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**Abuse of Market Power and Competition Law Enforcement in Hong Kong: An Overview of the Second Conduct Rule and Regulatory Framework**

1. **Introduction**

Hong Kong’s Competition Ordinance (Cap. 619), which came into full force in December 2015, represents a watershed moment in the jurisdiction’s economic regulation. The Ordinance establishes for the first time a comprehensive cross-sectoral competition law regime addressing three principal areas: (i) restrictive agreements under the First Conduct Rule, (ii) abuse of market power under the Second Conduct Rule, and (iii) limited merger control under the Merger Rule applicable only to telecommunications carriers.

The Competition Ordinance emerged from a lengthy legislative process spanning over a decade. Following extensive consultation in 2006 and 2008, the legislation was enacted in June 2012 and achieved full effect on 14 December 2015. The 2006 consultation demonstrated broad public support, with particular concern from small and medium enterprises about potential adverse effects on their businesses. The subsequent 2008 consultation received over 170 submissions, reinforcing general support for comprehensive competition legislation[[1]](#footnote-1).

This article specifically analyses the second conduct rule and regulatory framework imposed in Hong Kong under the Competition Ordinance. It will briefly cover the economic context behind the enactment of the Competition Ordinance, before providing an overview of the Second Conduct Rule in Hong Kong, introducing comparative perspectives with other jurisdictions, and finally looking ahead to future challenges to the regulatory framework in Hong Kong.

1. **Economic Background and Regulatory Context**

Hong Kong’s economy exhibits distinctive characteristics that profoundly shape its competition law landscape. Despite its small geographic area and population, Hong Kong’s global competitiveness ranks third according to the latest World Competitiveness Yearbook 2025 published by the International Institute for Management Development[[2]](#footnote-2). The economy’s structure is dominated by service sectors including finance, professional services, and retail, rather than manufacturing where economies of scale might justify concentration[[3]](#footnote-3).

The Competition Ordinance applies generally across all sectors except where specific exclusions apply under Schedule 1. These exclusions include agreements enhancing overall economic efficiency, compliance with legal requirements, services of general economic interest, mergers, and conduct of lesser significance. The *de minimis* thresholds are set at HKD 200 million combined annual turnover for the First Conduct Rule and HKD 40 million annual turnover for the Second Conduct Rule.

Uniquely, general merger control is absent in the Competition Ordinance in Hong Kong, save for the telecommunications sector. This arguably makes the Second Conduct Rule and its restrictions on the abuse of market power even more crucial as a tool for addressing market power abuse.

1. **The Second Conduct Rule Framework**

**3.1 Statutory Foundation and Market Power Threshold**

Section 21 of the Competition Ordinance establishes the Second Conduct Rule, prohibiting undertakings with “a substantial degree of market power” from abusing that power through conduct having the object or effect of preventing, restricting, or distorting competition in Hong Kong. This formulation introduces several notable departures from conventional abuse of dominance provisions found in other jurisdictions.

The threshold of “substantial degree of market power” represents a conscious departure from the European Union’s “dominance” standard, which typically requires market shares exceeding 50%. Section 21(3) provides additional flexibility by setting out a non-exhaustive list of factors that may be considered in determining whether an undertaking possesses substantial market power, including: (i) market share, (ii) power to make pricing and other decisions, (iii) barriers to entry to competitors, and (iv) any other relevant matters.

The concept of “substantial degree of market power” is borrowed from Section 46(1) of the Australian Competition and Consumer Act 2010[[4]](#footnote-4). Australian case law suggests that this threshold connotes a lower market power requirement than dominance, with cases such as *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)* [2001] FCA 1861 and *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] 215 CLR 374, indicating that market shares of 25% to 30% could potentially suffice for findings of substantial market power. This lower threshold could also reflect Hong Kong’s specific economic characteristics, where oligopolistic structures may prevent any single firm from achieving outright dominance while still possessing significant market influence.

The flexibility inherent in this standard allows the Competition Commission to address conduct by firms with potentially lower market shares than would be possible under traditional dominance tests. As noted in academic commentary, “*a number of markets in Hong Kong seem to be affected by the conglomerates operating in an oligopolistic fashion. Their market shares probably would not qualify for dominance under the prevailing EU jurisprudence*”[[5]](#footnote-5).

