A Critical Review of the Hong Kong New Competition Regime:

A Comparative Perspective of Objectives, Institutions, and Scope

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Abstract

This thesis examines the effectiveness of the competition regime in Hong Kong (HK), which is one of the few remaining developed economies to yet implement a competition law. In its search for the optimal dynamics of the regime, the thesis offers a tripartite examination on its objectives, institutions and scope of application, and how these three distinct internal dimensions individually and jointly influence the effectiveness of the regime. Furthermore, a critical review is offered on two significant external factors, land hegemony and the political regime, both of which exert a strong force on the competition regime.

This interdisciplinary research project encompasses legal, political, economic, and market-contextualized analysis. Given that HK has a new competition regime, and is an international financial, communication, and transportation centre, it is appropriate and apposite to evaluate it by international standards.

The thesis begins with an examination of three internal dimensions. As a preliminary, it considers the extent to which HK benefits from a free economy with a sound competitive environment. It then moves on to investigate the first dimension, which is that of the objectives of the competition law in terms of its clarity, prioritization and consistency. Following this, the thesis investigates the second dimension, the institutions of the Competition Commission and the Competition Tribunal, by asking how the structure shapes the substance of enforcement. It explores the limitations and virtues of major institutional models and which model is the most appropriate for HK. In its third dimension, the thesis questions the adequacy of the scope of competition law, with a focus on the near blanket exclusion of public entities. Commentary is offered on how to achieve a level playing field between private and public sectors.

Following the evaluation of the three internal dimensions, the thesis focuses on their correlations. The discussion reviews the challenges and puts forward a wide range of measures to manage them. Finally, the thesis explores the significance of two external powers, land hegemony and political regime, and suggests several long-term solutions which the author believes would lead to the steady optimization of the competition regime.

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Table of Cases and Decisions

Canada

European Union

Hong Kong

Singapore

United Kingdom

United States

Table of Abbreviations

AAHK	Airport Authority of Hong Kong
AIG	American International Group
ALJ	Administrative Law Judge
AML	Anti-Monopoly Law in China
ATV	Asia Television Limited
BA	Broadcasting Authority
BIS	Department for Business Innovation and Skills
BOR	Bill of Rights Ordinance
CA	Communications Authority
CCP	Chinese Communist Party
CEDB	Commerce and Economic Development Bureau
CFA	Court of Final Appeal
CLP	CLP Holdings Ltd
CMA	Competition Markets Authority
COMPAG	Competition Policy Advisory Group
CPRC	Competition Policy Review Committee
CRE	China Resources Enterprises
DG Competition	Directorate General for Competition of European Commission
DOJ	Department of Justice
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ExCo	Chief Executive in Council of Hong Kong
EU	European Union
FC	Functional Constituency
FTC	Federal Trade Commission of United States
GATT	General Agreement on Tariffs and Trade
GC	Geographical Constituency
GE(s)	Government Enterprise(s)
GLC(s)	Government-Linked Compan(ies)
HK	Hong Kong

HKCC	HKFE Clearing Company Limited
HKEx	Hong Kong Exchanges and Clearing Limited
HKFE	Hong Kong Futures Exchange Limited
HKMA	Hong Kong Monetary Authority
HKMC	Hong Kong Mortgage Corporation
HKSCC	Hong Kong Securities Clearing Company Limited
HKTV	Hong Kong Television Network
HOS	Housing Ownership Scheme
ICAC	Independent Commission Against Commission
ICCPR	International Covenant on Civil and Political Rights
ICN	International Competition Network
JFTC	Japan Fair Trade Commission
KMB	Kowloon Motor Bus Company
LegCo	Legislative Council of Hong Kong
LITER	Legality, Independence, Transparency, Effectiveness & Responsibility
MMT	Market Misconduct Tribunal
MS(s)	Member State(s)
MoU	Memorandum of Understanding
MTRC	Mass Transit Railway Corporation
NCA	National Competition Authorities
NPC	National People's Congress
NPCSC	National People’s Congress Standing Committee
NWFS	New World First Bus
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
OFTA	Office of Telecommunications Authority
OOCL	Orient Overseas Container Line
OTCC	OTC Clearing Housing Limited
PE(s)	Private Enterprise(s)
RPM	Resale Price Maintenance
SB(s)	Statutory Bod(ies)
Scheme	Scheme of Control Agreements
SCMP	South China Morning Post
SECD	Secretary for Commerce and Economic Development
SEHK	Stock Exchange of Hong Kong Limited

SFC	Securities and Futures Commission
SIDO	Securities (Insider Dealing) Ordinance
SGEI	Services of General Economic Interest
SMEs	Small and Medium Enterprises
SOE(s)	State Owned Enterprise(s)
SOECH	SEHK Options Clearing House Limited
STE	State Trading Enterprise(s)
TDC	Trade Development Council
TEU	Treaty on European Union
TFEU	Treaty of Functioning of the European Union
Towngas	The Hong Kong and China Gas Company
TVB	Television Broadcasts Limited
UCWG	Unilateral Conduct Working Group
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organisation

Introduction

Setting the Scene

Hong Kong (HK) has been one of the slowest developed economies to pass a general competition law. While HK was ranked in 2017 as the world's freest economy by the Heritage Foundation's Index of Economic Freedom for the 24th straight year, economic liberty in HK is, in reality, threatened by a fundamentally flawed competitive environment.[1]

The myth of HK's free economy, argues Mark Williams, has masked the reality that certain market participants are unfairly favoured by the government, and efforts to control their behaviour through competition policy, without enforcement power in many sectors, are unlikely to succeed.[2] Chen and Lin argue that the sectoral approach to competition policy has had serious drawbacks since the policy began in 1991.[3] Accordingly, hopes were high that a cross-sector competition law passed on 14 June 2012 and due to become effective on 14 December 2015 would address deep-rooted anti-competitive practices in HK.

This thesis aims to shed light on the challenges faced by the new regime, mainly by examining its internal aspects: objectives, institutional design and scope, as well as two external factors: land hegemony and politics. The thesis points to the law's ineffectiveness - despite its centrality to commercial life. The aim of this thesis is to contribute a better understanding of HK competition law, and how it should be used to promote true economic freedom.

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[1] The Heritage Foundation, '2016 Index of Economic Freedom ' (2016) <http://www.heritage.org/research/reports/2015/01/asia-pacific> accessed 1 January 2017.

[2] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) chs 6 & 7.

[3] The fundamental drawbacks are two. First, having different 'rules of the game' for different sectors caused distorted allocation of resources. Second, the regulatory agencies performed dual roles both as competition policy enforcer and as traditional regulator of natural monopolies, causing partiality in the competition decisions. See Edward Chen and Ping Lin, 'Competition Policy under Laissez-faireism: Market Power and Its Treatment in Hong Kong' (September 2002) 21 Review of Industrial Organization 145, 145.

Misconceptions about the Competition Environment

David Webb, a leading HK economic commentator, has asserted that efficient free markets can only be achieved if prompt and predictable intervention occurs when pro-competitive forces have disappeared. This has not happened, since powerful local tycoons who control many sectors have benefitted from *laissez-faire* public policy, permitting a system of entrenched cartels, and therefore impeding economic efficiency for many years.[4] Yet in a public message, the Competition Commission chairwoman, Anna Wu, stated: ‘competition has deep roots in HK’.[5] This thesis questions this sentiment. More apt might be a statement that ‘anti-competition practices have deep roots in HK.’ Indeed, there is insufficient awareness of competition policies and competition culture in the local population.[6] Many economically unhealthy practices have been seen as normal for years.

Both the salience and substance of the general *laissez-faire* policy are of profound importance for the HK government when it considers how to present itself internationally. Not only does HK supposedly have the world’s freest economy, but it is also ranked as one of the largest goods trading entities in the world.[7] HK has a reputation of having both a highly successful market economy and a vibrant business environment with few legal constraints, which promotes the movement of goods and attracts foreign direct investment.[8]

The government has adopted a positive non-intervention policy, a philosophy that has dominated almost every aspect of its policy making and follows the belief that market forces

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[4] David Webb, 'Hong Kong Needs a Competition Law' (13 July 2001) <www.webb-site.com/articles/noncompete.asp > accessed 20 December 2013.

[5] Competition Commission, 'Chairperson’s Message' (2016) <https://www.compcomm.hk/en/about/chairperson_msg/chairperson_msg.html> accessed 16 December 2016.

[6] Maher M. Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' (2010) 33 World Competition Law and Economic Review 457, 468.

[7] HK is the world’s 10th largest trading economy and 11th largest exporter of commercial services. Hong Kong Trade Development Council, 'Economic and Trade Information on Hong Kong' (14 August 2012) <http://www.hktdc.com/info/mi/etihk/en/Economic-Trade-Information-On-Hong-Kong#> accessed 12 May 2015.

[8] Competition Policy Review Committee, *Report on the Review of Hong Kong's Competition Policy* (June 2006) para 9.

are the best way of allocating resources.[9] It argues that any government intervention into the market system would not be conducive to achieving a sound competition environment.[10] The HK's flawed competitive environment is the main problem beneath the superficial picture of a flourishing free market. This triumphalist impression of the free economy is somewhat misleading, and can be better understood by examining the following aspects.

In order to assess how 'free' an economy is, the Heritage Foundation looks at evidence of corruption, government non-tariff barriers, tax burdens, the rule of law, regulatory burdens, restrictions on banks, labour market regulation and black-market activity. [11] However, anti-competitive conduct is not included. In other words, anti-competitive barriers created by private or public entities are not considered by the Heritage Foundation. Their judgement on HK's economy is therefore at best incomplete.

Furthermore, HK's free trade policy does not encourage competition in the domestic economy because many goods and services are not tradable. These goods and services are available locally. They are, for instance, real estate, transport, legal and accounting services, medical and dental services, housekeeping services, public utilities, gas supplies, water supplies, electricity supplies, local radio and television broadcasting, retail banking services, local newspapers and supermarkets.[12] While HK is truly competitive in international markets in terms of exports and the ability to attract foreign investment, competition is often lacking in domestic markets. In other words, free trade and a non-intervention policy do not necessarily ensure a fair competitive environment in HK.

Nonetheless, due to government investment in branding HK as competitive in nature, the general public is under the impression that HK has achieved a proper competition

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[9] Chen and Lin, 'Competition Policy under Laissez-faireism: Market Power and Its Treatment in Hong Kong' (n 3); Robert H. Bork, *The Antitrust Paradox* (New York Free Press 1978) ch 1.

[10] See Mark Williams, 'Seeds of Its Own Destruction: Hong Kong's Dysfunctional Competition Policy' (2006) 6 Journal of Business Law 550, 553; Hans Mahncke, 'Hong Kong's Competition Problem' (November 2008) Hong Kong Lawyer 69, 70.

[11] Terry Miller and Anthony B Kim, *2015 Index of Economic Freedom* (The Heritage Foundation 2015).

[12] These services are either not supplied from foreign sources for logistical reasons or they have high international transport costs. See interview with Wing-Kai Chan, former head of Complaints and Advice Division of the HK Consumer Council (HK, 16 June 2005). See also Morris Goldstein, Mohsin S. Khan and Lawrence H. Officer, 'Prices of Tradable and Nontradable Goods in the Demand for Total Imports' (May 1980) 62 The Review of Economics and Statistics 190, 191.

environment through *laissez faire* policy,[13] and that the imposition of any competition policy and competition law would be 'interventionist' and would distort the free market.[14] A discussion of competition policy was first initiated in 1991, and the general competition law was reluctantly passed in June 2012, although not enforced until December 2015. Having taken over two decades to put the law into action, the government's willingness to embrace the change has been questioned.

Research Question and Aims

With the above in mind, this thesis will answer the following research question: 'How can the design of the HK competition regime optimise its effectiveness in terms of its objectives, institutional set-up, and scope of application, and how does HK's experience improve our theoretical understanding of what an effective competition law regime is?'

Investigating this contemporary and under-explored legal problem will enhance understanding of the new competition regime in HK and contribute to theories on the objectives, institutional structure, and scope of application of competition regimes. As the design of the regime has been shaped by significant commercial and political pressure, it may serve as a cautionary tale for other jurisdictions.

To assess the effectiveness of the regime, these three distinct spheres will be examined comprehensively. For instance, if the impact of an objective seems far-reaching but the scope of application is narrow, the intended objective is essentially nullified. Likewise, if the institutional structure of enforcement is defective, both objectives and scope of application can be undesirably constrained. This research aims to analyse how these three inter-relating spheres, alongside the issue of land hegemony and the current political regime, can be harmonised to achieve maximum effectiveness. It is hoped that this thesis can develop stakeholders' awareness and understanding concerning the competition regime, and in doing so protect the rights of the consumers and the integrity of the free market system.

[13] Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (n 2) 264.

[14] Chen and Lin, 'Competition Policy under Laissez-faireism: Market Power and Its Treatment in Hong Kong' (n 3); Helen Wallace and Mark Pollack, *Policy Making in the European Union* (Oxford University Press 2005) 123-125.

Effectiveness is defined as 'the degree to which something is successful in producing a desired result' in accordance with the Oxford English dictionary.[15] Since the desired result of a competition regime is the elimination of anti-competitive conduct to a threshold of acceptability, 'effective' does not equate with perfection. A sub-optimal outcome may result in any competition regime and this means that it is less than effective.[16] While assessing effectiveness of this new competition regime, this thesis will therefore look at the above-mentioned internal dimensions and external factors to examine whether the threshold of acceptability has been attained by the recent reforms.

Interdisciplinary and Comparative Approach

The research, being interdisciplinary, explores the areas of competition law, economics, and politics. Thus, it will take specific social, economic, and political circumstances into account rather than uncritically hold HK to the standards offered by other jurisdictions. But an analysis of the HK domestic competition regime cannot be isolated from the international competition environment, as it borrows from foreign systems and should be judged by international standards.

The HK government has stated that its competition regime closely follows the European Union (EU) approach, and is partially modelled upon EU competition law, and was formed with reference to the UK and Singaporean models.[17] Additionally, since the United States (US) antitrust system has the longest and most substantial history, its rules and wealth of experience will serve as important points of comparison. Moreover, China, as the sovereign ruling state over HK since 1997, influences the HK competition regime through the executive and legislative institutions it controls. In fact, the increasing economic integration of China and HK[18] suggests that HK's competition law and policy might be seen as developing in parallel to the relatively new Chinese competition law model.[19]

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[15] Oxford English Dictionary <https://en.oxforddictionaries.com/definition/effectiveness> accessed 7 Feb 2017.

[16] Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (n 2) 434-435.

[17] The government's consultation paper mentions the words 'EU' 9 times, 'UK' 11 times, and 'Singapore' 12 times. CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (File Ref: CITB CR 05/62/25/13, May 2008).

[18] For example, over 50 per cent of Hang Seng Index Constituent Stocks are from Mainland China. See Hang Seng Indexes, 'Hang Seng Indexes' (2017) <https://www.hsi.com.hk/HSI-Net/> accessed 5 March 2017; HKEx actively promoted HK as an ideal listing venue to mainland China by organising many IPO seminars and

Wherever appropriate, the thesis also takes into account the experiences of some other jurisdictions such as United Kingdom (UK) and Singapore, as well as related international organisations such as the Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade & Development (UNCTAD) and International Competition Network (ICN). During the legislation consultation period, a clause was specially added to the Hong Kong Competition Ordinance, namely Article 32 ('Exemption to Avoid Conflict with International Obligations'), which ensures that the rules are internationally legitimate. Moreover, HK's accession to the ICN in December 2013 can be seen as another indicator signifying its desire to adopt international standards.

Methodology and Sources

Due to the qualitative approach of the research, documentary sources play a crucial role in developing the research beyond the legal and economic commentary that dominates most of the literature on the subject. In addition to competition law, the study incorporates political and comparative perspectives, opening up a new path for the study of competition law in HK.

On top of secondary sources from both Chinese and Western literature, the study analyses documents in HK from the Consumer Council, Competition Policy Advisory Group, the Competition Policy Review Committee's policy papers, annual reports, statistical yearbooks, gazettes, and international agreements. Since objectives are not expressly defined in the competition statutes in jurisdictions such as HK's, they have to be inferred from legislative history and governmental documents.[20] Court judgments and legal provisions from the US, EU, UK, Singapore, and China are used for comparative reference.

As this is a dynamic field in which new developments are constantly emerging, interviews with members of the HK Competition Commission, Competition Tribunal,

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presentations across 23 provinces and cities. See HKEx, *Annual Report* (2016); HKEx launched Shanghai-Hong Kong Stock Connect and Shengzhen-Hong Kong Stock Connect in 2014 and 2016 respectively. See HKEx, 'HKEX News Release' (2016) <http://www.hkex.com.hk/eng/csm/securities _announcements_and_news_releases.htm> accessed 5 April 2017.

[19] China's Anti-Monopoly Law came into effect on 1 August 2008 and has only eight years of experience.

[20] The case law approach is not currently possible as there have been no competition law cases yet in HK.

political parties, government officials, scholars, and businessmen have also been incorporated to supplement the above written sources. These sources also update and consolidate the thesis' arguments on restraints affecting the enforcement of competition policy and law.[21] The annual Asian Competition Forum (ACF) held in HK has also served as an important discussion forum for both competition law scholars and practitioners, bringing cutting-edge competition-related topics to the fore.

Thesis Structure

The three main spheres of the research (objectives, institutions, and scope) and two supplementary external factors (land hegemony and the political regime) are explored from Chapter 1 to Chapter 5 as follows:

Chapter 1 takes a normative perspective to examine the possible objectives of the regime. Following this, it discusses the challenges facing the enforcement agencies in applying these objectives. It then seeks to prioritise the objectives and consider whether such priorities are in line with consumer interests. It also investigates any possible inconsistencies or conflicts among these objectives. With reference to the US, EU, and Chinese models, suggestions are made to improve the objective-setting, which in turn could enhance the competition regime's effectiveness.

Chapter 2 focuses on an examination of the institutional design of Competition Commission and considers how the institutional design of an enforcement agency influences its effectiveness. The main competition institutions in HK are the Competition Commission and the Competition Tribunal, which have been newly established. Various schools of thought and theoretical definitions of competition institutions are discussed. It also reviews the similarities and differences between the HK Competition Commission and the

[21] Interviewees include but not limiting to president of HK Competition Tribunal (Godfrey Lam); chairwoman (Anna Wu), board member (Thomas Cheng) and former deputy secretary general (Sam Hui) of HK Competition Commission; deputy-chairman of Bills Committee on Competition Bill of HK Legislative Council (Ronny Tony); secretary (Gregory So) and under-secretary (Gregory Leung) of Commerce and Economic Development Bureau; Chief Executive (Gilly Wong), former head of Complaints and Advice Division(W. K. Chan), of HK Consumer Council, chief research and trade practices officer (Victor Hung); chief executive of Singapore Competition Commission (Yean Lim), chairman of young DAB Political Party (Holden Chow), director of the Asian Competition Law and Economics Centre (Mark Williams), judge of Supreme Court of France and of OECD Competition Law and Policy Committee (Frederic Jenny), former associate professor of law and associate dean at City University of Hong Kong (John Ho).

enforcement agencies of the UK, EU, US, and mainland China in terms of the selection and appointment processes, independence, and accountability. It then suggests how to establish sound institutions that promote and sustain effective competition, which in turn are capable of attaining the objectives mentioned in the previous chapter.

Chapter 3 continues to explore another major institutional creation – the Competition Tribunal. The focus is on the virtues, limitations, and choices of stakeholders within the major institutional models – administrative, judicial and semi-judicial. It looks at both the political and judicial reasons for the HK government's change of model during the law-making process, with an in-depth discussion of a leading Court of Final Appeal case. Attention is given to the changing roles of courts, unique political environment, history and legal culture, and certain potential problems in HK, including the threat of the Standing Committee of National People's Congress of China's supreme interpretation power, the titular role of assessors in the Competition Tribunal, and lame duck institutional enforcement. Finally, the chapter examines which model would be most appropriate for HK and suggests improvements in the choice of model for HK.

Chapter 4 considers the third core area – the scope of legal application. This section discusses concerns over the virtual blanket exclusion for statutory bodies and government departments and public enterprises, regardless of their undertaking status. Section 5 of the Competition Ordinance, which governs such exclusion, is carefully reviewed. This chapter critically examines the government's justifications for enforcing this exclusion on grounds of both substance and procedure. Accordingly, commentary and suggestions are offered on this exclusion and how to achieve an even playing field.

Chapter 5 serves as an integrative chapter. It builds on the discussion of the three distinct spheres (objectives, institutions, and scope), and brings them together for an all-inclusive discussion. The first half of the chapter illustrates the relations between these three levels.[22] It highlights how these three levels jointly shape the effectiveness of the regime from a structural approach with policy, economic, and market-contextualised analysis. The second

[22] For example, the formation and composition of enforcement institutions reflect the objectives of competition policy and law. The objectives of competition law can also determine its scope of application. The scope of the law's application is by and large influenced by its objectives and related institutional arrangements. Related institutions enforce the law according to its objectives and scope.

half of the chapter explores the two external factors: land hegemony and political factors. The former is a major root of anti-competition practices in HK, and its spiral and ripple effects spread to other associated sectors. The latter is intrinsically linked to the development and enforcement of the competition regime.

The ***Conclusion*** summarises the findings of the preceding chapters and suggests improvements to the regime, while exploring how the HK model can shed light on our understanding of competition law effectiveness as a whole, and possibly generalisable for other competition law regimes to improve their effectiveness.

1 A Comparative Analysis of Its Objectives

1.1 Introduction

This chapter explores the objectives of the new competition regime in Hong Kong (HK) and considers how their scope and formulation may impact the regime's overall effectiveness.

Objectives for competition law and policy have been a matter of international discussion. For example, the International Competition Network (ICN) has pushed to increase transparency in how competition regimes setting their objectives.[1] The Organisation for Economic Co-operation and Development (OECD) has also published reports on how the objectives of competition policy and law affect the design of a competition agency and its performance.[2] Using these international standards as guidelines, this chapter will evaluate the new regime in HK and also compare it to other jurisdictions as references. The United States (US) and European Union (EU) models, with their wealth of experience and tremendous influence in the world, will be the main jurisdictions for comparison. Additionally, given the increasing political and economic integration between China and HK, its system will also serve as a reference point.

The chapter is organised as follows: it first examines the possible objectives of the new competition regime in HK. It then examines challenges to enforcement agencies in applying these objectives. Next, the chapter identifies the prioritisation of objectives and considers whether such priorities are in line with consumer interests. It also investigates

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[1] The Unilateral Conduct Working Group, 'Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws' (11th Annual ICN Conference); ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* (2007); ICN, *Agency Effectiveness Handbook: Chapter 1 Strategic Planning and Prioritisation* (March 2010); ICN, *Competition Enforcement and Consumer Welfare — Setting the Agenda* (2011); ICN, *Objectives of Unilateral Conduct Rules* (2014).

[2] OECD, 'The Objectives of Competition Law and Policy' (2003) CCNM/GF/COMP(2003)3 OECD Global Forum on Competition; OECD, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (2003) CCNM/GF/COMP/WD(2003)1 OECD Global Forum on Competition; OECD, 'Competition Assessment Toolkit ' (2007) Vol 1; OECD, 'Competition Assessment Toolkit' (2010) Vol 2.

possible inconsistencies or conflicts among objectives. The overall aim of the discussion is to examine whether the government's chosen objectives are compatible with HK's competition policy needs. Lastly, with reference to the US, EU, and China models, suggestions will be made to improve objective-setting, including the adoption of a spectrum approach to replace the current exclusively economic approach.

1.2 Objectives – A Bird's Eye View

Robert Bork opined that competition law and policy cannot be made rational until we are able to firmly answer the question: what are its objectives?[3] The objectives of a law are the axioms from which its provisions naturally flow. Only after policymakers consider what the objectives of competition law are, can they frame the policy and set subsidiary policies.[4]

Having and defining clear objectives can serve multiple functions. Setting objectives can improve institutional arrangements, increase transparency, and provide a basis for appraisal. Objectives also facilitate debates over decision-making in individual cases.[5] Moreover, objectives can shape enforcement priorities and policies by alerting enforcers to discrepancies between desired and actual results in ongoing enforcement. Objectives allow enforcers to identify and measure impediments to policy execution, allowing for their early detections. They also enable observers to measure whether a legal framework is proportionate to the objectives. They can serve as references in assisting the courts in applying legal standards. More importantly, for jurisdictions with multiple competition law enforcers such as in the US,[6] China,[7] and HK,[8] having clear objectives allows competition authorities to avoid encroaching on and duplicating each other's efforts.[9]

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[3] R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).

[4] ibid 50.

[5] American Bar Association, 'Report on Antitrust Policy Objectives ' (2003) <http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_policyobjectives.authcheckdam.pdf> accessed 15 Dec 2003.

[6] The United States uses a multiple enforcers system through federal and state antitrust agencies and private plaintiffs. The Department of Justice and Federal Trade Commission are antitrust law enforcers at the federal level.

[7] There are three competition authorities enforcing the Anti-Monopoly Law (AML) in China. They are the State Administration for Industry and Commerce (SAIC, enforcing the AML's non-price related rules and rules

One can identify a number of common objectives which can be regarded as the core objectives of competition law.[10] Different jurisdictions may adopt several of them, depending on their political, economic, and legal cultural situation. In brief, they can be classified broadly into three categories: economic, political, and social objectives.[11]

Economic objectives: Economic objectives are the most well-known goals of competition regimes. They include ensuring effective market competitiveness, promoting consumer welfare, maximising market efficiency, alleviating undue concentration of economic power, providing equality of opportunity for all businesses,[12] promoting small and medium sized enterprises, creating entrepreneurial opportunities,[13] ensuring freedom to

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against the abuse of administrative powers to restrict competition), the Ministry of Commerce (MOFCOM, for merger oversight), and the National Development and Reform Commission (NDRC, enforcing price-related rules in the AML, including anti-competitive agreements and abuse of dominance).

[8] Articles 159-161 of HK Competition Ordinance describe the concurrent enforcement jurisdiction of the Competition Commission and Communications Authority.

[9] American Bar Association, 'Report on Antitrust Policy Objectives ' (n 5).

[10] OECD, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (n 2). (Some analysts argue that there is only one goal, the maximising of economic efficiency.) See P Areeda and D Turner, *Antitrust Law: An Analysis of Antitrust Principals and Their Application* (Aspen Publishers 1980) Bork, *The Antitrust Paradox: A Policy at War with Itself* (n 3) Ch 2; R Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976). (Other commentators believe that in addition to enhanced economic efficiency, various political, moral, and social goals have been significant to competition lawmakers.) See R Hofstadter, *The Paranoid Style in American Politics and Other Essays* (Knopf 1965) 199-200.

[11] Hofstadter, *The Paranoid Style in American Politics and Other Essays* (n 10); Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005) 412; Frank Maier-Rigaud, 'On the Normative Foundations of Competition Law: Efficiency, Political Freedom and the Freedom to Compete' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 132; Thomas J Horton, 'The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioural Analyses' (2011) 42 Loyola University Chicago Law Journal 469, 503–04.

[12] C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008] ECR I-4863, para 51 ('A system of undistorted competition such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators.') Opinion of AG J. KoKott, Case C-49/07, para 100. In *MOTOE*, the Court and Advocate General identified 'equality of opportunity' as an aim pursued by EU competition law. Case C-95/04 P, *British Airways plc v. Commission* [2007] ECR I-2331; see also, Opinion of AG Kokott in C-95/04P; Case T-203/01, *Manufacture Francaise Des Pneumatiques Michelin v. Commission (Michelin II)* [2003] ECR II-4071, paras 110 and 240. In *British Airways and Michelin II*, confirmed by European Courts, the European Commission's decisions found that rebate schemes (as well as being exclusionary and discriminatory) were 'unfair' to the affected travel agents and dealers.

[13] Kenneth Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 University of Pittsburgh Law Review 1191; Robert Pitofsky, 'The Political Content of Antitrust' (1978-1979) 127 University of Pennsylvania Law Review 1051, 1058.

compete,[14] encouraging local control over local business,[15] and safeguarding rights for franchisees' and distributors' to access to suppliers' products or services.[16]

Political objectives: Political objectives include the promotion of democracy, enlargement of individual liberty, reduction of political influence of large firms,[17] prevention of industrial concentration,[18] prevention of unfair transfer of wealth from consumers to firms with market power,[19] or even protection of industries vital to national security.[20]

Social objectives: Social considerations can create objectives such as securing high levels of employment, reducing poverty, redistributing income to achieve social objectives,[21] and pursuing social justice.[22]

Objectives may also be broadly divided into economic and non-economic goals. In HK micro-economic objectives relate to economic efficiency and consumer welfare.[23] Objectives may also be categorised into short-term, intermediate-term and long-term goals. Some objectives can be subordinate to others. Some goals are more difficult (e.g., informational pluralism in the media) or impossible to address through competition law (e.g.,

[14] Liza Lovdahl Gormsen, *A Principle Approach to Abuse of Dominance* (Cambridge University Press 2010). A number of authors have recently examined the principle of 'freedom to compete' as a distinct aim of EU competition law, in particular of Art 102.

[15] ibid.

[16] Pitofsky, 'The Political Content of Antitrust' (n 13) 7.

[17] Blake & Jones, 'The Goals of Antitrust: A Dialogue on Policy' (1965) 65 Columimbia Law Review 377, 377-82.

[18] T Arnold, 'The Purpose of Antitrust Laws ' (1955) 26 Mississippi Law Journal 207, 207-208.

[19] Robert Lande, 'Weath Transfers as the Original and Primary Concern of Antitrust: The Efficiency Intrepretation Challenged' (1999) 50 Hastings Law Journal 871.

[20] For example, in 2009 the veto of Coca-Cola's attempted purchase of China's Huiyuan Company is seen to raise national security issues, using the Anti-Monopoly Law. Mayer Brown JSM Legal Update, 'Coca-Cola / Huiyuan Deal Vetoed under China's Anti-Monopoly Law' (19 March 2009).

[21] Pitofsky, 'The Political Content of Antitrust' (n 13) 7.

[22] R. Hofstader, 'What happened to the antitrust movement?' in T. E. Sullivan (ed), *The Political Economy of the Sherman Act: The First One Hundred Years* (Oxford University Press 1991).

[23] Interview with Thomas Cheng, HK Competition Commission member, 18 Jan 2013.

controlling financial institutions' solvency).[24] Some even conflict with each other, such as the protection of competitors' interests and the efficiency of competitive processes.[25]

The objectives of competition law and policy over time and across different countries indicate that their nature and scope tends to vary. The objectives can be explicit or implicit in their legislation. For example, some jurisdictions such as Japan,[26] South Korea,[27] South Africa,[28] India,[29] and Malaysia[30] explicitly state the objectives in their legislation. Their aims can usually be found either in their first article or preamble. By contrast, objectives are not expressly written in the US antitrust law, but rather developed in case law. Similarly, for EU competition law, goals can be interpreted by reading between the lines, and inferred from a wealth of court judgements and enforcement agents' decisions. Antitrust laws from these oldest regimes have been implemented for many years, and inferences of objectives can be made from case law. This will be discussed in Sections 1.5.1 and 1.5.2.

1.3 Prioritisation of Objectives

Different stakeholders seek to obtain a range of values from competition law. As a result, views on what constitutes an effective objective vary among stakeholders.[31] Domestic competitors would like to insulate themselves from more efficient international competitors. International competitors often wish to enter and share the market.[32] Entrepreneurs may

[24] Jose Carlos Laguna de Paz, 'Regulation and Competition Law ' (2012) 35 ECLR 77.

[25] Anne Perrot, 'Appropriation of the Legal System by Economic Concepts: Should Conflicting Goals be Considered?' in Josef Drexl, Laurence Idot and Joel Moneger (eds), *Economic Theory and Competition Law* (Edward Elgar Publishing 2009) 126.

[26] Antimonopoly Act of Japan, art 1.

[27] Monopoly Regulation and Fair Trade Act in Korea, art 1.

[28] The South African Competition Act of 1998, preamble.

[29] India Competition Act, preamble.

[30] Malaysia Competition Act 2010, preamble.

[31] CUTS Centre for Competition Investment and Economic Regulation, *Towards a Healthy Competition Culture* (2003) i.

[32] ibid 17. For example, certain developing nations noted that transnational companies 'enjoy advantages over domestic firms because of their size, reach and control over intellectual property (technologies, brands, copyright etc). One necessity of competition policy, as envisioned by CUTS, is 'to prevent these firms from unfairly exploiting these advantages.'

emphasise greater access to the marketplace.[33] Governments may aim at promoting economics as the first priority among all objectives.[34] Consumers want lower prices, greater choice, better quality, and more innovation. Thus, competition policy aims are not always consistent with each other. Governments prioritise certain objectives over others.

The differing objectives of government policies give rise to possible tensions among other economic policies and objectives. This leads to questions regarding the extent to which competition law and policy should be accorded priority.[35] The author believes economic efficiency and consumer welfare are suitable objectives. However, the HK government appears to prioritise the objective of promoting economic efficiency over any other objectives.[36]

Before discussing the prioritisation of objectives, the objectives of the HK competition regime must be determined. The Competition Ordinance does not include a provision stating its objectives. The preamble is phrased in the negative: '[p]rohibit conduct that prevents, restricts or distorts competition in HK; to prohibit mergers that substantially lessen competition in HK'.[37] It does not specify underlying objectives in the positive, making them difficult to determine. The Competition Commission board has yet discussed the objectives of the Competition Ordinance, and some board members may not fully comprehend the meanings of economic efficiency and consumer welfare.[38]

Unlike the US and EU, HK in its competition regime infancy has no decided competition case law yet to aid understanding. Even if it did have some, case law usually requires a long period of time before clarified objectives are agreed upon by courts. A clear statement of objectives in the Ordinance would increase legal certainty, guide courts' decision-making, and aid market actors at this early stage of competition law implementation.

[33] Maurice E. Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College Law Review 551, 569.

[34] COMPAG, *Statement on Competition Policy* (May 1998); Commerce and Economic Development Bureau, *Public Consultation on Detailed Proposals of A Competition Law* (File Ref: CITB CR 05/62/25/13, May 2008).

[35] S. Khemani, *Application of Competition Laws: Exemptions and Exceptions* (United Nations 2002) 9-10.

[36] Consumer Council, *Feedback to Detailed Proposals for a Competition Law* (2008).

[37] Competition Ordinance, preamble.

[38] Interview with Thomas Cheng, 2 March 2016.

There many possible explanations for why the objectives are missing. The HK government may not have had a clear policy agenda to translate into clear objectives during its law-drafting process,[39] or it may have had internal conflicts as to the scope of such objectives. Alternatively, the government may have deliberately desired to leave flexibility for future interpretation. In any event, this ambiguity is a limitation for law enforcers.

Yet aims of the law can be deduced from government documents and legislative history. As early as in May 1998, the government promulgated a Statement on Competition Policy, articulating the objectives of competition policy as being 'to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare'.[40] Ten years later, the Public Consultation Paper of 2008 (Public Consultation) mentioned the objective of economic efficiency at least four times:[41]

1. The objective of the Competition Ordinance should be to enhance economic efficiency and thus benefit of consumers through promoting sustainable competition;[42]
2. The overall objective of the competition law is to enhance economic efficiency;[43]
3. Bearing in mind that the main objective of the proposed competition law is to enhance economic efficiency ;[44]
4. The proposed remit of the Competition Commission would be to implement a law whose objective is to enhance economic efficiency.[45]

Looking at the Hansard records as a second source,[46] it is also found that the goal of achieving economic efficiency was mentioned most frequently in the Legislative Council.[47]

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[39] Ching-yi Fung, 'Hong Kong Competition Bill: One Step Forward, Two Steps Back' (2012) 35 World Competition 165, 175.

[40] COMPAG, *Statement on Competition Policy*, para 2.

[41] Consumer Council, *Feedback to Detailed Proposals for a Competition Law* (n 36).

[42] ibid 1, para 1.

[43] ibid 7, para 15.

[44] ibid 50, para 4.

[45] ibid 53, para 15.

[46] This contains the lawmakers and government's motions concerning the competition policy from 27 Jan 1999 to 16 Dec 2013. See Hong Kong Legislative Council Hansard, 'Competition Policy in Hong Kong '

Consumer welfare on price issues[48] and protection of small and medium size enterprises (SMEs)[49] were occasionally brought up, but their frequency of citation was less than that of economic efficiency.

The Public Consultation emphasises that: 'The objective of the Competition Ordinance should be to enhance economic efficiency and thus benefit of consumers through promoting sustainable competition'.[50] This statement reveals many things. First, the government assumes that HK already had 'sustainable' competition in 2008. In reality however, anti-competitive behaviour exists throughout various sectors of HK's economy.[51] Second, the use of the words 'and thus' indicates that the government believes that economic efficiency will benefit consumer welfare. Therefore, consumer welfare is subject to the realisation of economic efficiency. The HK Bar Association also noted this point.[52]

In that sense, it seems that the HK government has so far adopted a solely microeconomic approach for its competition regime objectives – i.e., economic efficiency as primary objective, consumer welfare as secondary objective, and possibly the protection of SMEs as an implicit objective. If a conflict arose among the aims, economic efficiency would

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<http://www.legco.gov.hk/database/english/data_es/es-competition-policy.htm#cm990127> accessed 18 Oct 2013.

47 Some examples in Hansard can be seen: W T Lee, *Moving a Motion on Fair Competition Law* (16 Nov 2005) 191; Emily Lau, *Motion on Raising a Question on Regulation of Pump Prices* (25 Oct 2006) 28; Selina Chow, *Introducing a Fair Competition Law for the Oil Industries* (28 Jan 2005) 186; Andrew KY Leung, *Question on Measures to Promote Economic Development* (18 Feb 2009) 30; Jeffrey K Y Lam, *Maintaining a Business-Friendly Environment in Hong Kong* (23 May 2013) 74.

48 For example, HK Hansard: H M Tam, *Question on Owners Stipulating Bundled Lease Terms* (4 Apr 2007) 98; Audrey Y M Eu, *Question on Piped and Cylinder Liquefied Petroleum Gas* (18 Feb 2009) 91; Miriam K Y Lau, *Motion on Alleviating the Burden of Fuel Costs on the Public and Relevant Trades* (19 Nov 2008) 284.

49 For example, HK Hansard: Jeffrey K Y Lam, *Report of the Panel on Economic Services* (11 July 2007) 10247.

50 Commerce and Economic Development Bureau, *Public Consultation on Detailed Proposals of A Competition Law* 1, para 1.

51 The Consumer Council's studies have found that there is a lack of competition in important sectors in HK. See Consumer Council, *Feedback to Detailed Proposals for a Competition Law*. See also Ping Lin and Edward K. Y. Chen, 'Fair Competition under Laissez-Faireism: Policy Options for Hong Kong' (March 2008) Lingnan University of Hong Kong 3, 6.

52 Submission of Hong Kong Bar Association, *Detailed Proposals for a Competition Law in Hong Kong* (2008) para 3.

likely prevail over other objectives, such as consumer welfare.[53] In order words, economic efficiency predominates any other objectives. The government does not explain or justify why economic efficiency is its primary objective. This is not uncommon, since conflicts among objectives can be found in other jurisdictions.[54] Before discussing the possible conflicts among objectives, the inherent difficulties in defining them remain to be analysed.

1.3.1 Primary Objective – Economic efficiency

A competition law is often an expression of the values and aims of a specific society at a certain time and can, over time, change as political thinking does. Objectives can shift like a pendulum in different periods in some jurisdictions, as in the US. The terms economic efficiency and consumer welfare have become dominant phrases of competition discourse today but without any clear consensus as to what they mean exactly.[55] This remains true today.[56] Efficiency is a broad economic term that may refer to allocative efficiency,[57] productive efficiency,[58] or dynamic efficiency.[59] Each kind of efficiency carries its own difficulties in terms of assessment and proof.[60]

[53] Charlesworth argues that the economic purpose is deemed to override the consumer protection objective if there is a conflict. See James C. Charlesworth (ed), *Theory and Practice of Public Administration: Scope, Objective, and Methods* (The American Academy of Political and Social Science 1968).

[54] For example, Article 1 of Anti-Monopoly Law of China states that the Law is enacted for the purpose of enhancing economic efficiency, maintaining consumer interests and public interests, as some of the goals. Public interest is a controversial concept. In China, many State-owned enterprises are economically inefficient but they shoulder State-assigned responsibility to keep up employment, which is regarded as a public interest. Under such circumstances, economic efficiency and public interests are in a dilemma. See Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 133, 142-143.

[55] Joseph F. Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 New York University Law Review 1020, 1020, 1032.

[56] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (West Publishing Company 1994); Steven C. Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard' (4 Nov 2005) Georgetown University Law Center 22; Barak Y. Orbach, 'The Antitrust Consumer Welfare Paradox' (28 Feb 2010) 7 Journal of Competition Law and Economics 133,134 (noting that academic confusion led to the rise of a label consumer welfare that 30 years later has no clear meaning.)

[57] This refers to the allocation of resources to their most efficient uses.

[58] This refers to production in the least costly way.

[59] This refers to rate of introduction of new products or improvements of products and production techniques.

[60] John B. Kirkwood and Robert H. Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84 Notre Dame Law Review 89, 93-94 (stating that protecting buyer from supra-competitive prices was the Congress' major objective); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088 (D.D.C. 1997) (stating that as a legal issue the efficiency defence is not sufficiently clear.)

Efficiency arguments today are used as a shield, a defence against an otherwise anti-competitive mergers.[61] If promoting efficiency is competition law's primary objective, as in HK,[62] then preventing inefficiency should be the sword. Courts and agencies should block mergers that yield greater inefficiencies. Competition agencies and courts should calculate and weigh multiple efficiencies and inefficiencies arising from a merger. To do so, they need the tools to assess the three types of efficiency (allocative, productive, and dynamic)[63] along with other benefits, costs, and risks posed by the merger. The problem, however, is that no such tools exist today in HK.[64] Even worse, the three types of efficiency may not be consistent and can even be in conflict. An obvious example is the potential inconsistency between dynamic efficiency and productive efficiency.

Dynamic efficiency is deemed to be the most difficult to measure among all types of efficiencies.[65] Dynamic efficiency arises when firms innovate and foster technological change and progress.[66] Competition law and policy still lacks adequate tools to measure dynamic efficiency or assess the long-term effects of many constraints on it. The first difficulty is its involvement with introducing something new, which may be a new method, idea, product, etc.[67] There is a serious difficulty in distinguishing between socially beneficial and harmful innovations.[68]

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[61] DOJ & FTC, *Horizontal Merger Guidelines* (2010) § 10 ('Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions.')

[62] COMPAG, *Statement on Competition Policy* (n 34).

[63] This includes their impact on the poor, whose marginal utility of income differs from wealthier consumers.

[64] OECD, *Policy Roundtables: Dynamic Efficiencies in Merger Analysis* (2007) 1; (Quantitative assessments seem not feasible at the present time.)

[65] ibid (noting that 'the uncertainty inherent in innovative activity regarding its cost, timing, and the likelihood and extent of its commercial success, difficulties in measuring innovation itself, the problem of how to conceptually transform innovation into some measure of welfare, and informational asymmetry between the merging parties and the enforcement agencies.')

[66] OECD, *Glossary of Industrial Organisation Economics and Competition Law* (1993) 23.

[67] ibid.

[68] Josef Drexl, 'Real Knowledge Is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases' (2010) Antitrust Law Journal 677, 698; OECD, *Policy Brief: Mergers and Dynamic Efficiencies* (Sept 2008) 5 (recognising that, 'There is almost always uncertainty about how much innovative activity will cost, how long it will take, and the likelihood and extent of its commercial success.')

The US Antitrust Guidelines for the Licensing of Intellectual Property in the 1990s attempted to measure innovation outputs. There was a problematic assumption that each input would produce a socially beneficial innovation output. Not every copyright or patent output, however, is socially beneficial.[69] Another difficulty is in deciding what promotes or hinders innovation and to what extent greater concentration or market power fosters more innovation.[70] Although the 2010 Merger Guidelines in the US are an improvement in incorporating non-price dimensions on competition, it is admitted that they still lack a clear framework for analysing a merger's impact on innovation, variety, and other non-price competition.[71] The Guidelines leave many issues on evaluating a merger's impact on innovation unresolved.[72] At any rate, having a set of imperfect guidelines to deal with dynamic efficiency is better than no guidelines. Comparatively, HK lags far behind in this respect because it still does not have any merger control rules except in the sectors of telecommunications and broadcasting.[73]

An illustrative lack of dynamic efficiency can be found in the following case: Before April 2016, the TV media sector in HK was a duopoly: Television Broadcasts Limited (TVB) and Asia Television Limited (ATV). The sector has transformed into monopoly from April 2016, because of ATV's closure at that time. TVB enjoyed a dominant position in market since its establishment in 1967. In September 2013, the Communications Authority fined TVB 900,000 HK dollars.[74] The amount was not very large but the implications were far reaching. TVB was a local free television programme service licensee that dominated the concentrated TV industry market for more than four decades. The Authority found that TVB abused its dominant position by engaging in several anti-competitive practices, such as exclusive use of artists and singers with harsh and unreasonable terms; prohibiting them from using their original voices when performing on other TV stations' programmes; prohibiting from attending promotional activities of the productions of other TV stations; and preventing

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[69] DOJ & FTC, *Horizontal Merger Guidelines* (n 61).

[70] Steven Johnson, *Where Good Ideas Come from: a Natural History of Innovation* (Allen Lane 2010) 21 (realising that an open and creative environment is more conducive to innovation than a competitive one.)

[71] J. Thomas Rosch, 'The Next Challenges for Antitrust Economists' (8 July 2010) Remarks at the NERA 2010 Antitrust & Trade Regulation Seminar 7-10.

[72] ibid 9-10; Darren S. Tucker and Bilal Sayyed, 'The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities' (May 2006) Antitrust Source 1, 11–12.

[73] Hong Kong Competition Ordinance, Division 4 – Contraventions of Merger Rule.

[74] Amy Nip and Phila Siu, 'TVB Slapped with Fine over Unfair Terms' *SCMP* (HK, 20 September 2013) City1.

them from speaking Cantonese, the native language of HK, on other TV stations in HK.[75] A monopolist or duopolist that is not exposed to actual or potential competition has less incentive to invest in research and development than a firm in a competitive industry.[76] Although TVB claimed productive efficiency,[77] its dominance in the market has resulted in a lack of creativity and diversity in HK's television programming, adversely affecting dynamic efficiency in the sector.

Concerning productive efficiency, the oft-cited reasons for mergers are to reap economies of scope and scale that would enhance efficiency by lowering the unit cost of business operations and minimising the duplication of resources.[78] However, as competition agencies have found, efficiencies projected reasonably and in good faith by the merging firms may not be realised.[79] Even if they are realised, the likely productive efficiencies are difficult to verify and quantify, partially because much of the information relating to efficiencies is only possessed by the merging firms. Allowing mergers or disallowing new entrants to a market may form an oligopoly that claims to increase productive efficiencies but could lessen dynamic efficiency.[80]

The TV sector again shows conflicts between productive efficiency and dynamic efficiency. After TVB was fined by the Communications Authority in September 2013 for abuse of its dominant position, the following month Hong Kong Television Network (HKTV) became involved in another significant case in the TV sector. In October 2013, there was a

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[75] IS Department of Hong Kong SAR Government (English) *Communications Authority releases findings of investigation into alleged violations of competition provisions of Broadcasting Ordinance* (press release 19 September 2013).

[76] K. Arrow, 'Economic Welfare and the Allocation of Resources for Inventions' in R. Nelson (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (NEBR 1962).

[77] Tammy Tam, 'TV transparency furore could rear its head again in 2015' *SCMP* (HK, 11 November 2013) CITY2).

[78] Oliver E. Williamson, 'Economies as an Antitrust Defense: The Welfare Trade-offs' (1968) 58 American Economic Review 18.

[79] DOJ & FTC, *Horizontal Merger Guidelines* § 10.

[80] Eleanor M. Fox, 'The Efficiency Paradox, in How the Chicago School Overshot the Mark' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (2008) 77, 81; Daniel L. Rubinfeld, 'On the Foundations of Antitrust Law and Economics' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (2008) 51, 56.

first attempt to introduce competition into the free TV market.[81] The previous government mentioned that three additional free-to-air TV licenses would be issued in the market in which there were only two existing licensees – TVB and ATV. The general public in HK had long wanted more competition to break TVB's dominance in the market.[82] Dynamic efficiency has been poor as programming innovation, quality, and diversity no longer meet audience expectations. 'TV is the best dish to go with dinner' used to be a popular saying. HK once was proud of being an entertainment leader in Asia, with its television dramas being exported to mainland China, Taiwan, and many Southeast Asian countries. This was especially true during the 1980s and 1990s. But the once-happy relationship between audiences and the TV stations gradually soured. Many believe the dominance of TVB resulted in a lack of creativity and diversity in its programming. Local dramas are also losing their edge on mainland China. According to the Beijing-based rating agency CSM Media Research, none of TVB programmes made the top ten list recently. Shows from Taiwan and Korea have.[83] This should ring alarm bells in the industry.

The Communications Authority thus recommended issuing three licenses. HKTV invested a large amount of money and resources to prepare for setting up its business. It was regarded as the most ambitious and well-prepared of the three applicants. Unexpectedly, the new government announced it would issue only two new free to air TV licenses instead of three, causing a public outcry.[84]

The government said it was concerned there would be too much competition, leading to the eventual closure of a TV station.[85] In other words, the government claimed that higher

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[81] IS Department of Hong Kong government (English), *Government further explains CE in Council's decision on free TV licence applications* (press release 5 Nov 2013).

[82] You Qiu, 'Clear pictures on HKTV license dispute' *China Daily Hong Kong Edition* (Hong Kong 31 October 2013) P09.

[83] CSM Media Research <http://www.csm.com.cn/index.php/knowledge/listKnowledge/ktid/1/d/2014> accessed 18 April 2014.

[84] Tam, 'TV transparency furore could rear its head again in 2015' (n 77).

[85] There are several points showing people's grievances over the government's decision. 1) The general public expressed their dissatisfaction by turning off their TVs during TVB's anniversary. See Kelly Ip, 'Don't See Too Much in License Calls' *The Standard* (Hong Kong 13 Nov 2013) P08. 2) The government used a consultant report to justify its decision to issue only two licenses rather three. However, the managing partner of consultancy commented that, 'The way they used our reports … is a great insult for me and my company. I regretted very much that officials had made such a decision.' She added that 'I never recommended only two

productive efficiency could be achieved by disallowing HKTV's entry to the market. But if a TV station closed owing to its own inefficiency or lack of innovation, it is natural to let it die out in the market. Inevitably, the government's decision to only permit two market entrants led to a loss of diversity and innovation in the market, leading to lower dynamic efficiency. HKTV launched a judicial review against the government's decision, and the High Court ruled that the government had failed to follow the pro-competition 1998 reform that encourages competition within the broadcasting industry.[86]

In brief, the above difficulties in defining and assessing the three types of efficiency are not only applicable to HK but may also apply to other jurisdictions as well. It is a matter of fact that dynamic efficiency may be more important than productive efficiency.[87] Moreover, a competition policy that focuses on maximising one type of efficiency (e.g., productive) will not necessarily maximise another (e.g., dynamic)[88] and will not necessarily benefit consumer interests.

1.3.1.1 Efficiency Objective in Mergers

The scope of the Competition Ordinance only covers two conduct rules: 1) a prohibition of agreements, decisions, and concerted practices that prevent, restrict, or distort competition in HK (the first conduct rule);[89] and 2) a prohibition of the abuse of a substantial degree of market power in a market (the second conduct rule).[90] However, the 'merger rule' only applies to the telecommunications and broadcasting sectors. Without a complete mechanism

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applicants should get a licence.' See Tanna Chong, Shirley Zhao and Thomas Chan, 'Hong Kong government rating slumps to new record low amid HKTV row' *SCMP* (HK, 15 November 2013) EDT3. 3) The Executive Council member, Bernard Charnwut Chan also admitted that the decision ran against public expectations because residents want more choices of TV programmes. See Ip, 'Don't See Too Much in License Calls' (n 85).

