PRC

A Practice Note providing an overview of the Competition Commission of Hong Kong, which is the regulator for the enforcement of the competition laws in Hong Kong. This Note includes a discussion of the Commission's structure and processes, the scope of its enforcement authority, and current priorities.

Competition Laws Enforced by the Commission

First Conduct Rule (FCR)

Second Conduct Rule (SCR)

Merger Rule

Consumer Protection

Scope of Enforcement Authority

Structure of the Commission

Relationships with Other Regulators

Investigation Processes and Procedures

Initial Assessment Phase

Formal Investigation Phase

Nature of Investigation Powers

Outcomes of the Formal Investigation Phase

Civil Enforcement Processes and Procedures

Commitments, Infringement Notices and Warning Notices

Commitments

Infringement Notices

Warning Notices

Potential Sanctions

Private Actions

Leniency

Co-operation and Settlement

Judicial Review

Criminal Enforcement

Failing to Comply with a Requirement or Prohibition Under the Investigation Powers of the Commission

Intentionally or Recklessly Destroying, Disposing of, Falsifying or Concealing a Document

Obstructing the Execution of a Warrant to Enter and Search Premises

Knowingly or Recklessly Providing False or Misleading Documents or Information

Merger Review

Approach to Gun-Jumping

Enforcement Priorities

The Competition Commission of Hong Kong (Commission) is an independent statutory body established under the *Competition Ordinance (Cap 619)*, which was enacted in June 2012. The Commission is the principal authority in Hong Kong responsible for enforcing the Competition Ordinance and its related subsidiary legislation. The objective of the Competition Ordinance is to prohibit conduct that prevents, restricts, or distorts competition, and to prohibit mergers that substantially lessen competition in Hong Kong. To achieve this, the Commission is tasked with the following functions:

- Conducting investigations.
- Promoting public understanding of the value of competition.
- Encouraging undertakings to adopt appropriate internal controls and risk management systems, and to comply with the Competition Ordinance.
- Advising the government on competition matters within and outside Hong Kong.
- Conducting market studies into matters affecting competition in Hong Kong.
- Promoting research and development of the legal, economic and policy aspects of Hong Kong competition law.

As the Commission is an independent statutory body, it is not a servant or agent of the Hong Kong Government, and does not enjoy any status, immunity, or privilege of the government.

This Note provides an overview of the Commission and its operations, including:

- The scope of its authority.
- How decisions are made.
- Penalties that can be levied.

- Current enforcement priorities.

Competition Laws Enforced by the Commission

- The Competition Ordinance contains competition rules that mainly prohibit three types of conduct:
- A prohibition on anti-competitive agreements and concerted practices (including cartel conduct) (First Conduct Rule or FCR).
- A prohibition of abuse of market power by undertakings that have a substantial degree of market power (Second Conduct Rule or SCR).
- A prohibition of direct or indirect mergers that substantially lessen competition in Hong Kong (limited to carrier licences issued under the [Telecommunications Ordinance \(Cap 106\)](#)) (Merger Rule).

The Competition Ordinance has extraterritorial effect, meaning that it applies to agreements and conduct that take place both within and outside Hong Kong, to the extent that they have the effect of harming competition in Hong Kong.

First Conduct Rule (FCR)

- An undertaking (meaning any entity engaged in economic activity, including individuals) must not do any of the following, if the object or effect is to prevent, restrict or distort competition in Hong Kong:
- Make or give effect to an agreement.
- Engage in a concerted practice.
- As a member of an association of undertakings, make or give effect to a decision of the association.
- (Part 2, Division 1, Competition Ordinance.)

There are exceptions under Schedule 1 to the Competition Ordinance, such as:

- Conduct that enhances overall economic efficiency.
- Compliance with legal requirements.
- Conduct that is necessary for general economic interest.

- Mergers.
- Conduct of lesser significance (relevant conduct by small enterprises that do not meet the turnover threshold).

For "serious anti-competitive conduct," the exclusion for agreements of lesser significance does not apply.

Section 2(1) of the Competition Ordinance defines serious anti-competitive conduct to include:

- Price fixing.
- Market sharing.
- Output limitation.
- Bid-rigging.

If there is serious anti-competitive conduct, the Commission can bypass the warning notice procedure (see Civil Enforcement Processes and Procedures) and institute proceedings before the Competition Tribunal directly.

The Commission has issued guidelines to show its interpretation of the Competition Ordinance. Under the [Guideline on the FCR](#), the Commission takes a stricter approach towards horizontal restrictive arrangements (between competitors), whereas vertical restrictions (between suppliers and customers or distributors) are normally interpreted less strictly except in cases of resale price maintenance.

Determining the object of the agreement, practice or decision requires an objective assessment of the purpose or aim of the conduct, viewed in its context and in light of the way it is implemented, and not merely the subjective intentions of the parties. Agreements, practices or decisions that fall short of having an object of harming competition can nevertheless be prohibited if they have anti-competitive effects. This means that they must have, or be likely to have, an adverse impact on at least one of the parameters of competition, such as:

- Price.
- Output.
- Product quality or variety.
- Innovation.

In assessing the actual or likely effect of the conduct, the Commission can assess what the market conditions would have been without the conduct, and compare with the market conditions where the conduct is present (known as the counterfactual test).

