

I Introduction

The existence of a conglomerate does not create any competition issues unless it distorts the market competition through unilateral conducts or multilateral agreements. Anti-competitive conducts can be in different forms, meaning laws and policies must be flexible to suit a changing market condition. Tools of the Competition Commission in Hong Kong (HKCC) can be organized into three categories, namely legal basis, investigation power, and enforcement power. Both tools were designed with reference to the United States (US) and European Union (EU), which put less emphasis on conglomerates until the threat of digital conglomerates, such as Apple and Google, becomes serious. Changes are needed for the competition regime in Hong Kong to rectify conglomerates' anti-competitive conducts, but they should be localized and customized for Hong Kong given the difference in culture and economic structure. This article is divided into four sections. After the introduction, it outlines the available tools of the HKCC in tackling the anti-competitive behavior of conglomerates and briefly discusses the need for change. Section III focuses on a discussion about potential changes to the competition regime, followed by a conclusion.

II Available tools for HKCC

The HKCC relies on three major legal bases to take investigation and enforcement. Legal bases refer to merger regulation and market behavior regulation which mainly concerns the First Conduct Rule (FCR) and the Second Conduct Rule (SCR).

Merger Regulation

Merger regulation prevents anti-competitive behavior by controlling the merger and acquisition of undertakings, but it has limited use in Hong Kong. Hong Kong is a small open economy, merely holding monopoly power may be beneficial to the economy as a whole because of its international competitiveness. The Merger Rule stops a merger that will

substantially lessen competition in Hong Kong, but it only covers the telecom sector.¹ The FCR and the SCR also do not apply to any agreement that would result in a merger.² Extending the coverage of the Merger Rule to other sectors may maintain a local market structure with an optimal degree of competition, but it is unlikely a desirable measure for Hong Kong now.³ Therefore, changes to merger regulation have a lower priority.

First Conduct Rule

The FCR regulates multilateral behaviors between undertakings, but its use against conglomerates is restricted. If the object or effect of any anti-competitive agreement, concerted practice, and associations' decision is harming the competition in Hong Kong, such as price-fixing and market sharing, it is prohibited.⁴ However, undertakings within a conglomerate normally are classified under a "single economic unit" that is exempted from the FCR.⁵ Consequently, the FCR can only use against a conglomerate when it has an anti-competitive horizontal or vertical agreement with another "economic unit". Although the "single economic unit" may be interpreted strictly to utilize the FCR, the SCR provides an alternative to regulate unilateral anti-competitive conducts of an undertaking, changes related to the FCR are unnecessary.

Second Conduct Rule

The SCR regulates unilateral conducts of undertakings, which is the major legal basis against conglomerates' anti-competitive behavior. Under the SCR, undertakings are prohibited from abusing their substantial market power in a market to harm the competition in Hong Kong.⁶

¹ Competition Ordinance (Cap 619), Sch 7, ss 3 and 4.

² Competition Ordinance (Cap 619), Sch 1, s 4.

³ Regulating the market structure instead of anti-competitive act to promote competition may contradicts the concept of Open Market in Hong Kong. Conglomerates in Hong Kong often also have business overseas or in Mainland China, controlling their business size and internal operation may pose an adverse effect to their competitiveness in the international market, and reduce the overall economic efficiency of Hong Kong.

⁴ Competition Ordinance (Cap 619), Sch 7, s 6.

⁵ If a parent exercises a decisive influence, through legal or de facto control, over the commercial policy of its subsidiary, the HKCC treats them as a single economic unit and part of the same undertaking. *See* Competition Commission *Guidelines on The First Conduct Rule* Competition Commission Hong Kong 2015

⁶ Competition Ordinance (Cap 619), Sch 1, s 21.

To determine the market power of an undertaking in a relevant market, factors such as market share, market concentration, and power to make pricing decisions are taken into account.⁷ HKCC defined a “relevant market” mainly by product and geography.⁸ Accordingly, if a conglomerate abuses its substantial market power to perform any exclusionary conduct like foreclosing a “relevant market” through tying and bundling, it violates the SCR.⁹ However, exploitative conducts including excessive pricing are not regulated.¹⁰

Furthermore, the “substantial market power” analysis restraints the utilization of the SCR against conglomerates. A substantial market power crystallizes where an undertaking does not face adequate competitive constraints in the relevant market.¹¹ Although HKCC leaves open the possibility of interpreting “relevant market”, there is no clear and specific interpretation in response to the situation of conglomerates. A conglomerate is normally made up of various and potentially unrelated businesses of different sizes. Some of the conglomerate’s businesses retain a superior bargaining position and leverage advantages of the whole conglomerate, such as resources and risk sharing, even though their market powers in “relevant markets” are not significant. In other words, conglomerate poses a structural competition problem in the market that falls off the radar. Therefore, the phrase “... substantial market power in a market must not abuse that power ...” has to be revisited.

