1

Introduction

1.1 HISTORICAL BACKGROUND

About eight years after the passage of the Competition Ordinance[1] (the Ordinance) and five years after it came into effect, it is easy to forget how remarkable the journey has been for the adoption of competition law in Hong Kong. Since the early 1990s, when the Consumer Council, a quasi-governmental consumer protection body, began advocating a competition law in Hong Kong, the Hong Kong government had strenuously resisted calls for competition legislation on the ground that the city's economy was already highly competitive due to its openness to external trade. The lack of trade barriers meant that any firm could enter the city's markets easily and discipline existing market players. The ease of market entry would keep the exercise of market power to a minimum. The fallacy of this argument is easy to see. While the lack of trade barriers may allow competition in the markets for tradeable goods, it has no bearing on the degree of competition for non-tradeable services. Openness to trade would not save the domestic market from a monopolistic retailer, for example. As it turns out, non-tradeable services are exactly where the competition problems in the Hong Kong economy lie. The flaws of this argument, however, have not deterred the Hong Kong government from using it to oppose the adoption of competition law, both domestically and in international fora. When the World Trade Organization (WTO) was deliberating on the inclusion of competition law within its ambit under what were known as the 'Singapore issues', the Hong Kong government was vehemently opposed to it.[2] The Singapore issues were eventually dropped from the WTO agenda, but the domestic debate on competition law continued.

By the early 2000s, the Hong Kong government's attitude began to shift from outright opposition to acquiescence of a sectoral approach. The first competition

[1] Competition Ordinance (Cap 619) (Ordinance).
[2] International Centre for Trade and Sustainable Development and International Institute for Sustainable Development, 'The Singapore Issues' (Doha Round Briefing Series, February 2003) 3 www.iisd.org/system/files/publications/wto_doha_singapore_issues.pdf accessed 17 July 2020.

law provisions in Hong Kong were enacted in the Telecommunications Ordinance[3] (the TO) and the Broadcasting Ordinance[4] (the BO). Section 7K of the TO and Section 13 of the BO prohibited restrictive agreements and conduct in general. Section 7L of the TO and Section 14 of the BO forbade abuse of dominance. The government did not offer any justification for singling out the telecom and broadcasting sectors for competition regulation. No study was undertaken to show that these two sectors were particularly un-competitive or prone to competition problems. By 2000, the fixed-line telephony sector in Hong Kong had been fully liberalised and competition was keen. The mobile telephony sector was similarly competitive. One explanation for the competition provisions in the TO was that they were essentially codifications of the competition-related licensing conditions in the telecom licences. The Hong Kong government began to incorporate competition-related licensing conditions in the telecom licences starting in the mid-1990s. The competition provisions in the TO were the next logical step in this development. The television broadcasting sector in around 2000 was admittedly highly uncompetitive, having been dominated by the incumbent free-to-air television broadcaster, Television Broadcasting Ltd (TVB), for decades and was probably in need of competition regulation.

What was more peculiar about this sectoral approach to competition law was that the provisions in the TO and the BO differed. While they imposed a similar prohibition of anti-competitive conduct, the differences in the precise statutory language could be understood to mean that different approaches were needed for different sectors. If that was indeed the case, the government never offered any justification or explanation for it. A few years later, the government introduced Section 7P to the TO, which regulated mergers. Again, there seemed to be no obvious reason for singling out the telecom sector for merger regulation. The sector had not been particularly active in terms of merger activities (though it has subsequently seen quite a few mergers). There was also no reason to believe that mergers that might arise in the sector would be more prone to anti-competitive effects. No explanations were offered for why merger regulation was not introduced in the broadcasting sector.

The haphazard nature of the sectoral approach was further underscored by the different mechanisms put in place for appeal of the regulator's decision. A special appeal board was set up under the TO for appeal of the regulator's decisions under the competition provisions. Appeal of the Broadcasting Authority's decisions under Sections 13 and 14 would be heard by the Chief Executive in Council, which is an executive – not a judicial – body. It was this unusual appeal mechanism that would sow the seed of the regulator's downfall in its abuse of dominance case against TVB, when the Court of First Instance quashed the Broadcasting Authority's decision on

[3] Telecommunications Ordinance (Cap 106) (the TO).
[4] Broadcasting Ordinance (Cap 562) (the BO).

the ground that the lack of recourse to a judicial appeal mechanism was unconstitutional.

