

HONG KONG COMPETITION LAW

This is the first academic monograph on the new competition law in Hong Kong. It provides an overview of the historical background of the Competition Ordinance, highlighting the debate and the process that led to the adoption of the Ordinance. It offers detailed comparative and theoretical analysis of the key provisions of the Ordinance, focusing on the First Conduct Rule, the Second Conduct Rule, the exclusions and exemptions, and the procedural provisions. It draws on overseas legislation and jurisprudence that inspired the provisions in the Ordinance and incorporates a detailed examination of the latest cases decided by the Competition Tribunal. It engages in relevant academic debates and theoretical analysis of how competition law in Hong Kong should develop in light of its unique economic and political contexts. It concludes by setting forth of a set of recommendations for further reform

Thomas K. Cheng is an associate professor at the University of Hong Kong. His research has appeared in respected US journals including *Chicago Journal of International Law*, *Virginia Law and Business Review*, and the *University of Pennsylvania Journal of Business Law*. He has made critical contributions to the development of competition law in Hong Kong. He advised the government extensively during the drafting of the city's first competition law. He was a member of the inaugural Competition Commission.

Kelvin Hiu Kwok is an associate professor at the University of Hong Kong. His research has appeared in international peer-review journals including *European Law Review*, *Common Law World Review*, *Journal of Competition Law & Economics*, *Journal of Antitrust Enforcement*, *World Competition*, and *European Business Organization Law Review*. He has been active in knowledge exchange in competition law through his media appearances and serving as a Non-Governmental Advisor to the International Competition Network and as a Co-opted Member of the Consumer Council. He is also a practicing Hong Kong barrister with considerable experience advising on competition law issues.

Hong Kong Competition Law

COMPARATIVE AND THEORETICAL PERSPECTIVES

THOMAS K. CHENG AND KELVIN HIU FAI KWOK

The University of Hong Kong



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Preface

This book is the first academic monograph that engages in a thorough critique of Hong Kong's new competition law – the Competition Ordinance (Cap 619) – from comparative and theoretical perspectives. Our focus is not to restate legal principles, but rather reflect critically upon the relevant legal and policy developments leading up to, and since the inception of, the Ordinance, as well as suggest how competition law and policy in Hong Kong could have developed in different directions. Our analysis and conclusions are informed by latest developments not only in EU and US law, but also that in Commonwealth jurisdictions such as the United Kingdom, Australia, and Singapore, given their similarities with Hong Kong in terms of statutory framework and concepts. This book is, however, not simply an in-depth comparative study of Hong Kong competition law. Instead, it seeks to combine comparative insights with theoretical explorations of the economic and philosophical underpinnings of competition law concepts found in the Ordinance and the Competition Commission guidelines. We hope that our academic study will have a concrete impact on the future development of Hong Kong competition law and policy, whether by way of legislative reforms, judicial interpretations, or regulatory initiatives. We also hope that academics, students, and practitioners will find this book useful in furthering their understanding of the intricacies and peculiarities of the Hong Kong competition regime.

Our analysis of the history and background of the Ordinance (Chapter 1), the two conduct rules (Chapters 2 and 3), the exclusion and exemption provisions (Chapter 4), and the procedural aspects (Chapter 5) lead us to the conclusion (Chapter 6) that the Hong Kong competition regime has been off to the satisfactory start in terms of enforcement activity and advocacy work. There are, however, certain areas that raise deep concerns about the effectiveness of the regime. For example, the approach adopted by the Competition Tribunal in *Nutanix*, the very first case litigated by the Commission, to standard of proof and employee attribution may result in significant impediments to the Commission's future enforcement action. Some other areas of concern are even more entrenched and would require statutory reform, such as the

exclusion of statutory bodies, the limitation of merger review to the telecom sector, and the warning notice requirement. Our critique in these areas seeks to contribute to ongoing academic and policy debates on improvements that can be made to the current regime.

