



# Recent Amendments to Hong Kong's Competition Bill

Ping Lin  
Lingnan University  
of Hong Kong

&

Jingjing Zhao  
Norton Rose

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## I. INTRODUCTION

After more than a decade of policy study and two rounds of public consultation, the Hong Kong Government submitted its Competition Bill for the Legislative Council's ("LegCo") approval in July 2010. The Bill marked a giant step toward establishing a comprehensive competition law in Hong Kong.

Although widely regarded as well-crafted legislation by international experts, the Bill received strong criticisms from within Hong Kong, particularly from small and medium-sized enterprises ("SMEs"). They raised the following arguments:

- (a) The general prohibition against anticompetitive agreements is difficult to understand and comply with;
- (b) The payment requirement of infringement notice may place a significant burden on SMEs;
- (c) The *de minimis* arrangements should be laid down in the law to give more certainty to SMEs;
- (d) The penalty cap of 10 percent of global turnover for each year in which the contravention has occurred is too severe; and
- (e) Large companies may use private action to harass SMEs.

In response, the Government introduced six major changes to the Bill at the LegCo Bills Committee meeting on October 25, 2011.

## II. DISTINGUISHING BETWEEN "HARDCORE" AND "NON-HARDCORE" VIOLATIONS

The Government proposed to distinguish "hardcore" violations from "non-hardcore" ones. The former category was to be defined as price-fixing, bid rigging, market allocation and output control. The latter group included violations of the first conduct rule prohibiting anticompetitive agreements and concerted practices.

## III. FINES AND INFRINGEMENT NOTICE MECHANISM

The original infringement notice mechanism provided that the Competition Commission could require an infringing party to pay up to HK \$10 million (approximately U.S. \$1.28 million) in addition to admitting and ceasing the infringement. To address the SMEs' concern of having to pay financial penalties

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\* Lingnan University of Hong Kong.

\*\* Norton Rose Hong Kong.

even in a settlement, the Government proposed to remove the Commission's right to impose the fine.

Additionally, infringement notice would not be applied to cases involving non-hardcore breaches of the first conduct rule. Instead, a "warning notice" will be issued to request the relevant undertaking(s) to cease the infringement within a specified period, and only continued infringement after the warning period would attract legal consequences.

### III. "DE MINIMIS" FRAMEWORK

To provide greater certainty to SMEs, the Government proposed to introduce a "*de minimis*" framework into the Bill in the form of an exclusion from the first conduct rule for all agreements among undertakings with a combined turnover not exceeding HK \$100 million in the preceding financial year. This threshold was adopted because (1) it is easier to determine turnover than market share, which requires a definition of the relevant market for each and every agreement; and (2) the average annual business turnover of SMEs has been steady throughout 2005 to 2009 at about HK \$11 million, according to government statistics. However, exclusion would not apply to "hardcore" anti-competitive activities, because these activities almost always have an "appreciable adverse effect on competition." The threshold can be amended through subsidiary legislation when circumstances change.

As for the abuse of a substantial degree of market power prohibited by the second conduct rule of the Bill, a similar *de minimis* arrangement is adopted, with a threshold of HK \$11 million.

### IV. MAXIMUM PENALTY

In the original Bill, the maximum penalty in relation to a "single contravention" was 10 percent of the turnover of the undertaking concerned, for each year in which the contravention occurred.

The statutory maximum is now capped at 10 percent of the undertaking's total local turnover (deriving from all businesses, not only those relating to the contravention) for each year of infringement, but only up to a maximum of three years. If the infringement lasted for more than three years, the three years of infringement with the highest sales would be chosen.

### V. PRIVATE ACTIONS BEFORE THE COMPETITION TRIBUNAL

The Bill originally provides that in addition to public enforcement by the Competition Commission, the special court of Competition Tribunal would also hear damages claims brought by private parties, with or without a determination of infringement in prior public enforcement.

The Government proposed to remove the right altogether. As a result, private actions can only be carried out following a successful prosecution brought by the Commission. The government may restate stand-alone private actions "in a

few years' time," once the business community acquires more experience with the new competition regime.

## VI. MERGERS EXCLUDED

Lastly, although the specific merger rule in the original Bill is confined to M&A transactions relating to telecommunications licensees, the broad wording of the conduct rules made it possible for them to be used to challenge M&A activity in other sectors. The government has now expressly excluded mergers from the scope of application of the conduct rules.

## VII. CONCLUSION

Following the Government's release of the amendment proposal, LegCo's Bills Committee held a public hearing to invite comments on the amendments.

The SMEs mostly welcomed the changes, but many Councilors expressed concerns that the proposed turnover threshold under the second conduct rule was too low and that many SMEs would in practice exceed this threshold.

A similar concern was expressed regarding the proposed *de minimis* threshold under the first conduct rule. The Government refused to raise these thresholds, stating that its proposal was already more lenient than the regime in other jurisdictions where no *de minimis* rules exist for abuse of dominance rules. The Government also refused to replace the proposed "substantial degree of market power" test by the "dominance" test, re-stating its position that the former is more appropriate for Hong Kong, given its small and geographically concentrated economy to tackle anticompetitive conduct in oligopolistic markets.

Taken together, the six proposed amendments may have been too big a concession. The perceived benefits will undoubtedly come at a cost. The reduction in the maximum penalty and the removal of the stand-alone private action will significantly lower the deterrence effect of the law, which may in the end hurt the SMEs (and consumers) who are frequently victimized by anticompetitive conduct of their upstream suppliers and dominant rivals in the markets.

One controversial issue not touched upon in this round of amendment is the Competition Bill's exclusion of quasi-governmental statutory bodies, many of which are engaged in economic activities and compete with private undertakings. The Government is supposedly reviewing the 500-strong local statutory bodies in order to come up with a list of those not benefiting from the exclusion, yet the release of this list has been postponed many times. When it is eventually released, the list will certainly be subject to close public scrutiny before the Competition Bill is expected to pass into law in July 2012.