The fortune for competition law in Hong Kong took a positive turn with the first post-handover change of administration. For reasons that remain unclear to this day, Donald Tsang, who was campaigning in 2005 to replace Tung Chee-Hwa, the first Chief Executive of the city, incorporated the introduction of a cross-sector competition law as part of his platform. One possible explanation is that there was a common public perception that Tung was too close to the business community and Tsang wanted to distinguish himself from Tung by appearing to stand with the people. Competition law was rightly or wrongly seen as a populist policy that would help to rein in business interests. Be that as it may, after assuming the Chief Executive position, Tsang did not renege on his promise and began to set in motion the long and arduous process for the eventual adoption of the Ordinance.

The government began a two-stage consultation process on the adoption of competition law in Hong Kong in November 2006 by issuing a consultation document titled 'Promoting Competition – Maintaining our Economic Drive'.[5] Through the consultation exercise, the government attempted to canvass public opinion on whether Hong Kong should adopt a competition law. The document posed a range of questions on the implementation of competition law, including whether it should be a cross-sector law or a sector-specific law, the scope of behaviour to be covered by the law, the approach to determining illegality, the scope of any exclusions or exemptions, the appropriate enforcement model, the appropriate penalties, and the scope of private rights of action.

A year and a half later, in May 2008, the government issued its detailed proposal for the law.[6] A comparison between this initial proposal and the eventual ordinance reveals significant discrepancies. The original legislative proposal evolved to allow the government to win support from the business community. The government originally proposed an administrative enforcement model along the lines of the European Union (the EU). The proposed Competition Commission (the Commission) would have the power to investigate, to find infringements, and to impose remedies.[7] A court known as the Competition Tribunal (the Tribunal) would be set up to review the Commission's decisions.[8] The government proposed both follow-on and stand-alone private rights of action.[9] The proposal also included a slew of exclusions and exemptions such as a general economic efficiency exclusion and an exclusion for undertakings entrusted with providing services of general economic interest, both of which should be familiar to EU practitioners; a general

5 Economic Development and Labour Bureau, Hong Kong Government, *Promoting Competition – Maintaining our Economic Drive* (November 2006) (2006 Consultation Paper).

6 Commerce and Economic Development Bureau, Hong Kong Government, *Detailed Proposals for a Competition Law – A Public Consultation Paper* (May 2008) (2008 Consultation Paper).

7 ibid ch II [14].

8 ibid ch II [19].

9 ibid ch IV [5].

exclusion for statutory bodies, which are corporate or non-corporate bodies established by legislation that occasionally engage in economic activities, and a public policy exclusion.[10]

Two aspects of the legislation that were set from the very beginning are the civil nature of the penalties and the lack of a cross-sector merger control regime. It is probably sensible for a new competition law regime to eschew criminalisation. Applying criminal sanctions would impose a heavy burden on the Commission and create needless complications. Limiting the merger control regime to the telecom sector, however, would perpetuate the indefensible sectoral approach to competition law espoused by the government. The only explanation for this bizarre feature of the eventual legislation was that for some reason, the business community was particularly opposed to merger control. It was seen as a greater intrusion on commercial freedom than other parts of competition law. Rumour has it that the business community drew its bottom line at merger control.

What ensued was a two-year drafting process for the Competition Bill (the Bill), which was eventually gazetted in July 2010.[11] The drafting process was delayed when the Hong Kong Court of Final Appeal handed down the *Koon Wing Yee* decision, which effectively held that procedural safeguards of a criminal standard must be provided in proceedings in which sanctions of a punitive nature would be imposed.[12] Even though the case involved an insider dealing offence for individuals, as opposed to monetary sanctions for corporate entities, it was thought that the decision effectively foreclosed the possibility of an administrative enforcement model in Hong Kong. The government had to revise the Bill to incorporate a judicial enforcement model, which resulted in some delay. Apart from the choice of enforcement model, much of the Bill by and large followed the proposal in 2008. With the Bill gazetted, the legislative battle between the business community and supporters of the legislation began in earnest.