**3.2 Object and Effect Analysis**

The Commission’s Guideline on the Second Conduct Rule clarifies that conduct with the object of harming competition cannot be defended by showing absence of anti-competitive effects[[6]](#footnote-6). Like the law in the European Union, Section 21 of the Competition Ordinance incorporates the “object or effect” dichotomy from Article 101 TFEU. Section 21(2) provides two specific examples of conduct that may constitute abuse: predatory behavior towards competitors and limiting production, markets, or technical development to the prejudice of consumers. However, abusive conduct under the Second Conduct Rule constitutes an “open category” that is not limited to these examples.

However, conduct lacking anti-competitive object may still contravene the rule if it has the effect of harming competition. This effects analysis considers both actual and potential anti-competitive consequences, examining whether conduct results in higher prices, output restrictions, reduced product quality or variety, or anti-competitive foreclosure, and often-times requires economic analysis.

**3.3 Market Definition and Power Assessment**

The Competition Commission’s approach to market definition follows established international best practices while adapting to Hong Kong’s specific circumstances. The Small but Significant Non-transitory Increase in Price (SSNIP) test serves as the primary methodology, supplemented by qualitative analysis of demand-side substitution, supply-side responses, and potential competition[[7]](#footnote-7).

Market definition encompasses both product and geographic dimensions. The relevant product market comprises products considered interchangeable or substitutable by buyers due to characteristics, prices, and intended use. The relevant geographic market comprises regions where buyers could find substitutes for products in question. Uniquely for Hong Kong, geographical markets may extend beyond Hong Kong to include areas such as the Greater Bay Area where consumers demonstrate willingness to seek alternatives[[8]](#footnote-8).

Market power assessment under the Second Conduct Rule emphasizes several key factors beyond market share. The Commission’s guidelines define substantial market power as the ability profitably to charge prices above competitive levels, restrict output, or reduce quality below competitive levels for a sustained period - typically two years[[9]](#footnote-9). The assessment considers market share evolution over time, relative competitive positions, entry barriers, and countervailing buyer power.

Entry barriers receive particular attention, classified into regulatory and legal barriers, structural barriers, and strategic barriers. Persistently high market shares may indicate entry barrier presence, while large market shares combined with low entry barriers would be unlikely to yield findings of substantial market power. The Commission follows the “timely, likely, and sufficient” criteria for assessing whether entry or expansion poses credible competitive constraints[[10]](#footnote-10).

**3.4 Categories of Abusive Conduct**

The Second Conduct Rule Guidelines identify several categories of potentially abusive conduct while emphasizing that the list remains non-exhaustive.

“Predatory pricing” receives detailed treatment, with below-average-variable-cost pricing potentially constituting abuse by object. This approach follows European precedent in emphasizing exclusionary effects on equally efficient competitors rather than requiring proof of recoupment as under United States antitrust law. Pricing between average variable cost and average total cost may constitute abuse if undertaken as part of an elimination strategy or producing actual or likely exclusionary effects[[11]](#footnote-11).

“Exclusive dealing” encompasses both exclusive purchasing and supply obligations, as well as functionally equivalent loyalty rebate schemes. The Commission’s analysis focuses on whether arrangements foreclose significant market portions and thereby impair competitors’ effective competition ability. Retroactive rebates and individualized rebate structures receive particular scrutiny due to enhanced foreclosure potential[[12]](#footnote-12).

“Margin squeeze” occurs when vertically integrated undertakings reduce margins between upstream input prices charged to competitors and downstream prices charged to customers, rendering downstream competition economically unviable. The Commission follows European precedent in not requiring upstream input “indispensability,” though indispensability increases abuse likelihood[[13]](#footnote-13).

“Refusals to deal” are assessed restrictively, recognizing general freedom to choose trading partners. Liability typically requires genuine input essentiality for downstream competition, refusal preventing effective competition, and absence of objective justification. Special considerations apply to intellectual property rights, where refusal to license constitutes abuse only in exceptional circumstances[[14]](#footnote-14).