Second Conduct Rule (SCR)

An undertaking that has a substantial degree of market power must not abuse that power by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong (Part 2, Division 2, Competition Ordinance).

Common examples include:

- Predatory pricing.
- Tying.
- Bundling.
- Refusal to deal.
- Margin squeeze practices.
- Exclusive dealing.

In Hong Kong, there is no market share threshold for determining whether an undertaking has a substantial degree of market power. Instead, the Commission assesses market power by analysing several factors, including:

- Market share.
- Barriers to entry or expansion.
- Countervailing buyer power.
- Market-specific characteristics.

Ultimately, the Commission considers the extent to which the undertaking faces constraints on its ability to profitably sustain prices above competitive levels.

The SCR has a wide application, as abusive conduct potentially comprises any conduct which has the object or effect of harming competition in Hong Kong. The [Guideline on the SCR](#) reflects that the Commission focuses on exclusionary conduct (anti-competitive foreclosure) more than merely exploiting market power to increase profits. This is because the Competition Ordinance is concerned with protecting competition in the market and not the commercial interests of particular market participants.

There are exceptions under Schedule 1 to the Competition Ordinance, such as:

- Compliance with legal requirements.
- Where the conduct is necessary for general economic interest.

- Mergers.
- Conduct of lesser significance.

Merger Rule

- See [Merger Review](#).
- At present, the merger rule only applies to mergers involving carrier licence holders within the meaning of the Telecommunications Ordinance.

Consumer Protection

- In Hong Kong, there is no unified consumer protection legislation. Instead, consumer protection is provided by multiple laws on different areas, for example, the [Sale of Goods Ordinance \(Cap 26\)](#) protects consumers who have paid money to sellers in exchange for goods. Consumer protection matters are primarily dealt with by the Consumer Council. Nevertheless, it is an objective of the Commission and the Competition Ordinance to encourage and protect competition in Hong Kong to achieve more efficient resource allocation and protect consumer rights.

Scope of Enforcement Authority

The Commission has a range of enforcement powers under the Competition Ordinance which include:

- Investigations.
- Accepting commitments by undertakings.
- Issuing infringement notices.
- Issuing warning notices.
- Entering into leniency agreements.
- Applying to the Competition Tribunal to impose a penalty or any other order.
- Anything "necessary, advantageous or expedient" for, or in connection with, the Commission's functions (section 131).

Hong Kong's competition law regime is unique in that it is split between:

- The Commission, that takes investigation and enforcement actions.
- The Competition Tribunal, that carries out adjudication, and imposes penalties or sanctions.

The Commission cannot impose penalties or sanctions. Its primary responsibility is to investigate potential breaches of the Competition Ordinance. This paves the way for the Competition Tribunal to determine whether there is a contravention and to decide on the appropriate penalty.

The Competition Tribunal is a superior court of record. It comprises High Court judges, and is subject to the practice and procedure of a Court of First Instance.

Structure of the Commission

The Commission is an independent body established under the Competition Ordinance, and is overseen by the Chair. The Commission is currently administered by 15 members, who are appointed by the Chief Executive of Hong Kong, and make final decisions based on the work of the staff members, including the Chief Executive Officer, Senior Executive Director and Executive Directors.

There are three main working committees within the Commission:

- **The Enforcement Committee.** It conducts investigations and determines applications for decisions under sections 9 and 24 of the Competition Ordinance. The Enforcement Committee also advises the Commission on enforcement related matters, subject to certain non-delegable powers of the Commission.
- **The Finance and Administration Committee.** It supervises financial and administrative matters, including financial management control, accounting procedures and general administration management.
- **The Staff Committee.** It supervises human resources management matters.

Relationships with Other Regulators

The Commission actively collaborates with other local regulators to achieve effective enforcement. The Commission has signed memoranda of understanding with the Securities and Futures Commission to enhance the exchange of information regarding the securities and futures industry, and with the Communications Authority as required by section 161 of the Competition Ordinance.

Internationally, the Commission has signed memoranda of understanding with the Philippine Competition Commission, the Canadian Competition Bureau, and the Guangdong Administration for Market Regulation (to strengthen cooperation in advancing competition policy and law in the Greater Bay Area).

Investigation Processes and Procedures

The Commission receives information on possible violations through its own work (requests, intelligence gathering or investigations), complaints, referrals from other public agencies or leniency applications. Investigations by the Commission are governed by Part 3 of the Competition Ordinance and the [Guideline on Investigations](#) issued by the Commission.

Initial Assessment Phase

The Commission can conduct an investigation if it has reasonable cause to suspect a contravention of the competition rules (section 39(2), Competition Ordinance). At this stage, the Commission conducts an initial assessment of whether there is reasonable cause to suspect a contravention, and decides whether further investigation is appropriate. The test only needs to be satisfied beyond mere speculation, it does not require evidence to suggest that on balance, a contravention has occurred.

The Commission can seek information on a voluntary basis from undertakings or individuals who may have knowledge of the conduct through telephone, in writing, in person, or from public sources such as market surveys or reports. However, it does not have the power to compel undertakings or individuals to provide information.

