Baker McKenzie.

Client Alert

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The Merger Control Review - Hong Kong

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Introduction

Hong Kong's merger control regime is voluntary in nature and – substantively speaking – only applies to mergers involving a telecommunications carrier licensee. Mergers that fall outside of the merger control regime are wholly excluded from the application of competition law per Schedule 1, Section 4 of the Competition Ordinance.

The merger control regime under the Competition Ordinance

The Competition Ordinance, which came into full effect in December 2015, led to significant institutional and procedural reforms to the Hong Kong competition regime, which now applies across all sectors of the economy. To a lesser extent, the legislation has also brought changes to the merger control regime.

The Merger Rules (most of which are contained in Schedule 7 to the Ordinance) replaced the previous regime established under the Telecommunications Ordinance.

Merger control remains relevant only to mergers involving undertakings directly or indirectly holding carrier licences issued under the Telecommunications Ordinance (Cap 106).

Both the Competition Commission and the Communications Authority (together, the Competition Authorities) have concurrent jurisdiction to review competition law matters in the telecommunications sector.[1] Pursuant to the memorandum of understanding between the two agencies, the Communications Authority will usually be the lead agency on telecommunications matters, including mergers.[2] The Guidelines on the Merger Rule (the Merger Rule Guidelines) are published jointly by the Competition Authorities.

Under the Competition Ordinance, mergers that substantially lessen competition are prohibited (the Merger Rule). This prohibition, found in Section 3 of Schedule 7 to the Ordinance, has a limited scope of application and only applies to mergers involving undertakings that hold a telecommunications carrier licence or that directly or indirectly control such licensees.[3] The question of whether the Merger Rule applies to transactions where the affected markets are not in the telecommunications sector, but where one of the parties happens to have an entity holding a carrier licence within their corporate groups has yet to be addressed by the courts, and is not addressed in the Merger Rule Guidelines. Although the legislation could arguably be read as bringing such transactions within the scope of the Merger Rule, this would appear to be contrary to the legislative intent.

Contents

[1] Competition Ordinance, Section 159.

[2] Memorandum of Understanding between the Competition Commission and Communications Authority, Clause 1.2.

[3] Competition Ordinance, Section 4 of Schedule 7.

When the Competition Ordinance was enacted, the government undertook to review its scope and operation after three years. In February 2020, the Commerce and Economic Development Bureau (CEDB) (the government agency responsible for competition law and policy in Hong Kong) confirmed that this review was in progress. Senior Competition Commission officials, including both the chief executive[4] and chairperson,[5] had publicly expressed support for extending the Merger Rule to all sectors of the economy. However, the CEDB stated in August 2019 that this review would be limited to the applicability of the Competition Ordinance to statutory bodies, and does not include a proposed extension of the Merger Rule to other sectors of Hong Kong's economy.[6] Conversely, Rasul Butt, senior executive director of the Competition Commission at the time (and chief executive officer since May 2021), stated in an online event in April 2021 that 'it's not a matter of whether we will have merger [review] powers. It's a matter of when we will have it.'[7] It will ultimately fall to the Legislative Council to approve any changes to the Competition Ordinance.

Types of transactions caught

Sections 3 and 4 of Schedule 7 to the Competition Ordinance provide that the following types of transactions constitute a 'merger' for the purposes of the Merger Rule:

a. mergers between previously independent undertakings, where one or more of the undertakings participating in the merger holds a telecommunications carrier licence, or controls (directly or indirectly) an undertaking that holds such a licence (Sections 3(2)(a) and 4(a));

b. acquisitions of control (direct or indirect) over undertakings (through the acquisition of rights or assets), where the acquiring undertaking, the individual acquiring control, or the target, holds a telecommunications carrier licence, or controls (directly or indirectly) an undertaking that holds such a licence (Sections 3(2)(b), 3(2)(c), 3(3), 4(b) and 4(c) of Schedule 7); and

c. the establishment of full-function joint ventures, where any of the parent undertakings or the joint venture holds a telecommunications carrier licence, or controls (directly or indirectly) an undertaking that holds such a licence (Sections 3(2)(b), 3(4) and 4(b) of Schedule 7).