[86] *Hong Kong Television Network Limited v. Chief Executive in Council* [2014] HCAL 3/2014; *Hong Kong Television Network Limited v. Chief Executive in Council* [2015] CACV111/15. While the Court of Appeal quashed the High Court decision, HKTV was considering bringing an appeal to the Court of Final Appeal.

[87] OECD, *Policy Roundtables: Dynamic Efficiencies in Merger Analysis* (n 64).

[88] William J. Kolasky, Deputy Assistant Attorney, DOJ, Address at the Seminar on Convergence Sponsored by the Netherlands Ministry of Economic Affairs: What Is Competition? 4-5 (Oct. 28, 2002), http://www.justice.gov/atr/public/speeches/200440.htm.

[89] Competition Ordinance, s 6.

[90] Competition Ordinance, s 21.

to scrutinise mergers, it would leave a large loophole in the law that can be exploited by companies seeking monopoly or oligopoly rents. This is likely to hinder healthy development of efficiency, especially in a small and concentrated market like HK's.[91] The efficiency objective in mergers cannot be ignored although it may be tangentially related to the issue of objectives.

If maximising efficiency is the objective, the competition agency will undertake an extensive review to calculate the likely efficiencies or inefficiencies that would result if a merger were approved or not.[92] Unfortunately, this is not the case in HK. For example, currently there are three large supermarkets in HK, and two of them, ParknShop and Wellcome, occupy 73 per cent market share. The former is around 33 per cent while the later about 40 per cent. The third chain, China Resources Enterprises (CRE), takes around 8 per cent market share.[93] In August 2013, CRE announced that it might partner with Tesco Plc to bid for ParknShop.[94] If its bid were to succeed, CRE would immediately become the dominant participant in HK's supermarket sector, with a market share approaching 41 per cent.

In other developed markets, a deal like this would quickly capture the attention of the competition enforcement agencies, which would scrutinise the proposed merger. Unfortunately, the competition agency in HK still has no power to review such a merger, because rules of prohibiting the abuse of market dominance do not apply to mergers and acquisitions outside of telecommunications and broadcasting. Mergers are specifically excluded from the first and second conduct rules.[95] Even if ParknShop and Wellcome were to merge and set up a super-grocer controlling 73 per cent of the market, HK's Competition Commission could not question such merger. This case illustrates a large loophole in the

[91] Lin and Chen, 'Fair Competition under Laissez-Faireism: Policy Options for Hong Kong' 22; Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003) (arguing that small economy has a greater need for competition laws).

[92] Rosch, 'The Next Challenges for Antitrust Economists' (n 71) 9-10.

[93] Prudence Ho and Yvonne Lee, 'Hutchison Whampoa to Shop Its Hong Kong Grocery Chain' (*The Wall Street Journal*, 19 July 2013) <http://online.wsj.com/news/articles/SB10001424127887323309404578615573022263636> accessed 19 April 2013.

[94] Bloombery News, 'China Resources May Join Tesco to Bid for Li's ParknShop,' 22 Aug 2013.

[95] Competition Ordinance, division 2.

competition regime. Under the current duopoly, new entrants locally (e.g., adMart) and from overseas (e.g., Carrefour) have been squeezed out by predatory pricing and resale price maintenance, eventually being eliminated from the market.[96] Further discussion is in Section 5.4.3.6 of Chapter 5.

1.3.1.2 Application by Enforcers

Courts, competition agencies and the legislature play different roles in enforcing the efficiency objective. They are not supposed to consider only some efficiencies (e.g., productive) that are easier to measure.[97] Neither should they only consider the merging parties' defence of efficiencies. To utilise efficiency as an objective, courts and agencies may need to devote more attention to the harder-to-measure dynamic efficiencies or inefficiencies.[98] In theory, as a representative body politically accountable to the public, the legislature ought to play a role to deal with complex economic issues on efficiency in market. However, in practice HK's Legislative Council (LegCo) is an incomplete institution since only half of the house is elected democratically. The legislature is thus not properly accountable to the public. Section 2.3.4.3 of Chapter 2, Section 5.2.3, and Section 5.5 of Chapter 5 will elaborate more on this institutional defect.

Enforcement agencies may compromise accuracy, transparency, and objectivity while quantifying productive, allocative, and dynamic efficiency. For example, the enforcer may need to consider the trade-off between short-term, quantifiable static allocative efficiency gains against medium or long-term unquantifiable dynamic efficiency gains. Courts must also acknowledge the enforcement agencies' limitations. In different industries and societies, different efficiencies can increase or decrease citizens' well-being to differing degrees.[99] Some consumers may value lower priced homogenous goods, while others are willing to pay more for greater innovation in the industry. The objective of promoting efficiency will not

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[96] Tom Holland, 'A bad competition law could be worse than no law at all' *SCMP* (HK, 9 May 2007).

[97] For example, combining all the manufacturing post-merger in the one modern low-cost production facility.

[98] OECD, *Policy Roundtables: Dynamic Efficiencies in Merger Analysis* (n 64).

[99] Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' 1026-27.

inform the Competition Commission in HK on how to make these compromises, and there is often no easy way to determine whether they make the proper compromise.[100] The management board of the Commission is given the greatest power to make all major decisions. Nevertheless, it has too few competition experts to deal with complicated economic efficiency issues.[101]

Promoting efficiency also requires judges to engage in economic policy, rather than to merely secure compliance with existing competition laws. As the US Supreme Court stated four decades ago, '[C]ourts are of limited utility in examining difficult economic problems'.[102] Also, Congress never intended the courts to decide antitrust cases based on the courts' conception of the latest economic thinking.[103] Judges are politically unaccountable for economic policies and are not trained to deal with complexities of economic disputes arising from competition cases. A judge noted that, 'The judicial power involves the responsibility for interpreting and administering the law and settling disputes … Responsibility for resolving economic issues is a matter for the legislative branch of the government'.[104] The same difficulty happened in HK.

The Chief Justice of HK's Court of Final Appeal in the Ceremonial Opening of the Legal Year 2014 stated that,

> [C]ourts have had to adjudicate on difficult cases…that may involve testing demarcation lines between the legislature, the executive and the judiciary … Although disputes between parties may have political, economic or social consequences, such as those cases involving matters of government policy, at all times the courts took only to the legal issues.[105]

[100] Dennis W. Carlton, 'Does Antitrust Need to be Modernized?' (2007) Journal of Economics Perspective, 155, 157.

[101] Among the fourteen appointed members in the board, only one member is an expert in competition law.

[102] *United States v. Topco Assocs*., 405 U.S. 596, 609 (1972).

[103] S. Comm. on Interstate Commerce, Control of Corporations, Persons, and Firms Engaged in Interstate Commerce, S. Rep. No. 62-1326, at 10 (1913).

[104] Joseph W. Burns, *A Study of the Antitrust Laws: Their Administration, Interpretation and Effect* (Central Book Company 1958) 11.

[105] Press Releases, 'CJ' speech at Ceremonial Opening of the Legal Year 2014' (13 Jan 2014).

The Chief Justice reiterated the hybrid nature of legal cases in a 2016 speech,

> It is inevitable given the nature of the type of case that is involved in a judicial review that political, economic and social factors form a part of the background to such cases … the court is only involved in the legal questions which arise … I reiterate this point: that judicial reviews are all about legality and not the merits or demerits of a political, economic or social argument.[106]

In 2017, the Chief Justice admitted again the complexities of legal disputes, saying,

> The society in which we all live and work is a complex one. The complexities are reflected in the nature of the legal disputes that go before the courts for resolution. Some of these disputes I have referred to as high profile and may involve important political, economic or social consequences. This should, I reiterate, be seen in proper light. The courts deal with these types of case in precisely the same way as any other case: strictly in accordance with the law and legal principle.[107]

All of the above recent statements show the HK judiciary's attempts to avoid cases in connection with non-legal issues including economic policies but suggests that the legislature may stand in a better position to deal with complicated economic efficiency issues. However, the difficulty is that the competition law cases are hybrid in nature, involving legal and economic issues. In HK, the judges on the Competition Tribunal are in fact from the High Court with general law training but without expertise in economics, commercial, or competition law.[108] These generalist judges tend to focus on procedural legal issues rather than substantive issues. To compensate for this, the post of 'assessor' has been created[109] and 'may' be appointed in the proceedings.[110] The assessors, who possess knowledge of economics, should be able to help measure efficiency, especially in mergers. However, they do not vote in the Tribunal but only advise. The role and power of these assessors in the Tribunal may be undermined and is unclear. Neither the Competition Ordinance nor any other official documents give sufficient elaboration. Details regarding assessors are in Section 3.7.3.2 of Chapter 3.

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[106] Press Releases, 'CJ' speech at Ceremonial Opening of the Legal Year 2016' (11 Jan 2016).

[107] Press Releases, 'CJ' speech at Ceremonial Opening of the Legal Year 2017' (9 Jan 2017).

[108] Commerce and Economic Development Bureau, *Public Consultation on Detailed Proposals of A Competition Law* (n 34) proposal 17.

[109] ibid proposal 18.

[110] Competition Tribunal, 'Guide to Court Services' (December 2015) Hong Kong Judiciary 17.

1.3.2 Secondary Objective – Consumer Welfare

In reference to US experience with the Sherman Act, Robert Lande has said that there is no evidence that economic efficiency in terms of cost saving, and increased profits from the trusts, has be passed to consumers.[111] Senator Sherman asserted that savings by better methods of production went to producers instead of consumers.[112] This shows that economic efficiency may not necessarily result in consumer welfare.

The secondary importance of the objective of consumer welfare can be seen in the following three places: the preamble, Section 130, and Section 1 of Schedule 1. Some members of the Bills Committee on Competition Bill opined that safeguarding consumer benefit should be clearly specified as an objective of the Bill.[113] One member recommended it says, '[t]o enhance economic efficiency and the free flow of trade through promoting sustainable competition thereby bringing benefits to both the business sector and consumers'. This would have fit with the purpose of the legislation as stated in the 2008 public consultation document and other jurisdictions, including the UK and China. This objective could have been in the preamble. There are worries that if the objective of 'economic efficiency and hence consumer protection' is not stated in the Bill, the Competition Tribunal would not consider this factor when hearing and adjudicating on competition cases.[114] The government explained that the recommended phrase is a stated objective of the competition policy and it is unnecessary to make explicit this pre-existing objective.[115]

However, this gives rise to several questions: If the government is so sure that this is the intended outcome, why should it not be stipulated? Competition law is still different from competition policy. The former has binding effect while the latter does not. Would it not

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[111] Robert H Lande, 'Wealth Transfers as the Original And Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings Law Journal 65.

[112] E. Thomas Sullivan (ed), *The Political Economy of the Sherman Act* (Oxford University Press 1991) 13.

[113] Legislative Council, 'Report of the Bills Committee on Competition Bill' (2012) LC paper No CB(1)1919/11-12, para 10.

[114] ibid para 13.

[115] ibid para 14.

improve legal certainty for the Competition Commission, Competition Tribunal, and parties in litigation if the objectives are stated in the law?

The Competition Commission has not commented in detail on its function in Section 130 of the Bill, where objectives are absent.[116] Some Bills Committee members have suggested that the objective of enhancing consumer welfare should be stipulated in the Bill as a 'new function' of the Competition Commission so that the Commission would take this factor into account in its future operation. However, this suggestion was declined by the government, which has said that unlike the former Office of Fair Trade (OFT) (now, Competition and Markets Authority) in the UK, which implemented the Competition Act 1998, the Competition Commission in HK does not have a statutory function in consumer protection.[117] The question is why there is a lack of statutory function for consumer protection for the Commission, if enhancing consumer benefits is 'undoubtedly' one of the intended of outcomes of the Bill based on the government's promise?

The government initially resisted the introduction of an express reference to consumer benefit when considering the overall economic benefits exclusion in Section 1 of Schedule 1.[118] Subsequently, the government changed its stance to agree to include an express reference in Section 1(a) of the Schedule 1, as 'this is in line with the overall objective in our competition policy to enhance economic efficiency and free flow of trade, and thereby benefitting consumer welfare'.[119] Beyond the economic benefits required for the purpose of general exclusions from the Ordinance in Section 1 of Schedule 1, enhancing consumer welfare seems merely a by-product of the Ordinance rather than an objective.[120]

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[116] Only §3.3 of the *Guideline on the merger rule* states that the promotion of competition in the context of the Ordinance has an economic objective to increase economic efficiencies, and ultimately, consumer welfare. However, this statement still emphasises economic efficiency and undermine consumer welfare. See Marc Waha, *Competition Law Handbook* (LexisNexis Butterworths 2015) 28.

[117] § 15 of the Report of the Bills Committee on Competition Bill of 23 May 2012, LC Paper No CB(1)1919/11-12.

[118] Minutes of the fifth meeting for the Bills Committee on Competition Bill of 20 December 2010, LC Paper No CB(1)1134/10-11, p.2 of the Appendix.

[119] Administration's paper on Proposed Committee Stage Amendments of 5 April 2012, LC Paper No CB(1)1573/11-12(03), at §7; see also Secretary for Commerce and Economic Development during third reading of the Competition Bill, Official record of Legislative Council proceedings, 6 June 2012, at 14615.

[120] Waha, *Competition Law Handbook* 27 (n 116).

Thus the government implies that consumer welfare is a secondary objective.[121] The economic purpose appears to override the consumer welfare objective if there is an inconsistency. Furthermore, the term 'consumer welfare' is often unclear in competition analysis.[122] Although consumer welfare is frequently mentioned as a policy goal, there is no consensus on what the term means. Nor is there any simple, non-contestable method for quantifying harm to consumer welfare that works for all cases.[123] Additionally, the connection between consumer welfare and practical enforcement of competition law is not always straightforward.

Though many countries agree that consumer welfare should be a competition objective, most of them never specifically define consumer welfare. Competition agencies themselves disagree over the meaning of consumer welfare.[124] Even in the oldest competition regime, it is ironic that US courts never mentioned consumer welfare in an antitrust case before 1975.[125] Even the US Antitrust Modernization Commission after three years' study still could not reach a consensus on the term.[126] Given the varying definitions of consumer welfare that exist, it is not surprising that courts have reached inconsistent results based on their varying conceptions of consumer welfare.[127]

[121] Commerce and Economic Development Bureau, *Public Consultation on Detailed Proposals of A Competition Law* 1, para 1. In the Competition Bill, the term 'efficiency' is mentioned four times while the term 'consumer' is mentioned only once. In the Competition Ordinance, efficiency is mentioned four times whereas the term 'consumer' is mentioned twice.

[122] Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (n 55) 1032.

[123] ICN, *Competition Enforcement and Consumer Welfare — Setting the Agenda* (n 1) 45.

[124] Stucke, 'Reconsidering Antitrust's Goals' (n 33) 527.

[125] *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 131 n.1 (1975).

[126] The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–11060, 116 Stat. 1766, 1856–59.

[127] Compare *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1033–34 (N.D. Cal. 2001) (noting that antitrust laws, in promoting consumer welfare, do not protect rivalry. This is to sustain a monopoly.) with *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) (noting that the Sherman Act protects rivalry in order to obtain a monopoly).

1.3.2.1 Consumer Welfare v. Consumer Protection

Consumer welfare in competition law enforcement is not synonymous with consumer protection. William Kovacic sees consumer protection as a separate, though probably complementary field of law to competition law.[128] In HK, the Consumer Council was established in 1974.[129] In its mission statement, the Council states that it is committed to enhancing 'consumer welfare' and empowering consumers to protect themselves. However, no definition of consumer welfare can be found on the Consumer Council website or elsewhere.[130] It seems that the concept of consumer protection overlaps with consumer welfare, because the two terms are used interchangeably.

The HK government asserted that its competition regime closely follows the EU's.[131] However, the EU has EU-wide consumer laws whereas HK still lacks statutory consumer rights and class action.[132] Thomas Cheng, a Competition Commission board member and Consumer Council competition policy committee member, said in an interview that,

> Up to the present moment, no discussion has been done on the objectives of the competition law. Consumer welfare is a microeconomic concept for the interests of consumers that the Competition Commission should be working on, while the Consumer Council is dealing with the broad concept of consumer protection.[133]

[128] William Kovacic, 'Competition Policy, Consumer Protection, and Economic Disadvantage ' (2007) 25 Journal of Law and Policy 101,101, 114.

[129] It answers consumer enquiries, handles complaints, mediates dispute between consumers and service suppliers, conducts research, surveys and does product testing to produce and publish information to consumers. The Council also advises on all matters affecting interests of consumers, monitors trade practices, liaises with industry bodies to safeguard consumer interests, and launches consumer education campaigns. See Consumer Council <http://www.consumer.org.hk/website/ws_en/profile/performance_ pledge/PerformancePledge.html> accessed 10 March 2014.

[130] ibid Consumer Council, Mission Statement.

[131] Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions* (25 June 2010).

[132] The Law Reform Commission published a report in May 2012, proposing that a mechanism for class actions should be adopted in HK. However, no further news has been heard afterwards. See The Law Reform Commission of Hong Kong, 'Class Actions' (May 2012).

[133] Interview with Thomas Cheng, Competition Commission member, 18 Dec 2014.

In any event, both consumer protection and consumer welfare are weakly defended mainly owing to the limited powers of the Consumer Council, which is basically an advisory body that offers mediation between consumers and merchants. It has no authority to impose a fine against merchants and demand any compensation for consumers.[134] The Council has long been criticised as a toothless tiger. Therefore, hopes are high for the new Competition Commission, which is expected to enforce genuine consumer welfare.

1.3.2.2 All Consumers v End Consumers

Before defining consumer welfare, we need to define the consumer first. Economic relations are readily understood in common-sense terms. However, it is as though we always referred to companies as undertakings and consumers are individual people. Are they direct or indirect consumers, intermediate users or end users? If consumers refer to all direct and indirect users who are affected by the anti-competitive agreements, behaviour or mergers in question, then a large number of people can be understood as consumers. The consumer welfare standard approaches the total welfare standard.[135] If the consumer, however, mainly consists of ordinary individuals and excludes wealthy monopolies and undertakings, then the definition becomes somewhat subjective and objectionable.[136]

According to the European Commission, ‘the concept of consumers encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers’.[137] In other words, consumers include all actual and potential, direct and indirect customers (e.g., clients, distributors, possibly competitors, as well as end-customers). However, some see end consumers as the only true consumers.[138] For example, some recent decisions at the General

[134] Consumer Council Ordinance (Cap 216).

[135] ICN, *Competition Enforcement and Consumer Welfare — Setting the Agenda* (n 1).

[136] Carlton, 'Does Antitrust Need to be Modernized?' (n 100) 158 (stating that the perception of antitrust as ‘protecting innocent individuals from evil corporate empires is misleading’ as ‘[m]ost transactions in the US economy are between firms’.)

[137] European Commission Notice on the Application of Art 81(3).

[138] P. Akman, 'Consumer versus Customer: The Devil in the Detail' (2010) 27 British Journal of Law and Society 315, 315-344.

Court have explicitly referred to the importance protecting final consumers.[139] Article 102 of the TFEU is also interpreted as referring to practices which may cause damage to consumers directly, implying a protection for end consumers.[140] Thus, it seems that there is still no universal agreed definition on consumers in the EU. The US's Department of Justice tends to give more weight to effects on consumers that are direct and immediate.[141] But HK so far has left 'consumers' undefined. The term 'consumer' is mentioned only once in the Competition Ordinance.[142]

1.3.3 Implicit Objective – Protection of SMEs

Having discussed the two main objectives, maximising economic efficiency and benefiting consumer welfare, we must note another – protecting small and medium enterprises (SMEs). The Competition Commission's former CEO, Stanley Wong, told SMEs before implementation of the competition law, 'Usually it is the big players who fear the Competition Law. There was no other place in the world apart from HK where small businesses where worried about competition laws'.[143] In fact, there are several provisions in the Ordinance that protect SMEs. During the debate over the Competition Bill, the original *de minimis* exclusions in both the first conduct rule (combined turnover not exceeding HK$100 million for 'agreements of lesser significance') and the second conduct rule (turnover below HK$11 million for 'conduct of lesser significance') were obviously aimed at SMEs.[144] The Bills Committee further generously relaxed the threshold to HK$200 million in the first conduct rule[145] and HK$40 million in the second conduct rule.[146] Such 'major concessions'

[139] Case T-321/05, *AstraZeneca AB and AstraZeneca plc v European Commission*, [2010] ECR II-2805, para.804; Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR 2969, para. 118; Joined Cases T-213/01 and T-214/01, *Osterreichische Postsparkasse AG and Bank fur Arbeit und Wirtschaft AG v. Commission* [2006] ECR II-1601, para 115. ('Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods or services.')

[140] Case C-52/09, *Konhurrenverket v. TeliaSonera Sverige AB* [2011] ECR, paras 21-24.

[141] ICN, *Competition Enforcement and Consumer Welfare — Setting the Agenda* (n 1) 28.

[142] Competition Ordinance, s 21(2)(b).

[143] Amy Nip, 'Small businesses should not fear competition law, say watchdog chief Dr Stanley Wong' *SCMP* (HK, 23 April 2015).

[144] Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 113) para 40.

[145] Section 5 of Schedule 1 of Competition Ordinance.

[146] Competition Ordinance, sch 1, s 6(1).

essentially mean almost all SMEs to fall outside the jurisdiction of the rules.[147] This issue is further elaborated upon in Section 5.3 of Chapter 5. Section 82 of the Ordinance is another provision conferring specific protection for SMEs by adopting a warning notice mechanism:

> [W]arning notice seeks to address concerns of the business sector, *particularly SMEs*, over clarity of the general prohibition and the risk of falling foul of the law unknowingly. Under the new "warning notice" mechanism, the Commission is required to warn the infringing parties before instituting any legal proceedings in respect of non-hardcore anti-competitive activities … [T]he non-compliance of a warning notice has no legal consequences *per se*.[148]

The government has proposed in Section 143(3) of the Competition Bill that 'the Competition Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice'. The government admitted that this could provide a less formal framework and expeditious proceedings, thereby easing the burden on SMEs involved in competition cases.[149]

The Competition Ordinance gives the Competition Commission wide discretion in handling complaints.[150] Protection of SMEs is certainly within the capabilities of the Competition Commission. If SMEs breach the Ordinance, the Commission could and is likely to exercise these discretionary powers for the protection of SMEs.[151] The Competition Tribunal could also impose less harsh sanctions against SMEs. However, if the objective of the competition law is to ensure competition rather to protect competitors, it is undesirable that the law be written in favour of SMEs. Nonetheless, it is proper for the Competition Commission's current policy to educate SMEs by holding public seminars, printing pamphlets, advertising, and issuing guidelines. Spending resources in such a way is preferable to bending the law to protect SMEs.

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[147] Nearly 95 per cent of all SMEs would be excluded from the application of the second conduct rule. See Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 113) para 50.

[148] ibid (n 113) paras 34, 37 (emphasis added).

[149] ibid para 139.

[150] The discretion includes accepting commitment, settling complaint, allowing exemption, granting leniency agreement, issuing warning or infringement notice, bringing a case to Competition Tribunal, etc.

[151] Interview with Thomas Cheng, 2 March 2016.

The government's desire to shelter SMEs can be inferred from the composition of the Competition Commission's management board,[152] which allows five to sixteen board members to be appointed by the Chief Executive.[153] The board is the highest decision-making body in the Commission. In considering the appointment of a member, the Competition Ordinance stated that the Chief Executive may take into account a candidate's experience in SME.[154] Additionally, a government document states that 'in the Commission at least one member should have experience in SME matters', but this was removed after a public outcry.[155] Criticism arose because many members of the public did not want a protection of competitors in market. In any event, the Chief Executive appointed a chair and thirteen members in 2013 and increased that to fourteen members in 2016. Felix Kwok-Wai Chan, the permanent honourable chairman of the HK General Chamber of Small and Medium Business, has served as a member since the establishment of the Commission.[156]

The above design of the Commission hints that SME interests are being protected. This raises the question of whose interests will take primacy: the consumers', SMEs', or will both be balanced somehow? It is likely that the government desires to promote the interests of SMEs because of their existing policies in this regard. For example, the government has created an SME Funding Scheme with an SME Export Marketing Fund, SME Loan Guarantee Scheme, and SME Development Fund. Additionally, the government set up the Support and Consultation Centre for SMEs and the Small Entrepreneur Research Assistance Programme. The government does this to politically appease SME businesses, which are a key constituency the government cultivates to maintain legitimacy in the absence of democratic elections for chief executive and legislature. It is understandable that the government endeavours to maintain economic stability by helping SMEs, which account for 98 per cent of businesses out of HK's 300,000 entities.[157] Nevertheless, combining SME

[152] Commerce and Economic Development Bureau, *Public Consultation on Detailed Proposals of A Competition Law*, Proposal 3.

[153] Section 2(1), Hong Kong Competition Ordinance.

[154] Schedule 5, Part 2, Section 2(2), Hong Kong Competition Ordinance.

[155] Proposal 4, Commerce and Economic Development Bureau, *Public Consultation on Detailed Proposals of A Competition Law*.

[156] The Hong Kong General Chamber of Small and Medium Business <http://www.hkgcsmb.org.hk/tw/aboutus/life-hon-chairmen> accessed 14 June 2012.

[157] Hong Kong Small and Medium Enterprises Association <http://www.hksmega.org/English/introduction.htm> accessed on 26 Nov 2013.

protection policies with the institutional design of the Commission is improper because it conflates the objectives of competition regulation with economic management.

However, Chinese culture emphasises the protection of the poor, and SMEs may be considered the poorer neighbours of big business. A Chinese proverb says, ‘Rob the unethical rich to relieve the poor (Jie fu ji pin)’.[158] Article 15(3) of China’s Anti-Monopoly Law specifically allows exemptions in a range of cases for the purpose of reinforcing the competiveness of SMEs. In the case of the supermarket duopoly (ParknShop and Wellcome) and its possible abuse of its dominant position, the effect has been that the number of traditional grocery stores has shrunk. Small scale sellers cannot offer as low prices as the bulk-buying duopoly. Sometimes, ParknShop and Wellcome sell some goods at lower prices than the suppliers’ wholesale prices to grocery shops. This may constitute predatory pricing. Because of this, many of these small shops close and are driven out of the market, hurting the competition environment.

During the legislative process, some lawmakers in HK were inspired by the traditional idea of protecting the poor and weak, i.e., SMEs. However, in order to present an image of meeting international standards, it is unlikely that the HK government would openly admit to designing a competition law to protect SMEs. Such a protection for SMEs would run afoul of the latest developments in competition law principles. But it is an open secret that protecting SMEs is one of the implicit objectives of the new competition regime.

1.4 Ultimate Objective — Promoting Well-Being

Many argue over the ultimate objectives of competition policy. Lande claimed that the US Congress passed the antitrust laws to further economic objectives of a distributive rather than efficiency aims. In other words, he demonstrated that Congress was primarily concerned with preventing the unfair transfer of wealth from consumers to firms – i.e., preventing consumer

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[158] Deng Xiaoping, 'Building a socialism with a specifically Chinese character' (30 June 1984) People's Daily Central Committee of the Communist Party of China (noting that in accordance with socialism, Deng Xiaoping, the former General Secretary of the Communist Party of China stressed that, ‘socialism means eliminating poverty.’); Rita Yi Man Li and Yi Lut Li, 'The Role of Competition Law: An Asian Perspective ' (2013) 9 Asian Social Science 47, 51.

harm.[159] When conduct presents a conflict between protecting consumers and improving the economic efficiency, no court in recent years has chosen efficiency over consumer welfare.[160] Adam Smith remarked that, ‘Consumption is the sole end and purpose of all production; and the interest of producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer’.[161] Buttigieg believed that economic efficiency should be merely an intermediate goal to attain the ultimate objective of enhancing consumer interest.[162] He added that should competition policy seek to attain other objectives, these objectives should be subordinate to consumer well-being.[163] Cseres also stressed that competition policy usually focuses on a specific reconciliation of the overall interests of society with the particular interest of consumers.[164] In brief, economic efficiency alone cannot guarantee consumer well-being.[165]

Sir John Vickers, the former Chairman of the Office of Fair Trading (later, the Competition and Markets Authority) in the UK remarked that competition is not an end in itself but a process that advances the goal of economic well-being for consumers.[166] Mario Monti, former EU Commissioner responsible for competition policy also commented that, ‘Freedom of competition is a public freedom. It impacts not only on the economic environment but also on the organisation of society at large. It is in this way that competition policy is a "people's" policy’.[167]

[159] Lande, 'Wealth Transfers as the Original And Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (n 111).

[160] Kirkwood and Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (n 60).

[161] Adam Smith, *Nature and Causes of the Wealth of Nations* (Kindle Edition, University Of Chicago Press 2012) 251.

[162] Eugene Buttigieg, *Competition Law: Safeguarding the Consumer Interest* (Wolters Kluwer 2009) 383.

[163] ibid.

[164] Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law 2005) 311.

[165] Buttigieg, *Competition Law: Safeguarding the Consumer Interest* (n 162) 382.

[166] Sir John Vickers, ‘Competition is for Consumers’, a speech given to the Social Market Foundation on 21 Feb 2002.

[167] Mario Monti, ‘Competition for Consumers' Benefit’, a speech given in Amsterdam on 22 October 2004.

Tracing the earliest intention to formulate competition policy in HK, it is notable that Great Britain's last appointed Governor, Chris Patten, delivered a speech in the LegCo in 1992 on this issue:

> Hong Kong is proud of its free and competitive markets. But a more sophisticated and prosperous community has become increasingly unwilling to accept unfair and discriminatory business practices. The public has already begun to voice alarm at the use of market power by suppliers in area of special importance to the ordinary family's *well being* ... I shall ask my Business Council to put at the top of its agenda the development of a comprehensive competition policy for Hong Kong.[168]

Patten noticed a contradiction between HK's free economy and anti-competitive conduct in the market. He showed deep concern over the abuse of market power adversely affecting people's well-being. Therefore, he initiated a comprehensive competition policy upon his arrival to deal with the unfair competition environment.

After China's resumption of sovereignty, HK competition policy's emphasis seemed to shift from people's well-being to economic efficiency. This can be seen from the Statement on Competition Policy in 1998 that announced explicitly that the objective was to enhance economic efficiency and the free flow of trade.[169] In the eyes of China, HK was an international export hub, even after its sovereignty reversion. China thus showed great concern for HK's economic prosperity and market efficiency.[170]

There are also grounds for concern that the wealthy will use the law to safeguard their interests.[171] HK's competition law took more than two decades to be passed owing to notable resistance from the business sector. One of the well-being metrics in which HK excels is material welfare as a whole city. However, if a larger pie means greater wealth

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[168] Hong Kong Legislative Council, *Official Record of Proceedings*, 7 October 1992, 16 (Emphasis added).

[169] COMPAG, *Statement on Competition Policy* (n 34) para 2.

[170] Graham E Johnson, 'Links to and Trough South China: Local, Regional, and Global Connections' in Gerard A. Postiglione and James T. H. Tang (eds), *Hong Kong Becoming China: The Transition to 1997* (East Gate 1997); Yun-Wing Sung, 'The Hong Kong Economy Since Reversion ' in Ming K. Chan (ed), *China's Hong Kong Transformed: Retrospect and Prospects* (City University of Hong Kong Press 2008).

[171] Maurice E. Stucke, 'Lessons from the Financial Crisis' (2010) 77 Antitrust Law Journal 313, 339–40.

inequality, the whole population will not necessarily be happier.[172] The former Chief Executive of HK, Donald Tsang, admitted to legislators in a session that he failed to adequately address the city's wealth gap in the Legislative Council:

> Before, I always believed that I just needed to make the economy grow, to make the pie grow bigger — and through the trickle-down effect, every level of society could benefit. But practice and theory aren't the same thing.[173]

HK recently acknowledged that it has a sizeable poverty problem by declaring that over one million out of its seven million citizens are officially poor.[174] There is a growing perception that HK's free market model is designed to benefit the wealthy. The city has the worst income disparity of all developed economies, according to a UN report, and one in five households is living below the poverty line.[175] Today, protests against widening wealth disparity are appearing.[176] HK's competition regime may thus need to take note of Lande's argument that the first objective of antitrust laws should be distributive efficiency.[177]

The final aim of competition law and policy should be to improve or, at least, not hamper social well-being. Webster's Dictionary defines 'well-being' as 'the state of being happy, healthy, or prosperous.'[178] Well-being, as the OECD found, is multi-faceted. Promoting well-being entails promoting (1) material welfare (income, wealth, housing, earnings, etc.) and (2) quality of life (human rights, freedoms, liberty, democracy, personal security, civic engagement and governance, health care, employment, education, environmental quality, etc.).[179] Does HK competition law and policy promote (1) only

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172 Better Life Index: United States, OECD, http://www.oecdbetterlifeindex.org/countries/united-states/ (last visited Jan. 10, 2013).

173 Te-Ping Chen, 'Tsang's Exit in Hong Kong Marred by Scandal' *The Wall Street Journal* (18 June 2012).

174 Jennifer Ngo, '1.3 m Hongkongers below poverty line' *SCMP* (HK, 29 September 2013) EDT1.

175 Enid Tsui, 'Hong Kong to Introduce Competition Law ' (15 June 2012) Financial Times.

176 Editorial, 'Hong Kong Protesters March to Demand Media Freedom' *Reuters* (London, 23 Feb 2014).; Gary Cheung and Emily Tsang, 'Beijing Urged to Listen to Message of July 1 Marchers' *SCMP* (HK, 1 July 2013).

177 Lande, 'Wealth Transfers as the Original And Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (n 111).

178 Merriam-Webster's Collegiate Dictionary 1342 (10th ed. 1996).

179 OECD, 'Better Life Initiative: Compendium of OECD Well-Being Indicators ' (2011) <http://www.oecd.org/document/28/ 0,3746,en_2649_201185_47916764_1_1_1_1,00.html> accessed 10 July 2013; Jon Hall et al., 'A Framework to Measure the Progress of Societies ' (2010) OECD Statistics, Working Paper No 2010/05.

material welfare, (2) quality of life, or (3) both material welfare and quality of life?

A competition policy's objective to maximise wealth to the exclusion of other objectives will not necessarily increase well-being. To maximise well-being, any competition policy must balance promoting material welfare with quality-of-life factors, such as freedom and self-determination.[180] A single-minded economic efficiency approach to competition policy is likely to overlook opportunities to increase social well-being.

1.5 Spectrum Approach

It is less controversial to suggest that competition law should be based on economic objectives. The Chicago school finds economic objective to be the only goals of antitrust law.[181] Whereas, post-Chicago competition thinking views non-economic goals as important considerations.[182] It is argued that the mechanism of competition is affected by many factors besides economic factors.[183] The rigidity of the sole economic approach may result in injustice and therefore a spectrum approach is suggested. A spectrum approach does not mean that multiple objectives have to be set for competition enforcement. Instead, it proposes that non-economic values should be duly taken into account as needed for certain competition law cases.

The notion of equity is that it deals with the rigidity of the common law system, and gives a chance for petitions based on moral grounds at odds with the restrictive judicial precedents of common law courts. The importance of equity law can be traced back to a foundational decision, *Earl of Oxford's case*, that the law of equity should prevail over common law.[184] As a commonwealth jurisdiction, HK's legal system guarantees equitable

[180] Stucke, 'Reconsidering Antitrust's Goals' (n 33) 602.

[181] E Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84 University of Michigan Law Review 213, 226, 229.

[182] Aleksander Maziarz, 'Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?' (August 2014) 10 European Competition Journal 341, 345.

[183] ibid 342.

[184] *Earl of Oxford's case* (1615) 21 ER 485.

remedies in the constitution. Article 8 of the Basic Law stipulates that laws previously in force in HK including rules of equity shall be maintained after handover to China.

Similar principles apply to competition law cases. Rigidity giving rise to potential injustice is a concern with the pure economic approach. Both economic and non-economic factors should have been considered when HK drew up its competition regime and proposed a spectrum approach. Ariel Ezrachi argues that such a view of rejecting external social or political objectives is merely an illusion.[185] Competition law has a ‘sponge-like’ feature that makes it inherently pre-disposed to different values and considerations.[186] The experiences of three influential competition regimes (US, EU, and China) will be explored to see if the inclusion of non-economic considerations serve the ultimate objective of promoting well-being.

1.5.1 United States

US antitrust laws do not specify objectives.[187] Their interpretation evolves over time. Robert Bork suggests economic efficiency was the only objective of Sherman Act, but such an argument was rebutted by other scholars.[188] Indeed, the economic objective, among the aims, was the most confused as no economists testified during the legislative debate.[189] The fear of the trust problem invited social pressure for federal intervention. Richard Hofstader argues about whether economic or political power had to be decentralised. Democratic government itself was threatened when centralised trusts’ power could challenge the government. One of the goals was to protect the democratic governance of the nation by preventing economic power from being too concentrated in big companies. He observes that the political impulse

[185] Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49, 49.

[186] ibid 50.

[187] Kenneth G. Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 University of Pennsylvania Law Review 1191, 1191.

[188] Robert H. Bork, 'Legislative Intent and the Policy of the Sherman Act ' (Oct 1966) 9 The Journal of Law and Economics 7.

[189] Sullivan (ed), *The Political Economy of the Sherman Act* 6.

was more articulate than the economic theory.[190] Competition also facilitated individualism and discipline from the social and cultural context. David Million views the Sherman Act as designed to advance individual liberty at the expense of economic power. This is contrary to Bork's argument.

Pitofsky argued that almost all antitrust lawyers, judges, and academics agree that antitrust has economic aims as well as political, social, and moral objectives.[191] The US Supreme Court's 'State Action' doctrine enables the States to consider non-competition values which are important in the operation of their markets.[192] Congress, in passing Section 7 of the Clayton Act[193] in its 1950 Celler-Kefauver Anti-Merger amendment, was concerned with concentrated ownership in the American economy.[194] But Congress's fear was not only of economic effect of accelerated concentration of commercial power, but also of the threat to other values that such concentration was thought to pose.[195] Congress wanted to break the powerful trusts.[196] Similarly, in post-war Germany and Japan, the birth of a competition policy was aimed at the political objective of rendering impossible the former cooperation between totalitarian regimes and the powerful national cartels. The US advocated competition law and policy in these two countries to promote democracy.[197]

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[190] Richard Hofstadter, 'What happened to the antitrust movement?' (1965) The Paranoid Style in American Politics and Other Essays, New York: Alfred A Knopf .

[191] Pitofsky, 'The Political Content of Antitrust' (n 13).

[192] *Parker v Brown*, 317 US 341 (1943).

[193] Ch 1184, Section 7, 64 Stat. 1125 (1950) (current version at 15 U.S.C. s18 (1976).

[194] *United States v. Pabst Brewing Co*., 384 U.S. 546, 551 (1966). Antitrust Division Workload Statistics FY 2001–2010, DOJ <http://www.justice.gov/atr/public/workload-statistics.html> accessed 28 Nov 2013.

[195] *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962); H.R. Rep. No. 81-1191, at 8 (1949) (prohibiting relationships that deprive rivals of a fair opportunity to compete); Kenneth M. Davidson, *Reality Ignored: How Milton Friedman and Chicago Economics Undermined American Institutions and Endangered the Global Economy* (2011).

[196] Eleanor Fox, 'Against Goals' (2012) 81 Fordham Law Review .

[197] David Gerber, *Law and Competition in Twentieth Century Europe* (Hart 2001) (noting that 'ordoliberalism' in Germany developed a political and economic ideology which viewed competition policy as opposing the previous fascist regime.) See Josef Drexl, 'Competition Law in Media Markets and its Contribution to Democracy: A Global Perspective' (2015) 38 World Competition Law and Economic Review 367, 367; Josef Drexl, 'Principles of European Constitutional Law' in Amin von Bogdandy and Jurgen Bast (eds), *Competition Law as Part of the European Constitution* (Hart 2006), 633, 636-41.

As time has passed, the main objective of antitrust law in the US shifted to consumer welfare, as is commonly understood today. Birkwood and Lande indicate that the ultimate goal of antitrust is not to increase the total wealth of society, but to protect consumers from behaviour that deprives them of the benefits of competition.[198] The FTC clearly states the objective is to protect the process of the competition for the benefit of consumers.[199] The Supreme Court case of *Brooke Group Ltd v. Brown & Williamson Tobacco Corporation,* states that the Robinson Act is concerned with consumer welfare and competition, as opposed to protecting individual competitors from harm. The Supreme Court explicitly required that predatory pricing involve recouping to cause consumer harm,[200] inferring the adoption of a consumer welfare objective. The FTC decided in a recent case, *Tesoro Corporation/BP PLC transaction,* that much consideration was given on protection of jobs for employees at a national level.[201] The Supreme Court in the *Leegin* case commented that the interpretation of the Sherman Act's provisions has changed over the years to meet changing market and enforcement philosophies.[202] The objectives of US policy will continue to evolve in the future in accordance with changes in political, economic, and social ideas and conditions.

1.5.2 European Union

Protection of consumer welfare is a predominant objective of EU competition law.[203] The current state of the case law of the European Courts (General Court and the Court of Justice) casts serious doubt on the notion that the jurisdiction's competition law holds to a single objective (welfare or the protection of the competitive process) and indicates that EU

[198] John Kirkwood and Robert Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84 Notre Dame Law Review 192,192.

[199] The FTC <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> accessed 2 March 2017.

[200] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp* 509 U.S. 209 (1993).

[201] California's attorney general approved the transaction subject to the condition that Tesoro could not dismiss workers for two years. FTC, 'Tesoro Corporation/BP p.l.c.' (17 May 2013) <www.ftc.gov/enforcement/cases-proceedings/closing-letters-corporationbp-plc> accessed 27 March 2017.

[202] *Leegin Creative Leather Products, Inc v PSKS, Inc* (06-480), 127 SCt 2705 US (2007).

[203] Chris Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)? Reflections of a community lawyer' (2007-2008) 10 Cambridge Yearbook of European Legal Studies , 345; Chris Townley, 'Is there (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?' in Caroline Heide-Jorgensen and others (eds), *Aims and Values in Competition Law* (2013) 177; Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016).

competition law actually adheres to multiple objectives.[204] Recent EU Court judgments confirm that Article 101 TFEU relates to the values such as: environmental protection, culture, public health, market integration, administration of justice, sport, etc.[205]

Moreover, EU competition law involves that clear political objective of creating a single, EU-wide market.[206] The European Commission acknowledged the diversity of competition law can be beneficial to the EU's diverse cultural, language, and consumer preferences which are 'an invaluable asset and source of innovation'.[207] EU competition rules allow member states to have various conditions of competition domestically.[208] Christopher Townley noted that, 'The application of Article 101 requires the relevant actors to balance short and long-term competition (today most speak of consumer welfare), environment protection, and other public policy goals'.[209] He concluded that there is room for non-economic goals in Article 101 TFEU cases.[210]

Public interest objectives have even occasionally outweighed the finding of a restriction of competition under Article 101(1).[211] When applying competition law might jeopardise certain public interests, the interpretation of the concept of 'undertaking' by the Commission and the courts have been altered with the aim of excluding certain activities

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[204] European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJC 101/7, para. 13, ('The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers'.)

[205] Case C-519/04 P *Meca Medina v Commission* [2006] ECR I-6991, para. 45; Case C-1/12 *Ordem dos Te´cnicos Oficiais de Contas v Autoridade da Concorre^ncia*, 28 February 2013; Case C-136/12 *Consiglio nazionale dei geologi v Autorita` garante della concorrenza e del mercato*, 18 July 2013, paras 52–57; Case T-193/02 *Laurent Paiu v Commission* [2005] ECR II-209, paras 102-4.

[206] Vasiliki Brisimi, *The Interface between Competition and the Internal Market* (Hart 2016).

[207] European Commission, *A Single Market for 21st Century Europe* (2007) 5.

[208] Article 34 and 36 TFEU; Article 3(3) of Regulation 1/2003.

[209] Christopher Townley, 'Coordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 194 215.

[210] Townley, 'Is there (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?' (n 203) 116.

[211] Case C-309/99, *Wouters and Others* [2002] ECR I-1557; Case C-519/04, *Meca-Medina and Majcen* [2006] ECR I-6991. For an analysis of this issue in the context of Article 101 TFEU, see C. Townley, 'Which Goals Count in Article 101 TFEU?: public policy and its discontents' (2011) 9 European Competition Law Review 441 and more recently; Julia Nowag, 'Wouters, when the condemned live longer: A comment on OTOC and CNG' (2015) 36 European Competition Law Review 39-44.

from the scope of the competition law provisions of the Treaty.[212] Within the framework before Regulation 1/2003, the courts recognised the discretion of the Commission in balancing public interest objectives with the restriction to competition in a number of cases regarding the enforcement of Articles 101(3).[213] The role of public interest in the enforcement of EU competition law is also recognised in the context of Article 106 TFEU. One could also refer to Protocol No. 26 on Services of General Interest, which has been annexed to the Treaty with the aim of emphasising the importance of services of general interest. Already Article 14 TFEU recognises the role of services of general economic interest in the 'shared values of the Union' and provides that members states 'shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions'.

The importance of the non-economic aim of market integration can also be seen in the interpretation and application of Article 102.[214] Recently, the ECJ held that Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of the political objective of the internal market. It states,

> The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.[215]

Similarly, the Guidance Paper states that '[Article 102] is the legal basis for a crucial component of competition policy ... This is particularly important in the context of the wider

[212] For instance, solidarity between generations and the social security system: Joined Cases C-159/91 & 160/91, *Poucet v. Assurances Generales de France* [1993] ECR I-637; Joined cases C-261/01. C-306/01, C354/01 and C-355/01, *AOK Bundesverban* [2004] ECR I-2493.

[213] Case C-26/76, *Metro v. Commission (Metro I)*[1997] ECR 1875, para 21: 'The powers conferred upon the Commission under Art 85(3) [now Article 101(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of different nature and to this end certain restrictions of competition are permissible, provided they are essential to the attainment of those objectives and they do not result in the elimination of competition for a substantial part of the common market'; joined cases T-538/93, 542/93, 543/93 and 546/93, *Metropole Television v. Commission* [1996] ECR II-649, para 118: 'in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of public interest in order to grant exemption under Article 85(3) of the Treaty'.

[214] Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in C. D. Ehlermann and M. Marquis (ed), *2007 EU Competition Law and Policy Workshop/Proceedings* (Hart Publishing 2008) 120-164, 128-138.

[215] Case C-52/09 *Konhurrensvrket v TeliaSonera Sverige AB*, 17 February 2011, nyr, para 22; see also Case C-94/00 *Roquette Freres* [2002] ECR I-9011, para 420.

objective of achieving an integrated integral market'.[216] The European Commission has also said that, '[C]ompetition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context'.[217] Obviously, EU competition adheres to the goal of pluralism.

1.5.3 Mainland China

China created a competition law, the Anti-Monopoly Law (AML), in 2008. It serves as a principal pillar of Chinese competition policy.[218] Article 1 of the AML clearly shows its plurality of objectives.

> This Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers, and *social public interest*, promoting the healthy development of the *socialist market economy*. [219]

Article 4 also stipulates that 'the State formulates and implements competition rules compatible with the socialist economy […]'. Thus, the AML has been designed to serve both economic and non-economic objectives. Its references to social public interest and development of socialist market economy have drawn significant attention. [220]

To truly understand Chinese competition law and policy, one has to consider political philosophy and not just economic and competition principles.[221] Under its official ideology,

[216] Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, para 1; Liza Lovdahl Gormsen, 'Can Consumer Welfare Convincingly be Said to be an Objective of Article 102 when the Methodology Relies on an Interference of Effects' in Caroline Heide-Jorgensen and others (eds), *Aims and Values in Competition Law* (DJOP 2013) 197.

[217] EC Commission, XXIInd Report on Competition Policy 1992, 13.

[218] Xiaoye Wang and Jessica Su, 'China's Anti-Monoploly Law: agent of competition enhancement or engine of industrial policy?' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012) 380.

[219] China Anti-Monopoly Law, art 1 (emphasis added).

[220] Hannah Ha, John Hickin and Gerry O'Brien, 'One country, two antitrust systems' (November 2008) Asia Law

[221] JS Schneider, 'Administrative monopoly and China's new anti-monopoly law: lessons from Europe's State Aid Doctrine' (2010) 87 Washington University Law Review 877; MM Dabbah, 'Competition law and policy in developing countries: a critical assessment of the challenges to establishing an effective competition law regime' (2010) 33 World Competition 470; MM Dabbah, *International and comparative competition law* (2010).

China is implementing 'socialism with Chinese characteristics'[222] that allows China to develop into an industrialised country with flexible economic policies but without an admission of a transformation to capitalism. With this ideological foundation, the Chinese Communist Party (CCP) is able to continue an 'open and reform policy' while justifying the constitutional legitimacy of its centralised political control.

To the Chinese government, social stability and harmony is more important than economic efficiency. China considers social unrest and protests intolerable, and competition law is subordinated to the putative public interest of preventing protest, dissent, and private political freedom.[223] Given that HK is part of China, the same principle applies to HK, whose stability and harmony concerns China tremendously. Regarding political objectives, the AML must be in line with the 'Four Cardinal Principles'[224] which cannot be questioned. The essence of the Principles is that the CCP is the only legitimate ruling party in China, and it prioritises the goal of social stability.

1.5.4 Hong Kong

In political context, competition policy's main objective is not simply to lower prices, but to prevent the concentration of economic power from threatening a dynamic economy and democracy. Hayek said that, 'The competitive system is the only system designed to minimise by decentralising the power exercised by man over man'.[225] Under this understanding, competition policy's salience increases. Competition policy, rather than simply promoting efficiencies, can be an important mechanism to disperse economic and

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[222] Wei-Wei Zhang, *Ideology and Economic Reform under Deng Xiaoping* (Kegan Paul International 1966).

[223] Emile Kok-Kheng Yeoh, 'Social change and social contradictions: The China dilemma', Institute of China Studies, University of Malaya, Malaysia 2012); see also Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005).

[224] They refer to the principles of upholding the socialist path, the people's democratic dictatorship, the leadership of the Communist Party of China, and Mao Tse-Tung's thoughts on Marxism-Leninism.

[225] F.A. Hayek, *The Road to Serfdom* (The Reader's Digest condensed version 2005) 33.

political power while promoting individual freedom.[226] If HK identifies with such ideas, a spectrum approach is preferable over a single objective approach to competition law.

The HK government has stated that its competition regime closely follows the EU's, and its Competition Ordinance is partially modelled upon EU Competition Law. Like the EU, the Competition Ordinance of HK also contains exclusions or exemptions from the law.[227] Specifically, the two conduct rules against anti-competitive behaviour do not apply to an undertaking with provision of services of general economic interest.[228] Moreover, like the EU's diversity, HK's status as a former British colony of 150 years enables it to have a diverse population and hybrid culture of East and West, reflected in language and consumer preferences. HK's socio-political and cultural dimensions are realities that simply cannot be ignored.

Although led by economic analysis, distinctive political, economic, and social foundations promote diversity.[229] Competition proceeds in a complex socio-economic environment. The Competition Commission and Competition Tribunal may need to take account of other considerations. For example, Thomas Cheng, HK Competition Commission board member, suggests that the cultural characteristic that has the most immediate application to competition enforcement is trust. If trust is gained more easily in a country, cartel enforcement may be more difficult.[230] Cartel members are less likely to defect if they have high trust in each other. Leniency programs may work less well in cultures that are more collectivist.[231] These cultural conditions may exist in HK. Doubtlessly, HK is increasingly influenced by China's culture, especially after its sovereignty handover in 1997. It would be appropriate for antitrust enforcers to comprehend the local culture so that adjustments can be

[226] Kenneth M. Davidson, *Reality Ignored: How Milton Friedman and Chicago Economics Undermined American Institutions and Endangered the Global Economy* (2011) 13; Walter Adams and James W. Brock, 'Antitrust, Ideology, and the Arabesques of Economic Theory' (1995) 66 University of Colorado Law Review 257, 268–69, 271; Lawrence Anthony Sullivan, 'Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?' (1977) 125 University of Pennsylvania Law Review 1214, 1222–23.

[227] Section (9)(2)(a) and Schedule 7, Part 5 (3) (a), Hong Kong Competition Ordinance.

[228] Hong Kong Competition Ordinance, sch 1, s 3.

