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Hong Kong Competition Law Series

2015 - THE YEAR OF COMPETITION IN HONG KONG

As we step into the Year of the Goat, businesses in Hong Kong are gearing up for the impending enforcement of the Competition Ordinance (Cap.619) (Ordinance), with the Competition Commission (Commission) having indicated the Ordinance is likely to come into operation by the end of 2015.

While the Commission is currently revising the draft enforcement guidelines and preparing other guidance documents, the Government has also been busy preparing subsidiary legislation to the Ordinance.

In mid-February, the Commerce and Economic Development Bureau (CEDB) and the Chief Executive in Council published a number of regulations relating to statutory bodies, exempted persons and turnover, which marks another step closer to full enforcement of the Ordinance.

Provisions relating to statutory bodies and exempted persons to commence on 17 April 2015

By regulations published on 10 February 2015, the Chief Executive in Council specified the statutory bodies to which the Ordinance will apply, and persons to which the Ordinance will be disapplied:

STATUTORY BODIES TO WHICH ORDINANCE WILL APPLY:

1. Ocean Park Corporation
2. Matilda and War Memorial Hospital
3. Kadoorie Farm and Botanic Garden Corporation
4. The Helena May
5. Federation of Hong Kong Industries
6. The general committee of the Federation of Hong Kong Industries

SPECIFIED PERSONS TO WHICH ORDINANCE WILL BE DISAPPLIED:

1. The Stock Exchange of Hong Kong Limited
2. Hong Kong Futures Exchange Limited
3. Hong Kong Securities Clearing Company Limited
4. HKFE Clearing Corporation Limited
5. The SEHK Options Clearing House Limited
6. OTC Clearing Hong Kong Limited
7. Hong Kong Exchanges and Clearing Limited

The other 575 statutory bodies in Hong Kong will be exempt from the First Conduct Rule, the Second Conduct Rule and the Merger Rule (collectively, the Competition Rules) and the enforcement powers of the Commission and Competition Tribunal (Tribunal). Although exempt, these statutory bodies will still be required to adhere to the principles underlying the Competition Rules[1] and to offer assistance in investigations by the Commission (Part 3) as well as proceedings or appeals before the Tribunal (Parts 5, 7 and 10).

Pursuant to a commencement notice issued by the CEDB on 12 February 2015, provisions of the Ordinance relating to statutory bodies (sections 3-5) will come into operation on 17 April 2015.

Calculation of Turnover

On 12 February 2015 the CEDB also issued the Competition (Turnover) Regulation (Turnover Regulation).

1 http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc120214cb1-1031-2-e.pdf

Calculation of turnover is relevant to the following determinations:

1. Whether an undertaking can avail itself of the exclusion for agreements or conduct of lesser significance (SME Exclusion); and
2. The amount of fines payable by an undertaking upon having contravened a Competition Rule[2].

We summarise below the rules relating to turnover as they apply to the SME Exclusion and calculation of fines respectively:

	SME Exclusion	Fine
Amount	Total gross revenues derived from ordinary activities both in Hong Kong and outside of Hong Kong;	Total gross revenues derived from ordinary activities in Hong Kong only;
	- sales rebates; - taxes directly related to the revenues; + grants, subsidies or financial assistance received in return for a contractual obligation to supply goods or services to a third party.	
Relevant Undertakings	Includes revenues generated by all affiliates of the undertaking, less intra-group transactions.	
Relevant Period	The last calendar year or the financial year ending in the last calendar year.	Each year in which the contravention occurred, or, if the contravention occurred in more than 3 years, the 3 years with the highest turnover.

SME Exclusion

As noted above, the Turnover Regulation is relevant in assisting undertakings to determine whether they benefit from the SME Exclusion.

The First Conduct Rule will not apply to agreements between undertakings with a combined turnover not exceeding HK$200 million in the preceding financial year. However, the exclusion will not apply to the four types of "serious anti-competitive" or "hardcore" conduct regardless of the combined turnover of the undertakings to the agreement. The Second Conduct Rule will not apply to undertakings with a turnover not exceeding HK$40 million in the preceding financial year.

The aim of the SME Exclusion is to reduce the compliance burden and costs for SMEs, however, it is not as broad as the de minimis arrangements available in some other competition law jurisdictions.

Stay Tuned!

There remain key guidance and rules to be issued by the Commission and Tribunal.

In the coming few months, we expect the Tribunal to publish its procedural rules, and the Commission to publish various documents including:

1. Revised draft guidelines;
2. Its enforcement priorities; and
3. A leniency policy.

In order to help you identify the types of competition law risks that may arise in day to day business operations, we will shortly be publishing a series of articles on how the competition rules will work.

Stay tuned for more!

2 Pursuant to section 93(3) of the Ordinance, an undertaking may be find up to 10% of its total gross revenues in Hong Kong for each year in which a contravention occurred.

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