Investigation Power

⁷ Ibid.

⁸ The HKCC also outline particular issues for markets with specific characteristics, and a non-exhaustive list of anti-competitive conducts regarding the abuse of dominance, *see Competition Commission Guidelines on The Second Conduct Rule* Competition Commission Hong Kong 2015.

⁹ For instance, a property developer may tie its subsidiary’s property management services to the sale of property, that potentially foreclosing the entry of other property management companies. *See Cheng, Thomas Sherman vs. Goliath?: Tackling the Conglomerate Dominance Problem in Emerging and Small Economies—Hong Kong as a Case Study.* (2017) 37 (1) *Northwestern Journal of International Law & Business* 35.

¹⁰ Kwok, Kelvin *The New Hong Kong Competition Law: Anomalies and Challenges* (2014) 37(4) *World Competition: Law and Economics Review* 541.

¹¹ For example, if an undertaking has an ability to profitably to charge prices higher than a competitive level, or restrict output or quality below a competitive level, it has substantial market power in the relevant market. *see Competition Commission Guidelines on The Second Conduct Rule* Competition Commission Hong Kong 2015.

The HKCC has different sources and powers of investigation. Complaints and queries from the public play an important role in allowing the HKCC to identify possible contraventions.¹² It might also conduct investigations based on its research or referrals by other statutory bodies or authorities.¹³ After the investigation started, it can apply for search warrants, require person for interviews and producing of documents and information, when it has a “reasonable cause to suspect a contravention”.¹⁴ Failing to comply with the HKCC’s investigation powers constitutes a criminal offense.¹⁵ Taking into account the number of conglomerates and the complexity of market analysis, the HKCC could consider strengthening the cooperation with other government bodies in conducting the studies and follow-up investigations.

Enforcement Power

The HKCC has various alternatives of enforcement before commencing a proceeding in the Hong Kong Competition Tribunal (Tribunal). When deciding the effective and appropriate remedies, the HKCC focuses on encouraging compliance with the Competition Ordinance and considers the severity of the anti-competitive conduct.¹⁶ If a person makes a commitment to the HKCC that he is stopping the anti-competitive behavior, the HKCC may stop investigating or bringing the proceeding.¹⁷ Warning notice provides an opportunity for a person to cease the anti-competitive behavior before proceedings when the HKCC reasonably believes the FCR (other than serious anti-competitive conduct) is contravened.¹⁸ For all other anti-competitive conducts, the HKCC can issue an infringement notice to that person instead

¹² Competition Commission *Guidelines on Complaints* Competition Commission Hong Kong 2015

¹³ Competition Commission *Guidelines on Investigations* Competition Commission Hong Kong 2015

¹⁴ Competition Ordinance (Cap 619), ss 39, 41, 42 and 48.

¹⁵ See Competition Ordinance (Cap 619), ss 52-55.

¹⁶ With the Compliance Focus, the HKCC adopts an approach mixed with education, engagement and enforcement. The enforcement function targets on clear anti-competitive conduct that harms competition and consumer and Hong Kong, with commencing proceeding in the Tribunal from time to time. “Severity Factors” are taken into account in determining the remedies for individual cases. See Competition Commission *Enforcement Policy* Competition Commission Hong Kong 2015

¹⁷ Competition Ordinance (Cap 619), s 60. A commitment can be made at the initial stage of investigation, but the HKCC may withdrawal its acceptance of the commitment if it is likely breached, see above n 13.

¹⁸ Competition Ordinance (Cap 619), s 82.

of bringing proceedings, provide an opportunity for him to comply with the requirements stated in the notice.¹⁹ Leniency agreement is less relevant to conglomerates because it currently focuses on cartels while the FCR has limited use against conglomerates.²⁰ Since the HKCC's enforcement of is "Compliance Focus", Commitments and Infringement Notice are likely to be used against conglomerate's anti-competitive behavior before commencing a proceeding in Tribunal. Tribunal can impose a pecuniary penalty up to 10% turnover of an undertaking in Hong Kong and make orders including disqualification order, but mere anti-competitive conduct does not result in a criminal offense.²¹ Accordingly, the HKCC's enforcement tools mainly impose behavioral and monetary remedies, instead of regulating the market structure.