[229] Ezrachi, 'Sponge' (n 185) 51.

[230] Thomas Cheng, 'How Culture May Change Assumptions in Antitrust Policy' in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press 2012) 214.

[231] ibid 215.

made to their analysis. This is even more reason to adopt a spectrum approach to include consideration of the cultural dimension.

Compared to the US antitrust experience, competition law is regarded in HK as a purely economic matter unrelated to the democratic development of a society. In fact, political and economic development are inseparable. The conditions under which the US created its antitrust law are similar to those in HK today. There exists resentment against big companies being able to influence public policy strongly in favour of business. Property developer conglomerates have been colluding with government officials to induce land hegemony. Social disparity is widening. The concentration of economic power, allied to anti-democratic forces in the legislature and executive, is threatening the progress of democracy. In fact, HK people have repeatedly demanded universal suffrage over the past decade. A spectrum approach would better facilitate political development in this pivotal time by breaking the big business and political nexus. Further discussion is in Sections 5.4 and 5.5 of Chapter 5.

Institutionally, competition agencies compete with other agencies for funding. Hence, if the competition law and policy are irrelevant to pressing social issues, then competition, relegated to a niche organisation with little resources, is easier to marginalise. The chairwoman of the Competition Commission of HK, Anna Hung-yuk Wu, admitted that seeking sufficient funding is her first priority.[232] She also concurs that the objectives of HK's competition law should be more than purely economic.[233]

Even if competition policy technocrats, for normative reasons, limit competition policy to economic objectives, they cannot avoid non-economic values. As Hayek noted, 'It is the essence of the economic problem that the making of an economic plan involves the

[232] Anna Wu, keynote speech at Asian Competition Forum dinner hosted by HK Competition Commission on 10 Dec 2013.

[233] Anna Wu, Chairperson, HK Competition Commission, 'Preparing for the Implementation of the Hong Kong Competition Law,' Asian Competition Forum, 8-10 Dec 2013, held in Hong Kong Polytechnic University.

choice between conflicting or competing ends – different needs of different people'.[234] To resolve the trade-offs, one invariably relies on political, social, and moral values.[235]

It is understandable that the spectrum approach would increase the workload on the Commission compared to the single objective approach. But the benefits outweigh the costs. Pursuing the well-being of consumers, the experiences of major economies (US, EU, and China) tell us that the spectrum approach is workable. At the same time, the author does not mean that the Commission should have unlimited discretion in pursuing multiple objectives. If relevant values arising in cases can be taken into account, a widening of objectives may not be necessary. A Commission board member commented that majority of cases should come with economic concerns for the Commission to address in accordance with economic objectives – economic efficiency and consumer welfare. It is expected that only in marginal cases will the Commission need to take into account non-economic concerns.[236] If a case involves multiple values and non-economic concerns, who should make these choices? It would be for the Competition Commission board members and the Competition Tribunal judges to make these choices. This means institutional design is vitally important to ensure the integrity, expertise, and independence of these decision makers. Chapters 2 and 3 will examine these issues.

1.6 Suggestions and Conclusion

A critical analysis has shown the weaknesses of the solely economic objective approach in HK, although the author agrees that economic objectives are important in competition law and policy. Efficiency, however defined, should not be the ultimate end. Competition instead represents the means to achieve broader government objectives for the economy or for a

[234] F.A. Hayek, 'The Road to Serfdom: Text and Documents—The Definitive Edition', (Routledge 2007) 187–92.

[235] Stucke, 'Reconsidering Antitrust's Goals' (n 33) 604.

[236] Interviewed with Thomas Cheng, 2 March 2016.

given industry.[237] Thus, a spectrum approach is recommended to replace the solely economic approach for HK's competition regime.

It is also found that the current objectives of HK's competition regime are insufficiently defined and not included in the text of the law. A codification could have given the HK Competition Commission, Competition Tribunal, and stakeholders clearer directions for enforcement. The author believes that the objectives of economic efficiency and consumer welfare are suitable for HK. The weight of the two principal objectives are not equal. However, these two core objectives are put forward in an unbalanced manner. The purely economic approach highlights efficiency, but may undermine consumer welfare and entirely ignores other non-economic objectives. If the order of priority is not changed between efficiency and consumer welfare, they should at least be placed in equal importance. Thus, the original objective statement, 'to enhance economic efficiency, thereby also benefiting consumer welfare' should be revised to read, 'to enhance economic efficiency *and* promote consumer welfare'. In other words, efficiency should be reasonably balanced against consumer welfare. In terms of protection of SMEs, it is submitted that it is inappropriate as an objective, even implicitly. Firms should be allowed to close when they are inefficient or lacking innovation on a level playing field.

The lack of well-defined and appropriate competition law objectives in HK raises questions about the effectiveness of the overall regime. Without a clear set of guiding aims, the attention of the Competition Commission and the Competition Tribunal is likely to remain unfocused, and the quality of enforcement will remain uneven. It is also a worrying sign that the Competition Ordinance and official competition discourse in HK have failed to address other important aims of competition policy, such as consumer welfare and non-economic goals like the reduction of monopolists' political power that enables them to corrupt the law-making and regulatory processes. If the Competition Commission fails to take notice of the political dimension of competition enforcement, HK's richest individuals like Li Ka-Shing – Asia's wealthiest man thanks to his various monopolies – will continue to use their economic power to pass or block laws that enrich themselves at the expense of the

[237] OECD, Global Forum on Competition: Bringing Competition to Regulated Industries 2 (2005), <http://www.oecd.org/dataoecd/11/24/34339715.pdf> accessed on 3 Apr 2014.

HK people. If the Commission ignores pressing social factors which cause disharmony and instability in the community, LegCo will have to decide whether requests for budget increases should be approved. The lack of clearly-written and non-economic efficiency objectives therefore threatens the overall effectiveness of HK's competition regime.

A good sign is that the competition agency's management appears to be open-minded and flexible regarding competition objectives. During interviews, the chairwoman of the Competition Commission said that, 'In future, we will take into account all factors affecting competition policy in Executive Council meetings for policy making. This should be done in regular process, like considering a bill of rights and environmental protection issues'.[238] The former Deputy Secretary-General of the Competition Commission, Sam Hui, added that, 'Merger review plays a significant role in anti-competitive behaviour. The general merger-control rule has not been passed yet. Upon the submission of the motion of this rule to be effective to the Executive Council in future, I agree that a proposal of non-economic objectives can be discussed for inclusion'.[239]

[238] Interview with Ms Anna Hung-Yuk Wu, Chairlady of Competition Commission, 6 Feb 2014.

[239] Interview with Mr. Sam Hui, former Deputy Secretary-General of Competition Commission, 6 Feb 2014.

2 A Critical Review of Institutional Arrangements – Part I

2.1 Introduction

Leading ideas in economics, law, or other disciplines need well-functioning institutions to implement them.[1] The ambitious objectives of competition law can only be realized if the institutions in play are suitable for the task.[2] Thus, the method of designing an institutional structure plays an important role in shaping the effectiveness of competition law enforcement.

Both this chapter and the following one add to the discussion in Chapter 1 by considering the institutional structure and its suitability to serve the competition objectives. This chapter approaches the question of how to establish an institutional framework that can promote and sustain effective competition, which in turn can fulfil the objectives of pursuing consumer welfare and economic efficiency. It will provide a theoretical framework in which to position institutional enforcement for the competition law, and will then critically examine the institutional structure of the HK Competition Commission in terms of its appointment nature, selection process, independence, accountability and concurrent jurisdiction concerns. Lastly, suggestions will be made to improve the institutional arrangement of the Commission. As the competition regime in HK is still in its infancy,[3] international examples will be examined, in particular mature regimes such as the United States (US), the European Union (EU), and the United Kingdom (UK), and the experiences of China and Thailand.

2.2 Theoretical Framework for Institutions

Institutional design has attracted much attention in recent years. Most notable is the writing of William Kovacic, former chairman of the FTC, who argues that the institutional design of

[1] William E. Kovacic, Hugh M. Hollman and Patricia Grant, 'How does your competition agency measure up?' (2011) 7 European Competition Journal 1, 25.

[2] Ariel Ezrachi, 'Editorial' (2013) 1 Journal of Antitrust Enforcement 1.

[3] The Competition Commission has just commenced its first proceeding in the Competition Tribunal on 23 March 2017 against five information technology companies over bid-rigging.

an agency can have a powerful influence on effectiveness,[4] and that structure can shape the real-life manifestation of competition law.[5] He adds that good competition agencies contribute to the public's trust and confidence in public governance, thereby strengthening the governments' legitimacy.[6] Many political scientists have emphasised the significance of institutional design for government performance[7] and have used antitrust enforcement to show how institutional arrangements shape policy.[8] Still, while antitrust legal literature is rich in substantive concepts, it is relatively thin on the systematic study of actual institutions.[9]

There is a broad spectrum of institutional systems in competition law regimes over the world. Scholars have classified different interpretations of institutions as broad or narrow, abstract or concrete. For example, Ignacio Leo described institutions as 'simply the rules of the game in regimes'.[10] According to the economic-centred theories of Daniel Crane, 'the category "institution" is capacious to the point of including many abstract values such as the entire spectrum of substantive legal norms, procedural rules, and informal mechanisms that comprise the antitrust enterprise'.[11] Malcom Rutherford and Warren Samuels also defined institutions broadly to include social norms, social conventions, laws, and constitutions that

[4] William E. Kovacic and DeCourcey Eversley, 'An Assessment of Institutional Machinery: Methods Used in Competition Agencies and What Worked for Them' (2007) International Competition Network Competition Policy Implementation Working Group 1; William E. Kovacic and David A. Hyman, 'Competition agency design: what's on the menu?' (2013) European Competition Journal 443; William Kovacic, 'The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective' in Robert J. Mackay, James C. Miller III and Bruce Yandle (eds), *Public Choice and Regulation: A View from Inside the Federal Trade Commission* (1987).

[5] William Kovacic, 'The Institutions of Antitrust Law: How Structure Shapes Substance' (2012) 110 Michigan Law Review 1019; William E Kovacic, 'Achieving better practices in the design of competition policy institutions' (2005) 50 Antitrust Bull 511; William E. Kovacic, 'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 32 Brooklyn Journal of International Law 403; Kovacic, Hollman and Grant, 'How does your competition agency measure up?' (n 1).

[6] William Kovacic, 'Rating the competition agencies; what constitutes good performance?' (2009) 16 George Mason Law Review 906.

[7] Ian Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures' (December 2009) 34 European Law Review 817; Donald Slater, Sébastien Thomas and Denis Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5 European Competition Journal 97; Philip Marsden and Ioannis Kokkoris, 'The Role of Competition and State Aid Policy in Financial and Monetary Law' (2010) 13 Journal of International Economic Law 875.

[8] C-D Ehlermann, 'Reflections on a European Cartel Office' (1995) 32 Common Market Law Review 471; Stephen Wilks and Lee McGowan, 'Disarming the Commission: the debate over a European cartel office' (1995) 33 Journal of Common Market Studies 259.

[9] Kovacic, 'The Institutions of Antitrust Law: How Structure Shapes Substance' 1021 (n 5).

[10] Ignacio de Leon, *An institutional assessment of antitrust policy: the Latin American experience* (Kluwer Law International 2009) 533.

[11] Daniel A. Crane, *The institutional structure of antitrust enforcement* (Oxford University Press 2011) xii.

'together make up the set of general social rules, and the formal and informal institutions which operate within the broader social and legal environment'.

Comparably, Marc Eisner defined institutions concretely by referencing antitrust agencies, courts, Congress, and to a lesser extent, presidents.[12] A narrower understanding of antitrust institutions would focus solely on formally established governmental bodies such as the competition authority, the competition tribunal, and appeal courts. For instance, antitrust institutions in the US refer to the Federal Trade Commission (FTC), the Justice Department's Antitrust Division (DOJ), the State Attorney General's offices, and federal courts.[13]

This thesis follows a narrow and more concrete interpretation of 'institutions' while assessing the related institutions in the HK competition regime. The focus of the analysis is on two tiers: endogenous institutional factors and exogenous institutional factors. In this chapter, the former directly refers to the competition institutions – the Competition Commission and the Competition Tribunal, and the latter to the executive and the legislature more generally. The exogenous institutional factors, both executive and legislature, must be analysed in order to comprehend the evolving political process for establishing the Competition Commission and Competition Tribunal and the impacts on the effectiveness of these bodies. Thus, a narrow and concrete understanding of institutions applies to the newly established Competition Commission and Competition Tribunal. In institutionalist literature and also in this chapter, the terms 'design' and 'structure' are used interchangeably.

2.3 Institutional Enforcement Concerns

Looking back upon institutional enforcement against anti-competitive conduct in HK, we can see that the former competition regulators (Competition Policy Advisory Group, Competition Policy Review Committee, Broadcasting Authority and Telecommunications Authority) were not proactive enough in establishing their credibility in combating anti-competitive

[12] Marc Allen Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (University of North Carolina Press 1991) 21.

[13] Many antitrust drivers (e.g., private enforcement system, criminal leniency rules, civil juries and the Hart-Scott-Rodino pre-merger notification requirement) are to supplement the formal institutions. See Crane, *The institutional structure of antitrust enforcement* (n 11) xii.

behaviour.[14] In fact, these regulators investigated very few cases of their own accord,[15] and it is this lax enforcement which has prompted the emergence of a new competition regime.

Although the Competition Ordinance has been passed,[16] the final version of the law has been significantly watered down by making multiple concessions to undertakings and also to the HK government. For example, in the new regime, the Competition Ordinance states that aggrieved persons may bring a follow-on private action, but not a stand-alone action, before the Competition Tribunal. However, a follow-on action cannot be brought after a contravention has been established by the Tribunal.[17] On this basis, the change leaves affected parties' reliant on public enforcement.

It is worth noting that the original design of the institutional framework was to adopt an administrative model, allowing the Competition Commission to investigate and identify breaches of competition law and impose sanctions.[18] However, the government later changed this administrative model to a semi-judicial model. Thus, the powers to adjudicate and award penalties belong to the Competition Tribunal,[19] but not the Competition Commission, as supposed to many other national competition regimes where both powers are exercised by the competition agency. The Commission's major role is to investigate anti-competitive conduct.[20] Other powers, based on degree of severity, include issuing warning notices[21] and infringement notices;[22] arranging leniency agreements;[23] bringing cases before the Tribunal

[14] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005).

[15] Staff reporter, 'Probe launched into TVB monopoly row' (25 January 2010) Standard.

[16] After a public consultation was conducted in 2008, a total of 38 meetings were held to prepare the draft of the Competition Ordinance. Data was provided by Gregory So Kam-leung, the current secretary for commerce and economic development in HK, who gave his key speech in the 8th Annual Asian Competition Law Conference 2012 at the Polytechnic University of Hong Kong on 10-11 December 2012.

[17] Competition Ordinance, ss 106-112. See Jenny Connolly and Annalisa Heger, 'Hong Kong: Dominance' (2014) The Asia-Pacific Antitrust Review 10.

[18] Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions* (25 June 2010) para 6.7.5.

[19] Competition Ordinance, pt 6.

[20] Competition Ordinance, division 2, pt 3.

[21] Competition Ordinance, s 82.

[22] Competition Ordinance, ss 66-78.

[23] Competition Ordinance, ss 79-81.

and granting block exemptions.[24] If the Commission wants to seek remedies such as disqualification orders or penalties, proceedings must be commenced in the Competition Tribunal.[25] After this transformation to a semi-judicial model, the Commission's power is substantially limited in comparison with the EU Commission, despite the fact that HK claims that it has adopted the EU model.[26]

The Competition Commission is an agency designed to enforce the Competition Ordinance.[27] As mentioned earlier, it is agreed by scholars that the effectiveness of law enforcement is highly dependent on a sound institutional design. However, there are several significant starting points for a discussion of the Commission's design flaws, including the nature of appointments; register of interests; selection process; institutional independence; accountability; and concurrent jurisdiction concerns – all of which have visible effects on institutional effectiveness.

2.3.1 Nature of Appointment

A feature of the institutional design for the Competition Commission is to adopt a two-tier system with an appointed board and a full-time executive arm. The board oversees the executive arm and makes all major decisions.[28] Under the Ordinance, the Competition Commission consists of five to sixteen members,[29] who are all appointed by the chief executive for a term not exceeding three years but with possible re-appointment.[30] Although the Ordinance does not state whether the chairperson and the members will be appointed in a full-time or part-time capacity, all members are appointed on a part-time basis.[31] By contrast,

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[24] Competition Ordinance, ss 15-20.

[25] Competition Ordinance, ss 92 and 93.

[26] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (File Ref: CITB CR 05/62/25/13, May 2008). Proposals 23, 23, 27, 38, 42, 43 and 48 of Consultation Paper are in connection with the EU model.

[27] Competition Ordinance, s 2.

[28] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 26) proposal 3.

[29] Competition Ordinance, sch 5, pt 2, s 2(2).

[30] Competition Ordinance, s 2(3).

[31] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 26) proposal 3. The Commission should have a two-tier structure, with an appointed board of Commission members overseeing a full-time executive arm. See ibid para 6. The Commission should also appoint a full-time chief executive officer (CEO), who would be the head of the executive. The main responsibility of the CEO would be to supervise the day-to-day administrative functioning of the Commission.

both the US Federal Trade Commission (FTC) and Japan Fair Trade Commission (JFTC) employ five full-time commissioners in supervising its operation.[32]

When the HK government's strong financial capacity is taken into account, hiring the members and chairperson in part-time roles appears to be questionable decision. Based on the Political Appointment System, the government created new positions of undersecretaries and political assistants to help the various bureau directors in 2008. From 2008 to 2012, generous remuneration was paid for eight undersecretaries from US $26,700 to US $28,600 monthly, which is even higher than the salary of the US Secretary of State and US Federal Reserve,[33] and nine political assistants were paid from US $17,200 to US $21,000 monthly, which is more than the earning level of the White House press secretary.[34] While the government was willing to fund new positions under the system, it would be unreasonable to indicate that the positions of the Competition Commission board are less important than political assistants and undersecretaries.

Another example that highlights the lack of priority given to the enforcement of competition law is the 'cash sharing scheme'. After years of budget surplus, the HK government had a record of HK$579 billion in reserve during 2011.[35] While many countries have still been suffering from a tight budget policy due to the global financial crisis, the government implemented a tax rebate program that gave out HK$6,000 to all adult holders of a HK permanent identity card without requiring a means test.[36] There is no reason why maintaining a full-time chairperson should be seen as any less of a financial priority. In addition, given the part-time nature of the members, meetings may not be sufficiently

[32] FTC, 'The Role of the Commissioner at the FTC,' <http://www.ftc.gov/speeches/brill/110314wesfacca.pdf> accessed 13 March 2013; JFTC <http://www.jftc.go.jp/en/about_jftc/list_of_members.html> accessed 24 July 2014.

[33] Tom Yam, 'Appointees' high salaries at odds with lack of experience' *SCMP* (18 June 2008)

[34] Though the appointees were highly paid staff, there were concerns regarding their performance and the PAS. Some were questioned as under-qualified to receive such high remuneration. For example, it was a shocking decision that Paul Chi-yuen Chan, a 28 year old with minimal job experience as research assistant in a tertiary institute, was appointed to be political assistant with monthly payment of up to US$17,200. See Michael Chugani, '"Novices' salary". "Public Eye"' *SCMP* (HK, 16 July 2008) A2.

[35] HK government, 'Revised Estimates for 2010-2011' (The 2010-2011 Budget, 2010-2011) <http://www.budget.gov.hk/2010/eng/budget41.html> accessed 9 January 2015.

[36] Peter So and Tanna Chong, 'Equality chief slams budget's ritual giveaways' *SCMP* (HK, 21 February 2011)

frequent, although the Competition Ordinance stipulates that 'meetings of the Commission are to be held as often as necessary to enable the Commission to perform its functions'.[37]

Another argument for not recruiting a full-time chairperson or board members is that there is a need to amend the relevant regulation.[38] However, the short-term burden of amending the law should not serve as an excuse not to proceed with an amendment if changes could bring about long-term benefits to the system. Reliance on a whole team of part-time members which could easily grow a norm of titular appointment, plus a part-time chairperson, is not a sufficient workforce to properly perform the necessary duties. Equally, part-time members who have other interests and roles in the economy may invite difficulties if their involvement generates real or perceived conflicts of interest.

It is interesting to note that HK is not unique in this set-up. For example, the appointment pattern of the HK competition regime resembles that of Thailand – a parallel that will be discussed furthered in the section on selection process below. The composition of Thailand's competition agency resembles certain areas of HK's, particularly its over-representation of business interests and under-representation of competition law experts. The Trade Competition Commission in Thailand is composed of sixteen members, with three representing the Federation of Thai Industries and three representing the Thai Chamber of Commerce. Many others are also affiliated with the business sectors. There have been concerns that there are too many members[39] and that there is an over-representation of individual, commercial and business sectors,[40] whilst members only work on a part-time basis and receive an extremely low level of compensation.[41] Additionally, the Trade Competition Law of Thailand is believed to play no role in combating anti-competitive conduct, and there is little fear for undertakings to breach the competition law, making the Thai model a representative example of an ineffective regime. Lessons learned from this neighbouring regime may help to identify the conditions needed for successful competition law enforcement, and its failure may offer insights into HK's institutional arrangements.

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[37] Competition Ordinance, sch 5, pt 4, s 12(1).

[38] Interview with Anna Wu, 10 December 2013.

[39] Comparatively, there are only 5 commissioners in the FTC of the United States.

[40] Sakda Thanitcul, 'Competition Law in Thailand: A Preliminary Analysis' (2002) 1 Washington University Global Studies Law Review 171, 184.

[41] ibid 181-182.

2.3.2 Register of Interests

One of the good agency principles for competition authorities suggested by Annetje Ottow is transparency,[42] which is necessary not only to ensure fair investigation but also to maintain public confidence. Board members must have high integrity to gain respect, and one way to achieve this is to avoid conflict of interests, which can be defined as 'circumstances that create a risk that professional judgments or actions regarding a primary interest will be unduly influenced by a secondary interest'.[43] Such conflicts can distort decision-making and harm the public interest. Thus, it is important to ensure that all board members of the Competition Commission are subject to the conflict of interest rules and relevant regulations under the Prevention of Bribery Ordinance,[44] the Ombudsman Ordinance,[45] and value-for-money audits conducted by the Director of Audit.[46] It is also good practice for the Competition Commission to require the board members to fill in the 'register of interests'[47] for the benefits of increasing institutional transparency and public confidence. In accordance with the Rules of Procedure of the Competition Commission,[48] it is also beneficial if the public are able to view the interests registered in the board members' profiles from the Competition Commission website. This registering of interests, however, presents several challenges:

Time Required on Disclosure - According to Rule 5(2) of Rules of Procedure of the Competition Commission, a member should register his/her interests in writing with the chief executive officer or an officer designated by him/her within fourteen days of his or her

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[42] Annetje Ottow, *Market and competition authorities: good agency principles* (Oxford University Press 2015) 11.

[43] Bernard Lo and Marilyn J. Field, *Conflict of Interest in Medical Research, Education, and Practice* (National Academies Press 2009) 46; Dennis Thompson, 'Understanding Financial Conflicts of Interest' (1993) 329 New England Journal of Medicine 573.

[44] Competition Ordinance, pt 6, sch 8.

[45] Competition Ordinance, pt 8, sch 8.

[46] Competition Ordinance, sch 5, s 27.

[47] Competition Commission, 'Rules of Procedure of the Competition Commission (made pursuant to section 34 of Schedule 5 to the Competition Ordinance)' (May 2013 Edition) Annex A.

[48] Rules of Procedure of the Competition Commission made pursuant to section 34 of Schedule 5 to the Competition Ordinance, May 2013 Edition.

appointment.[49] However, it does not specify when that registration of interests should be disclosed in the public register,[50] so there is a risk of procrastination regarding disclosure.

Discretion of Commission on Disclosure - Rule 5 (1) of Rules of Procedure stipulates: '[t]he Commission may determine the class or description of the interest required to be disclosed, determine the details of the interest required to be disclosed and the manner in which such interest is to be disclosed and change any matter so determined from time to time'.[51] This presents at least two serious concerns. First, this provision gives unfettered power to the Commission to decide on the substance and scope of interests required to be disclosed. There is no objective set of criteria, procedure or mechanism restricting how the Commission can exercise such power. Second, this provision could allow the Commission to decide what and how its own members' interests ought to be disclosed. This malpractice is likely to be perceived as a way to protect the interests of its own members, and goes against the fundamental principle of natural justice that no one should be a judge in his own case.

Limitations on Property Disclosure - Rule 3(d) states '[regarding] the general nature of the land and property in the Hong Kong Special Administrative Region owned by a Member, land and property in the HK Special Administrative Region are registrable where a Member has a right over its disposition or has any pecuniary interest deriving from it'. This stipulation only requires members to record their properties, if any, inside HK territory − a standard far lower than that of the register of interests for the Legislative Council (LegCo) members, who are required to register both local and overseas interests.[52] A similar requirement to disclose overseas property can be seen in the Executive Council (ExCo)'s registrable interests.[53] It is a matter of fact that many people, who do not have any, or have few, properties in HK, own overseas properties. Due to geographical proximity, mainland China is a very popular place for HK people to own properties. Statistics indicate that among

[49] ibid.

[50] For example, a member, Mr. Kwai-huen Wong, joined the Commission on 1 June 2014 but his register of interest has not been known to public until today.

[51] Rules of Procedure of the Competition Commission, s 5(1).

[52] See Annex A, Rules of Procedures of the Competition Commission. The declaration form for register of interest for LegCo members asks, 'Do you have any land or property in Hong Kong or elsewhere? If so, please list the location of the property, eg, A property on Hong Kong Island' or Properties in Hong Kong, Canada and the United Kingdom'.

[53] Question 4 of the Annual Declaration of Registrable Interests of Members of the Executive Council states, 'land and property owned in Hong Kong or outside Hong Kong … are all registrable'.

seventy law-makers, twenty-eight of them (i.e., forty per cent of whole house), either have land, properties, or other valuable assets overseas, especially in mainland China.[54] Evidently, limiting the disclosure to only include local properties does not reflect an accurate picture of the Commission members' ownership. It is inexplicable why the Commission adopts a lower standard than the LegCo and thereby creates a double standard. Although the term 'registrable interests' is elaborated on Rule 5(3), it remains vague and far from adequate to cover the scope of interests. For example, there is a question of whether registrable interests refer only to legal interests, or also to equitable interests.

Limitations on Economic Activity Disclosure – Similarly, Rule 5(3)(c) asserts that the registrable interests are mainly restricted to economic activities in HK. Again, Rule 5(3)(e) mentions that registrable interests refer to economic activities including membership of boards, committees, and the governing boards of other organisations relevant to HK only, but not elsewhere.[55] Both LegCo members and ExCo members are required to disclose their interests in connection with overseas economic activities.[56] The Communications Authority, a statutory body with some overlapping competition law enforcement power, also requires its committee members to declare overseas economic activities under the Registrable Interests.[57] Nowadays, it is common for an undertaking to operate its business activities and transactions globally, especially in an international hub like HK. Furthermore, the Competition Ordinance

[54] The following law-makers hold properties or other assets outside HK: Alan Kah-kit Leong (holding properties in UK), Paul Wai-chun Tse (6 properties in USA, 3 in China and 1 in Australia), Abraham Lai-him Shek (properties in China and Canada), Frederick Kin-hing Fung (properties in China), Jeffrey Kin-fung Lam (properties in China), Ting-kwong Wong (properties in China), Tai-fai Lam (properties in China and Thailand), Claudia Mo (properties in Canada), Chi-wai Wu (properties in China), Charles Peter Mok (properties in USA), Che-cheung Leung (properties in China), Wai-keung Kwok (properties in Canada), Christopher Wah-fung Cheung (properties in China), Fernado Chris-hung Cheung (properties in Canada), Ka-piu Tang (properties in China), Lai-wah Chiang (properties in China), Kam-lam Chan (properties in China), Wong-fat Lau (properties in China and Singapore), Kwan-yuen Leong (properties in China and UK), Ting-kwong Wong (properties in China), Ronny Ka-wah Tong (properties in USA), Regina Suk-yee Ip Lau (property held by overseas incorporated company), Claudia Ho (properties in UK or Canada), Michael Puk-sun Tien (properties in USA, China and land in Malaysia), Frankie Chi-ming Yick (properties in UK), Chi-wai Wu (property in China), Si-wing Yiu (owning a ship in China), Kwok-pan Chung (property in China).

[55] Item 5 of Annex A of Rules of Procedure (n 51).

[56] Question 1 (c) of the Annual Declaration of Registrable Interests of Members of the Executive Council stipulates, 'remunerated directorships of both Hong Kong companies and those outside Hong Kong are registrable'. Question 2(e) also states, 'all remunerated employments in Hong Kong and outside Hong Kong are registrable'.

[57] Footnote C of Registrable Interest on Directorships of LegCo Members states, 'remunerated directorships of both local and overseas companies are registrable'. Question 2 of Register of Interests of Members of the Communications Authority (CA) and the Members of Committees of the CA requires a disclosure of proprietorships, partnerships or directorships of companies in HK and/or overseas.

itself emphasises this international aspect for its implementation.[58] Given the growing trend of anti-competitive conduct across borders, such as international cartels,[59] an international competition regime has in fact been proposed to cope with cross-border anti-competitive problems.[60] Thus, limiting the disclosure of the Competition Commission board members' economic activities to those located in HK is unconvincing and ineffective in addressing cross-border conflicts of interest.

It is worthwhile comparing the cost and the benefit of disclosure on overseas economic activities. The cost of wide disclosure of overseas economic activities would require a small concession of privacy from Commission members. The benefit of such a disclosure is that it could greatly increase public confidence regarding the fairness of decisions. In order words, non-disclosure of overseas economic activities is likely to lead a third party to believe that the advice or vote of a member might have been driven by his or her personal interests, rather than a duty to give advice or vote impartially. Whilst weighing the cost and the benefit of wide disclosure, it seems that there is a compromise to be made between keeping personal privacy and maintaining transparency. However, for responsible board members of the Competition Commission working within public interests such as other members in the LegCo and ExCo, it seems there is no reason not to support the wide disclosure.

2.3.3 Selection Process

Setting up an effective regulatory regime depends on designing a selection process that will produce suitable Commission members who are known to be immune to business influence and political lobbying. Again, transparency in the selection of members is critical to the effectiveness of the regime. Procedures taking place behind closed doors and without clear sets of rules are not in accordance with good agency principles. Board appointments should be done on the basis of objective and qualitative criteria, in order to make sure of appointees'

[58] Sections 9 (1)(c) and 24(10(b) of the Competition Ordinance allows an exemption of application of law to avoid conflict with international obligation. Section 32 further elaborates the international obligation by international agreement or international provisional arrangement. Section 131 (2)(e) suggests how the powers of the Competition Commission relate to any international body.

[59] Mark Williams, 'Make Hong Kong the cartel capital of the world' *SCMP* (HK, 18 August 2003) Niall Fraser and Mimi Lau, 'Colombian drug cartels used Hong Kong banks to launder more than US$5bn' *SCMP* (HK, 11 September 2015)

[60] Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press 2008).

impartiality and expertise.[61] However, the entire board of Commission members are appointed by one person, the chief executive.[62] C.Y. Leung, the current chief executive, is at his lowest level of popularity since his assumption of office on 1 July 2012.[63] Politically speaking, it would be unwise for him to disregard public perception in a time of dwindling support by adopting an internal private mechanism for appointing the Commission board.[64]

The government so far has not disclosed any details of the appointment process. Procedurally, it is unknown what criteria, if any, are used in selecting potential candidates, or whether these criteria are sufficiently objective. No governmental document has provided any information in this regard. As the chief executive retains the discretion to select people he finds fit to serve, this type of opaque decision-making process could be criticised as a defective black box operation. The LegCo, a representative body of people, plays no role in the selection process of the Commission members and chairperson, lacking even a right to enquire about the qualification, experience, and background of the candidates or make comparable checks and balances. It is notable in this respect that a World Bank document has suggested that the head of the competition authority should be appointed by a committee or parliament rather than by the president or the prime minister.[65] The appointment process of the Competition Commission in India may function as a useful reference − the selection of

[61] Ottow, *Market and competition authorities: good agency principles* (n 42) 251.

[62] The Chief Executive is head of the government of the Hong Kong Special Administrative Region. See Basic Law, art 43.

[63] In the latest survey conducted by the University of Hong Kong's Public Opinion Programme, C Y Leung's support rating dropped to a low of 46 on a scale of zero to 100. See Simon Lee and Stephanie Tong, 'Hong Kong's Leung Seeks Turnaround With Economy Focus' (*Bloomberg*, 8 Oct 2012) <http://www.bloomberg.com/news/2012-10-07/hong-kong-s-leung-seeks-turnaround-with-economy-focus.html> accessed 11 Mar 2013.

[64] This opaque decision-making process is evident from the exemptions on public policy grounds. The chief executive in council, (ExCo) in which chief executive sits as the president, can exempt any undertaking as s/he considers appropriate based on public policy grounds. See Competition Ordinance, s 31. ExCo may exclude conduct from the prohibition on anti-competitive conduct if the chief executive thinks that there are sound public policy reasons for doing so. See also CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 26) proposal 49. Such an exemption gives ExCo unnecessary and excessive power because ExCo lacks the expertise in the area of competition law and economics that it needs to play such a role. However, there is no procedural requirement to consult the Competition Commission before ExCo makes such a decision on competition law and economics. It seems that the executive would assume the role of a competition regulatory agency in this regard.

[65] World Bank, *World Bank World Development Report* (2002) 142; Roumeen Islam and World Bank, *Building institutions for markets* (Published for the World Bank, Oxford University Press 2002), ch 7.

Commission members in India is undertaken by a committee led by a Supreme Court judge to ensure impartiality and maintain public confidence.[66]

In order for the Commission to perform to a high standard, it is important to appoint members from a range of sectors and backgrounds. However, among fourteen appointees in the Commission, at least eight are from commercial and business groups, either being owners or senior employees in these groups, or having close pecuniary interests in various corporations. Moreover, it appears that no competition law practitioner has been appointed to the board.[67] Those members with proprietorship, partnership or directorship of a public or private company, or with one-hundredth or more of the issued share capital in any one company include Anna Hung-yuk Wu,[68] Andrew Kwan-yuen Leung,[69] Agnes Siu-kuen Chan,[70] Kwok-wai Chan,[71] Michael Wah-kit Hui,[72] Kwok-chuen Kwok,[73] Miranda Pui-fong Kwok,[74] Anthony William Yiu-wai Seeto,[75] Simon Kit-Lung Wong[76] and Kwai-huen

[66] Dhanendra Kumar, 'Setting up a new competition regime: the India Experience' (10-11 December 2012) Asian Competition Forum, 8th Annual Conference, Polytechnic University of Hong Kong Establishing Sound Competition Priorities and Processes.

[67] Though competition law is still its infancy in Hong Kong, it is still possible to appoint someone with overseas practical experience in competition law. There is only one expert in competition law on the board.

[68] She holds one-hundredth or more of the issued share capital of the following companies: Hamworth Ltd, Diamond Sum Ltd, Manyulon Properties Ltd and Mandarin Delta Holdings Ltd.

[69] He is the director or has one-hundredth or more of the issued share capital in 32 companies: Beaufort International Enterprises Ltd, BPA Services Company Ltd, China Capital International Ltd, China South City Holdings Ltd, CN Innovations Holdings Ltd, Cross Straits Youths Exchange Foundation Ltd, Gulligan Enterprises Corporation, Dah Sing Bank Ltd, Dah Sing Banking Group Ltd, Golden Fortune Properties Ltd, Golden Fortune Properties Ltd, Golden Harvest International Enterprises Ltd, Harbour Centre Development Ltd, Hong Kong Mortgage Corporation Ltd, Hong Kong Wollen & Synthetic knitting Manufacturers' Association Ltd, Kinfield Ltd, Mandatory Provident Fund Schemes Authority, North Troy Investment Ltd, Po Koon Investments Company Ltd, Shui Hong Trading Company Ltd, Soleway Investment Ltd, Sun Hing Knitting Factory Ltd, Sunshine Gold Holdings Ltd, Super Unique Ltd, Technological & Higher Education Institute of Hong Kong Ltd, Textile Council of Hong Kong Ltd, Winner Universal Ltd, Apex Glory Capital Ltd, Champ Grace International Ltd, Co-Wear International Ltd, Co-Wear Ltd, Sunny Spot Ltd, Sunshine Gold Holdings Ltd.

[70] She is a partner of Ernst & Young, and serves as a director in four companies (Ernst & Young Advisory Services Ltd, Ernest & Young Group Ltd, Ernest & Young Tax Services Ltd and GCGC Ltd).

[71] He holds multiple directorships and has one hundred or more issued shares in six companies: Kin Man Garment Fty Ltd, Kaiser Investment Ltd, Fortunecorp Investments Ltd, Charmgood Development Ltd, whale Fame Investment Ltd and World Trade Technologies Ltd.

[72] He also holds multiple directorships and has at least one hundred issued shares in seven companies: Freedom Industrial Corp Ltd, Fook Cheung Garment Fty Ltd, Solar Prosper Ltd, Transfer Investment Ltd and Gloryful Garment Fty (Shenzhen) Ltd, Dixt Company Ltd, Enrichment Investment Ltd.

[73] He serves as a director in Sunevision Holdings Ltd and DBS Bank (Hong Kong) Ltd.

[74] She serves as a director and has one hundred or more issued shares of eight companies: Happy Gold Investment Ltd, Hemmingway Assets Ltd, China Construction Bank (Asia) Corporation Ltd, China

Wong.[77] These and other members may also serve on committees and the governing boards of other public or private organisations which engage in economic activities.

This does not mean that the Commission's composition cannot include members with business and commercial backgrounds. However, similar to the Thai competition agency, such a dominate proportion (eight out of thirteen or fourteen) members, dependent on whether the chairperson will cast her vote in the meetings, is likely to give off an impression of adverse enforcement of the law. Even if the actual outcome is acceptable, overall trust in the process is lessened due to a lack of a transparency.

2.3.4 Institutional Independence

An essential attribute required for building an effective competition enforcement agency is that agency's independence from the government and business lobbying.[78] The Oxford English Dictionary defines 'independent' as 'not depending upon the authority of another; not in a position of subordination or subjection'.[79] The competition authority should be insulated from political interference[80] as much as possible for the sake of maintaining public

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Construction Bank (Macau) Corporation Ltd, CCB Nominees Ltd, China Construction Bank (Asia) Finance Ltd, CCB (Asia) Trustee Company Ltd and QBE Hong Kong & Shanghai Insurance Ltd.

[75] He serves as a director and has one hundred or more issued shares of thirteen companies: Progress Bright Enterprises Ltd, Progress (Asia) Ltd, Pacific Theme Investment Ltd, Brilliant Rise Investment Group Ltd, Champier Trading Ltd, Guess World Ltd, Income World Ltd, Plush Assets Ltd, Profit Billion Holdings Ltd, Profit Rise Hong Kong Development Ltd, Triple Win Ltd, World Capital Inc. Ltd, IW Management Services Ltd.

[76] He serves as a director and has one hundred or more issued shares of thirty-two companies: Draconis Investment Ltd, Fameco (HK) Ltd, Heritage Capital Ltd, KABU (Properties) Ltd, Kabu Ltd, Kabushikigaisha Ltd, King Dragon International Investment Ltd, LHG Catering Ltd, Lucky House Group (Management) Ltd, Masamura (Hong Kong) Ltd, Mou Mou Club (HH) Ltd, Mou Mou Club (KF) Ltd, Mou Mou (LF) Ltd, Mou Mou (MK) Ltd, Mou Mou (TST) Ltd, Mou Mou (TW) Ltd, Mou Mou Club Ltd, Nanjing Dong Lu (CB) Ltd, Peace Cuisine (YT) Ltd, Tamashii (WK) Ltd, Mou Mou Club (No 9) Ltd, Yakiniku (CB) Ltd, Yakiniku (HK) Ltd, Yakiniku (KB) Ltd, Yakiniku (MK) Ltd, Yakiniku (TM) Ltd, Yakiniku (TW), Institution of Dining Art Ltd, Lucky House Group Ltd, Kabushikigaisha Ltd, LHG Catering Ltd, The China House (WTS) Ltd.

[77] He serves as a director for ten companies: Hong Kong Coalition of Professional Services Ltd, Joint Mediation Helpline Office Ltd, The Law Society of Hong Kong Publications Co. Ltd, Hong Kong Academy of Law Ltd, Hong Kong Countryside Foundation Ltd, Hong Kong Aviation Security Co Ltd, Ultralead Ltd, PICC Asset Management Co. Ltd, China International Marine Containers (Group) Co. Ltd and Hua Hong Semiconductor Ltd.

[78] The latest Annual Report states that the role and functions of the Commission is 'independent'. Competition Commission, 'Annual Report 2012-13' (2014) 26.

[79] Oxford English Dictionary (first published 1900).

[80] Julio Faundez (ed), *Good government and law: legal and institutional reform in developing countries* (Macmillan; St. Martin's Press 1997) 175.

confidence. If competition law is not protected from political interference, changing political goals may influence competition policy and cause uncertainty. This uncertainty adversely effects the business environment, which in turn creates higher risks and costs for investors. Government policy may change over time, but altering political goals should not affect competition law enforcement. In fact, a more coherent development of case law and better-reasoned decisions have been identified as the result of a 'de-politicisation' of competition law in the UK over the past decade.[81] Institutional independence is the basis for building up credibility and a reputation for conducting effective enforcement, which takes time and effort, especially for a young regime.

In view of Ottow's good agency principles of LITER for competition authorities, independence is the leading principle from an institutional perspective.[82] Independence does not mean an entire absence of control or monitoring. Rather it means following certain rules to ensure no undue influence occurs.[83] Daniel Crane stresses that 'safeguards must be established to preserve the independence of the competition authorities, in financial and functional terms, as well as in their recommendations on regulatory reform'.[84] However, Ignacio de Leon claims that 'although it is undeniable that impartiality is not necessarily achieved through increased autonomy from governments; nor is it entirely desirable'.[85] Additionally, Knight-John argues that in the real world, absolute independence might not be possible for government ownership, and that independence must not be viewed as exempt from accountability. For Knight-John, the issue is how to achieve workable independence in an imperfect situation.[86] Competition statutes never define institutional independence, which

[81] Barry J Rodger, 'Globalisation and the depoliticisation of competition law' (2004) 90 ARSP-BEIHEFT- 163; Gerda Falkner and Michael Nentwich, *Enlarging the European Union: The short-term success of incrementalism and de-politicisation* (2000).

[82] To support a good competition agency, Ottow introduces the five principles: legality, independence, transparency, effectiveness and responsibility. LITER is an acronym. See Ottow, *Market and competition authorities: good agency principles* (n 42) 144.

[83] ibid 251.

[84] Leon, *An institutional assessment of antitrust policy: the Latin American experience* 557 (n 10).

[85] ibid 578-80. He added that 'it was naive to pretend that competition enforcement agencies could escape the pressing dependence arising from their membership in the bureaucracy of the government. Thus, matters such as budget allocation and staff appointment; labour matters such as holidays, bonuses, and permits; acquisition of equipment; internal administrative affairs; and many others are usually handled through the uniform procedures of the ministerial offices to which the competition agencies report'.

[86] Malathy Knight-John, *The institutional policy framework for regulation and competition in Sri Lanka* (Working paper series / Centre on Regulation and Competition, Centre on Regulation and Competition of the University of Manchester 2002) 21.

is often complicated by a nexus of interests expressing the realpolitik of power.[87] Trade-offs between institutional credibility and government intervention are particularly crucial, although under such trade-offs competition agencies suffer from a lack of credibility from the moment of their inception.[88] What, however, is the definition of 'workable independence,' given that no situation is perfect under any competition regime? Knight-John has not provided a complete answer. However, the author suggests that in principle a workable independence is a proper balance between absolute independence and dependence. On one hand, it should be free from any controlling influences as it makes decisions regarding investigating and prosecuting defendants. On the other hand, administrative matters such as public relations, educating the public and advertising may require collaboration with other government departments, advisory bodies and private businesses.

In the context of HK's regime, the above discussion of the Commission members' backgrounds casts doubt on independence from business lobbying. More importantly, given that the government has vested interests in the private sector,[89] this could induce unfair competitive effects in the market. The Commission must have public confidence that they are operating independently in both state and private sector interests. However, there is a close link between the government and the business sector due to the former first chief executive's strong commercial background,[90] the second chief executive's business-friendly policies,[91]

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[87] ibid.

[88] Leon, *An institutional assessment of antitrust policy: the Latin American experience* 534 (n 10).

[89] For example, the HK government is sole or largest shareholder of the following companies: MTR Corporation Limited (transportation company), Ocean Park (theme park), Disneyland (theme park), Hong Kong Exchanges and Clearing Limited.

[90] Staff report, 'Competition would make waves in the shipping trade' *SCMP* (HK, 4 July 2002); Editorial, 'Tung firm buys back 9pc Li stake' *The Standard* (HK, 9 August 2003). The first chief executive, Tung Chee-wah, was the chairman of one of the major players in the highly cartelised shipping industry, Orient Overseas Container Line (OOCL). In the early 1990s, OOCL and four other firms were found to have rigged the market in overland transport of containers, and were fined US$18.3 million by the EC Commission. OOCL and Cheung Kong/Hutchison Whampoa Limited, Li Ka-shing's flagship conglomerates, were financially connected. Cheung Kong/ Hutchison owned 9.08 per cent of OOCL. After the disclosure of this link in April 2003, OOCL bought back the share immediately. Under serious criticism regarding the close ties between government and business interests, Tung rebutted accusations in his 2005 policy address to LegCo: 'we are resolutely against collusion between business and government and will strictly enforce our monitoring systems to eliminate any transfer of benefits'. Interestingly, ten weeks after his speech, he tendered his resignation as chief executive on 10 March 2005.

[91] Joseph Cheng, *Has He Got the Job Done?: An Evaluation of Donald Tsang's Administration* (City University of Hong Kong Press 2013). Chee-Twa Tung was succeeded by Mr. Donald Tsang. A change in the leadership did not mean a change of direction of competition policy. During his governance, Tsang was seriously criticised with regards to his handling of the Cyberport project and the West Kowloon Cultural Development project due to favouring property development interests over and above considerations of encouraging competition. He was well known for his business friendly policy-making. Movement of upper level civil servants to private sector

and the strong business ties of the ExCo members.[92] Furthermore, the second chief executive was convicted of misconduct of office and sentenced to twenty months behind bars.[93] The third and current chief executive was investigated by the anti-graft agency in connection with a HK$50 million deal,[94] and involved in a rural housing scandal with developers and rural leaders.[95] The former chief administration secretary (second highest official figure) was convicted for accepting a bribe from tycoons and sentenced to seven years.[96] Accordingly, criticism is due to the government for committing collusion with businesses.[97] Details can be found in Section 5.4.5 of Chapter 5. On the other hand, the author does not mean to suggest that the Commission needs to completely isolate itself from the government in order to preserve its institutional autonomy at any cost. An enforcement agency's attempt to avoid any contacts with the government might result in it becoming an irrelevant public office condemned to social oblivion. In fact, it would not be feasible to entirely avoid business-government connections given that the Commission is required to cooperate with various administrative departments during its investigation of anti-competitive conduct, promotion of the law, and public education.

Taking the US as an example, presidents may influence antitrust agencies through their power of appointment. The assistant attorney general for antitrust and other officials in the Antitrust Division are all political appointees serving at the request of the president. As executive branch officials, it is expected that division executives will represent presidential

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jobs has not been uncommon. It has been raised that senior officials have been in a position to deliver policy benefits to prospective private employers while they are still in office. Even without directly holding a position, they could still offer useful information to private employers following their departure from government.

[92] Jürgen Schwarze, Rainer Bechtold and W Bosch, 'Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change' (2008) Gleiss Lutz Hong Kong Government, 'Membership of Executive Council' <http://www.ceo.gov.hk/exco/eng/membership.html> accessed 2 April 2013. ExCo is a formal body of advisers to the chief executive, serving as a core public policy-making unit of the government.

[93] *HKSAR v Tsang Yam-Kuen Donald* [2015] HCCC484/2015. The jury found that the former chief executive, Donald Tsang, had failed to disclose a conflict of interest when he approved applications from radio broadcaster licence.

[94] Joyce Ng, James Griffiths and Benjamin Robertson, 'CY Leung faces separate probes of HK$50 million deal with Australian firm' *SCMP* (HK, 10 October 2014).

[95] Joyce Ng, 'Revealed: decision behind Wang Chau rural housing scandal reaches very top of Hong Kong government' *SCMP* (HK, 21 September 2016)

[96] *HKSAR v Hui Si-yan Rafael* [2013] HCCC 98/2013; *HKSAR v Hui Si-yan Rafael* [2014] CACC 555/2014.

[97] Ngok Ma, 'Hong Kong's democrats divide' (2011) 22 Journal of Democracy 54; JM Wu, 'Strange bedfellows: Dynamics of government - business relations between Chinese local authorities and Taiwanese investors' (1997) 6 Journal of Contemporary China 319.

policy goals.[98] Regarding the FTC, presidents appoint new commissioners when vacancies arise, however its status as an independent regulatory agency places limits on presidential authority.[99] The Commission must remain bipartisan, with no more than a simple majority representing the president's party. Unlike the assistant attorney general, commissioners do not serve fully at the request of the president, and presidential control is further limited by the inability to remove commissioners over questions of policy. To preserve the FTC's independence, the president can replace an appointee only as a result of 'inefficiency, neglect of duty or malfeasance.'[100] Nevertheless, the chairperson is a presidential appointee expected to advocate a president's agenda.[101] This does not necessarily mean a loss of independence. What is important is that investigation and prosecution decisions are not subject to government intervention. In other words, the FTC should have the power to choose which undertakings will be investigated and prosecuted, and which economic sectors to survey. An ideal and achievable workable independence is probably found in the US, which maintains a constructive relationship with government and, at the same time, insists upon a high degree of political insulation.

The HK government stressed the importance of the Competition Commission's independence during the public consultation period.[102] Nonetheless, independence is no longer mentioned in either the Competition Bill or the Competition Ordinance. Section 132 of Competition Ordinance is the only relevant provision for the status of the Commission. It states that 'the Commission is not a servant or agent of the government and does not enjoy any status, immunity or privilege of the government'. Can such a provision sufficiently guarantee its independence and insulation from political influence? Independence is often confined to the decision-making process at a formal level. Nevertheless, there are many informal factors significantly affecting that process. Real operational independence is restricted by insufficiency of financial resources or expertise, the pressure exerted by the

[98] Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (n 12) 41.

[99] ibid 42.

[100] Federal Trade Commission Act, s 1.

[101] Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (n 12) 42. President Nixon used this power to bring about significant and long-term changes in the FTC when he appointed Casper Weinberger and Miles Kirkpatrick as successive chairmen. Likewise, Ronald Reagan's appointment of James Miller to the chairmanship was a clear sign of agency reorientation.

[102] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 26) 1, 2, 5, 8 and 16. The government has mentioned 'independence of the Commission' nine times in the document.

public officials with vested political interests, or by the private stakeholders such as business associations, trade unions, and professional bodies. Thus, it is arguable that Section 132 is necessary to safeguard minimum institutional independence, but is still far from adequate in ensuring effective independence.

2.3.4.1 Removal of Commissioners

The restriction of power to remove commissioners from the competition authority indicates some degree of independence from politics. The HK Competition Commission is designed to be more similar to the FTC than the Antitrust Division of the DOJ in the US in terms of the design of independence. Institutionally, the FTC is independent from the legislative, executive, and judicial branches and insulated from direct political control, and statutorily multipartisan. By contrast, the Antitrust Division is simply a subset of the executive's law enforcement department and an unexceptional and ordinary feature of the American political landscape.[103] Unlike the Antitrust Division, which is directly accountable to the president, the FTC is supposed to exercise independent technical judgement in the interests of the American people.