In deciding whether to further investigate, the Commission takes into account factors including:

- Whether the evidence indicates that there has been a contravention.
- The potential impact of the alleged conduct on competition and consumers.
- The Commission's enforcement strategy, priorities and objectives.
- Other matters currently under consideration by the Commission and the courts.
- The likelihood of a successful outcome after further investigation.
- Whether the resource requirements of further investigation are proportionate to the expected public benefit.

The initial assessment phase can result in:

- No further action.
- Commencement of the formal investigation phase.
- Alternative actions such as referring the matter to another agency or conducting a market study.
- The Commission accepting a voluntary resolution, such as a commitment.

Formal Investigation Phase

If the Commission commences a formal investigation, its objective is to gather evidence to confirm whether a contravention of the Competition Ordinance has occurred. In doing so, the Commission has a range of investigation powers under Part 3 of the Competition Ordinance, including:

- The power to request information or documents (section 41).
- The power to request any person to appear before the Commission to answer questions (section 42).
- The power to carry out inspections of premises without prior notice under warrant (known as a dawn raid) (section 48).

The Commission also has the power to seek evidence, without relying on its investigation powers, by inviting parties to make voluntary submissions relevant to the investigation.

Under section 50 of the Competition Ordinance, if a search warrant to conduct a dawn raid has been granted, the Commission has the powers including:

- To gain entry to premises (if necessary by force).
- To conduct a search.
- To make copies of documents.
- To take possession of computers.

The Commission can also apply to the Competition Tribunal for an interim order if it is satisfied that a person is engaged in, or proposing to engage in, a contravention of the competition rules, which can include injunction-type orders.

Timeline of an Investigation

In Hong Kong, a warrant is necessary for the Commission to conduct a dawn raid. An authorised officer of the Commission makes the application for a warrant on oath to the Court of First Instance. A warrant can be issued where a judge of the Court of First Instance is satisfied that there are reasonable grounds to suspect that there are or are likely to be, on the premises in question, documents that may be relevant to an investigation by the Commission.

The scope of the warrant is generally wide, providing officers with broad powers to enter and search specified premises without prior notice to the occupier. The Commission can seek a warrant if, for example:

- The undertaking or individual under investigation displays secretive conduct.
- The Commission considers that relevant documents or information may be destroyed or interfered with if the Commission seeks them through other means.

- The Commission has been unsuccessful in obtaining documents or information from a previous request, or suspects non-compliance with an earlier request.

The Commission is not required to have first used one of its other investigation powers before applying for a warrant.

Premises Subject to the Inspection

Dawn raids are not limited to the premises of the company under investigation. The search can cover premises of the investigated company's suppliers or customers, as well as the residential premises of its officers and employees.

The Start of the Inspection

Subject to operational considerations, Commission officers will typically arrive during usual office hours.

Usually, the officers arrive at the location in teams consisting of at least two Commission officers and IT specialists, and may conduct concurrent investigations at different premises. Officers sometimes have site maps and the names of staff members.

Upon request, the Commission officers will present proof of their identity, authorisation (section 47, Competition Ordinance), and the warrant.

If the Commission officers arrive and find no one present, they make reasonable efforts to notify the occupant of their intent to enter, and provide a reasonable opportunity for the occupant or their representative to be present when the warrant is executed.

Section 50 of the Competition Ordinance empowers the Commission to perform various actions, such as:

- Using reasonable force to gain entry or access evidence on the premises.
- Removing any barriers, including individuals impeding the warrant's execution.
- Taking any action or measures necessary to preserve relevant documents or prevent tampering with them, including removing them from the premises. This can involve seizing any computer or device found on the premises that, upon examination, could provide evidence of a violation.

The Competition Ordinance does not require the Commission to wait for legal advisers to arrive before initiating a search. However, if parties have requested the presence of their legal advisers during the search and no in-house lawyer is present, Commission officers typically provide a reasonable amount of time for external legal advisers to arrive.

To prepare for a possible investigation by the Commission, a company should establish a set of response measures. When Commission inspectors arrive, the company's response team should take the following actions:

- Liaise with relevant in-house or external legal advisers to assist in dealing with the officials. The Commission has stated that it will generally wait for external counsel to arrive before starting the search, as long as this does not negatively impact the investigation.
- Verify the identity of the officials and request documentation demonstrating their authorisation(s) to conduct the investigation. The Commission must obtain a warrant from a judge of the Court of First Instance to carry out a dawn raid.
- Take note of the authorised scope of the investigation as indicated on warrant, and ensure that the officials restrict their search and questioning to those matters.
- Appoint a suitable person, such as a response team coordinator, to serve as the primary point of contact with Commission officers during the search.

Searches and Copies of Documents and Data Under Investigation

When conducting a search, Commission officers have the authority to:

- Search all areas of the designated premises, including desks, bookshelves, and cabinets.
- Scrutinise and take copies of or seize any relevant documents, business records and anything that potentially contains evidence of a contravention.
- Confiscate equipment and electronic devices like laptops, servers, hard drives, and mobile phones, whether for work or personal use.
- Request clarifications from individuals regarding relevant documents.

To ensure smooth and effective execution, officers usually ask the person in charge of the premises to appoint a suitable individual to liaise between officers and staff members.

The company's response team should pay close attention to the scope of the investigation specified in the warrant to ensure that the officers search only within that scope. The company can request certified copies of documents that have been seized, and should keep a copy for itself. If computer data is taken, the company can make a backup copy to safeguard against data loss.

