ASIA-PACIFIC COMPETITION LAW GUIDE

LEGAL GUIDE
FIFTH EDITION

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Contents

Introduction

Welcome to the fifth edition of the Herbert Smith Freehills Asia-Pacific Competition Law Guide. Since the last edition was published just over two years ago, there have been a number of substantial competition law and policy developments in Asia and Australasia, ranging from the creation of a unified competition regulator in Mainland China to the passage of new competition laws (Vietnam), and the continued development of relatively new authorities (the Philippines, Hong Kong).

For companies doing business in this dynamic and fast-moving region, these developments underline the importance of monitoring and anticipating change.

A growing number of competition law regimes

Since the previous edition of this Guide, new laws have come into effect in Brunei, Thailand and Vietnam, and are imminent in Indonesia. Meanwhile, Myanmar's new authority is understood to have begun enforcement activities, while the authority in Laos is being set up, following the introduction of laws in both countries in 2015. Some of these new regimes include mandatory, pre-closing merger control rules, either for the first time, or replacing older post-closing or under-enforced rules. Before too long, a cross-sector merger control regime may also be introduced in Malaysia.

Accordingly, all but a small number of countries in the region now have active competition laws. This means that the Asia-Pacific cannot be overlooked when carrying out multi-jurisdictional merger control planning, applying for cartel leniency, or when developing global compliance programmes.

Stricter penalties and enforcement

The costs of getting it wrong can be substantial, as seen by the increasing number of fines imposed for "gun-jumping" or late notification of mergers in Mainland China, India, Indonesia, and elsewhere. Under proposed amendments to Mainland China's existing Anti-Monopoly Law, published for consultation in January 2020, the maximum fines for failure to file are expected to be increased to 10% of sales revenue in the preceding year, bringing the Mainland Chinese regime in line with international practice.

On the behavioural side, courts in Australia and South Korea upheld record fines in 2019: A$46 million (approximately US$31.6 million) against car parts maker Yazaki for cartel conduct in relation to wire harnesses in the case of Australia, and ₩1.03 trillion (approximately US$887.9 million) against Qualcomm for unfair business practices in the case of South Korea. (Qualcomm would have paid a similar fine in Taiwan as well, but instead reached a settlement with the Taiwan Fair Trade Commission (**TFTC**) in 2018 that is understood to have included an undertaking to invest as much as US$700 million in the local semi-conductor industry.) The Japan Fair Trade Commission (**JFTC**) also imposed a record ¥60 billion (approximately US$544.6 million) cartel fine in 2019 against eight construction companies for fixing the price of asphalt mixture, although this fine was later reduced.

In South Korea, already one of the more active jurisdictions in criminal enforcement of competition law, more aggressive enforcement is anticipated following the appointment in June 2019 of a new antitrust-focused prosecutor-general, as well as proposed amendments to the country's competition law that would allow prosecutors to bring own-motion cases without reference from the Korea Fair Trade Commission (**KFTC**).

Modernising competition regulation

While competition laws continue to spread, more established authorities in the region have been at the forefront of regulating critical issues confronting competition authorities globally, most notably in the digital economy. Authorities in both Japan and Australia issued reports in 2019 dealing with a range of issues relating to digital platforms. These include considering how best to capture and review "killer" acquisitions of smaller tech rivals, competitor access to big data, and protection of data privacy: all issues currently equally under consideration in the EU and North America.

Governments in both countries have already moved to implement some of the recommendations in those reports, including establishing a dedicated unit responsible for digital competition matters within the Australian Competition and Consumer Commission (**ACCC**). The KFTC has similarly established a tech sector task force across multiple divisions, which has already launched several investigations.

The speed with which these jurisdictions have sought to address these critical issues means that companies should be cautious of how rules relating to, eg data privacy, may depart from newly developing rules in Europe or elsewhere. The JFTC in particular appears keen to impose an even stricter approach than most European regulators.

