

FIRST YEAR OF ENFORCEMENT OF THE COMPETITION ORDINANCE IN HONG KONG



BY PING LIN & THOMAS W. ROSS¹



I. INTRODUCTION

Hong Kong's Competition Ordinance ("CO") came into effect on December 14, 2015, three and a half years after its enactment. This article reviews what proved to be an active first year for the new competition policy regime. We begin by summarizing the considerable amount of work undertaken by the Hong Kong Competition Commission ("HKCC") in advance of the full implementation of the law. We then describe the high level of activity through the law's first year: including advocacy work, market studies, investigations of complaints (to the point of escalating some cases to the investigation stage). While there is still yet a single case to be formally charged, HKCC's enforcement effort has had a real impact on some important sectors of the economy, and has raised awareness of the CO by educating the public about the new law. We review the major enforcement activities by the HKCC and provide an assessment of its "complaints-driven" approach, from the decision theory viewpoint and in light of the fact that Hong Kong does not have a merger control regime.

II. THE COMPETITION ORDINANCE AND ESTABLISHMENT OF THE HKCC

After an extended period of consultation and debate, the CO was adopted in June 2012. Getting to this point was not easy for competition law supporters: there was considerable unease in some quarters in Hong Kong – particularly in the small and medium-sized enterprise ("SME") sector – about regulatory overreach. Several compromises were necessary to move forward, but the result was a modern competition law, at least with respect to horizontal agreements and abuse of dominance.² The key prohibitions of the CO take the form of two "Conduct Rules" modelled on European antitrust law: (1) the First Conduct Rule ("FCR") prohibits agreements and concerted practices that restrict competition; and (2) the Second Conduct Rule ("SCR") prohibits an undertaking with a substantial market power from abusing that power by engaging in conduct that restricts competition. The CO also contains a "Merger Rule" that – at this time – only applies to the telecoms sector.

The CO further provided for the establishment of the HKCC. The first panel of commissioners of the HKCC was appointed in April 2013 by the Hong Kong SAR Government, and the first CEO was named in July 2014. Cases investigated by the HKCC can be brought to the newly created Competition Tribunal which determines whether the alleged conduct constitutes contraventions of the CO and, if so determined, the level of penalty or appropriate remedies.

¹ Lin: Lingnan University, Hong Kong; Ross: University of British Columbia, Vancouver, Canada.

² On the compromises, see, e.g. P. Lin and J. Zhao, "Recent Amendments to Hong Kong's Competition Bill," Competition Policy International, 2012.

III. PREPARING FOR THE COMMENCEMENT OF THE CO

Between the passage into law of the CO and its coming into force in December of 2015, a great deal of work was undertaken to prepare the Hong Kong business community, and the HKCC itself, for this new competition policy regime.

From the appointment of the first commissioners in 2013, the HKCC was built up quickly with a combination of local and international hiring, leading to a staff of 47 members by March 2016.³ At the time the CO took effect, the HKCC was “ready to take on the challenges ahead,” claimed then-CEO Stanley Wong.⁴

In terms of capacity building, in addition to getting help from the major competition agencies from the EU, the United States, and the International Competition Network (of which the HKCC is a member), the HKCC also sent staff members on secondment in Australia, New Zealand, Singapore and Canada during 2014-2015. Such arrangements provided “invaluable experience on cartel investigation matters, including dealing with leniency applications.”⁵ It is interesting to note that these countries all belong to the category of small modern economies, which may indicate the HKCC’s intention of learning from the kind of experiences most relevant to Hong Kong. Notably, in December 2016, the HKCC signed its first memorandum of understanding with a foreign competition authority – the Canadian Competition Bureau. Such MOUs facilitate cooperation between authorities on areas of mutual interest, such as enforcement activity involving multinational companies.

A. Guidelines and Advocacy

To encourage compliance and reduce the need for expensive, formal legal actions, modern competition authorities will devote considerable resources educating market participants about their rights and obligations under competition law. This is a particularly important activity for new authorities, and the HKCC clearly saw this need.

