



Merger Control Survey **2015**

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 **NORTON ROSE FULBRIGHT**

IFLR
INTERNATIONAL FINANCIAL LAW REVIEW

Hong Kong

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1. REGULATORY FRAMEWORK

1.1 What is the applicable legislation and who enforces it?

The Competition Ordinance (CO), a cross-sector competition law, was gazetted on July 2 2012 and is expected to take full effect before the end of 2015. The CO contains a merger control regime which, at this stage, only applies to telecommunications licensees. Upon commencement of the merger rule in the CO, the existing merger control rules in the Telecommunications Ordinance (TO) will be repealed. The Communications Authority (CA) will, however, have concurrent jurisdiction with the Hong Kong Competition Commission (HKCC) over the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors.

Until the CO comes into effect, the only merger control regime is the sector-specific regime which applies to telecommunications licensees, as contained in the TO and enforced by the CA. This sector-specific regime is considered below.

1.2 What type of transactions are caught?



Where there is a change in relation to a carrier licensee, which occurs if:

- A person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 15% of the voting shares in the licensee;
- A person, either alone or with any specified person, becomes the beneficial owner or voting controller of more than 30% of the voting shares in the licensee; or
- A person, either alone or with any associated person, becomes the beneficial owner or voting controller of more than 50% of the voting shares in the licensee or acquires the power by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation or otherwise, to ensure that the affairs of the licensee are conducted in accordance with the wishes of that person.

2. FILING

2.1 What are the thresholds for notification, how clear are they, and are there circumstances in which the authorities may investigate a merger falling outside such threshold?



The thresholds for notification are relatively clear and set out in section 1.2. We understand the CA has not departed from such thresholds, but if it does, it would be required to provide written reasons for doing so.

2.2 Are there circumstances in which a foreign-to-foreign merger may require notification, and is a local effect required to give the authority jurisdiction?



Foreign-to-foreign mergers may require notification if there has been a change in relation to a carrier licence as set out in section 1.2.

2.3 Is filing mandatory or voluntary and must closing be suspended pending clearance? Are there any sanctions for non-compliance, and are these applied in practice?



Filings are voluntary. There are no specific sanctions for non-compliance.

There are a number of ways in which a merger can be considered by the CA: informal advice; applications for prior consent; and ex post investigation.

2.4 Who is responsible for filing and what, if any filing fee applies? What are the filing requirements and how onerous are these?



The carrier licensee or any interested persons may apply to the CA for an informal advice or prior consent of the merger. The CA will contact the carrier licensee direct if it initiates an ex post investigation.

The costs or expenses incurred by the CA in processing an application for prior consent and making a decision on the application, are recoverable from the applicant. The amount recoverable by the CA is subject to a cap set at HK\$200,000 (\$25,800).

A checklist of information to be submitted is set out in an annex to the Guidelines on Mergers and Acquisitions in Hong Kong Telecommunications Markets.

3. CLEARANCE

3.1 What is the standard timetable for clearance and is there a fast-track process? Can the authority extend or delay this process?



The timeline for clearance will depend on the way in which a merger is considered by the CA.

Informal advice takes place within the parties' requested time frame.

For applications for prior consent, a final decision is given within one month in cases which do not raise serious competition concerns or within three months where a detailed investigation is necessary.

For ex post investigations, the CA will notify the parties within two weeks of the completion of the transaction if it wishes to carry out a detailed investigation, which will be completed within three months unless parties fail to meet information request deadlines.

3.2 What is the substantive test for clearance and to what extent does the authority consider efficiencies arguments or non-competition facts such as industrial policy or the public interest in reaching such decisions?



The CA will provide clearance where it forms an opinion that the proposed change would not have, or not be likely to have, the effect of substantially lessening competition in a telecommunication market.

If the CA forms an opinion that the merger has, or is likely to have the effect of substantially lessening competition, it will consider whether the merger has, or is likely to have, a benefit to the public that outweighs any detriment to the public that is, or is likely to be, constituted by the anti-competitive effect. Since the term benefit to the public is not defined in the TO, the CA is able, in principle, to consider any benefit it believes may be relevant.



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3.3 Are remedies available to alleviate competition concerns? Please comment on the authority's approach to acceptance and implementation of remedies.



Where the CA takes the view that it would be appropriate to require the parties to modify a merger, it will consider both structural and behavioural remedies. In general, structural remedies are preferred.

4. RIGHTS OF APPEAL

4.1 Please describe the parties' ability to appeal merger control decisions – how successful have such challenges been?



Any person aggrieved by an opinion, direction or decision made by the CA may appeal to the Telecommunications (Competition Provisions) Appeal Board. To date there have been no challenges in respect of merger control decisions. An opinion, direction or decision may also be judicially reviewed.

About the author

Hannah Ha is a partner of Mayer Brown JSM and co-heads the firm's award winning antitrust and competition team in Asia. She has more than a decade's experience in advising clients on merger control and other antitrust issues in China, covering various industries. She has assisted clients to roll out antitrust compliance programmes and has extensive experience in foreign direct investment in China, cross-border mergers and acquisitions, private equity transactions and general corporate and commercial matters.

Ha is widely recognised throughout the industry, ranked as a leading lawyer for antitrust and competition work in China by *IFLR1000* 2011 to 2015, and *Chambers Asia Pacific* 2009 to 2015. She won the Best in Competition and Antitrust award at Euromoney LMG's Asia Women in Business Law Awards 2013 and is listed in *Euromoney's Expert Guides – Competition and Antitrust 2014*. She is also recognised by independent publications for her corporate, mergers and acquisitions work.



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About the author

John Hickin has been a partner at Mayer Brown JSM since 2005 and co-heads the firm's award winning antitrust and competition team in Asia. He has also been involved in the consultation with the HKSAR Government regarding the region's cross-sector Competition Bill, and he advises a number of clients regarding compliance and other preparation activities following the introduction of the new law.

Hickin has advised clients from a range of sectors on Hong Kong competition-related issues, including conducting full business reviews. He also advised a statutory authority in Hong Kong in relation to its position regarding the Hong Kong competition regime and assisted with preparing a compliance programme, as well as accompanying training and its submission to government. Hickin also assists clients in coordinating antitrust advice in various other Asian jurisdictions.

IFLR1000 and *Chambers Asia Pacific* have recognised Hickin's work in this practice area in their rankings of China and Hong Kong antitrust lawyers from 2013 to 2015.