“Tying and bundling” may constitute abuse when undertaken by firms with substantial market power to foreclose competitors in tied product markets. The analysis examines whether tying and tied products are distinct and whether conduct produces anti-competitive foreclosure effects[[15]](#footnote-15).

1. **Enforcement Framework and Procedure**

**4.1. Prosecutorial Model and Institutional Design**

Hong Kong’s adoption of the prosecutorial model, separating investigation and adjudication between the Competition Commission and Competition Tribunal, provides enhanced procedural protections compared to administrative models prevalent in other jurisdictions. This separation addresses human rights concerns about fairness of administrative proceedings. In *Competition Commission v Nutanix Hong Kong Ltd & Others* [2019] 3 HKC 307*,* the Commission and the parties in Nutanix proceeded on the basis that pecuniary penalty proceedings under the Ordinance are ‘criminal’ for the purpose of Article 11 of the Hong Kong Bills of Rights Ordinance. In particular, the Court found that “t*he criminal standard was applicable in the light of the criminal character of the proceedings which flowed from the presence of the power to impose the penalty*” (at §57) and “*there is a clear basis for suggesting that [the criminal] standard of proof is implicit within Article 11(1) of the Bill of Rights*” (§61).

Therefore, the Competition Commission serves as both investigator and prosecutor, with powers including document production requirements, witness interviews, and dawn raids conducted under warrant. The Commission may resolve investigations through various mechanisms: commitments under Section 60 of the Competition Ordinance, warning notices, infringement notices, or full Competition tribunal proceedings. This flexibility enables proportionate enforcement responses based on violation severity and market impact.

The Competition Tribunal, as a specialized division of the Court of First Instance, determines liability and imposes remedies following contested Commission proceedings.

**4.2 Investigation and Enforcement Process**

The Competition Commission’s investigation process proceeds through two phases: (i) Initial Assessment and (ii) Investigation phases. During Initial Assessment, the Commission has not formed a view about reasonable cause to suspect contravention, and seeks information voluntarily through various means including reviewing publicly available information and conducting market studies[[16]](#footnote-16).

Upon forming reasonable suspicion, the Commission enters the Investigation Phase, utilizing statutory powers including section 41 notices requiring document production, section 42 notices requiring persons to answer questions, and dawn raids pursuant to warrants issued under section 48. The Commission’s approach to dawn raids balances enforcement effectiveness with procedural fairness, allowing reasonable time for legal adviser attendance while taking necessary measures to prevent evidence tampering[[17]](#footnote-17).

Following investigation, the Commission may pursue various enforcement options. For serious anti-competitive conduct, it may bring proceedings directly to the Tribunal without warning notices. For non-serious conduct, warning notices provide opportunities to cease problematic behavior within specified periods. The Commission may also accept commitments under Section 60, providing flexible resolution mechanisms for competition concerns.

**4.3 Penalties and Sanctions**

Hong Kong’s penalty framework provides both financial and non-financial sanctions, capped at 10% of Hong Kong turnover for up to three years of infringement. This territorial limitation contrasts with global turnover approaches used elsewhere, potentially reducing deterrent effects for multinational enterprises while avoiding excessive penalties relative to Hong Kong market presence.

The Tribunal’s structured four-step penalty methodology, established in *Competition Commission v W Hing Construction Co Ltd (No 2)* [2019] 3 HKLRD 46, follows European precedent in calculating base amounts from value of sales multiplied by gravity percentages and duration multipliers, adjusted for aggravating and mitigating factors, subject to statutory caps, and reduced for cooperation or inability to pay.

The W Hing decision established that for serious anti-competitive conduct such as price fixing, market sharing, and bid-rigging, gravity percentages range from 15% to 30%. The Competition Commission subsequently published its Policy on Recommended Pecuniary Penalties in June 2020, providing transparency and consistency in penalty recommendations while recognizing ultimate Tribunal authority for penalty determination.

Non-financial sanctions include director disqualification orders for up to five years, structural or behavioral orders under Schedule 3, and cost recovery for Competition Commission investigations. The breadth of available remedies provides flexibility in addressing diverse competition concerns through appropriate interventions.

