



Hong Kong's Competition Law – Unveiled!*



LAWYERS

Introduction

Hong Kong's Competition Bill (**the Bill**) was gazetted on 2 July 2010.¹ Formal public consultations on a cross-sector competition law for Hong Kong commenced in 2006. The Bill will be tabled in Hong Kong's Legislative Council (**LegCo**) on 14 July 2010. When the Bill becomes law, it will be known as the Competition Ordinance (**CO**).

The primary objectives of the Bill are two-prong:

- to prohibit conduct which prevents, restricts or distorts competition in Hong Kong; and
- to prohibit mergers that substantially lessen competition in Hong Kong.

Who does what?

The Bill provides for a judicial enforcement model, such as applies in Australia and New Zealand, with a Competition Commission (**the Commission**) and a Competition Tribunal (**the Tribunal**) established to enforce the Bill.

The Commission's primary role is to investigate suspected breaches of the CO. The Commission may commence investigations:

- on its own initiative;
- upon receipt of complaints; or
- on referral from the Hong Kong Government (**the Government**) or a court.

The Commission will be led by a Chairperson and will consist of at least 5 members (including the Chairperson). Commission members are expected to have expertise or experience in industry, commerce, economics, law, small and medium enterprises or public policy.

The Tribunal's primary role is to adjudicate on whether breaches of the CO have occurred. The Tribunal will also hear appeals from the Commission on a limited set of matters where the Commission can make binding determinations such as on exemption or exclusion applications. The Tribunal may hear cases brought to it either by the Commission or by private parties.

All judges of Hong Kong's Court of First Instance are Tribunal members. The Tribunal will formally be a division of the High Court. The Chief Executive in Council (**CE**) will appoint a President to lead the Tribunal. Each case will be led by a presiding Tribunal member who will sit with other judicial members. The Tribunal may also appoint one or more assessors or non-judicial persons to assist in the adjudication of cases.

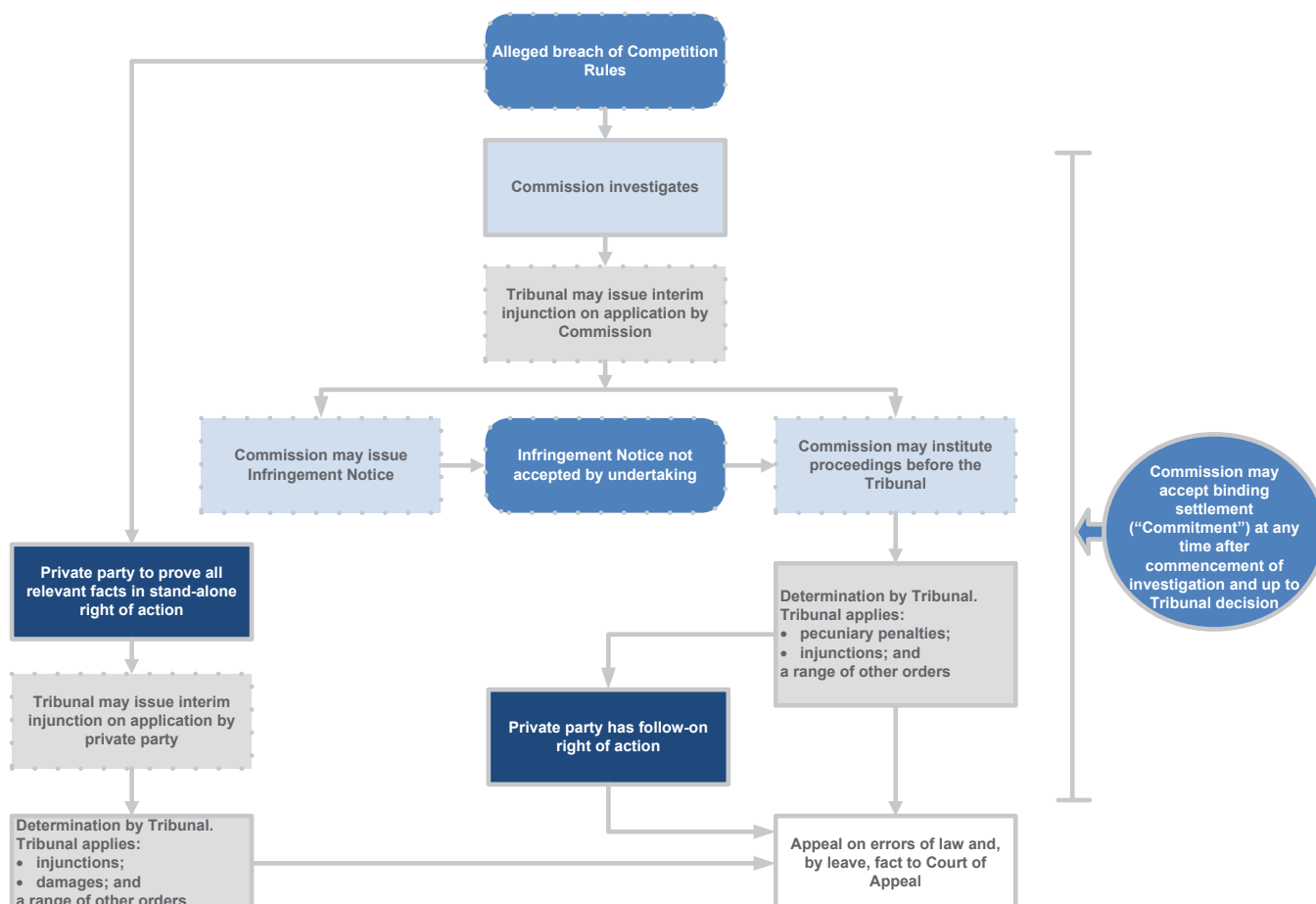
The separation of investigative and adjudicative functions (between the Commission and the Tribunal) provides a good system of checks and balances appropriate in a small jurisdiction.