After the dawn raid, the Commission examines the evidence to determine whether any of the documents or equipment seized are not relevant to the investigation or are duplicates, and returns these items to the company. The Commission retains any evidence discovered during the search for as long as necessary for the purposes of the investigation or any ensuing legal proceedings.

The Commission's power to investigate does not infringe on claims of legal professional privilege, and any disputed documents will be sealed until a determination is made regarding the claim. To safeguard the company's privilege during dawn raids, the response team should consider making a record of the events that occurred during the dawn raid.

Questions and Interviews Under Investigation

Commission officers can demand that any individual present on the premises provide an explanation for any document that seems to be relevant, or information about where such an explanation could be obtained, to the best of their knowledge and ability (section 50(1)(k), Competition Ordinance).

The Commission can issue a notice requiring any person to appear before it at a designated time and place to answer questions related to any matter the Commission reasonably believes to be relevant to the investigation (section 42(1), Competition Ordinance). Persons with relevant evidence can include current or former employees, competitors, customers, distributors, suppliers, representatives of relevant trade associations, or complainants.

This section 42 notice can be issued at any point in the formal investigation phase, and can be issued to a person more than once. When setting the time and place, the Commission considers a range of factors including the resources available to the person and the urgency of the matter. Anyone summoned by the Commission to appear can be accompanied by a legal adviser who is qualified to practice law in Hong Kong and holds a valid Hong Kong practicing certificate.

If practicable, recordings and transcripts of an interview are provided to the interviewee on request, but the interviewee must keep these confidential. If the Commission discloses confidential information to an individual, that person must keep the information confidential and not divulge it to others or permit any third party to access it. Failure to maintain confidentiality is an offence under section 128(3) of the Competition Ordinance.

Sealing Documents or Premises During the Investigation

While waiting for external legal advisers to arrive, Commission officers can take appropriate steps, such as directing employees and individuals at the premises to vacate their work areas, blocking computer or IT system access and email accounts, suspending external communications, and sealing offices or filing cabinets where necessary.

However, the Commission will commence its search immediately if compliance with the requirements cannot be assured, the legal advisers are unable to arrive promptly, or waiting for the legal advisers would otherwise adversely impact the search.

Although the Commission has not published specific guidance on overnight seals, it would be sensible to apply overnight seals according to the same procedures.

Minutes of the Investigation

There are no substantive procedural requirements mandating the preparation of minutes by the investigators, and no mention of this in the [Guideline on Investigations](#).

The party under investigation can prepare minutes of the dawn raid and invite the Commission to acknowledge them as a reliable account of the dawn raid. This record could be valuable if any disagreements arise regarding conduct in the investigation, or if the investigated entity decides to contest the investigation or initiate a potential judicial review.

Legal Professional Privilege

The Commission's investigation powers do not impact any legal claims, rights, or entitlements pertaining to legal professional privilege (LPP) that would otherwise have arisen under Hong Kong laws. However, section 58 of the Competition Ordinance clarifies that this does not exempt the obligation under the Competition Ordinance to disclose the name and address of a counsel's or solicitor's client.

If the Commission challenges the privileged status of certain materials, or if privilege is only claimed in relation to a part of a document and that part cannot be readily separated, those materials will be put into a sealed container for further determination.

Within seven days after the dawn raid, the investigated party must index the sealed items, specify the type of privilege claimed for each item, and submit a supporting statement for consideration by the Commission, that explains the basis and factual context upon which privilege is claimed.

An independent third party LPP lawyer may be appointed to help resolve any outstanding claims of privilege which remain in dispute. If the Commission and the investigated party still cannot reach an agreement, they can apply to the court to decide on the matter.

If the sealed items are voluminous, an extension can be granted upon agreement with the Commission. Timelines must be strictly observed as the Commission will promptly inspect the sealed items if LPP claims are not duly substantiated by the deadline.

For more information, see the [Guideline on Investigation Powers of the Competition Commission and Legal Professional Privilege](#).

Nature of Investigation Powers

If the Commission requires a person to provide any explanation, answer, further information or statement, it can demand the person to make a statutory declaration to verify the truth of the information (section 43).

Section 46 of the Competition Ordinance states that a person cannot refuse to provide information or documents to the Commission, even if they owe an obligation of confidence to another party. However, these individuals will not be personally liable for disclosures made in accordance with the Competition Ordinance. The Commission must maintain the confidentiality of any confidential information obtained during inspections, which includes information identified as confidential by the party under investigation, or that pertains to the private affairs of a natural person, confidential commercial activities, or the identity of any informant.

The Commission can request the transfer of personal data in relation to complaints, enquiries, investigations, applications, market studies, or submissions. The Commission's website assures that it will adhere to the [Personal Data \(Privacy\) Ordinance \(Cap 486\)](#), and maintain the confidentiality of any personal data provided. The inspected party may wish to obtain legal advice before providing any data to ensure that obligations regarding confidentiality are met.

Section 45 of the Competition Ordinance stipulates that a person cannot use self-incrimination as a reason to refuse to provide details about a document or to avoid answering any questions from the Commission, except for cases involving section 55 of the Competition Ordinance, Part V (Perjury) of the [Crimes Ordinance \(Cap 200\)](#), or perjury. However, any answers provided are inadmissible as evidence against that person in any pecuniary, financial or criminal proceedings, unless that person or someone on their behalf introduces evidence or a question relating to those answers in the proceedings.

