



HONG KONG'S NEW COMPETITION LAW

The Competition Ordinance ("CO") was finally adopted by the Hong Kong Legislative Council on 14 June 2012, bringing Hong Kong in line with other developed economies. The primary objective of the CO is to deter and prohibit companies and persons (known as "undertakings") from engaging in anti-competitive behavior via the conduct and merger rules set out below. Two institutions, namely, the Competition Commission ("Commission") and the Competition Tribunal (the "Tribunal") will be established under the CO. The CO will apply to any entity (regardless of its legal status) engaged in economic activity, including individuals.

TWO NEW GOVERNMENT INSTITUTIONS

A. THE COMPETITION COMMISSION

In addition to providing guidelines to the public, the Commission will be empowered with wide-ranging powers to :

- (1) investigate suspected breaches of the law, for which the Commission will have powers to require documents to be produced and parties to answer questions, and
- (2) issue orders including taking enforcement actions. This will include the power to order the production of documents, to conduct dawn raids after obtaining a warrant from Court, and to perform some enforcement functions. The Commission can agree not to bring proceedings to the Tribunal or to terminate on-going proceedings in return for the commitments made by the undertakings. The Commission does not have the powers to impose sanctions.

B. THE COMPETITION TRIBUNAL

The Tribunal will be composed of judges from the Court of First Instance. It will hear administrative cases brought by the Commission, appeals against decisions of the Commission and private actions. The Tribunal has extensive powers to impose sanctions.

THREE BROAD PROHIBITIONS

1. FIRST CONDUCT RULE

The First Conduct Rule prohibits agreements, concerted practices or decisions with an object or effect to prevent, restrict, or distort competition in Hong Kong. This

prohibition applies to both verbal and written agreements, and it applies to arrangements made overseas which would impact the Hong Kong market and will have extra territorial effect. Under the CO, the following acts are considered to be serious violations:-

- price fixing
- market sharing
- output restriction
- bid rigging

2. SECOND CONDUCT RULE

Under this rule, undertakings that have a "substantial degree of market power" are prohibited from engaging in conduct that have the effect of preventing, restricting or distorting competitions in Hong Kong. The CO does not provide a clear definition of a "substantial degree of market power", rather, it lists out the factors that would be taken into account in determining whether an undertaking has such power:

- the market share of the undertaking
- the power to make pricing and other decisions of the undertaking
- barriers to entry to competitors

An undertaking with a market share of 25% or below would be considered unlikely to possess a substantial degree of market power. The CO provides two examples which would result in "abuse" of market power; (1) predatory behavior towards competitors or limiting production, markets and (2) technical development to the prejudice of consumers. However, the exact scope is to be delineated by enforcement guidelines.



3. MERGER RULE

The last competition rule is the merger rule. It only concerns transactions that involve telecommunications carrier licensees. The rule provides that these licensees are prohibited from carrying out a merger that has or is likely to have the effect of substantially reducing competition in Hong Kong. The rationale behind the narrow scope of this rule is that Hong Kong is not yet ready for cross-sector merger control. This rule is subject to review in a few years' time.

It is pertinent to note that the HK Government, its instrumentalities and statutory bodies are exempted from the CO. The Chief Executive also has wide powers to exempt specified agreements and specified conduct from the operation of the CO.

EXCLUSIONS AND EXEMPTIONS

There are five categories of exclusions to the First Conduct Rule:

- agreements enhancing overall economic efficiency
- compliance with other legal requirements
- services of general economic interest
- merger agreements
- agreements of lesser significance

Apart from the ground of enhancing overall economic efficiency, the above exceptions are applicable to the Second Conduct Rule.

Two specific exemption grounds, which are exemption on public policy grounds and exemption to avoid conflict with international obligations, are also available in the CO. These exemptions are also applicable to both the First Conduct Rule and the Second Conduct Rule. Importantly, the Chief Executive's order is required.

In addition, the 'de minimis' exemptions apply to Small to Medium Enterprises ('SMEs'), which state that:

- for arrangements which do not amount to a 'serious' anti-competitive behavior, undertakings which annual turnover is below HK\$200 million are exempted from the First Conduct Rule; and
- undertakings with a worldwide annual turnover of below HK\$40 million are exempted from the Second Conduct Rule.

These thresholds can be amended in the future.

SANCTIONS

A broad range of sanctions can be imposed by the Tribunal as follows: pecuniary penalty of up to 10% of local Hong Kong turnover for each year of violation for up to 3 years; director disqualification orders for up to 5 years; interim injunctions; damages; striking down or altering agreements in whole or in part; profits confiscation; divestiture order and order to pay the costs of the Commission's investigation.

TIME FRAME

A transitional period is included in the CO to allow business to adjust their practices to comply with the CO. The substantive provisions are not expected to come into effect before late 2013 or early 2014.

A phased-in approach will be adopted. The institutional provisions will first come into force to allow the two competition authorities to be established. After the preparation of relevant implementing guidelines by the Commission, the substantive rules will become operative.

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