* King & Wood and Gilbert + Tobin are Consultants to the Hong Kong Government on the cross-sector competition law, however, the views expressed in this article are those of the two firms' alone.

¹ Currently, there are competition law rules and regulations in Hong Kong which apply to licensees in the Telecommunications and Broadcasting industries only. There are transition arrangements in the Bill which provide for the smooth transition of these sector-specific competition laws to the cross-sector competition law. For instance, when the Bill is enacted as law, the Broadcasting Authority and the Telecommunications Authority will possess concurrent jurisdiction with the Competition Commission to enforce the prohibitions in the law.



The following diagram outlines the institutional framework outlined by the Bill.



What does the Bill prohibit?

The Bill prohibits three categories of conduct:

- the **First Conduct Rule** prohibits undertakings (a broad term encapsulating any entity engaging in commercial or economic activities²) from engaging in agreements, concerted practices or decisions with the object or effect of preventing, restricting or distorting competition in Hong Kong;
- 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; and
- the **Merger Rule** prohibits undertakings from directly or indirectly carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong. The Merger Rule will apply only to undertakings who are licensees in respect of the telecommunications industry only. This is a continuation of the current merger regime applicable to telecommunications licensees in Hong Kong, although as the Government has said, the Merger Rule has been “modernised”³

² Similar terminology is used in the United Kingdom and Singapore competition laws.

³ The Government has also announced that there is a possibility that the Merger Rule will apply more broadly in the future.



The First Conduct Rule and the Second Conduct Rule are known collectively as the **Conduct Rules**. The First Conduct Rule, the Second Conduct Rule and the Merger Rule are collectively known as the **Competition Rules**.

Exclusions and exemptions

Certain conduct or agreements may be excluded from the application of the Conduct Rules, provided these fall into the categories of conduct and agreements set forth in the exemption and exclusion framework in the Bill.

The following table indicates the exemption and exclusion grounds under which conduct or agreements may be exempt, and which of the Conduct Rules these would be exempt or excluded from.

No.	Exclusion / Exemption grounds	First Conduct Rule	Second Conduct Rule	Self-assessment?
1	Exclusion in relation to agreements which enhance economic efficiency.	✓	✗	Yes
2	Exclusion in relation to agreements or conduct undertaken in order to comply with legal requirements.	✓	✓	Yes
3	Exclusion in relation to agreements or conduct undertaken by undertakings entrusted by the Government with the operation of services of general economic interest.	✓	✓	Yes
4	Exemption based on exceptional and compelling reasons of public policy.	✓	✓	Not until CE makes order
5	Exemption based on avoidance of conflict with an international obligation.	✓	✓	Not until CE makes order

The exclusion grounds in (1) to (3) (in the table) above apply without the need for a Commission determination applying the exclusion to an undertaking. This allows scope for undertakings to undertake self-assessment to determine if their conduct or agreements fall into the exclusion grounds.