Under section 44 of the Competition Ordinance, anyone who provides evidence to the Commission or appears before it as a counsel, solicitor, or any other person, receives the same immunities and privileges as they would have in a civil proceeding in the Court of First Instance.

Outcomes of the Formal Investigation Phase

At the end of an investigation, the Commission can:

- Take no further action. This does not prevent the Commission from revisiting the matter.
- Accept a commitment from the undertaking.
- Issue a warning notice (for non-serious FCR breaches).
- Issue an infringement notice (for serious FCR or SCR breaches).
- Commence proceedings in the Competition Tribunal (for serious FCR or SCR breaches).
- Apply for a consent order.
- Refer the matter to a government agency.
- Conduct market studies.

Civil Enforcement Processes and Procedures

Under the Competition Ordinance, any person who suspects an undertaking has contravened, is contravening, or is about to contravene a competition rule can make a complaint to the Commission. The Commission only investigates a complaint if it considers it reasonable to do so, and can refuse to do so if the complaint is trivial, frivolous or vexatious, or misconceived or lacking in substance. The [Guideline on Complaints](#) provides that the Commission accepts complaints in any form, including those provided directly, anonymously, and through an intermediary. Complaints or queries can be made by telephone, email, completion of an online form, or in person at the Commission's office.

Commitments, Infringement Notices and Warning Notices

Commitments

Under section 60 of the Competition Ordinance, the Commission can, at any stage, accept a commitment from the parties under investigation to take any action or refrain from taking any action. The [Policy on Section 60 Commitments](#) outlines the key criteria that the Commission would consider:

- The seriousness of the conduct.
- The ability to address competition concerns.
- Effective implementation and monitoring within a reasonable period.
- Severity factors and remedial goals.
- Good faith of the party offering the commitment.
- Timing: the Commission is unlikely to accept a commitment before it has gathered sufficient information or where the matter is too advanced.

If the Commission accepts a commitment, it can agree not to commence an investigation or bring proceedings, or to terminate an ongoing investigation or proceedings. However, the Commission can still commence or continue an investigation in relation to matters that are not addressed by the commitment, or to persons not subject to the commitment. Commitments can subsequently be enforced, or otherwise withdrawn, varied, substituted, or released in certain circumstances. Upon acceptance, the Commission must as soon as practicable give written notice to the maker of the commitment enclosing a copy of the commitment, and register it on the register of commitments. In May 2020, the Commission first accepted commitments made by three online travel agents, where the agents agreed to remove clauses that may have hindered competition by favouring certain accommodations to give them better sales terms.

Accepted commitments are made public on the Commission's [commitments register](#).

Infringement Notices

If the Commission has reasonable cause to believe that there is serious anti-competitive conduct under the FCR or a contravention of the SCR, prior to bringing proceedings before the Competition Tribunal, it can issue an infringement notice.

An infringement notice provides the Commission an opportunity to settle those proceedings on condition that the person commits to comply with the requirements in the notice. If an infringement notice has been issued to any person, the Commission cannot bring proceedings against that person in respect of the contravention specified in the notice so long as the compliance period has not expired, and the notice has not been withdrawn. The requirements of an infringement notice can include:

- Requiring the person to refrain from any specified conduct, or taking any specified action that the Commission deems appropriate.
- Requiring the person to admit to a contravention of the competition rules.

An infringement notice must:

- Identify the relevant competition rule.
- Describe the contravening conduct.
- Identify the relevant persons.
- Identify the evidence or other materials relied on by the Commission.
- Specify the requirements to be complied with by the addressee.
- Be accompanied by a copy of section 68 of the Competition Ordinance.

Section 68 of the Competition Ordinance provides that whilst a person is not obliged to make a commitment to comply with the notice requirements, the Commission can bring proceedings against the person if they do not make a commitment within the compliance period.

The compliance period can be extended either of the Commission's own volition, or on written application, if the Commission considers there is good reason for doing so.

Before issuing an infringement notice, the Commission must send a notice to that person and consider any representation made in accordance with the notice. The notice must state that the Commission proposes to issue an infringement notice, include a draft of the infringement notice, and specify a period of no less than 15 days where the person can make representations as to why the infringement notice should not be issued. Information or evidence provided in a representation cannot be used against the provider in any proceedings, except if they provide false information.

If the Commission decides not to issue an infringement notice after considering the representations, it must give notice of that decision.

Warning Notices

If the Commission has reasonable cause to believe that there is a contravention of the FCR that does not amount to serious anti-competitive conduct, it must issue a warning notice before it can bring proceedings before the Competition Tribunal. The warning notice allows parties under investigation to cease or alter the contravening conduct within a specified period to avoid proceedings.

A warning notice must include certain information, including:

- A description of the contravening conduct.
- Identification of the relevant undertaking.
- Identification of the evidence relied on by the Commission.

- A statement requiring the undertaking to cease the contravening conduct within a specified warning period.
- The manner in which the conduct can be ceased.
- The consequences of failing to cease the conduct.