There are many ways to evaluate the institutional positions of the FTC. Much comparative institutionalist literature has tried to model the optimal institutional design of the FTC. A landmark constitutional judgement in *Humphrey's Executor* is worthy of discussion.[104] William E. Humphrey was re-appointed as a Commissioner of the FTC in 1931 but due to his controversial style, President Franklin D Roosevelt fired him.[105] After Humphrey's death, his estate brought a suit for the salary that Humphrey allegedly should have earned between his unlawful dismissal and his death. The US Supreme Court ruled in his favour, and went on to establish the principle that the president may not remove FTC Commissioners for political reasons.[106] The court declared that the FTC is 'a body which

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[103] Crane, *The institutional structure of antitrust enforcement* (n 11) 29.

[104] *Humphey's Ex'r v. U.S.* 295 US 602 (1935).

[105] ibid 618-619.

[106] ibid 619. On 31 August 1933, after further correspondence on the subject, the president wrote to the commissioner expressing the hope that the resignation would be forthcoming: 'you will, I know, realise that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence'.

shall be independent of executive authority, except in its selection, and free to exercise its judgment without leave or hindrance of any other official or any department of the government'.[107]

That holding alone is a significant fact in understanding that the FTC is as independent from the president as it is from the Supreme Court. The president appoints both bodies' members, but loses control thereafter. The reasons given by the court for protecting the FTC's independence from the president are far-reaching in their implications. In explaining why Roosevelt could not remove Humphrey, it was asserted that the president disagreed with Humphrey's policies and was not justified in removing him for this reason; the good causes for removal were to be very strictly and narrowly defined to avoid this sort of occurrence.[108] Dismissal can be undertaken only for a 'good cause' defined in the statute as 'inefficiency, neglect of duty, or malfeasance in office'.[109] Similarly, a person holding office as chairperson or member may only be removed from the former Office of Fair Trade (OFT)[110] in the UK due to incapacity or misbehaviour under a provision of the Enterprise Act 2002 by the Secretary of State,[111] which is applicable to the recently established Competition and Markets Authority (CMA). In the EU, the ECJ may, upon application by the European Council acting by a simple majority or the European Commission, rule that the Commission member concerned be compulsorily retired.[112] The compulsory retirement needs to go through democratic procedure. The cause has to be in connection with a breach of obligations,[113] failure of performance of duties, or guilt of serious misconduct.[114]

By contrast, the power of the chief executive in HK (authorised by the Competition Ordinance) to remove any Competition Commission members including the chairperson is far stronger than the US, UK and EU. In HK, there are 10 different provisions for dismissal in

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[107] 295 U.S. at 625-26.

[108] Crane, *The institutional structure of antitrust enforcement* (n 11) 34.

[109] Section 1 of the Federal Trade Commission Act fixes the terms of the Commissioners and states that a commissioner can only be removed for good reason.

[110] The Office of Fair Trade (OFT) has merged with the Competition Commission and become a single competition law enforcement agent - the Competition and Markets Authority (CMA).

[111] UK Enterprise Act 2002, sch 1, s 3(2)(b).

[112] TFEU, arts 245 and 247.

[113] TFEU, art 245.

[114] TFEU, art 247.

the Competition Ordinance, and some of them are relatively vague.[115] The chief executive can remove them according to Section 5 of Schedule 5 of the Ordinance. Among the list of 10 dismissal causes, the most controversial ones are Sections 5(1)(a) and 5(1)(j). In accordance with Section 5(1)(a), 'The chief executive may remove a[ny] member from office if the member fails to attend three consecutive meetings of the Commission without (in the opinion of the chief executive) sufficient cause'.[116] It is likely that the chief executive would appoint people with professional or commercial backgrounds in a part-time arrangement, making failure to attend three consecutive meetings less uncommon. Such a phenomenon is easily seen in advisory or quasi-governmental bodies. Even in the LegCo, there can be low attendance rates at meetings, especially for those legislators who represent business and commercial interests and are only able to contribute part-time.[117] While any Commission member may have accumulated possible penalties for not attending three consecutive meetings, the chief executive can exercise his own discretion to determine whether or not there is 'sufficient cause' in accordance with the Competition Ordinance. A term such as this is broad and subjective, and lacking in any further guideline, example, or elaboration.

Another provision, Section 5(1)(j), stipulates that 'the chief executive may remove a Commission member, who is, in the opinion of the chief executive, unable or unfit to perform the functions of a member'.[118] There is no definition of 'being unable or unfit to perform'. Does it refer to a state of ethnics, private life, or other considerations? It is controversial to consider removal based on personal life issues. Does this provision include removal on grounds of policy such as in the *Humphrey's Executor* case? It is undoubtedly unacceptable

[115] The other provisions of Part 2, Section 5(1) of Competition Ordinance include the following. 'The Chief Executive may remove a member from office if the member— (a) fails to attend 3 consecutive meetings of the Commission without (in the opinions of the Chief Executive) sufficient cause; (b) fails to comply with a conflict of interest disclosure obligation set out in any rules made by the Commission under section 34 of this Schedule; (c) becomes bankrupt or is for the time being bound by a voluntary arrangement with his or her creditors; (d) is, under the Mental Health Ordinance (Cap 136), found by the Court of First Instance (or any judge of the Court of First Instance) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; (e) has been found by the Tribunal or another court to have contravened a competition rule; (f) is an officer of an undertaking that has been found by the Tribunal or another court to have contravened a competition rule; (g) has made a commitment with the Commission under this Ordinance, or is an officer of an undertaking that has made such a commitment; (h) becomes a member of the Tribunal or a judge of another court; (i) is appointed by the Tribunal as an assessor under section 141; or (j) is otherwise, in the opinion of the Chief Executive, unable or unfit to perform the functions of a member'.

[116] Competition Ordinance, pt 2, s 5(1)(a).

[117] Marcos Van Rafelghem and P Anson Lau, *Past and Future Justifications for Functional Constituencies - An Analysis through the Performance of Functional Constituencies Legislators (2004-2006)* (November 2006).

[118] Competition Ordinance, pt 2, s 5(1)(j).

that removal is related to policy grounds. Again, the government has never clarified the limitations or the scope of this power. Such ambiguity could leave the chief executive free to interpret the provision at his own discretion, and thus grant unfettered power to remove Commission members. During the protracted legislative process, the government did not address this removal power based on a seemingly undefined scope. As a result, these two provisions not only harm legal certainty and predictability, but also entrench political interference within the Commission. In contrast to the FTC and CMA - whose members the president and secretary of state respectively appoint but lose control of thereafter, the chief executive still retains his control in the Competition Commission even after appointing the members.

The level of independence can differ from one institution to another. Abel Mateus, president of the Portuguese Competition Authority, divided the extent of independence into 5 levels from lowest to highest in the following manner:

> Level 1 is the lowest level of independence that the board nominated by government with a fixed-term appointment is with no possibility of being dismissed except in cases of "cause majeur", or serious breach of performance of the institution. Level 2, referring to the board appointed by government or president after Parliament hearing, cannot receive directions form government, and as in level 1. Level 3 is, as in level 2, plus administrative autonomy and own revenues. Level 4 is, as in level 3, plus the capability to define details of competition policies. Level 5 is, as in level 4, plus the possibility to issue (non-binding) recommendations to government, to be consulted on competition assessment matters in the legislative process and to be able to judicially challenge government decisions that might conflict with competition laws.[119]

When applying this classification to the HK competition regime, the Competition Commission fails even to achieve the lowest level of independence. The principle of independence could be *de jure* and *de facto*. It may be premature to predict whether the Commission can achieve its *de facto* independence based on performance for only one year. A longer period is required to test if the Commission can resist interference from political and commercial pressure. However, the above analysis indicates that the Commission does not have enough *de jure* independence with respect to retaining Commissioners.

[119] Abel M Mateus, 'Why should national competition authorities be independent and how should they be accountable?' (2007) 3 European Competition Journal 17, 19.

2.3.4.2 Financial Control by the Executive

Financial control by the executive on the HK Competition Commission may resemble the situation of Thailand's Trade Competition Commission, which depends completely on an annual budget allocation approved by the government. On one hand, all political parties in Thailand need large businesses' financing for their campaigns. On the other hand, the large businesses want their interests to be given priority as they take part in politics and policy implementation. Such an interdependent and close relationship between the executive and business sector exemplifies the Thailand Trade Competition Commission's lack of independence and its being vulnerable to political and business intervention.[120] Similarly, as previously mentioned, collusion between the government and businesses have been notorious in HK. Serious doubt may be cast upon the independence of the Competition Commission if the core of the executive is found to be rotten, especially given that the executive has the power of approval over annual government subventions to the Commission.[121]

Whether competition agencies are capable of promoting competition independently and impartially owes much to the provision of adequate financial resources by the executive.[122] The president of the US could, in theory, set antitrust enforcement priorities through the budgetary process.[123] Apart from the appointment and removal powers which are in the chief executive's hands, the HK government also controls the finance and remuneration of the Commission by the following provisions of the Competition Ordinance. Section 3(1) of Part 2 states that the chief executive is authorised to determine the remuneration and allowances of any member of the Commission.[124] In addition to the control of remuneration of each individual member, the overall budget of the Commission could be influenced by the government through the financial secretary who is under the chief executive.[125] The role of the financial secretary is to assist the chief executive in supervising the policy bureaux,

[120] Deunden Nikomborirak, 'Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries' (Spring 2006) 26 Northwestern Journal of International Law & Business 597, 605-606.

[121] Competition Commission, 'Annual Report 2012-13' 40. The government has approved government subventions of approximately HK$73 million to the Commission for the year ending 31 March 2014.

[122] Leon, *An institutional assessment of antitrust policy: the Latin American experience* 534 (n 10).

[123] Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* 42-43 (n 12).

[124] Competition Ordinance, pt 2, s 3(1).

[125] Basic Law, art 53.

mostly in financial and economic policies. For instance, Section 131(2)(c) stipulates that the Commission's power to borrow money is subject to the approval of the financial secretary.[126] Similarly, Section 131(2)(d) also restricts the Commission's power to invest by requiring permission from the financial secretary.[127] Consequently, the independent operation of the Commission could in some ways be manipulated by the executive's financial decisions.

2.3.4.3 Financial Control by the Legislature

Apart from executive interference on competition agencies, another major political power is the legislature. As already stated, the president of the US lacks the power to remove commissioners of the FTC. Congress, however, does not lack the authority to remove, decrease or increase funding.[128] Similarly, the Competition Ordinance of HK stipulates that 'the funds of the Commission consist of all money … appropriated for that purpose by the LegCo'.[129] Whether the Commission can sustain its effectiveness and competence largely depends upon the budget appropriation by the legislature. Again, this reflects the fact that absolute independence may not be viable, and that a workable independence is probably a more appropriate goal for which a competition agency should aim. Doubtless, the legislature has an obligation to scrutinise government expenditures, but once the appropriation has been made, the legislature should not interfere in the Commission's independent operation, investigation and prosecution decisions.

Interestingly, Robert Mackay conducted a series of empirical studies in 1987 with the purpose of measuring this 'purse strings' effect for the FTC. The findings consistently showed an obvious correlation between the FTC investigation targets and the will of the congressmen.[130] In another example, a study by Faith, Leavens and Tollison, it was found that case dismissals at the FTC were not accidentally concentrated in defendants' districts where there were congressmen on committees or subcommittees with budgetary and

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[126] Competition Ordinance, s 131(2)(c).

[127] Competition Ordinance, s 131(2)(d).

[128] Robert J. Mackay and others, *Public choice and regulation: a view from inside the Federal Trade Commission* (Hoover Institution Press 1987).

[129] Competition Ordinance, pt 5, s 21(a).

[130] Mackay and others, *Public choice and regulation: a view from inside the Federal Trade Commission* (n 128).

oversight jurisdiction over the FTC'.[131] Kovacic, who later assumed the chairmanship of the FTC, also found that the FTC had consistently selected and implemented policy programs that, by and large, followed the explicit will of the FTC's oversight committees in Congress.[132] In other words, the will of congressmen with dominant control over the FTC's purse strings is a significant factor affecting the independence of competition agencies.

It is still unknown how great the purse string effect is for the Competition Commission in HK.[133] However, given the features of institutional design of the LegCo, clues as the future budget appropriation for the Commission are visible. Currently, the seventy-seat LegCo is divided into three parts: thirty-five seats are from geographical constituencies which are democratically and directly elected by public; five seats are from District Council (Second) functional constituency;[134] and the remaining thirty seats are from traditional functional constituencies.[135] The criticisms of functional constituencies include: corporate voting;[136] separate voting;[137] and restrictions upon private bills[138] which render almost half of

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[131] L. Faith Roger, R. Leavens Donald and . Tollison Robert D, 'Antitrust Pork Barrel' in Robert J. Mackay, James C. Miller III and Bruce Yandle (eds), *Public Choice and Regulation: A View from Inside the Federal Trade Commission* (1987).

[132] Kovacic, 'The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective', 105; Crane, *The institutional structure of antitrust enforcement*, 35 (n 11).

[133] HK Competition Commission obtained 73 million HK dollars in its first year running budget. Competition Commission, 'Annual Report 2012-13' 42.

[134] In September 2012 LegCo election, five seats of District Council (Second) functional constituency were created. Only district councillors can nominate, vote and be elected. However, 20 per cent of the district councillors were appointed by the government but not elected by the people, and 27 seats were reserved for ex officio members in the 2011 District Council election. All appointed seats were abolished but 27 ex officio members remained in the 2015 District Council election.

[135] See Constitutional & Mainland Affairs Bureau, Public Consultation on the Methods for Selecting the Chief Executive and for Forming the LegCo in 2012 government of HK, 18 November 2009. LegCo consists of two major components: functional constituencies (FC) and geographical constituencies through direct elections (GC). FC is special interest group, and most of the members are pro-business- involved in the electoral process without proper democratic basis. Furthermore, the number of eligible voters in FC is usually much fewer than those in GC. For example, in the 2016 LegCo election, very few registered electors can be seen in the following sectors: 147 eligible voters in Heung Yee Kuk, 154 in agriculture and fisheries; 134 in insurance; 195 in transport; 125 in finance. Furthermore, 12 seats were uncontested in same election under FC. As opposed to FC, GC is directly elected by all eligible voters according to geographically demarcated constituencies. The registered and eligible voters in GC were up to 3.78 million in 2016.
See also Voter Registration, 'Voter Registration Statistics: Functional Constituency' (2016) <http://www.voterregistration.gov.hk/eng/statistic20163.html> accessed 29 March 2017; HKSAR LegCo Election, 'Election Matters' (2016) <http://www.cmab.gov.hk/en/issues/electoral2.htm> accessed 29 March 2017.

[136] FC allows other designated legal entities such as organisations and corporations to vote. Such votes are called 'corporate votes' which are under criticised for being a violation of the 'one person one vote' principle. Other than his one natural vote in GC, a tycoon can have corporate votes in his hand in the FC, depending on how many corporations are under his control in various sectors.

the house virtually impotent. Each of these features entrenches the political power of business groups in the LegCo and their interests in the market. Under such a political arrangement, there is an important question to be explored. How would the LegCo, half of which is operatively dominated by the business interest groups, set an appropriate budget for the Commission in order to choose policy programs against the self-interests of those legislators, who may be involved in or represent the interests of related undertakings?

2.3.5 Institutional Accountability

Making a competition agency independent imposes a constraint upon government interference with competition law, while making the agency accountable imposes a constraint on how it exercises independence. Mateus suggests: 'Independence in a democratic society means accountability. These are two sides of the same coin that should go hand-in-hand … checks and balances need to be designed towards ensuring independence, while making the institution responsible for its actions and decisions'. [139] Ottow states, 'An agency's independence should not be taken for granted: in a democratic society, it must be counterbalanced by accountability and controls in order to create the correct institutional balance'. [140] In the context of HK, it is necessary to realise that HK does not have a properly

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[137] See LegCo Rules of Procedure, Part J, Voting, Rule 46 and 47. See also Annex II(II) of Basic Law. Theoretically speaking, bills can be proposed by either the government or legislators. For bills proposed by the government, only a simple majority is required to pass it. A private bill proposed by a legislator needs to be passed by a majority in both the FC and GC. If the bill concerns public interests rather the business interests, the FC representing the large corporations can easily reject the bill. The best example of this was when the Democratic Party initiated enactment of a Fair Competition Bill, which had more than majority support in the GC, carrying eighteen votes to three with two abstentions from GC. However, the bill lost in the FC which was dominated by business interests and in February 2001 it was rejected on a separate voting basis despite being a popular motion.

[138] In theory, legislators have the right to put forward a private bill. In fact, this is highly unlikely to happen because any bill related to public expenditure, political structure or the operation of the government cannot be introduced individually or jointly by legislators in accordance within Basic Law. Almost all bills, however, relate to the above-mentioned aspects. In other words, a private bill can barely be introduced by legislators under such a restriction. See Article 74 of Basic Law. With regards to the Fair Competition Bill initiated by the Democratic Party, although the Bill lost in separate voting, the Democratic Party then sought to introduce a limited competition statue in the next session. However, discussion of the Fair Competition Bill was ruled unconstitutional as it involved government expenditure. Moreover, the legislature lacks any amendment power on bills proposed by the government, with a choice only to accept or reject. There are many other examples of instances in which the FC members blocked the motion of an elected group by banning a private bill and separate voting despite its overall support. See also LegCo president's ruling on the Fair Competition Bill, 12 February 2001.

[139] Mateus, 'Why should national competition authorities be independent and how should they be accountable?' 17 (n 119).

[140] Ottow, *Market and competition authorities: good agency principles* (n 42) 241, 249.

democratic society in the first place and accountability is not in place. Section 5.5 of Chapter 5 will further elaborate on the relationship between the competition regime and political regime.

An effective institutional design needs to sustain a satisfactory level of accountability. Then, one must ask the question: accountable to whom and for what? The Oxford English Dictionary defines 'accountable' as 'liable to be called to account or to answer for responsibilities and conduct'.[141] In turn, it defines 'responsible' as 'having an obligation to do something, or having control over or care for someone'.[142] Therefore, accountability is located within a principal-agent relationship.[143] The competition authority is the agent, but who is the principal? If the government is the only principal, a contradiction could arise between the concepts of independence and accountability. It is inappropriate for a competition agency to be predominantly accountable to the executive, because independence should ensure the agency's freedom from the executive. Accountability can be viewed as an adjunct to independence which enables consumers as a collective to monitor the performance of a competition agency. In accordance with Ottow's good agency principle, the value of accountability helps form the transparency principle.[144] According to Mark Bovens, being accountable means 'a willingness to act in a transparent, fair, and equitable way'.[145] Competition authorities are expected to be accountable to different individuals: the minister, the political arena, the legislator, enterprises and citizens.[146] However, Ottow neither describes how to prioritise the accountability partners for competition authorities, nor how to apply the accountability principle in an undemocratic political regime. In the specific context of HK whose government is *de facto* unelected and authoritarian, the semi-democratic legislature is the appropriate body, which to a certain extent represents the general public, and to which a competition agency should be held accountable.

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[141] Oxford English Online Dictionary Oxford English Online Dictionary Oxford English Online Dictionary Oxford English Online Dictionary Oxford English Online Dictionary Oxford English Dictionary (Third Edition), updated on December 2011.

[142] ibid.

[143] Clive B Briault, Andrew G Haldane and Mervyn A King, 'Independence and Accountability ' (Apr 1996) working paper series 9 Bank of England 11.

[144] Ottow, *Market and competition authorities: good agency principles* (n 42) 41.

[145] M Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 west European Politics 949.

[146] Ottow, *Market and competition authorities: good agency principles* (n 42) 41.

In the UK, the CMA is answerable to parliament and the Department for Business, Innovation and Skills.[147] In order to reduce political interference in public affairs, the CMA is accountable to parliament in the following ways: undergoing scrutiny by the National Audit Office; providing evidence to select parliament committees in support of parliamentary investigations; attending parliamentary meetings and answering questions; publishing at least one 'annual plan' for its main objectives and priorities for the year, and putting an annual report on its activities and performance before parliament.[148] The annual reports are legally required to include: a general survey of developments of the CMA's functions; an assessment of the extent to which the CMA's main objectives and priorities for the year (as set out in the annual plan) have been met; a summary of the significant decisions and investigations; a summary of the allocation of the CMA's financial resources to its various activities; and an assessment of the CMA's performance and practices.[149] It is worth noting that the description of annual report requirements is relatively detailed. The CMA is also accountable to parliament for its use of public money.[150]

Similar detailed requirements can be found in relevant reports in the EU. The Commissioner for Competition is accountable to the European Commission to present the following: an 'annual management plan' setting out its key objectives for the year ahead; an 'annual report on competition policy' providing information on matters of both policy and enforcement, and a review of activities undertaken in which they set out their achievements and suggestions to remedy any shortcomings; as well as an 'annual activity report,' presenting the achievements reached and the corresponding resources used by the Directorate General for Competition (DG Competition) for a particular year's activities. To ensure the

[147] The relevant pieces of legislation for the CMA are: The Enterprise and Regulatory Reform Act 2013 (Competition and Markets Authority); The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014; The Designation of the Competition and Markets Authority as a National Competition Authority Regulations 2014; and The Competition and Markets Authority (Penalties) Order 2014. A number of guidance amendments such as Competition Act 1998 and cartels guidance, consumer protection and unfair terms guidance, competition and consumer law compliance: guidance for businesses, mergers guidance, markets guidance, regulatory appeals and references guidance were adopted by the CMA. The existing powers of the CMA under section 7 of the Enterprise Act 2002 have been revised by Section 37 of the Small Business, Enterprise and Employment Act 2015.

[148] Part 1 Sections 1-4 of Enterprise Act 2002; OFT, 'Statement of Accountability' <http://www.oft.gov.uk/about-the-oft/oft-structure/accountability/#.UUOSQhy-2Sr> accessed 15 March 2013; See also Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions*, para 3.2.8.

[149] UK Enterprise Act 2002, pt 1, s 4(2)(a)-(e).

[150] CMA, 'Competition and Markets Authority Annual Plan 2014/2015' (1 April 2014) 29.

transparency of its actions and to accommodate an appraisal of its institutional performance, the Commission publishes an 'annual strategy plan' each year. The Commission's reports are subject to the approval of the European Parliament to which it reports every year, and therefore all these reports are tabled before the European Parliament.[151] Apart from these reports, the Commissioner for Competition is required to attend parliamentary meetings and answer questions, and is subject to the scrutiny of the Internal Audit Service of the Commission.[152]

In the US, both the FTC and Antitrust Division of DOJ have to submit a 'performance and accountability report' and a 'strategic plan' to Congress and the Administration under the Government Performance and Results Act, which is under the purview of the General Accounting Office. The US Senate has the opportunity to influence the selection of presidential appointees through its power of confirmation. Congress plays an increased role in confirming the appointment of the Commissioners of the FTC[153] and the assistant attorney general of the Antitrust Division of DOJ, listening to the testimonies given by chairman of commissioners and assistant attorney general, as well as approving the organisational structure of the Antitrust Division of DOJ.[154] The above jurisdictions show that the legislature is of immense importance in terms of the accountability of competition enforcement agencies.

By contrast, the extent of accountability of the Competition Commission in HK is limited to simply a *possible* examination by the director of audit,[155] an annual report, and an accounts statement submitted to the chief executive, who then transfers it to the LegCo.[156]

[151] Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions*, para 2.2.9(a). It is only about the annual reports but not the Commission as a whole or its individual competition decisions or policies.

[152] ibid. paras 2.2.9 (b) and (c). See Iaonnis Lianos and Arianna Andreangeli, *GAL Project Institutional Design and Decision-Making Processes in European Competition Laws and Policy* (Centre for Law and Governance in Europe 2011), 54. Article 228 TFEU also empowers the European Ombudsman to receive complaints on alleged instances of maladministration.

[153] FTC, 'Commissioners' <http://www.ftc.gov/commissioners/index.shtml> accessed 16 March 2013.

[154] Antitrust Division, 'Assistant Attorney General' <http://www.justice.gov/atr/about/baer.html> accessed 16 March 2013. Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions* paras 4.2.8, 4.2.14 and 6.7.9.

[155] Competition Ordinance, sch 5, s 27.

[156] To fulfil the requirement of the annual report, the Commission also hires an auditor who is solely accountable and reports to the Commission. Institutionally, this system does not include enough checks-and-balances. See Competition Commission, 'Annual Report 2012-13', 30; Competition Ordinance, sch 5, s 26.

The director of audit is accountable directly to the chief executive, which further entrenches the executive control. Several questions arise with arrangement such as this. First, the Competition Ordinance merely requires that the report contains an outline of the investigations carried out, a summary of complaints received, and an outline of proceedings brought before the Competition Tribunal.[157] It completely fails to require the production of an assessment of its performance and practices, or a report of its allocation of resources to various activities. Neither does it require the information essential to measuring how effective and efficient an enforcement agency will be. The required disclosure in the annual report of HK is thus far less than that of the CMA. Unlike EU disclosure documents such as the annual management plan, annual activity report, and annual strategy plan, there are no such requirements in HK except for an annual report with limited information provided. Furthermore, the annual report does not require the publishing of a yearly plan of its main objectives and priorities. Whilst being privy to the number of complaints received but not knowing which have been acted upon, how can the public assess whether or not the Commission has kept its promises?

Second, the law only briefly mentions that the Competition Commission is required to give its annual report and auditor's report to the chief executive, who then arranges for these items to be laid on the table of the LegCo.[158] Questions arise in this regard, such as why the annual report and statement of accounts need to be forwarded to the LegCo 'through the chief executive' and why these documents cannot go directly to the LegCo for examination, given that the Commission is independent from the executive. The purpose and rationale for the above arrangement is unclear and may give rise to multiple disadvantages. For example, the chief executive may refer the report back to the Commission if he dislikes anything therein. Indeed, the Ordinance does not mention how to restrict the power of the chief executive in this regard. Furthermore, in order to get past the chief executive, the Commission may have to perform a degree of self-censorship while preparing the report even before the chief executive can exercise his power to refer it back. Under such circumstances, the independence of the Commission and accountability to the LegCo is hugely undermined. Certainly this would deepen the political power of the chief executive but undermine the LegCo's critical duty towards the Commission. Accountability seems to lean towards the

[157] Competition Ordinance, sch 5, s 25(2).

[158] Competition Ordinance, sch 5, s 26.

chief executive rather than the LegCo, which again could raise concerns regarding the Commission's real institutional independence from politics. The Ordinance does not specify whether the chief executive has a right to comment, amend, or return the annual report or even the auditor's report to the Commission if he wants.

Lastly, in contrast to the UK and US, the LegCo has no power over the appointment of any Commission members made by the chief executive. The Competition Ordinance does not require the Commission chairperson to provide evidence when selecting LegCo committees or the LegCo itself, nor does it oblige the chairperson or members to attend LegCo meetings and answer questions. As a whole, the Commission's accountability to the LegCo appears to be relatively limited compared to the institutional designs of other enforcement agencies in the UK, US, and EU.

Similar to the classification of independence discussed above, Mateus divides accountability into three levels from lowest to highest. The lowest level of accountability is that 'annual plans and budgets, in broad terms, have to be approved by the ministry in charge. They depend on the general budget allocation of the respective ministry. Annual reports and budget implementation are subjected, in broad terms, to approval by the ministry in charge'.[159] This lowest level of accountability to legislature is applicable to the HK Competition Commission, whose budget is subject to annual government subventions.

2.3.6 Concurrent Jurisdiction

While pro-competitive sector regulation and competition law both aim, broadly, to promote market competition markets, they begin with different assumptions. *Ex-ante* regulators typically start with the perspective that the sectors for which they are responsible are not as competitive as they could be, since their role is to intervene in such a manner as to help make those sectors more competitive. On the other hand, competition authorities use *ex-post*

[159] The other two higher levels are as follows. 'Level 2: A business plan (3-4 years), discussed with stakeholders. The ministry approves only the broad budget. An advisory council of enterprise association, universities and consumer associations provides advice on strategy and general performance. The NCA [national competition authorities] is subjected to annual hearings by Parliament. The ministry approves annual accounts and annual report. So, the main difference between level 1 and level 2 is that part of the control exercised by the ministry is replaced by an advisory representative of the stakeholders. Level 3: As in level 2, but now in level 3 the NCA has earmarked resources or own revenues that do not depend on a discretionary decision of the ministry. Budgetary resources may function as a residual source'. See Mateus, 'Why should national competition authorities be independent and how should they be accountable?' 24-25 (n 119).

measures so that they begin with the assumption that markets are generally competitive and therefore should need intervention unless the competitive process is clearly being undermined. In this section, a critical and comparative analysis will be undertaken to address the HK competition regime's concurrent jurisdiction concerns. First, it will look at international experience in this area. Second, for the sake of a better understanding of the concurrent jurisdiction concerns in HK, a brief account will be provided for the development of a sectoral approach in HK. Last, it will critically examine the transformation from a sectoral approach to a concurrent jurisdiction.

2.3.6.1 International Experience

Nowadays, concurrency of competition competences involving both a sectoral regulator and competition authority is relatively uncommon in the current general trend of competition regime development. For example, within the EU only Greece (telecommunications and post), Ireland (communications) and the UK's sectoral regulators[160] have concurrent powers to enforce EU competition rules in specific sectors.[161] Over the past decade, the number of national competition authorities has been reduced from two to one in Spain, Portugal and France.[162] Some commentators suggest that enforcement of competition rules is believed to span all sectors of the economy, and sector regulators should not be entrusted with their implementation.[163] A few sectors in the EU, UK and US are still monitored by sectoral regulations in parallel to the application of competition law. However, the relative weighting between regulation and competition law is changing. For instance, in the electronic

[160] They are Water Services Regulation Authority (Ofwat), Office of Communications (Ofcom), Office of Rail Regulation (ORR), Office of the Gas and Electricity Markets (OFGEM) and Civil Aviation Authority (CAA).

[161] European Policy Forum, 'Streaming the UK's Competition Authorities' (October 2010) para 30.

[162] On the restructuring in Spain, see Comisión Nacional de la Competencia, 'Who We Are' <http://www.cncompetencia.es/Inicio/ConocerlaCNC/QueeslaCNC/tabid/77/Default.aspx > accessed 3 Dec 2012 (describing Comisión Nacional de la Competencia and noting absorption of the former Tribunal for Defense of Competition). On the restructuring in Portugal, see Autoridade da Concorrência, 'About Us—Mission' <http://www.concorrencia.pt/vEN/A_AdC/About_Us_mission_and_functions/Pages/About-Us-mission-and-functions.aspx> accessed 3 December 2012 (describing unification of Competition Council and the Directorate of Competition and Trade in 2003). On the restructuring in France, see Autorité de la concurrence, 'Reform of the French Competition Regulatory System: The Conseil de la Concurrence Becomes the Autorité de la Concurrence (Competition Authority)' <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=317 > accessed 3 December 2012.

[163] Mateus, 'Why should national competition authorities be independent and how should they be accountable?' 28 (n 119). Karl M Meessen, 'Antitrust jurisdiction under customary international law' (1984) American Journal of International Law 783; John McInnes, *Concurrent exercise of competition powers by the sectoral regulators: is it time for a more radical change of approach?* (Competition, Regulation & Trade, Herbert Smith LLP 2012).

communications sector of the EU, the system is designed to gradually remove the regulatory obligations when competition develops in various markets. When sector regulation is no longer necessary, there are market-by-market 'sunset clauses' to facilitate the transition towards the application of competition law.[164]

In a recent consultation on the reform of the UK competition regime, the Department for Business Innovation and Skills (BIS) revealed concerns regarding the relative scarcity of competition cases in the regulated sectors.[165] The BIS set out targeted proposals including strengthening the primacy of competition law over sectoral regulation by imposing an obligation on the sectoral regulators to use their competition powers in preference to their sectoral powers. This included the CMA acting as a central resource for sectoral regulators and giving the CMA a bigger role in the regulated sectors.[166] The overriding theme is the importance of increasing the use of competition powers in the regulated sectors. [167]

In the US, the argument for preserving sectoral regulators (such as the Federal Communications Commission, Federal Energy Regulatory Commission and several agencies that regulate financial institutions) seems to still be prevalent.[168] However, the deregulation of many industry segments over the past three decades has led to the sectoral regulators putting increasing emphasis on competition analysis.[169] It is believed that antitrust rather than regulation is the most likely the best way to address market power issues in markets that can structurally support competition.[170] In terms of cost saving, antitrust would be a more

[164] Alexandre de Streel, 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' (2008) XLVII Reflets et Perspectives 53, 57.

[165] John McInnes, 'Concurrent Exercise of Competition Powers by the Sectoral Regulators: Is It Time for a More Radical Change of Approach? ' (2012) 11 Competition Law Journal 37, 38.

[166] BIS, *A competition regime for growth: a consultation on options for reform* (TSO 2011) paras 7.13–7.34.

[167] McInnes, 'Concurrent Exercise of Competition Powers by the Sectoral Regulators: Is It Time for a More Radical Change of Approach? ' (n 167) 41.

[168] Jonathan Baker, 'Antitrust Enforcement And Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in the Communications Sector' (Spring 2013) 9 Competition Policy International ; OECD, *Creating Constructive Relationships Between Competition Policy and Sectoral Regulators Submission of the United States* (2006); Streel, 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications'.

[169] OECD, *Creating Constructive Relationships Between Competition Policy and Sectoral Regulators Submission of the United States* 2, 4-5.

[170] ibid 7.

targeted and less costly means of competition enforcement.[171] In other words, regulation is seen to be costlier than either antitrust enforcement or a combination of antitrust and regulation would be. It argues that the benefits of regulation diminish as markets become more competitive, while the costs of regulation remain and even increase as that transition occurs.[172] In the words of Judge Breyer, '[A]ntitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative'.[173]

2.3.6.2 The Sectoral Approach

Back in 2000-2001, legislation was passed in HK to specifically disallow particular types of anti-competitive behaviour and the abuse of an influential position. Under the sectoral approach, there were only two sectors with relatively full competition provisions − telecommunications and broadcasting. The Office of Telecommunications Authority (OFTA) was the department responsible for handling anti-competitive conduct in the telecommunications sector, whereas the Broadcasting Authority (BA) regulated the broadcasting issues. Although these two sectors have been monitored, there are still many other sectors which remained untouched.

The World Trade Organisation (WTO) questioned the efficiency of a sector-specific approach to competition as a substitute for a comprehensive competition approach in HK.[174] This was inconsistent with the government's competition objectives to be 'more proactive, transparent and *comprehensive*'.[175] In the December 2002 review, concerns were expressed that the heavy involvement of a few dominant conglomerates in the domestic market and the seeming lack of coherent measures to address anti-competitive practices could constitute an

[171] Howard A. Shelanski, 'The Case for Rebalancing Antitrust and Regulation ' (March 2011) 109 Michigan Law Review 683 718.

[172] ibid 719.

[173] Stephen G. Breyer, 'Antitrust, Deregulation, and the Newly Liberated Marketplace' (1987) 75 California Law Review 1005, 1007; Shelanski, 'The Case for Rebalancing Antitrust and Regulation ', 719. However, after *Verizon Commons Inc. v. Law Offices of Curtis V. Trinko*, (540 U.S. 398 (2004) and *Credit Suisse Sec. (USA) L.L.C. v. Billing*, 551 U.S. 264 (2007), statutory authority to regulate has become a greater potential barrier to antitrust law as a substitute for regulation.

[174] World Trade Organisation Secretariat, 'Trade Policy Review Hong Kong, China' (December 2002) para 4.

[175] Trade and Industry Bureau, 'Government Response to Consumer Council's Report entitled Competition Policy: The Key to Hong Kong's Future Economic Success' (November 1997) para 4.4 (emphasis added).

obstacle to healthier competition for domestic and foreign firms in many sectors.[176] Further criticisms were expounded in the WTO's Trade Policy Review in 2006. It was specifically argued that the existence of different rules for different sectors could lead to a distortion of resource allocation because firms would choose to enter sectors with clear competition rules so that they would not be coerced by incumbents.[177] Eventually, the WTO's Trade Policy 2014 review changed its stance to celebrate the fact that the recent adoption of comprehensive competition legislation in HK is a remarkable development since the previous review.[178] In Asia, the government's sectoral approach received a warning from the Asia-Pacific Economic Cooperation in August 2003: 'this [sectoral approach] is obviously an area which needs constant surveillance and evaluation'.[179] In 2005, the establishment of the Competition Policy Review Committee (COMPAG)[180] by the government to review the effectiveness of the sectoral approach was welcomed by the International Monetary Fund, which had taken note of urgent calls over the years to promote domestic competition in other sectors.[181]

Based on this international criticism, it is difficult for the government to justify its opinion that only telecommunications and broadcasting sectors need full pro-competition provisions but the rest of the economy does not need any competition regulation at all. This is especially true given that the studies of the Consumer Council and COMPAG[182] have showed

[176] World Trade Organisation Secretariat, 'Trade Policy Review Hong Kong, China' para 4.

[177] ibid para 134.

[178] World Trade Organisation Secretariat, 'Trade Policy Review Hong Kong, China', Concluding remarks by the Chairperson, (November 2014) para 9.

[179] Graeme Johnston (ed), *Competition Law in China and Hong Kong* (Sweet and Maxwell 2009) 148.

[180] In June 2005, the Competition Policy Advisory Group (COMPAG) appointed a Competition Policy Review Committee (CPRC) to, *inter alia*, make a recommendation on the future direction for competition policy in HK. The composition of CPRC members was more diverse than previous appointed bodies, including academics and members with other non-government backgrounds in addition to business sector representatives. In June 2006, CPRC submitted its report to COMPAG, recommending that a new law with a clearly defined scope be introduced in HK to cover anti-competitive conduct across all sectors. CPRC's results were similar to the Consumer Council but very different to the government. The CPRC concurred with the Consumer Council's opposition to the sectoral approach adopted by the government and suggested the legislation should apply to all. See Competition Policy Review Committee, 'Report on the Review of Hong Kong's Competition Policy' (June 2006).

[181] International Monetary Fund report, 'Hong Kong SAR Preliminary Conclusions of the IMF Mission' (25 October 2005).

[182] The HK government set up the COMPAG in December 1997 in response to the Consumer Council's report on anti-competitive conducts in market. COMPAG is under the chairmanship of the financial secretary to review competition-related matters in the non-regulated sectors as the telecommunications service is the only sector to have had competition regulations since 1995. COMPAG's objective is 'to provide a high-level and dedicated forum to review competition related issues and examines the extent to which more competition should

extensive anti-competitive conduct in many other sectors.[183] Legislation applying competition regulation in certain sectors but not others is perplexing and unjustifiable.

2.3.6.3 From a Sectoral Approach to Concurrent Jurisdiction

In response to local and international criticism of the sectoral approach, HK started a public consultation in 2008 in connection with the enactment of a general competition law. According to the proposal, the former OFTA and BA should share jurisdiction over competition matters with the Competition Commission.[184] In other words, the former OFTA and BA will be subject to one more competition law (i.e. Competition Ordinance), and the substance of the new law overlaps to a certain extent with their own ordinances (Telecommunications Ordinance and Broadcasting Ordinance). However, the design of the sectoral regulators and the Competition Commission could be structurally problematic. Even the Consultation Paper of 2008 itself raises the concern that 'having more than one authority exercise concurrent power under the same law could admittedly lead to a situation where the respective regulators might interpret the law differently'.[185] The Consultation Paper further elucidates:

> If more than one competition law applied to the same sector, this would likely create higher compliance costs for some businesses. For example, if competition in the telecommunications and broadcasting sectors is regulated under both the general competition law and the sector-specific laws, companies in these sectors will need to ensure that their business practices did not constitute an infringement under either law.[186]

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be introduced in the public and private sectors. COMPAG also receives complaints of anti-competitive conduct and investigates possible abuses of dominance as they arise'. See COMPAG, *Annual Report* (1998) para 1.2.

[183] ibid; COMPAG, *Statement on Competition Policy* (May 1998); Consumer Council, *Competition Policy: The Key to Hong Kong's Future Success* (1996); Trade and Industry Bureau, 'Government Response to Consumer Council's Report entitled Competition Policy: The Key to Hong Kong's Future Economic Success' (n 175); Consumer Council, *Submission of Motion on Anti-Monopolization to be Moved at the Legislative Council* (1999).

[184] CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, Proposal 45, para 5, (n 26). The author notes that, since mid-2000, Hong Kong telecommunications market has been highly competitive. It is no longer necessary to preserve the jurisdiction for the competition issues arising from the former OFTA (now Communications Authority). Any anti-competitive conducts can be handled by the Competition Commission.

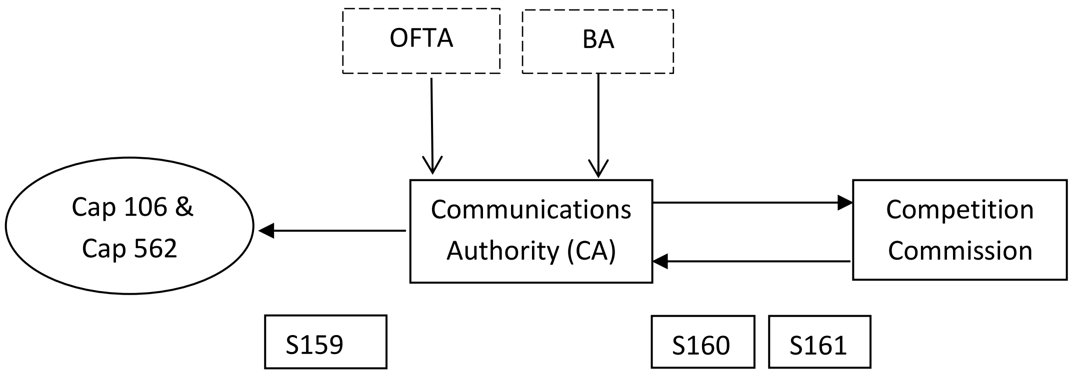
[185] ibid para 8.

[186] ibid para 4.

The government proposed preserving both the former OFTA and BA, which would continue to play the dual roles as traditional sector regulators[187] and competition rules sector enforcers.[188] However, the Communications Authority (CA) was created in April 2012 to replace the OFTA and BA, and was vested with powers of investigation and the arranging of enforcement proceedings of competition cases in the broadcasting and telecommunications sectors, while their existing adjudicative function was transferred to the Competition Tribunal.[189] The sector-specific competition provisions in the Telecommunications Ordinance and Broadcasting Ordinance were repealed upon the implementation of the Competition Ordinance.[190] Avoiding duplication of the law seems to be a sensible arrangement.

Nevertheless, the problem of institutional concurrent jurisdiction still remains unresolved. The government first proposed to preserve both sectoral regulators (OFTA and BA) but subsequently dropped this proposal. Although the number of bodies with power to cope with anti-competitive behaviour changed from three (OFTA, BA and Competition Commission) to two (CA and Competition Commission), problems may still occur if an anti-competitive agreement involving both telecommunications or broadcasting and 'one or more other sectors' are subject to scrutiny under different regulatory regimes. In the light of concerns over regulatory and institutional disharmony, the government created the CA in an attempt to resolve the concurrent jurisdiction conflicts. Let us then consider whether the institutional design of the CA is able to achieve this goal.

Chart: Institutional Structure of Concurrent Jurisdiction since April 2012



[187] ibid para 6.

[188] ibid para 7.

[189] CEDB, 'Fifteenth Meeting of the Business Facilitation Advisory Committee. Agenda Item 2: Competition Bill' (November 2010) BFAC Paper 8/10 , para 14; Part 11 of Competition Ordinance.

[190] CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, proposal 45 (n 26).

The chart shows the interrelations between several key provisions and the newly-established competition authorities. Section 159 provides for the establishment of CA as a statutory body in April 2012 which *may* perform the functions of the Competition Commission relating to the conduct of undertakings under the Telecommunications Ordinance or Broadcasting Ordinance.[191] It is noteworthy that Section 159 could add complexities and nuances to the structure by creating an unnecessary bureaucratic body. The term 'may' in the provision is vague enough to confuse stakeholders regarding whether and when the CA may or may not function under the two ordinances. This does not help predictability and legal certainty within the concurrent jurisdiction. Businesses need an environment with predictability and legal certainty in order to make sensible decisions. The CA is again vested with the powers of both 'investigation and adjudication' together in enforcing the competition provisions in the Telecommunications Ordinance and Broadcasting Ordinance.[192] Thus, the problems which arise from having two conflicting roles as in its former status (OFTA & BA) are perpetuated. This seeming violation of the principle that no man could be a judge in his own case taints the image of this new set-up. It is simply an old idea in a new guise.

Section 160 stipulates the transfer of competition matters between competition authorities.[193] Subsection 1 states:

> Where one competition authority is performing a function in relation to a competition matter and another competition authority also has jurisdiction to perform functions in relation to that matter, the 2 competition authorities may agree that the matter be transferred to and be dealt with by one of them.[194]

Again, the provision just broadly and vaguely tells us that a possible ad hoc agreement may be reached between the CA and the Commission. Such an agreement may or may not happen under concurrent jurisdiction and no further details can be inferred from it. It does not mention anywhere how, when, and under what circumstances the bodies ought to

[191] Competition Ordinance, s 159 (emphasis added).

[192] Communications Authority, 'Competition Matters' <http://www.coms-auth.hk/en/policies_regulations/competition/index.html> accessed 17 February 2013.

[193] Competition Ordinance, s 160.

[194] Competition Ordinance, s 160(1).

exercise their powers of transfer. It seems that competition authorities have huge discretion and the flexibility to make subjective decisions.

Stakeholders may not appreciate such legal uncertainty and unpredictability. It is also possible that the two authorities may not agree on a matter, such as in the landmark case of *Schering-Plough*[195] handled by the FTC and Antitrust Division.[196] Kovacic criticised this potentiality, saying that 'multiplicity would impede the ability of a jurisdiction to speak with one voice in international forums'.[197] Questions hereby arise concerning how to handle disagreement between the two authorities. What, for example, fits the definition of 'is performing' in terms of timing? In other words, at what stage does the agreement need to be made – upon receipt of a complaint, at the start of the investigation, or later? Also, questions arise concerning whether an agreement in advance necessary if the process has not yet started, which authority should initiate the agreement, how long it takes to reach an agreement to transfer a case, how clear the agreement needs to be in order to divide their duties, and whether it is necessary to reach an agreement every time, for every case. If so, how complicated are the procedures for forming an agreement? All of these questions need to be answered by the authorities.

[195] *FTC v. Schering-Plough Corp*., 402 F.3d 1056 (11th Cir 2005). FTC took enforcement action against Schering-Plough over several of Schering's patent litigation settlements involving reverse payment from the branded drug-maker to the generic drug-maker not to enter the market.

[196] The FTC and the Antitrust Division have been collaborating on a report about unilateral exclusionary conduct. At that point, a joint report was much anticipated. But when the report was released in September 2008, it discussed unilateral conduct, and the FTC refused to collaborate. Instead, the FTC issued a harshly worded dissent, complaining that the report 'would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act,' asserting that 'the evidence gathered during the hearings was not representative of the views of all Section 2 stakeholders,' and saying that the FTC 'stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its report'. Eventually, the unilateral conduct report turned into an embarrassing enforcement of federal antitrust. As has been argued: 'if the antitrust agencies can't even agree among themselves, why we should listen to them at all?' During the periods of dissent, the dual-agency model tends to diminish the influence of the agencies over antitrust decision-making. See U.S. DOJ, 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act' (2008) <http://www.justice.gov/atr/public/reports/236681.htm> accessed 30 December 2014; FTC Commissioners React to DOJ Report, 'Competition and Monopoly: Single-Firm Conduct Under section 2 of the Sherman Act' (8 September 2008) <http://www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and> accessed 30 July 2014; Crane, *The institutional structure of antitrust enforcement*, 46 (n 11); Leon, *An institutional assessment of antitrust policy: the Latin American experience* 555 (n 10).

[197] Kovacic, 'Achieving better practices in the design of competition policy institutions', 533 (n 5).

Subsection 2 mandates:

> Where more than one competition authority has jurisdiction to perform functions in relation to a competition matter, if one of them is performing or has performed a function in relation to that matter, then, unless there is an agreement of a kind mentioned in subsection (1), the other competition authority must not perform any function in relation to that matter.[198]

In other words, the one who comes first has the responsibility of taking the case over to the other one. Given the track record of government policy implementation in HK, it is not uncommon for those departments that have concurrent responsibility to be blamed if they fail to carry out their own responsibilities because they presumed the other department was handling the case.[199] The Office of Ombudsman made the following criticism:

> The departments had failed to attend to the needs of the public. A negative impression was given that coordination among government departments was poor and the departments were shifting their responsibilities onto each other without making serious effort to resolve the problem. In this context, the government's image was tarnished.[200]

Under concurrent jurisdiction, the provision provides no clear idea of work division between the two competition authorities. There is a real risk that both parties may think the other party should be responsible for the matter and no one takes the initiative. Needless to say, this could be detrimental to the effectiveness of law enforcement.

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198 Competition Ordinance, s 160(2).

199 Office of Ombudsman, 'Summary of Investigation Report' <http://www.ombudsman.hk/investigation_report.shtml#1213> accessed 12 February 2013.

200 See Office of Ombudsman, 'Complaint against Seven Government Departments for Delay in Handling a Road Repair Works' <http://ofomb.ombudsman.gov.hk/engreports/2011_04_02.pdf> accessed 27 February 2013. For example, it sometimes happened that a complaint to the Office of Ombudsman could involve up to seven departments which denied responsibility of a simple road repair work. The complainant noticed that there was a pothole on a footpath leading to a playground (the Footpath). The pothole turned into a pool of water when it rained. In April 2010, he lodged a complaint with the 1823 Call Centre under the Efficiency Unit (EU). The complaint was subsequently referred to the Highways Department (Hy D), the Lands Department (Lands D), the Drainage Services Department (DSD), the Leisure and Cultural Services Department (LCSD), the Home Affairs Department (HAD) and the Food and Environmental Hygiene Department (FEHD). However, the six departments denied responsibility for the repairs. Allegedly, Hy D once mentioned to him, 'The Department was only responsible for named streets. The Footpath had not been named and was, therefore, not within Hy D's jurisdiction. Since the Footpath served as an access leading only to a playground under LCSD, LCSD should be the responsible department'. FEHD allegedly refused to follow up the case because the pothole was filled with water, not refuse.

The last provision to deal with concurrent jurisdiction is Section 161, which is a memorandum of understanding (MoU) for the Competition Commission and CA, with some matters set out in Schedule 6.[201] In fact, this measure resembles the UK's approach. It is notable that this kind of arrangement may be workable, but it certainly entails complexities to establish a process for deciding the responsibility of each agency, especially when it comes to handling those complaints which are hybrid in nature and involve telecommunications, broadcasting, and other competition issues. The MoU remains untested. Although it is too soon to draw conclusions with regard to the effectiveness of the MoU, it is foreseeable that many time-consuming coordination challenges lie ahead. It could be argued that there is a benefit to diverse jurisdiction as it creates helpful competition between the competition agency and regulator.[202] This author hesitates to agree with this argument, however, because the costs of concurrent jurisdiction seem to outweigh this possible benefit.

This idea, however, raises the question of whether the co-existence of two competition enforcement bodies with overlapping functions and jurisdictions are necessary, given that one is sufficient? Possible negative outcomes include: creating unnecessary delays and expenses for all parties involved; undermining the effectiveness of law enforcement due to a lack of legal certainty; an increase of time spent sorting out who has the proper jurisdiction and harnessing their respective expertise; causing confusion to stakeholders who may not know which one to approach, and risking inconsistency in the application of new laws. Until the above questions are properly addressed, it is highly improbable that those provisions (Sections 159, 160 and 161) would satisfactorily solve the institutional disharmony. Having more than one body enforcing the same law in some sectors of the economy could still lead to confusion, duplication of resources and inconsistency. For example, a battle of wills is emerging after the Competition Commission outlined plans to deter anti-competitive behaviour by introducing a blanket policy of leniency towards whistle-blowers while the CA wants a 'case by case' approach.[203] Charles Mok, the law-maker representing the information technology sector, said, 'This may raise questions about

[201] Competition Ordinance, sch 6, s 161.