As required by the CO, the HKCC developed a series of guidelines to inform Hong Kong’s business community about how the various sections of the CO are to be interpreted and how the HKCC expects to enforce them. In July 2015, a set of six guidelines were published after an extended period of drafting, public consultation and revision: the Guideline on the First Conduct Rule, the Guideline on the Second Conduct Rule, the Guideline on the Merger Rule, and three other guidelines on handling complaints, conducting investigations and on exclusions and exemptions, respectively.

Among other advocacy and educational activities prior to the CO taking effect, the HKCC in fact directed attention to, and had impact on, some key sectors in Hong Kong. Specific brochures were prepared and published, including some targeting the SME sector as well as trade associations in Hong Kong.

For example, the HKCC started a program focusing on trade associations in mid-2014 aimed at promoting compliance with the new law. On 16 June 2015, the HKCC launched (via a press conference and media release) a brochure titled “The Competition Ordinance and Trade Associations.” The brochure, sent to over 500 trade associations and professional bodies in Hong Kong, provides clear, practical guidance on what associations should and should not do to ensure the associations and their members comply with the CO, using an easy-to-understand approach with hypothetical examples and illustrations. In addition, HKCC also engaged directly with the trade associations by reviewing their trade practices that might constitute contraventions of the CO, one important area being publishing fee scale/fee schedules for members. The program turned out to be very effective. Based on its review of publicly available information (on trade associations’ websites), the HKCC identified over 20 trade associations that appeared to fall within a high risk category. After direction communications and engagements with the HKCC, 12 of these trade associations had indicated publicly, in November 2015, that they

³ HKCC Annual Report 2015/16.

⁴ HKCC Press Release, “Competition Ordinance Comes into Full Effect Today”, December 14, 2015; available at: https://www.compcomm.hk/en/media/press/files/Competition_Ordinance_Comes_into_Full_Effect_Today_EN.pdf. Unfortunately, the HKCC did lose the experienced leadership of Mr. Wong when serious ill health forced his resignation in March 2016. He passed away in April 2016.

⁵ Anna Wu, “Fighting Cartels Under the Hong Kong Competition Ordinance: Lessons from the European Union,” keynote speech at Competition Law Conference of the Chinese University of Hong Kong, March, 2015.

had revised their conduct or were in the process of doing so before or shortly after the full commencement of the CO to remove one or more price restrictions/fee scales.⁶

B. Enforcement Policy and Priorities

The HKCC published its Enforcement Policy document in November 2015, shortly before the CO came into effect.⁷ The Enforcement Policy supplements the CO and the six Guidelines to provide guidance on how the HKCC intends to exercise its enforcement function in investigating possible contraventions of the First Conduct Rule and the Second Conduct Rule of the CO.

The Enforcement Policy sets out six “core principles” to which HKCC will adhere in conducting investigations: specifically they will be professional, confidential, engaged, timely, proportionate and transparent. In spelling out the HKCC’s approach to setting enforcement priorities, the document explains that during the initial years of the operation of the CO, the Commission’s resources should be focused on “encouraging compliance with the Ordinance in the Hong Kong economy as a whole, rather than focusing on specific sectors. The Commission will achieve this through a mix of education, engagement and enforcement.” It goes on to indicate that the Commission will: (a) target anti-competitive conduct that is clearly harmful to competition and consumers in Hong Kong; and (b) commence proceedings in the Tribunal in appropriate cases to, over time, obtain judicial interpretation of the CO.

When considering whether to investigate a particular case, the HKCC will accord priority to those cases which involve any one or more of the following types of conduct: (a) cartel conduct (agreements of concerted practices involving price-fixing, market sharing, output restriction, or bid rigging); (b) other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong; and (c) abuses of substantial market power involving exclusionary behavior by incumbents.