Cooperation within the region

Within Asia, the move is very much towards greater cooperation and harmonisation of competition rules, in particular following the creation of the ASEAN Competition Enforcers Network in 2018. This cooperation was evident in the case of Grab's acquisition of Uber's South-East Asian ride-hailing business in 2018, where authorities from Indonesia, Malaysia, the Philippines, Singapore, and Vietnam actively cooperated in a post-facto investigation of the transaction which had not been notified. The investigation has resulted in fines totalling more than US$30 million in all jurisdictions but Vietnam.

While the Competition Enforcers Network promotes exchanges of information and best practices between ASEAN member states, the more experienced authorities of Japan, South Korea, Australia, and New Zealand have also continued to provide training and secondment opportunities for new ASEAN regulators. The Australian and New Zealand authorities also held annual workshops with their ASEAN counterparts under the auspices of the ASEAN-Australia and New Zealand Free Trade Agreement Competition Law Implementation Program.

In addition, the number of formal cooperation agreements between authorities also continues to increase. Most recently (May 2019) such an agreement was entered into between the KFTC and the State Administration for Market Regulation (**SAMR**) of Mainland China. Companies should therefore assume, more than ever, that regulators "talk".

Foreign direct investment regulation

Although not covered in detail in this Guide, foreign direct investment (**FDI**) has risen in prominence and is something that should now be considered in parallel with merger control. Jurisdictions have different thresholds for reviewing FDI, some of which are heavily influenced by the prevailing political climate. In Asia-Pacific, some jurisdictions are following the trend towards greater scrutiny of FDI (for example, Australia and Japan), while other jurisdictions are gradually loosening their FDI regimes.

About this Guide

As with previous editions, this updated Guide provides readers with an overview of the legal framework in a number of key Asia-Pacific jurisdictions, as well as the rules relating to both competition law enforcement and merger control. As with Herbert Smith Freehills itself, the Guide covers the breadth of the Asia-Pacific region, with dedicated chapters for Australia, Hong Kong, Indonesia, Japan, Mainland China, Malaysia, Singapore and Thailand, as well as for ASEAN more generally.

Each chapter also looks ahead to the key issues on the horizon in each jurisdiction that companies should be cautious of when planning their activities in the region.

For certain chapters we have received assistance in updating these chapters from colleagues at local law firms, with whom we often work together in providing cross-border solutions for our clients. We are grateful for their input and assistance.

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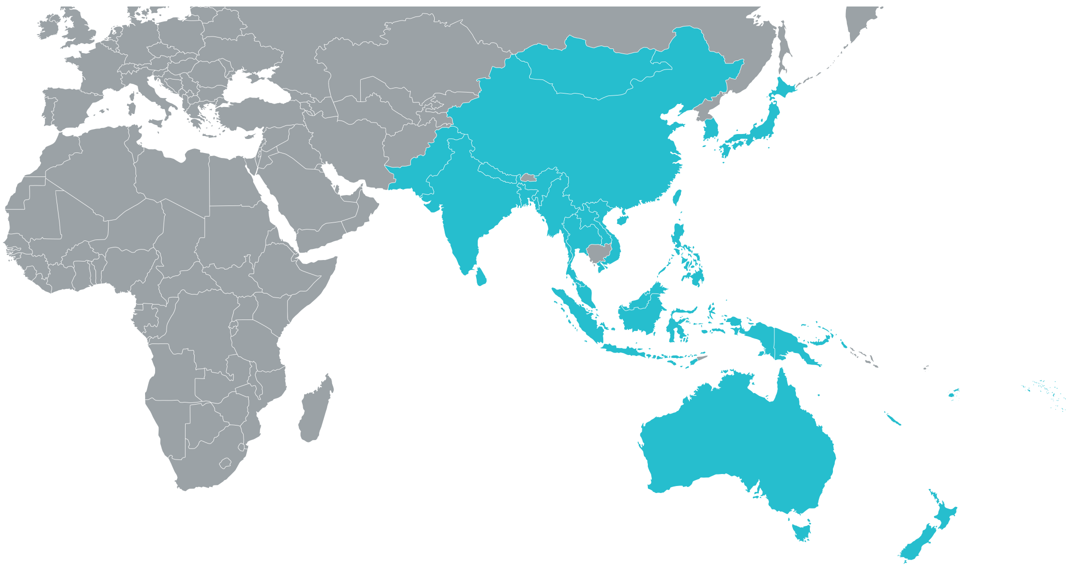

