

HKGCC Submission to Bills Committee on Competition Bill
19th November 2010

Summary

It is important to spell out at the outset that competition regulations are all about promoting market competition and weeding out hard-core anti-competitive behaviours, such as, price fixing and bid rigging. However, the Competition Bill, as it is drafted, seems to diverge from the original intent. The Bill is interventionist in tone and seems to target market structure, with provisions that may result in highly intrusive regulatory operations. The fundamental questions of what kind of competition regime that Hong Kong wants, and needs, must, therefore, be reconsidered.

The Hong Kong General Chamber of Commerce (the “Chamber”) has always supported the introduction of a good competition law for Hong Kong, on the premises that the approach is minimalist, and that the regime will ensure fairness, transparency and certainty. We do not want to see overly intrusive laws that impose unnecessary costs to companies, consumers, as well as the overall economy. More fundamentally, the Bill eventually put in place should serve to enhance Hong Kong’s attractiveness as a vibrant business hub.

Keeping to Hong Kong’s transparent system of legal certainty, we deem it crucial for the Bill to lay out which previously accepted behaviours are now prohibited. Moreover, to address public concern over passing the Bill without the benefit of vetting the detailed implementation guidelines, discussions on the guidelines must go hand in hand with the current legislative process.

With a view to enhance legal certainty, we recommend amending the object clause, the two Conduct Rules, Merger Rule and exclusion provisions. Efforts should be made to put limits to private actions, and be more specific about the proposed penalties and the structural relief measures. We also see the need for the Legislative Council Bills Committee to tackle these issues as a matter of priority.

Experts in the Chamber’s competition law working group have gathered thoughts on the ways to improve the draft legislation substantially, without a complete overhaul. A marked-up version of selected parts of the Bill is attached in the Annex as an illustration. The Chamber’s working group is prepared to provide further recommendations on possible amendments as the Bills Committee proceeds to the section-by-section, clause-by-clause study of the Bill.

Detailed Comments

Object: “economic efficiency” must be included

1. The Government has consistently said (for example, in its May 2008 consultation document) that the objective of the competition law should be economic efficiency. Competition is a means to that end, not an end in itself. This is consistent with the fact that, under the Bill itself, agreements and mergers will not be prohibited if they result in economic efficiencies which outweigh the harm to competition. Yet the objects clause of the Bill does not mention economic efficiency, only competition. A reference to economic efficiency as the primary objective should be inserted. It is critical that the precise objectives of the law

are discussed and agreed at the outset, since these will determine how the Conduct Rules are drafted, and interpreted by the Commission and the courts. For this reason we are concerned that the proposed workplan which the Government has produced for the Bills Committee does not contain any reference to a discussion of the objects at all, far less at the outset of the Committee's deliberations.

Legco workplan: "Conduct Rules" should be the priority

2. We have reservations about the proposed plan to discuss the institutional structures prior to the Conduct Rules. The Conduct Rules form the crux of the Bill for all stakeholders, and the discussion of the rules and what they mean for businesses which will have to comply with them should take priority, after the objectives. This is logical, since the rules flow from the objectives. This is also consistent with the order in which these matters appear in the Bill itself. The discussions on the institutional structures should take place towards the end, at Component 9 of the workplan, since the Conduct rules, investigation powers, sanctions, etc. may all have a bearing on the structure and composition of the bodies appointed to administer the law.

Enhancing certainty

3. Several key terms are not defined in the Bill, such as 'competition' and 'substantially lessen competition'. These terms must be defined, otherwise the Commission will be given too much discretion to interpret them, and will effectively act as legislator rather than enforcer.

4. Under the Bill as drafted, whether agreements or conduct are prohibited will depend on their future economic effects, which by definition are uncertain. Businesses will find it difficult in many cases to predict whether a proposed arrangement or course of action will be prohibited. This means that they will have to either (a) go ahead, and take the risk of being found guilty and penalized, (b) refrain from transactions or conduct which may actually benefit competition and consumers, or (c) ask the Commission for clearance before proceeding (but the Commission has a discretion whether or not to give a view, and even if it does the process involves delay). None of these options is satisfactory. Irrespective of how other jurisdictions may have approached the matter, we do not believe that it is fair or reasonable in a Hong Kong context that businesses be expected to make such economic assessments (which substantially increases compliance costs), or that they are placed in the position of having acted illegally if they make an assessment which differs from that subsequently made by the Commission or Tribunal.