The first type of transaction can be likened to the corporate concept of a merger, through which one unified undertaking would be created by the amalgamation of two existing undertakings, or by the absorption of one by another. While this generally means that the legal personality of one or more pre-merger undertakings would no longer exist post-transaction, de facto mergers also qualify under Section 3 (2) (a), if the transaction results in the creation of a permanent, single economic management (such as through revenue or risk-sharing through the entities being part of the group).

The second type of transaction concerns the acquisition of control that translates into the ability to exercise a decisive influence by one or more undertakings, whether solely or jointly, over the activities of another undertaking. In this regard, the Ordinance (at Section 5 of Schedule 7) makes clear that particular regard will be attributed to the ownership of or the right to use an undertaking's assets; or rights or contracts that enable decisive influence to be exercised with regard to the composition, voting and governance of any governing body of an undertaking. Consistent with the position under EU law, Paragraph 2.7 of the Merger Rule Guidelines states that 'decisive influence' refers to the power to make strategic and management decisions (including the positive making or negative vetoing of a decision) related to an undertaking (such as in respect of budget, the business plan, major investments or the appointment of senior management). Accordingly, similar to EU law, an acquisition of a minority stake could also qualify as a merger if it leads to the acquisition of control over the target. Note also that an acquisition of assets, whether whole or part, which results in the target undertaking being replaced (or substantially replaced) in its business or part of the business would also constitute a merger.

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[4] See *Hong Kong Lawyer*, October 2018 'Face to Face with Brent Snyder, CEO of the Competition Commission', available at www.hk-lawyer.org/content/face-face-brent-snyder-ceo-competition-commission.

[5] See comments by Anna Wu (then chairperson of the Competition Commission) reported in the *South China Morning Post*, 17 January 2019, available at www.scmp.com/news/hong-kong/hong-kong-economy/article/2182425/tightening-hong-kongs-competition-laws-cover.

[6] See comments made by the Commerce and Economic Development Bureau to MLEX, 19 February 2020, reported at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1164885&siteid=202&rdir=1.

[7] See comments made by Rasul Butt in the online event '10 Years Anniversary Celebration 2021: New Insight of MyCC', 1 April 2021, reported at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1277107&siteid=202&rdir=1.

In the final type of transaction, the creation of a joint venture would constitute a merger under the Ordinance if the joint venture is to perform, on a lasting basis, all the functions of an autonomous economic entity (i.e., a 'full function joint venture'). Consistent with EU law, the Merger Rule Guidelines state that these are joint ventures that bring about lasting change in the structure of the undertakings concerned and the relevant market. In this regard, a short-term, project-specific (such as a research and development or production) joint venture would not generally be seen as bringing about a lasting change. Additionally, a full-function joint venture must ultimately have sufficient resources (in the form of management personnel, financial resources and other assets) to act independently of its parents on the market. The activities of its parents upstream or downstream will be relevant for the analysis. Where substantial sales or purchases occur between the joint venture and its parents for a lengthy period and not on an arm's-length basis, the joint venture would not generally be seen as having autonomy on the market.[8]

In line with most other regimes (including the EU), intra-group mergers (i.e., where the parties form part of a single undertaking) are outside the purview of the Ordinance.

Finally, in an attempt to bring legal certainty to M&A activities that are not caught by the Merger Rule, the Ordinance makes clear that mergers cannot be challenged under the Ordinance's behavioural rules. In other words, the only relevant provisions in the Ordinance under which mergers should be assessed are the merger control regime; if a merger falls outside of the regime because none of the undertakings involved control telecommunications carrier licensees, then the merger is completely excluded from the scope of application of the Ordinance.[9] Although the Competition Authorities' guidance on this point is not entirely clear, the Merger Rule Guidelines suggest at Paragraphs 2.18 and 2.19 that ancillary restrictions (such as non-competes) that are directly related and necessary to the implementation of the merger should also benefit from this exclusion.