[202] Thanitcul, 'Competition Law in Thailand: A Preliminary Analysis' (n 40); Nikomborirak, 'Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries' 300-01 (n 120).

[203] Eddie Lee, 'Penalties at stake: leniency policy differs between Hong Kong's competition watchdogs in enforcing same law' *SCMP* (HK, 20 November 2015)

fairness, with two competition authorities holding contrasting views in enforcing the same law'.[204]

2.4 Suggestions and Conclusion

If the above setbacks are not addressed, the ineffective institutional regime may remain a reality. Accordingly, the following suggestions have been made in order to overcome the setbacks of the institutional design. The author recommends, based on the generous public reserve,[205] that the government can and should reduce the number of part-time Commission members but appoint more full-time ones. A full-time chairperson is necessary at the very least to run an effective system of operation, however it would be preferable to also employ a full-time vice-chairperson and even some full-time members to assist with the daily work of the chairperson.[206] Decreasing the number of members with a commercial background allows for better public confidence in the Commission's independence, and having more full-time professionals with a competition law and economics background (without increasing the total number of members) would help to deal with a heavy workload and complicated competition law issues.

Additionally, an adequate system to monitor the process is as important as the end result. The selection process of Commission members should be prudently designed and only those with a high level of integrity and relevant experience should be appointed. The decision is too important to be made only by the chief executive and therefore a legislative hearing should be part of the selection process. Today, the public is demanding more transparency from policy implementation than ever, stemming from a belief that, 'justice needs not only to be done, but also to be perceived to be done'.[207] The legislative process is generally more

[204] ibid.

[205] As at end-March 2016, the government's fiscal reserves are estimated to reach HK$859.0 billion, representing 35.8 per cent of GDP or equivalent to 24 months of government expenditure. See Research Office of Legislative Council Secretariat, 'The 2016-2017 Budget' (2015-2016) 3 Research Brief 1.

[206] In fact, the chairlady did not disagree about a need of full-time members in the Commission. She noted that the appointment of members in all other statutory bodies is usually done on a part-time basis without remuneration. An appointment of members on a full-time basis with remuneration requires an amendment of the relevant law. However, she never commented that this *cannot* be achieved, although such an achievement would require some effort. What is most important is that full-time appointments can clearly improve law enforcement, and that the government is financially capable of providing it. Interview with Anna Wu, Chairlady of Competition Commission, 10 Dec 2013.

[207] *R v Sussex Justices,* Ex parte *McCarthy* [1924] 1 KB 256.

transparent than the political appointment process, as it is subject to parliamentary scrutiny. The selection criteria and mechanism needs to be objective enough that the public is convinced that the chief executive has decided on the appointment based on merit rather than connections. Likewise the chairperson should either be appointed by the chief executive in concurrence with the LegCo or by the LegCo on the recommendation of the chief executive. Under such an arrangement, the LegCo could have a chance to enquire into the suitability of the appointee.

Thus, it is necessary for the Commission to be more accountable to the LegCo which is able to reflect general consumer interests because at least half of its member seats are democratically elected.[208] The Competition Ordinance should stipulate that the Commission chairperson attends the LegCo's meetings, answers enquiries, supports investigations, and provides evidence to the select committees of the LegCo or the LegCo itself to maintain public confidence. The annual report should be submitted directly to the LegCo with a disclosure of annual objectives, priorities, resource allocation, details of the work the Commission proposes to undertake, and the outcomes it expects to achieve in the coming year(s). With this transparent information, the public will be able to assess achievements or failures at the end of each year, with reports of completed cases accessible and in the public domain. At present, oversight of the Commission is limited to audits and financial matters which are far from sufficient to attain a satisfactory degree of transparency. Such practices have already been adopted by other regulators such as the Housing Authority, Hospital Authority, former OFTA, former BA in HK, and other competition authorities in major jurisdictions.[209]

In terms of registering the interests of members, the Commission should specify a date by which to publish the register on the Commission website when the Commission officer has received a submission of the interests within 14 days. Besides local interests, members also ought to be required to disclose overseas interests including those in mainland China since anti-competitive behaviour is not restricted to local firms, as is readily evident in the example of international cartels.

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[208] The other half of the house (from the FC) is regularly subject to corporate, organised and professional body interests. These law-makers can hardly insulate themselves from those interests in the context of a clientele relationship. In the long run, an implementation of universal suffrage for the whole of the LegCo is an answer to enhancing the accountability of the Competition Commission.

[209] Catherine Fung, 'Response to Detailed Proposals for a Competition Law' (2008) para 8.

For maintaining independence, the author suggests that the chief executive's power to remove members should be substantially narrowed down in line with international standards. Therefore, Sections 5(1)(a) and 5(1)(j) of the Competition Ordinance should be deleted. Furthermore, as an extra step, the Commission members should not be removed without the LegCo's approval. It is a matter of fact that the Commission, to a certain extent, is financially controlled by both the executive and legislature. To attain proper checks and balances between the executive and legislature that reflects the budget assigned to the Commission, a fundamental solution would be to reform the political system and introduce full democracy in HK. However, this is probably a 'mission impossible' under the current political climate. A discussion of broader political reform will be discussed in Chapter 5.

For the concurrent jurisdiction problems, the CA and the Competition Commission are aiming to take measures to minimise disharmony in the short-term. The MoU so far only focuses on procedural and mutual assistance matters but not the clarification of work division. The two authorities each need to understand their own competency, and to clearly define the scope of their respective responsibilities, duties, and enforcement powers. Thus, the authorities could issue a declaration indicating the boundaries of their responsibilities and competency, which would act as a guideline for potential complainants. Such a declaration, ideally published in the public domain, may reduce the number of situations in which parties may become inadvertently entangled in jurisdictional disputes between respective authorities. Cooperation and consultation is of paramount importance, but this inevitably requires time in coordinating their respective expertise and getting the necessary approvals while processing the transfer of a case from one authority to another. It is therefore highly recommended that the concerned parties work with a policy of setting deadlines for each procedural step to avoid unnecessary delays.[210]

In the medium-term, the CA should transfer its competition investigative powers to the Competition Commission. This could yield the following benefits. First, a streamlined and comprehensive authority rather than a fragmented one would be more able to focus on competition issues. Second, this would produce a higher level of consistency, clarity,

[210] For example, the Office of Ombudsman could be approached for redressing grievances and addressing issues of maladministration in the public sector including unreasonable delay caused by the CA and Competition Commission.

efficiency and effectiveness through a concentration of skilled staff resources. Last, despite the Commission having less experience and fewer experts on the telecommunications and broadcasting sectors in comparison to the CA at this point, it would not take long to make up the difference.

In the long-term, it would be advisable for all undertakings to become subject to a single body of competition law under a single competition regime. With the longest implementation experience, the US has identified the flaws of concurrent jurisdiction.[211] With reference to the UK, the work previously done by the OFT and the Competition Commission was transferred to CMA without any significant difficulty over the past few years, proving that the transition process can be smooth and successful.[212] Thus, the merging of two authorities (CA and Competition Commission) into one could be a satisfactory answer to the current jurisdiction concerns in HK.

The means of establishing an effective institutional mechanism to handle competition cases remains one of the main challenges for young competition agencies, of which HK is not exempt. Many institutional determinants are key to enhancing the effectiveness of enforcement by the Commission, such as improving its appointment nature and process, preserving sufficient independence and enhancing accountability to the LegCo. Perhaps there is no perfect competition regime in the world, but HK could have a more credible and pro-active enforcement agency if the discussed structural setbacks are overcome. In the next chapter, we will continue to review institutional arrangements with a shift of focus to another important entity – the Competition Tribunal.

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[211] In 2007, the bipartisan, congressionally appointed Antitrust Modernisation Commission released an evaluative report on the entire gamut of modern antitrust law. The Commissioners admitted that the two agencies did not provide counter-cyclical checks on each other, but ‘typically have worked together to develop similar, if not identical, approaches to substantive antitrust policy’. See Antitrust Modernization Commission, *Report and Recommendations* (2007).

[212] Alex Chisholm, 'Achieving a culture of compliance' (Law Society Competition Section Annual Conference), 16 May 2014.

3 A Critical Review of Institutional Arrangements – Part II

3.1 Introduction

Having discussed in detail the institutional setbacks of the Competition Commission in Hong Kong (HK), this chapter continues to analyse the institutional arrangements of the HK competition regime, with a closer focus on another institutional body – the Competition Tribunal.

Several institutional models are used in more than 120 competition regimes worldwide. Trebilcock and Iacobucci identify the most common ones as the integrated agency model (administrative model), the bifurcated judicial model (judicial model) and the bifurcated agency model (semi-judicial model).[1] A central question when assessing these models is whether agencies have the power to initiate and decide on cases, or whether they simply have the power to investigate and bring prosecutions to the attention of the courts. The examination of a model usually highlights variations in institutional ability across a wide range of evolving factors based on law and policy, society, history and political economy. Therefore, the author will examine a variety of areas in order to select an appropriate model for HK and the best way of reducing the potential challenges accordingly.

3.2 Constraints and the Changing Roles of Courts

An understanding of the constraints and changing roles of courts in a competition regime is important when deciding on an appropriate model for the enforcement agency. The Supreme Court in particular deserves special attention when analysing competition behaviour. In the latter part of this chapter, the author will examine a Court of Final Appeal (CFA) case in HK which was an important catalyst for adopting a change of competition regime model. Using the example of the United States, the authority that Congress has vested in the Department of Justice (DOJ) and the Federal Trade Commission (FTC) can be exercised only within the discretionary field established by the courts. Their capacity to enforce antitrust is always

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[1] Michael J. Trebilcock and Edward Iacobucci, M., 'Designing competition law institutions' (2002) World Competition 361.

contingent on court doctrine.[2] As antitrust agencies have relied on economics as the basis for prosecutions, the courts have increasingly resolved legal problems through an appeal to economics. The relationship, in many ways, has been reciprocal.[3]

The emergence of competition agencies in the twentieth century reiterated the roles of both the government and the courts in adjudications of such rights.[4] It was found that members of the judiciary do not always handle highly sophisticated economic problems well due to their lack of training in microeconomics. The technical complexity of the field quickly made it evident that courts were ill-suited to enforce the competition policy aptly,[5] giving the impression that they favour form over substance.[6] Judges are not always familiar with the economic principles of market operation and their judgments may excessively rely on black letter law and the concepts of administrative law, rather than a substantive review of complexity in economic and competition issues in market. It has even been argued that, from the perspective of general courts, there is a perception that economists are driven by policy goals that overshadow matters of social justice.[7] Technical incapacity of this kind appears to limit appropriate handling of competition cases by general courts, including appellate bodies.[8] These factors contribute to an ideological stance which tends to support competition agencies playing a role in the adjudication of complex economic disputes, and furthers their

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[2] The FTC's dependence on the courts is equal to that of the Antitrust Division. The accused will rarely consent to a negotiated settlement if there is reason to believe that a commission decision can be overturned on appeal. Past court decisions have placed limits both on the willingness of the parties to arrive at agreements prior to adjudication and on the willingness of the commission to file a formal complaint. As in the case of the Antitrust Division, negotiated settlements may be rejected by the courts. See Marc Allen Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (University of North Carolina Press 1991) 35.

[3] ibid 38.

[4] D. J. Galligan, *Discretionary powers: a legal study of official discretion* (Repr. with corrections edn, Clarendon Press 1990); Ignacio de Leon, *An institutional assessment of antitrust policy: the Latin American experience* (Kluwer Law International 2009) 534.

[5] Leon, *An institutional assessment of antitrust policy: the Latin American experience* (n 4) 533-4.

[6] L Tineo, *Competition Policy and Law in Latin America: From Distributive to Efficient Market Regulations* (Monterrey: Centre for Trade and Commercial Diplomacy 1997) 32.

[7] This inability of courts to handle competition law cases has been reinforced by a legal tradition that has regarded economics as a field entirely devoid of connection with the science of law which could multiply tensions between competition agencies and appeal courts. See Leon, *An institutional assessment of antitrust policy: the Latin American experience* (n 4).

[8] Referring to Latin American experience, courts are usually inclined to decide on antitrust cases based on formal or procedural grounds in order to circumvent what is perceived to be a difficult economic analysis. The grounds for appeal are usually limited to errors of fact or of law, including the failure to follow a required process. Appellate bodies are generally not permitted to reconsider the merits of the decision and substitute their own judgment. Courts usually give priority to issues of due process rather than to the economic evaluation of the substantive merits of the case. See ibid 536.

developing towards an adjudicatory/administrative model or a semi-judicial model. The specialised competition law court is chosen under such circumstances. Also, the administrative or semi-judicial models are preferred by some jurisdictions in response to the constraints and changing roles of the courts, as has been the case in HK in its initial design of institutional development.

3.3 The Administrative Model

The term 'administrative model' is used throughout this thesis, though it may also be known as the 'civil administrative model', the 'integrated agency model' or the 'executive model'. To help to explain the features of the administrative model, a popular example is the Directorate-General for Competition of the European Commission (DG Competition). The Commission investigates and initially adjudicates on competition questions, and its decision-making does not involve any formal taking of evidence, cross-examination of opposing witnesses, or any of the other trappings of direct adversarial courts.[9] A hearing officer is responsible for organizing and conducting oral hearings and acting as an independent arbiter when a dispute arises concerning the effective exercise of procedural rights between DG Competition other parties.[10] Undertakings have a right of appeal to the EU General Court whose judgments can be appealed before the European Court of Justice (ECJ) by an unsuccessful party. The Commission can also be an appellant.[11] Such a model was chosen by the Treaty drafters and by the drafters of the Implementation Regulations,[12] and was inspired by the legal and administrative traditions of the founding member states, which were all civil law countries. The Commission cannot criminally enforce the Treaty's competition law provisions, nor can private litigants file cases before the Commission – the process is strictly civil and administrative.[13] Under this model, what we observe is that the European

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[9] Wouter P.J. Wils, 'The Combination of the Investigative and Prosecutorial Function and Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 World Competition 201; Douglas H Ginsburg and Taylor Owings, 'Due Process in Competition Proceedings' (April 2015) 11 Competition Law International 399.

[10] European Commission, 'Hearing Officer' <http://ec.europa.eu/competition/hearing_officers/index_en.html> accessed 27 March 2017.

[11] European Commission, 'Right of Appeal' <http://ec.europa.eu/competition/antitrust/procedures_101_en.html> accessed 27 March 2017.

[12] The old Council Regulation 17/62 and the 2003 instrument.

[13] The Commission's essential coercive power is to order fines, which may be up to ten per cent of the defendant corporations' annual worldwide turnover or revenue.

Commission is a 'centralised power' unit which is responsible for both fact-finding and decision-making in an inquisitorial system. The specialised competition agency undertakes investigative, enforcement and adjudicative functions in combination.

Another noteworthy authority is the FTC of the US, which employs a combination of investigation, prosecution and adjudication in the general sense, but follows an 'internal separation of powers' model when the Complaint Counsel at the Bureau of Competition initiates an action with the approval of the Commissioners and Administrative Law Judge (ALJ) renders a decision. The five Commissioners then sit as a court of appeals to hear the competing arguments about the ALJ decision from the Complaint Counsel and the defendant's lawyers.[14] A difference between the US and the EU is that the former employs an adversarial-administrative model, whereas the latter generally employs an inquisitorial-administrative model. [15] Both of them still have 'concentrate' power in government bureaucrats.[16]

3.3.1 Virtues of the Administrative Model

Choice of model is always a trade-off between due process and efficiency. A better administrative efficiency is expected due to a combination of the investigative, prosecutorial, and adjudicative function in the Commission. For example, the DG Competition is required under its regulations to make decisions in all mergers within five months of being notified of such mergers. [17] Furthermore, higher levels of transparency are attained as the DG Competition publicly discloses the basic details of all mergers, and the settlements of all formal proceedings complete with supporting reasons.[18] Administrative entities may enjoy more flexibility in enforcement actions because they handle the entire antitrust case from

[14] Wils, 'The Combination of the Investigative and Prosecutorial Function and Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (n 9); Ginsburg and Owings, 'Due Process in Competition Proceedings' (n 9) 43-44.

[15] Ian S Forrester and Assimakis P Komninos, 'EU Administrative Law Competition Law Adjudication' (2006) <http://www.americanbar.org/content/dam/aba/migrated/SectRptAdj_Competition_Komninos_spring2006_2.authcheckdam.pdf> accessed 29 September 2015; Eleanor M. Fox and Micharl J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project* (2012) (n 1).

[16] Richard A. Nagareda, 'Turning from Tort to Administration' (1994) 94 Michigan Law Review 899.

[17] Michael J Trebilcock and Lisa Austin, 'Limits of the Full Court Press: Of Blood and Mergers, The' (1998) 48 U Toronto LJ 1, 383.

[18] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 382.

investigation to final disposition.[19] Higher levels of expertise in agency staff and Commissioners would be a huge benefit in policy-making tasks, such as the preparation of guidelines. In terms of budget, the Commission's current streamlined approach has been defended primarily on the grounds of cost savings.[20] As administrative mode agencies are usually led by multiple members, this would arguably yield higher levels of accountability, more consistency, and continuity in terms of decision-making,[21] such as is found in the FTC. In the interest of efficiency, the FTC adopted a series of carefully structured time limits and other procedural reforms in the mid-1990s that have shortened the litigation process, called a 'rocket docket'.[22]

To cope with the due process concerns of the EU competition framework, the enactment of the Modernisation Regulation[23] and the entry into force in 2009 of the Treaty of Lisbon[24] it was pointed out that the choice of administrative model for EU competition law would not be incompatible with the European Convention of Human Rights. The adoption of the Treaty of Lisbon has produced important effects on the institutional design of EU competition law – especially on its procedure. Necessary reform measures would be taken to ensure the protection of human rights and fairness provided in the European Court of Human Rights (ECtHR).[25] The *Menarini* judgment in 2012 shows that the administrative model may be compatible with Article 6(1) of the European Convention on Human Rights (ECHR),

[19] Leon, *An institutional assessment of antitrust policy: the Latin American experience* (n 4) 554.

[20] Wils, 'The Combination of the Investigative and Prosecutorial Function and Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', (n 9) 201; Ioannis Lianos and Arianna Andreangeli, 'GAL Project - Institutional Design and Decision-Making Process in European Competition Laws and Policy' <http://www.iilj.org/GAL/documents/GALprecis.pdf> accessed 25 Feb 2013.

[21] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 381.

[22] David A Balto, 'The FTC at a Crossroads: Can It be Both Prosecutor and Judge? ' (August 23, 2013) 28 Legal Backgrounder 1.

[23] EC Regulation 1/2003 has not only caused a decentralisation of European competition law's enforcement, but has also provided additional investigatory powers for the Commission. The powers have been subject to much scrutiny by the ECHR. See 136/79 *National Panasonic v Commission of the European Communities* [1980] ECR 2033.

[24] The Lisbon Treaty (2007/C 306/01) introduced important changes to human rights protection in the EU, e.g., amendments to Article 6 of the Treaty of European Union. As a result, the EU Charter of Fundamental Rights is legally binding, with the same status as primary EU law. The EU shall accede to the ECHR. Another significant modification introduced by the Treaty of Lisbon is Article 263-4 TFEU, which enables any legal or natural person to institute proceedings against 'a regulatory act which is of direct concern to them and does not entail implementing measures'. Such relaxation of standards allows individuals including companies to challenge regulatory measures.

[25] Lianos and Andreangeli, 'GAL Project - Institutional Design and Decision-Making Process in European Competition Laws and Policy' (n 37).

which concerns the right to a fair trial, [26] as long as an opportunity of appeal before a tribunal is given. [27] One could also highlight the considerable evolution of EU competition law procedures with the aim of safeguarding the principle of due process, including the internal peer review processes, enhancing the roles of the hearing officers and of the chief competition economist (although there remains room for improvement). In addition, the Commission has enacted a number of Best Practices Guidelines on its procedures, seeking to increase the transparency and predictability of its actions.[28] Generally, there is an ongoing effort to increase the transparency of the procedure and the involvement of the parties during the first steps of the investigation process.[29]

3.3.2 Limitations of the Administrative Model

The discussion that follows is separated into an investigation of the European administrative model and the FTC administrative model.

European Administrative Model

From the inception of the European Commission, the European administrative model has attracted criticism due to its concentration of power,[30] and because the inquisitorial system is

[26] Article 6(1) of ECHR provides: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

[27] ECHR *Menarini Diagnostics S.R.L. v Italy* (2011) 43509/08. However, the judgement fails to elaborate if the tribunal in charge of appeal should have power to decide on both facts and law, as well as which criteria need to be fulfilled.

[28] Best Practices can be seen at DG Competition <http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf> accessed 20 March 2013.

[29] Alexander Italianer, 'Safeguarding due process in antitrust proceedings' (Annual Conference on International Antitrust Law and Policy Session on "Enforcers' perspectives on international antitrust"); for commentary, see Carol Harlow, 'Global administrative law: the quest for principles and values' (2006) 17 European Journal of International Law 187, 208.

[30] See Donald Slater, Sébastien Thomas and Denis Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5 European Competition Journal 97; Frank Montag, 'The case for a radical reform of the infringement procedure under Regulation 17' (1996) 17 European Competition Law Review 428; Herwig CH Hofmann, 'Good governance in European merger control: due process and checks and balances under review' (2003) 24 European Competition Law Review 114; Arianna Andreangeli, 'Enforcement by the Commission – the decisional and enforcement structure in antitrust cases and the Commission’s fining system' in Massimo Merola and Denis Waelbroeck (eds), *Towards an optimal enforcement of competition rules in Europe* (Bruylant 2010); International Chamber of Commerce Commission on Competition, 'Due process in EU antitrust proceedings' (8 March 2010) ; AmCham EU, 'AmCham EU calls for Improvements in Due Process in EU Competition Cases' (3 March 2010)

regarded as having an absence of ‘due process’[31] and a limited concept of the ‘rights of defence’.[32] The right to an adversarial trial including cross-examination is regarded as a widely accepted norm. The disadvantage of a relatively informal administrative model of decision-making is that it lacks many features of the Anglo-American adversarial process.[33] For example, the Commission was embarrassed when the EU’s ombudsman discovered that during its investigation of the *Intel* case (which ultimately resulted in a record $1.5 billion fine against Intel), DG Competition had failed to make written records of a meeting with a Dell executive that could have provided exculpatory evidence.[34] A more overtly adversarial process might have drawn out the exculpatory facts. Needless to say, the decision-makers in this case are not judges and the Commission is not a tribunal.[35] This tight combination of investigative, prosecutorial, and adjudicative functions within DG Competition has led to charges of prosecutorial bias, although it is difficult to substantiate or falsify such claims.[36] The case team reports to the DG Competition and its main roles include investigating the case, proposing the decision and discussing the penalties and other remedies to be imposed. Clearly, checks and balances of powers are largely absent. It is a point of further criticism that the presence of the Competition Policy Commissioner, to whom the DG Competition reports, creates a risk of prosecutorial bias even at the earliest stages of the procedure.[37] The

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<http://ec.europa.eu/competition/consultations/2010_best_practices/amcham%20eu_en.pdf> accessed 23 March 2015; Ian Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures' (December 2009) 34 European Law Review 817.

[31] Fox and Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, 51. Fox and Trebilcock raised certain due process issues. For example, lawyer-client privilege is defined by the civil law rule which does not protect communications with in-house lawyers. Furthermore, the EU competition law is not criminal law and, therefore, there is no right against self-incrimination. See Joaquin Almunia, 'Fair Process in EU Competition Enforcement' (30 May 2011) Speech/11/396 Speech in European Competition Day in Budapest However, Joaquin Alumnia, Vice President of the European Commission for Competition Policy, pointed out, ‘the EU Courts have been examining the compatibility of our action with fundamental rights […]. One example is the principle of non-self-incrimination’.

[32] Case 17/74, *Transocean Marine Paint Association v Commission*, [1974] ECR 1063.

[33] For example, the common law trial lawyer has ample opportunity to uncover the truth in a laboratory called the courtroom. Most cases that go to trial are carefully prepared through a discovery process that aids the review of evidence and testimonies before it is presented to the judge or jury.

[34] European Ombudsman, 'Decision of the European Ombudsman Closing his Inquiry into Complaint 1935/2008/FOR against the European Commission' <http://www.ombudsman.europa.eu/cases/decisions.faces/en/4164/html.bookmark> accessed 16 Feb 2013.

[35] Massimo Merola and Denis Waelbroeck (eds), *Towards an optimal enforcement of competition rules in Europe* (Bruylant 2010) 3.

[36] Wils, 'The Combination of the Investigative and Prosecutorial Function and Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (n 9) 201, 212-3.

[37] See C-D Ehlermann, 'Reflections on a European Cartel Office' (1995) 32 Common Market Law Review 471; Stephen Wilks and Lee McGowan, 'Disarming the Commission: the debate over a European cartel office' (1995)

investigation and decisions are made by an expanding group of political appointees (i.e. one commissioner for each member state) instead of an independent agency. These political appointees may be affected by political considerations.[38]

Additionally, though the Commission's decision is subject to the EU courts' judicial scrutiny, this right of appeal would still be insufficient to meet a fair hearing standard; appeals to the ECJ are limited to questions of law only.[39] Apparently, the limited scope of the courts' power of review, especially in respect of the complex economic evaluations carried out by the Commission, would not be enough.[40] It is also argued that the position of hearing officer, important though it may be as a guarantee of the general fairness of the oral hearing, due to his reporting duties, does not offer a sufficiently strong system of checks and balances.[41] Furthermore, the hearing officer limits his work to overseeing the parties' procedural rights rather than the legal substance.[42]

FTC Administrative Model

The FTC administrative model has its own internal separation of powers between the Complaint Counsel, Commissioners, and the ALJ. Nonetheless, it has not been immune from similar criticisms.[43] Calvani's study revealed that this perception is widespread with respect to the FTC, where Commissioners must vote on the initiation of formal proceedings and then

33 Journal of Common Market Studies 259; Lianos and Andreangeli, 'GAL Project - Institutional Design and Decision-Making Process in European Competition Laws and Policy' (n 20); Miert, V., 'The Proposal for a European competition agency', (1996) 2 EC Competition Policy Newsletter, available at http://ec.europa.eu/competition/speeches/text/sp1996_023_en.html. Resolution on the 10th Report of the Commission of the European Communities on Competition Policy [1982] OJC 11/78.

[38] Annetje Ottow, *Market and competition authorities: good agency principles* (Oxford University Press 2015) 126-7.

[39] European Commission, 'Right of Appeal' (n 11).

[40] See Appl. Nos. 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29; *inter alia*, appl. No 19178/91, *Bryan v United Kingdom*, [1996] 21 EHRR 342, para. 46 of the judgment; Commission Opinion, separate concurring Opinion of Mr N. Bratza, p. 354; Arianna Andreangeli, *EU competition enforcement and human rights* (Edward Elgar Pub 2008). For judicial review, see House of Lords Select Committee on the European Union, XIXth Report, session 1999-2000, 21/11/2000, especially para 56 ff.

[41] House of Lords Select Committee on the European Union, XIXth Report, session 1999-2000, 21/11/2000, para. 2.

[42] Robert Pitofsky, 'The Political Content of Antitrust' (1978-1979) 127 University of Pennsylvania Law Review 1051.

[43] Malcolm B Coate and Andrew N Kleit, 'Does it matter that the prosecutor is also the judge? The administrative complaint process at the Federal Trade Commission' (1998) 19 Managerial and Decision Economics 1.

subsequently adjudicate with respect to the same proceedings.[44] It seems to be the norm for decision-makers to be reluctant to overrule their own decisions made in the first instance. Indeed, there are difficulties with structuring internal separations of power that have troubled the European Commission and sometimes the FTC, for a number of years.[45]

The procedural fairness on offer is also questionable given that these dual roles that carry enormous power. In developing a case and issuing the complaint, the Commissioners act initially as prosecutors, then as an adjudicator once the complaint is issued. After the hearing, the ALJ's initial decision becomes the FTC's decision. Either the respondent or the FTC complaint counsel can appeal the decision. Upon appeal by the FTC staff, the Commissioners may reverse the ALJ. The Commissioners are not bound by the ALJ's conclusions of law and findings of fact.[46] If the case was originally heard by the FTC Commissioners instead of an ALJ, the Commissioners have the final say on both the laws and facts of every case.[47] Nonetheless, the appellate courts may only disagree with the Commissioners' findings of fact provided that substantial evidence can be produced to prove the Commissioners' error.[48]

Given the FTC's dual roles for its Commissioners, the institutional and political pressures are likely to make it difficult for the Commission to dismiss a compliant, which could be viewed as 'an admission of costly error – costly both in time and taxpayer money'.[49] Commissioners may sustain a complaint for the purposes of keeping staff morale high, or to appear successful in the eyes of the public, or perhaps because of a prejudice to believe that the respondent has violated the law. At a hearing in front of the Commissioners, the burden of proof may 'subtly shift to the respondent'.[50] The FTC's almost two-decade history of consistently ruling in its own favour creates a strong impression of unfairness.[51]

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[44] Terry Calvani, *Lessons to Be Avoided: The Experience South of the Border* (May 2001).

[45] Daniel A. Crane, *The institutional structure of antitrust enforcement* (Oxford University Press 2011) 220.

[46] 5 U.S.C. §557(b).

[47] 16 C.F.R. §3.54(a).

[48] Balto, 'The FTC at a Crossroads: Can It be Both Prosecutor and Judge? ' (n 22) 2.

[49] Phil Elman, 'Administrative Reform of the Federal Trade Commission' (1971) Georgetown Law Journal 810.

[50] Balto, 'The FTC at a Crossroads: Can It be Both Prosecutor and Judge? ' 2; Elman, 'Administrative Reform of the Federal Trade Commission' (n 22).

[51] Balto, 'The FTC at a Crossroads: Can It be Both Prosecutor and Judge? ' (n 22) 3.

The allocation of economic rights under this model normally involves competition agencies dividing the prosecutorial and adjudicative roles internally into different administrative units.[52] It is clear, however, that formal separation is often undermined in reality since investigating officials, prosecuting officials and decision-makers all belong to the same administrative authority. It may be difficult for the same people who bring a case against a business not to find the investigated party guilty. A risk of this nature, not easily justifiable under the rule of law, may create considerable uncertainty in the business community and have negative effects on investment.[53]

3.4 The Judicial Model

This model has been described as 'adjudicatory', a 'prosecutorial model', a 'judicial model' or a 'bifurcated judicial model' in other written materials. The major doctrine of the judicial model is that the adjudication power is separated from the investigation and prosecution functions in the enforcement of competition law.[54] The model allows judges to adjudicate cases, decisions of a lower court to be appealed in a higher court, and adjudication to disperse decision-making power horizontally.[55] Parallel to that of the competition authority, the judicial method lends itself to private enforcement and the compensation of injured parties.[56] A typical example is the Antitrust Division of the DOJ, which performs investigative and enforcement functions under US antitrust law, but must initiate formal enforcement proceedings before federal courts, where it may seek either criminal sanctions or civil relief.[57] This proceeding is part of an adversarial system. The DOJ has no power to make binding decisions; it can only sue in court to enforce the law.

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[52] Leon, *An institutional assessment of antitrust policy: the Latin American experience* (n 4) 555.

[53] ibid 555.

[54] Julio Faundez (ed), *Good government and law: legal and institutional reform in developing countries* (Macmillan; St. Martin's Press 1997) 175.

[55] Peter H. Schuck, 'Mass Torts: An Institutional Evolutionist Perspective' (1995) 80 Cornell Law Review .

[56] Nagareda, 'Turning from Tort to Administration' (n 16) 899; Ottow, *Market and competition authorities: good agency principles* (n 38) 124.

[57] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (West Publishing Company 1994).

3.4.1 Virtues of the Judicial Model

The judicial model may have advantages over the administrative model. Adjudicatory decision-making tends to be more fact-specific and incremental.[58] Generalist judges may avoid the tunnel vision and agency capture problems of administrative agencies.[59] In those adversarial judicial systems, the common law lawyers have plenty of opportunities to uncover the facts in courts. Most cases that go to trial are carefully prepared through a discovery procedure which assists in the review of evidence and testimony before it is presented to a judge or jury. Accordingly, this model provides a high level of protection of due process values for the trial cases.[60] Previous research has demonstrated that the judicial model does well regarding the value of independence in the performance of the adjudicative function. The model includes significant accountability through the process of judicial appeal, and performs well with respect to transparency.[61] Interestingly, both individual member states and the EU itself, through the European Commission in the competition law context, have progressively evolved from the administrative model towards the judicial model.[62] For countries with strong and independent courts, this model is the preferred option.[63]

3.4.2 Limitations of the Judicial Model

The judicial model has several limitations. First, there are only two solutions in an antitrust trial: either the defendant *did* or *did not* violate the relevant norm. In an antitrust adjudication, either defendants are *guilty* or *non-guilty*.[64] Antitrust adjudication, however, does not solve industrial organization problems, but rather announces winners and losers in legal contests at

[58] Schuck, 'Mass Torts: An Institutional Evolutionist Perspective' (n 55) 941, 974-76 (discussing advantages of adjudication over regulation).

[59] Caleb Nelson, 'Statutory Interpretation and Decision Theory' (2007) 74 University of Chicago Law Review 329, 351.

[60] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 370.

[61] ibid 370.

[62] David Gerber, 'Two Models of Competition Law' in Hanns Ullrich (ed), *Comparative Competition Law: Approaching an International System of Antitrust Law* (Baden-Baden 1998). Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 382.

[63] Ottow, *Market and competition authorities: good agency principles* (n 38) 125.

[64] Carrie Menkel-Meadow, 'Whose Dispute Is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)' (1995) 83 Geo Law Journal 2663, 2674-75.

the end.[65] Adjudication aims to locate actions that harm the competitiveness of markets. However, the lack of competitiveness may not necessarily be the result of a bad act. Adjudication is thus trapped in two extremes with no middle ground, and without any practical solutions to market power problems.[66] Second, the judicial model has fared poorly with respect to process costs and timeliness in previous studies compared to the administrative model.[67] Third, judges usually demonstrate a lack of expertise in economics,[68] in particular at the beginning of setting up institutional arrangements.

3.5 The Semi-Judicial Model

This model may be known as the bifurcated agency model which is regarded as a quintessential compromise between the administrative model and judicial model.[69] It is a specialised, quasi-judicial body comprised of expert lay members and judicial members. The rationale behind it is that business people and economists are better able to understand the relevant issues than a typical judge.[70] This model is not as common as either the administrative or the judicial model.

In Canada, the Commissioner of Competition at the Competition Bureau performs investigative and enforcement functions, and the Competition Tribunal, comprising of a mix of Federal Court Trial division judges and lay experts, performs the adjudicative function. Judicial members of the Tribunal must chair every panel, typically a panel of three,[71] and the rest of the panel is usually made up of two lay members.[72] The Tribunal's decisions are reviewable before the Court of Appeal, and only the Commissioner may initiate proceedings before the Competition Tribunal – private parties have no direct access to the Tribunal. The

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[65] Crane, *The institutional structure of antitrust enforcement*, (n 45) 97.

[66] ibid 101.

[67] Trebilcock and Iacobucci, 'Designing competition law institutions', (n 1) 370; see also Ottow, *Market and competition authorities: good agency principles* (n 38) 129.

[68] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 371.

[69] ibid 380.

[70] American Bar Association, *Competition Laws outside the United States Volume I* (2001) 17.

[71] Competition Tribunal Act, S.C. 1985, c. C-19 (2d sup.) s12.

[72] There is an exception that cases under Part VII.1 of the Competition Act (deceptive marketing practices) are heard by a judicial member who sits alone in the trial. See Johnny H. Killian and George A. Costello (eds), *The Constitution of the United States of America: Analysis and Interpretation*, vol Senate Document No.103–6 (U.S. Government Printing Office 1992).

agency must seek adjudication of anticompetitive conduct complaints before the special Competition Tribunal.[73] This institutional arrangement was introduced with the Competition Act in 1986, and did not have any counterparts in other jurisdictions at the time.[74]

The Australian Competition Tribunal is another example of a semi-judicial body, which is a review body that hears to appeals on decisions by the Australian Competition and Consumer Commission, and which is somewhat different from the Canada Competition Tribunal. The Tribunal has a multi-disciplinary panel consisting of a Federal Court judge as president and two lay members, one of whom is almost invariably an economist and the other a business person.[75] A similar semi-judicial model appears in the Competition Appeal Tribunal in the UK as a review body, which has cross-disciplinary expertise in law, economics, business and accountancy, and whose function is to hear and decide on cases.[76]

3.5.1 Virtues of the Semi-Judicial Model

To obtain a better understanding of this model, it is worthwhile explaining its theoretical advantages and its practical limitations in reference to the experience of Canada. The model is designed to strike a reasonable balance between the administrative efficiency offered by the administrative model, and the due process values in the judicial model. As Section 9 of the Competition Tribunal Act in Canada provides, 'all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit', and the presence of judicial members on the Tribunal is a good approach to ensure appropriate attention to due process considerations.[77] Similarly, Section 147 of the Competition Ordinance in HK also states,

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[73] Crane, *The institutional structure of antitrust enforcement* (n 45) 219.

[74] The institutional arrangements within competition law in post-war Britain bear some similarities with the director of the OFT undertaking investigative and enforcement functions, and adjudicative functions being vested in either the Restrictive Practices Court (a mix of judges and lay experts), or the Monopolies and Mergers Commission (subject to the ultimate political decision-making authority of the secretary of state). See Trebilcock and Iacobucci, 'Designing competition law institutions', (n 1) 372.

[75] Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International 2003) 11.

[76] The UK Competition Appeal Tribunal <http://www.catribunal.org.uk/> accessed 19 March 2017.

[77] Canada Competition Tribunal Act, S.C. 1985, s 9.

> [T]he Competition Tribunal is not bound by the rules of evidence and may receive and take into account any relevant evidence or information, whether or not it would be otherwise admissible in a court of law.[78]

Therefore, it is expected that the court proceeding in competition law cases would be less formal than in other civil cases. The consultation paper also suggests that the HK Competition Tribunal's proceedings should be conducted as informally and expeditiously as possible.[79] Applying too strict an approach to rules of evidence may narrow the competition institution's margin of discretion and it leads to inadequate protection of consumers.[80]

In theory, the design aims to achieve a balance amongst various values such as predictability, expertise, and prevention of prejudice in the Tribunal. The presence of lay experts on the Tribunal is presumably representative of an effort to ensure, at least in part, some flexibility in applying competition law principles to business transactions or practices, and to reflect changes in the nature of domestic and international economic environments. It ensures a high level of independence in the performance of adjudicative functions, while at the same time ensuring some degree of accountability through the judicial process.[81] This model is also suitable for countries with a strong and independent judiciary.

3.5.2 Limitations of the Semi-Judicial Model

However, the actual experience of the Competition Tribunal in Canada since its creation in 1986 has proven otherwise as regards some of the aforementioned advantages, including efficiency and authoritative expertise.[82] Between 1999 and 2000, only four cases out of 392 received authoritative adjudication by the Tribunal while the rest were concluded by the Competition Bureau.[83] The Tribunal has only heard and decided on six contested merger

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[78] Competition Ordinance, s 147.

[79] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (File Ref: CITB CR 05/62/25/13, May 2008), proposal 19.

[80] Ottow, *Market and competition authorities: good agency principles* (n 38) 253.

[81] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 372-373.

[82] Trebilcock and Austin, 'Limits of the Full Court Press: Of Blood and Mergers, The' 1; A Neil Campbell, Hudson Janisch and Michael Trebilcock, 'Rethinking the Role of the Competition Tribunal (1997)' 76 Canadian Bar Review 297, 303.

[83] Canada Competition Bureau Annual Report, 1999-2000.

cases from 1986 to 2012.[84] The abuse of dominant position provisions of the Act have only been contested and adjudicated by the Tribunal on five occasions since 1986.[85] In 2008, the Tribunal held fourteen proceedings, only seven of which were contested. Of those, two were deceptive marketing cases, leaving only five contested competition cases, all of which dealt with leave applications by private parties involving a refusal to deal or exclusive dealing provisions. Out of those five, only one was granted.[86] Over 99 per cent of all mergers brought to the attention of the Competition Bureau are resolved through abandonment, approval, monitoring, modification, or other undertakings.[87] The Tribunal has turned out to be a minor player in the wider institutional design in comparison to the Competition Bureau, which handles substantial anti-competitive practices. This outcome disappointed many people who participated in the policy-making process that led to the enactment of the Competition Act in 1986, where it was widely assumed that the Competition Tribunal would become the focus of authoritative expertise in the interpretation of the Act, or at least for the more difficult cases.[88]

The composition and formalised procedures of the Tribunal have rendered its operation very similar to that of courts. The resulting costs, delays and uncertainty involved in Tribunal proceedings have induced firms and the Commissioner to move decision-making, even in difficult cases, away from the Tribunal towards the Bureau, where process values such as transparency, accountability, and publically reasoned decision-making are much diminished. This substitution effect has turned the Competition Bureau into a *de facto* administrative model agency, performing investigative, prosecutorial and adjudicative

[84] *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd*. (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) [*Hillsdown*]; *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 4 C.P.R. (3d) 261 (Comp. Trib.); *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Comp. Trib.); *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc. et al*. (2001), 11 C.P.R. (4th) 425 (Comp. Trib.); *Canada (Commissioner of Competition) v. Labatt Brewing Co.* (2007) C.C.T.D. No. 5 (Comp. Trib.); *The Commissioner of Competition v. CCS Corporation et al*., 2012 Comp. Trib. 14. See Eleanor M. Fox and M. J. Trebilcock, *The Design of Competition Law Institutions* (Law and global governance series, Oxford University Press 2012) Ch 3.

[85] Michael Trebilcock and others, *The Law and Economics of Canadian Competition Policy* (University of Toronto Press 2003)16-17; *Canada (Commissioner of Competition) v. Canada Pipe Co*.2006, D.L.R. (4th) 193 FCA.

[86] Calvin S. Goldman and Navin Joneja, 'The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner' (Spring 2010) Loyola University Chicago Law Journal 535, 548.

[87] Trebilcock and Iacobucci, 'Designing competition law institutions', (n 1) 374.

[88] ibid 374.

functions.[89] Moreover, the prominent role played by the Federal Court Trial Division judges on the Tribunal has encouraged Federal Court of Appeal judges to regard the Tribunal as a regular Court of First Instance by substituting their non-expert judgements in place of Tribunal decisions and overruling their decisions.[90] Accordingly, the 'judicialisation' of the Tribunal has undermined the objective of developing an authoritative, expert, public body of competition policy jurisprudence.[91] The expected functions of a special expert-tribunal cannot be realised. The semi-judicial model was widely judged to have been dysfunctional in Canada, at least in terms of mergers and monopolisation.[92] Such problems could easily happen in the early stage of setting up a special tribunal. This could give the HK Competition Tribunal a clear indication that it is functioning more like a *de facto* judicial model than a *de jure* semi-judicial model.

3.6 From an Administrative Model to a Semi-Judicial Model in HK

In HK, the original purpose of the institutional framework as proposed in the public consultation document in 2008 was to adopt a 'civil administration model' comprising the Competition Commission and the Competition Tribunal. The Competition Commission was fully equipped with functions to investigate, prosecute, and adjudicate any breach of the competition rules, and to impose a wide range of sanctions, with a maximum fine of up to ten per cent of the global turnover during the period when the infringement occurred. The Competition Tribunal was mandated to hear applications under review of the Competition Commission's decision and to impose a full range of remedies, including: pecuniary penalties; award of damages to aggrieved parties; making of interim orders during investigations or proceedings; termination or variation of an agreement or merger; and disqualification orders against directors and others who have contributed to the contravention of the competition rules.[93] More importantly, the Tribunal can hear private rights actions.[94]

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[89] ibid.

[90] Federal Court of Appeal decisions in *Canada (Director of Investigation and Research) v. Southam Inc*., rev'd in part [1997] 1 S.C.R. 748; *Commissioner of Competition v. Superior Propane Inc*., (2000) Comp. Trib. 15 rev'd (2001) F.C.A. 104.

[91] Trebilcock and Iacobucci, 'Designing competition law institutions', (n 1) 375.

[92] ibid 380.

[93] Competition Commission, 'Annual Report 2012-13' (2014)

[94] CEDB, *Progress on the Preparation of the Competition Bill* (CB (1) 1111/08-09 23 March 2009) para 3; CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, proposal 16 and 20; Jackie Wu,

As noted above, in Section 3.3.1, administrative efficiency amounts to a significant advantage derived from a streamlined approach. Other benefits – including higher levels of expertise in agency staff, predictability, flexibility, consistency, and continuity – are expected from this model based on the EU experience, which the HK government was in fact tempted to choose. To cope with the concerns of insufficient economic knowledge, the government has created a special tribunal which has non-judicial members with expertise in economics, commerce or competition law, in addition to judicial members.[95] This type of administrative model is also common in a variety of other sectors in HK, such as the Securities and Futures Commission, the former Telecommunications Authority[96] and the former Broadcasting Authority.[97] The HK government has remarked that its competition regime will be based on the EU model.[98] It is also similar to the arrangement for review under the UK and Singapore Competition Acts.[99] The government believed that such a model would be acceptable to most stakeholders. The author also believes that it was a wise plan to create a tribunal with cross-industry expertise. In most other Asian countries, government agencies act as investigators, prosecutors and judges.[100]

Nonetheless, shortly after the possibility of adopting this model was articulated, the government announced a pendulum policy change from an administrative model to a semi-

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Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions* (25 June 2010), para 6.7.5.

[95] CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, proposal 17.

[96] This would be similar to the arrangement under the Telecommunications Ordinance, wherein a Competition Appeals Board may review decisions of the Telecommunication Authority (Telecommunications Ordinance, s32M). There is no special tribunal to hear appeals.

[97] Frederick Ma, 'Speech by SCED at Asian Competition Forum - Workshop on the Government's Competition Law Proposals' (12 June 2008) <http://www.cedb.gov.hk/speech/pr12062008b.htm> accessed 28 May 2014.

[98] Proposals 23, 25, 26, 27, 38, 43 and 48 of the Consultation Paper are in connection with the EU model. Similarities include the European Commission enforcing the treaty's competition law provisions criminally. The process is strictly civil and administrative. The Commission's essential coercive power is to order fines which may be up to ten per cent of the defendant corporation's annual worldwide turnover or revenue. Although there is no direct private enforcement under the EU models, many member states allow private action. On the other hand, although the Consultation Paper initially included the right to private action in HK, this right has been cancelled in the final draft of competition law. See CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 98).

[99] Competition Act 2004 (Singapore), s 71 and Competition Act 1998 (UK), s 46.

[100] Marc Waha and Julienne Chang, 'HK's antitrust model offers clear separation of powers' *SCMP* (HK, 15 August 2012).

judicial model.[101] Under the new model, the Competition Commission will be empowered to investigate and the Competition Tribunal is to be vested with the powers to adjudicate on infringements and impose pecuniary penalties,[102] serving a separation of functions. In other words, the Tribunal is established within the judiciary to hear and adjudicate competition cases brought by the Competition Commission.[103] It appears that adjudication power has shifted from the Commission to the Tribunal. The Tribunal will consist of judges from the Court of First Instance and assessors,[104] and retains all the powers, rights, and privileges of a superior court of record, including the power to require attendance of witnesses, production and inspection of documents, and enforcement of its orders.[105] This is similar to the institutional arrangements of the competition law regime in Canada. Accordingly, the Tribunal has been transformed from a review body into an adjudicative authority whose decisions would in turn be reviewable by the Court of Appeal, where only points of law will be considered. This change is a departure from the EU model that the HK government promised to follow closely.

3.6.1 Why a Shift of Model?

These developments raise interesting questions as to why the change occurred. The HK government has attempted to rationalise its shift in approach by offering two justifications: (1) concerns regarding a concentration of too much power in one place by some respondents in the public consultation (a political reason);[106] and (2) Court of Final Appeal judgments (a judicial reason). First, a political reasoning can be understood as follows. Some respondents

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[101] Although the Hong Kong government has named the new model as a judicial model, the alleged model appears to be semi-judicial model based on the above analysis of features of models, e.g., the cross-industry expertise of assessors in the tribunal design. Throughout the chapter, semi-judicial model is used to refer to the new model.

[102] The Tribunal will be empowered to apply a full range of remedies, including but not limited to pecuniary penalties; award of damages; injunction; termination or variation of an agreement; and disqualifications orders. Such decisions or determinations of the Tribunal are reviewable on appeals to the Court of Appeal and Court of Final Appeal. See CEDB, *Progress on the Preparation of the Competition Bill* par 4; Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions,* para 6.7.6.

[103] Competition Ordinance, s 134(2).

[104] Competition Ordinance, s 135(1).

[105] Competition Ordinance, s 143(1).

[106] Bills Committee on Competition Bill, 'Overview of Major Components of the Competition Bill ' (CB(1)320/10-11(02) para 4.

considered that the proposal to give the Competition Commission powers to adjudicate on infringements and to impose remedies in addition to its investigative and prosecutorial roles amounted to too great a concentration of power in one place. However, there are just as many respondents who showed support for the original model.[107] A policy can hardly please everyone and it is normal to have some degree of opposition. It has been raised, however, that the rationale of some respondents who were in opposition has not yet been fully explained by the government. For example, who are those 'respondents'?

In accordance with the above analysis of model preference, we can find that the semi-judicial model is likely to attract support from big corporations.[108] Many of the respondents who suggested a shift to a semi-judicial model are from commercial and business backgrounds.[109] In fact, HK's political structure in both legislature and executive is dominated by business interests. Critiques have even suggested that collusion between the government and tycoons has often been the cause of the government's concessions and capitulations on policy- and law-making.[110] The chief executive and many members of the ExCo have close ties to business.[111] In fact, under the semi-judicial model, the government has made concessions under high pressure to business groups on the final draft of the Competition Bill, such as reducing penalty fees from ten per cent of global turnover to ten per cent of local turnover, and cancelling the right to private enforcement. There is, in all likelihood, a hidden but important political reason why the government did not mention the reason behind the change in model.

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[107] CEDB, 'Full List of Written Submission to Response 'Detailed Proposals for a Competition Law - A Public Consultation Paper'' (2008) <http://www.cedb.gov.hk/citb/en/Pub_Press/Consultation_Documents/isub_full_2008.html> accessed 10 January 2013.

[108] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 391.

[109] CEDB, 'Full List of Written Submission to Response 'Detailed Proposals for a Competition Law - A Public Consultation Paper''.

[110] Ngok Ma, 'Hong Kong's democrats divide' (2011) 22 Journal of Democracy 54.

[111] A series of scandals revealing a close relationship with local tycoons, including acceptance of private jet and yacht rides, provoked public ire and drew thousands to street protests. During legislation of the Competition Ordinance, the chief executive, Donald Tsang, resisted calls to resign and repeatedly issued tearful apologies for his errors in judgment, which include staying at luxury hotel suites costing more than US$6,000 a night on official trips, a sum nearly three times the local median monthly income. See Te-Ping Chen, 'Tsang's Exit in Hong Kong Marred by Scandal' (*The Wall Street Journal,* 18 June 2012) <https://www.wsj.com/articles/SB10001424052702303836404577474313122249478> accessed 16 April 2015; see also Hong Kong Government, 'Membership of Executive Council' <http://www.ceo.gov.hk/exco/eng/membership.html> accessed 2 April 2013.

Second, the government argued that a number of recent judicial decisions have also had an impact on the institutional arrangement of the Competition Ordinance.[112] The Court of Final Appeal (CFA) delivered its judgement on the cases of *Koon Wing Yee & Insider Dealing Tribunal* [113] and *Chan Kin Shing Sonny & Insider Dealing Tribunal* (The *'Koon'* case)[114] in March 2008, ruling that although the offences may be explicitly classified as 'civil', so long as they have incurred severe pecuniary penalties which are punitive and deterrent in nature (i.e. not compensatory), they should properly be deemed 'criminal'. As such, the criminal offence safeguards should apply, including fair trial, protection against self-incrimination, and a standard of proof beyond reasonable doubt. These must be in place during the investigation and adjudication of such infringements so as to meet the requirements of Articles 10 and 11 of the Bill of Rights Ordinance (BOR).