5. One solution to this problem is to prohibit only specific types of conduct: price-fixing, market-sharing and bid-rigging. However, if the Government's proposal that all conduct be subject to a competition assessment is to proceed (and we assume for the purpose of our other points below that this is the case), another solution to this problem is that agreements and conduct should not be automatically prohibited: they should be prohibited only in specific cases, if and when the Tribunal decides, after examination by the Commission, that they should be prohibited; and the prohibition will only take effect from the date of the Tribunal's ruling, thereby only outlawing relevant future conduct after the ruling. There is recent precedent for such an approach in Canada. The Tribunal could have the power to impose sanctions in the case of 'hardcore' conduct (price-fixing, market-sharing and bid-rigging) given the fact that these are more easily defined, and the likelihood that these practices will lessen competition substantially.

First Conduct Rule

6. The so-called ‘illustrative examples’ of anti-competitive agreements under the First Conduct Rules are too vague to give any guidance, and are capable of covering normal, pro-competitive conduct such as joint buying by SMEs. They should specifically refer to price-fixing, market-sharing and bid-rigging.

Second Conduct Rule

7. The concept of ‘dominant position’ is preferable to ‘substantial market power’ as it has a clearer meaning and is widely used in other jurisdictions (such as the EU and China).

8. The concept of ‘abuse’ has given rise to great difficulty and uncertainty in other jurisdictions. The overseas case-law is unclear and in some respects contradictory. Academics and think tanks have tried for many years to find a satisfactory definition of abuse, without success. The risk of using this term in the Hong Kong legislation is that this difficulty and uncertainty will be ‘imported’ into Hong Kong. A better approach is to avoid using the term, but to identify the essence of the conduct which most competition experts agree should be targeted, i.e. conduct that forecloses competition by pushing competitors out of a market or blocking entry in the medium to long term. This means that the ‘illustrative examples’, which are in any event too vague to provide guidance (e.g. what does ‘predatory’ mean?), are unnecessary.

Merger Rule

9. The business sector and perhaps the wider public had been led to believe that mergers will be excluded from the law, at least for the first few years of the new law being in force. But a closer reading of the Bill and discussions with officials during consultation meetings indicate that this appears not to be the case.

10. First, if the Government’s policy objective continues to be that the Merger Rule should apply to mergers between Hong Kong telecommunications carrier licensees, but not to other sectors, the Bill does not achieve this objective. As currently drafted, the rule would catch mergers involving any other market outside telecommunications, as long as a party to the merger happened to have a Hong Kong carrier licensee in the same group of companies. This would need to be amended.

11. Government officials have indicated during consultation forums that the First Conduct Rule could indeed be applied to mergers in all sectors, as some legal experts have pointed out. Officials seem to imply that the potential application of the First Conduct Rule to mergers is a deliberate arrangement, not an oversight, and that the Government intends the First Conduct Rule to be a general rule, hence no carving out of mergers from it. Such indication is in stark contrast to the declared policy that merger regulation will be restricted to telecommunications carrier licensees only. The Government should clarify their stance on this very important issue. The HKGCC remains of the view that general merger regulation should not be contemplated at this stage.

12. It should be emphasised that if the Government chooses to introduce general merger control by this method, it is going to impose further unnecessary and unjustified costs to businesses and the regulatory authorities, as Europe has come to realize when this was not

clear under the EC competition rules. If the question about the First Conduct Rule's applicability to merger is not clarified in Hong Kong, it will necessarily need to be determined by the Commission/Tribunal one way or the other, inviting expensive and entirely unproductive satellite litigation on the point. In the meantime, people will have no certainty as to what is and is not prohibited.

