MAYER·BROWN JSM

Legal Update
Antitrust & Competition
Hong Kong

2 September 2011

Hong Kong's Competition Law - Where Are We At?

On 26 July 2011, the Bills Committee appointed to review Hong Kong's Competition Bill held its final meeting of the 2010/2011 Legislative Council session. The Legislative Council is now in its summer recess period, and the Bills Committee is not scheduled to meet again until mid-October. With just five more Bills Committee meetings scheduled for the current calendar year, and an expectation that the committee will complete its review early in the new year in order to facilitate a Council vote on the Bill in the second calendar quarter of 2012, it seems the fate of the Bill is likely to become clearer very soon. Indeed, many observers believe a signal on the Bill's prospects is likely to be given by the Chief Executive in his annual policy address scheduled for October.

The Bills Committee has so far met a total of 20 times. In addition to formally inviting submissions on the Bill from the public, Bills Committee representatives have met with a large number of business sector representatives to receive views on the Bill, and have referred a number of issues back to the Administration for comment.

At this stage, the Bill's prospects remain unclear. Certainly there has been broad business sector opposition to the Bill, not just from 'big business' but also from many small to medium sized enterprises (SMEs). An example of this was the full page advertisement taken out in the Sing Dao Daily on 20 July 2011 by (or at least with the express support of) a large number of SME trade associations such as associations representing the electronics, mechanics, Chinese medicine, food and beverage, flowers, plastics, watches, jewellery, printing and garments sectors.

However, there is also strong support for the Bill, perhaps most publicly from academic circles. A large number of academics, including six from Hong Kong and numerous others from overseas, have published articles and written to the Bills Committee to express support for the Bill, as well as to respond to some of the more common objections raised in relation to it.

At this stage, there are different views regarding who has the 'upper hand' in terms of convincing the Bills Committee members.

The push for adoption of the so-called 'Canadian model'

One of the most notable aspects of the process so far has been the concerted push by a number of business sector representatives, mainly led by the Hong Kong General Chamber of Commerce ("HKGCC"), for the Bill to be amended to more closely align with an enforcement model recently adopted in Canada.

Under this alternative model, the only conduct that would be automatically unlawful under the competition law would be so-called 'hardcore' cartel conduct (such as agreements between competitors to fix prices or share markets) that has a relevant level of adverse effect on competition. In respect of other conduct, illegality and exposure to sanctions would only arise if the proposed new Competition Tribunal first ruled against the conduct and the relevant business operator(s) thereafter failed to comply with the ruling.

A useful example cited by the HKGCC in its submissions to the Bills Committee is where after commencement of the proposed law a joint buying agreement was implemented between a number of SMEs who had a combined market share of 30%. According to the enforcement model set out in the Bill, it is conceivable that this agreement could be challenged some years after implementation as being in violation of the Bill's so-called 'First Conduct Rule' (a general prohibition of agreements that restrict competition), and if the Competition Tribunal upheld this challenge the participating SMEs would be exposed to penalties calculated by reference to the entire period during which the arrangement has been in effect. Conversely, if the alternative enforcement model HKGCC is advocating was adopted, any decision by the Tribunal that deemed the agreement to be contrary to the First Conduct Rule would not in itself lead to penalties on the participating SMEs. Instead, the Tribunal would at that time of that decision order that the relevant conduct should cease, and it is only if that order was subsequently breached that exposure to penalties would arise.

The benefit of this alternative model is obvious. It allows business operators to proceed with a degree of certainty at all times, and they are relieved of the burden of having to engage in a 'self-assessment' process (of whether the relevant conduct adversely affects competition to the relevant extent and/or whether relevant defences apply) that can sometimes be a complex and inexact science in respect of fact scenarios like the one in the example. Of course, an opposing view is that the so-called 'Canadian model' will make the process of eradicating certain anti-competitive behaviour such as abuse of market power too cumbersome and ineffective.

In any case, the Administration has so far appeared reluctant to contemplate any significant changes to the Bill. Administration representatives have reportedly deemed the 'Canadian model' explained above "unsuitable" for adoption in Hong Kong, although without a great deal of explanation of their basis for this view.

The Administration's approach to other concerns expressed about the Bill

Calls for other changes to key aspects of the Bill, such as a narrowing of the scope of the broad penalty provisions and inclusion of wording to confirm that vertical agreements (that is, agreements between business operators at different levels of the supply chain) will be excluded from the scope of permitted challenges under the First Conduct Rule, have also received little support from the Administration.

