

Statutory bodies and Hong Kong's proposed competition law - Exempt or Exposed?

The Hong Kong government is proposing to introduce a cross-sector competition law. After three rounds of public consultation and debate, and several 'false starts'¹, the government appears committed to moving forward with proposals it published in a detailed consultation document in May 2008 - albeit with some significant adjustments².

One of those adjustments concerns whether statutory bodies should enjoy a wholesale exemption from the proposed law.

The May 2008 consultation paper suggested that such an exemption should be implemented. However that proposal has been the subject of widespread criticism from business groups and media commentators. Accordingly, the government has stated that it is now reconsidering this issue, and may look to exempt only select statutory bodies, with the remainder subject to the proposed law insofar as they engage in commercial economic activities.

In this article, we look at the ongoing debate regarding the application of competition law to

statutory bodies in Hong Kong, and consider how the issue has been dealt with in other jurisdictions.

The May 2008 consultation paper, and the government's backflip in relation to statutory bodies

According to the May 2008 consultation paper, exempting statutory bodies from the proposed competition law would have the benefit of ensuring their operations are not adversely affected by unfounded and misconceived complaints. The consultation paper also suggested that the activities of such bodies would, in any case, almost invariably fall under a more general proposed exemption for activities that "would enhance economic efficiency or achieve other important social or public policy objectives".

These justifications for the proposed exemption have attracted considerable criticism. Twenty-six of the formal submissions the government received in response to the consultation document expressed concern about the proposed exemption, and a number of media commentators have echoed these comments.

In particular, critics have questioned why statutory bodies should be afforded a unique protection from hindrances such as unfounded complaints, which may just as readily be a concern for private businesses. The government has also been challenged to provide evidence for the claim that relevant activities of statutory bodies would always qualify for the exemption in relation to activities of 'general economic interest', and there have been

¹ On several occasions during 2008, Chief Executive Donald Tsang and other government representatives publicly stated that the government intended to introduce the Proposed Law during the 2008/2009 Legislative Council session. However, on 27 February 2009, the government announced that the Proposed Law's introduction would be postponed until the 2009/2010 session, due to a need to address some 'technical issues' in relation to it.

² As recently as 1 June 2009, a representative of the government bureau responsible for developing the law confirmed that the government intended to introduce the law within the next 12 months.

calls for the government to focus on applying this exemption where it is appropriate rather than carving out statutory bodies from the law altogether.

Consequently, the government has agreed to reconsider the issue. According to Hong Kong's Commerce & Economic Development Bureau ("CEDB"), which has been charged with developing the law, the exemption may now be limited to a designated subset of statutory bodies - with the remainder subject to the law insofar as they engage in commercial economic activities.

Rita Lau, Secretary of the CEDB, has stated that the government will consider a range of factors when determining whether and to what extent to exempt a particular statutory body. These factors include:

- whether it is engaged in economic activities, and if so whether for the purpose of regulation these activities are inseparable from and incidental to the provision of essential services;
- whether it operates in direct competition with private sector entities;
- whether it is engaged in conduct that could affect the economic efficiency of a specific market; and
- whether it enjoys autonomy in decision-making and day-to-day operation.

International precedent, and the special role of statutory authorities in Hong Kong

Several jurisdictions in Asia have seen fit to introduce broad exemptions from competition laws for statutory bodies. For example, section 33(4) of Singapore's Competition Act exempts all statutory bodies from the Act, and a broadly worded exemption applicable to statutory bodies applies in respect of Indonesia's Law on the Prohibition of Monopolistic Practices and Unfair Business Competition.

Outside of Asia, however, such exemptions are relatively rare. While it is not unusual for many statutory bodies to fall outside of the ambit of the

cross-sector competition laws applicable in mature jurisdictions such as Europe and the United States, this is usually because such laws are framed so as to apply only to undertakings that engage in economic or commercial activities.

In this context, it is appropriate to note that Hong Kong is relatively unique in having a very large number of statutory bodies operating in sectors which are more commonly the preserve of private industry. For example, statutory bodies in Hong Kong are engaged in activities as diverse as operating theme parks, managing commercial shopping centres, providing parking facilities, and operating fixed telecommunications tunnel networks.