**4.4 Standard of Proof and Procedural Challenges**

The Competition Tribunal’s decision in *Nutanix* established that the criminal standard of proof (“beyond reasonable doubt”) applies to competition proceedings classified as criminal for human rights purposes. This determination followed the Hong Kong Court of Final Appeal’s decision in *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, which held that proceedings classified as criminal must apply the criminal standard[[18]](#footnote-18).

In the context of the second conduct rule, this high standard of proof may present significant challenges for Competition Commission enforcement, particularly for complex economic analysis involving market definition, substantial market power assessment, and effects analysis. If every case were to require the demonstration of anti-competitive foreclosure effects beyond reasonable doubt, the enforcement of Article 21 might become all but impossible[[19]](#footnote-19).

The Irish competition law experience provides instructive parallels, where the criminal standard requirement has limited effective enforcement to cartel cases, with non-cartel conduct rarely prosecuted under penalty-imposing procedures[[20]](#footnote-20). This suggests Hong Kong may face similar constraints in pursuing complex abuse cases requiring sophisticated economic analysis under the current procedural framework.

**4.5 Private Rights and Follow-on Actions**

Hong Kong’s approach to private competition litigation restricts standalone actions while providing for follow-on damages claims based on Competition Tribunal findings or Commission-accepted admissions of liability. Section 110 of the Ordinance provides limited private action rights, namely follow-on actions by persons suffering loss or damage from conduct determined to constitute competition rule contraventions.

This framework balances access to redress with concerns about duplicative proceedings and inconsistent findings between courts and specialized tribunals. While limiting private enforcement incentives compared to systems permitting standalone private litigation, it ensures consistency with public enforcement determinations and avoids parallel proceedings complexity on identical competition issues.

1. **Exclusions and Exemptions Framework**

**5.1 General Exclusions Structure**

The Competition Ordinance provides six exclusions under Schedule 1, applicable to varying degrees to both conduct rules. These exclusions reflect policy decisions to balance competition enforcement with other legitimate regulatory objectives and practical considerations for small businesses.

Agreements enhancing overall economic efficiency under Section 1 of Schedule 1 are excluded from the First Conduct Rule but not the Second Conduct Rule.

Agreements made in compliance with legal requirements are excluded from the First Conduct Rule and Second Conduct Rule under Section 2 of Schedule 1, covering requirements imposed by Hong Kong enactments or national laws applying in Hong Kong. The Competition Commission’s decision regarding the Code of Banking Practice established a three-step test: (i) identifying compulsive measures, (ii) deriving from enactments, and (iii) interpreting whether these measures entail anti-competitive conduct through express specification or necessary implication[[21]](#footnote-21).

**5.2 Services of General Economic Interest and Sector-Specific Issues**

The services of general economic interest exclusion under Section 3 follows a partial adoption of Article 106 TFEU in exempting undertakings entrusted by government with operating services of general economic interest, insofar as conduct rule application would obstruct assigned task performance[[22]](#footnote-22). The exclusion applies to services that public authorities believe should be provided regardless of private sector willingness.

**5.3 Merger Exclusions**

Under Section 4 of Schedule 7, merger transactions cannot be challenged under conduct rules, consistent with the limited scope of merger regulation in Hong Kong.

**5.4 De Minimis Exclusions and SME Protection**

The de minimis exclusions under Sections 5 and 6 operate based on turnover thresholds: (i) a HKD 200 million combined turnover threshold is imposed for the First Conduct Rule; and (ii) a HKD 40 million threshold is imposed for the Second Conduct Rule. These thresholds were specifically designed to protect small and medium enterprises, providing greater business certainty than market share-based approaches.

1. **Case Law Development and Precedent**

**6.1 Early Tribunal Decisions**

The Competition Tribunal’s jurisprudence remains limited given the Ordinance’s relatively recent implementation. Unfortunately, at the moment, there has not been any published decision on liability or penalty on the Second Conduct Rule.

**6.2 Ongoing Enforcement Developments**

The Competition Commission commenced its first abuse of substantial market power proceedings in December 2020 against Linde HKO Limited and Linde GmbH. In this case, the Competition claims that the Respondents have leveraged their de facto monopoly position in medical gases supply into downstream medical gas pipeline system maintenance markets through supply cessation and exclusionary conduct against competitors.