C. Leniency Policy

Also in November 2015, the HKCC published its Leniency Policy for Undertakings Engaged in Cartel Conduct. The policy provides an overview of the HKCC’s approach to leniency applications as well as a template leniency agreement which will form the basis of all leniency agreements to be entered into between the HKCC and successful leniency applicants. Using a “marker system,” the HKCC agrees to not to commence proceedings for a pecuniary penalty against the first cartel member who reports cartel conduct to the Commission and meets all the requirements for receiving leniency. One such requirement is that the member had not coerced other members to participate in the cartel. Leniency is also extended to relevant current and/or past employees.

IV. FIRST YEAR OF ENFORCEMENT

Launched with the benefit of all this preparatory work, the first year under the CO was an active one for the HKCC. It included further advocacy work, market studies, one block exemption, investigating a large number of complaints (some of which may advance toward interventions) and even the drafting of another guideline document.

A. Chairperson’s Letter to Hong Kong: Day Zero

On December 14, 2015, the day before the CO came into effect, Ms. Anna Wu, Chairperson of the HKCC issued a Letter to Hong Kong, via a local radio channel, in which she reminded businesses in Hong Kong to embrace the commencement of the CO. In the letter, Ms. Wu stated that “many honest businessmen as well as unsuspecting consumers have fallen victim to anti-competitive conduct such as cartels and the exclusionary behaviour of businesses with substantial market power.” She cited studies from the OECD that the illegal gains from price fixing amounted to around 10 percent of selling prices and that contract prices of public procurements fell by about 20 percent in

6 See HKCC, “Report on Trade Associations in Hong Kong and the Competition Ordinance,” 2015, which lists the names of those 12 trade associations (but not the others); available at: https://www.compcomm.hk/en/media/reports_publications/files/TA_project_report_EN.pdf.

7 See HKCC, “Enforcement Policy,” 2015; available at: https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Enforcement_Policy_Eng.pdf.

Japan after strict enforcement against bid-rigging.⁸ (She also pointed out that bid rigging “has become a topical subject in Hong Kong,” and “is rife in the local building maintenance industry.”) In addition to educating the public about harms of anti-competitive behavior, citing those specific price declines may also be seen as an indication of the HKCC’s belief of what enforcement of the CO would do for Hong Kong consumers, at least in the area of cartels.

B. Block Exemptions

In September 2016, the HKCC issued its first proposed block exemption order for certain shipping liner agreements. Through the publication of the proposed decision and the associated preliminary views, members of the public and potential applicants for block exemptions would have a better understanding of the Commission’s criteria for applying the efficiency exemption, thus providing more certainty to businesses and market players. The HKCC invited interested persons to make representations on the proposed block exemption up to December 14, 2016 and is now considering those representations.

C. Across-the-Board and Complaints-Oriented Approach

Regarding the often-asked question of which sectors it would take enforcement actions against first, the HKCC made it clear before the commencement of the CO and publications. In particular, the HKCC does not take a sectoral approach but instead will monitor all sectors of the economy. Consistent to this, the HKCC made it clear that it is complaints-driven and focuses more of its attention to sectors and types of conduct it has information about, as received via various channels.⁹ One source of such channels is complaints and public reports of suspected anti-competitive practices in certain sectors.

Prior to full commencement of the CO, the HKCC had received a number of complaints, queries and referrals (from other government agencies) about potential competition issues (“enforcement contacts”). It received a surge in enforcement contacts on and after December 14, 2015. Between December 14, 2015 and March 31, 2016, the HKCC received a total of 924 enforcement contacts. The majority of these contacts were related to possible violations of the First Conduct Rule, with cartel conduct and resale price maintenance being the major concerns.¹⁰ By the end of 2016, the HKCC had received nearly 1,900 complaints and queries. Of this total, over 50 percent related to the First Conduct Rule issues, with cartel conduct being the major concern, especially bid-rigging. About 20 percent of the complaints and queries raised concerns related to the Second Conduct Rule.¹¹ Approximately 130 cases had been escalated for further assessment. The escalated cases spanned over 21 sectors, with *Property & Property Management* and *Professional & Technical Services* being the top two sectors involved.¹² Over 10 percent of these cases have proceeded to in-depth investigations.

