

Hong Kong Regulators Join Forces to Combat Anti-Competitive Conduct in the Financial Market

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Following the recent ruling by the Competition Authority in the UK, in which three asset management firms were found to be in breach of competition laws for sharing “strategic information” during an IPO and a placing in 2015, the Competition Commission (CC) and the Securities and Futures Commission (SFC) in Hong Kong announced on 16 April 2020 that they have entered into a memorandum of understanding (MoU) with the aim to deepen their cooperation and information-sharing efforts.

The MoU serves as an important reminder to persons and entities regulated by the SFC (Relevant Entities) that anti-competitive behavior in the financial market will not be tolerated.

The MoU further outlines the extent of coordination between the CC and the SFC during the exercise of their investigative powers and decision-making in the following three areas:

1. Information-sharing. The CC and the SFC may share information with one another where any issue arising in investigations and proceedings by the CC or the SFC is considered to be relevant to the functions and objectives of the other. Specifically, the CC agrees to inform the SFC of its impending decisions on infringement and warning notices (which are usually issued where an undertaking is investigated for conduct not deemed to be Serious Anti-Competitive Conduct [2]). Both of these mean the SFC will be apprised of any details or results of the CC’s investigations before the general public is, and can therefore take appropriate preemptive measures if it so decides.
2. Consent for CC’s investigation subjects to disclose ongoing investigation to the SFC. Generally, complaints

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made to the CC are kept confidential. However, the MoU provides that the CC will give consent to a Relevant Entity subject to its investigation to inform the SFC about the details of the investigation that the CC deems necessary and appropriate. Outside the investigation context, CC also agrees to inform the SFC about its decisions on block exemptions, which is when companies apply to get an exemption under the Competition Ordinance (CO) if the efficiency effects of a cooperation agreement outweigh its anti-competitive elements. While the CO sets out mechanisms for the disclosure of confidential information in specific contexts,^[5] it does not cover the situations now set out in the MoU. In other words, the MoU effectively provides for additional occasions on which confidential information about its ongoing investigations may be released to the SFC.

3. Notification and consultation. Further, the MoU provides that the SFC and the CC should notify and consult one another when one proposes policies and guidelines that are likely to have significant impact on the other, and take into consideration the other party's views about such proposed policies and guidelines. This further highlights the interplay between securities regulation and competition law in Hong Kong and the regulators' readiness and determination to combat any anti-competitive behavior in the financial sector in Hong Kong.

TAKEAWAYS

The MoU sends a robust message to all financial market participants and stakeholders that anti-competitive conduct in the financial market is not going to be tolerated. All stakeholders and Relevant Entities should familiarize themselves with the competition law regime in Hong Kong, keep up-to-date on the rapid developments in the regime, and ensure appropriate policies and protocols are in place to guard against anti-competitive conduct.

[1] See <https://www.fca.org.uk/publications/notices-and-decisions/anti-competitive-conduct-asset-management-sector-fca-decisions-under-competition-act-1998>

[2] CO s 2(1) defines an undertaking as any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity.

[3] CO s 2(2) defines serious anti-competitive conduct as any conduct that consists of price-fixing, market-sharing, output-restriction, and bid-rigging.

[4] Guideline on Complaints, para 3.2.

[5] Under CO s 126, the specific contexts where disclosure of confidential information is permitted include where disclosure is: legally required by law, necessary for the Commission to perform its functions or to carry into effect or to do anything authorized by the CO, for the purpose of bringing criminal proceedings, or regarding information that has already been previously disclosed to the public or to another competition authority (e.g., the Communications Authority).

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