This case represents a crucial test of the Second Conduct Rule’s practical application, particularly regarding substantial market power thresholds, abuse theory development, and remedy design. The Tribunal’s eventual decision will provide essential guidance for future abuse cases and market power assessment methodologies.

**6.3 Commitment and Settlement Practice**

The Competition Commission has accepted several significant commitment packages, including agreements with online travel agents ([Booking.com](http://Booking.com), [Expedia.com](http://Expedia.com), [Trip.com](http://Trip.com))[[23]](#footnote-23) addressing price parity clauses and Hong Kong Seaport Alliance addressing joint venture concerns[[24]](#footnote-24). These commitments demonstrate the Commission’s willingness to resolve competition concerns through negotiated solutions where appropriate.

The commitment mechanism under Section 60 provides flexibility for addressing competition concerns without lengthy tribunal proceedings, enabling resource allocation toward more serious violations while securing behavioral changes addressing market problems.

However, as of the date of this Article, there have been no commitment or settlement decisions that relate to the Second Conduct Rule.

1. **International Comparisons and Academic Analysis**

**7.1 Comparative Institutional Models**

Hong Kong’s prosecutorial model contrasts with administrative models prevalent in many jurisdictions, including the European Union and most Asian competition jurisdictions. While providing enhanced procedural protections, this model creates potential enforcement challenges, particularly when combined with criminal standard of proof requirements.

**7.2 Market Power Standards and Thresholds**

As stated above, Hong Kong’s “substantial degree of market power” threshold draws from Australian precedent while adapting to local market conditions.

The flexibility of Hong Kong’s approach contrasts with more rigid market share presumptions found in other jurisdictions. While the European Union maintains 50% dominance presumptions[[25]](#footnote-25) and the United States typically requires more than 70% market shares for monopolization findings[[26]](#footnote-26), Hong Kong’s framework enables case-by-case analysis sensitive to specific market conditions.

1. **Future Challenges and Development**

**8.1 Digital Markets and Platform Economics**

Hong Kong’s competition law framework will face testing through application to digital platform markets with their network effects, multi-sided characteristics, and rapid innovation cycles. The Second Conduct Rule’s flexibility provides advantages in addressing novel business models, though market definition and substantial market power assessment may require sophisticated economic analysis.

The Commission’s guidelines acknowledge two-sided market complexities[[27]](#footnote-27), recognizing that competitive constraints on both market sides must be considered when assessing market power. However, the practical application of the Second Conduct Rule to specific digital platform cases will require further development of analytical frameworks and precedent.

**8.2 Conglomerate Power and Cross-Market Effects**

Hong Kong’s concentrated economy, dominated by large family-owned business groups, presents ongoing enforcement challenges requiring careful analysis of cross-market relationships and portfolio effects. The Second Conduct Rule’s substantial market power threshold may enable addressing oligopolistic conduct that would escape scrutiny under traditional dominance standards.

Future enforcement may need to develop theories addressing conglomerate conduct that, while not creating single-market dominance, enables coordinated behavior across multiple markets or leveraging of positions in related markets to exclude competitors or exploit consumers.

**8.3 Procedural and Institutional Reforms**

The criminal standard of proof requirement creates significant enforcement challenges that may require legislative reform to address effectively. Options include express statutory provision for civil standard application or constitutional amendment approaches, though both raise complex legal and policy considerations.

Alternative approaches might include expanded use of non-pecuniary remedies or enhanced settlement mechanisms to achieve consumer protection without necessarily having to resort to enforcement proceedings in the Competition Tribunal.

**9. Conclusion**

Hong Kong’s Competition Ordinance establishes a sophisticated legal framework that balances international best practices with adaptation to the territory’s unique economic characteristics. The Second Conduct Rule in Hong Kong has several unique features tailored to the jurisdiction’s unique economic background and context that departs from other competition law jurisdictions such as the European Union.

At the moment, Hong Kong’s competition law regime is still in its infancy stage. There has not yet been a published decision on liability or quantum under the Second Conduct Rule. We look forward to future developments in the local jurisprudence, whilst bearing in mind the challenges that technology and Hong Kong’s unique conglomerate economy will bring to the Second Conduct Rule.

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