One of the few areas in relation to which the Administration has signalled that it is contemplating amendments concerns the potential use of the First Conduct Rule to challenge M&A deals. Representatives of the Administration have conceded that amendments to the Bill may be necessary to 'carve out' M&A deals from potential challenge under this rule, which would limit the scope of 'merger review' under the Bill to certain deals impacting control of telecommunications licensees in Hong Kong (under the separate 'Merger Rule' in Schedule 7 of the Bill).

The Administration has also confirmed that they believe minor restrictions on competition should not be actionable under the proposed law, and that they support setting the enforcement threshold at a level that will focus on 'appreciable' restrictions of competition. However, on this and many other issues the Administration has signalled that it will leave it to the proposed new Competition Commission to make the final decision.

It has also been confirmed that the Administration intends for there to be a transitional period of at least 12 months between enactment of the proposed law and commencement of the key prohibitions, to allow business operators to prepare for compliance. During this period, the Commission would also be established, and would draft guidelines to reflect its interpretation of the scope of the key prohibitions in the Bill and its enforcement approach and priorities. It should be noted that several 'example' guidelines have already been published by the Administration

for illustration purposes, at the request of the Bills Committee, however these will not be in any way binding on the Commission (and it is hoped that Commission's version will be more comprehensive and instructive than the Administration's published examples).

In relation to the scope of exemptions and exclusions from the proposed law, it is noted that the Administration has still not released a list of the statutory bodies it proposes to make subject to the law. As those who have closely followed this issue will be aware, the Bill provides that a statutory body will be exempt from the law unless a regulation made by the Chief Executive in Council specifies otherwise. Administration representatives have on several occasions committed to publishing the relevant list of bodies, however that list has still not surfaced. When questioned on this topic more recently, Administration representatives have stated that they are continuing to engage in a 'review' of all of Hong Kong's statutory bodies so as to finalise the list, however if that is the case then the review will have been running for over two years. The Administration's apparent reluctance to make known its position is not surprising, as objections are bound to be made whichever bodies are or are not included.

Where does this all leave us?

It is now over five years since the Government's Competition Policy Review Committee formally recommended that a cross-sector competition law be introduced in Hong Kong. During that time there have been two comprehensive public consultation processes relating to the proposed law (2006 and 2008), followed by introduction of the Competition Bill into the Legislative Council and a call by the relevant Bills Committee for submissions on it (2010), and more recently extensive liaison between the committee and the Administration to discuss business sector concerns and other views on the Bill (2011). The protracted process now appears to be drawing to a conclusion, although the fate of the Bill remains uncertain.

What is clear is that if the Bill is not passed by the Legislative Council within the current legislative session it will lapse, and with it will disappear any realistic prospect of the introduction of a comprehensive competition law in Hong Kong in the short to medium term.

For that reason, it is expected that the Government (and in particular new Secretary for Commerce and Economic Development Greg So, who has championed the Bill since his time as Undersecretary) will push hard for passage of the Bill in the coming months. Notwithstanding the growing support for movement to the so-called 'Canadian-model' discussed further above, the prospect of major changes to the structure and scope of the Bill appear unlikely at this stage. In this respect, the Government's position appears to be largely one of "take it or leave it" in relation to the present model and Bill.

However, with even traditionally pro-government political parties (such as the Democratic Alliance for the Betterment and Progress of Hong Kong) expressing opposition to the Bill in its present form, concessions may need to be made on some of the issues in respect of which key business sector representatives have expressed concern, such as the broad scope of the current penalty provisions.

In the meantime, those businesses in Hong Kong who have not begun to think about the potential impact of the law on their operations are advised to consider this issue as a priority. Although the fate of the Bill remains uncertain, many observers believe that its prospects of passage remain more favourable than not, and if they are proved right then Hong Kong will have a comprehensive competition law in place within the next 9 to 12 monthsNotwithstanding the likelihood of a transitional period before commencement of the key prohibitions, delay in considering appropriate compliance management steps may mean too much is left to do in too little

time in terms of identifying and addressing risk. Additionally, businesses will benefit from a full understanding of the issues the law will raise for their operations in time to apply for relevant exemptions where appropriate or effectively participate in the consultation process that the Commission will be required to hold as it prepares guidelines setting out its approach to interpretation and enforcement of the law.

For more information, see our previous updates on the Bill:

Hong Kong's Competition Bill - More Questions Than Answers?

Hong Kong's Competition Bill - An Update

Hong Kong's Competition Bill - Implications for Directors & Senior Executives

Hong Kong Government attempts to shed light on Competition Bill... but business sector remains in the dark

Contact Us

For inquiries related to this Legal Update, please contact the following person or your usual contacts with our firm.

John Hickin
Partner
T: +852 2843 2576
E: john.hickin@mayerbrownjsm.com

Gerry O'Brien
Consultant
T: +852 2843 4355
E: gerry.obrien@mayerbrownjsm.com