The legislature in Hong Kong, the Legislative Council, was generally divided into two camps, the so-called pan-democratic camp and the pro-establishment camp. As its name suggests, the pro-establishment camp was pro-government and consisted of many establishment figures, including prominent members of the business community. The pan-democratic camp consisted of legislators who advocated for greater democracy and autonomy for Hong Kong, which on multiple occasions set them on a collision course with the government. The roles were reversed, however, with the Bill. Because of the perception that competition law is pro-consumer, the pan-democratic legislators were supportive of the Bill from the start. In fact, some of them had been pushing the government to adopt a cross-sector competition law for years. The pro-establishment legislators, in contrast, were not willing to toe the government line. Many legislators with a business background were sceptical of

[10] ibid ch VII.
[11] Hong Kong Competition Bill (2010).
[12] *Koon Wing Yee v Insider Dealing Tribunal* [2008] 3 HKLRD 372.

competition law. Due to the city's famously laissez-faire environment, the business community in Hong Kong was unaccustomed to economic regulation. Thus, the business community was vociferous in their opposition to the Bill.

The opposition was mainly along the unsurprising lines of compliance costs and regulatory uncertainty. What was more surprising was that the ostensible source of public opposition was mainly the small- and medium-sized enterprises (SMEs). The trade associations that publicly opposed the Bill claimed to represent SMEs. This puzzled many local and foreign commentators and scholars, who were visiting Hong Kong during that time and had been interviewed by the local media for their views on competition law in Hong Kong. While competition law treats businesses equally and does not favour SMEs over big businesses, the reality is that apart from the hardcore cartel offences, SMEs are highly unlikely to run afoul of competition law. The abuse of dominance provisions require substantial market power, which an SME would not generally possess unless it is operating in an extremely small market. Vertical restraints, with the possible exception of resale price maintenance (RPM), generally do not pose competitive concerns absent market power either. Regulatory uncertainty and inadvertent infringement of the law should not arise with respect to cartel offences; no one, including SMEs, unknowingly stumbles into a cartel. Therefore, the concern incessantly raised by the SME community about regulatory uncertainty seemed rather difficult to comprehend. A number of explanations were offered at the time for this somewhat bizarre state of affairs. One explanation was that SMEs genuinely failed to appreciate the technical intricacies of competition law and feared that competition law would become another weapon in the arsenal of the big businesses to harass them. A more sinister explanation was that the big businesses were merely using these so-called SME trade associations as fronts to oppose the law, knowing that opposition coming directly from them would attract little public sympathy.

On the other side of the legislative debate were supporters of the Bill, the most high profile of which was probably the Consumer Council. The Consumer Council set up a working group on the Bill and actively engaged with the media. It organised seminars to introduce competition law to SMEs. It held press conferences to clarify key concepts and to correct misunderstandings of competition law held by the media and the general public. Given the Consumer Council's long-standing role as a voice for consumers, the government highly valued the Council's support for the Bill and worked closely with the Council to help drum up support for it.

One example of the Council's influence on the legislative process was the reformulation of the economic efficiency exclusion from the First Conduct Rule (FCR) (which regulates restrictive agreements) contained in Schedule 1 of the Bill and the eventual Ordinance. This exclusion was modelled after Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). The language of the exclusion in the eventual Ordinance is almost identical to that of Article 101(3)

Cambridge University Press & Assessment
978-1-108-44812-3 — Hong Kong Competition Law
Thomas K. Cheng, Kelvin Hiu Fai Kwok
Excerpt
More Information