Standard of review: substantial lessening of competition

Section 3 of Schedule 7 to the Ordinance provides that mergers that substantially lessen competition are prohibited. The Ordinance provides further guidance on the matters that may be considered in determining whether competition is substantially lessened. Section 6 of the same Schedule lists the following matters:

a. the extent of competition from competitors outside Hong Kong;

b. whether the acquired undertaking, or part of the acquired undertaking, has failed or is likely to fail in the near future;

c. the extent to which substitutes are available or are likely to be available in the market;

d. the existence and height of any barriers to entry into the market;

e. whether the merger would result in the removal of an effective and vigorous competitor;

f. the degree of countervailing power in the market; and

g. the nature and extent of change and innovation in the market.

The above factors are not exhaustive. The Competition Authorities have developed a more comprehensive methodology for their assessment, which is set out at Paragraphs 3.21 to 3.85 of the Merger Rule Guidelines. One of the most relevant aspects of this methodology is the reliance on market concentration levels as a proxy for the more complex economic analysis of whether competition is substantially lessened. The Merger Rule Guidelines provide indicative market concentration safe harbours below which a substantial lessening of competition is deemed unlikely.

The Merger Rule Guidelines state that, in general, horizontal mergers leading to a combined market share of 40 per cent or more are likely to raise competition concerns, and warrant a detailed investigation.[10] Below this market share threshold, there may still be concerns for transactions falling outside of the safe harbour measures. The safe harbour measures are set out at Paragraphs 3.15 to 3.19 of the Guidelines.

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[8] Merger Rule Guidelines, Paragraphs 2.8 to 2.12.

[9] Competition Ordinance, Section 4 of Schedule 1.

[10] Merger Rule Guidelines, Paragraph 3.13.

a. Safe harbour one: (1) the post-merger combined market share of the four largest firms (CR4) in the relevant market is less than 75 per cent, and the merged firm has a market share of less than 40 per cent; or (2) CR4 is greater than 75 per cent, but the market share of the merged entity in the relevant market is less than 15 per cent.

b. Safe harbour two, based on the Herfindahl-Hirschman Index (HHI):[11] (1) the merger leads to a post-merger HHI of less than 1,000 on the relevant markets; (2) the merger leads to a post-merger HHI of between 1,000 and 1,800 and produces an increase in the HHI of less than 100; and (3) the merger leads to a post-merger HHI of more than 1,800 and produces an increase in the HHI of less than 50.

The Merger Rule Guidelines state that the Competition Authorities are unlikely to assess any mergers that fall within one of these safe harbours, but do not categorically rule out such an assessment.[12]

The Merger Rule Guidelines state that it will normally be appropriate to assess a merger against the prevailing conditions of competition at the time. However, they state that this may not be the correct counterfactual in all circumstances, giving the example of a merger where one of the parties is a failing firm.[13] To date, the Competition Authorities have not had to consider the 'failing firm' defence.

The power of adjudication in respect of the Merger Rule belongs to the Competition Tribunal. The powers of the Competition Authorities under the Competition Ordinance in relation to mergers are limited to conducting investigations. While the Competition Authorities can seek to resolve issues informally or by way of commitments, most adjudicative powers belong to the Competition Tribunal.

Voluntary notification

There is no requirement to notify the Competition Authorities of a merger falling within the Merger Rule. The merger control regime is voluntary. The Merger Rule Guidelines state that the Competition Authorities will keep themselves informed about merger activity by, for example, monitoring the media and through receiving information or complaints from third parties.

In a departure from the previous regime under the Telecommunications Ordinance (and other voluntary regimes such as those of Australia, Singapore and the United Kingdom), the availability of a formal decision from the Competition Authorities is severely curtailed. Under the Competition Ordinance, applications for a decision can only be made if parties intend to avail themselves of a cause for exclusion (i.e., exclusion as a result of economic efficiencies, as a result of the involvement of an excluded statutory body or person, or as a result of the involvement of a specified person or a person engaged in a specified activity as provided for in a decision of the Chief Executive in Council). An application may only be considered where it poses novel or unresolved questions of wider importance or public interest and where there is no clarification in existing case law on the matter,[14] but even then, the Competition Authorities have no obligation to issue a decision.

