Hong Kong's economy is dominated by family-owned conglomerates: often accumulating vast wealth as property developers, they have successfully diversified their profits in real estate into other sectors of the local economy, including supermarket retail, telecommunications, etc[1]. Because of their sheer size, it is interesting to see how they might use the market power that they yield to their own benefit, to the effect that it might become anti-competitive and fall under the Competition Ordinance, and have the risk that the Competition Commission may use its enforcement tools against them.

To formally define conglomerates, they are not simply large companies. Conglomerate firms are composed of several unrelated businesses, diversified in different areas[2]. Conglomerates in Hong Kong may be involved in multiple competition issues, including resale price maintenance (vertical agreement), mergers and tying. There may be enforcement action from HKCC based on the three conduct rules, but effects could be limited.

Vertical agreements in conglomerate supermarkets

One area of anti-competitive conduct which has a large conglomerate presence is the retail supermarket industry, and there have been some allegations related to conduct including resale price maintenance.

[1] Williams, Mark The Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared (2009) 54(3) *The Antitrust Bulletin*, 545

[2] Gerald, F. Davis et al The decline and fall of the conglomerate firm in the 1980s: The deinstitutionalization of an organizational form (1994) 59(4) *American Sociological Review*, 547

Observing the market, we may see that two major supermarket chains, Wellcome and ParknShop, have overwhelming dominance of the market, with nearly 70% market share combined, each owning over 270 outlets in Hong Kong as of 2018[3]. They are each owned by a powerful conglomerate in Hong Kong, Jardine Mathesons (Wellcome) and CK Hutchison Holdings (ParknShop)[4]. For resale price maintenance, the two supermarkets appear to have a history of restricting competition in this manner of vertical agreements. In a 2003 Consumer Council study, it was alleged that a system of retail price maintenance had suppliers determine the minimum price that retailers must charge consumers, which might have led to the withdrawal of new entrants to the market[5]. The most direct effect is the reduction of price competition and hence efficiency: if more efficient retailers would like to enter the market and offer low prices to compete with the potentially less efficient conglomerate supermarket, they cannot do so due to the resale price arrangements. Discount stores, which may be beneficial for consumers in terms of price, may be driven out of the market.

In order to combat vertical price restrictions for supermarkets owned by conglomerates, the Commission might first look to the First Conduct Rule for enforcement, if the object or effect of the agreement is restricting competition. Indeed, the gravity of resale price maintenance has been mentioned by the Guidelines issued by the Competition Commission and section 2(1) of the Ordinance, to be Serious Anti-Competitive Conduct.

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[3] Li, Chris *Hong Kong Retail Foods: Hong Kong Food Retail Industry* USDA Foreign Agricultural Service U.S 2018 https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Retail%20Foods_Hong%20Kong_Hong%20Kong_6-29-2018.pdf

[4] A.S. Watsons Group (2020) *PARKnSHOP* https://www.aswatson.com/our-brands/food-electronics-wine/parknshop/#.X9mSX8ZS_OR (15 December 2020); Jardines (2020) *Dairy Farm* https://www.jardines.com/en/companies/dairyfarm.html (15 December 2020)

[5] Consumer Council *Wet Market vs Supermarkets Competition in the Retailing Sector* Consumer Council 2003, 67 https://www.consumer.org.hk/web/CompetitionStudyReports/2003-08_Wetmarket_vs_Supermarket.pdf

In terms of enforcement, once the Commission has reasonable cause to believe that "Serious Anti-Competitive Conduct" has been committed, the Commission may institute proceedings before the Competition Tribunal without following the Warning Notice procedure under section 82[6]. The Warning Notice procedure may give the company in question an opportunity to cease or alter the resale price maintenance conduct[7].

In the present case, dispensing with the Warning Notice procedure and going straight to Tribunal proceedings is much more preferable and effective, since a large conglomerate may not be compelled to comply simply with a warning due to the large benefits extracted from such price agreements. A warning notice would have dramatically reduced the deterrent effect of the rule[8]. However, even if the conduct does not amount to Serious Anti-Competitive conduct, then the Commission may resort to using the Second Conduct Rule. Even so, there may be difficulties in proving the case, as shown below.