ASIA-PACIFIC JURISDICTIONS WITH ACTIVE COMPETITION LAW REGIMES

AUSTRALIA
BANGLADESH
BRUNEI
MAINLAND CHINA
FIJI
FRENCH POLYNESIA
HONG KONG
INDIA
INDONESIA
JAPAN
LAOS
MALAYSIA
MONGOLIA
MYANMAR
NEPAL
NEW CALEDONIA
NEW ZEALAND
PAKISTAN
PAPUA NEW GUINEA
PHILIPPINES
SAMOA
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Hong Kong

1. Introduction

Overview of regime

1.1 What is the applicable competition legislation and who enforces it?

The Competition Ordinance (Chapter 619 of the Laws of Hong Kong) (**Ordinance**) implements a cross-sector antitrust regime, and a merger control regime for the telecommunications sector in Hong Kong. The Ordinance was approved by the Legislative Council on 14 June 2012 and was fully implemented on 14 December 2015 (the **Implementation Date**). The Ordinance has many similarities to the EU, and in particular the UK, competition law regimes.

The Hong Kong Competition Commission (**Commission**) is responsible for investigating alleged or potential infringements of the Ordinance and, if appropriate, initiating enforcement action. The Competition Tribunal (**Tribunal**), comprising judges of the Hong Kong Court of First Instance (**CFI**), acts as the adjudicative body for a number of applications and proceedings, including proceedings brought by the Commission alleging an infringement of the Ordinance. The Tribunal has wide-ranging powers to impose administrative, financial and other penalties for infringements.

Under the Ordinance, the Communications Authority (**CA**) and the Commission exercise concurrent jurisdiction regarding: (i) potential competition law infringements in the telecommunications and broadcasting sectors; and (ii) the regulation of mergers involving an undertaking that directly or indirectly holds or controls a "carrier licence" within the meaning of the Telecommunications Ordinance (Chapter 106 of the Laws of Hong Kong) (**Telecommunications Ordinance**). References to the Commission in the Ordinance and in this chapter are to be read as including the CA for these sectors.

On 27 July 2015, the Commission published six guidelines (the **Guidelines**) which set out how it proposes to interpret the Ordinance. These Guidelines cover both substantive matters (the First Conduct Rule, Second Conduct Rule, and Merger Rule), and procedural matters (complaints, investigations, and applications for exemption decisions) under the Ordinance. In addition, the Commission has published three policy documents setting out the key aspects of its approach to enforcement, namely the *Enforcement Policy*; the *Leniency Policy for Undertakings Engaged in Cartel Conduct* (**Leniency Policy**); and the *Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct* (**Cooperation Policy**).

1.2 What are the current enforcement priorities of the competition authority (in headline terms)?

On 19 November 2015, the Commission published its *Enforcement Policy*. This policy reiterated the Commission's focus on competition law compliance, and identified the following enforcement priorities: (i) cartel conduct; (ii) other First Conduct Rule contraventions; and (iii) exclusionary conduct under the Second Conduct Rule.

In December 2019, the Chief Executive Officer of the Commission commented that the regulator's priorities are matters that have "the strongest direct impact on competition and consumers as well as the strongest evidence".

Definitions of the First Conduct Rule (**FCR**) and the Second Conduct Rule (**SCR**) can be found in sections 2.1 "What is the substantive law applicable to horizontal arrangements?" and 2.12 "What is the substantive law applicable to unilateral behaviour by dominant undertakings/undertakings with market power?" below respectively.

1.3 Is the protection and promotion of competition the only policy aim of the regime, or does the competition authority take into account other policies, such as industrial policy or the protection of national interests?