TFEU.[13] The exclusion was drafted differently, however, in the Bill. There are four cumulative conditions for Article 101(3) to apply, one of which is that consumers obtain a fair share of the benefits of the efficiency gains. This condition was omitted in the Bill for reasons that are not entirely clear. Therefore, as formulated in the Bill, the general economic efficiency exclusion adopted a total welfare standard whereby technical or economic progress which can only be achieved through certain restriction of competition and which does not risk eliminating competition in a substantial part of the market will be upheld. Consumers need not receive any benefit from the progress at all. The Consumer Council opposed this formulation of the exclusion and urged the government to align it with the language of Article 101(3). The government eventually accepted the Consumer Council's proposal and re-incorporated the consumer benefit condition into the exclusion.

As the battle between supporters and opponents of the Bill raged on, the government was convinced that the Bill would not garner sufficient votes to pass in the Legislative Council without some concessions to appease the business community and to address the risks of inadvertent infringement and vexatious lawsuits feared by the SMEs. In October 2011, the government presented a number of amendments to the Bill to the Legislative Council.[14] The government identified six major concerns about the Bill: (1) the general nature of the prohibition in the FCR and the Second Conduct Rule (SCR), which are the counterparts of Articles 101 and 102 TFEU respectively in the Ordinance, made it difficult for SMEs to comply with; (2) the payment requirement under an infringement notice placed a significant burden on SMEs; (3) the thresholds for the de minimis exceptions should be set out in the law to improve clarity; (4) the pecuniary penalty cap of 10 percent of global turnover was too severe; (5) stand-alone private action might be abused to harass SMEs; and (6) the potential application of the FCR and the SCR to mergers would frustrate the government's avowed goal of limiting merger review to the telecom sector.[15]

Even though the government justified the need for concessions on SME grounds, it is obvious that not all of these six areas of concerns were related to SMEs. SMEs are highly unlikely to have substantial overseas operations and thus their domestic turnover should be generally the same as their global turnover. The government's proposed amendment to address the severity of the penalty cap, which was to replace global turnover with local turnover, could hardly be viewed as a concession to SMEs. SMEs are also likely to be much less concerned about merger review as whatever transaction that may take place between them would likely fall below any plausible notification threshold. In any case, the invocation of the FCR and the SCR

[13] Ordinance, sch 1 s 1.
[14] Commerce and Economic Development Bureau, Hong Kong Government, *Bills Committee on Competition Bill: Responses to Concerns on the Competition Bill* (CB(1)91/11–12(01), October 2011) (Responses to Concerns on the Competition Bill).
[15] ibid 1.

in merger situations would predicate on market power, which SMEs lack. Overseas experiences suggest that vexatious lawsuits against SMEs are rare. If anything, the elimination of stand-alone private action is more likely than not to frustrate SMEs' efforts to seek redress for the anti-competitive conduct by big businesses. The concessions offered by the government perhaps suggest that SMEs were not the genuine source of concerns about competition law within the business community. Even though SMEs' concerns were voiced in the public, what was conveyed to the government behind the scenes could have gone significantly beyond that.

Having identified these six main areas of concerns, the government proceeded to offer what was commonly referred to as the 'six concessions' to the business community. First, to address the open-ended nature of competition law prohibitions, particularly in the FCR, the government proposed a warning notice mechanism.[16] Under this mechanism, save for the four types of conduct that were subsequently designated in the Ordinance as 'serious anti-competitive conduct', namely price fixing, market allocation, output restriction, and bid-rigging,[17] contraventions of the FCR would only result in a warning notice in which the undertaking concerned is warned to cease the conduct.[18] It is only when the undertaking refuses to do so that the Commission may bring an infringement action.[19] Second, the possibility of imposing a penalty of up to HK$10 million as part of an infringement notice was removed.[20] Third, the government agreed to specify the turnover thresholds for the de minimis exceptions in the Ordinance (applicable to the FCR and SCR respectively). The government had originally proposed HK$100 million as the turnover threshold for the de minimis exception under the FCR and HK$11 million under the SCR,[21] but these were subsequently raised to HK$200 million and HK$40 million in the eventual Ordinance.[22]