Tying and bundling of services

Another area where conglomerates have been observed to have committed anti-competitive conduct is through tying and bundling. Tying is something which conglomerates may find easier to do than standalone companies, as conglomerates own multiple businesses in different markets, where combinations of them may not bear direct relation, but when tied together to sell to the market, may stunt competition. In the 2003 Banyan case, residents at a housing estate filed a

[6] Competition Commission *Guideline The First Conduct Rule* Competition Commission 2015, 21 https://www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf
[7] Ibid. 21
[8] Cheng, Thomas Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance (2014) 5(2) *Journal of European Competition Law & Practice*, 93

complaint that Hutchison's fixed line business benefited from the anti-competitive conduct of the property managers who were affiliated with Hutchison[9]. This would have amounted to tying due to its exclusion of other competitors for supplying services on the estate, but the Telecommunications Authority found no evidence that Hutchison sought the advantage[10]. Nonetheless, it is entirely plausible that conglomerates, due to their wide reach in a large number of markets, some of their products may be tied up to the exclusion of other competitors to sell to consumers without being entirely obvious.

The Second Conduct Rule, as prescribed in section 21(1) of the Ordinance, forbids an undertaking that has "a substantial degree of market power" to abuse that power by engaging in conduct that, in object or effect, prevents, restricts or distorts competition in Hong Kong. One important element to prove, is that the undertaking in question has substantial market power. Even though no one conglomerate in Hong Kong may be a monopolist in a particular market, as sometimes multiple conglomerates simultaneously wield large market power, the Guidelines provided by the Commission does emphasise that "substantial degree of market power" does not preclude more than one undertaking having such a magnitude of market power, if in reality, there is an oligopoly[11]. Also, another relevant factor in evaluating whether an undertaking has a substantial degree of market power is the barriers to entry of new entrants[12]. This is worth noting, as Hong Kong has ranked first in the Economist's 2016 Crony Capitalism Index, such that Hong Kong's largest conglomerates and billionaires derive most of their wealth from industries that

[9] Office of the Communication Authority *Complaints about Arrangements of the Provision of Telephone and Internet Access Service at Banyan Garden Estate* Office of Communication Authority 2004, 2 https://tel_archives.ofca.gov.hk/en/c_bd/completed-cases/t261_03.pdf
[10] Quigley, Conor and Suzanne, Rab *Hong Kong Competition Law* Oxford, Bloomsbury 2017, 302
[11] Competition Commission *Guideline The Second Conduct Rule* Competition Commission 2015, 16 https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf
[12] Ibid. p.19

have a high entry barrier, such as real estate and construction, ports and telecoms services[13]. Thus, it is likely that conglomerates in Hong Kong may be prone to having substantial market power and fall prey to the Second Conduct Rule when deriving an advantage from their business.

It is important to note that since tying may not be Serious Anti-competitive Conduct as defined in the Ordinance, the Commission must first proceed with a warning notice before bringing proceedings at the Tribunal, under section 82 of the Ordinance. The warning notice provides an opportunity for the person to cease the alleged conduct. However, since the persons in question are large conglomerates, a warning notice may not effectively deter the anti-competitive action, since they have extensive resources to face a court battle. However, there could also be a factor of naming and shaming, where acting upon the warning notice is a sign to the public that the conglomerate is committed to complying with legal requirements. That effect may not be significant, even if it exists.

Attempted merger of ParknShop

Finally, since conglomerates own multiple businesses and have large market presence in many of its businesses, they may find it commercially attractive to sell off some of their businesses which they believe are stagnating, and focus on other businesses. Conglomerates have the flexibility to do so and engage in a merger with another company/conglomerate. The problem may be that, in a market dominated by conglomerates, selling off a business to another large player in the market may create a monopoly that is extremely large in market power, potentially turning an oligopoly into a full-fledged monopoly. Events were heading in that direction when Hutchison made an

[13] The Economist (2016) *Comparing crony capitalism around the world* https://www.economist.com/graphic-detail/2016/05/05/comparing-crony-capitalism-around-the-world (15 December 2020)

attempt to sell ParknShop in 2013[14]. One of the bidders was China Resources Enterprise, whose Vanguard Supermarket then took up about 7.8% of the market (ranked third in the market)[15]. If the bid had succeeded, China Resources would have become the largest or second-largest supermarket chain in Hong Kong, with around 40% market share[16].

Such large-scale mergers might have caught the attention of the Competition Commission, but there was nothing to be done within the boundaries of the Ordinance, as the merger rule in the Ordinance was limited to the telecommunications sector. The Merger Rule provides that "an undertaking must not, directly or indirectly, carry out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong"[17]. However, Section 4 of Schedule 7 of the Ordinance provides that the rule only applies if an undertaking that holds a "carrier license" within the meaning to the Telecommunications Ordinance is involved in the merger[18]. If the rule had indeed applied, as part of the enforcement procedure, the Commission may accept a Commitment to take any action (or refrain from taking action) that the Commission might consider taking[19]. If that has failed, the Commission may, after an investigation, bring proceedings before the Tribunal seeking orders to unwind a completed merger or stop the merger process[20].