Appropriate test: 'Substantially Lessen Competition'

13. The appropriate test for Commission/Tribunal intervention in all cases should be 'substantially lessen competition' (SLC), as in the Merger Rule, not 'prevent, restrict or distort competition' (PRDC) as in the First Conduct Rule. This is because the SLC test refers to the effects on the market, which should be the concern of competition law. By contrast, virtually any restraint on commercial freedom has been viewed as anti-competitive under the PRDC test, which is overly-intrusive. There is also no justification for using the SLC test for mergers and the PRDC test for other agreements and conduct, as currently proposed.

Exclusions and Exemptions

14. The proposed exclusion for transactions which produce overall economic efficiencies is framed in different terms for mergers than for other agreements. There is no valid justification for this difference: the terms should be consistent and the wording for mergers should be used, as it is clearer and more consistent with the Government's stated policy objective. Moreover a similar exclusion should apply to unilateral conduct subject to the 'Second Conduct Rule'. In addition, the exclusion in all three cases should make it clear that, in balancing economic efficiencies against the lessening of competition, innovation and dynamic efficiency (such as through the introduction of new or improved products, processes or services) are to be given prominence, given Hong's reputation for creativity, dynamism and entrepreneurship. This in turn acts as a spur to continuing competition in any event, by encouraging competitors to continually match or outdo each other's performance, as well as new market entry.

15. The conditions which must be satisfied before the Commission is obliged to issue a decision confirming whether an exemption or exclusion applies are too tightly drawn. In the early years of the new regime, in particular, when businesses are still becoming accustomed to it, it is more appropriate that the Commission be obliged to issue such a decision, unless the request relates to purely hypothetical questions.

Disproportionate penalties and relief powers

16. The investigation powers (e.g. the power to take away property) are too stringent compared with other competition regimes such as the EU, particularly in the early stages of a new competition law. Moreover the proposed cap on penalties- 10% of worldwide group consolidated turnover for each year of the infringement- is grossly disproportionate compared with even the EU. As a new competition regime, it would be proportionate to set the cap at 10% of one year's turnover in the products or services concerned in Hong Kong (since the law is only addressed at conduct which has anti-competitive effects in Hong Kong).

17. The Government has consistently said the law is not going to target structural issues. The proposed structural relief powers in Schedule 3- in particular Paragraphs 1(d), (e) and (f)- should therefore be removed. More generally, there are a number of other proposed

powers which, like the structural powers, are additional to those specifically proposed in previous consultations, which have not been consulted upon, and which overlap with other powers, such as a power to order disgorgement of profits (paragraph 1(p)) as well as impose penalties and damages orders. These proposed powers should be carefully scrutinized by the Bills Committee to ensure that they are proportionate, and not excessive or duplicative, particularly in comparison with other more mature competition regimes.

Private actions: Should limit to “follow-on”

18. Third party actions should be limited to ‘follow-on’ actions (i.e. only available once the Tribunal has determined after investigation by the Commission that there is an infringement). Otherwise there is a risk of excessive litigation. It is instructive to note that, in the UK, where competition law has been in force for many years, even follow-on actions in the Competition Tribunal have only been available since 2003, and it is not possible to bring a standalone action. Hong Kong should proceed with similar caution.

Proposed Section 7Q of Telecommunications Ordinance

19. There is a wide consensus amongst competition experts that rules against ‘exploitative’ behaviour should have no place in competition rules, because they are not about protecting competition. Moreover, the difficulties and subjectivity involved in assessing what constitutes exploitative behaviour are notorious. Consistent with this position, the Government has therefore correctly limited the Second Conduct Rule to exclusionary (i.e. anti-competitive) abuse. It is therefore anomalous to impose a rule against exploitative abuse in the telecommunications sector, as the proposed new section 7Q of the Telecommunications Ordinance would do. This proposed new section (contained in Schedule 8 Part 4 of the Bill) should be withdrawn.

Regulations that unreasonably limit competition

20. Hong Kong Government policy has, for a long time, sought to ensure government intervention is minimal and, where it does occur, that it is not unduly distortive of competition, e.g. through COMPAG's existing role reviewing both private and Government conduct and the Government's "Be the Smart Regulator" policy. In other jurisdictions over the last few decades the role of competition policy has also expanded to include lessening the adverse effects of government intervention in the market place. In some countries, competition authorities can analyze whether regulatory measures from the public sector will negatively affect competition and strive to have any measures that unreasonably limit competition amended or abolished. It could be proposed that similar provisions be included in Hong Kong's competition law.