As set out in its Guideline on Complaints, Guideline on Investigations and in its Enforcement Policy, the HKCC considers all complaints and queries it receives and escalates those that warrant further assessment to an Initial Assessment phase.¹³ Up to March 31, 2016, the HKCC escalated 97 cases to the Initial Assessment phase. These Initial Assessment cases were either initiated by HKCC of its own volition based on intelligence; initiated in response to contact from whistle-blowers or leniency applicants or escalated in response

8 See: <http://programme.rthk.hk/channel/radio/programme.php?name=radio3/lettertohongkong&d=2015-12-13&p=535&e=336626&m=episode>.

9 Ms. Anna Wu made this approach public in a speech in October 2015, two months before the commencement of the CO. See: https://www.compcomm.hk/en/media/press/files/20151030_GCR_Live_Conference_speech.pdf.

10 Each case may involve allegations of multiple types of anti-competitive conduct. The contacts include complaints, queries and referrals from other agencies, but exclude intelligence gathered independently by the HKCC. See Annual Report 2015-2016, Figure 1, p.49, available at: https://www.compcomm.hk/en/media/reports_publications/files/2015_16_CC_Annual_Report.pdf.

11 HKCC Press Release, December 14, 2016.

12 Other sectors include transport & logistics, food & groceries, construction & infrastructure, financial products & services, apparel, footwear, jewelry, watches & accessories, and others. See Figure 3, HKCC Annual Report, 2015-2016, p.51, for the sectors covered during December 14, 2015 to March 31, 2016.

13 As outlined in HKCC’s Guideline on Investigation, the Initial Assessment Phase is used by the Commission to identify, as appropriate, it is reasonable to conduct an investigation and there is sufficient evidence to establish a reasonable cause to suspect that a contravention of a Competition Rule has occurred, using information received or sought on a voluntary basis. In the Investigation Phase, HKCC may use of the compulsory document and information gathering powers provided by the CO to conduct investigation.

to enforcement contacts the HKCC had received. For example, while approximately 21 percent of the enforcement contacts received up to March 31, 2016, are related to cartel conduct, 62 percent of the Initial Assessment cases fall into cartel category. On the other hand, while approximately 22 percent of enforcement contacts related to allegations of RPM, only 18 percent of Initial Assessments related to alleged RPM. These figures about the escalation process are said by the HKCC to reflect its “strategic enforcement focus, as set out in its Enforcement Policy,”¹⁴ namely that RPM is not of as high priority as cartel conduct.

Regarding its compliance project on trade and professional association which started in mid-2015, as mentioned above, the HKCC continued to have made progress during the past year. As of December 14, 2016, nineteen out of over twenty high-risk trade associations identified by the HKCC have removed price restrictions and/or fee scales during the year as a result of the Commission’s engagement efforts.¹⁵ Indeed, as the HKCC claims, this project has cast a widespread positive impact in the community.¹⁶

During the past year, HKCC made substantial use of its compulsory evidence gathering powers in conducting its investigations by, for example, using “dawn raids” and seizing files as well as physical devices containing relevant data. It also looked at communications via personal mobile phones (e.g. Whatsapp, WeChat) and found “some of the most valuable evidence” for certain cases.¹⁷

The Commission has also made encouraging progress with its compliance project on trade and professional associations. Nineteen out of over twenty high-risk trade associations identified by the Commission have removed price restrictions and/or fee scales during the year as a result of the Commission’s engagement efforts. These associations are key to changing behavior by their members and their compliance with the Ordinance has cast a widespread positive impact in the community. The engagement with trade associations revealed telling information about how some businesses had viewed their business practices. For example, the Hong Kong Institute of Surveyors was one of the associations that had published a “recommended” scale of professional charges for its members for more than ten years, with the justification that the public would not know what a reasonable charge level is. The recommended price scale was removed by the Institute as a result of the engagement project of HKCC. In another high-profile example, in May 2016, as a result of advice delivered in meetings with staff of the HKCC, the Hong Kong newspaper Hawker Association withdrew a letter it had sent to its members recommending retail prices on certain branded cigarettes.