After the warning period expires, the Commission can bring proceedings in the Competition Tribunal against the undertaking, if it has reasonable cause to believe that the contravening conduct has not ceased. If the Commission has reasonable cause to believe that the undertaking is repeating the contravening conduct, it can bring proceedings for the repeated conduct. The warning period can be extended either of the Commission's own motion, or on application in writing, if there is good reason for doing so.

Potential Sanctions

Only the Competition Tribunal can impose sanctions for contraventions of the Competition Ordinance. In most cases (except obstruction of an investigation or providing false information), breaches of the Competition Ordinance attract no criminal sanction. Schedule 3 to the Competition Ordinance sets out the orders that the Competition Tribunal can make. These include:

- A declaration that a person has contravened a competition rule.
- An order to pay damages to anyone who has suffered as a result of the contravention.
- An order prohibiting them from engaging in certain conduct.

Financial Penalties

The Competition Tribunal can, on application by the Commission, impose pecuniary penalties on a person who has contravened or been involved in a contravention. The Competition Tribunal can order this person to pay to the government a pecuniary penalty of an amount it considers appropriate.

The penalty is statutorily capped at a maximum of 10% of the annual turnover of the undertaking for each year of violation, up to a maximum of three years. If the period of contravention exceeds three years, the penalty can be based on the three years during which the highest turnover was recorded.

The Commission recommends a penalty amount on its application, which is calculated in accordance with the [Policy on Recommended Pecuniary Penalties](#) as follows:

- Step 1: Determining the base amount.
- Step 2: Making adjustments for aggravating, mitigating and other factors.

- Step 3: Applying the statutory cap.
- Step 4: Applying any cooperation reduction and considering the inability to pay.

The Competition Tribunal decides the appropriate penalty, having regard to the Commission's recommendation and matters including:

- The nature and extent of the contravening conduct.
- Loss or damage caused.
- The circumstances in which the conduct took place.
- Whether the person has previously contravened the Competition Ordinance.

Individuals

Section 91 of the Competition Ordinance provides for a regime of accessory liability. A person "involved in a contravention" of a competition rule is defined to include any person who:

- Attempts to contravene the rule.
- Aids, abets, counsels or procures any other person to contravene the rule.
- Induces or attempts to induce any other person to contravene the rule.
- Conspires with another person to contravene the rule.
- Is in any way, knowingly concerned in or party to a contravention of the rule.

As section 93 refers to "persons" rather than "undertakings", this suggests that fines can be imposed on individuals as well as undertakings. This position is confirmed by the Competition Tribunal in *Competition Commission v Kam Kwong Engineering Company Limited and Others* [2022] HKCT 2 at [7]. Given that the statutory cap is defined by reference to an undertaking's turnover, it is unclear whether it also applies to pecuniary penalties against individuals. It is unlawful to indemnify a director, officer, employee or agent of an undertaking against liability for paying pecuniary penalties or costs.

Damages

The Competition Tribunal can order a person to pay damages to any other person who has suffered loss or damage as a result of the contravening conduct (see [Private Actions](#)).

Disgorgement of Profits

- The Competition Tribunal can order a person to pay the government or any other specified person an amount not exceeding the amount of any profit gained, or loss avoided, as a result of the contravention.

Order to pay Investigation Costs

The Competition Tribunal can order a person to pay the government an amount equal to the Commission's costs reasonably incurred for its investigation.

Non-Financial Sanctions

The Competition Tribunal can impose an array of non-financial sanctions, including:

- An order to modify or terminate an agreement.
- An order to restore the parties to the position they were in prior to the contravention.
- An order to restrict a person from dealing with any property.
- An order prohibiting departure from Hong Kong.

If the Competition Tribunal is satisfied that a person is engaging in, or is proposing to engage in, conduct that contravenes the competition rules, it can make an interim order pending its determination of final relief.

The Commission can apply to the Competition Tribunal for a disqualification order not exceeding five years against any director, liquidator or provisional liquidator, receiver or manager, or a person concerned in the promotion, formation or management of a company. The Competition Tribunal can only make a disqualification order against a director if it determines that a company which the person is a director of has breached a competition rule, and the director's conduct makes him/her unfit to manage the company. The director need not directly participate in the company's contravention, it is sufficient that the director had reasonable grounds to suspect the contravention (see [Competition Commission v Fungs E&M Engineering Company Limited and Others \[2022\] HKCA 786](#)).

Private Actions

There is no standalone right for individuals to bring an action independent of the Competition Ordinance. However, under section 110, a person who has suffered loss or damage as a result of a contravention of a competition rule can bring a follow-on action against any contravening person.

A follow-on action can be brought following a decision of the Competition Tribunal or court that there has been a contravention or an admission by the contravening party. This action can only be commenced after the expiry of the period during which an appeal can be made, and within three years.

Leniency

The Commission can make a leniency agreement with a person, on any terms it considers appropriate. This means that it will not bring or continue proceedings, in exchange for that person's co-operation.