-END-

A Bill To

~~Prohibit conduct that prevents, restricts or distorts competition in Hong Kong; to prohibit~~ Promote economic efficiency in Hong Kong, by prohibiting conduct and mergers that substantially lessen competition in Hong Kong unless they result in economic efficiencies which outweigh such lessening of competition; to establish a Competition Commission and a Competition Tribunal; and to provide for incidental and connected matters.
Enacted by the Legislative Council.

PART 1 Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Competition Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

2. Interpretation

In this Ordinance—

...
"competition" means workable (as opposed to perfect) competition and is a process of rivalry or potential for rivalry whereby undertakings seek to discover new and more efficient ways of offering goods and services.

...
"dominant position" means an ability to conduct business in a way which is over the medium to long term to a large degree unconstrained by the actions or reactions of competitors and/or customers.

...
"foreclosing" means pushing competitors out of a market or blocking entry in the medium to long term.

...
"substantially lessen competition" means lessen the degree or intensity of competition to the extent that most consumers as a result of such lessening are, or are likely to be, adversely affected.

...
"workable" means reasonable in the circumstances of the particular industry under consideration.

PART 2 The Conduct Rules

Division 1—Agreements etc. ~~Preventing, Restricting or Distorting~~ Substantially Lessening Competition

Subdivision 1—First Conduct Rule

6. Prohibition of anti-competitive agreements, concerted practices and decisions

(1) An undertaking must not—

- (a) ~~make or~~ give effect to an agreement;
- (b) engage in a concerted practice; or
- (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the ~~object~~effect or likely effect of the agreement, concerted practice or decision is to ~~prevent, restrict or distort~~ substantially lessen competition in Hong Kong by reducing contestability in the medium to long term.

(2) Subsection (1) ~~applies~~shall apply in particular to agreements, concerted practices and decisions ~~that—(a)~~between two or more actually or potentially competing undertakings that have as their principal purpose, directly or indirectly ~~fix purchase or, to—~~

- (a) increase, maintain, or prevent the reduction of selling prices ~~or any other trading conditions;~~
- ~~(b) limit or control production, markets, technical development or investment; or~~
- (b) subvert competitive tendering or procurement processes; or
- (c) share geographical markets or ~~sources of supply~~customers.

(3) For conduct other than the particular conduct specified in Subsection 2 —

- (a) Subsection (1) applies only if and to the extent that the Tribunal, on application by the Commission, so determines, from the date it so determines;
- (b) the Tribunal may only make an order that the undertaking or undertakings engaging in the conduct shall not continue to give effect to the conduct or any part of the conduct as from the date of the Tribunal's determination under Subsection (a).

(4) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).

(5) Subsection (1) does not apply —

- (a) where the economic efficiencies that arise or may arise from the conduct outweigh the adverse effects caused by any lessening of competition in Hong Kong;
- (b) to the extent that an agreement constitutes, or is directly related to and necessary for, the implementation of, a merger.

(6) In balancing economic efficiencies against any lessening of competition for the purposes of Subsection (5)(a), innovation and dynamic efficiency (such as through the introduction of new or improved products, processes or services) are to be given prominence, to ensure the maintenance of the Hong Kong economy's creativity, innovation and dynamism.

(7) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “first conduct rule” .

