



竞争法，一水之隔

Competition law across the river

反垄断专家Suzanne Rab与邓志松为您介绍香港新竞争条例及其对中国大陆的影响

Antitrust experts Suzanne Rab and Jet Deng introduce Hong Kong's new Competition Law and what it means for mainland China

香港与中国大陆有许多共同的历史渊源，但是在一国两制的体系下，香港维持着独立的立法和司法制度。例如，两地在竞争法下对商业活动和并购的监管方法就有所不同。

中国自2008年开始实施全行业的竞争法，而香港是迄今为止少数几个没有统一竞争法的发达经济体之一。

不过，这种情形将于今年12月14日随着《竞争条例》的生效而改变。竞争事务委员会（竞委会）与通讯事务管理局于7月27日公布了新法指引。

Hong Kong shares many historical roots with mainland China, but its legal and judicial system maintain a separate identity under the One Country, Two Systems policy. One area where they have taken different approaches is the regulation of commercial practices and mergers under competition law.

An economy-wide competition law took effect in China in 2008, but Hong Kong has to now remained one of the few advanced economies without a general competition law. This will change on 14 December this year when the Competition

《竞争条例》很大程度上借鉴了欧盟、美国、澳大利亚等司法管辖区的竞争法规，它还具有其他竞争法规所没有的特征。在香港经营和投资的国际企业需要了解法律发展和执法实践的最新情况。本文将概述新《竞争条例》的主要特征及其区别于中国大陆规定的主要不同点。

全行业范围

《竞争条例》以第一行为守则、第二行为守则和合并守则为基础。这些守则分别针对反竞争协议、滥用市场权势、电讯及广播领域的合并等事项。

原来仅有《电讯条例》和《广播条例》就特定行业的竞争进行了有限的规定。尽管竞委会有权将《竞争条例》适用于经济活动的全部领域，但竞委会和通讯事务管理局对电讯和广播领域共同享有管辖权。

另外，还有进一步的特定行业禁止性规定禁止电讯行业持牌人进行超高定价，这被非官方称为电讯规定 (telco rule)。

新《竞争条例》具有域外效力，这意味着它适用于对香港造成影响的行为，即使该行为发生在香港之外。因此，如果在中国大陆签署的协议或进行的商业活动妨碍、限制或扭曲了在香港的竞争，那么该等行为也将受《竞争条例》的管辖。

相比之下，中国主要的竞争法规《反垄断法》于2008年8月1日正式实施。执法责任由商务部、国家工商行政管理总局（国家工商总局）和国家发展和改革委员会（国家发改委）共同承担。

《反垄断法》同样对整个经济中的垄断协议（横向和纵向）和滥用市场支配地位的行为进行了禁止。不过，公用事业、电讯、航空运输和国际海运行业等领域还适用特定的行业规定。

监管红线是有关协议或行为是否对中国境内的市场竞争产生了排除、限制影响。与《竞争条例》一样，反竞争行为是否发生在境内市场不是决定性因素。

反竞争协议

《竞争条例》第一行为守则禁止订立或执行其目的或效果是妨碍、限制或扭曲在香港的竞争的协议。协议对竞争的限制必须是明显的。

第一行为守则确定了四种严重的反竞争行为：固定价格，分割市场（编配顾客、销售、地域或市场），限制生产或供应，以及围标。

对于严重的反竞争行为，竞委会在竞争事务仲裁处（仲裁处）提起法律程序前不会发出告诫通知。仲裁处是最近新设立的审批是否存在违反竞争相关规定的机构。

在其他情况下，竞委会必须发出告诫通知，给予行为人承认违反规定并作出承诺的机会。如果业务实体决定不遵守承诺，它将会面临在仲裁处被提起法律程序的风险。

第一行为守则适用于横向协议（即竞争者之间）和供应链不同阶段当事人之间的纵向协议（比如供销协议）。竞委会认为固定购买者销售商品或服务的价格（维持转售价格）这种做法并不会自动被禁止，而是会根据其经济效果进行个案分析。

《反垄断法》和《竞争条例》针对的行为类似。许多构成《竞

Ordinance (CO) takes effect. The Competition Commission (the commission) and the Communications Authority, the telecommunications regulator, issued guidelines on the new law on 27 July.