Given that the regime has been in effect for a relatively short time, it is difficult to tell whether the protection and promotion of competition will be the only policy aim of the regime. The Ordinance itself does not suggest that other policy aims will be taken into account.

Notwithstanding this, the Ordinance sets out that the Chief Executive in Council (**Chief Executive**) may give effect to two policy-type exemptions that could apply to arrangements or conduct that would otherwise infringe the Ordinance. The first is an exemption on public policy grounds; the second is an exemption to avoid conflict with international obligations.

2. Antitrust

Anti-competitive agreements: cartels and other horizontal arrangements between competitors

2.1 What is the substantive law applicable to horizontal arrangements?

Restrictive agreements and practices (whether horizontal or vertical) are regulated by the FCR at Section 6 of the Ordinance. This is a cross-sector rule prohibiting agreements, concerted practices, or decisions of associations that have the object or effect of preventing, restricting or distorting competition in Hong Kong.

The FCR covers both formal and informal agreements, and concerted practices. The term "agreement" is widely defined in the Ordinance and includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings.

The Commission's Guideline on the FCR states that a concerted practice may exist where there is cooperation between competitors, falling short of an agreement, where the parties knowingly substitute practical cooperation for the risks of competition. Under the FCR, competitors are precluded from direct or indirect contact where the object or effect of that contact is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question.

2.2 What types of arrangement are prohibited?

All arrangements which have the object or effect of preventing, restricting or distorting competition in Hong Kong are prohibited by the FCR. Where an agreement has an anti-competitive object, it is not necessary for the Commission to prove that the agreement has an anti-competitive effect.

Under the Ordinance, certain infringements by object can also be deemed "Serious Anti-competitive Conduct" (**SACC**). The Commission's Guideline on the FCR makes it clear that SACC involves conduct or practices that are "inherently harmful to competition". SACC is conduct that involves any of the following:

- price fixing;
- market sharing;
- output limitation; and
- bid-rigging.

The implications of an agreement constituting SACC are:

- the general exclusion for "Agreements of Lesser Significance" does not apply (see section 2.3 "Are there any applicable exemptions or defences?" below); and
- the Commission may institute proceedings directly before the Tribunal without issuing a "Warning Notice" to the undertakings involved in the conduct (see section 3.3 " What are the typical steps in a competition investigation?" below).

2.3 Are there any applicable exemptions or defences?

The Ordinance provides for a number of exclusions and exemptions from the FCR. In order to benefit from such an exclusion or exemption, there is no requirement to make a notification or application to the Commission. However, undertakings may apply to the Commission for a decision to the effect that an agreement is excluded/exempted from the FCR (Section 9 of the Ordinance).

The Commission is only required to consider such an application if:

- it poses novel or unresolved questions of wider importance or public interest regarding the application of exclusions or exemptions;
- it raises a question for which there is no clarification in existing case law or Commission decisions; and
- it is possible to make a decision on the basis of the information provided.

The following exclusions to the FCR are available under the Ordinance:

- agreements enhancing overall economic efficiency;
- agreements entered into for the purposes of compliance with legal requirements (the Guideline on the FCR states that the requirements sought to be complied with must eliminate any margin of autonomy on the part of the undertaking concerned);
- an undertaking entrusted by the Government with the operation of services of general economic interest, in so far as the FCR would obstruct the performance of any assigned tasks;
- agreements that result in a merger; and
- de minimis agreements, ie Agreements of Lesser Significance. These are agreements or practices between or engaged in by undertakings, or decisions of an association of undertakings whose combined annual worldwide turnover does not exceed HK$200 million (this exclusion does not apply where the arrangements involve SACC).

In terms of exemptions, the following bodies and persons are exempted from the FCR:

- statutory bodies other than those specified in a regulation by the Chief Executive; and
- persons specified or persons engaged in activities specified in a regulation by the Chief Executive.

Arrangements exempted from the FCR include:

- agreements or categories of conduct that are exempted by an order published in the Gazette by the Chief Executive, either on public policy grounds or to avoid conflict with international obligations; and
- categories of agreement in respect of which the Commission has granted a block exemption order.