D. Advocacy

The HKCC regards advocacy “as important as enforcement action,” especially at the introductory stage of a new law. Over the past year, the HKCC has continued to put a great deal of effort and a number of innovative ideas toward raising public awareness and fostering a compliance culture in Hong Kong. For example, the HKCC directed several activities toward educating the public about how to detect and prevent bid-rigging cartels. In May 2016, the Commission launched a multi-pronged “Fighting Bid-rigging Cartels” Campaign as its first major public advocacy initiative, using roving exhibitions, educational videos and broadcast media programming, etc.¹⁸ The Campaign was supported by extensive online and outdoor advertising and seminars to enhance public awareness. In August, publicity posters of the Campaign were sent to the owners’ corporation of over 15,000 residential and commercial properties in Hong Kong. The HKCC won eight local and international awards during the year for its outreach and publicity activities with its innovative and accessible approach to competition law advocacy gaining recognition around the world.¹⁹

14 HKCC Annual Report, 2015/2016, p. 51.

15 HKCC Press Release, 14 December, 2016.

16 Ms. Anna Wu, Chairperson of the HKCC, stated that “with the Commission’s advocacy effort since its establishment, many businesses are making genuine efforts to understand and comply with the new law. In time, I am confident that the full benefits of the Ordinance and its potential to enhance Hong Kong’s overall economy will be felt in all aspects of our daily lives.”

17 Rose Webb, CEO of HKCC, speech at Panel Discussion at Freshfields, Hong Kong, December 9, 2016.

18 The HKCC even had soap opera stars record one-minute videos that aired on local television stations after the evening news. J. VanDerMiller “Reflecting on Year 1 of Hong Kong Competition Enforcement,” *LAW 360*, <https://www.law360.com/articles/861598/reflecting-on-year-1-of-hong-kong-competition-enforcement>.

19 HKCC Press Release, December 14, 2016.

The HKCC has noted some other effects on competitive behavior even without direct enforcement action. For example smart phones retail prices reportedly fell as much as 20 percent for some brands shortly after the CO took effect. This can be interpreted as the retailers ignoring the RPM policy set by the manufacturers or alternatively that the manufacturers suspended or stopped their long-time RPM policy. There is no public information now regarding how long the price drop lasted.²⁰

E. Market Studies

Market studies have been used by competition agencies around the world to gain understanding of competition situations in selected markets/sectors. The CO provides the HKCC with the authority “to conduct market studies into matters affecting competition in markets in Hong Kong” and “to advise the Government on competition matters in Hong Kong and outside Hong Kong.”²¹

A major market study HKCC undertook during the past year was that of the residential building renovation and maintenance sector. Partly in response to media reports and other sources suggesting that bid-rigging was common in Hong Kong’s residential building renovation and maintenance sector, the HKCC undertook a study into certain aspects of the market in May 2016. The overall result of the study is consistent with the widespread concern that bid-manipulation practices were prevalent in the local residential building renovation and maintenance market in the recent past.²²

Two types of bid-manipulation practices were examined in this study. One type occurs when competing contractors engage in bid-rigging cartel conduct or other collusive behavior intended to influence – in their favor – the outcome of the tender for their services. A second type occurs where a consultant and a contractor conspire with each other so that the particular consultant wins the bid to oversee the tender for the physical works (sometimes by putting in an extremely low bid for the consulting services), and then organizes for its allied contractor to win the bid for the renovation work at an inflated price.