To remedy this very limited scope of application, the Competition Authorities have introduced an informal notification regime under the Merger Rule Guidelines. Under this informal procedure, parties are invited to approach the Competition Authorities to discuss their transaction and seek informal non-binding advice on the transaction on a confidential basis.[15] That said, note the caution in the Merger Rule Guidelines that, because such advice is given without the benefit of third-party views being made known, it is not binding.

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[11] The Herfindahl—Hirschman Index (HHI) measures market concentration. It is calculated by adding together the squares of the market shares of all firms operating in the market. The increase in the HHI resulting from the merger is calculated by subtracting the pre-merger index from the expected value of the HHI following the merger, the difference being known as the 'delta'.

[12] Merger Rule Guidelines, Paragraph 3.20.

[13] Merger Rules Guidelines, Paragraph 3.37.

[14] Competition Ordinance, Section 11 of Schedule 7.

[15] Merger Rule Guidelines, Paragraphs 5.4 to 5.8.

Year in Review

The merger control regime under the Competition Ordinance took effect on 14 December 2015 and enforcement is still in its infancy. The most striking difference of the new regime as compared with its predecessor is the change to a judicial enforcement model, whereby adjudicative powers now solely rest with the Competition Tribunal. The Communications Authority no longer has the power to adopt formal decisions, except where causes for exclusion are invoked. Accordingly, most enforcement activities now take place outside of the formal statutory framework.

Mergers in the telecommunications sector

At the time of writing, neither the Communications Authority nor the Competition Commission has published details relating to the review of any reviewed in 2022. Between 2018 and 2021, the Communications Authority reviewed three transactions under the Merger Rule. The details of two of these transactions (including the identity of the parties) were not disclosed by the Communications Authority, apart from statements that no concerns were identified.[16] The other transaction was HKBN's acquisition of WTT Holdings. On 17 April 2019, the Communications Authority announced its decision to accept behavioural commitments from the parties in lieu of commencing an investigation under the Competition Ordinance.[17] According to the Communications Authority's preliminary assessment, the merged entity would become the second-largest player in the commercial segment of the market for the provision of fixed broadband services and fixed voice services post-merger. The Communications Authority identified two potential competition concerns.

a. Difficulties in accessing buildings that are not exclusively for residential use, and where HKBN and WTT both provide access. The merger would lead to a reduction in the number of competitors providing fixed line services to these buildings. This would be a problem only to the extent that other fixed network operators would have difficulty in obtaining access.

b. Foreclosure of downstream operators: both HKBN and WTT offered wholesale access to their networks to downstream competitors (i.e., providers of voice and broadband services). The Communications Authority identified a risk that the merged entity could refuse to supply wholesale access, raise prices for access substantially or lower service quality post-merger.[18]

The parties proposed two behavioural commitments to address these concerns: (1) in-building interconnection commitments to facilitate access to a building for installation of block-wiring circuits by new competitors to enable them to compete with the merged entity; and (2) a two-year wholesale access commitment was also made to enable downstream rivals that had existing agreements with HKBN or WTT on wholesale services to continue to obtain supply of wholesale inputs on existing or no less favourable terms. Following a public consultation, the Communications Authority decided to accept these commitments and not investigate the transaction further.

Other developments

On 10 January 2019, the Competition Commission announced that it was investigating a commercial alliance between four of Hong Kong's five container terminal operators (Hongkong International Terminals Limited, Modern Terminals Limited, COSCO-HIT Terminals (Hong Kong) Limited and Asia Container Terminals Limited). This investigation was conducted under the First Conduct Rule, which implies that the alliance did not constitute a full-function joint venture. The chief executive of the Competition Commission at the time stated publicly (in support of his view that the Merger Rule should be extended) that, were this alliance to have been structured in such a way, the Competition Commission would have had no jurisdiction to investigate.[19] The Competition

[16] Communications Authority, Annual Report 2019—2020, p. 56; Annual Report 2018—2019, p. 57.