The CO draws heavily on other competition laws including those of the European Union, United States and Australia. It also contains several features lacking an exact counterpart in other competition laws. Businesses in China and internationally with activities and investments in or affecting Hong Kong will need to keep abreast of the developing law and enforcement practice. This article provides an overview of the key features of the new law and the principal ways in which it differs from its counterpart in China.

Industry-wide scope

The CO is based around the first conduct rule, the second conduct rule and the merger rule. These regulate, respectively, anticompetitive agreements, abuse of substantial market power and mergers in the telecommunications and broadcasting sector.

Limited sector-specific competition regulation previously existed under the Telecommunications Ordinance (TO) and the Broadcasting Ordinance (BO). While the commission will have the power to apply the CO to all sectors of the economy, the commission and the Communications Authority will have concurrent jurisdiction in relation to the telecommunications and broadcasting sector. There is also a further sector-specific prohibition, unofficially known as the telco rule, which prohibits excessive pricing by telecommunications licensees.

The new regime has an extraterritorial application, meaning that conduct with an effect in Hong Kong is caught even if the undertaking is outside Hong Kong. Thus an agreement or commercial practice taking place in mainland China could be caught by the CO if it has the effect of preventing, restricting or distorting competition in Hong Kong.

In comparison, China's main competition legislation, the Antimonopoly Law (AML) entered into force on 1 August 2008. Responsibility for enforcement is split between the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC).

The AML similarly stipulates prohibitions on restrictive (horizontal and vertical) agreements and abuse of market power across the economy. However, some specific sector rules apply in the public utilities, telecommunications, air transport and international maritime transport industries.

The test is whether the agreement or conduct has the effect of eliminating competition in the Chinese market. As with the CO, whether the activity takes place within the domestic market is not a determining factor.

Anticompetitive agreements

The CO's first conduct rule prohibits agreements with the object or effect of preventing, restricting or distorting competition in Hong Kong. The restriction on competition must be appreciable.

The rule identifies four categories of serious anticompetitive conduct: price fixing, market sharing (allocation of customers, sales, territories or markets), output limitation and bid rigging.

争条例》下严重反竞争行为的限制行为，也同样会违反《反垄断法》的规定。

《反垄断法》有关维持转售价格的规定似乎与《竞争条例》及其指引的规定类似。《反垄断法》禁止供应商固定购买者的转售价格。与《竞争条例》相似，这样的行为并不总是违法，并且在满足某些条件的情况下可以得到豁免。不过，国家发改委已经针对违法维持转售价格的行为开出了许多罚单，以下表格列出了一些代表案例。尽管存在豁免的可能，维持转售价格似乎只在有限的情况下可以获监管部门接受。

年份	产品	罚款总额
2013	白酒	两家公司被处罚金7000万美元以上
2013	婴儿配方奶粉	六家公司被处罚金一亿美元以上
2014	眼镜镜片和隐形眼镜	五家公司被处罚金300万美元以上
2014 / 2015	汽车和售后服务	四家汽车制造商和多家经销商被处罚金1亿2000万美元以上

滥用市场权势

第二行为守则禁止那些在市场中具有相当程度市场权势的业务实体滥用其权势来从事目的或效果是妨碍、限制或扭曲在香港的竞争的行为。

《竞争条例》没有包含明确的标准来界定何为具有相当程度的市场权势。这种立法方法明显是受到香港市场的结构特征影响，一家公司可能由于市场上缺少其他可靠的供应商而拥有强大的市场地位。因此，无法排除市场占有率低至 25% 的公司仍可能拥有相当程度的市场权势。

许多单边行为都可能被监管：掠夺性定价、歧视性定价、忠实折扣、拒绝供应、独家交易和搭售。竞委会在仲裁处提起法律程序前不会发出告诫通知。竞委会可以发出违章通知书，给予业务实体承认违反规定并作出承诺的机会。

《反垄断法》《价格法》和《反不正当竞争法》调整中国具有市场支配地位的经营者的行为，它们对市场支配地位以及滥用市场支配地位的定义与《竞争条例》存在着广泛的相似性。不同于《竞争条例》及其指引，《反垄断法》就判定市场支配地位规定了一些市场份额假设。