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[14] Holland, Tom (2013) *ParknShop merger will prove Hong Kong's competition law is a joke* https://www.scmp.com/business/companies/article/1298710/parknshop-merger-will-prove-hong-kongs-competition-law-joke (15 December 2020)
[15] Ho, Prudence and Lee, Yvonne (2013) *Hutchison Whampoa to Shop its Hong Kong Grocery Chain* https://www.wsj.com/articles/SB10001424127887323309404578615573022263636 (15 December 2020)
[16] Ibid.
[17] Competition Ordinance Cap 619, sch7 s3(1)
[18] Competition Commission *Guideline The Merger Rule* Competition Commission 2015, 16 https://www.compcomm.hk/en/legislation_guidance/guidance/merger_rule/files/Guideline_The_Merger_Rule_Eng.pdf
[19] Competition Ordinance Cap 619, s60
[20] Competition Ordinance Cap 619, ss97,99

Nonetheless, this alarming limitation of the Merger Rule may have been borne out of political expediency, as there was regulation on mergers for the telecommunications sector before the enactment of the Competition Ordinance, while the Government might have feared the unpopularity of the merger rule if it covered multinational mergers[21].

Changes to the competition regime

There may be three ways to improve existing enforcement tools with regard to conglomerate anti-competitive practices.

First, the merger rule should be extended to sectors beyond the telecommunications sector. This has been long overdue, and much needed to address the potential mergers by large conglomerates that may disrupt the competitiveness within the market. In particular, Section 4 of Schedule 7 should be removed. It is encouraging that Commission chairwoman Anna Wu has stated in early 2019 that the Commission was considering widening the law's scope to regulate anti-competitive mergers across all sectors, despite the potential pushback from the business sector[22].

However, Quigley and Rab suggested an equally expedient method of bypassing the limitation without the need for amendment of the merger rule: they stated that there was no explicit constraint against taking action against a merger in which the owner of a dominant telecommunications license purchased a business in another industry, so that the merged firm

[21] Cheng, Thomas Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance (2014) 5(2) *Journal of European Competition Law & Practice*, 92

[22] Leung, Kanis (2019) *Tightening of Hong Kong's competition laws to cover mergers on the horizon, says Competition Commission chairwoman* https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2182425/tightening-hong-kongs-competition-laws-cover (15 December 2020)

will have acted in an anti-competitive manner[23]. In that way, potentially, all conglomerates that own a telecommunications license could be covered by the merger rule regardless of whether or not the merger involved transfer of assets in that particular sector. This is an interesting possibility but is ultimately hard to defend, as there is no reason why the rule should apply to Hutchison (which owns a telecoms license) and not Henderson Land (which does not). The Commission should also be more ambitious in updating the law, rather than exploiting existing loopholes that are open to challenges in court.

Additionally, the Ordinance should further clarify in law as to the rules determining what amounts to "substantial degree of market power". It was stated in the Guideline from the Commission that how market shares are calculated depends on the case, and includes several factors[24]. Granted, EU case law has shown a tendency to determine that an undertaking with a market share of more than 40% may be dominant[25]. Godfrey Lam, the President of the Hong Kong Competition Tribunal, has stated that EU jurisprudence and practice may be expected to provide assistance in the interpretation and application of the Competition Ordinance[26]. Thus, the EU standard will very probably be referenced. However, in the absence of case law, it is still unknown whether or not, say, a supermarket with 30% market share would amount to substantial market power, so as to effectively curb conglomerate anti-competitive behaviour in an oligopolistic market.

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[23] Quigley, Conor and Suzanne, Rab *Hong Kong Competition Law* Oxford, Bloomsbury 2017, 301
[24] Competition Commission *Guideline The Second Conduct Rule* Competition Commission 2015, 18 https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf
[25] Whish, Richard and Bailey, David *Competition Law* (9th ed) Oxford, Oxford University Press 2018, 644
[26] Norton Rose Fulbright (2020) *Television Broadcasts Limited v Communications Authority & Anor* https://www.nortonrosefulbright.com/en/knowledge/publications/0a769a3c/television-broadcasts-limited-v-communications-authority-anor (15 December 2020)

Finally, to strengthen the deterrent effect of the First Conduct Rule, the warning notice and infringement notice mechanism should be abolished, or at least exempt for companies beyond a certain size (defined by a minimum annual turnover). This prevents the Commission from having to wait until the warning is issued and the notice period has passed in order to bring proceedings, as large conglomerates are not likely to be affected by a mere warning. This makes for more swift and efficient legal action on the part of the Commission.