[17] Notice of Acceptance by the Communications Authority (CA) of Commitments Offered by Hong Kong Broadband Network Limited, HKBN Enterprise Solutions Limited and WTT HK Limited under Section 60 of the Competition Ordinance (CO) in relation to the Proposed Acquisition of WTT Holding Corporation by HKBN Ltd (with commitments accepted enclosed).

[18] Notice to Seek Representations regarding the CA's Proposed Acceptance of Commitments Offered by Hong Kong Broadband Network Limited, HKBN Enterprise Solutions Limited and WTT HK Limited under Section 60 of the CO in relation to the Proposed Acquisition of WTT Holding Corporation by HKBN Ltd (13 February 2019).

[19] 'Competition update: Q&A with Brent Snyder', *Chartered Secretaries Journal*, 20 June 2019, available at http://csj.hkics.org.hk/site/2019/06/20/competition-update-qa-with-brent-snyder/.

Commission's concerns over the commercial alliance were ultimately addressed by commitments offered by the parties, which were accepted by the Competition Commission on 30 October 2020.[20] To be clear, the Policy on Section 60 Commitments issued by the Competition Commission in November 2021 does not apply to commitments that relate to possible contraventions of the Merger Rule.[21]

At the start of 2019, it was reported that the Competition Commission was consulting businesses about the competition impact of past mergers, ostensibly to assess recommendations to make to the government about revisions to the Merger Rule.

The Merger Control Regime

No suspension obligation

In the absence of a statutory obligation for parties to notify and obtain clearance from the Competition Authorities in respect of a merger falling within the scope of the Merger Rule, parties are not subject to any corresponding obligation to suspend the implementation or consummation of their transaction.

The absence of any suspension obligation removes an important hurdle, giving parties considerable flexibility in the implementation of their transaction. More specifically, it means that transactions involving publicly listed entities, including hostile takeovers, which are otherwise often subject to merger control filing requirements around the world, can proceed unimpaired by protracted delays.

The Competition Authorities can apply to the Competition Tribunal for interim measures for the purpose of 'preventing pre-emptive action', which may prejudice the hearing of the application by the Tribunal. Interim measures would include measures akin to hold-separate orders or stand-still obligations. To date, these powers have not been exercised.

Challenges by the Competition Authorities Completed mergers

Notwithstanding its general power to conduct investigations in respect of a suspected contravention of the Ordinance (under Section 39), investigations of a completed merger must be commenced within 30 days of the day on which the Competition Authorities first became aware, or ought to have become aware, that a merger has taken place. Further, the Competition Authorities may only mount a challenge before the Competition Tribunal within six months of completion of such merger or becoming aware of it (whichever is later). Accordingly, the commencement of an investigation within the prescribed time limit is essential to their ability to remedy the consequences of a contravention of the Merger Rule. Once an objection in respect of a completed merger has been raised in legal proceedings, and the Competition Tribunal is satisfied that it leads to a substantial lessening of competition in Hong Kong, the Competition Tribunal can make an appropriate order against the merger.

Anticipated mergers

While the Competition Authorities are subject to more onerous procedural constraints in respect of proceedings initiated against completed mergers, these do not apply to anticipated mergers. Accordingly, they may exercise their general power to conduct an investigation and apply to the Competition Tribunal for an order to prevent (or alter the scope) of a merger that, if carried into effect, would result in the substantial lessening of competition in Hong Kong. In a similar vein, interim measures can be issued to prevent any pre-emptive action that might prejudice the outcome of proceedings or a final order made by the Competition Tribunal following the hearing of such application.