Fourth, the government changed the pecuniary penalty cap from 10 percent of global turnover to 10 percent of local turnover.[23] The formulation is different from that under EU law. The originally proposed cap applied not to one single year, but to every year of contravention. Therefore, if a cartel lasts for five years, an undertaking could be fined for up to 10 percent of its local turnover in each one of those five years. Therefore, as originally proposed, the cap in the Ordinance could be effectively higher than that under EU law. The government thus proposed to limit the number of years for which a fine can be imposed to three. For a cartel that lasts for five years, for example, the fine could be up to 10 percent of the local turnover of the undertaking in the three years with the highest turnover.[24] Fifth, the stand-alone

16 ibid 3–4.
17 ibid 3.
18 ibid 3–4.
19 ibid 4.
20 ibid 5.
21 ibid 6–7.
22 Ordinance, sch 1 s 5.
23 Responses to Concerns on the Competition Bill (n 14) 8.
24 ibid.

Cambridge University Press & Assessment
978-1-108-44812-3 — Hong Kong Competition Law
Thomas K. Cheng, Kelvin Hiu Fai Kwok
Excerpt
More Information

private right of action was eliminated.[25] Finally, a provision that explicitly excludes the application of the FCR and the SCR to mergers was incorporated.[26] The government, however, was careful to clarify that the two conduct rules would continue to apply to the merged undertaking post-merger.[27] This means that if the merged undertaking engages in excessive pricing post merger as a result of the accretion of market power through the merger, the exclusion from the two conduct rules would not itself stop the Commission from pursuing the merged undertaking.

Of the six concessions, the most consequential one was probably the introduction of the warning notice mechanism. This mechanism could effectively take away any incentive on the part of the Commission to investigate non-cartel restrictive agreements under the FCR. It is difficult to imagine any enforcement authority willing to invest the time and resources to investigate a case that would only result in a warning. The elimination of the stand-alone private right of action could be very important as well, especially if the Commission is not adequately funded and regularly turns down meritorious cases on resource grounds. It is, however, important not to overstate the significance of this change given the difficulty that many jurisdictions have faced in encouraging stand-alone private action. With the lack of precedents and prohibitively high legal fees in Hong Kong, it is entirely possible that a stand-alone private right of action would rarely be invoked anyway. The removal of a possible pecuniary penalty under the infringement notice may not matter much as the Commission can instead bring an action at the Tribunal to seek fines. The adjustment of the penalty cap did result in a substantial change in the size of the maximum fine. One wonders, however, whether the Tribunal would take full advantage of the generous cap of global turnover under the previous formulation given the lack of a history of imposing significant regulatory penalties by the local judiciary. The remaining two concessions amounted to clarifications of the government's intent and did not result in any material change.

With the offer of the six concessions, the general sense was that the local business community was finally willing to accept the Bill. The government was particularly anxious to complete the legislative process in light of the impending election of the Legislative Council in September 2012. Failure to pass the Bill during the legislative session of 2011–2012 would require the government to restart the entire process in the newly elected Legislative Council. This would have resulted in substantial delay. Moreover, it was not clear if the next Chief Executive to succeed Donald Tsang would show the same support for competition law. The Ordinance was finally passed on 14 June 2012 as one of the final pieces of legislation to be adopted by the Legislative Council before it was disbanded.

The wait for an effective competition law regime did not end with the passage of the Ordinance. The government waited for almost a year to appoint the first batch of

25 ibid 8–9.
26 ibid 9–10.
27 ibid.

members of the Commission. The Commission was not officially convened until May 2013. One of the first tasks for the Commission was the promulgation of guidelines. During the legislative debate, legislators raised significant concerns about the open-ended nature of the FCR and the SCR. To assuage these concerns, the government inserted a statutory requirement for the Commission to promulgate a number of guidelines, including guidelines for the FCR and the SCR.[28] Therefore, the Commission faced the slightly awkward situation of having to produce guidelines before it acquired any enforcement experience. As a further concession to the business community, the government promised a long grace period of more than two years for the local businesses to adapt to the new Ordinance. The Ordinance finally came into effect on 14 December 2015, potentially portending a new era of economic governance in the city's history.