豁免和豁免

中小企业享有特定的豁免。如果营业额总计少于两亿，香港中小企业的行为就不会违反第一行为守则。第二行为守则不适用于营业额少于 4000 万的企业。不过，固定价格，分割市场（编配顾客、销售、地域或市场），限制生产或供应、围标等严重反竞争行为不享有豁免。

For serious anticompetitive conduct the commission will not issue a warning notice before bringing proceedings before the Competition Tribunal recently established to adjudicate whether there has been an infringement. In other cases, the commission must issue a warning notice allowing the opportunity to admit the infringement and enter into commitments. If the undertaking decides not to comply with the commitments it will be at risk of proceedings before the tribunal.

The rule applies to both horizontal agreements (i.e. between competitors) and vertical agreements between parties operating at a different stage in the supply chain (e.g. a supply and distribution agreement). The commission has taken the view that the practice of fixing the final sales price for the buyer of goods or services (resale price maintenance or RPM) will not automatically be prohibited and will be analysed based on the economic effects.

The AML and the CO target similar practices, and many of the restrictions constituting serious anticompetitive conduct under the CO also infringe the AML.

The AML's approach to RPM appears to be similar to that under the CO and guidelines. The AML prohibits a supplier from fixing the buyer's resale price. Like the CO, these provisions are not always illegal and may benefit from exemption where certain conditions are met. However, the NDRC has issued a number of fines for illegal RPM, some representative cases of which are set out in the below table. Despite the potential exemption, RPM appears to be acceptable in limited circumstances only.

Year	Product	Fines
2013	Liquor	Two companies fined more than US\$70 million
2013	Baby formula	Six companies fined more than US\$100 million
2014	Glasses and contact lenses	Five companies fined more than US\$3 million
2014 / 2015	Automobiles and after services	Four automobile manufacturers and several dealers fined more than US\$120 million

Abuse of market power

The second conduct rule prohibits undertakings with a substantial degree of market power from abusing that power by engaging in conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong.

There are no bright line indicators for determining substantial market power. This approach has apparently been motivated by structural features of the Hong Kong market, where a company may enjoy a strong market position due to the market lacking few other credible suppliers. It thus cannot be ruled out that a company with a market share as low as 25% may hold substantial market power.

此外，第一行为守则也不适用于提升经济效率的协议或者遵守法律规定的协议。同时，由香港政府委托经营、令整体经济受益的服务也不适用第一行为守则。

业务实体可以要求竞委会就特定协议是否适用《竞争条例》下的豁免和豁免规定做出决定。这与2004年5月1日之前的欧盟程序类似。欧盟委员会此前有权就《关于欧洲联盟运行的条约》项下针对反竞争协议的禁止规定给予个别豁免。

《反垄断法》没有包含任何安全港规定，只有国家工商总局规定了仅限于知识产权和反垄断交叉领域的安全港。目前没有像欧盟竞争法和《竞争条例》约定的集体豁免规定。

执法框架

竞委会具有广泛的调查权，包括要求业务实体提供文件或信息的权力。竞委会还可以根据手令临时搜查处所。

竞委会没有权力决定是否发生了违反《竞争条例》实质性的行为。竞委会在怀疑存在违反第一行为守则的严重反竞争行为的情况下，可以发出违章通知书。在其他情况下，竞委会必须发出告诫通知，给予行为人承认违反规定并补救违法行为的机会。如果行为人没有作出承诺，或者持续其违法行为，竞委会可以在仲裁处提起法律程序。

国家发改委和国家工商局不需要法院或法庭的参与，就可以直接对违法行为进行处罚。这是与香港执法制度相比一个重要的不同之处。

制裁

被认定违反《竞争条例》的企业或自然人可能会面临一系列民事制裁，包括最高不得超过违反行为发生的每一年度营业额10%的罚款，最多收取三个年度，以及取消最多五年直接或间接参与公司管理的资格。

仲裁处可以进行更多的制裁，包括宣布违反行为守则并发出禁止从事违法行为的命令。仲裁处还可以在作出决定之前发出临时命令，下令支付损失赔偿，追缴非法所得或避免的损失以支付给香港政府或特定人。法院可以就不配合竞委会调查的行为处以刑事制裁。