Under the [Leniency Policy for Undertakings Engaged in Cartel Conduct](#) (Leniency Policy for Undertakings):

- Leniency applies only in respect of cartel conduct contravening the FCR. That is, it only applies to horizontal agreements and concerted practices between competitors.
- Leniency is available only for the first cartel member that either:
 - discloses its participation in a cartel that the Commission has not yet investigated (Type 1); or
 - provides significant assistance to the Commission's investigation and enforcement actions (Type 2).
- Leniency is not available to an undertaking that is the cartel's leader or has coerced others to engage in the cartel conduct.
- The Commission uses a marker system based on the date and time of contact to determine the order in which leniency applications are considered. Undertakings can contact the Commission anonymously to check if a marker is available for their specific conduct.
- Unsuccessful leniency applicants cannot challenge the Commission's decision. However, the decision to terminate a leniency agreement can be reviewed by the Competition Tribunal.
- Leniency does not protect a Type 2 applicant that is an undertaking from follow-on actions. The applicant is still required to admit a contravention of the FCR if an action is brought. However, Type 1 applicants and Type 2 applicants who are individuals will be protected as they are not required to admit to a contravention.

Under the [Leniency Policy for Individuals Involved in Cartel Conduct](#) (Leniency Policy for Individuals):

- Leniency is only available for the first individual who reports the cartel to the Commission. Both Type 1 and Type 2 leniency are available.
- Following an update in September 2022, leniency is now potentially available for the first individual, even if leniency has already been granted to an undertaking in the same case.

- Individuals who acted as the ringleader of the cartel or coerced others to participate in the cartel are not eligible for leniency.

For successful applicants, the Commission will not commence proceedings before the Competition Tribunal in relation to the conduct covered by the leniency agreement, including proceedings for an order declaring that the applicant has contravened the Competition Ordinance.

Under the Template Leniency Agreements, the undertaking or individual agrees to provide full and truthful disclosure, co-operate continuously, and keep information confidential unless otherwise authorised.

Co-operation and Settlement

If leniency is not available, undertakings engaged in cartel conduct can enter into a co-operation agreement with the Commission, and receive benefits under [the Co-operation and Settlement Policy for Undertakings Engaged in Cartel Conduct](#) (Co-operation Policy). The co-operation agreement allows the Commission to refrain from taking proceedings against current and former employees, officers, partners, and agents of the undertaking, if they fully co-operate with the Commission.

If the undertaking fulfils all the requirements under the Co-operation Policy, the Commission will make a co-operation agreement with the company, and they jointly apply for a consent order based on a joint statement of agreed facts. The parties involved must continuously fulfil their obligations under the agreement, and the Commission will issue a letter confirming that all conditions have been met.

If an undertaking expresses its willingness to cooperate before any Tribunal proceedings are initiated against it, the Commission will determine a co-operation discount based on the order in which companies express interest to co-operate. The recommended discounts are classified into:

- Band 1 (between 35% and 50%).
- Band 2 (between 20% and 40%).
- Band 3 (up to 25%).

Bands 1, 2, and 3 refer to the order in which undertakings come forward, with Band 1 being assigned to the first undertaking. The Commission can choose to include multiple undertakings in each band based on the circumstances.

The Co-operation Policy provides for a Leniency Plus programme, which grants an additional discount of up to 10% of the recommended penalty for the first cartel, if an undertaking co-operating with the Commission in the first cartel enters into a leniency agreement with the Commission regarding a second cartel completely separate from the first. The extent of the Leniency Plus discount is decided by the Commission after taking into account:

- The evidence provided by the undertaking regarding the second cartel.
- The importance of the second cartel.

- The probability of the second cartel being discovered without the cooperation of the undertaking.

The Competition Tribunal is not obliged to follow the Commission's recommendations, but can take into account the recommendations and the policy justifications when deliberating the case.

Judicial Review

The Competition Tribunal has power under section 83 of the Competition Ordinance to review certain decisions made by the Commission, such as decisions on block exemption orders. As of the date of this Note, there are no precedents in Hong Kong of judicial review by the Competition Tribunal.

Criminal Enforcement

The Competition Ordinance introduces four criminal offences in relation to investigations:

- Failing to comply with a requirement or prohibition imposed under the investigation powers of the Commission.
- Intentionally or recklessly destroying or otherwise disposing of, falsifying or concealing a document required to be produced under the Competition Ordinance (including emails), or causing or permitting this.
- Obstructing any person executing a warrant to enter and search any premises.
- Knowingly or recklessly providing any documents or information to the Commission that are false or misleading as to a material particular.

Sections 172 to 175 of the Competition Ordinance also contain general criminal offences, such as provision of false information.

Unlike in some jurisdictions, cartel conduct is not a criminal offence under the Competition Ordinance. For enforcement of cartel conduct, see [Civil Enforcement Processes and Procedures](#).

Failing to Comply with a Requirement or Prohibition Under the Investigation Powers of the Commission

This offence is committed when a person fails to:

- Provide any document or specified information.
- Appear before the Commission.

- Verify the truth of any information given to the Commission by statutory declaration.
- Comply with any of the powers of the Commission pursuant to a warrant.

Any person found guilty, without reasonable excuse, is liable:

- On conviction on indictment to a fine of HKD200,000 and imprisonment for one year.
- On summary conviction to a fine of HKD50,000 and imprisonment for six months.

(Section 52, Competition Ordinance.)

Intentionally or Recklessly Destroying, Disposing of, Falsifying or Concealing a Document

Any person found guilty, without reasonable excuse, is liable:

- On conviction on indictment, to a fine of HKD1,000,000 and imprisonment for two years.
- On summary conviction to a fine of HKD100,000 and imprisonment for six months.

(Section 53, Competition Ordinance.)