The HKCC used some of the screening techniques developed by economists and used in such cases as the LIBOR scandal in the UK and highway public tenders in the United States. These techniques were applied to actual bid and participation data from Hong Kong’s residential building renovation and maintenance services market prior to when the CO came into effect. The one-year study revealed patterns that would be consistent with the wide-spread feeling among the public that there may have been problems in the sector. Although any bid-rigging, if it did occur during the time period the study covered, would not be a violation of the CO, (as it would have been prior to the CO taking effect), the HKCC did state, very clearly in its report, that “it would very likely investigate further certain patterns highlighted by the analysis,” if similar results were obtained today. The HKCC was clear and stern in its warning that:

Those who might be tempted to manipulate bids in contravention of the competition rules should know that the Commission is watching and it has at its disposal a number of tools to detect such contraventions. The Commission understands what has been taking place, and it will investigate where it can. Those contemplating rigging a bid should abandon such projects. Those already involved in rigging bids should realise that they are involved in serious anti-competitive conduct and should do the right thing by approaching the Commission to apply for leniency under the Commission’s Leniency Programme to avoid the risk of facing substantial penalties and other sanctions. Commission has identified bid-rigging cartels as a priority for enforcement and will use the full extent of its powers to end bid-rigging cartels. (p. 12 of the Report)

The HKCC also used the above study as an opportunity to set up its general purpose and approach in conducting market studies. In the above report, it is stated that “The main objective of a market study is to examine if competition within a market is working well or can be improved; it does not seek to establish general rules and obligations for firms.” The Commission can look at firm conduct as it relates to the functioning of competition in the market generally, and it can also look for structural aspects of the market (including barriers to entry and expansion) or the conduct of customers that might cause insufficient competition in the market.

²⁰ South China Morning Post, January 3, 2016.

²¹ Competition Ordinance, Section 130.

²² See Hong Kong Competition Commission, *Report on study into aspects of the market for residential building renovation and maintenance*, May, 2016; https://www.compcomm.hk/en/media/reports_publications/files/Report_on_market_study.pdf.

If the Commission identifies that there are systematic problems of insufficient competition in a market, it can take a number of steps. For instance, if the Commission identifies that there is problematic conduct potentially falling foul of the Competition Ordinance by a number of firms in the market, it may identify that sector as meriting priority in enforcement case selection. Additionally, if the Commission identifies that there is a structural competition deficit within the market that may be solved through Government policies or action, it may make appropriate recommendations to the Government in accordance with its government advisory function. The Commission may also consider whether education of market participants would assist in resolving the problems identified. (p. 2 of the Report)

The HKCC also studied the supply of piped liquefied petroleum gas to rental housing estates in Hong Kong and provided competition-related advice to the Hong Kong Housing Authority on the awarding of supply contacts in September 2016, so as to improve upon the existing practice of contract renewal that favors the incumbent suppliers.²³

F. Guide to Proceedings in the Competition Tribunal: Follow-on Action

The Competition Tribunal has provided some additional guidance of its own. In December 2015, it issued a document titled *The Guide to Proceedings in the Competition Tribunal: Follow-on Action*. The Guide aims to provide the public with a brief outline of the practice and procedure of follow-on proceedings in the Competition Tribunal and is for general reference only. It provides answers to such questions as “who is entitled to bring a follow-on action?”; “what is the timeframe to commence the action?” and other practical questions. According to the Guide, any person who is certain to have suffered loss or damage as a result of any act that has been determined to be contravention of a conduct rule, has “a right of action under the CO against (a) any person who has contravened or is contravening the rule; and (b) any person who is, or has been, involved in that contravention.” This would seem to suggest that both direct and indirect purchasers have the right to sue. A follow-on action can only be brought after the appeal period for a decision has expired, or an appeal has been determined, and must be brought within three years of the determination.²⁴

V. AN ASSESSMENT OF THE COMPLAINTS-ORIENTED APPROACH

From the viewpoint of decision theory, the complaints-oriented approach taken by the HKCC makes a lot of sense in that the sectors and/or the types of conduct that are the subject of more complaints, particularly those by non-competing parties, are generally more likely to have suffered from anti-competitive practices.²⁵ Furthermore, among the most complained-about conduct reported to the HKCC during the past year, namely cartel conduct, is also the most damaging anti-competitive conduct to society and thus should undoubtedly be the top priority of enforcement. That this seems to be so for the HKCC may be seen in the relatively high proportion of complaints regarding cartel conduct that make it to the Initial Assessment stage (60 out of 192 up to 31 March 2016). The market studies conducted by the HKCC, particularly that on bid-rigging in residential building renovation and maintenance sector, provide significant evidence of cartelized agreements, albeit for the time period right before the commencement of the CO. It is expected that the HKCC will bring formal charges against cartel conduct to the Competition Tribunal some time during the first half of 2017.