The Commission may issue a block exemption order if it is satisfied that a particular category of agreement enhances overall economic efficiency. Such orders may be made either on the Commission's own initiative, or on application by an undertaking or an association of undertakings. The Commission indicates, in its *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders*, that the issue of a sector-specific block exemption will be viewed as an "exceptional measure". To date, the Commission has issued only one such order, being a block exemption order regarding vessel sharing arrangements by liner shippers. It should be noted that the application for this block exemption order also extended to a further class of agreements, so called "vessel discussion agreements", which was rejected by the Commission.

Singapore

1. Introduction

Overview of regime

1.1 What is the applicable competition legislation and who enforces it?

The legislation

The principal piece of competition legislation in Singapore is the Competition Act 2004 (Cap 50B) (**Competition Act**), which came into force in stages from 1 January 2005 and was amended by the Competition (Amendment) Act 2018 (**Competition (Amendment) Act**) with effect from 16 May 2018. The Competition Act is intended to protect consumers and businesses from the anti-competitive practices of private entities, and is largely modelled on the equivalent UK legislation.

The Competition Act is supplemented by various regulations and orders, issued by the Minister of Trade and Industry (**MTI**) and/or the Competition and Consumer Commission of Singapore (**CCCS**) – the regulatory body established on 1 January 2005 by the Competition Act. The CCCS was formerly known as the Competition Commission of Singapore, and all references to the CCCS in this chapter should be read as including the Competition Commission of Singapore as it then was.

There are currently six regulations and two orders in force dealing with, amongst other things, fees, appeals and exemptions. In addition to the regulations and orders, the CCCS has also issued various detailed guidelines (**Guidelines**), intended to "outline how CCS will administer and enforce the provisions under the [Competition] Act", and which provide a useful and detailed indication of how the CCCS interprets the legislation in carrying out its duties and exercising its powers. Following a comprehensive review and a public consultation on proposed changes, the CCCS published a revised set of Guidelines which took effect on 1 December 2016. Taking into account 10 years of experience of the CCCS and international best practice, this was the first major revision since the original Guidelines were published in 2007. Notably, the revised Guidelines contain:

- a new Fast Track Procedure (**Fast Track Procedure**) for a shorter and faster investigation process;
- more clarity and guidance on how the CCCS will calculate financial penalties; and
- simplified processes to increase efficiency and save time for businesses.

In addition to the Guidelines, the CCCS issued the *Guidance Note for Airline Alliance Agreements* in September 2018. This guidance note aims to streamline the CCCS's review process and to clarify whether any given airline alliance agreement may constitute an anti-competitive agreement prohibited by Section 34 of the Competition Act. The guidance note also provides a clear timeline for the review of airline alliance agreements which are notified to the CCCS.

The regulatory bodies

The CCCS is responsible for administering and enforcing the provisions of the Competition Act. It has the power to investigate, prosecute, judge and enforce decisions in competition investigations.

Section 72 of the Competition Act established the Competition Appeal Board (**CAB**) – an independent body made up of members appointed by the MTI – as the body with exclusive jurisdiction to hear appeals against the decisions of the CCCS. It is a specialist tribunal, modelled on the UK's Competition Appeal Tribunal and intended to provide the necessary checks and balances in a system where the CCCS holds extremely broad powers. The CAB similarly has a range of broad powers, enabling it to confirm or set aside all or part of a CCCS decision; remit a matter to the CCCS for reconsideration; repeal or vary the amount of a penalty; and give any direction, take any other step or make any other decision which the CCCS itself could have made.

The MTI (under which the administration of the Competition Act falls) also has various powers under the Competition Act, including: issuing Block Exemption Orders (see section 2.3 "Are there any applicable exemptions or defences?" below); excluding a specific category of agreements from the application of the provision of the Competition Act prohibiting anti-competitive agreements; and the exclusive power to exempt a merger from the statutory prohibition on public interest grounds.