~~7. “Object” of agreement~~

~~(1) If an agreement, concerted practice or decision has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.~~

~~(2) An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted practice that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.~~

8. Territorial application of first conduct rule

The first conduct rule applies to an agreement, concerted practice or decision that has the ~~object~~effect or likely effect of preventing, restricting or distorting competition in Hong Kong even if—

- (a) the agreement or decision is made or given effect to outside Hong Kong;
- (b) the concerted practice is engaged in outside Hong Kong;
- (c) any party to the agreement or concerted practice is outside Hong Kong; or
- (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

Subdivision 2—Decisions

9. Application for decision

(1) An undertaking that has made or given effect to, is giving effect to or is proposing to make or give effect to an agreement may apply to the Commission for a decision as to whether or not the agreement is—

- (a) excluded from the application of the first conduct rule by or as a result of Schedule 1;
- (b) exempt from the application of the first conduct rule by virtue of a block exemption order issued under section 15;
- (c) exempt from the application of the first conduct rule by virtue of an order of the Chief Executive in Council made under section 31 (Exemptions on public policy grounds) or section 32 (Exemption to avoid conflict with international obligations); or
- (d) excluded from the application of this Part by virtue of section 3 (Application to statutory bodies) or section 4 (Application to specified persons and persons engaged in specified activities).

(2) The Commission is ~~only~~ required to consider an application under ~~this section if—~~

- ~~(a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under this Ordinance;~~
- ~~(b) the application raises a question of an exclusion or exemption under this Ordinance for which there is no clarification in existing case law or decisions of the Commission; and~~
- ~~(c) it is possible to make a decision on the basis of the information provided.~~

~~(3) The Commission is not required to consider an application under this section if~~ this section unless the application concerns hypothetical questions or agreements.

Division 2—~~Abuse of Market Power~~Conduct by an Undertaking with a Dominant Position

Subdivision 1—Second Conduct Rule

~~21. Abuse of market power~~

21. Conduct Substantially Lessening Competition

(1) An undertaking that has a ~~substantial degree of market power~~dominant position in a market must not ~~abuse that power by engaging~~engage in conduct ~~that has as if its object or effect the prevention, restriction or distortion of effect or likely effect is to substantially lessen~~ competition in Hong Kong by foreclosing competition where there is no other economic rationale for this conduct.

~~(2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—~~

~~(a) predatory behaviour towards competitors; or~~

~~(b) limiting production, markets or technical development to the prejudice of consumers.~~

(2) Subsection (1) does not apply where—

(a) the substantial lessening of competition arises only from the superior competitive performance of the relevant undertaking; or

(b) the economic efficiencies that arise or may arise from the conduct outweigh the adverse effects caused by any lessening of competition in Hong Kong.

(3) In balancing economic efficiencies against any lessening of competition for the purposes of Subsection (2)(b), innovation and dynamic efficiency (such as through the introduction of new or improved products, processes or services) are to be given prominence, to ensure the maintenance of the Hong Kong economy's creativity, innovation and dynamism.

(4) Subsection 1 applies only if and to the extent that the Tribunal, on application by the Commission, so determines, from the time it so determines.

(5) The Tribunal may only make an order that the undertaking or undertakings engaging in the conduct shall not continue to give effect to the conduct or any part of the conduct as from the date of the Tribunal's determination under Subsection 4.

(6) Subsection (1) does not apply to the extent that the conduct constitutes, or is directly related to and necessary for the implementation of, a merger.

(7) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “second conduct rule” .

~~22. “Object” of conduct~~

~~(1) If conduct has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.~~

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~~(2) An undertaking may be taken to have engaged in conduct that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.~~

23. Territorial application of second conduct rule

The second conduct rule applies to conduct that has as its ~~object~~effect or likely effect ~~the prevention, restriction or distortion~~ the substantial lessening of competition in Hong Kong even if—

- (a) the undertaking engaging in the conduct is outside Hong Kong;
- or
- (b) the conduct is engaged in outside Hong Kong.

Subdivision 2—Decisions

24. Application for decision

(1) An undertaking that has engaged in, is engaging in or is proposing to engage in certain conduct may apply to the Commission for a decision as to whether or not the conduct is—

- (a) excluded from the application of the second conduct rule by or as a result of Schedule 1;
- (b) exempt from the application of the second conduct rule by virtue of an order of the Chief Executive in Council made under section 31 (Exemptions on public policy grounds) or section 32 (Exemption to avoid conflict with international obligations); or
- (c) excluded from the application of this Part by virtue of section 3 (Application to statutory bodies) or section 4 (Application to specified persons and persons engaged in specified activities).