与《竞争条例》相似，中国《反垄断法》仅规定了严重违反中国竞争法的行政责任，而未规定刑事责任。法律对垄断协议和滥用市场支配地位的行为规定了三种法律责任：停止违法协议或行为、没收违法所得，以及处以上一年度销售额百分之一以上百分之十以下的罚款。虽然《反垄断法》未明确规定，但上一年度销售额倾向于是在企业在中国就受影响产品产生的销售额。

合并控制

《竞争条例》下的合并控制限于电讯领域，各领域的强制性合并控制预计会在几年内公布。交易如果具有或相当可能具有大幅减弱香港市场竞争性的效果，就会被禁止。不过，交易方没有义务在进行交易前后通知竞委会，从这个意义上来看，合并控制是

A range of unilateral conduct is potentially caught including predatory pricing, discriminatory pricing, loyalty rebates, refusal to supply, exclusive dealing and tying. No warning notices will be issued before the commission brings proceedings before the tribunal. The commission may issue an infringement notice giving the undertaking an opportunity to admit the infringement and enter into commitments.

The AML, the Price Law and the Antiunfair Competition Law regulate the behaviour of dominant firms in China, and their definitions of market power and abuse in the latter are broadly similar to those of the AML and CO. Unlike the CO and guidelines, the AML sets out certain presumptions on market share when determining market dominance.

Exemptions and exclusions

There are specific exemptions for small and medium sized enterprises (SMEs). SME conduct will not infringe the first conduct rule where they have a combined turnover in Hong Kong of less than HK\$200 million. The second conduct rule does not apply to businesses with local turnover of less than HK\$40 million. However, serious anticompetitive conduct, including price fixing, market sharing, output limitation and bid rigging, do not benefit from exemption.

Also excluded from the first conduct rule are agreements that enhance economic efficiency or are entered into to comply with Hong Kong law. Agreements in which the Hong Kong government entrusts operation of services of general economic interest are excluded as well.

An undertaking may have the commission determine the applicability of the CO's exclusions and exemptions to a particular agreement. This resembles EU procedure prior to 1 May 2004. The European Commission formerly was empowered to issue individual exemptions from the prohibition against anticompetitive agreements contained in the Treaty on the Functioning of the European Union.

The AML does not contain any safe harbours. Only SAIC's regulations have dedicated safe harbours, limited to the intersection between intellectual property rights and antitrust. There are currently no block exemptions as under EU competition law and contemplated under the CO.

Enforcement framework

The commission has broad investigatory powers, including requiring an undertaking to provide documents or information. It may also conduct unannounced inspections of premises under warrant.

The commission lacks the power to determine whether a breach of the CO's substantive provisions has occurred. It may issue an infringement notice where it suspects a breach of the first conduct rule involving serious anticompetitive conduct. In other cases, it must issue a warning notice affording the opportunity for admission of the breach and remedy of the unlawful conduct. If the commitments are not entered or the breach continues, the commission may bring proceedings before the tribunal.

NDRC and SAIC are able to directly impose penalties without the involvement of a court or tribunal. This represents an important contrast with the enforcement regime in Hong Kong.