Article 10 of the BOR provides:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 11 of the BOR provides:

> (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –
> (g) not to be compelled to testify against himself or to confess guilt

The CFA declared that the power to impose such a penalty is invalid on the grounds that it has violated the above two provisions of the BOR.[115] It also held that evidence obtained by the Securities and Futures Commission under its statutory powers was inadmissible in the former Insider Dealing Tribunal inquiry since it involved the determination of a criminal charge, and the use of such evidence violated Article l0 ensuring a fair trial. In effect, it violated the privilege against self-incrimination under Article 11. The

[112] CEDB, *Progress on the Preparation of the Competition Bill*, para 4.

[113] Final Appeal No. 19 of 2007 (Civil) (on Appeal from CACV No. 358 of 2005).

[114] Final Appeal No. 20 of 2007 (Civil) (on Appeal from CACV No. 360 of 2005).

[115] *Koon* case, para 120.

Insider Dealing Tribunal was replaced by the Market Misconduct Tribunal (MMT) in 2003.[116]

The author does not believe that the political reason and the favourable consideration given to big cooperate interests are convincing enough to compel a shift to another model. Nonetheless, the judicial importance given in these cases to due process on human rights grounds sounds persuasive enough to justify a particular change which will be explored in the subsequent section. Although the semi-judicial model has a number of virtues discussed in Section 3.5.1, such as striking a balance between due process and administrative efficiency, predictability, and expertise, it is difficult to conclude at the present stage whether it is a suitable or ill-fitting model for HK. This will be further discussed in Section 3.7.

3.6.2 International Aspect of BOR

The provisions of Articles 10 and 11 of the BOR are articulated in the same terms as the corresponding provisions in Articles 14(1) and 3(g) of the International Covenant on Civil and Political Rights (ICCPR). Article 39 of the Basic Law provides that the provisions of the ICCPR as applied in HK shall remain in force and shall be implemented through the laws of HK. Therefore, by enacting the BOR and implemented the ICCPR as applied to HK, the BOR has constitutional effect pursuant to Article 39 of the Basic Law. In other words, the Basic Law required HK legislation not to infringe upon certain human rights found in the BOR.

By comparison with other jurisdictions in the UK and the EU, whose competition regimes the HK government claims to model theirs on, it remains difficult to reconcile the outcome of the *Koon* case with the treatment of penalties under competition law in the UK[117] or the EU.[118] This is clearly because significant penalties (being up to ten per cent of turnover)

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[116] The MMT ceased operation from December 2009 upon completion of all cases in hand. See Insider Dealing Tribunal, 'Welcome Message' <http://www.idt.gov.hk/english/welcome.html> accessed 12 April 2017.

[117] The UK's competition regulator wants to issue fines of up to 30 per cent of what the "relevant turnover" companies make from their infringing behaviour in a year. Currently the OFT can issue fines up to 10 per cent of that relevant turnover. Out-Law.com, 'OFT proposes increasing maximum fine for anti-competitive behaviour' 31 October 2011) <http://www.out-law.com/articles/2011/october/oft-proposes-increasing-maximum-fine-for-anti-competitive-behaviour/> accessed 15 November 2014.

[118] The fine is limited to ten per cent of the overall annual turnover of the company. The 10 per cent limit may be based on the turnover of the group to which the company belongs if the parent of that group exercised

that may be imposed in the UK and the EU for breaches of the competition law are treated as civil penalties and are subject to the civil standard of proof. In the UK, the Competition Appeal Tribunal expressed the view that the ECHR did not require proof beyond reasonable doubt in *Napp Pharmaceutical Holdings.*[119] Despite the fact that the penalty cap in the Competition Ordinance was reduced from up to ten per cent of a firm's total *global* turnover to ten per cent of a firm's total *local* turnover for each year of the infringement (up to a maximum of three years), this penalty could be considered sufficiently large enough to be classified as criminal in nature.[120] In fact, the Tribunal may order an undertaking to 'pay the government a pecuniary penalty of an amount it considers appropriate' in accordance with Section 93 of the Competition Ordinance. Therefore, there is a notable departure from the UK and EU models in terms of burden of proof.

Paragraph 15 of General Comment No.32, published by the United Nations Human Rights Committee at its 90th session in July 2007, relating to Article 14 of the ICCPR (Articles 10 and 11 of the BOR), stated:

> Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are 'criminal in nature' with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.

Before HK's handover to China, the Privy Council used to act as a Supreme Court to deliver final judgments in HK. In *Attorney-General of Hong Kong v. Lee Kwong-kut,*[121] the Privy Council regarded general Comment No.13 as indicating that the standard of proof beyond reasonable doubt was the general standard applicable for the purposes of Article 14 of the ICCPR and Article 11(1) of the BOR.

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decisive influence over the operations of the subsidiary during the infringement period. There is also a limitation period of five years from the end of the infringement until the beginning of the Commission's investigation.

[119] At para 96, citing Sir Richard Buxton, 'The Human Rights Act and the Substantive Criminal Law' [2000] Crim. LR 331.

[120] It is believed that this change in legislation may reflect the fact that the focal point of the jurisdiction is the local market. See Peter Waters and Melanie Tan, 'Hong Kong's First Cross-Sector Competition Law: a modern competition law with Hong Kong characteristics' (2013) Golbert Tobin 12.

[121] *Attorney-General of Hong Kong v. Lee Kwong-kut* [1993] AC 951.

Moreover, the principles enunciated by the ECtHR in relation to the right to a fair hearing under Article 6(1) of ECHR are applied by English courts in the interpretation and application of the Human Rights Act 1998 (UK). Article 6(1) protects a person from being compelled to testify against himself. The decisions of the ECtHR on provisions of the ECHR which are in the same, or in substantially the same terms, as the relevant provisions of the BOR – though not binding on the courts of HK – are of high persuasive authority given that the sovereignty of HK has been returned to China.

An increase in the number of fines for violation of EU competition law to threefold and more was debated at length.[122] Though an increased fine could be of greater deterrence, it has been argued that it would exceed reasonable levels.[123] High levels of fines could constitute penalties of a 'criminal nature' in the case of *LeCompte, Van Leuven and de Meyere* decided by European Court of Human Rights.[124] Accordingly, the standards of due process should be elevated to a criminal procedure.[125]

The CFA follows the decisions of the ECtHR relating to Article 6 ECHR, establishing that the three criteria to be taken into account for the purpose of determining whether there is a 'criminal charge' within the meaning of Article 6 are:

(1) the classification of the offence under domestic law;
(2) the nature of the offence; and
(3) the nature and severity of the potential sanction.

In the application of the three criteria, the ECtHR has recognized that the classification of the proceedings under domestic law is no more than a starting point and that

[122] Ioannis Lianos, 'Competition law in the European union after the Treaty of Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (University of Cambridge 2012) 278.

[123] Jürgen Schwarze and others, 'Deficiencies in European Community Competition Law' (2008) <http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf> accessed 26 September 2015.

[124] Series A no. 43, *LeCompte, Van Leuven and de Meyere v Belgium* [1982] 4 EHRR 1 paras 45-47.

[125] I Forrester, 'Due Process in EC competition Cases; A Distinguished Institution with Flawed Procedures' (2009) 34 European Law Review 817, 825.

factors (2) and (3) carry substantially greater weight than factor (1). The third factor was considered to be the most important element in English cases to determine a criminal charge.[126] Although the offence was classified as civil under the Securities (Insider Dealing) Ordinance (SIDO),[127] the penalty was held to be criminal in nature given the extent of fines imposed. Penalties of HK$15m and HK$1.5m were imposed upon the two defendants.[128] The CFA added that disciplinary proceedings which do not concern the public at large usually have a 'non-criminal, non-penal character'. The provision of SIDO[129] was arguably more than compensatory and also intended to be punitive and deterrent in nature against insider dealing. Therefore, it could be regarded as a criminal charge.[130] Despite the fact that there are civil sanctions in the SIDO such as the disqualification of a director,[131] and a dual regime of civil and criminal sanctions to deal with insider dealing, these items may still infringe the BOR. As the HK government claims to have adopted a competition law which lives up to international standards, the international aspect of the actual or potential violations of the BOR cannot be ignored.

3.6.3 Impacts on the Competition Ordinance

Similarly, though Section 171 of Competition Ordinance stipulates that 'criminal proceedings for an offence under this Ordinance may not be brought in the Tribunal', Section 93(3) provides that the maximum penalty in relation to a single contravention is up to ten per cent of the annual turnover obtained by the undertaking concerned in HK for each year the infringement lasted, with a maximum of three years.[132] The Ordinance does not limit the

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[126] The principle was echoed by Potter L J in *Han v. Customs and Excise Commissioners* [2001] 1 WLR 2253 and again by Lord Steyn in the House of Lords in *R (McCann) v. Manchester Crown Court* [2001] 1 WLR 1084.

[127] Now it is replaced by the Securities and Futures Ordinance.

[128] International Bar Association Antitrust Committee, 'Working Group on the Proposals for a Competition Law in Hong Kong ' (August 2008)

[129] SIDO, s 23(1)(c).

[130] *Koon* case, para 39.

[131] *Koon* case, para 74. See Section 23(1)(a) of SIDO mentions the power to order disqualification of a director. See also Division 5 of Competition Ordinance which carries the same kind of sanction involving disqualification of directors.

[132] Competition Ordinance, s 93(3). The penalty in the scenario of HK is less serious than those in the EU and UK where the actual amount is not restricted to local turnover.

actual amount of any penalty in anti-competitive cases.[133] In other words, it could impose sanctions far above the HK$15m imposed in the *Koon* case. Accordingly, the actual amount of the penalty and its severity are likely to be not only compensatory, but also punitive. If the penalty does not produce a deterrent effect, the effectiveness of the Competition Ordinance itself is very questionable.[134] Despite the classification of anti-competitive conduct as civil, the Ordinance does not anticipate that the financial penalty might be treated as criminal in nature according to the precedent of the *Koon* case. This might constitute a dilemma in future operations of the Competition Tribunal since there is a possibility that the fines imposed by the Tribunal could be struck down as being constitutionally invalid. Alternatively, the Tribunal may be forced to limit itself to imposing relatively small fines in order to ensure compliance with the Basic Law and the BOR if it wants to be regarded as a civil standard. However, this inevitably limits the effectiveness of the Competition Ordinance's deterrence.

Several other provisions in the SIDO that could be challenged against the requirement of due process can also be found in the Competition Ordinance. For example, Section 17 of SIDO empowered the Tribunal to: '(b) … require any person to attend … and to give evidence … (d) … require such person to answer all questions put by or with the consent of the Tribunal'. The direct use of questions and answers obtained under compulsion, during investigation, in subsequent proceedings before the Market Misconduct Tribunal (MMT) violated the BOR, which protects against self-incrimination and ensures the right to silence. The failure of the MMT to apply the criminal standard of proof also violated the BOR. Similarly, Section 42(1) of the Competition Ordinance states: '[f]or the purpose of conducting an investigation, the Commission may, by notice in writing, require any person to attend the Commission … to answer questions … relevant to the investigation'. It indicates a concern for the Competition Tribunal where evidence collected may be challenged if the civil standard continues to be applied by not taking the BOR and Basic Law into account.

Section 23(1)(a) of SIDO allows the MMT to make an order against the insider dealer holding a position of director, liquidator, receiver or manager of a company, and Section

[133] Competition Ordinance, ss 93(1)(a) and 63(2)(b).

[134] See also Section 5.3.5 of Chapter 5 regarding the lowering pecuniary penalty. This is to elaborate the impacts on the deterrent effects on the Competition Ordinance.

23(1)(b) and (c) enables the MMT to make an order to pay pecuniary penalty.[135] Comparatively, Section 101 of the Competition Ordinance carries the same penalty of a 'Disqualification Order'.[136]

Section 27 of SIDO allows the MMT to order the insider dealer to pay the expenses of the inquiry. Correspondingly, Section 96 of the Competition Ordinance states, '[the Competition] Tribunal may order any person who has contravened a competition rule to pay the government … any investigation into the conduct … with proceedings for the contravention'. Additionally, Section 93(1)(a) allows the Competition Tribunal to make an order to require the person to pay to the government a pecuniary penalty of any amount it considers appropriate. Furthermore, Section 63(2)(b) enables the Competition Tribunal to make an order directing the person to compensate another individual for any loss or damage caused by their failure to comply with the commitment.

Other possible provisions in Competition Ordinance of a criminal nature include self-incrimination in Section 45, non-compliance with the Competition Commission's investigative powers in Section 52(b), disclosure with lawful authority in Section 126(1)(f), providing false or misleading documents or information in Section 148(3)(b) and contempt of the Competition Tribunal in Sections 144(2), 168(1) and 171(2).

Last but not least, it is written under Section 143(3) of the Competition Bill, that the Competition Tribunal is to conduct its proceedings with as much 'informality' as is consistent

[135] The full text of s 23(1) SIDO is as follows: 'In relation to a person who has been identified by the Tribunal as an inside dealer, any or all of the following orders: (a) an order that that person shall not, without the leave of the Court of First Instance, be a director or a liquidator or a receiver or manager of the property of a listed company or any other specified company or in any way, whether directly or indirectly, be concerned or take part in the management of a listed company or any other specified company for such period (not exceeding 5 years) as may be specified in the order. (b) Any order that that person pay to the government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the insider dealing. (c) An order imposing on that person a penalty of an amount not exceeding three times the amount of any profit gained or loss avoided by any person as a result of the insider dealing'.

[136] The full text of s 101 of Competition Ordinance is as follows: '(1) In the circumstances specified in section 102, the Tribunal may, on application by the Commission, make a disqualification order against a person. (2) A disqualification order is an order that a person may not, without the leave of the Tribunal – (a) Be, or continue to be, a director of a company; (b) Be a liquidator or provisional liquidator of a company; (c) Be a receiver or manager of a company's property; or (d) In any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for a specified period, not exceeding 5 years, beginning with the date of the order'.

with attaining justice. The Competition Tribunal will be a superior court of record[137] under the Ordinance, meaning that all proceedings will be recorded and published. It is notable that the proceedings of some tribunals (e.g. the Lands Tribunal, the Labour Tribunal, and the Small Claims Tribunal) which are not a superior court of record are conducted in an informal manner, enabling the Competition Tribunal to handle complex competition issues in a timely manner and at comparatively lower cost for all parties involved.[138] However, it appears to be fairly uncommon for a superior court of record to conduct its proceedings informally. The Legal Service Division stated that it will be seeking clarification on the rationale for this clause.[139] Up to now, no explanation with regard to the rationale has been given. Such informality for admitting evidence before a superior court of record, which can impose pecuniary penalty, may become another challenge for a possible criminal standard of proof and justice. Probably due to this reason, Section 143(3) has been deleted in the process of drafting the final version of the Competition Ordinance.

In view of the above, the new Ordinance needs to comply with relevant human rights perspectives and to stand up to legal challenges such that the relevant authority can effectively impose all the intended types of penalties and remedies. This includes those financial penalties significant enough to be criminal, especially given that the HK government abandoned the administrative model which was criticised for paying little attention to due process and human rights. Although an administrative model can cope with the penalty concerns which may involve a criminal standard, the semi-judicial model is more capable of meeting due process challenges. The author believes that the judicial reason is more convincing than the political reason to explain the shift of direction from an administrative model to a semi-judicial model.

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[137] The chief distinction between superior and inferior courts is found in their jurisdiction. '*Prima facie* no matter is deemed beyond the jurisdiction of the superior courts unless it is expressly shown to be so, while nothing is within the jurisdiction of the inferior courts unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court'. (*Halsbury's Laws of Hong Kong, Vol. 8, 2008 Reissue, LexisNexis, paragraph 125.010*). In Hong Kong, the Court of First Instance, the Court of Appeal, and the Hong Kong Court of Final Appeal are superior courts of record by virtue of sections 12(1) and 13(1) of the High Court Ordinance (Cap. 4), and section 3 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) respectively.

[138] CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, para 20.

[139] Legislative Council, 'Legal Service Division Report on Competition Bill' (8 October 2010) LC Paper No. LS93/09-10 Paper for the House Committee Meeting para 12.

3.7 Establishment of the Competition Tribunal

Initially, the HK Competition Tribunal was designed to be a review body like the one in Australia and the UK. Subsequently, based on the reasons outlined above, it shifted to a model more similar to the Canada Competition Tribunal. However, a key difference is that in the Tribunal in HK the judges are from the Court of First Instance, and the lay experts act only as 'assessors' to give assistance to adjudication in trial but have no decision-making power.[140] In Canada, the lay members may adjudicate issues of mixed law and fact, or fact alone.[141] The Canadian Competition Act contains both criminal offences – notably price fixing and bid-rigging, and civil matters. The criminal ones are among the Competition Bureau's main enforcement priorities and tried by criminal courts, whereas civil matters are the subject of a remedial order made by the Competition Tribunal.[142] In HK, the design of the Competition Ordinance does not permit the bringing of criminal proceedings;[143] the Competition Tribunal is the body responsible for adjudicating all civil proceedings brought by the Competition Commission.

The HK Competition Tribunal was established on 1 August 2013 and Mr Justice Godfrey Lam Wan-ho was appointed as the president of the Competition Tribunal while Madam Justice Queeny Au-Yueng Kwai-yue was appointed as deputy president, both for a term of three years. Decisions of the tribunal can be appealed in the Court of Appeal[144] and the Court of Final Appeal.[145] Under the semi-judicial model, many characteristics of the Competition Tribunal in HK remain unchanged, although its original duty to review has been replaced by the functions to adjudicate and impose penalties. Though the government shifted to this model with corporate interests in mind, the semi-judicial model has its own advantages. A regime which provides for court-imposed penalties has strengths of independence and transparency.

[140] Competition Ordinance, s 141(1).

[141] Canada Competition Tribunal Act, s 12.

[142] Edward M. Graham and J. David Richardson (eds), *Global Competition Policy* (Institute for International Economics 1997) 50; Claus Dieter Ehlermann and Laraine L. Laudati, *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing 1998) 395.

[143] Competition Ordinance, s 171.

[144] Competition Ordinance, s 154-155.

[145] Competition Ordinance, ss 110(3)(d) and 119(4)(b).

Another benefit lies with its status as a court within the judiciary. It is notable that Competition Tribunal doctrine is characterised by a certain logic and coherence in comparison to the legislature's law-making and executive's policy-making. This is because common law courts rely on precedents and are insulated from electoral pressures. Robert Solo argues that the court's capacity to make coherent policy reflects institutional factors that are quite similar, especially in contrast with the legislature and executive branch agencies.[146] Comparatively, he characterizes the legislature and the executive as subject to their electoral vulnerability to competing organized interests.[147] Policies made within these institutions tend to be an expression of a diversity of interests and pressures, resulting in composite choices. The policies promoted by these institutions often work at cross purposes, resulting in inconsistencies across broadly defined policy arenas. By contrast, courts which act as authoritative decision-makers are relatively insulated from pluralist pressure to define property rights and express a coherent ideology.[148] Thus, the Competition Tribunal, in a semi-judicial model under the Common Law system in HK, would be expected to achieve this benefit. For a comprehensive consideration of a choice of model, the factors of political environment, history, and legal culture reflected by the executive, legislature and judiciary cannot be ignored.

3.7.1 Political Environment

Choice of institutional model is subject to the local political environment which in turn is usually affected by the actions and perceptions of government and legislature. A competition agency for law enforcement is a branch of the executive, and the Competition Commission in HK is no exception. In addition, as discussed extensively in Chapter 2, serious doubt has been cast on the independence of the Commission due to the opaque appointment process, the chief executive's huge power to remove board members, financial control by the executive and legislature, and so on. The administrative model features a concentration of power in the enforcement agencies. Based on the analysis in Section 2.3 of Chapter 2 on the Commission's institutional concerns, there remains a question as to whether the Commission can insulate

[146] See Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (n 2) 17.

[147] ibid 17.

[148] ibid.

itself sufficiently from the government's influence. Additionally, there have been critics who have suggested that collusion between the government and the business sector has been a deep-rooted problem for long time.[149] How could the Competition Commission win the people's trust with such a high concentration of power?

Surveys conducted by the two major local universities, the University of Hong Kong and the Chinese University of Hong Kong, showed that the chief executive's popularity has fallen to a record low, indicating huge dissatisfaction with the government's performance.[150] The degree to which residents distrust the government is harming its ability to implement policies including competition policy, and generally hindering its ability to rule. A series of unpopular policies can be traced back to the transfer of HK's sovereignty to China.[151] It has been said that the chief executive's political legitimacy will be difficult to preserve if low popularity persists.[152]

As analysed in the previous chapter, LegCo can directly and indirectly influence the operation of the Competition Commission through budget appropriation. LegCo has also been facing low popularity due to employing an abnormal electoral system known as functional constituencies (FCs) to elect half of its members. The system confers the privilege to vote on a small percentage of the population based on membership of or registration in a number of sectors. The method used to determine electors is arbitrary and illogical in its attempt to limit the overall size of the electorate.[153] Many popular bills with support from the general public have been blocked by the FCs so that voting outcomes often do not reflect the

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[149] Ngok Ma, 'Hong Kong's democrats divide' (2011) 22 Journal of Democracy 54; Williams, Competition Policy and Law in China, Hong Kong and Taiwan (n 103) 300.

[150] Based on a recent survey by Hong Kong Asia Pacific Institute on 27 November 2014, the popularity score of the current chief executive, Leung Chun-Ying, has dropped to an historical low of 38.6 out of 100, with 50 seen as a passing grade. See Kang-chun Ng, 'C Y Leung's popularity hits record low 'as society becomes more polarised'' *SCMP* (HK, 28 October 2014).

[151] Examples include, but are not limited to, asking Beijing to re-interpret the final judgment of the Court of Final Appeal in 1999, introducing the mainland's concept of national security into HK by legislation in 2003; the Director of Housing Department being found guilty of having a conflict of interests leading to an abuse of his discretionary power for the estate development project of a private company in 2005; delaying universal suffrage in 2008; inflowing excessive mainland tourists and pregnant mothers in 2012, and scuffling along the border over milk powder in 2013. See Eldes Tran, 'Trouble with D words: democracy and domestic helpers' *SCMP* (HK, 17 March 2013).

[152] Keith Bradsher and Kevin Drew, 'Protesters March as New Hong Kong Leader Is Sworn In' (1 July 2012) The New York Times.

[153] Christine Loh, *Functional constituencies: a unique feature of the Hong Kong Legislative Council* (Hong Kong University Press 2006) 59.

wishes of the majority of the population, and there has been criticism directed at corporate voting, separate voting, and restrictions upon private bills.[154] Under such circumstances, HK people are dissatisfied with LegCo and are striving for universal suffrage for elections of the chief executive and for LegCo. However, requests of this kind have been repeatedly declined by Beijing.[155] Consequently, in terms of considering a choice of institutional model for its competition regime, the HK people might not have strong confidence in the involvement of both executive and legislature branches.

3.7.2 History and Legal Culture

HK was a British colony for more than 150 years from 1841 to 1997. As has been the case in its other colonies, Britain has modelled HK's legal system on its own, in which the proceedings have been predominantly adversarial in common law with a feature of due process. This legal system has gained considerable support and trust from HK people. After a handover of its sovereignty to mainland China in 1997, HK has preserved its legal system in much the same form as in the colonial period, as is obviously reflected in a number of provisions in Basic Law, a constitutional document and the highest law in HK.[156] The only difference is that the right of final adjudication is given to HK by setting up the CFA

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[154] See notes 136-138 of Chapter 2.

[155] Despite Beijing's promise that HK would be allowed to practice universal suffrage from 2007 and practice direct election for a full Legislative Council from 2008 by amending the Basic Law, this promise has been broken. On 6 June 2014, a White Paper issued by the State Council of China even stated that the judges in HK judiciary and candidates running for chief executive are required to be patriotic to Beijing. On 31 August 2014, the National People's Congress Standing Committee, the supreme power in China, created a rule as part of HK's political reform which permits only two to three candidates running for the post of chief executive and the candidates are 'vetted' by a nominating committee with only 1,200 members, and most of whom are Beijing loyalists. This leaves no chance for any candidate from the pro-democratic camp to be nominated. On 23 October, the United Nations Human Rights Committee emphasised 'the need to ensure universal suffrage, which means both the right to be elected as well as the right to vote'. This ruling is condemned as a falsity and a betrayal of the principle of 'one person one vote' by screening all popular candidates. It has attracted massive demonstrations including the teacher and student strikes, Occupy Central Movement, Yellow Umbrella Revolution and other protests, lasting for 79 days and involving hundreds of thousands of protesters.

[156] Several provisions of the Basic Law can reflect such preservation of the legal system. The second paragraph of Article 81 of the Basic Law states, 'The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region'. Article 86 states, 'The principle of trial by jury previously practised in Hong Kong shall be maintained'. First paragraph of Article 87 states, 'In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained'. Article 94 states, 'On the basis of the system previously operating in Hong Kong, the government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region'.

locally,[157] abandoning the Privy Council in London. This is to increase the independence of the judiciary from either China or Britain, and realize a 'high level of local autonomy'[158] with 'local people administrating HK'.[159] More importantly, the Basic Law emphasises a continuation of common law attributes in the legal system. For example, Article 82 provides that HK may invite judges from other common law jurisdictions to sit in the CFA,[160] and Article 84 asserts that HK courts may refer to precedents of other common law jurisdictions.[161] All of the above are vital to maintain HK people's confidence in the court system that they have been using in the same essential form for more than one and a half centuries.

Different jurisdictions' systems for the appointment of judges may affect their independence when making judgments. Under the Treaties, all judges (including Advocates General) of the ECJ and General Court are political appointees with relatively short tenure, and the possibility of one six-year renewal.[162] These European judges are probably less independent than the US federal courts where judges are also political appointees but enjoy life tenure with the sole requirement of good behaviour.[163] In colonial times, Judges in HK courts were appointed like those of US courts with life tenure. The provisions to protect their life tenure employment remain unchanged and valid after handover.[164] Article 8, one of the most important provisions in the Basic Law to sustain stability, provides:

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[157] Basic Law, arts 81 and 82.

[158] Article 3(2) of Joint Declaration of the of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984; Article 2 of Basic Law states, 'Hong Kong has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication'.

[159] Articles 3(4) of Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984; chapter IV of the Basic Law regarding political structure that reflects the concept of Hong Kong people administrating Hong Kong.

[160] Basic Law, art 82.

[161] Basic Law, art 84.

[162] See Lord Mance, 'The Composition of the European Court of Justice' (19th October 2011,) the text of a talk given to the United Kingdom Association for European Law 9 &12.

[163] Crane, *The institutional structure of antitrust enforcement* (n 45) 198.

[164] Pension Benefits (Judicial Officers) Ordinance, ch 401, s 6; Basic Law, art 93 (1).

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 93 of Basic law also stipulates:

> The government of Hong Kong shall pay to judges all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before the handover.

Such assurances aim to maintain quality performance and the continuous stability of judiciary services in HK. Therefore, based on the analysis of history and legal culture, the adoption of a semi-judicial model for the Competition Tribunal as part of the judiciary system with judicial independence, which is achieved by assigning it more rights and roles such as adjudication and the imposition of penalty, sounds like a logical and acceptable decision. The strength of the courts is an important factor on the choice of model.[165] Under the semi-judicial model, the Competition Commission, which is part of the executive, has no power to take binding decisions – it can only enforce the law by suing in the Competition Tribunal, an institution in which HK people have relatively more confidence than they do in the executive or legislature.

3.7.3 Potential challenges

In the interest of a balanced discussion, the author suggests that an application of a semi-judicial model for the competition regime in HK is not without potential problems, three of which are: the threats to judicial independence; the role and power of assessors in the Competition Tribunal; and the absence of private enforcement in the institutional design.

3.7.3.1 Threats to Judicial Independence

The first challenge comes from the threat to judicial independence which could be seen in several aspects: the National People's Congress Standing Committee (NPCSC)'s supreme interpretation power, the State Council's White Paper and Chinese officials' remarks.

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[165] Ottow, *Market and competition authorities: good agency principles* (n 38) 125.

First, concerning the NPCSC's interpretation power, the NPCSC is a *de facto* legislative body in mainland China[166] with the authority not only to interpret the laws of China, but also the Basic Law of HK.[167] In contrast to other jurisdictions in which the power of both final interpretation and adjudication are usually given to a supreme court, the Basic Law provides that NPCSC has the final interpretative power[168] while the CFA has the final adjudication power.[169] This can be best demonstrated by the landmark case of *Ng Ka-Ling v Director of Immigration.* In this judgment from 1999, just two years after HK's sovereignty handover to mainland China in 1997, the CFA considered the immigration status of four claimants who claimed a right of abode in HK. The CFA granted the applicants that right of abode in accordance with the relevant provisions of the Basic Law.[170] The NPCSC, however, reinterpreted those provisions and, in effect, reversed the CFA's decision.[171] This reflected the fact that the final interpretation power prevails over the final adjudication power. In other words, the so-called 'final' adjudication made by the CFA is not final any more. Critics have often highlighted the HK government's failure to follow proper procedure while seeking the NPCSC's re-interpretation.[172]

In fact, the NPCSC has exercised its interpretation power five times in the past nineteen years in connection with the power division between the NPCSC in Beijing and the CFA in HK, triggering controversy surrounding judicial independence and the constitutional

[166] The NPCSC is a committee of about 150 members of the National People's Congress (NPC). The latter one is the *de jure* legislative body of mainland China with more than 3,000 members. NPCSC meetings are convened between plenary sessions of the NPC. It has the constitutional power to amend legislation within limits set by the NPC, and thus acts as a *de facto* legislative body.

[167] Basic Law, art 158(1).

[168] ibid.

[169] Basic Law, art 2.

[170] *Ng Ka-Ling v Director of Immigration* (Final Appeal No. 14, 15, 16 of 1998).

[171] Interpretation of the Standing Committee of the National People's Congress of Article 22, Paragraph 4 and Subparagraph 3 of Paragraph 4 of Article 24 of the Basic Law of the Hong Kong Special Administrative Region, issued June 26, 1999. The HK government estimated that no less than 1.67 million claimants in mainland China would have qualified to settle in Hong Kong if NPCSC had have not carried out a re-interpretation of the Basic Law. See Frank Shihong Hong, Richard & Richard and Miami P.A., 'International Decision: Ng Ka Ling v. Director of Immigration' (2000) 94 American Journal of International Law .

[172] Article 158 of the Basic Law provides that CFA is the body to seek for interpretation from NPCSC. However, the HK government circumvented the CFA and initiated a request to seek for interpretation of the Basic Law from the NPCSC via State Council. Such an act has been criticized as a contravention of the Basic Law. See Yash Ghai, *The NPC Interpretation and Its Consequences, Hong Kong's Constitutional Debate- Conflict over interpretation* (Hong Kong University Press 2000).

status of the CFA.[173] The more numerous the interpretations made by the NPCSC, the more serious the doubts cast on the judicial independence and the local autonomy of HK. Under such circumstances, one is left to wonder whether the core principles of 'One Country, Two Systems',[174] 'a high degree of autonomy'[175] and 'Hong Kong people administrating Hong Kong'[176] still have credence or not. On the basis of the questionable independence of the judiciary, if appeal cases of anti-competitive offences were tried in the CFA, which holds Supreme Court status but is without equivalent real power to finalise litigation, this would seriously undermine the efficacy of and confidence in the entire competition regime.

Second, another threat to judicial independence comes from the Chinese State Council's White Paper which was issued on 10 June 2014, claiming that HK judges should be 'patriotic'.[177] Critics interpret it as a new political requirement of being loyal to the

[173] On top of the *Ng Ka Ling* case in 1999, the other cases are as follows: 1) the NPCSC interpreted the Basic Law again in 2004 to rule out the possibility of universal suffrage for the chief executive and LegCo in 2007 and 2008 respectively. (See Interpretation by National People's Congress Standing Committee of Article 7 of Annex I and Article III of Annex II to Basic Law of Hong Kong Special Administrative Region of People's Republic of China made on 6 April 2004). 2) A year later, the NPCSC exercised its interpretation power to decide that if any chief executive should resign before the end of the term, the coming chief executive should serve out the remainder of his predecessor's term rather begin a new term. (See Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress on 27 April 2005.) 3) An interpretation decided that HK courts had no jurisdiction on execution of two international arbitral awards against the Democratic of the Congo and other defendants due to state immunity. (See Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress on 26 August 2011.) 4) The latest interpretation happened on 7 November 2016 when NPCSC interpreted Article 104 Basic Law that the person taking the oath should take it in a sincere and solemn manner with accurate, complete and solemn phrases. Based on this interpretation, two law-makers' memberships were disqualified.

[174] Article 5 of Basic Law states, 'The socialist system and policies shall not be practised in the HKSAR, and the previous capitalist system and way of life shall remain unchanged for 50 years'.

[175] Article 3(2) of Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984; Article 2 of Basic Law states, 'Hong Kong has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication'.

[176] Articles 3(4) of Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984; chapter IV of Basic Law regarding political structure that reflects the concept of Hong Kong people administrating Hong Kong.

[177] Information Office of State Council of People's Republic of China, 'White Paper - The Practice of the 'One Country, Two Systems' Policy in Hong Kong' (10 June 2014) The White Paper asserts a 'comprehensive jurisdiction' over Hong Kong and affirms that Hong Kong does not have a full autonomy. This is openly contradictory to the Basic Law (see Several provisions of Basic Law (Articles 2, 12, 18(3), Explanations on Basic Law (Draft) and Its Related Documents, Interpretation of Para 1, Article 13 and Article 19 of Basic Law) stipulates that Hong Kong enjoys high autonomy), and Sino-British Joint Declaration (see Paragraph 3.2 of Joint Declaration states, 'Hong Kong will be directly under the authority of the Central People's Government of the PRC will enjoy a high degree of autonomy […].').

Communist party.[178] Former chief justice, Andrew Li, and his successor, Geoffrey Ma, expressed reservations about the view in the White Paper that they are politically required to be patriotic to mainland China.[179] Such a requirement has never been mentioned in the Basic Law. The White Paper also called judges 'administrators' of HK,[180] triggering worries regarding the separation of powers between executive and judiciary.[181] Lord Chris Patten, the last British governor of HK, accused China of attempting to undermine judicial independence. 'Judges under the rule of HK law are independent and there shouldn't be any question of them being instructed or pressed to subordinate their views of due process and what is legal to some other political consideration', said Patten.[182]

Lastly, mainland Chinese officials and academics' remarks add uncertainty to HK's judicial independence. For example, on 16 September 2015 Zhang Xiaoming, director of Beijing's liaison office in HK,[183] highlighted that the chief executive had a 'transcendent' status over the three branches of executive, legislature, and judiciary'.[184] Zhang added, 'HK is not a political system that exercises the separation of powers. The concept of separation of powers was confined to the sovereign State only and served at best as a reference for HK'.[185] In other words, since HK is not a sovereign State, there is no actual separation of powers. Additionally, Peking University law professor Rao Geping, a member of the Basic Law Committee from mainland China has said, 'if [HK] judges interpret HK's political structure as a separation of powers, that is inaccurate'.[186] However, the HK Chief Justice Geoffrey Ma

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[178] Demetri Sevastopulo and Kiran Stacey, 'Patten attacks China over Hong Kong judiciary remarks' *Financial Times* (4 July 2014).

[179] ibid.

[180] Information Office of State Council of People's Republic of China, 'White Paper - The Practice of the 'One Country, Two Systems' Policy in Hong Kong'. A record number of lawyers marched against Beijing's White Paper which jeopardised judicial independence. See Stuart Lau, Austin Chiu and Brian Yap, 'Lawyers march against Beijing's white paper' *SCMP* (28 June 2014).

[181] Information Office of State Council of People's Republic of China, 'White Paper - The Practice of the 'One Country, Two Systems' Policy in Hong Kong' (31 August 2014).

[182] Sevastopulo and Stacey, 'Patten attacks China over Hong Kong judiciary remarks' (n 178).

[183] He is the highest official representing mainland China in HK.

[184] Zhang Xiaoming, 'Zhang Xiaoming's controversial speech on Hong Kong governance: The full text' *SCMP* (HK, 16 September 2015).

[185] Jennifer Ngo and Stuart Lau, ''Hong Kong *leader* is above the executive branch, legislature and courts', says Beijing's liaison chief' *SCMP* (HK, 12 September 2015).

[186] Stuart Lau, 'Leung Chun-ying questions Hong Kong's 'separation of power' model after controversial remarks by Beijing official' *SCMP* (HK, 15 September 2015).

rebutted, 'everyone is equal before the law'.[187] Ma quoted several provisions of the Basic Law that stipulate judicial independence and final adjudication.[188] The HK law-maker, Alan Leong, critically suggested that Zhang did not respect HK courts at all.[189] The above threats to judicial independence involving mainland China must not be underestimated, as they would not only affect the new competition regime but the whole judicial system in HK.

Remarks from Chinese officials and academics have also attacked overseas judges in the HK judicial system. Article 82 of the Basic Law stipulates that judges can be invited from other common jurisdictions to sit on the CFA.[190] Article 92 adds that judges shall be chosen on the basis of judicial and professional qualities and may be recruited from other common law jurisdictions.[191] There is no restriction on the nationality of judges, except in Article 90 which states that the chief justice of the CFA and the chief judge of the High Court shall be Chinese citizens.[192] If HK is to preserve its common law system and distinguish itself from the rest of mainland China, having sufficient depth and breadth of legal talent is important to maintain its high standards. These provisions are designed to enhance confidence in the proper functioning of judiciary, including its independence. Unfortunately, from time to time, mainland Chinese academics and officials question the presence of overseas judges in the HK judiciary. Recently, a comment was made that all judges of the CFA should be Chinese nationals. [193] Inevitably, calls for the removal of overseas judges have been a cause for concern in terms of HK judicial independence.

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[187] Joyce Ng, 'Hong Kong Chief Justice Geoffrey Ma Transcends political debate but stands up for separation of powers' *SCMP* (HK, 10 October 2016); Geoffrey Ma, 'CJ ' speech at Ceremonial Opening of the Court of Final Appeal Building' (25 September 2015) IS Department, Hong Kong SAR Government fourth to last paragraph. Article 25 of Basic Law states, 'All Hong Kong residents shall be equal before the law'.

[188] Article 2, 'National People's Congress authorizes Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law'. The first paragraph of Article 19 reads, 'The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication'. Article 85, 'The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference'. Second paragraph of Article 35, 'Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel'.

[189] Joyce Ng, 'Beijing scholar admits error and omissions in white paper on Hong Kong' *SCMP* (HK, 28 August 2015).

[190] Basic Law, art 82.

[191] Basic Law, art 92.

[192] Basic Law, art 90.

[193] Editorial, 'Having overseas judges boosts confidence in judicial independence in Hong Kong' *SCMP* (HK, 3 October 2015); Frank Ching, 'Recruiting overseas judges the right thing to do for now' *SCMP* (HK, 9 May 2013).

3.7.3.2 Titular Role of Assessors

There is another potential challenge to the Competition Tribunal's composition under the semi-judicial model. According to the Public Consultation Paper, the Tribunal would have the necessary expertise by requiring the appointment of non-judicial members with economics, commercial or competition law expertise.[194] Proposal 18 expounds:

> When hearing reviews, the Tribunal should sit as a three-member panel, chaired by a judicial member, and comprising at least one non-judicial member with expertise in economics.[195]

As discussed, it is agreed that a mix of judicial and non-judicial members – i.e., assessors – would be able to process the complex data, documentation and arguments so that the 'substance' of adjudication can be processed fairly. A court containing all general judges tends to adjudicate competition law cases with a focus on procedural matters rather than substantive ones. It is therefore expected that 'non-judicial members' refer to those appointed in positions with decision-making power more than or at least equivalent to those of judicial members. Most notably, the Canada Competition Tribunal model allows non-judicial members to participate in decisions involving pure fact or a mix of fact and law. Only pure questions of law are determined by judicial members.[196] However, when the final draft of the Competition Ordinance was completed, it seemed to restrict the role of assessors:

> The Tribunal may appoint one or more specially qualified assessors and may dispose of the proceedings, wholly or in part, with the assistance of such assessor or assessors, but the decision of the Tribunal is the members of Tribunal only.[197]

The judges thus have full discretion to adopt the opinions of the assessors or not. The post of assessor in a competition tribunal is uncommon in other jurisdictions. In the context of HK, the experts will only have been placed in an advisory position without any decision-making power. As mentioned, the lay members in the Canadian Competition Tribunal may

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[194] CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, proposal 17.

[195] ibid proposal 18.

[196] The Competition Tribunal Act, R.S.C., ch. 19, Section 3(2) (1985), Id. s 12.

[197] Competition Ordinance, art 141(1).

adjudicate issues of mixed law and fact or fact alone[198] whereas in HK the assessors can adjudicate nothing. The government has not provided details about what assistance the assessors will deliver. Nevertheless, it is certain that the role of non-judicial members is substantially undermined and far below people's expectation in the first instance. This runs a risk that the lay experts may become only a titular and symbolic role-player in the Competition Tribunal design. In fact, lay experts in relevant fields sitting as judges are a feature of semi-judicial models such as Canada's. The absence of this feature raises significant questions as to whether the semi-judicial model will be run effectively, and whether the advantages of this model will be weakened.

Even if HK adopted the same features of a semi-judicial model such as Canada's, with laypersons being given some decision-making power, other questions remain unanswered. Would the phenomenon which took place in Canada also take place in HK? For example, would the judges in the panel of the Competition Tribunal in HK from the Court of First Instance encourage the Court of Appeal judges to treat the Tribunal merely as an ordinary rather than a special court? Would the 'judicialisation of the Tribunal', if any, cause an undermining of the objective of developing a strong competition policy jurisdiction? Would the HK Competition Tribunal become only a minor player in the competition regime and would the Competition Commission eventually take up most of the task of tackling anti-competitive behaviour, even though that would be beyond the intention of the designers and stakeholders? The author retains considerable concerns on the uncertainties arising from the above questions.

3.7.3.3 Lame Duck Institutional Enforcement

Last but not least, all of the three major models (administrative, judicial and semi-judicial) unanimously indicate that private parties as stakeholders who are precluded from directly accessing the competition regime are likely to feel that their interests are not well served. Concomitantly, a dilemma arises as large corporations are likely to oppose direct private access to the adjudicatory agency because they would see themselves as defendants rather than plaintiffs under a semi-judicial model.[199]

[198] Competition Tribunal Act, s 12.

[199] Trebilcock and Iacobucci, 'Designing competition law institutions' (n 1) 391.

Private enforcement is common in many jurisdictions. Within the discipline of antitrust in the US, for instance, private enforcement is not only used to supplement the public enforcement, but also fundamentally to integrate the competition regime.[200] Congress even encourages those who are adversely affected by allegedly anti-competitive conducts to serve as ‘private attorneys general’.[201] EU competition law also allows member states’ competition regimes to be equipped with private enforcement. In the context of HK, regardless of any model chosen for the institutional arrangements, a suboptimal level of enforcement is readily foreseeable under a lame duck policy, i.e., one that is reliant on public enforcement.

Unlike in many other jurisdictions, stand-alone private claims in HK are not allowed under the Competition Ordinance. This is another limitation of the Competition Tribunal’s power with respect to its design. The provisions were removed from the original legislation[202] after fierce lobbying from SMEs which, ironically, feared that larger companies would use private actions to harass them. Actually, private actions are generally believed to supplement public enforcement to cope with large undertakings’ anti-competitive conduct. The Ordinance only allows for ‘follow-on’ actions for damages, following determinations by the Tribunal (or appellate courts) of an infringement or, crucially, an admission, in a commitment that has been accepted by the Commission: that a person has contravened a conduct rule under Section 110. The prohibition of stand-alone claims limits the enforcement power of the Tribunal. This is a shortcoming for consumer protection, especially when class actions and consumer law are not yet available in HK.[203]

In view of the limited jurisdiction to bring to stand-alone action, the restraining of trade doctrine may potentially help cover the absence of private enforcement. Under common law, anti-competitive acts can be challenged over the unlawful restraint of trade doctrine inducing breach of contract and interference with business by unlawful means. The president

[200] Montag, 'The case for a radical reform of the infringement procedure under Regulation 17', (n 30) 1137.

[201] The United States Supreme Court mentioned in its judgement in respect of private antitrust lawsuits in the case *Hawaii v. Standard Oil Co. of Cal*., 405 U.S. 251, 262 (1972): ‘By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as “private attorneys general”.’

[202] Competition Ordinance, part 7.

[203] Andrew Skudder, 'Hong Kong: Procedural Issues' (2014) <http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2340/hong-kong-procedural-issues/> accessed 16 June 2014

of the HK Competition Tribunal, Mr. Justice Godfrey Lam, commented that economic torts might be a more expeditious option than any of the follow-on actions to seek for damages under the current competition regime.[204] A travel agency, Loyal Profit International Development, argued in the pre-trial hearing in June 2016 that HK Travel Industry Council's request on travel agencies to bring mainland Chinese tourists only to a specific list of registered shops was 'outright anti-competitive'. Instead of lodging a compliant with the Competition Commission to assert a breach of conduct rule under the Competition Ordinance, the plaintiff brought the case directly to the High Court based on a violation of the Companies Ordinance, alleging that the respondent's powers should be limited by its company articles.[205] Potentially, it may be the first competition law case if the judge of High Court decides with his discretion to refer this case to the Competition Tribunal. Case law requires a higher burden of proof for an intention to cause economic injury under the restraint of trade.[206] Thus, competition law remains the most direct means to cope with anti-competitive conducts, and the restraint of trade claims on anti-competition issues remains to be tested in HK courts.

3.8 Reflections and Conclusion

Facing challenges from the threat of NPCSC's interpretation power to judicial independence, the titular role of assessors in the Competition Tribunal and the lame duck institutional enforcement, the effectiveness of competition law enforcement will inevitably be undermined.

First, to maintain public confidence in judicial independence, in particular with a semi-judicial model in the competition regime, interpretation of the Basic Law provisions should only be sought as rarely as possible. In case there is any ambiguity or controversy to be found in any provision of the Basic Law in future, it is highly desirable to rectify it by an

[204] Justice Godfrey Lam, 'Hong Kong judge examines private litigation' (20 October 2016) GCR Live 2nd Annual Hong Kong: Focus on China

[205] *Loyal Profit International Development v Travel Industry Council* [2016] HCMP256/2016; see also Henry Wheare and P J Kaur, 'Stand-alone actions possible for anti-competitive behaviour in Hong Kong?' (21 November 2016) kluwer Competition Law Blog

[206] *British Airways v Emerald Supplies Limited & Others* [2015] EWCA Civ 1024 (Court of Appeal strikes out economic tort claims in air cargo litigation); *Air Canada & Ors v Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024; *OBG v Allan* [2007] UKHL 21 (The House of Lords held that actual intention to harm the claimant must be a cause of the defendant's conduct.); *WH Newson Holding Ltd & Ors v IMI Plc & Ors* [2013] EWCA Civ 1377.

'amendment of constitution' rather than NPCSC interpretation. In spite of the fact that it may take a longer time to go through a series of legal procedures,[207] the adverse impact on judicial independence is far less than any potential interpretation made by NPCSC. It is not, in fact, uncommon to seek constitutional amendment in other jurisdictions. China for example has made eight amendments to its constitution since its establishment in 1949.[208] In the US, there have been 27 instances of amendments to date.[209]

Second, it seems advisable to clarify the role of assessors and what kind of assistance they can contribute in the semi-judicial model design. The grades of assessors can be divided into junior and senior, and their rights to adjudicate can be granted based on their experience in the tribunal. The junior assessors should, at least, have a right to adjudicate on questions of fact in the early stages. Involving assessors in the process is beneficial because they have the necessary knowledge and expertise to recognize anti-competitive conduct. Completely prohibiting their role in decision-making would substantially undermine the advantages of a semi-judicial model. After a number of years of experience, the junior assessors can be promoted to senior assessors who will have the right to decide on a mixed operation of fact and law. This gradual authorization of power could ensure a genuinely expert tribunal rather than merely a titular one. It would also allow for a smooth transition period for both the judges and the assessors to adjust to working and cooperating on their competition cases effectively. Currently, the shortage of judges with competition law and economics backgrounds remains a concern. The author recommends that the two judges should attend the competition law and economics courses before assuming their duties. In March 2014, a competition scholar was invited to lecture High Court judges on a single area of competition law. This was a good starting point, but not really adequate. It has been suggested that a

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[207] Article 159 of Basic Law. The procedure is as follows, 'The power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region. Amendment bills from the Hong Kong Special Administrative Region shall be submitted to the National People's Congress by the delegation of the Region to the National People's Congress after obtaining the consent of two-thirds of the deputies of the Region to the National People's Congress, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region. Before a bill for amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views'.

[208] Since the Common Program 1949, the amendments of Constitution of the People's Republic of China were made in 1954, 1975, 1978, 1982, 1988, 1993, 1999 and 2004.

[209] Killian and Costello (eds), *The Constitution of the United States of America: Analysis and Interpretation* (n 72).

specialist judge cover wider areas of competition law and economics issues.[210] Alternatively, Article 92 of the Basic Law States:

> Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

Accordingly, the judiciary can consider recruiting judges or assessors in the Competition Tribunal from common-law jurisdictions with a wealth of experience such as the US, the UK, Australia and Canada where there are plenty of appropriate candidates.

Third, the right to private enforcement should be returned to consumers in the near future so as to fill the loophole of institutional enforcement. If a combination of private and public enforcement operates smoothly within the institution, the competition regime could take a step closer to optimal effectiveness.

A final reflection concerns Section 171 of the Competition Ordinance, which states that 'criminal proceedings for an offence under this Ordinance may not be brought in the Tribunal'. The section should be deleted so as to allow the Competition Commission to bring either civil or criminal proceedings to the tribunal, depending upon the level of fines, on a case-by-case basis. In other words, financial sanctions could go beyond the civil standard to ensure a proper deterrence effect.

To conclude, in the context of the institutional competition regime in HK, the author has made some interesting findings with regards to how a choice of model can be made by drawing upon the above discussion. Owing to the constraints and changing roles of general courts in handling complex economic and competition law issues, a tendency towards using a judicial model has shifted to an adoption of an administrative model for the benefits of a high level of expertise in agency staff and administrative efficiency. Subsequently, due to a growing concern with due process and the concentration of power in a single body, a semi-judicial model has been created with the aim of striking a reasonable balance between the judicial model and the administrative model. However, it has been discovered that an

[210] UCL Centre for Law, 'Ioannis Lianos trains the newly established Hong Kong Competition Tribunal and lectures to the judges of the Hong Kong High Court' (21 March 2014) <http://www.ucl.ac.uk/cles/law-econ-soc-news-publication/HongKongCompetitionTribunal> accessed 30 November 2014.

unintended process of judicialisation can happen under a semi-judicial model, bringing back a *de facto* judicial model and forming a 'cyclical pattern'.

There is no one universal model which is suitable for all competition regimes. Each choice of model is reflective of a jurisdiction's political environment, history and legal culture, and other factors. Having critically analysed the virtues and limitations of the major models, and having considered the application of a semi-judicial model in the unique context of HK, the author cautiously agrees with implementing a semi-judicial model for its competition regime. This is due to its adversarial nature which is embedded in a long-recognized common law system, and in recognition of a lack of confidence in its current problematic political structure in both the executive and legislature. In particular, many challenges to due process in the administrative model are made by individuals accustomed to the adversarial legal system in common law jurisdictions. It therefore appears to be an acceptable option to aim to strike a balance between the administrative model's efficiency and the judicial model's due process, as the benefits appear greater than the potential problems, which, as we have seen earlier in this section, are not unresolvable. Additionally, since a new law is rarely free from legal uncertainty in the early stages of implementation, it seems wise to grant this new policy a trial period before pausing to analyse and ultimately conclude whether it is indeed a suitable model for the real-life environment of HK.

4 The Scope of Application of the Competition Ordinance

4.1 Introduction

Competition laws apply, commonly, to all entities in both the private and public sectors as long as commercial and economic activities in the market are involved. From the outset, it is accepted that some government acts should be shielded from competition rules for the sake of social or political purposes. Even some economic activities entrusted to public entities could be excluded if they operate in the services of general economic interests[1] due to their values being greater than those of competition law. Yet, at the same time, other areas may be subject to competition rules when public entities operate purely as economic entities in the market.