1.2 What are the current enforcement priorities of the competition authority (in headline terms)?

In general, the role of the CCCS is to maintain and enhance efficient market conduct, promoting overall productivity. In doing so, it focuses on enforcing the three key prohibitions under the Competition Act, being:

- the prohibition against agreements, decisions and practices which prevent, restrict or distort competition under Section 34 of the Competition Act (**Section 34 Prohibition**);

- the prohibition against abuse of a dominant position under Section 47 of the Competition Act (**Section 47 Prohibition**); and
- the prohibition against mergers and acquisitions that substantially lessen competition under Section 54 of the Competition Act (**Section 54 Prohibition**).

The CCCS has confirmed that it is likely to impose the most severe financial penalties in cartel cases (such as price fixing, market sharing and bid-rigging) and also cases of abuse of dominance, since it considers these to be among the most serious examples of infringements of competition law.

1.3 Is the protection and promotion of competition the only policy aim of the regime, or does the competition authority take into account other policies, such as industrial policy or the protection of national interests?

The CCCS also advises the Singapore Government and other public authorities on national policies on competition-related matters, and acts internationally as Singapore's representative body with regard to such matters.

The CCCS takes account of the impact that regulatory intervention can have on markets and thus seeks to balance regulatory and business compliance costs against the benefits of effective competition. The CCCS will therefore give due consideration when considering intervention as to whether its action will promote innovation, productivity, or longer-term economic efficiency.

The Third Schedule to the Competition Act also lists exclusions to the Section 34 Prohibition and Section 47 Prohibition. These are wide enough to include activities relating to national security, defence and other strategic interests.

2. Antitrust

Anti-competitive agreements: cartels and other horizontal arrangements between competitors

2.1 What is the substantive law applicable to horizontal arrangements?

Section 34 of the Competition Act came into effect on 1 January 2006. It prohibits:

- agreements between undertakings;
- decisions by associations of undertakings; or
- concerted practices,

which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they fall under one of the exemptions, Block Exemptions or exclusions (see section 2.3 "Are there any applicable exemptions or defences?" below). The Section 34 Prohibition has extra-territorial application and will, therefore, cover agreements entered into outside Singapore and/or by one or more parties that are outside Singapore.

The CCCS has specifically clarified that the words "object" and "effect" within the Section 34 Prohibition are alternative, not cumulative, requirements. Once it has been established that an agreement has as its object the appreciable restriction of competition, the CCCS need not go further to demonstrate anti-competitive effects. On the other hand, if an agreement is not restrictive of competition by object, the CCCS will examine whether it has appreciable adverse effects on competition.

The assessment of whether the "object" of an agreement is the restriction of competition is based on a number of factors, including:

- the content of the agreement and the objective aims pursued by it;
- the context in which the agreement is (to be) applied; and
- the actual conduct and behaviour of the parties on the relevant market(s).

In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.

Prohibited agreements, decisions or concerted practices include amongst other things: price fixing, bid-rigging, market sharing or output limitations.

The term "agreement" has a similarly broad meaning in this context and includes both legally binding and non-binding agreements, whether written or verbal. An agreement may be reached by any means (physical meeting, exchange of letters, telephone calls etc) – all that is required is that the parties arrive at a consensus on the actions they will, or will not, take.

The Section 34 Prohibition applies equally to agreements and "concerted practices" (Section 34(1) of the Competition Act). The Guidelines explain that concerted practices differ from agreements in that they may exist where there is only informal cooperation. There need not be any official agreement or decision.

The term "undertaking" has a wide meaning and encompasses any person including individuals, bodies corporate, unincorporated bodies of persons, or any other entity capable of carrying on commercial or economic activities.

2.2 What types of arrangement are prohibited?

A non-exhaustive list of the various types of agreements which might appreciably adversely affect competition is set out by the CCCS, as follows:

- directly or indirectly fixing prices;
- bid-rigging (collusive tendering);
- sharing markets;
- limiting or controlling production or investment;
- fixing trading conditions;
- joint purchasing or selling;
- sharing information;
- exchanging price information;
- exchanging non-price information;
- restricting advertising; and
- setting technical or design standards.

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