The primary objective of competition law in Hong Kong is to promote competition and prohibit anti-competitive practices. The HKCC may need to consider structural remedies only if its enforcement tools are insufficient to regulate conglomerates' behavior.²² However, direct interventions to market structure contradict the philosophy of the free-market economy. Instead of considering structural remedies, the analysis of structural competition problems should be part of the investigation to identify conglomerates' anti-competitive acts followed by the HKCC's enforcement.

III Potential changes to the competition regime

¹⁹ Competition Ordinance (Cap 619), s 67.

²⁰ The HKCC designs Leniency Policies providing incentive for "whistle-blower" to provide information, and a Cooperation and Settlement Policy to incentivize undertaking to cooperate for investigation, but both are only used for cartel conduct. See the details also in Competition Commission *Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct* Competition Commission Hong Kong 2019; and Competition Commission *The Leniency Policy for Undertakings Engaged in Cartel Conduct* Competition Commission Hong Kong 2020

²¹ Competition Ordinance (Cap 619), ss 91-93, 101, and Sch 3.

²² An example of structural remedies is the order of divestment of assets. Besides, the EU has been considering to implement a new market investigation tool to address structural competition problems across markets, see European Commission, 'Public consultations – Impact Assessment for a possible New Competition Tool' (26 October 2020) < https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html > accessed 16 December 2020.

There are potential changes in legal bases, investigation power, and leniency agreement. The HKCC's enforcement tools are capable to regulate anti-competitive behavior flexibly and efficiently. It is a question of identifying conglomerates' anti-competitive conducts with proper legal grounds and investigation tools.

Legal Bases

Neither the FCR nor the SCR covers all unfair trade conducts that harm the competition, but drastic measures are not suitable for Hong Kong. Japan and Korea prohibit "unfair trade practice" covers most unfair vertical restraints and activities without requiring any evidence of substantive restraint of trade or a dominant position in the market.²³ Nonetheless, the measure adopted in Japan and Korea may overregulate the commercial activities of undertakings conflicting with the free market economy in Hong Kong.²⁴ Therefore, the prohibition of "unfair trade practice" may not be desirable legal grounds for the HKCC's enforcement currently.

The interpretation of "... substantial market power in a market must not abuse that power ..." needs to be altered or supplemented in accordance with the characteristics of conglomerates. Conglomerates often have diversified businesses in several different markets forming their own business ecosystems.²⁵ This implies the conventional definition of a conglomerate's market power in the "relevant market" understated its actual market power in that market.

²³ Hayashi, Shuya et al 'The Japanese competition law in its own way: a historical review of the AMA and its characteristics' in Uytsel, Steven *Research Handbook on Asian Competition Law*, Edward Elgar Pub 2020; and Choi, Yo 'The evolution of fair and free competition law in the Republic of Korea' in Uytsel, Steven *Research Handbook on Asian Competition Law*, Edward Elgar Pub 2020

²⁴ Some unfair trade practices against consumers, such as misleading omissions and aggressive commercial practices are prohibited in Hong Kong, while the enforcement power mainly resides with the Commissioner of Customs and Excise. Trade Descriptions Ordinance (Cap 362), ss 13D-13I and 14.

²⁵ A business ecosystem is made up of interdependent firms adopting common standards and providing goods and services to customers collectively. Palgrave Macmillan *The Palgrave Encyclopaedia of Strategic Management* [online] dated 24 June 2016, Business Ecosystem. The idea of business ecosystem, however, keeps evolving that could potentially include customers, competitors, distributors, suppliers, trade association, public bodies, etc,

Extensive studies by economists about structural problems or structural risks of market competition may be able to solve this problem, but it may result in ineffective law enforcement in Hong Kong. Hence, the idea of “substantial market power” should be replaced by “substantial restraint of competition” without the need of proving the market dominance of an undertaking when the SCR is used against conglomerates.²⁶ Although market studies are still required to show the competition itself has significantly lessened, the legal standard and complexity of investigation are lower than that of examining the power and impact of conglomerate’s ecosystem,²⁷ To minimize the distortion to Hong Kong’s economic freedom, such interpretation should be limited to conglomerates and the term “conglomerate” should be defined clearly in the ordinance.²⁸ It then provides legal grounds for the HKCC to design several Guidelines and Policies to investigate the anti-competitive behavior of typical conglomerates and those operating in new business models like the idea of the platform economy.