1.2 OVERVIEW OF THE ORDINANCE

1.2.1 *Objectives of the Ordinance*

Unlike competition legislation in some jurisdictions, the Ordinance does not contain an objective section. It can be said that the Ordinance is silent on the objective(s) it seeks to achieve. It is well understood that the policy objective of competition legislation can make a material difference in its interpretation and implementation. A particular business practice may be permissible when consumer welfare is ascribed as the policy objective, but illegal when fairness is deemed to be the goal of the law. The conventional wisdom is that the policy objective of competition law is to protect consumer welfare and/or perhaps to pursue economic efficiency.[29] In recent years, some commentators have argued that the objective of competition law should be more broadly conceived to include consumer choice, control of economic concentration and bigness, fairness, or other non-efficiency goals.

Even though the Ordinance is silent on its policy objective, the Hong Kong government has over the years given a consistent articulation of the rationale of its competition policy. In its 2006 consultation document, the government asserted that the ultimate objective of its competition policy was to promote economic efficiency and optimal allocation of resources.[30] The document acknowledged the existence of other possible objectives of competition law, including promotion of trade, industrial policy, and consumer protection (which presumably refers to protection of consumer welfare).[31] Tellingly, the document asserted that 'where there were conflicting objectives, the final judgment on how to proceed would be made on

[28] Ordinance, s 35.
[29] See Robert Bork, *Antitrust Paradox: A Policy at War with Itself* (The Free Press 1978).
[30] 2006 Consultation Paper (n 5) 5.
[31] ibid.

the basis of what was considered best for the economy as a whole'.[32] While the document does not spell out the metric to be used to determine what is best for the economy, the reference to 'the economy as a whole' would appear to suggest that the government favours a total welfare standard over a consumer welfare standard if economic welfare is chosen as the appropriate metric.

The 2008 consultation document muddied the waters by seemingly amalgamating the twin objectives of economic efficiencies and protection of consumer welfare. It stated that '[t]he objective of the Competition Ordinance should be to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition'.[33] Although the government did not explicitly adopt the term 'consumer welfare', 'the benefit of consumers' can be plausibly understood as referring to consumer welfare, perhaps more broadly to encompass consumer choice as well. It is important, however, to note that the above-mentioned formulation seems to suggest a hierarchy between these two amalgamated objectives. The primary objective of competition law is to promote economic efficiency; the enhancement of consumer welfare is only a secondary or derivative objective.

Finally, in the brief attached to the Bill that was presented to the Legislative Council in 2010, the government asserted that the main objectives of its competition policy were 'to enhance economic efficiency and the free flow of trade through promoting sustainable competition to bring benefits to both the business sector and consumers'.[34] Again, the primary focus was the promotion of economic efficiency. The reference to both the business sector and the consumers harkened back to the 2006 consultation document and seemed to espouse a total welfare standard.

Overall, the government seems to have consistently ascribed economic efficiency as the main objective of the Ordinance. Some doubts remain as to whether it prefers a total welfare or a consumer welfare standard. The choice of welfare standard would be the most pertinent in the case of a business practice or merger that harms competition but creates efficiency gains that may or may not benefit consumers. If the consumer welfare standard is chosen, the efficiency gains must benefit consumers in order to be credited. No such requirement exists if the total welfare standard is chosen. The Ordinance displays some inconsistencies in its approach. It seems to have opted for a total welfare standard for mergers. Section 8 of Schedule 7 states that a merger will not be prohibited 'if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition'.[35] There is no explicit requirement that the efficiencies be passed on to consumers (although the provision does not preclude judicial imputation of such

32 ibid.
33 2008 Consultation Paper (n 6) 4.
34 Commerce and Economic Development Bureau, Hong Kong Government, *Legislative Council Brief: Competition Bill* (CITB CR 05/62/43, July 2010) 1.
35 Ordinance, sch 7 s 8.