Obstructing the Execution of a Warrant to Enter and Search Premises

Any person found guilty, without reasonable excuse, is liable:

- On conviction on indictment to a fine of HKD1,000,000 and imprisonment for two years.
- On summary conviction, to a fine of HKD100,000 and imprisonment for six months.

(Section 54, Competition Ordinance.)

In December 2021, the Commission lodged criminal proceedings for the first time against two cleaning companies, and alleged that some employees obstructed the search by trying to delete electronic documents and other relevant information.

Knowingly or Recklessly Providing False or Misleading Documents or Information

Any person found guilty, without reasonable excuse, is liable:

- On conviction on indictment to a fine of HKD1,000,000 and imprisonment for two years.
- On summary conviction to a fine of HKD100,000 and imprisonment for six months.

(Section 55, Competition Ordinance.)

Merger Review

The Merger Rule is stated in section 3 of Schedule 7 to the Competition Ordinance, which prohibits an undertaking, where it directly or indirectly holds a carrier licence within the meaning of the Telecommunications Ordinance, from carrying out a merger that has or is likely to have the effect of substantially lessening competition in Hong Kong.

As the Communications Authority has concurrent jurisdiction to enforce the Competition Ordinance with respect to mergers in the telecommunications or broadcasting sectors, the [Guideline on the Merger Rule](#) (Merger Guideline) should be read in conjunction with the [Memorandum of Understanding between the Competition Commission and the Communications Authority](#) (Memorandum of Understanding).

Under the Merger Guideline, approval or clearance by the Commission or the Communications Authority is not necessary for a merger to proceed. Hong Kong adopts a voluntary notification system, meaning there is no requirement to notify the Commission of a relevant merger. However, parties to a proposed merger which may be caught by the Merger Rule should consider approaching the Commission to discuss on a confidential basis and seek advice in advance (this advice is not binding on the Commission).

As the Commission ordinarily takes the role of lead authority and assumes responsibility for exercising the relevant powers under the Competition Ordinance, it should be sufficient to give notice to the Commission, and the Commission will work with the Communications Authority in accordance with the Memorandum of Understanding. Both authorities will, where necessary, exchange information (including confidential information) to adopt a harmonised approach to enforcement.

Parties to a merger or proposed merger can also apply to the Commission for a decision to exclude the transaction from the Merger Rule (Part 5, Schedule 7, Competition Ordinance).

In determining whether a merger is likely to substantially lessen competition, the Commission will take into account non-exhaustive factors including the extent of competition from foreign competitors, availability of substitutes, barriers of entry, degree of countervailing power, and innovation in the market. Vertical mergers are less likely to be considered anti-competitive and the Commission can consider other relevant factors, such as whether there is market power at various levels in the merger.

If there is a breach of the Merger Rule, the Commission can investigate under Part 3 of the Competition Ordinance and take necessary action including:

- Conducting market inquiries.
- Seeking representation from the merging parties.

- Carrying out independent research.

Parties to a merger or proposed merger can propose commitments to the Commission to address its concerns about a possible contravention of the Merger Rule, in exchange for the Commission's agreement not to commence an investigation.

If no action is taken to address the Commission's concerns and the Commission has reasonable cause to suspect a contravention of the Merger Rule, the Commission can bring proceedings before the Competition Tribunal for an order to end the contravention.

Approach to Gun-Jumping

As there is no obligation to obtain clearance prior to completing a merger, gun-jumping is not an issue in Hong Kong. Given that any investigation is conducted ex-post, the Merger Guideline provides that it may be in the parties' interests to contact the Commission at an early stage.

Enforcement Priorities

In its [Enforcement Policy](#), the Commission gives priority to cases involving:

- Cartels.
- Other agreements contravening the FCR causing significant harm to competition in Hong Kong.
- Abuses of substantial market power involving exclusionary behaviour.

On 14 December 2021, in a press release marking the sixth anniversary of the full commencement of the Competition Ordinance, the Commission announced three priority areas for enforcement which are:

- Anti-competitive behaviours that affect people's livelihoods.
- Cartels that aim to take advantage of public funding and subsidies.
- Cases involving digital markets.

Overall, the Commission is more proactive in investigating breaches of the FCR than the SCR or the Merger Rule. As of September 2023, 14 cases had been brought to the Competition Tribunal by the Commission, and all but one cases concerned breaches of the FCR. The only case on the SCR was filed in December 2020 against a medical gases supplier group for engaging in exclusionary acts whereby they abused their substantial market power.

Although civil enforcement largely dominates the scope of enforcement, in December 2021, the Commission lodged criminal proceedings for the first time against two cleaning companies, and alleged that some employees obstructed the search by trying to delete electronic documents and other relevant information.

Industries such as the fish market business and air-conditioning business were investigated heavily by the Commission in recent years, coupled with an increased use of alternative enforcement strategies, such as joint operations with the Hong Kong Police.

Cartel activity remains a consistent focus of the Commission. According to the Commission's latest Annual Report 2021/2022, the Commission filed three cartel cases with the Competition Tribunal in that year alone. Furthermore, the Commission revised the [Leniency Policy for Individuals](#) in September 2022, encouraging cartel participants to provide information by expanding the grant of leniency to the first individual, even if leniency has already been granted to the first undertaking.