Accordingly, even if Hong Kong's competition law is framed so as to only apply to entities engaging in economic activities (as is currently proposed to be the case), many statutory bodies would still be subject to the law unless they receive the benefit of a relevant exemption.

How will statutory bodies be impacted if they are subject to competition laws?

The Hong Kong government has indicated that the proposed cross-sector competition law will include two key prohibitions.

Firstly, there will be a general prohibition on undertakings participating in agreements or concerted practices that have the purpose or effect of substantially lessening competition. According to the May 2008 consultation paper, enforcement of this prohibition will focus on 'cartels' (e.g. agreements between competitors to fix prices, share markets or boycott particular trading partners).

Statutory bodies who are subject to the law will need to consider the impact of this prohibition whenever they communicate with other businesses who compete in their sector. Indeed, the prohibition may have a particular significance for statutory bodies, as

it is possible they will face pressure from competing private bodies to confine the scope of their dealings to certain types of customer or activity - as a way of avoiding complaints about their scope of influence or dominance of the market. Discussions or agreement regarding such arrangements could very easily give rise to an unlawful cartel.

Secondly, the law will include a prohibition applicable only to undertakings that have a substantial degree of market power. The government has indicated this may be assumed to exist wherever an undertaking's market share is 40% or more.

Undertakings who enjoy the relevant degree of market power will be prohibited from engaging in certain types of conduct where that conduct is deemed to have the purpose or effect of substantially lessening competition.

This prohibition is likely to raise the most significant concerns for statutory bodies forced to comply with the law, as many such bodies operating in commercial markets in Hong Kong will easily achieve the 40% market share threshold. Additionally, statutory bodies with smaller market shares may still face allegations that they enjoy market power by virtue of the financial, reputation or relationship strength they maintain by virtue of their statutory underpinnings.

Where statutory bodies are deemed to have substantial market power, they will be subject to a set of legal restrictions that their competitors and trading partners are not subject to. For example, based on previous statements by CEDB representatives and the application of analogous prohibitions in other jurisdictions, such bodies may be restricted from engaging in the following acts if they are deemed to relevantly lessen competition and lack objective justification:

- charging 'unfair' prices (too high, or too low);
- making the supply of goods or services conditional on the acquirer also purchasing other unrelated goods or services;
- refusing to trade with willing trading partners;
- discriminating against certain trading partners when offering supply terms or pricing; or
- imposing exclusivity terms on trading partners.

Accordingly, it is possible that many of the existing trading arrangements of such statutory bodies will need to be reviewed and overhauled if the prohibition is capable of applying to them.

The road ahead for statutory bodies

It is understood that several statutory bodies in Hong Kong are lobbying the government to try and convince it to return to its original proposal to include a broad exemption for statutory bodies from the Hong Kong competition law, or alternatively to ensure they are amongst any subset of statutory bodies who do benefit from any more limited exemption.

It seems likely that the statutory bodies who will enjoy the greatest prospect of achieving an exemption from the law are those that can demonstrate that:

- to the extent they engage in commercial activities in competition with the private sector, those activities are central to the special role they are required to play in the Hong Kong economy in accordance with their statutory mandate;
- any restriction of their activities through the application of a Hong Kong competition law may also harm the interests of their Hong Kong trading partners (such as by limiting their ability to offer discounts and rebates, or to enter into long term agreements or product and service 'bundling' arrangements);

- appropriate restrictions on the scope and nature of their activities already exist under the Ordinance that provided for their establishment, and this Ordinance already constitutes a mechanism via which the government can curb any activities that may be deemed problematic; and
- they have the support of other industry participants and customers (particularly any small to medium sized enterprises who are competitors or customers, given that the government has made it clear it wishes to especially protect the interests of SMEs when developing the competition law regime).

For more information on the proposed Hong Kong competition law, and how the law may impact on statutory bodies, please contact a member of JSM's Antitrust & Competition Team.

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