竞争法特征 Main features of competition law		
特征 Feature	香港 Hong Kong	中国大陆 China
监管者 Regulator	竞委会 (全行业) 通讯事务管理局 (与竞委会共同管辖电讯和广播行业) Competition Commission (industry-wide) Communications Authority (concurrent jurisdiction with the commission in telecoms and broadcasting sectors)	商务部、国家工商总局和国家发改委 Ministry of Commerce, State Administration for Industry and Commerce and National Development and Reform Commission
反竞争协议 Anti-competitive agreements	第一行为守则 (《竞争条例》第6条) 禁止严重反竞争行为 (固定价格、分割市场、限制生产或供应、围标)。其他协议会受到告诫通知。 First conduct rule (CO section 6) Prohibits serious anti-competitive conduct (price fixing, market sharing, output limitation and bid rigging). Other agreements subject to a warning notice.	垄断协议 (《反垄断法》第二章) 禁止固定价格、分割市场、限制生产或销售数量、新技术限制、联合抵制交易、转售价格。其他安排会受到竞争分析。 Monopoly agreements (AML chapter II) Prohibits price fixing, market sharing, output limitation, new technology restriction, boycott and RPM. Other arrangements subject to competitive analysis.
滥用市场权势 Abuse of market power	第二行为守则 (《竞争条例》第21条) 禁止具有相当程度的市场权势的业务实体滥用市场权势 Second conduct rule (CO section 21) Prohibits abuse of market power by undertakings with "substantial market power".	滥用市场支配地位 (《反垄断法》第三章) 禁止没有正当理由滥用市场支配地位 Abuse of dominant market position (AML chapter III) Prohibits abuse of dominance without justification.
特定领域规定 Sector-specific rules	电讯规定 (《电讯条例》第7Q条) 禁止超高定价 (只适用于《电讯条例》下的牌照持有者)。 Telco Rule (TO, section 7Q) Prohibits excessive pricing (only for dominant telecoms licensees covered by the TO).	公用事业、电讯、航空运输和国际海运等特定领域有反垄断和反不正当竞争规则。 Some anti-monopoly and anti-unfair competition rules exist in some specific sectors such as public utilities, telecommunications and international maritime transport industries.
合并控制 Merger control	自愿合并控制 (只限于电讯行业) Voluntary merger control (only in telecoms sector)	经营者集中 (《反垄断法》第四章) 全行业的强制性合并控制制度 Business operator concentration (AML chapter IV) Cross-sector mandatory merger control system
私人执法 Private enforcement	只能后续行动 Only follow-up actions	后续行动和独立诉讼 Both follow-up and standalone actions

Sanctions

A business or person found to be in violation of the CO may face a range of civil sanctions, including a penalty of up to 10% of annual local turnover based on the gross turnover for each year of infringement, up to a maximum of three years, and disqualification for up to five years from being directly or indirectly involved in a company's management.

The tribunal may impose a wide range of sanctions, including declaring that the conduct rules have been infringed and issuing an order prohibiting a person from engaging in infringing conduct. The tribunal may also impose an interim injunction pending determination of proceedings, an order for damages payable and disgorgement of illegal gains or avoided losses payable to the Hong Kong government or a specified person. The court may impose criminal sanctions for failure to cooperate with a commission investigation.

Similar to the CO, China's AML only provides for administrative, not criminal, liability for the substantive infringements of Chinese competition law. Three penalties for behavioural violations may be imposed: orders to cease the illegal agreement or activity, to confiscate illegal gains or to impose a fine of 1-10% of the party's turnover in the preceding year. While unspecified in the AML, the latter tends to relate to the undertaking's turnover generated in China in relation to the affected products.

Merger control

Merger control under the CO is limited to the telecommunications sector; sector-wide mandatory merger control is expected to be revisited in a few years. Transactions that have or are likely to have the effect of substantially lessening competition in Hong Kong will be prohibited. Merger control is voluntary in that there is no obligation to notify the commission of a transaction before or after its implementation. However, the commission may investigate a merger that falls within the scope of the merger rule, so it may be advisable to discuss the transaction with it prior to implementation.

The AML contains specific provisions on economy-wide merger control under which MOFCOM has sole jurisdiction. Notification is mandatory where the relevant thresholds are met, and the transaction cannot be implemented without MOFCOM clearance.

Private enforcement

Private actions based on infringement of the CO can only be brought after the tribunal has ruled that there has been a violation following the commission's application for a fine or order to cease the infringement. However, the government is understood to be considering the need for a standalone competition law private action.

In China, by contrast, parties to a monopolistic agreement suffering losses as a result can bring damages claims in the courts. There is no requirement for a prior finding of infringement by a competition agency. Unlike in the EU, most competition law private enforcement claims in China generally tend to be standalone rather than follow-on actions.