We are most grateful to Cambridge University Press for the opportunity to revise the manuscript after its initial submission to account for major Hong Kong developments in competition law – most notably the Tribunal’s first penalty decision and the Commission’s revised leniency policy – up till July 2020. We are well aware, however, that competition law continues to develop at a rapid pace both locally and abroad. A full analysis of latest Hong Kong and overseas developments will have to await the next edition of this work.

Thomas K. Cheng

Associate Professor of Law, The University of Hong Kong

Kelvin Hiu Fai Kwok

Associate Professor of Law, The University of Hong Kong; Barrister, Hong Kong

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In writing this monograph we have drawn on, but also substantially expanded upon, our previous works on competition law, including: Thomas Cheng, ‘Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies’ (2010) 33 *World Competition* 317; Kelvin Kwok, ‘The New Hong Kong Competition Law: Anomalies and Challenges’ (2014) 37 *World Competition* 541; Thomas Cheng, ‘Sherman vs Goliath: Tackling the Conglomerate Dominance Problem in Emerging and Small Economies—Hong Kong as a Case Study’ (2017) 37 *Northwestern Journal of International Law & Business* 35; Kelvin Kwok, ‘Antitrust Enforcement and State Restraints at the Mainland China-Hong Kong Interface: The Importance of Bilateral Antitrust Co-operation’ (2017) 12 *Asian Journal of Comparative Law* 335; Kelvin Kwok, ‘Re-conceptualizing “Object” Analysis under Article 101 TFEU: Theoretical and Comparative Perspectives’ (2018) 14 *Journal of Competition Law & Economics* 467; Kelvin Kwok, ‘The Concept of “Agreement” under Article 101 TFEU: A Question of EU Treaty Interpretation’ (2019) 44 *European Law Review* 196; Kelvin Kwok, ‘Object and Intention under Article 101 TFEU: Lessons from Australia, New Zealand and Analytical Jurisprudence’ (2019) 48 *Common Law World Review* 114; Kelvin Kwok and Thomas Cheng, ‘Procedural Fairness in Hong Kong Competition Law’ in Daniel Sokol and Andrew Guzman (eds.),

Antitrust Procedural Fairness (Oxford University Press 2019); Kelvin Kwok, “Hub-and-spoke” Bid-rigging and Corporate Attribution under Hong Kong Competition Law’ (2020) 8 Journal of Antitrust Enforcement 223. We thank the relevant copyright holders for their kind permission to re-use copyright material in this book.

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Kelvin Kwok dedicates this book to his wife, Annette.

Foreword

For any system of competition law, the arrival of a work as well written as the present is bound to be beneficial. To Hong Kong's competition law which is in its infancy, the publication of an in-depth analysis by two of its foremost academics in the subject is without doubt a most welcome and significant contribution. We are fortunate in that they do not only research and teach competition law, but Thomas Cheng was also a member of the Hong Kong Competition Commission during its first five years of existence, and Kelvin Kwok is also a practising barrister, giving this book the combined benefit of their regulatory and practical insights. The book meticulously narrates the legislative history of the Competition Ordinance, scrutinises its detailed provisions in comparison with overseas models, and subjects the few decisions made thus far by the Court of First Instance and the Competition Tribunal to detailed, stimulating (and, for me, humbling) critique. There is a wholesome amount of conceptual and theoretical analysis drawing on a wide range of cases and writings as well as a good deal of comparative studies, especially in relation to the conduct rules, which are both scholarly and refreshing.

Although the Ordinance only fully came into effect in December 2015, an early review of its operation has already been anticipated. In that context the discussion of the scope for legislative development in this book will particularly be of direct relevance, such as on the question of standard of proof, stand-alone private action, the reach of the merger rule, the mechanism of warning notice, and exclusions for statutory bodies. All this will provide much future food for thought.

I am sure that this work will prove valuable to every student, researcher and practitioner of Hong Kong competition law.

Godfrey Lam
President of the Competition Tribunal, Hong Kong, 2013–2021

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