Exploitative abuse should also be prohibited under the SCR.²⁹ Anti-competitive conduct conglomerate should be regulated comprehensively to promote competition because of the unsuitability of structural remedies in Hong Kong. Therefore, exploitative conduct should also be prohibited by the SCR explicitly.

Investigation Tool

²⁶ In Japan, The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade does not require an establishment of monopoly power or a dominant position of an undertaking to constitute a private monopolisation infringement, it rather requires evidence of “substantial restraint of competition”. See an overview in Hayashi, Shuya et al ‘The Japanese competition law in its own way: a historical review of the AMA and its characteristics’ in Uytzel, Steven *Research Handbook on Asian Competition Law*, Edward Elgar Pub 2020

²⁷ “Substantial restraint of competition” means “establishing, maintaining, or strengthening the state in which a certain entrepreneur or group of entrepreneurs can control the market at will by being, to some extent, free to influence price, quality, quantity, and various other terms and conditions after competition has decreased”. *Tōhō Kabushiki-gaisha (Tōhō Co.) v KTC, Koto Saibansho Minji Hanreisha (Tokyo High Ct., Dec. 9, 1953)* 873.

²⁸ Note that the general exclusion of “lesser significance” will still be upheld to promote competition and fairness by allowing a conglomerate to expand the business into a new market. See Competition Ordinance (Cap 619), Sch 1, s 6.

²⁹ Exploitative abuse refers to undertakings’ unilateral conducts that distort the market competition by harming customers directly instead of excluding rivals, such as charging excessive price.

Although structural remedies might improper to solve the competition problem in Hong Kong, the examination of structural competition problems created by conglomerates is compulsory to identify the anti-competitive practices to be rectified. While it is arguably the definition of “single economic unit” in the FCR can be reused in mapping out the core of a business ecosystem, the market power of a conglomerate must be measured on a case by case basis.³⁰ The HKCC can conduct “market studies into matters affecting competition in markets in Hong Kong”, so it already has the statutory power to study the structural competition problem.³¹ Nevertheless, it should address the potential concurrent jurisdiction issues and set up guidelines on leveraging resources of statutory bodies or authorizes, including the Consumer Council and the Census and Statistic Department, for market studies considering the cross-sector nature of conglomerate.³²

Given the changing market condition and the adverse impact of conglomerate economic power in Hong Kong, the HKCC should conduct regular market studies concerning conglomerate. In the digitalization era, conglomerates’ business models are changing as a result of digital transformation. There will be new types of conglomerates appear in the market, so regular market studies are compulsory to ensure all the anti-competitive behavior are regulated through proper enforcement promptly. This also allows the HKCC to update its guidelines and policies with the latest market development.

Leniency Agreement

The HKCC should consider incentivizing employees and directors to report behaviors of abusing dominance. Leniency can also be potentially granted for a contravention of the SCR,

³⁰ The HKCC retains its discretion in taking different factors into account, *see* Competition Commission *Guidelines on The Second Conduct Rule Competition Commission Hong Kong* 2015.

³¹ Competition Ordinance (Cap 619), s 103(e).

³² For instance, the HKCC shares concurrent jurisdiction with the Communications Authority for matters about telecommunications and broadcasting industry. Competition Ordinance (Cap 619), s 159.

but there no particular policy has been enacted by the HKCC.³³ The HKCC should consider enacting a leniency policy for individuals involved in the abuse of dominance.

IV Conclusion

The SCR remains the major legal basis for regulating conglomerates' anti-competitive conducts in Hong Kong. While the prohibition of "unfair trade practices" may overregulate the Hong Kong market, "substantial restraint of competition" is a replacement of "substantial market power" to ensure the effectiveness of the SCR against conglomerates. Because of the inappropriateness of structural remedies in an open economy, exploitative abuse should also be banned under the SCR.

Although the leniency agreement should be extended to cover behaviors of abusing dominance, the HKCC's enforcement tools are sufficient to handle a wide variety of investigation outcomes. The HKCC should closely cooperate with statutory bodies and authorities to study the structural problem and structural risk of competition. With adequate regular market analysis conducted by economists, anti-competitive conducts of conglomerates would be rectified in a timely manner.

³³ Competition Ordinance (Cap 619), s 80.