²³ See, HKCC, “[Advice on Liquefied Petroleum Gas Supply Arrangement for 15 Public Rental Housing Estates](https://www.compcomm.hk/en/media/press/files/20160908_Competition_Commission_Advisory_Bulletin_en.pdf),” https://www.compcomm.hk/en/media/press/files/20160908_Competition_Commission_Advisory_Bulletin_en.pdf.

²⁴ The absence of stand-alone private action under the CO, which primarily resulted as a main compromise the SAR government took before the CO passed the Legislative Council of Hong Kong in 2012, has been criticized by many. It has also led parties to look for other means to privately address competition issues. For example, Loyal Profit International has filed a suit directly to the High Court of Hong Kong alleging anti-competitive conduct by the Travel Industry Council of Hong Kong – in this case under the Companies Ordinance. This important case – which could create an alternative path for stand-alone private competition actions – is to be heard early in 2017. See, e.g. <http://kluwercompetitionlawblog.com/2016/11/21/stand-alone-actions-possible-for-anti-competitive-behaviour-in-hong-kong/> and, South China Morning Post, “First case using new Hong Kong competition law set to be heard,” <http://www.scmp.com/news/hong-kong/law-crime/article/1980860/first-case-using-new-hong-kong-competition-law-set-be-heard>.

²⁵ Among the 537 enforcement contacts (up to March 31, 2016) related to the First Conduct Rule, 192 are about cartel conduct, 211 about RPM, 60 for exchange of information. Among the 190 enforcement contacts related to the Second Conduct Rule, 41 are for tying and bundling, 29 for both exclusive dealing and refusal to deal, and 67 for other conduct. Interestingly, 24 enforcement contacts received are for predatory pricing – a practice that many competition experts believe is extremely rare and seldom effective.

Exchange of information is another area worth noting, and one that has received considerable attention from the HKCC. Among the 97 Initial Assessment cases as of March 31, 2016, 39 were related to information exchange among undertakings which may constitute concerted practices. In a speech in late 2016, Rose Webb, Chief Executive of the HKCC, highlighted concerns in relation to the human-resources sector in Hong Kong as the HKCC had become aware of certain exchanges of competitively sensitive information (e.g. salary) among competing firms.

By contrast, while the conduct raised most often in enforcement contacts up to March 2016 was actually RPM (211), only a relatively small fraction (18, or 8.5 percent) have made it to the Initial Assessment stage. However the 18 Initial Assessment RPM issues do still reflect a significant share of the total number of Initial Assessments (97 up to March 2016). Noting the historical prevalence of RPM and the attention paid to it in Hong Kong during the years even prior to the enactment of its CO in 2012²⁶ and the recent anecdotal evidence (in smartphone retailing and news magazine retailing mentioned earlier), we expect RPM to continue to be an active area of enforcement activity in Hong Kong.

Regarding the possible violations of the Second Conduct Rule of the CO, one cannot help notice that the percentage of alleged abuse of dominance was quite low in the set of the complaints/queries received by the HKCC, namely only 20.6 percent (raised in 190 out of 924). Among the 97 Initial Assessment cases up to March 2016, a slightly higher percentage, 28.9 percent, involve concerns related to the Second Conduct Rule as at least part of the issues under study. In terms of the total number of allegations involved (as each case may involve multiple types of anti-competitive conduct), Second Conduct Rule related practices account for 18.6 percent and 17.8 percent, respectively, of the total number of allegations received from the enforcement contacts by HKCC and the total number of allegations that went into the Initial Assessment phase.²⁷