(2) The Commission is ~~only~~ required to consider an application under ~~this section if—~~

- ~~(a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under this Ordinance;~~
- ~~(b) the application raises a question of an exclusion or exemption under this Ordinance for which there is no clarification in existing case law or decisions of the Commission; and~~
- ~~(c) it is possible to make a decision on the basis of the information provided.~~

~~(3) The Commission is not required to consider an application under this section if~~ this section unless the application concerns hypothetical questions or conduct.

PART 6

Enforcement before Tribunal

Division 2—Pecuniary Penalty

90. Commission may apply for pecuniary penalty

(1) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for a pecuniary penalty to be imposed on any person it has reasonable cause to believe—

- (a) has contravened a competition rule; or

(b) has been involved in a contravention of a competition rule.

(2) An application under subsection (1) may not be made—

(a) in the case of an application with respect to a contravention of the merger rule, more than 6 months after the day on which the merger was completed or the Commission became aware of the merger, whichever is the later; or

(b) in the case of an application with respect to a contravention of a conduct rule, more than 5 years after the day on which the contravention ceased or the Commission became aware of the contravention, whichever is the later.

91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.

(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters—

(a) the nature and extent of the conduct that constitutes the contravention;

(b) the loss or damage, if any, caused by the conduct;

(c) the circumstance in which the conduct took place; and

(d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.

(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total—~~(a) 10% of the turnover in Hong Kong of the undertaking concerned, in the products or services concerned by the infringement~~ for the year in which the contravention occurred; or ~~(b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in 1 year, in the year in which the contravention has continued commenced~~.

(4) In this section—

“turnover” (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong;

“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

SCHEDULE 1 [ss. 9, 15, 24, 30 & 36]

General Exclusions from Conduct Rules

1. Agreements enhancing overall economic efficiency

The first conduct rule does not apply to ~~any agreement that~~ an agreement, decision or concerted practice if the economic efficiencies that arise or may arise from the agreement, decision or concerted practice outweigh the adverse effects caused by any lessening of competition in Hong Kong. In balancing economic efficiencies against any lessening of competition for the purposes of this Section, innovation and dynamic efficiency (such as through the introduction of new or improved products, processes or services) are to be given prominence, to ensure

the maintenance of the Hong Kong economy's creativity, innovation and dynamism.

~~(a) contributes to—~~

~~(i) improving production or distribution; or~~

~~(ii) promoting technical or economic progress; and~~

~~(b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and~~

~~(c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.~~

...

SCHEDULE 7

Mergers

PART 2

The Merger Rule

3. Mergers substantially lessening competition prohibited

(1) An undertaking must not, directly or indirectly, carry out a merger to the extent that it has, or is likely to have, the effect of substantially lessening competition in a telecommunications market in Hong Kong.

(2) For the purpose of this section, a merger takes place if—

(a) 2 or more undertakings previously independent of each other cease to be independent of each other;

(b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

(c) an acquisition by one undertaking (the “acquiring undertaking”) of the whole or part of the assets (including goodwill) of another undertaking (the “acquired undertaking”) has the result set out in subsection (3).

(3) The result referred to in subsection (2)(c) is that the acquiring undertaking is in a position to replace the acquired undertaking, or to substantially replace the acquired undertaking, in the business or in part of the business concerned (as the case requires) in which the acquired undertaking was engaged immediately before the acquisition.

(4) The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger within the meaning of subsection (2)(b).

(5) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “merger rule” .

4. Application of merger rule

The merger rule applies only in the following cases—

- (a) in the case referred to in section 3(2)(a) of this Schedule, ~~one~~two or more of the undertakings participating in the merger holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence;
- (b) in the case referred to in section 3(2)(b) of this Schedule, the undertaking or the person or persons acquiring control ~~of~~and the undertaking in which control is acquired holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence; and
- (c) in the case referred to in section 3(2)(c) of this Schedule—
- (i) the acquiring undertaking or the acquired undertaking holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence; and
 - (ii) the relevant business conducted by the acquired undertaking immediately before the acquisition was conducted under a carrier licence.