Competition Tribunal orders against mergers

The consequences of completing a merger that is found to contravene the Competition Ordinance, or proceeding with a merger that will likely do so if carried into effect, are far-reaching: potentially giving rise to a Competition Tribunal order that either seeks to prevent a contravention or bring it to an end. This may include orders directing parties not to proceed with a merger or imposing structural or behavioural remedies, such as business, asset or share divestitures in respect of an overlapping business, the

[20] Case EC/03AY, Commitments made by Modern Terminals Limited and HPHT Limited to the Competition Commission pursuant to Section 60 of the Competition Ordinance (Cap 619), available at www.compcomm.hk/en/enforcement/registers/commitments/files/Commitments_Fo_Publication_Eng.pdf.

[21] Policy on Section 60 Commitments, Footnote 1.

dissolution of the merger, or an undertaking by parties to conduct themselves in a particular manner. When challenges are brought in relation to anticipated mergers, the Competition Tribunal can also order interim measures for the purpose of preventing pre-emptive action pending review of the proposed transaction.

Appeals

Under Section 155 of the Competition Ordinance, parties (including the Competition Authorities) that wish to challenge a judgment of the Competition Tribunal may bring an appeal in the Court of Appeal.

Voluntary notification procedures

The risks that a merger might be blocked or unwound altogether or materially altered in scope, and the transaction costs associated with these risks, are likely to encourage parties to exercise caution before consummating transactions that fall within the scope of the Merger Rule. This situation is further aggravated given that the market-share safe harbours set out under the Merger Rule Guidelines, aimed at facilitating the self-assessment of whether a transaction might raise competition concerns, do not sufficiently safeguard the interests of merging parties. Meeting one or both of these thresholds does not exclude the risk of ensuing investigations.[22]

Several options are available to merging parties that wish to seek comfort that their transaction will not be challenged. The Ordinance provides for two formal procedures, whose scope of application is regrettably very limited. This has led the Competition Authorities to establish informal procedures, one of which is documented in the Merger Rule Guidelines. These are discussed below.

Applications for a decision on the availability of an exclusion

The only procedure that allows parties to seek a formal decision from the Competition Authorities is found in Section 11 of Schedule 7 to the Ordinance. Under this procedure, merging parties can apply for a decision in reliance on a statutory cause for exclusion (i.e., an exception in the Ordinance pursuant to which the transaction escapes from the application of the Merger Rule), the most relevant of which is the economic efficiency exclusion under Section 8 of Schedule 7 to the Ordinance. This efficiency exception is available by operation of statute and can be relied upon as soon as specific conditions are met — the parties need not obtain a decision from either the Competition Authorities or the Competition Tribunal.

The Competition Authorities are not under a statutory obligation to consider an application for a decision under Section 11 of Schedule 7 to the Ordinance unless three specific conditions are met. In other words, it retains the discretion to decline to consider an application altogether unless:

a. the application poses novel or unresolved questions of wider importance or public interest in relation to the application for an exclusion;

b. the application raises a question for which there is no clarification in existing case law or decisions of the Competition Authorities; and

c. it is possible to make a decision on the basis of the information provided.

In addition to a lack of precedent showing (and certainty as to) how these conditions will be applied in practice, even where all three conditions are met, the Competition Authorities' statutory obligation would still be limited to considering the application of an exclusion — it need not consider the merits of the application, nor provide a definitive decision on whether the subject matter merger infringes the Ordinance. On being satisfied that the above conditions have been met, it is also subject to an obligation to publicise a notice of the relevant application and to allow 30 days for the submission of representations by interested third parties.

Having considered these representations, the Competition Authorities may then make a decision as to whether the merger would be excluded from the application of the Merger Rule. The Ordinance does not provide for a timetable in this respect. In the Merger Rule Guidelines, the Competition Authorities state that they will endeavour to process applications in an efficient and timely manner with due regard being paid to the circumstances of the case.[23] Although the Competition Authorities' statutory obligation is only limited to considering an application and it does not follow that they will also issue a formal decision, they would be expected to

[22] Merger Rule Guidelines, Paragraph 5.6.

[23] Merger Rule Guidelines, Paragraph 5.21.

adopt a decision in all cases where they decide to proceed to launch a public consultation in respect of an application under consideration.