As part of the quest to establish an effective competition regime, most States aim to strike a balance when outlining the scope of application of competition laws. With that in mind, it is important to consider the scope of application of competition law in HK, to understand its impact on the economy. Interestingly, in HK the scope for applying competition rules to public entities is much more limited when compared to EU benchmarks. Public entities in HK are comprised of the government, statutory bodies and government enterprises. More significantly, the Competition Ordinance sets extremely high thresholds under the substantive and procedural tests to enable the remaining non-excluded area to be excluded, causing almost all statutory bodies and certain government-owned enterprises to be shielded from competition rules.

The resulting implications of these exclusions should be noted. At a policy level, the competition law is inapplicable to the public sector. This creates a question of whether the case of HK is in line with the international benchmarks as well as competition law and economic principles such as maintaining a level playing field, protecting consumer welfare, and promoting economic efficiency. From a practical perspective, the adverse impact on the HK market is even greater. This is because HK has a large number of statutory bodies, and many of them are involved in economic activities and compete with private enterprises. Nearly all government aspects, including their economic activities, are so widespread and

[1] See Section 4.7.5.4 of this chapter which is about services of general economic interests.

deeply rooted in the society that a total exclusion of their conduct from competition law substantially reduces the effectiveness of the competition law. The anti-competitive effects of this exclusion are even greater since public entities enjoy various privileges and special rights which private enterprises do not. When the law came into effect in 2015, HK has something which looks similar to competition law but, in essence, lacks any real power to eliminate anti-competitive conduct in the public sector. The private sector is monitored under a double standard and operates on an uneven playing field as a result.

In view of the above phenomenon, unique to HK, this chapter will critically examine the limited scope of the competition legislation where public entities are substantially excluded. Accordingly, this chapter will put forward the following core questions: is there a sufficient justification for shielding a large proportion of, or even all, government acts from competition law? If not, then it must be asked: which type of exclusion is appropriate in HK's small open economy? Should the benchmarks set elsewhere in the world be transposed to HK, as they have wider scope to include public entities under their competition laws? What are the criteria and mechanisms for granting such exclusions? To what extent will the established framework for granting these exclusions be able to achieve legal certainty? Overall, this discussion of exclusion will intersect with the realm of competition law and will consider whether the exclusion is narrowed beyond optimal levels.

The chapter will also examine the justifications raised by the HK government regarding the blanket exclusion of its enterprises from competition rules. Afterwards, it will analyse the practices of other jurisdictions (the EU, US and Singapore) as well as the opinions of the relevant international bodies (the OECD, UNCTD and ICN) regarding how to combat anti-competitive conduct in the public sector from a comparative and international perspective. Comparisons and comments from these bodies are interwoven throughout this chapter. Aiming to resolve the issues of the exclusions, the chapter will suggest improvements for the Competition Ordinance.

4.2 Terms

It is necessary at the outset to define some important terms exclusion before further issues can be considered. These terms are: exclusion and exemption; undertaking; public entity; statutory body; government enterprise and non-application to government departments.

4.2.1 Exclusion and Exemption

The terms ‘exclusion’ and ‘exemption’ are not always distinguished from each other, so that this may cause confusion when they are applied in the context of competition law and policy. An exclusion is defined as ‘excluded from or not conforming to a general class, principle, rule, etc’.[2] Thus, in legal terms, the excluded subject is outside of the jurisdiction of the law. Sometimes, an exclusion is also defined as an exception. The term exemption refers to being ‘excused or free from some obligation to which others are subject’.[3] While the two terms are often used interchangeably in some jurisdictions,[4] they represent distinct categories in HK and in Singapore.[5]

The former chief executive of the Singapore Competition Commission elaborated on the distinction. She stated that certain types of agreements and certain conducts carved out from the applicable prohibition under the Competition Act by operation of law are immune to investigations and financial penalties.[6] These exclusions are intended to be *permanent* in nature.[7] On the other hand, other agreements or conduct, by reason of needing to meet certain

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[2] Funk & Wagnalls Standard Dictionary 1991; Oxford English Dictionary 1997.

[3] ibid.

[4] WTO, “Exceptions, Exemptions and Exclusions Contained in Members’ National Competition Legislating”, Document WT/WGTCP/W/172 (2001), 15; Barry Hawk, *OECD Trade Committee Study of the Sectoral Coverage (and Limitations) of Competition Laws and Policies* (Mimeo 1996) 9.

[5] Yena Lim, 'Exemptions from the application of competition law' (Conference on Competition Law and the State: International and Comparative Perspectives, Hong Kong, 18 & 19 March 2011), co-organized by HKU and UCL held in HK, 18-19 March 2011.

[6] Personal communications with Yena Lim, the chief executive of Singapore Competition Commission, 30 March 2011.

[7] ibid. Those exclusions from the Singapore Competition Act are subjected to the Minister’s power of amendment and they are contained in the Third and Fourth Schedule of the Act.

specific criteria, are exempt from the Act. In contrast to exclusions, exemptions are *discretionary* and more *temporary* in nature as they may have an operative timeline and can be varied or revoked.[8] Though these distinctions are not specifically set out in the Act, they were underlying considerations when Singapore was drafting and developing its competition legislation.[9]

In HK, the Competition Ordinance clearly distinguishes the use these of two terms. Indeed, they are so designated as to be dealt with in separate areas.[10] Although no specific definition or interpretation of these terms can be found in the Ordinance, the Guideline on the First and Second Rules states: 'Unlike exclusions, exemption requires a positive decision to apply the exemption to particular agreements or classes of agreements'.[11] An exclusion allows a subject to fall outside the jurisdiction of competition law, while an exemption causes a suspension of the law, with discretion, to be applied under specific conditions. With reference to the aforesaid definitions and the example set by Singapore's competition regime, the HK government and its affiliated SBs intend to enjoy a permanent exclusion rather than a discretionary and temporary exemption from the regime of competition, although this is not explicitly set out in the Competition Ordinance.

4.2.2 Undertaking

Although the term 'undertaking' is not defined in the Treaty on the Functioning of the European Union (TFEU) or the UK Competition Act 1998, it has been held to encompass entities engaged in an economic activity. Thus, competition law applies to all economic activities regardless of whether performed by public or private entities.[12]

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[8] ibid. For example, in the context of a block exemption order which excludes agreements from the Section 34 prohibition, these are discretionary in nature and are provided for by Ministerial Order.

[9] *Lim* (n 5); subsequent email communications on 30 March 2011.

[10] This public consultation also distinguishes these two terms in Chapter 7. Under the Division 3 of Competition Ordinance, Subdivision 1 is for exclusions and Subdivision 2 is for exemptions. See CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (File Ref: CITB CR 05/62/25/13, May 2008).

[11] Bills Committee on Competition Bill, Guidelines on the First Conduct Rule (CB(1)2336/ 10-11(01) para 5.1; Bills Committee on Competition Bill, Guidelines on the Second Conduct Rule (CB(1)2618/10-11(01) para 9.5.

[12] Alan C Page, 'Member States, Public Undertakings and Article 90' (1982) 7 European Law Review 19, 23.

Its meaning has also been set out in European case law, where in *Höfner v Macrotron* the concept of an undertaking is defined as any entity engaged in economic activity, regardless of its legal status or the way in which it is financed.[13] In the *Pavlov* case, undertakings were defined as the offering of goods or services on a given market that is the characteristic feature of an economic activity.[14] Government enterprises engaging in economic activities can be undertakings for these purposes if one refers to the cases of *Sacchi*[15] and *Italy v Commission.*[16] The same principle applies to quasi-governmental bodies which carry on economic activities as in the case of *Nungesser KG v Commission*.[17]

In HK, the Competition Ordinance defines undertakings as 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes a natural person engaged in economic activity'.[18] It basically follows the definition of the EU model. However, neither the Ordinance nor any other government document addresses whether said definition will cover any public entity which is engaged in economic activity. Furthermore, the definition of statutory bodies[19] and the test of applying competition law to statutory bodies[20] are inconsistent with the principles of the above EU provision and case law, which clearly include public entities as undertakings. This will be addressed in Section 4.6.1 of this chapter. It is clear that the blanket exclusion excludes government and statutory bodies from competition law.[21]

4.2.3 Public Entity

The term 'public entity' is used throughout this thesis to refer to a statutory body (SB), government enterprise (GE), or government department in HK. It is important to note that

[13] Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR 1-1979.

[14] Case C-180/98 etc Pavlov [2000] ECR I-6451, [2001] 4 CMLR 30.

[15] Case 155/73 *Sacchi* [1974] ECR 409, [1974] 2 CMLR 177.

[16] Case 41/83 *Italy v Commission* [1985] ECR 873, [1985] 2 CMLR 368.

[17] Case 258/78 *Nungesser KG v Commission* [1982] ECR 2015, [1983] 1 CMLR 278.

[18] Competition Ordinance, s 2.

[19] Competition Ordinance, s 3.

[20] Competition Ordinance, s 5.

[21] CEDB, *Public Consultation on Detailed Proposals of a Competition Law*, proposal 50.

they are not clearly distinguished in character from each other, especially SBs and GEs. Some SBs are also GEs, such as the Hong Kong Science and Technology Parks Corporation, the Mass Transit Railway Corporation and the Ocean Park Corporation. These, and others like them, are hybrid in nature. These public entities all engage in economic activities with varying degrees of involvement. They shall be explored below.

4.2.3.1 Statutory Body (SB)

For more than a century during the colonial period, many social services were provided by organizations which were incorporated under ordinance, financially supported and indirectly controlled by the HK government through the appointment of officials to the boards.[22] The government has given a dubious description of SBs, defining them as ‘not commercial enterprises, although they often operate along commercial lines’.[23] In Section 2 of the that Competition Ordinance, SBs are defined as ‘a body of persons, corporate or unincorporated, established and constituted by or under an Ordinance or appointed under an Ordinance’.[24]

Some of them are amalgams without distinctions amongst policy, regulatory function and economic activities. Some are inseparable from economic and commercial activities. It is unique in HK that there are about 580 SBs in such a small region.[25] The government intended to exclude all SBs in the consultation period from the application of competition law.[26] Due to intensive opposition, in reliance of Section 5(1)(a) of Competition Ordinance the government applied the key provisions of the Ordinance to only six SBs among the 580

[22] Home Affairs Bureau, *Legislative Council Panel on Home Affairs: Review of Advisory and Statutory Bodies: Interim Report No. 11 - Review of Non-departmental Public Bodies.* (July 2004).

[23] Ibid 2-3. See also Ian Scott, 'The Government and Statutory Bodies in Hong Kong: Centralization and Autonomy' (2006) 6 Public Organization Review 192, 195.

[24] Although it excludes companies, corporations of trustees incorporated, societies registered under the Societies Ordinance, and cooperative societies and trade unions, the definition remains ambiguous regarding which bodies will and will not excluded be under the competition regime. See Competition Ordinance, s 2.

[25] Department of Census and Statistics, HK Government <http://www.yearbook.gov.hk/2003/ > accessed 23 December 2010; Hong Kong Democratic Foundation, *Submission to Bills Committee on Competition Bill* (19 November 2010).

[26] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) chapter 7.

SBs.[27] However, many others are operating in sectors that are normally the preserve of private enterprises in other jurisdictions.[28] There are many examples of this, from sectors such as trade, healthcare, housing to technological innovation, and these shall be examined below in terms of their relationship to the market.

The Trade Development Council (TDC) is a SB established by Trade Development Council Ordinance, and acts as an international marketing arm for HK-based traders, manufacturers and service providers as well as organizing various kinds of commercial trade fairs.[29] The TDC is in a dominant position with a signification share at 45 per cent in the trade show sector, and therefore has a direct economic effect on the market. In other jurisdictions, running trade shows is a commercial and trade activity run by the private sector for profit rather than performed by the government as a public service function. If with the help of significant government support and demonstrable market dominance the TDC is able to outcompete suppliers of exhibition services, then why should it not be subject to competition law, just like a private sector contractor?[30]

The Airport Authority Hong Kong (AAHK) is a SB responsible for the operations of the Hong Kong International Airport.[31] In fact, AAHK is involved in a wide range of services such as security, catering, transportation, hotel accommodation, real estate, property management, etc., which directly and indirectly compete with the private sector.

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[27] The six SBs are Ocean Park Corporation, Federation of Hong Kong Industries, the general committee of the Federation of Industries Ordinance, Matilda and War Memorial Hospital, Kadoorie Farm and Botanic Garden Corporation and The Helena May. See Legislative Council Brief, 'Competition (Application of Provisions) Regulation and Competition (Disapplication of Provisions) Regulation' (Feb 2015) File Ref.: CITB CR 05/62/25/14, 3.

[28] JSM, *Statutory bodies and Hong Kong's proposed competition law - exempt or exposed?* (June 2009) 2; Graeme Johnston (ed), *Competition Law in China and Hong Kong* (Sweet and Maxwell 2009) part III; Mark Williams, 'Seeds of Its Own Destruction: Hong Kong's Dysfunctional Competition Policy' (2006) 6 Journal of Business Law 550, 553-4.

[29] It was established in 1966 under Trade Development Council Ordinance (Chapter 1114). Trade Development Council <http://hktdc.com> accessed 3 March 2011.

[30] David Dodwell, 'Hong Kong's Competition Commission shaping up as a paper tiger with paper teeth' *SCMP* (HK, 18 December 2015).

[31] The Authority was formed in 1995 and is financially independent of the government. There were plans to corporatize the AAHK and to list it on the Hong Kong Stock Exchange and to partially sell it to the public but these were never followed through. AAHK is a statutory body and governed by the Airport Authority Ordinance (Chapter 483) and is wholly owned by the HK government.

The Hospital Authority is a statutory body established under the Hospital Authority Ordinance and responsible for managing public hospitals and their services.[32] Some of them (e.g., the Prince of Wales Hospital, Queen Mary Hospital,[33] Hong Kong Eye Hospital, Chinese Medicine General Outpatient Services in Queen Elizabeth Hospital, Tung Wah Hospital, and Kwong Wah Hospital) have provided medical care to private patients at market rates. There are fourteen public hospitals which provide private bed services as well.[34] The list above is not exhaustive. Given the increase in private care services in the recent past, it is a trend that looks set to continue.

The Housing Authority is a statutory body established under the Housing Ordinance, providing housing to more than two million people. It is in charge of all public housing matters for over thirty per cent of the population in HK, including both commercial and residential property rental, estate management and tendering.[35] The Housing Authority also periodically builds and sells properties to individuals in the name of an ownership scheme which is directly competing with private property developers.

The Urban Renewal Authority was established under the Urban Renewal Authority Ordinance to replace the Land Development Corporation as the statutory body to undertake, encourage, promote and facilitate the regeneration of older urban areas of HK. This Authority is supported by the government through waivers of land premia for redevelopment sites. The URA is tasked to adopt redevelopment and rehabilitation as its core businesses, for which there are other private companies rendering all or part of these services in the market.

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[32] It was established by Hospital Authority Ordinance in 1990. The Hospital Authority currently manages 42 public hospitals and institutions, 47 specialist out-patient clinics and 73 general out-patient clinics.

[33] At least these two hospitals, the Princess of Wales Hospital and the Queen Mary Hospital, provide private specialist outpatient services and private inpatient services in the collaboration with the Faculty of Medicine of the Chinese University of Hong Kong and the University of Hong Kong respectively. Patients are charged at the market rate and the private service income is shared among the Hospital Authority, the universities and the doctors. See Hong Kong Government Press Releases, 'Private Consultation Services by Faculties of Medicine Staff' (9 May 2007) <http://www.info.gov.hk/gia/general/200705/09/P200705090106.htm> accessed 8 March 2015; Hong Kong Government Press Releases, 'Private Practice by Teaching Staff of Medical Faculties' <http://www.info.gov.hk/gia/general/200603/08/P200603080105.htm> accessed 8 March 2006.

[34] Hong Kong Government Press Releases, 'Private Services in Public Hospitals' (22 Feb 2006) <http://www.info.gov.hk/gia/general/200602/22/P200602220156.htm> accessed 8 March 2015.

[35] Housing Authority <http://www.housingauthority.gov.hk/en/index.html> accessed 8 March 2015.

The Hong Kong Science & Park Corporation was inaugurated as an SB for technology innovation.[36] This technology innovation company is inevitably an undertaking and a competitor with other private, business-driven companies in the market. However, all of the above-mentioned SBs are not subject to the Competition Ordinance.

Importantly, SBs have been increasingly influenced by the powerful property developers in HK. The directors of six major property companies had been given 54 seats on various SBs as at the end of March 2010, compared with just 16 in 1998 and 38 in 2007.[37] Collusion between the government and the land developers has been an open secret and it contributes to land hegemony, which is the major source of anti-competitive conducts that exist in many sectors in HK.[38] This issue will be detailed in Section 5.4 of Chapter 5.

Politically, some SBs could influence the lawmaker elections, because the functional constituency has a limited number of eligible voters and because of the existence of a corporate voting system. The elected lawmakers would then represent the SBs' interests in related sectors. For example, the Airport Authority can cast ballot in transport sector elections, while the Urban Renewal Authority and the Tourism Board have their corporate votes in the commercial sector as members of the Hong Kong General Chamber of Commerce. In this manner, the SBs have a say in determining who sit in the Legislative Council (LegCo).[39] The government's argument is sceptical in that, on the one hand, SBs should not be treated as undertakings in the market; on the other hand, the fact is that these SBs are able to elect representatives for their commercial sectors in the LegCo, and therefore voice their own interests in these sectors. It would be problematic to ignore such participation in the market when determining if they are undertakings. The issues of how the competition regime is shaped by the issues of land hegemony and political regime will be explored in next chapter.

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[36] Technology innovation covers the areas of electronics, biotechnology, IT and telecommunications, and precision engineering. See Hong Kong Science and Technology Parks Corporation <http://www.hkstp.or/ Hong KongSTPC/en_html/>accessed 16 August 2011.

[37] Gary Cheung, 'Property giants' influence grows' *SCMP* (HK, 12 April 2010).

[38] Alice Poon, *Land and the Ruling Class in Hong Kong* (Enrich Professional Publishing 2011).

[39] Tanna Chong, 'Legco election 2016' *SCMP* (HK, 6 February 2016).

4.2.3.2 Government Enterprise (GE)

The World Bank adopts the following definition of State-owned enterprises (SOEs): 'government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services'.[40] The OECD does not offer a definition but notes that the concept of SOEs encompasses a broad range of entities united by the common feature of government control. This can take various forms, such as: grants of exclusive rights to private enterprises; shares of ownership; direct assignment of manufacturing or service; and providing functions to governmental agencies. SOEs may be corporatized, and exist in corporate forms available to private actors, while others may exist in specific organizational forms reserved for SOEs.[41] Although there is no general agreement on how to define an SOE, there is, however, some consensus on the key factors that distinguish SOEs from privately-owned firms. SOEs can, in the main, be categorised as the following: 1) statutory corporations which run close to or as part of a government department; 2) fully incorporated but still State-controlled companies; and 3) listed SOEs with a certain amount of shares floated on stock markets.[42] The HK government departments and SBs can be comprised of all three types.

Due to HK's special political status under the principle of 'One Country Two Systems',[43] it is politically inaccurate to use the term State-owned enterprises, as HK is not a sovereign State.[44] Broadly speaking, there are various terms used to refer to SOEs, such as: public enterprises; public undertakings; government-linked enterprises; government-owned/controlled/funded/traded enterprises, and so on. Sometimes the terms 'company' or 'corporation' are also adopted. These terms are used interchangeably for the same entities. For the sake of presenting a consistent terminology, the author uses the term 'government

[40] World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* (1995) Report No.15037, 1-5.

[41] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (DAF/COM(2009)37 2009) 9.

[42] Ibid. The last category is becoming more widespread and is subject to securities laws, company laws, listing requirements, etc.

[43] Basic Law, preamble.

[44] Article 1 of Basic Law stipulates that 'Hong Kong is an inalienable part of People's Republic of China'.

enterprises' (GEs) throughout the rest of the thesis. For GEs, there are two ways to escape from being subject to the competition law: disapplication of law and public policy exemption.

Disapplication of Law to GE

The Chief Executive in Council (ExCo) can exempt 'a specified person' or a 'specified activity' from the competition rules in accordance with Section 5(1)(b) of the Competition Ordinance. This section applies to entities which are not SBs, but allows disapplication of the conduct rules of the Competition Ordinance to these entities where the ExCo finds fit.

In February 2015, the government used this provision to disapply the Competition Ordinance to a number of GEs through subsidiary legislation. The companies included the Stock Exchange of Hong Kong Limited (SEHK), Hong Kong Futures Exchange Limited (HKFE), Hong Kong Securities Clearing Company Limited (HKSCC), HKFE Clearing Company Limited (HKCC), SEHK Options Clearing House Limited (SOECH), OTC Clearing Housing Limited (OTCC), and Hong Kong Exchanges and Clearing Limited (HKEx). These are all firms which offer stock exchange and clearing services. Currently, HKEx is the only recognized exchange controller, and the HK government is the only substantial shareholder of HKEx. It is the holding company of all existing recognized exchange companies and recognized clearing houses (holding 75 per cent of OTCC, and 100 per cent of each of SEHK, HKFE, HKSCC, HKCC and SEOCH).[45]

HKEx itself is a listed company, while acting as a regulator and a GE at the same time. There is an obvious conflict of interests among the roles. The Financial Secretary asked for a review by an expert group on the regulatory structure of HK stock market in 2002, and the expert report recommended removing the listing function from HKEx in recognition of this conflict. Their criticism highlighted the 'fundamental flaw' in assuming the status of both

[45] Legislative Council Brief, 'Competition (Application of Provisions) Regulation and Competition (Disapplication of Provisions) Regulation', para 6 .

a regulatory body and a listed company motivated by profitability.[46]

HKEx and all its subsidiaries perform securities exchange and clearing duties and they have monopolized the market for more than three decades. It is undeniable that they directly participate in economic activities. Such a disapplication is clearly framed so as to allow a continuation of a monopoly in the market. Taking a comparative view, new trading venues have entered some markets to break monopolies. For example, Chi-Japan added to the number of proprietary trading systems competing against the Tokyo Stock Exchange in 2010. Chi-X Global competed against the Australian Stock Exchange in 2011[47] and against Chi-X Canada in the Canada Stock Exchange.[48] Singapore has two major bourses – Singapore Exchange and ICE Futures Singapore. In mainland China, the Shanghai Stock Exchange and the Shenzhen Stock Exchange operate separately. Given these examples, there is no reason why HKEx should be an exception in terms of its monopolization of the market.

The ExCo explains that the disapplication is in the public interests[49] and the seven GEs are already regulated under the Securities and Futures Ordinance.[50] However, such explanation is unconvincing, for several reasons. The ExCo fails to explain how and why this action is in conformity with the public interest. Also, the Securities and Futures Ordinance and the Competition Ordinance serve two different purposes. The former aims to maintain the stability of the financial system and protect public investing, whereas the latter is designed to combat anti-competitive behaviour. There is no conflict between the two ordinances. Already being regulated by the Securities and Futures Ordinance does not preclude the possible anti-competitive behaviour of these seven GEs.[51] On the contrary, such a disapplication is perceived as against the public interests in that consumers have no choice of service provider

[46] Poon, *Land and the Ruling Class in Hong Kong* (n 38) 160; The Expert Group to Review the Operating of the securities and Futures Market Regulatory Structure, 21 March 2003, Report, Hong Kong.

[47] David Webb, *HK Competition Bill to Thwart Exchange Rivals* (2 September 2010) <http://www.thetradenews.com/trading-venues/exchanges/4993> accessed 5 March 2011.

[48] Chi-X Canada <http://www.chi-xcanada.com/ABOUTUS.aspx> accessed 8 March 2015.

[49] Legislative Council Brief, 'Competition (Application of Provisions) Regulation and Competition (Disapplication of Provisions) Regulation', para 6.

[50] Ibid, para 8.

[51] Similarly, the EU Market Abuse Regulation (MAR), which took effect across the EU on 3 July 2016, aims to protect consumers by combating certain types of behaviour, such as insider dealing and market manipulation. However, having MAR does not preclude the possible anti-competitive conducts of undertakings.

and a loss of opportunity to pay lesser transaction fees.

Public Policy Exemption on GE

The ExCo can make an exemption for 'exceptional and compelling reasons of public policy', based on Section 31 of Competition Ordinance, or to avoid conflict with international obligations, by executive order based on Section 32. Singapore[52] and the UK[53] have similar provisions. A number of GEs which could be exempted from the Section 31 of the Competition Ordinance by executive order under the public policy ground, if the ExCo wants to do so.

There are many examples of these GEs which are not specifically excluded, but may well be, through the blanket powers of the ExCo. For instance, the Mass Transit Railway Corporation (MTRC), is a government-owned corporation with 76.48 per cent ownership. It obviously competes with other means of transportation in the market. Following a successful initial public offering, it was partially privatised with the government holding a majority stake. It is a hybrid of SB and GE in nature.[54] The MTR Ordinance provides the franchise right to MTRC.

Tradelink, with exclusive rights, has monopolized the electronic gateway between the trading community and the HK government since 1997. Tradelink provides a wide range of business-to-government and business-to-business electronic trade services and maintains an obvious dominant position in market. It has been appointed by the government to continue offering exclusive government electronic trade services. Its market dominance is evident within the entire HK trade and logistics community and no other company has a foothold in this service.[55]

[52] Singapore Competition Act, third sch, paras 3-4.

[53] UK Competition Act 1998, sch, paras 6-7.

[54] This term refers to statutory entities providing public services and to those with corporation status engaging in economic activities at the same time.

[55] Mark Williams, 'Hong Kong's Competition Bill: Lobbying, Opposition, Politics' (Competition Law and the State: International and Comparative Perspectives, HK, 18 & 19 March 2011).

Hong Kong Disneyland is an amusement theme park with entertainment activities and cultural shows. The HK government is also the largest stockholder with 51 per cent of shares. Another example is the Hong Kong Mortgage Corporation, wholly funded and owned by the government, which offers and dominates the provision of second mortgage services to a wide range of customers in the market.[56]

Although the above GEs are not specifically excluded like the HKEx, the ExCo may exempt application of conduct rules of Competition Ordinance based on Section 31 which states, 'if he or she is satisfied there are exceptional and compelling reasons of public policy for doing so'. The legal language arising from the exemption creates ambiguity and uncertainty regarding the terms of 'exceptional and compelling reasons of public policy'. The ExCo's blanket powers to decide such exemptions may be excessive. The above GEs may easily be exempted on public policy grounds if the government wishes to interpret their operation in such a way as to be performing certain social and public policies. Inevitably, the scope of HK's competition law may be also challenged by this exemption being granted on public policy grounds.

4.2.3.3 Non-application to Government Departments

In addition to the disapplication of law and public policy exemption to GEs, the conduct rules of the Competition Ordinance do not apply to the government departments under any circumstances. For example, the Hong Kong Post Office is part of the government but also performs an express delivery service which is patently an economic activity, competing as it does with other local express delivery companies such as DHL, FedEx, UPS et al. To date, the government has offered no justification for its economic activities being excluded from competition law. This situation is in direct contrast with the United States, where the Postal Reorganization Act of 2007 explicitly allows for the application of antitrust law to the US Postal Service for competitive services.[57] Likewise, in 2008 the European Commission found

[56] Hong Kong Mortgage Corporation <http://www.hkmc.com.hk> accessed 3 May 2011.

[57] Postal Reorganization Act 2007.

that the postal services offered by statutory monopoly of the State-run company should be open to competition.[58]

4.3 Public Entities and an Uneven Playing Field

Although all of above-mentioned SBs, GEs and government departments are engaged in commercial activities that might lessen competition, they are not subject to the Competition Ordinance, without any strong justification for this being so. This is the conclusion of Section 4.5 below, which investigates the government's justifications and finds them problematic. Thus, the most contentious area in the Ordinance is evidently the exclusion, disapplication, non-application and exemption of such public entities. While conclusions about the justification of government acts cannot yet be fully drawn, the potential inefficiency of government monopolies created by coercive State powers, and the distortions in the competitive process that they may cause, is clearly an important and interesting area for study.

The government controls enterprises in a number of different ways. These may be manifested as the granting of exclusive rights to private enterprises, share ownership, or the direct assignment of manufacturing or service functions to governmental agencies. Some GEs, like the HKEx and its subsidiaries, fall outside the scope of competition law, though their engagement in economic activities signifies that they lack sufficient reason to be so excluded.[59] This critique extends beyond government-controlled businesses and industries, into franchises, exclusive licenses, and other instruments used by the government to restrict entry into a particular field of economic activity.

The absence of competition oversight in the public entities' commercial activities has grave consequences. Private companies are not the only party affected by a public entity's abuse of market power, as consumers also bear the cost of abuses of government monopolies. The substantial exclusion has allowed public entities to pursue anti-competitive practices to

[58] Case COMP/39.562 *Slovakian postal Law*. OJ C322, 17 December 2008.

[59] Interviews with Dr. Mark Williams, Director of Asian Competition Law and Economics Centre (HK, 12 April 2011) and Dr. John Ho, Associate Professor of City University of Hong Kong (HK, 14 April 2011).

stifle private competition or to overcharge consumers where private competition is absent. The problem of anti-competitive practices is likely to be much more severe when a public entity performs the regulatory role itself, as in this case.

Additionally, the privileges solely restricted to public entities further highlight the unfair playing field of the market in HK. The privileges are conferred upon them as a result of their government background, privileges which are absent for private enterprises. These privileges include, but are not limited to: monopoly powers and exclusive rights;[60] regulatory exemptions;[61] preferential access to credit services;[62] subsidies from the government;[63] cross-subsidisation;[64] information asymmetries;[65] equity lock-in;[66] predatory pricing;[67] raising

[60] Richard Geddes, 'Case Studies of Anticompetitive SOE Behaviour' in Richard Geddes (ed), *Competing with the Government, Anticompetitive Behaviour and Public Enterprises* (Hoover Institution Press 2004) ch 1; Office of Fair Trading, *Government in Markets: Why Competition Matters - A Guide for Policy Makers* (2009) 1.

[61] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41); Sappington and Sidak, 'Competition Law for State Owned Enterprises' (2003) 72 Antitrust Law Journal No 2 479, 480; Simon Milnes, 'Competitive Neutrality and State Owned Enterprises' (Conference on Competition Law and the State: International and Comparative Perspectives, Hong Kong, 18 & 19 March 2011) 4.

[62] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41) 35; Geddes, 'Case Studies of Anticompetitive SOE Behaviour' (n 61) 3.

[63] Margaret Kelly and others, 'Issues and Development in International Trade Policy' (1988) Occasional Paper No 63 Washington, DC IMF 114; Cliff Stevenson, 'Distorting the Truth? The Economics of Domestic Farm Subsidies' (2004) 10 International Trade Law and Regulation 50, 57-58; Hans-Joachim Priess, 'EU Subsidies - Protective Measures' (1998) 4 International Trade Law and Regulation N3; Paula Paizes, 'Australian Government Subsidies and Co-production' (1991) 2 Entertainment Law Review 151, 152-154; Benjamin O'Donnell, 'Does 'Withdraw the Subsidy' Mean 'Repay the Subsidy'? The Implications of the Howe Leather Case for Firms in Receipt of Government Subsidies' (2000) 6 International Trade Law and Regulation 168, 170.

[64] OECD, *Non-Commercial Service Obligations and Liberalisation* (DAFFE/COMP(2004)19 2003); Paizes, 'Australian Government Subsidies and Co-production' (n 63) 151; Stevenson, 'Distorting the Truth? The Economics of Domestic Farm Subsidies' (n 63) 50.

[65] John Ho, 'In Search of the Level Playing Field: Asymmetries and Consumer Protection in HK,' (2006) 61 Part 1 HK Law Report 61; Katleen Janssen and Jos Dumortier, 'Towards A European Framework for the Re-Use of Public Sector Information: A Long and Winding Road' (2003) 11 International Journal of Law and Information Technology 184, 189.

[66] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41) 36; Winnie Chan, 'On Tax and Justice' (2003) 23 Oxford Journal of Legal Studies 711; Philip Marsden and Ioannis Kokkoris, 'The Role of Competition and State Aid Policy in Financial and Monetary Law' (2010) 13 Journal of International Economic Law 875, 879.

[67] John Lott, 'Predation by Public Enterprises' (1990) 43 Journal of Public Economics 237, 238; Lott, *Are Predatory Commitments Credible? Who Should the Court Believe?* (The University of Chicago Press 1999) Ch.3; Sappington and Sidak, 'Competition Law for State Owned Enterprises' (n 61) 48-482; Paul Milgrom, 'Predatory Pricing' in John Eatwell (ed), *The New Palgrave Dictionary of Economics* (Palgrave 1987) 23.

competitors' costs;[68] acts of State protection,[69] and less concerned about bankruptcy or take-over.[70]

The above-mentioned direct and indirect privileges that public entities enjoy are not available to private enterprises. These privileges are not based on better performance, greater efficiency, superior technology or management skills, but are instead government-granted. They give public entities significant advantages over their rivals. It is beyond doubt that these privileges distort competition between public entities and their privately-owned rivals. Public entities are instructed by the government to pursue the objective of fulfilling public service requirements while participating in economic activities. Public entities are less concerned with profit-making, which causes lower economic efficiency, but they still survive in the market due to the support, status, and privileges granted from governments. Due to these various privileges and advantages, public entities have a high propensity for raising anti-competitive concerns. Accordingly, governments may tend to create an uneven playing field in markets where they have a vested interest in ensuring that public entities succeed.[71]

4.4 Critique of Section 5

This section offers a critical examination on Section 5, which is used by the government to prepare a *non-excluded* list of SBs for the legislature to review after strong opposition to the wholesale exclusion of government and SBs during public consultations. The Ordinance,

[68] Stacey R. Kole, 'The Government as a Shareholder: A Case from the United States' (1997) 40 Journal of Law & Economics 1, 10; OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41); Stephen Martin, *Advanced Industrial Economics 2nd* (Blackwell 2002) Ch.7; Sappington and Sidak, 'Competition Law for State Owned Enterprises' (n 61) 483.

[69] Court of Final Appeal Ordinance, s 4; Basic Law, art 19.

[70] Geddes, 'Case Studies of Anticompetitive SOE Behaviour' (n 60) 10-13; Amanda Cohen, 'Market Movements' (2011) 8 Journal of International Banking and Financial Law 517, 519, 520; OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41); Michael Crew and Paul Keindorfer in Hudgins (ed), *Privatizing the US Postal Service* (Cato Institute 2000); Markus Krajewski, 'Public Services and Trade Liberalisation: Mapping the Legal Framework' (2003) 6 Journal of International Economic Law 341, 344.

[71] Perhaps the most vocal external critique of the government's competition policy has come from the EU in its November 2000 parliamentary report on the political and economic environment in HK. It expressed its concerns about an un-level playing field possibly tilted against foreign companies, citing that 'a number of tycoons have an undue and dominant influence in certain sectors of HK'. The report called for a general competition law by saying that 'as the existence of fair competition laws and practices ensure a level playing pitch for HK firms when they compete in the EU marketplace, EU businesses are entitled to reciprocation when they operate in HK'. See EU Parliamentary Report, 23 November 2000.

prima facie, provides opt-out provisions. However, Section 5(1) provides a high threshold opt-in provision and states that the ExCo may, by regulation, apply the provision in Section 3(1) to any statutory body. Section 5(1) operates in conjunction with Section 5(2), which states that the ExCo may only make a regulation under Section 5(1)(a) to enable a SB *not* to be excluded from competition law if the SB can fulfil all four conditions.

The Ordinance has already excluded all SBs from the application of competition law. The ExCo can only impose conduct rules on an SB provided that the SB can satisfy the four conditions listed in Sections 5(2)(a) to 5(2)(d). However, given the high threshold of each condition, it is extremely difficult to satisfy the four conditions together. As a result, only a few SBs can overcome these hurdles. Ultimately, most the SBs are still be able to enjoy the exclusion privileges. The Consumer Council stated that this is a ‘negative listing’ approach.[72] There are many problems inherent in this approach. These are the fact that the subsidiary legislation that creates the list is unscrutinised; the LegCo’s power is curtailed; and a conflict of interest further undermines the legitimacy of Section 5.

Unscrutinised Subsidiary Legislation

In the Ordinance, the government itself is wholly excluded, as are all SBs in principle. The government simply makes a regulation using its own discretion to opt in whichever statutory bod(ies) or person(s) it deems appropriate. The regulation, being subsidiary legislation, is not scrutinized or examined by the LegCo. Matters of principle are usually discussed and debated in primary legislation. A regulation, however, is a form of secondary legislation designed to make detailed arrangements which give effect to the intent and purpose of primary legislation. It can also serve as an instrument of coercion, since it is exempt from proper scrutiny from legislature.[73]

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[72] Interview with Victor Hung, Chief Research and Trade Practices Officer of Consumer Council (HK, 20 April 2011). A negative list is prepared by the ExCo, which, based on its judgment, evaluates and selects from an initial total of more than 580 SBs. SBs selected will, preliminarily, be deemed ineligible to enjoy exclusion privileges. The LegCo will subsequently vet which SBs are truly not eligible. It is predicted that only a few SBs will appear in the list.

[73] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge Press 2011) ch 1.

The Limited Power of the Legislative Council

All SBs are assumed to qualify for exclusion from the competition law. The LegCo only has the power to vet the particular SBs in the negative list provided by the government, to examine whether they should be subject to competition law. Ronny Tony, vice-chairman of the Bills Committee on Competition Bill, complained that it is a fundamental breach of proper procedure for the ExCo to decide on the list first, because this step fixes the minimum number of SBs not to be subject to the law.[74]

Given its limited power, the only subsequent step that the LegCo can take is to further reduce the number of the SBs (if the LegCo is satisfied that they qualify to be excluded), instead of expanding the number in the list. In other words, the LegCo cannot perform its duty as gatekeeper to control or even question which SBs should be excluded among the non-listed bodies. The LegCo can merely play a symbolic role in letting more SBs be excluded among the negative list prepared by the ExCo.[75] Among the 580 SBs, given that the government included only six SBs which should be under the jurisdiction of the competition law, the LegCo has no chance of questioning the other SBs not in the list during the negative vetting. Hence, proper checks and balances between the executive and the legislature cannot function under this arrangement. More importantly, any possible anti-competitive conduct by the non-listed SBs cannot be rectified. The Competition Commission can do practically nothing regarding their conducts.

Conflict of Interests between Government and SBs

All SBs have been established by the government, and they are necessarily in a close relationship and have a common interest in supporting each other. It is not difficult to understand why the government prefers to prepare a negative list[76] rather than a positive list[77]

[74] Interview with Ronny Tong on 14 April 2011.

[75] ibid.

[76] See note 72 for the meaning of ‘negative list’.

for the LegCo, in order to minimise the possible intervention of competition law on SBs, which would damage their monopoly and the advantages that the government draws from it'. The government therefore passes its own judgement on its own exclusion and also upon its affiliated SBs. It is an obvious conflict of interest that the government should be a judge in its own cause.[78] The specific problems raised by the high thresholds of Section 5(2) will also be explored below.

4.4.1 Extremely High Thresholds

Section 5(2) allows the ExCo to exercise its discretion to apply the conduct rules to SBs by making regulation if *all* four conditions, i.e. Section 5(2)(a)–(d), can be satisfied. Such a provision, however, carries both substantive and procedural defects, producing extremely high thresholds in order to regulate SBs.

4.4.1.1 Substantive Defects

The substantive defects can be found in all of Section 5(2)(a) to (d), which are full of ambiguity, uncertainty and unreasonableness, the particulars of which are detailed below.

Section 5(2)(a)

Section 5(2)(a) stipulates: 'the statutory body is engaging in an economic activity in *direct* competition with another undertaking'.[79] First, the term 'economic activity' is vague, and the Ordinance fails to give an interpretation of it.

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[77] Conversely, there is a positive list comprised of SBs, which are selected by the ExCo and are potentially eligible to enjoy the exclusion privilege, with their eligibility being further reviewed by the LegCo. Then the non-listed SBs are still subject to competition law. It is predicted that the ExCo will put most SBs on the positive list so that the LegCo at least can call into question more SBs under this arrangement.

[78] *R v Sussex Justices*, Ex parte *McCarthy* [1924] 1 KB 256.

[79] Competition Ordinance, s 5(2)(a) (emphasis added).

Second, the passage requires that a SB has to be in direct, rather than indirect, competition with other undertakings. However, no definition is given in the Ordinance of what direct or indirect competition is. In this complex commercial market, it is often difficult to distinguish whether competition is direct or indirect. Competition manifests itself through different means, through both direct and indirect ways; it is pointless to narrow the non-application of conduct rules to direct competition only. As it is, if a SB is deemed to engage in economic activity in indirect competition with another undertaking, the SB will not be subject to competition law, although the activity is anti-competitive in nature. Such a result fundamentally undermines the effectiveness of the competition regime.

Most importantly, Section 5(2)(a) uses the *present tense* ('is engaging') to refer to the state of competition, implying that the competitor is already in the market. However, many SBs have been dominating the market for such a long time that no rival can even have an opportunity to enter the market. Under these circumstances, how can another undertaking be involved in direct competition with the SB? It is clear that the provision is illogical and out of touch with the dynamic reality of competition.

Section 5(2)(b)

Section 5(2)(b) stipulates that 'the economic activity of the statutory body is affecting the *economic efficiency* of a specific market'.[80] Even if it is regarded as being in direct competition with other undertakings, the claimant has to bear the significant burden of proof that the SB affects economic efficiency under Section 5(2)(b), a concept for which no definition or explanation is provided. It is unclear what type of required economic efficiency is to be achieved. Many questions remain unanswered. For example, how does one determine whether an SB is affecting economic efficiency when there is a monopoly? What is the standard for measuring efficiency? Should there be an economic analysis and study before concluding that there is an effect on economic efficiency? Is the provision referring to consumer surplus, producer surplus or total surplus? All of the above ambiguities create

[80] Competition Ordinance, s 5(2)(b) (emphasis added).

difficulties in making the regulation and deciding whether a particular SB should be on the list.

Section 5(2)(c)

Section 5(2)(c) states: 'the economic activity of the statutory body is *not directly* related to the provision of an *essential* public service or the implementation of public policy'.[81] Many public services involve economic activities to a greater or lesser extent. How is the weight distributed between public service and economic activity, especially for those that are hybrids in nature? For instance, is promoting trade in HK by the TDC regarded as an essential public service, or as the implementation of public policy? The government will be likely to argue positively, so that this type of activity is excluded. The same argument from the government can also be applied to parts of the postal service, medical care, or even theme park entertainment. As a result, all of the above activities may be excluded under the argument that they are hybrids of a public service and economic activity.

Moreover, it is difficult to assess and clearly distinguish whether the economic activity is directly or indirectly related to provision of a public service. Even assuming the term 'public service' to be universally understood, it is still difficult to prove whether such a service is 'essential' or not. The burden of proof lies too heavily on the claimant. The government, on the other hand, can easily retort that the activity is an essential service based on its own standard or perspective. Furthermore, it is unknown whether a subjective test or objective test is to be adopted, which only adds to the uncertainty and unaccountability of the procedure.

Even though the government may decide that a particular SB is directly related to the provision of an essential public service or the implementation of public policy, on the basis of it having a greater social value than the competition law, and therefore omit the SB from the negative list, the procedural flaw is still not remediable. The reasons are obvious. First, there is the fact that the government itself decides the scope of application of the competition law

[81] Competition Ordinance, s 5(2)(c) (emphasis added).

for affiliated SBs under its ownership or control presents a conflict of interest, with a strong temptation for the government to protect and maintain its existing interests. Second, an impartial decision could be difficult in view of the government's status as an interested party. Third, public confidence is entirely destroyed by this direct conflict of interest and by the serious doubt that arises regarding the impartiality of decision-making, since justice must not only be done but be perceived to be done.[82] Finally, and most importantly, this institutional conflict can hardly convince the private market participants of the existence of a level playing field, as the government exempts its SBs by the aforesaid arbitrary definition and uses an ambiguous criterion in this exemption. Hence, before addressing whether a given decision is right or wrong, the government has been demonstrated to be procedurally unsound.

Section 5(2)(d)

The last condition demands that 'there are no other *exceptional and compelling reasons* of public policy against making such regulation'.[83] Having exceptional and compelling reasons is such a strict standard of scrutiny that it constitutes a very difficult condition to meet. The government has avoided using other less demanding tests here, such as a minimal scrutiny test (legitimate reasons) or intermediate scrutiny test (important reasons), and instead chooses to adopt the maximum scrutiny test (exceptional and compelling reasons) to make the regulation.[84] As a result, the likelihood of making a regulation that includes certain SBs is slim, because the test is extremely difficult to pass. Consequently, the substantive threshold embedded in Section 5 itself is very high. The barriers are many and each condition is extremely hard to meet.

[82] See *R v Sussex Justices,* Ex parte *McCarthy* [1924] 1 KB 256. The case established the principle that the mere appearance of bias is sufficient to overturn a judicial decision since 'not only must justice be done; it must also be seen to be done'.

[83] Competition Law, s 5(2)(d) (emphasis added).

[84] Conviser Mini Review, *Constitutional Law* (Barbri 2006) 31.

4.4.1.2 Procedural Defects

In terms of procedure, there are still many unanswered questions concerning allegations that the ExCo operates in a black box and plays an inappropriate role in making the regulation and deciding which SBs are on the list.

Black Box Operation

The unanswered questions - they are not exhaustive - concern the opaque decision-making process by the ExCo: what procedure is followed in making the regulation and preparing the non-excluded list? How is the regulation to be put into effect? Who initiates the process for deciding whether the exclusion is to be removed or not? What evidence does the ExCo listen to, when some people are arguing in favour of retaining the exclusion, but others are arguing that the SB is covered by the law? How is weight given to the different arguments? Is there an economic analysis to be carried out? If so, by whom? Is there an appeal system? What procedure does it follow, if any?

Neither the Ordinance nor any government document gives an answer to the above questions. The whole process is operated in a black box which is completely internal, private, and therefore fundamentally flawed. Such a procedure is against the principle of the rule of law and the principle of being impartial, open, and fair.

Inappropriate Role

The whole process places no confidence in the public, as the ExCo need not even consult the Competition Commission, which is responsible for anti-competition issues. It is unreasonable that the Competition Commission should have no role in the process of reviewing which SB should be excluded or not, when the Commission has competition law experts whereas there is none in the ExCo.[85] In 2008, the Secretary for the Commerce and Economic Development Bureau in the LegCo laid out the role of the Competition Commission in relation to defining essential public services:

> The Competition Commission should decide on a case-by-case basis whether an undertaking should be excluded on the grounds that it is entrusted with the operation of 'essential public services of an economic nature' […] the Commission could issue guidelines to explain in detail its considerations when making a decision. The Commission would consult stakeholders before issuing guidelines.[86]

However, just two years later, unexpectedly, the power to decide on essential public services shifted into the hands of the ExCo in accordance with the Ordinance.[87] In addition to taking such an inappropriate role, the government is passing judgement on its own exclusion rather than referring to an open, independent, and impartial Commission Tribunal decision. Again, the ExCo is judging its own cause. A conflict of interests arises in the procedural test as well.

To summarise, on top of the very strict and problematic substantive requirement in connection with completely fulfilling the four conditions from Section 5(2)(a) to (d), there are fundamental defects in procedural justice in making the regulation under Section 5(2). It is likely that Section 5(2) will further entrench the government's ability to exercise its unfettered discretion to produce whatever negative list of SBs it wishes for the LegCo's vetting. In the absence of sufficient checks and balances on the executive organ, the LegCo becomes powerless to scrutinize the SBs' involvement in anti-competitive conduct. The most telling symptom of this is that the LegCo can only reduce rather than expand the number of suspected SBs whose exclusion privilege may be taken away during the negative vetting process.

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[85] ExCo is responsible for all government policies and the day-to-day administration of affairs. It comprises the Chief Executive, 14 ex-officio members and 15 non-official members in the Executive Council. The ex-officio members are responsible for education, security, food and health, labour and welfare, environment, transport and housing, etc. The non-official members come from political parties and various sectors. However, none of them are competition law experts.

[86] Legislative Council, *Official Record of Proceedings - Exemptions and Exclusions Under Proposed Competition Law* (11 June 2008) .

[87] Competition Ordinance, ss 3 to 5.

4.4.2 Excessive Power of the ExCo

In comparison to the LegCo, the ExCo is more powerful in deciding the fate of SBs. The power to make a regulation and prepare the non-excluded list rests in the hands of the ExCo, which may freely implement internal and private executive decisions through subsidiary legislation, based on Sections 4 and 5.[88] In addition, the ExCo has absolute power to define the meaning of specified SBs, activities, persons and agreements.

Specified SBs

Despite Section 3(1) excluding conduct rules being applied to SBs, Section 3(2)(a) allows an exception, in which conduct rules may be applied for a specified SB. However, such discretion to decide the meaning, the scope, and the nature of being specified, is again vested in the ExCo.[89]

Specified Activities

Section 3(2)(b) also allows an exception that conduct rules may be applied if a SB is engaged a specified activity.[90] Who has the authority to decide which specified activity qualifies the SB to enjoy exclusion from competition law? The answer is, again, the ExCo. No definition of specified activities is given in the HK Competition Ordinance, and so, again, there is no oversight and no way to see into the black box of the ExCo's operations.[91]

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[88] eMarc Waha and Julienne Chang, 'HK's antitrust model offers clear separation of powers' *SCMP* (HK, 15 August 2012) 3.

[89] Competition Ordinance, s 3(3)(a) .

[90] Competition Ordinance, s 3(2)(b).

[91] It may be noted in contrast that detailed definition is given in the Singapore Competition Act. See Singapore Competition Act, Third Sch, para 6.

Specified Persons

In addition to the above SBs, Section 4(1) also allows that conduct rules do not apply to specific persons.[92] Again, there is no definition nor any elaboration of what it means to be 'specified'. All authority to interpret this clause is vested in the the ExCo under Section 4(2). Specified persons may extend to an employee or agent of the person, acting in that capacity.[93] This also enlarges the scope of the exclusion in the 2008 Consultation Paper, in which only SBs are excluded.

Specified Agreements

Further to the powers mentioned in Sections 3, 4 and 5 of the Competition Ordinance to decide the meaning of specified SBs, activities, and persons, the ExCo may also exempt a specified agreement or a specified class of agreement from the first and second conduct rules under Section 31(1), which stipulates exemptions on public policy grounds. Sub-Section 2 states that the ExCo may impose conditions or limitations if it deems appropriate. Sub-Section 3 states that the ExCo may extend the period of its validity.

It is clear that these powers are excessive. The government has argued:

> As it would not be practicable to provide a common set of general criteria in the provision for determining exemption, in particular given the vast number of non-statutory bodies in Hong Kong, the Administration considers that clause 5(1)(b) as currently drafted provides the necessary flexibility for catering for unforeseen circumstances under which non-statutory bodies may warrant exemption.[94]

[92] Competition Ordinance, s 4(1).

[93] Competition Ordinance, s 4(2)(b).

[94] Legislative Council, *Report of the Bills Committee on Competition Bill* (CB(1)1919/11-12) para 87.

The government further elaborated:

> In considering … exempting certain persons or specified activities. The Chief Executive in Council may take into account the relevant consideration, including but not limited to exceptional and compelling reasons of *public policy* in doing so.[95]

There is already a comprehensive set of specific exclusions and exemptions under Schedule 1 of the Competition Ordinance. If there are certain practices that are not covered by these exclusion or exemptions but are worthy of immunity, they can most likely be addressed by the public policy exemption provision under Section 31. The open-ended nature of 'public policy reasons' should be versatile enough to cover most of the unforeseen circumstances that deserve an exemption. The very few meritorious cases which are unrelated to public policy can be dealt with by introducing a new exclusion, in which case amending Schedule 1 of the Competition Ordinance requires the LegCo's approval before taking effect.[96] This would be a more acceptable state of affairs, as it would take unilateral control away from the ExCo. It is unnecessary and undesirable to allow the ExCo to cover the remaining unforeseen situations by exempting under Sections 4 and 5 any person or any activity as it sees fit. In brief, the vast powers accorded to the ExCo are inappropriate. Their ability to define what is and is not within the scope of specified SBs, activities, persons and agreements directly and proximately affects which of these are excluded from competition law. It is highly dubious whether the ExCo, without any competition law expert, would be in the best position to assess the merits involved in competition cases.

