

Competition Law Approaches the Finishing Line

The fate of Hong Kong's proposed competition law is expected to be decided within the next three months. In this legal update, we provide an update on the status of the bill and recap on key amendments the Administration has agreed to make to the bill as it steps up efforts to secure support for its passage.

What stage are we at?

The Bill was introduced into the Legislative Council on 2 July 2010, and received its First Reading on 14 July 2010. A Second Reading debate on the bill was then adjourned while the bill was referred to a Bills Committee for review. Between 25 October 2010 and 10 April 2012, the Bills Committee has met a total of 40 times to review and receive submissions on the bill, and to liaise with representatives of the Administration to obtain explanations, clarifications, and views on proposed amendments.

Just 10 further meetings of the Bills Committee are scheduled, with the last such meeting scheduled for 19 June 2012. It is then likely the Bill will be referred back to the Legislative Council for resumption of the Second Reading. At this stage, members will present their views on the general merits and principles of the bill and may indicate their support or otherwise. A vote will then be taken by the Council on whether to proceed with the bill, and if passed it shall stand committed to a Committee of the whole Council. The Committee shall then go through and vote on each and every clause of, as well as amendments to, the bill.

After the bill has passed through the Committee of the whole Council with or without amendments, it will be reported back to the Council. The Third Reading of the bill will then proceed, before the bill is submitted to the Chief Executive for signature and promulgation.

How long before the fate of the Bill will be determined?

As mentioned above, the final scheduled meeting of the Bills Committee is on 19 June 2012. Accordingly, the decisive Legislative Council vote on passage of the bill should be between this date and 11 July 2012 (the last day of the current Legislative Council session). In other words, the fate of the Bill should be known in the next 2 to 3 months.

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. Of course, the Bill may be reintroduced under the new Chief Executive, but the entire legislative process (which has already taken close to two years) will need to be repeated. However, as mentioned below, there is some expectation that Donald Tsang's Administration will secure the support it needs to pass the bill during the current legislative session.

What are the Bill's prospects?

It is generally considered that the bill now has good prospects of passage. A primary reason is that the Administration has shown that it is willing to make just enough amendments to the bill to secure the support needed for passage, examples of which are provided below. Some legislators who had previously expressed concerns about the bill being 'watered down' through this process appear to now be reconciled to the fact that introduction of an imperfect cross-sector competition law is preferable to not implementing such a law at all.

LATEST AMENDMENTS

In its original form, the key cross-sector prohibitions in the Bill (the First Conduct Rule and Second

Conduct Rule) applied to all business operators excluding those afforded specific exemptions such as relevant statutory bodies or businesses designated by the Chief Executive in Council as appropriate to be excluded for public policy reasons. However, in response to concerns about the impact of the proposed law on small to medium sized enterprises (SMEs), the Administration agreed towards the end of 2011 to also include ‘de minimis’ exemptions:

- a. in respect of non-hardcore infringements of the First Conduct Rule for agreements between business operators with a combined turnover not exceeding HKD 100 million in the preceding financial year; and
- b. in respect of the Second Conduct Rule, if the relevant business operator’s turnover

was below HKD 11 million in the preceding financial year.

After further lobbying from the business sector, it is reported the Administration has now agreed to increase the turnover threshold in (a) to HKD 200 million and in (b) to HKD 40 million. These changes were only announced in recent days.

Previous amendments

The latest concessions follow five further significant amendments the Administration agreed to make to the bill in the final calendar quarter of 2011. Those amendments were explained in detail in our legal update of 19 October 2011 and are briefly recapped below:

Issue	Administration concession
Scope of the First Conduct Rule	The Administration has agreed to amend the bill to introduce a distinction between ‘hardcore’ and ‘non-hardcore’ infringements of the First Conduct Rule. The former category (which will cover price-fixing, bid-rigging, market allocation, and output control) will be considered to always adversely impact on competition and therefore to be subject to the full range of enforcement options in the bill, while in relation to the latter category the Competition Commission may only issue a “warning notice” requesting the relevant business operator(s) to cease the infringement conduct within a specified period (unless the conduct is not ceased or is repeated later, in which case prosecution before the Competition Tribunal can occur).
Monetary payment aspect of Infringement Notices	Under the Bill, the Commission has the option of issuing an ‘infringement notice’ instead of bringing proceedings before the Tribunal in respect of an infringement of the key cross-sector prohibitions. The infringement notice will identify the suspected infringement conduct and communicate the Commission’s offer not to bring proceedings in respect of that infringement on condition that the relevant business operator concerned makes a commitment to comply with the requirements of the infringement notice (which will usually involve ceasing or modifying the infringement conduct). The bill originally contemplated that the notice could also include an obligation for the business operator suspected of infringing the law to pay a sum not exceeding HKD 10 million penalty to the Government as a form of ‘settlement’ in exchange for the Commission’s offer not to prosecute. However, the Administration then agreed to remove this aspect of the bill, so infringement notices can no longer include a requirement for a monetary payment.

Issue	Administration concession
Pecuniary penalty	The bill originally provided that the Tribunal may impose a pecuniary penalty in respect of a single contravention of the key prohibitions in the bill up to 10% of the global turnover of the relevant business operator concerned for the year in which the infringement occurred (or if the infringement continued for more than one year, 10% of the global turnover of the business operator for each year in which the infringement continued). The Administration then agreed to adjust this so that the limit of the pecuniary penalty will be calculated by reference to 10% of local (Hong Kong) turnover for each year of infringement up to a maximum of three years. If the infringement lasts for more than three years, the three years with the highest local turnover will be chosen.
Stand-alone right of private action	The bill originally provided that any person who suffered loss or damage as a result of any infringement of the key prohibitions in the proposed law could bring a private action before the Competition Tribunal - either on a 'stand alone' basis (i.e. without a prior finding of infringement based on prosecution by the Commission) or on a 'follow-on' basis (i.e. with a prior finding of infringement). The Administration has agreed to remove the right of stand-alone private actions. Instead, all initial enforcement will be carried out by the Commission, supplemented by the follow-on right of action for determined contraventions.
Potential for challenges to M&A	Although the specific Merger Rule in the Bill is confined in application to certain M&A transactions relating to telecommunications licensees, the broad wording of the Conduct Rules meant it was conceivable that those rules could be used to challenge M&A activity in other sectors. The government has agreed to amend the bill to confirm that the First Conduct Rule cannot be used to challenge M&A activities.

If it is passed, when will the law commence?

The Administration has indicated that it 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.

coming into effect within the next twelve to eighteen months, all businesses should ensure they familiarise themselves with the key prohibitions in the law and identify any potential areas of risk in respect of their current activities. It will be prudent for business operators to adopt comprehensive compliance policies, train staff in this area, and consider involvement in the consultation processes the Commission will instigate in the months after the bill's passage - as it drafts enforcement guidelines and considers implementation of further exemptions.

What steps should business operators be taking to prepare for the new law?

The countdown to passage of Hong Kong's first cross-sector competition law is now on. For any businesses that have not commenced their preparations for the law, now is the time to do so. With the prospect of the new Competition law

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