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Hong Kong Competition Ordinance – An Overview

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Hong Kong passed its first comprehensive Competition Bill on June 14, 2012. With its passage, Hong Kong now has in place legislation to deal with price fixing, collusion, abuse of market power (akin to abuse of dominance in the EU and monopolization in the US), and merger review (although the merger rule applies only to the telecommunications sector). The Competition Ordinance separates enforcement and adjudication, relying on the Competition Commission for the former and the Competition Tribunal for the latter.

BACKGROUND

The discussion of a competition law started almost two decades ago when Hong Kong was under British rule. Between 1993 and 1996, the administration commissioned a series of studies on the state of competition in Hong Kong. When Hong Kong reverted to Chinese rule on July 1, 1997 the new government acknowledged the benefits of competition, but it concluded that there was no compelling reason to introduce a general competition law. Instead, the government decided to adopt a sector-by-sector approach with respect to competition-related legislation.² A Competition Policy Advisory Group (COMPAG) was established in December 1997 to review competition-related complaints, and the government's approach was to discourage anti-competitive conduct through voluntary compliance by the business community with administrative guidelines.

This approach has not been effective in addressing continued public concerns over alleged cases of anti-competitive conduct in Hong Kong. COMPAG lacked statutory power to conduct effective investigations into the complaints that it received. Neither did it have the power to impose sanctions for, or deter the recurrence of, any anti-competitive conduct even if a complaint was substantiated. COMPAG began a review of the effectiveness of Hong Kong's competition policy in 2005 and published a report in 2006 recommending the introduction of a cross-sector competition law in Hong Kong. The government conducted two consultation exercises to gauge the public's views on the need for such a law, and the Competition Bill was introduced to the Legislative Council on July 14, 2010. After almost two years of debates, the Bill was finally passed by a bare majority of the lawmakers.

THE COMPETITION ORDINANCE

The purpose of the Competition Ordinance³ is to prohibit and deter "undertakings" (defined as entities engaging in an economic activity) in all sectors from engaging in conduct that has the object or effect of preventing, restricting, or distorting competition in Hong Kong. The Ordinance provides for general prohibitions in three areas of anti-competitive conduct, described as the First Conduct Rule (prohibition of anti-competitive agreements, concerted practices, and decisions), the Second Conduct Rule (abuse of market power), and the Merger Rule (collectively known as the "Competition Rules"). The

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² Legislative proposals prohibiting certain types of anti-competitive conduct in the telecommunications and broadcasting segments were passed in 2000 and 2001, respectively.

³ <http://www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf>

Ordinance provides for a judicial enforcement model through the establishment of the Competition Commission (the Commission) and the Competition Tribunal (the Tribunal).

The Competition Rules

The **First Conduct Rule** prohibits undertakings from entering into an agreement or engaging in a concerted practice if the agreement or concerted practice has the object or effect of preventing, restricting, or distorting competition in Hong Kong. The Ordinance identifies four specific types of conduct that it deems "Serious Anti-Competitive Conduct": (i) price fixing, (ii) territorial or customer allocation, (iii) output control or restriction, and (iv) bid-rigging. A violation of the First Conduct Rule involving "Serious Anti-Competitive Conduct" is subject to the full range of enforcement options provided under the Ordinance; specifically, no warning is required before legal proceedings may be brought against the infringing parties. With respect to other activities covered by the First Conduct Rule that do not involve "Serious Anti-Competitive Conduct", the Commission is required to issue warning notices to the infringing parties before instigating any legal proceedings.

The **Second Conduct Rule** prohibits an undertaking with substantial market power from abusing its power by engaging in conduct that has the object or effect of preventing, restricting, or distorting competition in Hong Kong. Factors to be considered in determining if an undertaking possesses substantial market power include but are not limited to: (i) its market share, (ii) its power to make pricing decisions, and (iii) barrier to entry into the market. The Ordinance identifies two specific types of conduct that may constitute an abuse of market power: (i) "predatory behavior toward competitors" and (ii) "limiting production, markets, or technical development to the prejudice of consumers."