自愿的。不过，竞委会可以调查在合并守则适用范围内的合并交易，因此笔者建议最好在进行交易前与竞委会进行沟通。

《反垄断法》的特定条款规定商务部具有对各行业合并控制的管辖权。合并达到相关标准的交易必须进行申报，未经商务部同意不得进行交易。

私人执法

只有当审裁处裁定，在竞委会提出申请对当事人进行罚款或发出停止违法行为命令之后，违法行为依然存在，这时才能就违反《竞争条例》行为提起私人诉讼。不过，据悉香港政府正在考虑建立独立的竞争法私人诉讼。

相比之下，在中国，垄断协议的当事人因此受到损失的可以向法院提起赔偿诉讼。法律没有要求竞争执法机构要先行认定违法行为的存在。不同于欧盟，在中国大多数来自私人的竞争法执法主张通常是独立的，而不是后续行动。

执法重点

竞委会一直积极发展其政策和程序并积极从事宣传。竞委会已经启动了石油价格市场调查，并已完成房屋管理市场调查。竞委会还积极推进电力市场的开放。

企业似乎已经开始有所行动。比如，香港旅游业协会已同意在《竞争条例》生效前撤销对票价的指导。

竞委会目前尚未公布其执法重点，不过预计很快将会公布。许多竞委会官员具有消费者法的执法背景，预计医疗保健和零售等面向消费者的行业会成为重点。

并不令人感到奇怪的是，航运业已表示如果此前已进行的合作安排不具有申请豁免的资格而被视为违法，严格适用《竞争条例》可能会严重影响该行业发展的可持续性。

实践影响。熟悉《反垄断法》和其他国际竞争法的企业处于管理其竞争法风险和利用香港竞争法下机会的有利地位。

企业可以采取许多措施迎接新制度的到来。他们可以检查现有协议和实践做法是否符合行为守则和电讯规定，还可以更新和实施合规制度。这些企业不是从零开始，竞委会已经鼓励企业利用其已经在其他法域实施的合规制度。

中小企业应当考虑其协议或行为是否可以得到豁免，但是应当谨记卡特尔等严重的反竞争行为不能被豁免。

认为自己因供应商、消费者或竞争者的反竞争行为受到损害的当事人应当考虑向竞委会作出投诉。竞委会认为合理的可以向审裁处提起法律程序。如果其安排似乎具有效益效率，当事人应当考虑申请个别豁免或者集体豁免。

《竞争条例》生效后，香港将是最后一个通过全行业竞争法的发达经济体，向中国大陆、日本、马来西亚、台湾和泰国等大部分邻近法域看齐。如何结合香港市场政策进行解释和适用，将是这部新法规在今后面对的考验。

本文定稿后，一项近期的重要动态是竞委会于9月23日发布的《为从事合谋行为之业务实体而设的宽待政策》草拟稿，用以征求公众意见。■

Enforcement priorities

The commission has been actively developing its policies and procedures and engaging in advocacy. It has launched a market study into oil pricing and completed a study of the building management market. It has also urged that the electricity market be opened.

Businesses seem to be taking note. For example, the Travel Industry Council has pledged to rescind guidance on ticketing pricing before the CO takes effect.

The commission has not yet made its enforcement priorities public, although these are soon expected. Many commission officials have backgrounds in consumer law enforcement, and consumer-facing industries such as healthcare and retail are expected to be priorities.

Not surprisingly, the shipping industry has made statements that a rigid application of the CO could seriously affect its sustainability, if the cooperative arrangements previously acceptable are treated as illegal unless they qualify for exemption.

Practical implications. Businesses familiar with the AML and other international competition laws are well-placed to manage their competition law risk and take account of the opportunities presented by Hong Kong's competition law.

Several steps can be taken to prepare for the new regime. Businesses can review existing agreements and practices for compliance with the conduct and telco rules. They also can update and implement compliance programmes. Businesses are not starting from scratch and the commission has encouraged them to draw on their existing compliance programmes in other jurisdictions.

SMEs should consider whether their agreements or conduct can benefit from exemption, while bearing in mind that serious anticompetitive conduct, e.g. cartels, are not exempt.

Parties believing themselves harmed by the anticompetitive practices of their suppliers, customers or competitors should consider making a complaint to the commission. The commission may bring proceedings before the tribunal where appropriate. Parties should also consider their eligibility for an individual or block exemption if their arrangements seem to have efficiency benefits.

When the CO takes effect, Hong Kong will be the last developed economy to adopt an industry-wide competition law, joining most of its neighbours, including China, Japan, Malaysia, Taiwan and Thailand. The test will be how the law is interpreted and applied against Hong Kong market policy.

Since this article was finalized, on 23 September the commission published for consultation its Draft Leniency Policy for Undertakings Engaged in Cartel Conduct. ■

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