In respect of the exemption grounds listed in (4) and (5) above, undertakings would not be able to undertake self-assessment to determine if their conduct or agreements fall under those grounds, until the CE makes an order indicating the sorts of conduct or agreements which may be exempt based on those grounds.

There is only one exclusion ground in relation to the Merger Rule. The Merger Rule does not apply to a merger if the economic efficiencies that arise or that may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong.



Commission's role in exclusions

There are two avenues by which the Commission can provide for more certainty about the application of exclusions.

First, the Commission has the power to issue Block Exemptions which exclude categories of agreements from the First Conduct Rule, based on the exclusion ground listed in (1) in the previous table.

Second, if undertakings wish for clarification or greater certainty as to whether their agreements or conduct are exempt or excluded, they would be able to seek clarification from the Commission through a decision process. If the Commission makes a decision that conduct or agreements are excluded or exempt from the application of either or each of the Competition Rules, then those conduct or agreements are immune from any action pursuant to the Bill (including both public and private enforcement action). However, the Commission may rescind a favourable decision if there has been a material change of circumstances since the decision was made or if the information in which it has based its decision was incomplete, false or misleading.

Government and statutory bodies

The Competition Rules will not apply to the Government and to statutory bodies in Hong Kong. However statutory bodies may be brought within the scope of the Competition Rules through regulations. There are some 500 statutory bodies in Hong Kong with very diverse functions. The Government has yet to reveal which statutory bodies could be subject to the Competition Rules.

Enforcement by the Commission

The Commission will be vested with a full range of investigative powers, including the power to require production of documents and information, the power to require persons to attend an interview before the Commission and the power to enter and search premises under a court warrant. The Commission may only conduct an investigation if it has reasonable cause to suspect that a contravention of a Competition Rule has taken place, is taking place or is about to take place. There are criminal penalties for non-compliance with the Commission's investigative powers.

An innovation in the Bill is the power to issue infringement notices to undertakings alleged to have breached Conduct Rules. The Commission may only issue an infringement notice if it has reasonable cause to believe that a contravention of a Conduct Rule has taken place; and only if it has not yet brought proceedings in the Tribunal in respect of the alleged contravention. The infringement notice would describe the alleged infringing conduct, the evidence on which the Commission has formed its view and the terms in which the Commission would be prepared to settle the matter, including the payment of a specified amount not exceeding HK\$10 million (approximately US\$1.3 million). Undertakings who receive the infringement notice could choose not to accept the notice without any adverse inferences being drawn, in which case the Commission could proceed to institute proceedings before the Tribunal. It is likely that the Commission would issue infringement notices in respect of "smaller" or "minor" infringements of the Conduct Rules.



In addition:

- the Commission may accept commitments from a person to take any action or refrain from taking any action that the Commission considers appropriate to address its concerns about a possible contravention of a Competition Rule. If the Commission accepts a commitment, it may agree:
 - not to commence an investigation or if it has commenced an investigation, to terminate it; or
 - not to bring proceedings in the Tribunal or if it has brought proceedings, to terminate them;⁴ and
- the Commission may also enter into leniency agreements with individuals and corporations who have breached the Bill, but wish to mitigate their penalties by cooperating with the Commission. The Commission cannot bring proceedings against a party which is the beneficiary of a leniency agreement (which could include employees of a company which has made disclosure to the Commission).

Penalties

The Tribunal is vested with the power to apply a full range of remedies for contraventions of the Competition Rules. These include pecuniary penalties not exceeding 10% of the turnover of the offending undertaking; disgorgement orders; awards of damages to aggrieved parties; interim injunctions during investigations or proceedings; injunctions and disqualification orders against directors. The Tribunal may only impose pecuniary penalties on application by the Commission.

Private rights of action

The Bill provides for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a Conduct Rule. Such private actions:

- could be brought by a private party, following on from a Tribunal determination (i.e. a “follow-on action”); or
- could be brought independently of a Tribunal determination by a private party (i.e. a “stand-alone action”).

In relation to follow-on actions, private parties do not need to prove that the breach of the Conduct Rule occurred (but merely that they have suffered loss or damage as a result of the contravention of the Conduct Rule). In relation to stand-alone actions, private parties would need to prove that the contravention of the Conduct Rule occurred, before any loss or damage assessment can be undertaken.

⁴ If a person accepts an infringement notice, this could be done using the commitment framework.



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