The **Merger Rule** prohibits mergers that are likely to substantially lessen competition in Hong Kong, however, it only applies to the telecommunications sector. Notably, the Ordinance stipulates that any agreement or conduct that results in a merger (other than that involving an undertaking in the telecommunications sector) is exempted from the First or Second Conduct Rule.

Exclusions and Exemptions

The Ordinance provides for a number of exclusions and exemptions from the application of the Conduct Rules. An undertaking may apply to the Commission for a "Decision" as to whether certain agreement or conduct can be exempted from the Conduct Rules.

- The First Conduct Rule does not apply to an agreement that "improves production or distribution" or "promotes technical or economic progress" provided there is no other less restrictive way of achieving the enhanced efficiency, and the agreement does not affect competition in a substantial part of the relevant market. The Commission may issue a "Block Exemption Order" to exclude a particular category of agreement from the First Conduct Rule if the agreement satisfied the conditions described above.
- The First and Second Conduct Rules do not apply (i) to an agreement or a conduct if the purpose of the agreement or conduct is to comply with a legal requirement or (ii) to an undertaking entrusted by the government to provide services of "general economic interest."
- Except when it involves "Serious Anti-Competitive Conduct," the First Conduct Rule does not apply if the combined annual turnover of the undertakings at issue is less than HK\$200 million (US\$25.6 million).
- An undertaking is exempted from the Second Conduct Rule if its annual turnover is less than HK\$40 million (US\$5.1 million).
- The Chief Executive in Council, the head of the Hong Kong government, may exempt an agreement or conduct from the First or Second Conduct Rule (i) on "exceptional

and compelling” public policy grounds or (ii) to avoid a conflict between the Ordinance and an international obligation.

- All but six of the 581 statutory bodies (i.e., organizations established by legislation) are exempted from the application of the Conduct Rules.

The Competition Commission

Any person may file a complaint with the Commission alleging a violation of a Competition Rule. The Commission may conduct an investigation either on its own initiative, on receipt of a complaint, or on referral from the government or a court, and it has full subpoena power in conducting an investigation. The Commission may bring proceedings before the Tribunal against an undertaking violating the Second Conduct Rule or the First Conduct Rule involving “Serious Anti-Competitive Conduct.”⁴ Prior to bringing proceedings before the Tribunal, however, the Commission may issue an infringement notice to the undertaking and offer not to proceed if the undertaking makes a commitment to comply with the requirements of the notice.

The Competition Tribunal

The Tribunal will be set up to hear and adjudicate on proceedings brought by the Commission and applications for the review of the “Decisions” and “Block Exemptions Orders” made by the Commission. The Tribunal may impose pecuniary penalty on any person found to have violated the Competition Rules.⁵ It also has the power to impose a wide range of sanctions, including (but not limited to) orders prohibiting an undertaking from engaging in any conduct that violates the Competition Rules, orders requiring the parties to an agreement to modify or terminate the agreement, and orders requiring an undertaking to pay damages to an injured party.

Private Actions

The Ordinance does not provide for standalone right of private actions. However, any person who has suffered a loss as a result of a Conduct Rule violation has a “follow-on” right of action against the undertaking who has been determined by the Tribunal (or a higher court) to have violated a Conduct Rule.

GUIDELINES ON THE CONDUCT RULES

The Ordinance requires the Commission to issue guidelines on how it plans to interpret and enforce the Conduct Rules. The guidelines will lay out the analytical framework by which the Commission will identify, assess, and determine whether an agreement or a conduct has violated one or more of the Conduct Rules, clarify the key concepts involved, and provide specific examples of agreements and conduct that could potentially infringe the Conduct Rules.

⁴ If an alleged First Conduct Rule violation does not involve “Serious Anti-Competitive Conduct”, the Ordinance requires the Commission to issue a warning notice to the undertaking before bringing proceedings before the Tribunal.

⁵ The amount of penalty is capped at 10% of the undertaking’s total gross revenues obtained in Hong Kong for each year in which the violation took place, up to a maximum of three years.