It is difficult to pin down the reasons or considerations behind the lower level of Second Conduct Rule related cases/allegations relative to those applying to the First Conduct Rule. One factor may be that competition law is still new to many businesses in Hong Kong and so perhaps many of the horizontal and vertical agreements now falling under the CO are still being practiced relatively openly. Another possible reason is that complaints over abuse of dominance conduct are often against larger companies. Hence, potential complainants may fear possible retaliation by larger firms whether these large firms are competitors (e.g. for predatory pricing behavior, exclusive dealing that leads to foreclosure, and refusal to deal) or suppliers (e.g. for tie-in and bundling, exclusive dealing or refusal to deal). The newness of the law with few examples to learn from will add to their uncertainty and concerns. Lastly, it may be argued that the threshold for selecting a case to be escalated to the Initial Assessment phase may be higher for SCR related conduct, because it is more difficult to establish a reasonable cause to suspect an abuse of dominance. In other words, prosecuting price-fixing cases is often easier. It will be interesting to see how many and what type of SCR related cases that have been escalated to the Initial Assessment have entered or will enter the Investigation phase.

One may then ask the question, how much enforcement weight should be given to detecting violations of the SCR in Hong Kong. We would like to argue that it may make sense to give greater enforcement attention than might otherwise be suggested for a new authority to the abuse of dominance concern (i.e. Second Conduct Rule) in Hong Kong, because its CO does not have a merger control provision (except for telecoms). Without a strong merger policy to protect against the build-up of high levels of unilateral market power, we can expect the further development of dominant positions in many Hong Kong markets. A strong approach to abusive conduct will attack that conduct by firms with dominant positions currently, rendering that dominance less problematic. However, it will also send a message to potential future merger partners, deterring those mergers that are mainly driven by unilateral market-power enhancing motivations. At least in the longer term, the “complaints-oriented” approach can be supplemented by the consideration that the Second Conduct Rule may need extra enforcement attention (in conducting self-initiated investigation of potential violations and/or market studies) than in a jurisdiction where a strong merger control scheme is also available.

26 See, e.g. Lin, P., “Treatments of RPM in Hong Kong,” CPI Antitrust Chronicle, 2015.

27 Calculations are based on the information contained in Figure 1 and Figure 2 of the HKCC Annual Report, 2015/2016.

VI. CONCLUDING REMARKS

The period from the passage of the CO up to the end of the first year under the new law has been extremely demanding for the HKCC. In response to these demands the HKCC has, among other things: (i) built up and trained a professional staff; (ii) conducted ambitious education and advocacy programs; (iii) issued many guidelines (and other guidance and policy documents); (iv) investigated a large number of complaints in many areas of competition policy; and (v) taken on a number of matters (such as market studies) that are helping to further define its enforcement approach.

In case selection, it is currently very complaints driven – a sensible approach in our view. As a response to complaints and media reports, the market study on bid-rigging in residential building renovation and maintenance sector gathered strong evidence about bid-rigging, albeit about such conduct prior to the commencement of the CO. This enabled the HKCC to establish bid-rigging as a clear enforcement priority. It also sets the general principle and framework for conducting market studies in the future. Furthermore, the publication of the market study report also showed to the public that the HKCC has the technical and economic tools that can be readily applied to future such and other anti-competitive behavior. The current approach, however, can be supplemented by the consideration that the Second Conduct Rule may need extra enforcement attention than in a jurisdiction where a strong merger control scheme is also available.

In short, the HKCC and Hong Kong competition policy are off to a good start in our view. Many important tests lay ahead, perhaps even in the second year under the CO. Two principal questions arise in our minds at this point, to which we are optimistic. First, will the HKCC be prepared to take on powerful business interests when negotiations to resolve issues in a non-adversarial way are unsuccessful? Second, when necessary, can it mount good cases before the Tribunal and win them? Over the longer term, another important question arises: will the HKCC be a strong champion for competition within the Hong Kong government? Will it be able to advocate with other government agencies for the reform of competition-limiting regulations and policies and will it be able stimulate discussions within government on amendments to the CO, to make it an even more complete and effective law.²⁸

28 Proposals for eventual reform of the CO are beyond the scope of this paper, but the absence of both a general merger regime and provisions permitting stand-alone private actions both merit attention in our view.