Under the Competition Ordinance, a favourable decision in respect of an application provides an applicant with confirmation that a specific merger fulfils the conditions to qualify for the efficiency exclusion, affording immunity from enforcement. However, the very narrow scope of application of the procedure suggests that formal decisions from the Competition Authorities are likely to be few and far between.

Applications for exemptions on public policy grounds

The second formal procedure provided by the Ordinance does not involve the Competition Authorities. Under Section 9 of Schedule 7 to the Ordinance, parties may seek an order from the Chief Executive in Council that their transaction should be exempted from the prohibition under the Merger Rule on the basis that there are exceptional and compelling reasons of public policy. Reliance on this exemption is not automatic; parties are required to persuade the Chief Executive in Council to make a favourable order removing their obligation to comply with the Merger Rule. At the time of writing, the government has yet to publish any guidance on how the procedure would operate and the circumstances that would justify an exemption on public policy grounds.

Applications for confidential guidance

While the Competition Ordinance emphasises a self-assessment approach and provides very few avenues to obtain formal comfort from the authorities that their merger will not be challenged, the Merger Rule Guidelines give clear indication that parties consummate their transactions at their own risks, and that they are advised to engage with the Competition Authorities (in practice, the Communications Authority) to discuss proposed mergers at an early stage to understand whether they have any concerns.[24] However, the Competition Authorities' commitment to engage with transaction parties in respect of a proposed merger only extends to the provision of non-binding, informal advice on a confidential basis. There is no strict timetable applicable to this process. This procedure may have limited appeal for transaction parties as a result.

Possible outcomes and other possible procedures

The Merger Rule Guidelines contemplate the following outcomes in respect of applications for confidential guidance: (1) a positive confidential decision; (2) the opening of a formal investigation leading to a possible court challenge; (3) commitments discussions; or (4) a formal application for a decision that the merger benefits from a cause for exclusion. In practice, there may be room for the Competition Authorities to develop other approaches and procedures that offer more legal comfort to merging parties. For example, the Competition Authorities may well take steps to gather information from third parties about the transaction, on the model of the initial assessment phase described in Paragraphs 3.1 to 3.8 of the Guideline on Investigations, leading to the issuance of a public decision not to challenge the transaction without the need to formally open an investigation. Such a decision would be adopted on a more informed basis, thereby providing increased comfort to the merging parties.

Other Strategic Considerations

Hong Kong's merger control regime remains confined to a narrow category of transactions (i.e., those where one of the parties holds a telecommunications carrier licence).

However, there are now well over 100 jurisdictions globally with merger control, and transactions involving Hong Kong-based parties may require multiple filings in overseas jurisdictions.

In Asia, this includes established regimes such as mainland China (where filings are required if the parties' combined turnover exceeds 10 billion yuan globally or 2 billion yuan in China (excluding turnover derived in Hong Kong, Macau or Taiwan), and two or more parties have turnover in China exceeding 400 million yuan) and new and increasingly active regimes in South East Asia, such as Thailand, Vietnam and the Philippines. It is therefore vital for all businesses, including those based in Hong Kong, to take a global view of merger control and assess the potential for filings at an early stage in the transaction.

Because of the limited focus of merger control in Hong Kong, there is limited precedent on specific issues that can arise elsewhere (e.g., financial distress or the failing firm defence).

[24] Merger Rule Guidelines, Paragraphs 5.2, 5.3 and 5.6.

Outlook and Conclusions

While the merger control regime remains relatively new and some procedural uncertainty continues to linger, particularly for parties wishing to obtain formal legal comfort from the Competition Authorities, it builds upon an established decisional practice developed under the previous regime. As a result, merging parties with activities in the telecommunications sector do not face a significantly different regulatory framework.

The legal framework established by the Competition Ordinance has clearly been designed to serve as a blueprint for a merger regime of wider application. Senior Competition Commission officials are on the record as saying they will support the extension of the Merger Rule. However, it remains to be seen whether the Merger Rule will be extended to other sectors of Hong Kong's economy. It will ultimately fall to the Legislative Council to approve any changes to the Competition Ordinance.

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