4.4.3 Inconsistent with the Competition Policy Statement

As early as 1998, the Competition Policy Statement prepared by the government clearly stated:

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[95] Bills committee on Competition Bill, Overview of Major Components of the Competition Bill (CB(1)320/10-11(02)), para 27 (emphasis added).

[96] Competition Ordinance, section 36; Legal Service Division Report on Competition Bill (LS93/09-10) para 21.

> The government is committed to pro-actively nurture and sustain competition for the purpose of enhancing economic efficiency and free trade […]. [We] will invite all government entities to adhere to the Statement, propose initiatives for furthering the policy objective, examine the impact of all new proposals on competition and, where appropriate, bring this to the attention of the Executive Council and the Legislature. They are also expected to ensure that *all statutory bodies* under their charge pay heed to the Statement as well.[97]

However, the Ordinance does not appear to reflect this principle and consequently the government fails to stand by its own commitment. It is the government's self-appointed duty to promote greater adherence to good competition practices as they formulate new laws and procedures, and they must also act to remove or transform existing bodies which may impede competition. The government should not act in a contradictory manner by at once shielding itself from competition law and simultaneously competing with the private market on an uneven playing field; to do so contravenes their own stated goals, as well as undermining public confidence and market efficiency.

On one hand, it is accepted that sometimes there is a need to protect certain areas from competition law to advance certain important values such as enhancing overall economic efficiency.[98] Yet on the other hand, the major criticism that can be drawn from the analysis above is that the government has gone too far by opting for almost absolute exclusion of all government acts. Both procedural and substantive defects are primarily found in Sections 2 to 5 of the Ordinance, which fundamentally undermines the competition regime. The negative listing approach, the blanket exclusion, the lack of oversight into the LegCo, and the excessive power of the ExCo, along with procedural and substantive defects in the Ordinance, all contribute to the anti-competitive and unfair playing field.

The outcome of this is twofold. Theoretically, such widespread exclusion is not in line with principles of economics and competition. Practically, the adverse impact on HK's unique market is even greater because there are a huge number of SBs and GEs. These bodies have a higher propensity than private firms to engage in anti-competitive conduct, owing to the various privileges derived from their government backgrounds.

[97] COMPAG, *Statement on Competition Policy* (May 1998) (emphasis added).

[98] Agreement enhancing overall economic efficiency is qualified as a general exclusion from conduct rules. Section 1(a) of Schedule 1 of the Competition Ordinance stipulates, 'The first conduct rule does not apply to any agreement that contributes to improving production or distribution; or promoting technical or economic progress, while allowing consumes a fair share of the resulting benefit'.

4.5 Government Justifications

Although there was widespread criticism of this policy during the open consultation period,[99] the government defended its stance with five justifications, which shall be detailed and analysed in the following categories: 1) exemptions on public policy grounds; 2) unfounded and misconceived complaints; 3) small size of the public sector; 4) many services provided by the private sector; and 5) anti-competitive conduct being a private sector problem.

4.5.1 Exemptions on Public Policy Grounds

The first justification that the government deploys to support the adoption of blanket exclusions for public entities is as follows:

> The activities of the government and statutory bodies would almost *invariably involve public services and public policy* […] which is commonly accepted grounds for dis-applying the law prohibiting anti-competitive conduct.[100]

This justification overlaps with another exemption on public policy grounds which reads: the '[C]hief Executive-in-Council may exclude conduct from the prohibition on anti-competitive conduct if he considers that there are sound reasons of public policy for so doing'.[101] From the government's perspective, since the activities of the public sector are likely to fall under the public policy exemption, it is justifiable to create an additional exclusion option to free all public entities from the competition regime.

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[99] Interviews with Lee WM, Secretary of Democratic Party of Hong Kong (HK,13 April 2011) & Tin BC, Adviser of Liberal Party of Hong Kong (HK, 17 April 2011); JSM, *Statutory bodies and Hong Kong's proposed competition law - exempt or exposed?* 1.

[100] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) para 15 (a) (emphasis added).

[101] Ibid proposal 49; Competition Ordinance, s 31.

4.5.1.1 The Flawed Exemptions

There are, however, flaws in the government's reasoning in this respect. The government assumes that the public policy exemption is justified in the first place and that anything following it would, of course, also be justified. This argument appears to be tautological and circular, with several problems. First, the government says the exemption will only be revoked where 'there are sound reasons for so doing'. This language is ambiguous, lacking any definition of 'sound reasons' inclusive of criteria, scope and limitations. It is also unclear how the procedure for such exemption may be initiated.

Second, the ExCo is granted excessive power to exempt anyone it favours simply based on the government's argument that 'it would be in the best position to assess the relative merits involved in such cases'.[102] As stated before, the ExCo lacks the expertise in competition law and economics that it needs to play such a role. It is inappropriate for the government to make decisions on economic and competition issues without at least consulting the regulatory agency, i.e. Competition Commission. Overall, the government's justification represents a bold centralisation of power, as the executive would assume the role of a regulatory agency, without any checks and balances. Such a move would leave the exemption process open to politicised decision-making, harming the rule of law in HK.

Third, there is no public regulatory regime to oversee those undertakings which are exempt on public policy grounds. Many public services in HK are *de facto* private monopolies[103] which would be left without any public regulatory oversight. Such a scenario would be detrimental to the competition regime and unfair to other sectors of the economy that would be subject to the competition rules.[104]

[102] Ibid 53, 54.

[103] Examples include electronic trade services by Tradelink, express post by Post Office, exhibition and trade services by TDC.

[104] Jackie Wu, Research and Library Services Division and Legislative Council Secretariat, *Competition policies in selected jurisdictions* (25 June 2010) 33.

In addition, given that the public policy-making process is prone to distortion through special interest lobbying, exemptions may tend to protect particular vested interests rather than pursuing overall economic efficiency and consumer welfare. Thus, from the point of view of market and consumer interests, an exemption on purely public policy grounds itself is inherently defective. Merely falling within this category does not justify immunity from competition rules.

4.5.1.2 The Degree of Exclusion

As outlined previously, exclusion creates a permanent non-jurisdiction of the law, while an exemption merely suspends the application of law on a discretionary, revocable and temporary basis. If the government argues that the justification of the ‘exclusion on non-application of conduct rules to public entities’ follows and falls within the ‘exemption on public policy grounds’, it is unnecessary to upgrade the degree of immunity for public entities from exemption to exclusion. The government has so far failed to explain why it has chosen this path.

4.5.1.3 The Scope of Immunity

The scope of the ‘exemption on public policy grounds’ is literally restricted to public policy issues, while the scope of ‘exclusion on non-application to public entities’ is unspecified and may refer to any kind of public entity activity. The scope of the latter is significantly, and unnecessarily, wider than the former. According to the government, when ‘some activities’ performed by a public entity are not covered on public policy grounds, the existence of another exclusion clause is necessary. ‘Some activities’ probably include commercial and economic activities, areas where competition law should properly apply.

4.5.1.4 Unsound Reasoning

If the government aims to limit the application of competition law to 'undertakings'[105] and truly believes that the public entities only provide pure public services without engaging in economic activities, then it should have no concern for the applicability of competition rules. If the government genuinely believes that the activities of public entities would already fall within the exemption on public policy grounds, then it is unclear why there is a need for another exclusion, with a higher degree and larger scope of immunity than an exemption, for public entities. This creates unnecessary redundancy in the law. Consequently, the government's argument appears irrational.

4.5.2 Unfounded and Misconceived Complaints

The government's second justification for exempting public entities from competition law states that it would 'ensure that the operation of government and statutory bodies would not be affected by unfounded and misconceived complaints'.[106] In addition, the government considers the blanket exclusion as necessary 'to ensure efficient implementation of public policies as well as measures which are required to respond swiftly to the needs of the community.[107] This gives rise to more problems, such as the failure to create a level playing field, and the redundancy of the exclusion since safeguards already exist to protect public entities.

4.5.2.1 Failure to Create a Level Playing Field

During consultation stage, the government anticipated that the proposed law will give rise to 'unfounded and misconceived complaints'. Yet the government gave no reason why public entities should be protected from accusations while the private sector is liable to such

[105] Competition Ordinance, s 2.

[106] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) para 15 (a).

[107] Legislative Council, Report of the Bills Committee on Competition Bill (CB(1)1919/11-12, para. 83.

complaints. In a market-driven economy such as HK's, it must be asked why the private sector should be subject to the burden of potentially 'unfounded and misconceived complaints' while State-run companies are not. Such a situation induces a question as to whether the government might not be able to legally prevail against such complaints and therefore feels it must prevent them in the first place. If this were a sufficient reason to justify the wholesale exemption for public entities, then all private entities would be equally justified in seeking exemptions. Evidently, the government desires to create an uneven playing field for public and private enterprises, despite its official role of creating a level playing field.

4.5.2.2 Safeguards Already Exist

Both the Consultation Paper and Competition Ordinance have provided safeguards against unfounded and misconceived claims, making the additional powers superfluous and suspect. Section 37(2) of the Competition Ordinance stipulates that:

> The Commission is not required to investigate a complaint if it does not consider it reasonable to do so and may, in particular, refuse to investigate a complaint if it satisfied that (a) the complaint is trivial, frivolous or vexatious; or (b) the complaint is misconceived or lacking in substance.[108]

Additionally, proposal 37 of the Consultation Paper clearly states that, 'the Tribunal, of its own motion or on application by a party or the Commission, may strike out any action which the Tribunal considers to be without merit or vexatious'. The Paper addresses the concerns about the possibility of excessive litigation stemming from frivolous or vexatious claims. The government should not be unduly concerned about such complaints because appropriate safeguards are available at the discretion of the Commission. It can choose not to entertain unmeritorious complaints and utilize the power of the Competition Tribunal to strike out vexatious claims. Such protection is applicable not only to private entities but also public entities.[109] Thus, it would seem unnecessary to have an extra exclusion clause when the above provision already provides an adequate level of protection. It appears that the

[108] Competition Ordinance, s 37(2).

[109] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 101) 39.

government's argument, based on 'unfounded and misconceived' complaints, is itself unfounded and misconceived.

4.5.3 Hong Kong's Small Public Sector

A third justification raised by the government is as follows:

> Hong Kong has a *relatively small public sector* when viewed in relation to overall GDP; there is *no evidence* that the government and any statutory bodies has engaged, and is likely to engage in any anti-competitive conduct in the commercial market which is the mischief that the competition law is trying to curb.[110]

They have also said,

> Even if a public sector body engages in anti-competitive conduct, the government can take appropriate administrative measures under the *existing competition policy to rectify the situation*.[111]

Several issues arise from the above argument. First, it is unclear why and how the government argues that its size is relevant to public entities' exclusion, and even if such a connection was justified it is ambiguous about the definition of smallness. Does it refer to population size, government size, or GDP size? Does it refer to only the public sector, or HK overall? Second, the government wrongly assumes that it and its associated statutory bodies (SBs) do not engage in any anti-competitive conduct. Finally, the government, as demonstrated in the preceding sections of this analysis, presumes that its existing competition policy has already handled the issue of public sector anti-competitive conduct, which it plainly has not. All of these issues are explored in detail below.

[110] Ibid para 15(b) (emphasis added).

[111] Hong Kong Legislative Council, *Enactment of A Competition Law* (21 May 2008) (emphasis added).

4.5.3.1 Small Size and Exclusion of Public Sector

The government argues that a small public sector is unlikely to be able to engage in anti-competitive conduct simply because of its size. This assertion does not stand up to scrutiny, first through challenges to its relative size which is, in fact, quite large, and second since whatever the case of its size, it does not follow that this justifies exclusion from competition law.

In 2010, as regards government size, the HK government had around 580 SBs while Singapore had less than 70.[112] In terms of the total number of civil servants, HK had 157,000[113] while Singapore had only 60,000.[114] In terms of population size, HK had about 7.1 million people while there were around 5 million in Singapore.[115] In terms of overall GDP, HK was ranked 38 out 181 countries in the world.[116] In relative terms, HK is not that small.

In fact, the public sector is quite large. For example, more than half of the HK population lives in public housing. The government provides the majority of educational services and over 90 per cent of hospital services.[117] Additionally, the government created new public bodies to perform new functions such as regulating mandatory provident funds[118] and has engaged with providing mortgage financing since the 1990s. The public sector becomes even larger when one considers the industries directly controlled by the government, such as gambling (operated by the Jockey Club) and rice importation under government-

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[112] Singapore Government Directory <http://app.sgdi.gov.sg/> accessed 5 June 2011.

[113] Employment Statistics and Central Register of Establishments Section, Census and Statistics Department of Hong Kong, 2011. This figure does not include contract and temporary staff yet.

[114] Hasnita A Majid, 'Civil Servants Performance in Singapore' (*Channel News Asia*) <www.channelnewsasia.com/singapore> accessed 25 October 2010.

[115] Department of Statistic Singapore, *Singapore in Figures* (Singapore Government 2011) 12.

[116] International Monetary Fund, *World Economic Outlook Database: Nominal GDP List of Countries* (IMF April 2011) 9; IMF, *World Economic and Financial Survey: Slowing Growth, Rising Risks* (IMF September 2011) 12.

[117] Lam Pun Lee, *Competition in Energy* (The Hong Kong Economic Policy Series, City University of Hong Kong Press 1997) 1; Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 238.

[118] The Mandatory Provident Fund is a retirement protection scheme for employees into which employees and employers contribute an amount of salary funds on a monthly basis. MPF <http://www.mpfa.org.hk/ >accessed 10 September 2011.

granted franchises. Despite HK's free market reputation, the total proportion of economic activities controlled directly or indirectly by the government is vast.[119]

Even on the dubious premise that HK is a small economy, research has shown that small economies also need competition law.[120] According to Prof Michal Gal's research,

> [M]arket forces alone cannot achieve efficiency in small markets […] In the absence of appropriate regulation, the market will not, in many cases, sustain a desirable degree and form of competitive discipline among firms in the economy.[121]

Thus, being small in size is not a sufficient justification for rejecting a need of competition regime. Ho and Chan have also indicated that in a small market it is easier to communicate and reach anti-competitive agreements.[122] Many small economies[123] across the world have established competition laws which place pressure on domestic producers to be pro-efficient. This was acknowledged, for example, in New Zealand, with its population of 4.3 million, in parliamentary debates on this nation's equivalent of the Competition Act:

> [B]ecause the economy is small it is more important that competition rules exist, so that the consumer is not gouged and left to the mercy of a few suppliers who have rigged prices.[124]

[119] Hong Kong Democratic Foundation, 'Privatization - Hong Kong's Next Frontier' (March 1999) 10 HKDF 13-15.

[120] Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003) 5; Michal S Gal, 'The Effects of Smallness and Remoteness on Competition Law - The Case of New Zealand' (2007) 14 Competition and Consumer Law Journal ; Michal S Gal, 'Extra-Territorial Application of Antitrust - The Case of a Small Economy (Israel)' in Andrew Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press 2009).

[121] Michal S Gal, 'Competition Policy for Small Market Economies' (2003) 11(4) The Economics of Transition 749, 753; Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003) (n 120) 7.

[122] Suk-Ching Ho and Chi-Fai Chan, 'In Search of a Competition Policy in a Competitive Economy: The Case of Hong Kong' (2003) 37 The Journal of Consumer Affairs 74.

[123] Including the Faroe Islands (with a population of around 40,000), Malta (350,000), Israel (7.4 million), New Zealand (4.3 million), Slovenia (2 million), Latvia (2.2 million), Lithuania (3.2 million) and Estonia (1.3 million).

[124] (1985) 463 New Zealand Parliamentary Debates 4686.

In brief, being small is not an economic justification for being free from competition rules. In fact, it could be considered the opposite; nor has this factor been used as a basis for exemptions by other small economies.

4.5.3.2 Unfair Competition

It is untrue that the government and SBs have not engaged, and are unlikely to engage, in any unfair competition. In fact, there are many examples which challenge this justification. The government itself engages in the monopoly of land supply and use, which has distorted competition in numerous sectors. The Post Office Department offers express delivery services which compete directly with private companies. As discussed previously, many SBs, including the Mass Transit Railway Corporation, Ocean Park, Trade Development Council, Airport Authority, Tradelink and others are performing economic activities in the market. Given that these public entities hold privileges and advantages over the private sector, they are highly likely to engage in unfair competition.

4.5.3.3 Trustworthiness of Existing Competition Policy

The existing competition policy under the current competition environment has failed for the two decades of its existence. It was for this reason that the new competition law was drawn up. It is unconvincing for the government to ask the public to believe in a demonstrably malfunctioning mechanism (i.e., the existing competition policy) [125] under which its mishandling in competition issues can be rectified.

[125] Noting that the drawbacks of the competition policy can be seen in the Introduction (Setting the Scene) of this thesis.

4.5.4 Services Provided by the Private Sector

The government's fourth argument for a public sector exemption is that many services that are 'provided in other economies by the public sector are in HK *provided by the private sector*, making HK *one of the freest of most competitive economies* in the world'.[126]

On the contrary, the fact is that many services that are provided in other economies by the private sector are provided by the public sector in HK. For instance, trade shows, theme parks, courier delivery services, railway transportation and electronic trade services, which are maintained by private companies in other economies, are all under the auspices of the public sector in HK. As mentioned above, public bodies also provide public housing, hospital, and education services to more than half of the population in HK. In contrast, the UK government has proposed ways to create competition in all areas of public sector services, except for defence and the judiciary.[127] The mantra that HK is one of the freest economies in the world promotes a misconception, and it does not help to solve the domestic competition problem within HK.[128]

4.5.5 Anti-Competitive Conduct in the Private Sector

Lastly, the government argues that '[F]eedback from previous consultation exercises and subsequent discussion with stakeholders indicated that the *main* concern is anti-competitive conduct in the private sector'.[129] The word 'main' concedes by implication that there are also competition concerns regarding public entities' advantages and privileges in causing unfair competition, but relegates this as of lesser importance. Furthermore, it is difficult to see why the government insists that the exclusion of public entities had stakeholder support. During the consultation period, stakeholders, drawn from academia through to business sectors,

[126] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) para 15(c) (emphasis added).

[127] David Cameron, *Open Public Services White Paper* (Cabinet Office 11 July 2011) (London, 11 July 2011) <http://www.number10.gov.uk/news/speech-on-open-public-services> accessed on 10 August 2011.

[128] See the Introduction of this thesis.

[129] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) para 15(d) (emphasis added).

raised concerns that blanket exclusion could create a fragmentation in the law which may apply in private entities but not public ones, while both sectors engage in commercial and economic activities. [130] This thesis therefore finds this argument disingenuous. More importantly, if the government truly believes that it itself will not breach the competition law, then it should not be concerned about exemptions.

4.5.6 Baseless Justifications for Public Sector Immunity

Having discussed the above five justifications given by the government, its hostility to binding itself with a competition regime is clear, but its logic is not. In fact, the introduction of a general competition law is a golden opportunity to evaluate the merits of current government activities against strict economic criteria. It is the government's duty to ensure that acts by public entities do not undermine the competitive marketplace, and that both the public and private sectors are treated as equal before the law. Nonetheless, the Ordinance places the government above the law. The government's justifications appear to be inconsistent with the economic and legal principles involved in promoting market efficiency, consumer welfare, and a level playing field.

It is generally accepted that small economies require competition law to cope with anti-competitive conduct.[131] Moreover, many economies around the world operating market economies do not exclude their governments from competition rules. Wholesale government exemptions from the constraints of competition law within HK would appear to run entirely counter to the global standard.

HK has a serious need for a competition law that curbs the unfair competition of public entities due to its undemocratic political system in both the executive and legislature, which, due to cultural and political factors, is particularly prone to close links between the

[130] CEDB, 'Written submissions to the CEDB ' <http://www.cedb.gov.hk> accessed 9 August 2011

[131] Gal, *Competition Policy for Small Market Economies* (n 120) 10; Gal, 'Extra-Territorial Application of Antitrust - The Case of a Small Economy (Israel)' (n 23); Mcihal S Gal, 'Size Does Matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 South California Law Review 1437, 1440; Gal, 'The Effects of Smallness and Remoteness on Competition Law - The Case of New Zealand'; Charles Webb, 'Multum in Parvo: Competition Law in Small Economies Compared' (2006) 10 Jersey Law Review 350, 357.

government and businesses leaders.[132] Section 5.4.5 of Chapter 5 will elaborate the collusion between leading politicians and business conglomerate. Consequently, a political reform appears to be a pre-requisite to the competition law reform. This issue will be discussed in detail in Section 5.5 of Chapter 5.

4.6 International and Comparative Perspectives

Section 32 - Exemption to Avoid Conflict with International Obligations - has been added to the Competition Ordinance at a later stage of legislation, with much emphasis upon the fact that the government will legislate in line with the international standard.[133] It is an interesting line of inquiry as to whether the blanket exclusion in the Ordinance would meet the international standard. The government argued for blanket exclusion of SBs with reference to foreign competition law in this way: ‘These criteria [under section 5(2)] reflect the prevailing doctrines and case laws in *overseas jurisdictions* on the essential qualities of an entity which should be made subject to the regulation of competition law’.[134] Nevertheless, foreign jurisdictions simply do not support a blanket exclusion.

4.6.1 Foreign Jurisdictions

Having explored the HK regime, this section will compare its competition law to that in other leading jurisdictions. Their law and policies can provide a clear answer as to how wide the scope of the application of the competition law is, and whether it can cover public undertakings.

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[132] For example, the family-run firm (OOCL) of the previous Chief executive of HK (Tung Chee-wah) was partially owned by the richest tycoon in HK, Li Ka-shing. See Mark Williams, 'How Competitive in Hong Kong? The Need for Law' (Fifth United Nations Conference, Turkey, 14-18 November 2005).

[133] CEDB, *Legislative Council Brief - Competition Bill* (Hong Kong Government 2 July 2010), Section 32. Such a Section has never been mentioned in the 2008 Competition Proposals.

[134] Bills Committee on competition Bill, Overview of Major Components of the Competition Bill (CB(a)320/10-11(02)), para 27 (emphasis added).

4.6.1.1 European Union

The EU competition law applies both to public undertakings and private enterprises, though State intervention and control of economic behaviour takes many different forms.[135] As concerns the obligations of member states in relation to the competition rules on public undertakings, one provision in particular is of key significance. Article 106(1) TFEU stipulates that the competition rules apply also to public undertakings and any domestic law of member states that deprives the competition rules of their effectiveness would be in violation of the Treaty. Here, the term 'public undertakings' refers to State enterprises in the EU context.[136] The article applies not only to public undertakings, but also to private undertakings with special rights[137] or exclusive rights[138] which are known as 'privileged undertakings'.[139] The scope of Article 106(1) has been extended to an entity regardless of whether a member state remains the owner of the public undertaking or transforms its ownership into a private company as a privileged undertaking.[140] The EU uses a functional approach – whether an entity is an undertaking and is to be subject to EU competition law is determined by the character of its economic activities. Conversely, HK adopts a structural

[135] Richard Whish, *Competition Law* (Oxford University Press 2009). Examples of when a State measure infringes Art 106(1) include discrimination, conflict of interest, discrimination in favour of own down-stream arm, reservation of ancillary activity and extension of monopoly.

[136] 'Public undertaking' is a concept in EU law. At Article 2(1)(b) of the Transparency Directive the Commission stated that a public undertaking means 'any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'. This was amended by Directive 2006/111/EC OJ [2006] L 318/7. However, the term appears only in Article 106(1) of the Treaty but is not defined in the Treaty.

[137] In *France v Commission*, the ECJ indicated a difference between special and exclusive rights. Case C-202/88[1991] ECR I-1223, paras 31-47. In the amended Directive on *Telecommunications Liberalisation*, the Commission stated at Recital 11 that, special rights are 'rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument which, within a given geographical area, limited to two or more, otherwise than according to objective, proportional and non-discriminatory criteria, the number of undertakings which are authorised to provide any such service'. See Article 21(1)(g) of the Commission's Transparency Directive, 210.

[138] The concept of exclusive rights and dominant position are independent of one another. See Whish, *Competition Law* (n 135) 223. An exclusive right can be defined as 'a measure taken by a Member State in the exercise of its functions as a public authority, by which exclusivity is granted through any legal instrument in favour of a single undertaking, public or private, such exclusivity being for the exercise of a given economic activity in a given territory for a given period of time'. See also Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (Oxford University Press 1999) paras 1.09, 1.25-1.29.

[139] Commission's decision in *Second Operator of GSM Radiotelephony Services in Italy*. OJ [1995] L 280/49, para 6. See also Whish, *Competition Law* (n 135) 222.

[140] Mark Furse, *Competition Law of the EC and UK* (6 edn, Oxford University Press 2008); Daniel G Goyder, *EC Competition Law* (Oxford University Press 2003); OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41).

approach – whether an entity is under competition law scrutiny depends heavily on its private/public body status.

Article 106(1) TFEU acts as sturdy bulwark against anti-competitive conduct by public undertakings.[141] Although the HK government emphasises that the Competition Ordinance will follow the EU model,[142] there is no similar provision in the Ordinance. However, the Ordinance contains a similar clause on 'undertaking', defining it as 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes a natural person engaged in economic activity'.[143] In principle, the Ordinance should therefore apply to public entities if they engage in economic activities. Nevertheless, due to the blanket exclusion clause, almost all public entities will not be subject to competition law. The exclusion clause turns the provision from a sturdy bulwark to a rickety fence with respect to the monitoring of public entities' anti-competitive behaviour.

So, as seen above, the EU maximizes the scope of the competition regime applicable to public entities, whilst HK minimizes it. In other words, there are more EU public undertakings under competition law scrutiny than are excluded. Conversely, almost all public entities are not subject to the HK Competition Ordinance under Section 5. This anticipated result would be at odds with the HK government's rhetoric about adopting an EU-style competition regime.

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[141] The ECJ clearly defines an undertaking as any entity engaged in economic activity. See Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR 1- 1979. The ECJ focuses on an inability of the public entity to avoid abusing its dominant position while exercising the exclusive rights granted to it. This demonstrates an extension of the court judgment in *Macrtron*, which widened the application of Article 106. This raises the likelihood that a grant of exclusive rights would bring a potential breach of competition law. See Case C-179/90 *Merci v Siderurgica Gabrielli SpA*, ECJ [1991] ECR I-5889. It is unnecessary to the definition that an undertaking's activity is intended to earn revenues. See Case C-180/98 etc. *Pavlov* [2000] ECR I-6451.

[142] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) 2, 35, 36, 38, 50, 55, 58 & 64.

[143] Competition Ordinance, s 2.

4.6.1.2 United States

Generally, within the US jurisdiction there have been quite limited commercial activities in which governments and their enterprises are involved, as competition among private entities has been the norm for the US economy.[144] The US government has pursued self-limiting policies to deal with federal government corporations, especially for those established during crises.[145] For example, in 1917 and 1918, Congress created, among others, the United States Grain Corporation, the United States Emergency Fleet Corporation, the United States Spruce Production Corporation, and the War Finance Corporation, in response to mobilization and the necessity of resource allocation in order to sustain the basic operation of the US economy during World War I.[146] These entities were dissolved after the war ended. Similarly, during World War II, the US government seized enemy-owned assets by taking controlling interests in the US subsidiaries of German and Japanese corporations, such as the predecessors of the General Aniline & Film Corporation, Rohm & Haas Company, and the Schering-Plough Corporation.[147] The US government's policy and practice was to sell the firms and return them to the private sector as soon as possible.[148] In the recent global financial crisis in 2008, the federal government became the largest shareholder of a number of problematic corporations such as American International Group (AIG). When the crisis abated, the

[144] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41), 225. See also Jonathan Charles, 'United States Antitrust Policy from the Perspective of Austrian Economics', George Mason University 2001); Tim Frazer, *Monopoly, Competition and the Law: the Regulation of Business Activity in Britain, Europe and America* (Harvester Wheatsheaf 1992); David J. Teece, 'Dynamic Competition in Antitrust Law' (2009) 5 Journal of Competition Law & Economics 581; Carl Sverulov, 'Multinational Joint Venturing in the United States' (Nov 1991) Journal of Business Law 601.

[145] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41) 411; Paul Myron, 'The Work of the Alien Property Custodian' (Winter - Spring 1945) 11 Law & Contemporary Problems 76, 78; Arthur Garfied Hays, *Enemy Property in America* (Matthew Bender & Co 1923), 59.

[146] ibid. For background, see Hays, *Enemy Property in America* 23; Myron, 'The Work of the Alien Property Custodian' 80.

[147] See Office of Alien Property Custodian, *Terminal Report* (1946) 25, 26; Clifford G Hoderness and Dennis P Sheehan, 'The Role of Majority Shareholders in Publicly Held Corporations: An Exploratory Analysis' (1988) 20 Journal of Financial Economics 317, 319; Barclay Michael and Holderness Clifford, 'Negotiated Block Trades and Corporate Control' (July 1991) 46 Journal of Finance 861, 867.

[148] Stacey R. Kole, 'The Government as a Shareholder: A Case from the United States', 3-5; Scott E. Atkinson and Robert Halvorsen, 'The Relative Efficiency of Public and Private Firms in a Regulated Environment: The Case of U.S. Electric Utilities' (1986) 29 Journal of Public Economics 281, 287; Ronald Teeples and David Glyer, 'Cost of Water Delivery Systems: Specification and Ownership Effect' (1987) 69 Review of Economics and Statistics 399, 401.

government sold all AIG shares to the private sector.[149] In brief, in the US, a federal government's setting up of corporations or becoming a major shareholder in them is only a transitional and temporary arrangement driven by emergency contingencies.

By contrast, the HK government has not only failed to decrease its shares in SBs and GEs, but also created more of them over the past three decades. During the Asian financial crisis in 1997, the Hong Kong Mortgage Corporation (HKMC)[150] was tasked to stabilize the local banking sector and it did this by purchasing assets from local banks, thereby injected liquidity into the system. In this sense it may be compared to the US emergency interventions. However, despite the crisis concluding in mid-1999, the government has never shown any intention of dissolving the HKMC and has instead retained it and even assigned additional functions to it.[151] Furthermore, services of top-up mortgages have been recently extended to foreign jurisdictions in Shenzhen and in Malaysia's joint ventures.[152]

Another example is the Trade Development Council (TDC), a statutory body which was established more than four decades ago with the mission to promote HK's trade development while HK was economically vulnerable to build up its global trading network. Although HK is ranked as a developed economy and strong trading jurisdiction today, the TDC has kept increasing its wide range of trade promotion activities, from baby products to adult fashion, and from home electrical appliances to specialized laboratory and scientific equipment.[153] The examples of both the HKMC and the TDC clearly indicate that the government desires to encroach further into rather than to withdraw itself from market.

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[149] U.S. Department of the Treasury, 'Investment in AIG' <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/aig/Pages/status.aspx> accessed 22 March 2017.

[150] HKMC was registered under the Companies Ordinance in March 1997 but the Corporation was granted 'public sector entity' status four months later. It is 100 per cent owned by the government through the Exchange Fund, and the Financial Secretary of the HK government served as Chairman of the Board. It has been competing with private enterprises which provide services of mortgage, insurance and banking services. Pamela Lamoreaux, 'A Busy Year for Hong Kong Mortgage Corporation' (2005) Housing Finance International 33, 34-38.

[151] The additional functions include, but are not limited to, the launch of a 'Reverse Mortgage Pilot Scheme' (2011), a 'Special Arrangement of the SME Financing Guarantee Scheme' (2011), a 'Premium Loan Guarantee Scheme' (2010) and an 'Expansion on Scope of Eligible Borrowers in Mortgage Insurance Program' (2005).

[152] Williams, 'Hong Kong's Competition Bill: Lobbying, Opposition, Politics' (n 55).

[153] Hong Kong Trade Development Council < http://www.hktdc.com/en-buyer >accessed 16 July 2011.

4.6.1.3 Singapore

Both HK and Singapore are small, open economies in Asia, operating with a hybrid of Eastern and Western business cultures. They are often compared to each other.[154] Historically, the private sector was very weak in Singapore and the government stepped in as a State entrepreneur. It created Government-Linked Companies (GLCs) in order to maintain growth[155] and the government still holds substantial amount of shares.[156] As these sectors gradually matured, the government began to withdraw from activities that no longer needed to be undertaken by the public sector via privatization, liberalization and corporatization from the 1980s to 2000s.[157] For instance, SingPost and SingTel were privatised in 1993 in order to separate the Telecommunications Authority of Singapore's commercial operations from its regulatory role. Electricity generation and retail opened to competition between 1995 and 2000. Postal services were liberalized in 2007. Changi Airport was corporatized in 2009 and competition was introduced into the airport services market.[158]

By contrast, HK has been travelling in the reverse direction by further expanding its number of SBs and government enterprises (GEs) between the 1980s and 2000s.[159] For example, the Ocean Park Corporation transformed into an SB in 1987. Tradelink was set up in 1988 with exclusive rights to offer government electronic trade services. Its market dominance can easily be seen as it practically dominates the entire HK trade and logistics community.[160] The Hong Kong Mortgage Corporation was established in 1997, is wholly

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[154] Thomas Zhang, 'The great Hong Kong versus Singapore debate' *China Daily/Asia News Network* (9 November 2015).

[155] Entrepreneurship and Internationalisation Subcommittee (EISC), *Recommendations on Government in Business* (30 May 2002) 1.

[156] Yena Lim, 'Competition Law and State Regulation: Setting the Stage and Focus on State-Owned Companies' (Conference on Competition Law and the State: International and Comparative Perspectives , Hong Kong, 18 - 19 March 2011) 5. In a budget speech of 2002, delivered by the Ministry of Finance, it was stated at paragraph 1.26 that it is Temasek Holding Company which owns the government's shares in most GLCs. See Singapore Government Budget <http://www.mof.gov.sg/budget_2002/index.html> accessed 2 April 2011.

[157] ibid.

[158] Lim, 'Competition Law and State Regulation: Setting the Stage and Focus on State-Owned Companies', 18 March 2011 (n 156).

[159] Interviews with Ronny Tony, Holdon Chow and Mark Williams. They shared the same view that the HK government was the major player in this period, holding a monopoly in the market with its advantages of huge resources and information asymmetries.

[160] Williams, 'Hong Kong's Competition Bill: Lobbying, Opposition, Politics' (n 55).

funded and owned by the government, and offers and dominates the provision of second mortgage services to a wide range of customers in market.[161] Similarly, the Hong Kong Science & Park Corporation was inaugurated in 2001 as an SB for technology innovation.[162] A Disneyland was opened in 2005 with the HK government as a major shareholder.[163]

Although possessing a similar size of economy to that of Singapore, it is interesting to note that the total number of SBs in HK is far greater than that of Singapore. At the present moment, HK has about 580 SBs while Singapore has less than 70. Given such disproportionate numbers between the jurisdictions, the impact of distortion on the HK market may be larger than on that of Singapore.

The Singapore government's attitude toward the GLCs can be seen in a Budget Speech as early as 2002:

> Our philosophy is to have the GLCs operate as commercial entities. The government does not interfere with the operations of the GLCs … [and the] government will not favour GLCs with special privileges or hidden subsidies … The GLCs are expected to compete on a level playing field, and frequently in a global environment.[164]

In March 2011, Ms Yena Lim, the Chief Executive of the Singapore Competition Commission reiterated her view on GLCs thus:

> If the government (Ministries and Statutory Boards) engages in economic activities, the government approach is to adopt a Yellow Pages rule and abstain as far as possible. But if they do for whatever public policy reasons […], they are excluded from the Competition Act. In contrast, GLCs are not excluded. The GLCs are no

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[161] Hong Kong Mortgage Corporation <http://www.hkmc.com.hk> accessed 3 May 2011.

[162] Technology innovation covers the areas of Electronics, Biotechnology, Precision Engineering, and IT and Telecommunications. See Hong Kong Science and Technology Parks Corporation <http://www.hkstp.org/Hong KongSTPC/en_html/>accessed 16 August 2011.

[163] The LegCo approved the expansion plan in 2017. See Legislative Council Panel on Economic Development, 'Update on Hong Kong Disneyland Resort ' (27 February 2017) LC Paper No CB(4)570/16-17(05) 4-5.

[164] Ministry of Finance, Budget Speech 2002 on the economic role of the government <http://www.mof.ogv.sg/budget_2002/economic.html>accessed 18 July 2011.

> longer relevant to the Singapore government's objectives today, and the government will divest or dilute its shareholdings in a controlled way.[165]

In view of the above, the Singapore government has clearly shown its vision of combating anti-competitive conduct arising from their public entities. Even more significantly, its Competition Commission, in June 2010, has already issued its first infringement decision against a GLC, *SISTIC* case, which is owned by and had contractual agreement with a SB.[166] The Competition Appeal Board upheld the decision in 2012.[167] The decision against SISTIC showed that the Singapore Competition Act applies to all the commercial and economic activities carried out by public sector companies owned by statutory boards.

Comparatively, in HK no government document has revealed any criteria or mechanism to assess relationships between private entities and the government/SBs for testing if any possible anti-competitive conduct has been incurred. In terms of ensuring a level playing field for all enterprises, both private and private, to compete fairly in the market, HK lags far behind Singapore.

In view of these three foreign jurisdictions' experiences, it is clear that HK is far below the benchmark in regards to creating a level playing field between public and private entities. In essence, other jurisdictions' experiences can be important points of reference for HK, and can assist it in improving the scope of its application so as to fall into line with global trends, which are concerned with the promotion of economic efficiency and the protection of consumer welfare.[168] Based on these jurisdictions' experiences, it would appear that there are a wide range of options possible in order to tame the anti-competitive conduct

[165] Personal communication with Ms Yena Lim by email, the Chief executive of Singapore Competition Commission, 30 March 2011.

[166] Competition Commission of Singapore, Abuse of a Dominant Position by SISTIC.com Pte Ltd, CCS/600/008/07 (4 June 2010). This case was the first abuse of dominance case decided by Competition Commission and Competition Appeal Board. The Commission found that SISTIC, with a market share of 85-95 % and an increased booking fee for tickets, dominated ticket service provision in Singapore, proving that restrictions under exclusive agreements are harmful to competition.

[167] *SISTIC.com Pte Ltd v Competition Commission of Singapore* [2012] SGCAB.

[168] By comparison, the EU Treaty contains the commitment of the Union to a 'high level' of consumer protection. See Stephen Weatherill and others, 'EU Treaty Revision and Consumer Protection' (2004) 27 Journal of Consumer Policy 367, 5; Stephen Weatherill, 'The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) 13 European Business Law 497; Stephen Weatherill and others, *Consumer Protection Law* (Ashgate Publishing Company 2005).

of public entities, including corporatization, liberalization, privatization, the implementation of self-limiting policies, increased powers and functions for competition law enforcement agencies, the creation of specific provisions to monitor public entities and to ensure equal treatments between private and public entities, etc. Some, if not all, of these practices may be appropriately transposed to HK for its improvement.

4.6.2 International Organisations

As well as these international organizations also advocate practices and policies that promote a level playing field between public and private undertakings, and it is worth using these standards to investigate HK's place in a global perspective of competitive practices. The international organizations that will be discussed below are the Organization for Economic Co-operation and Development, the United Nations Conference Trade and Development, and the International Competition Network.

4.6.2.1 Organization for Economic Co-operation and Development (OECD)

The OECD has concluded that the GEs should be subject to the same competition law framework as private enterprises.[169] The OECD advocates that competition law alone is insufficient to ensure a level playing field for both GEs and private enterprises, and that the 'principle of competitive neutrality' should be introduced to the public sector. It believes that a necessary aim of policies should be the achieving of competitive neutrality between GEs and private enterprises.[170] The principles of competitive neutrality can be understood as a regulatory framework within which the private and public enterprises face the same set of rules, and where the State should not bring competitive advantage to any public enterprise.[171]

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[169] OECD, *Roundabout on Regulating Market Activities by Public Sector* (DAFFE/COMP/WD/26 2004)72; OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 140) 10; OECD, *Non-Commercial Service Obligations and Liberalisation* (n 64) 63.

[170] Jenny F, Judge of Supreme Court of France and Chairman of OECD Competition Law and Policy Committee (HK, interview on 19 April 2011 and email communication on 29 April 2011).

[171] OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41) 11.

The OECD believes that neutrality policies are of particular importance in recently liberalized sectors where they play a crucial role in levelling the playing field between former State monopoly entities and private entrants.[172] Since there are many public entities that hold monopolies available for liberalization in HK, the competitive neutrality principle is particularly useful for HK and would help to adjust its ineffective current competition policy once the liberalization process starts.

4.6.2.2 United Nations Conference Trade and Development (UNCTAD)

Similarly to the OECD and the EU, the UNCTAD, with its 'best practice' advice, recommends that competition law should be a law of general application in the market.[173] In a report, dated 2004, the UNCTAD emphasised that the blanket exemption extended to GEs has grave consequences. The exemption has allowed certain GEs to stifle private competition or overcharge consumers.[174] Additionally, the UNCTAD suggests that if there is a genuine need (e.g., performance of a pure social function) for seeking an exemption, such exemptions ought to be granted on a 'time-limited basis' and may be removed once there is a breach of competition law.[175]

Furthermore, according to the UNCTAD studies of various countries' economies, there are more similarities than differences among jurisdictions. In almost all of the economies reviewed, competition law is applicable to both public and private enterprises.[176] There appears to be no sound reason why HK should be an exceptional case. Based on the UNCTAD's recommendations, HK warrants a general competition law that can cope with

[172] Ibid 1; OECD, *Non-Commercial Service Obligations and Liberalisation* (n 64) 23.

[173] R.G. Lipsey and K. Lancaster, 'The General Theory of Second Best' (1956-57) 26 Review of Economics and Studies 119; UNCTAD, *Foundations of an Effective Competition Agency* (UNCTAD Secretariat Report, 9 May 2011) 10 .

[174] Michal Gal, *Prerequisites for Development-Oriented Competition Policy Implementation* (UNCTAD/DITC/CLP/2004/1 2004) 102, 103.

[175] UNCTAD, *Application of Competition Law: Exemptions and Exceptions* (2002) (2002), 35; UNCTAD, *Foundations of an Effective Competition Agency* (n 173) 34; Philippe Brusick, 'UNCTAD: towards a New Multilateral Framework' (1997) 25 International Business Lawyer 477, 480.

[176] UNCTAD, *Application of Competition Law: Exemptions and Exceptions* 35; UNCTAD, *Foundations of an Effective Competition Agency* 11; UNCTAD, *The Importance of Coherence between Competition Policies and Government Policies* (10 May 2010) 21.

public bodies' monopolies, regardless of the small economy factor or other government justifications.

4.6.2.3 International Competition Network (ICN)

With respect to the area of public entities, the ICN has done considerable work in relation to State-created monopolies.[177] A special Unilateral Conduct Working Group (UCWG) has been established within the ICN. The UCWG regularly reviews the challenges experienced by State-owned monopolies or recently privatized State-created firms that are dominant or have substantial power in a given market. It has observed that some jurisdictions exempt State-created monopolies from the application of unilateral conduct rules.[178] On this basis, the UCWG issued a set of 'Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws' in 2006-2007. As a member of the ICN since 2013, there is high hope that HK would follow this set of recommended practices. This document highlighted the ICN's belief that competition authorities, in their enforcement roles, should:

> [F]irstly, protect and promote competition by taking appropriate enforcement action against anti-competitive unilateral conduct by state-created monopolies; secondly, treat state-created monopolies like private undertakings by using standard antitrust analysis to assess dominance market power, regardless of state ownership or legal status of the firm; thirdly, possess effective investigative tools and remedies to carry out successful enforcement to unilateral conduct rules regarding state-created monopolies; and finally, apply sound antitrust analysis and remedies when investigating and deciding potentially anti-competitive unilateral conduct of state-created monopolies.[179]

The opinions of these international organizations are representative of their member countries. To maximize the functions of pro-competitive policies and practices, they make many insightful suggestions such as principles of competitive neutrality, recommended practices on State-created monopolies, restrictions for granting exemptions, and defining the advocacy and enforcement roles of competition authorities. HK being a member of some of

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[177] ICN, 'A Statement of Mission and Achievements Up Until May 2005' (2006) 2; Luis Santos, 'Implementation of ICN Recommended Practices' (2004) 7 Global Competition Review 121, 122; ICN, 'Should Global Business Care about the ICN?' (2004) 7 Global Competition Review 19, 21.

[178] ICN, 'A Statement of Mission and Achievements Up Until May 2005' (n 177) 1.

[179] ICN recommended 'Practices on State-Created Monopolies Analysis Pursuant or Unilateral Conduct Laws'. The full text is available at <http://www.internationalcompetitionwork.org/media/library/unilateral_conduct>accessed 14 July 2011.

the above organizations, HK cannot afford to ignore the opinions of these international organizations if it wants to conform to the standards expected of an international city.

4.7 Suggestions to Widen the Scope of the Application of the Competition Law

The non-application of this law to government enterprises and SBs represents a significant gap in the Competition Ordinance. The jurisdiction of law should extend to all public entities, including governmental departments, SBs, hybrid SBs and GEs. The following suggestions are proposed in order to fill the current gap in the Ordinance.

4.7.1 Adjustment of Scope and Abandonment of Protective Approach

The EU forms HK's government preferred model for delineating the scope for exempting public entities in HK. The government has stated that, 'our inclination is to follow the EU approach, as it would allow the exemption to be tailored specifically to the HK market and adjusted as market conditions change'.[180] Article 106 TFEU and European case law, including recent decisions by the ECJ, clearly indicate that EU competition law is to be considered applicable to all public entities, covering both the State and its businesses and private companies with special and exclusive rights. Exemptions may only be granted on narrow and clearly-defined bases. The OECD shares the EU's view that exemptions should only be granted in a few situations.[181] The UNCTAD has expressed, in strong language, that a wholesale exemption for GEs has no credible rationale.[182]

Accordingly, in order for a level playing field to be created between the public and private sectors, the economic activities of both private and public entities should be monitored within the scope of competition law in HK. The granting of exemptions should be

[180] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) 2, 26, 35, 36, 38, 50, 55, 58 & 64.

[181] Interview with Federic Jenny, Judge of Supreme Court of France and Chairman of OECD Competition Law and Policy Committee (HK, interview on 19 April 2011 and email communication on 29 April 2011; OECD, *States Owned Enterprises and the Principles of Competitive Neutrality* (n 41) 10.

[182] UNCTAD, *Application of Competition Law: Exemptions and Exceptions* 32.

based on clearly defined principles which take no account of whether the applicant is a private or public entity. To this end, current scrutiny should be expanded to cover all public entities (including government, SBs and GEs) that are engaged in economic activities. Additionally, scope for exemptions should be adjusted to cover eligible private entities which provide, for example, significant social services. In other words, the scope of both exemptions and coverage should be properly adjusted in order to give private and public sectors equal footing before the law. Whether an entity should be covered by or be exempted from the law should be based on its conduct, its operation or its effect on the competitiveness of the market, rather than its status.

The decision on the exclusion of public entities is to avoid being subject to Competition Ordinance. The author does not have doubts on the government's ability to reduce the unreasonably wide exclusion. However, the concern is that the government wants to maintain a protective approach – continuing to protect the existing interests and privileges of the entities generated from their public status. In the long run, such a protective approach would only make these public undertakings less competitive in the market. It is therefore highly desirable to abandon the protective approach for public undertakings.

4.7.2 Undertakings – a Functional Approach

The HK government has proposed a structural approach to determine the scope of exclusions for public enterprises based on their status. By contrast, in the EU the Court decision in *Diego Cali* case utilises a functional approach to consider whether an undertaking should be within the competition regime.[183] As such, 'all kinds of entities' can be brought within competition rules.[184] The Court also decided in *Commission v Italy* that an entity, even if it is a part of the State, qualifies as an undertaking.[185] Richard Whish suggests that it is appropriate that a

[183] C-343/95 *Diego Cali & Figli* [1997] ECR l-nyr 55, 56.

[184] Goyder, *EC Competition Law* 60.

[185] Case 118/85 *Commission v Italy* [1987] ECR 2599. It is interesting to note that, based on the functional approach, a Lithuanian Court has decided that a police force may be subject to competition regimes when it is acting as an undertaking. Considering the nature of policing, it is clear that the concept of 'public utility' is essential. See Stephen Weatherill, 'Buying Special Police Services' (Spring 1988) Public Law 106. See also *Harris v Sheffield United Football Club Ltd* [1988] QB 77 (CA).

functional rather than a formalistic approach should be taken as to the meaning of undertakings' exclusive rights.[186]

A follow-up question to ask regarding whether an entity is an undertaking depends on whether the particular activity could be pursued in competition.[187] An economic activity is assumed in cases where an entity offers services or goods to the market when it has not only the opportunity to make a profit, but also bears the financial risk of the operation.[188] In HK, theme parks, exhibition shows, railway transport and electronic trade services are evidently economic activities which are pursued in competition. Therefore, it is far more pertinent to use a functional approach to determine whether the entity qualifies as an undertaking by examining the activity of the entity in question.

4.7.3 Deleting the Exclusion Clause

At present, there are a number of options for public bodies in order to immunise themselves from competition rules, for example and as discussed by this thesis, defining undertakings,[189] exemptions on grounds of economic benefits,[190] exemptions on public policy grounds,[191] and a blanket non-application to government and statutory bodies.[192] These clauses are wide and vague, and public entities may interpret them to their advantage. They are also unduly complex and some of them are, in part, overlapping. Even if all of the above exemption and exclusion clauses did not exist, the government would still generally be exempt from competition rules because the Ordinance does not expressly provide that it shall apply to the government, according to Section 66 (1) of the Interpretation and General Clauses Ordinance. Section 66 stipulates,

[186] Whish, *Competition Law* (n 135) 222.

[187] Sauter Wolf, 'Services of General Economic Interest and Universal Service in EU Law' (2008) 33 European Law Review 167, 169.

[188] Okeoghene Odudu, 'The Meaning of Undertaking Within 81 EC' (2004-2005) 7 Cambridge Yearbook of European Legal Studies 209, 214.

[189] CEDB, *Public Consultation on Detailed Proposals of a Competition Law* (n 21) ch 1, para 2.

[190] Competition Ordinance, sch 1, s 3.

[191] Competition Ordinance, s 31.

[192] Competition Ordinance, ss 3-5.

> [N]o ordinance … shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.[193]

Thus, the government is comprehensively shielded from competition law. The ideal solution to this problem would be to delete Clauses 3 to 5 (non-application to government and statutory bodies) from the Ordinance entirely. This would mean that public entities would *not* be free from competition laws by default. Yet these public entities would still have the opportunity to be exempted on social or policy grounds under existing exemption clauses. To prevent the abuse of these exemptions, the social and policy values that would deserve protection must be clearly defined by the legislators who debate the Ordinance.

4.7.4 Procedural Consideration for Exemption

Under the *negative listing* in Clause 5 of the Ordinance, the ExCo may, based on its own judgment, evaluate and select a number of SBs from an initial total of around 580 SBs. Those selected SBs were, on a preliminary basis, deemed ineligible to enjoy exclusion privileges. Of these SBs, the LegCo subsequently vetted which SBs were truly ineligible. In other words, the SBs which were selected by the ExCo in the first place would be immediately free from competition rules, without being reviewed by the LegCo. In fact, the ExCo only submitted six SBs[194] and so the ExCo easily circumvented the LegCo's review of the majority of SBs during the legislation process.

4.7.4.1 The Positive Listing Approach

Conversely, the author's recommended *positive listing* approach would instead review targets in a mode of inquiry that is not restricted as to whether or not they are SBs but rather whether they are public entities, inclusive of government departments and GEs. A positive list would

[193] Interpretation and General Clauses Ordinance, s 66.

[194] Legislative Council Brief, 'Competition (Application of Provisions) Regulation and Competition (Disapplication of Provisions) Regulation' (n 27).

be comprised of public bodies initiated and selected by the ExCo. The selected public bodies would potentially be eligible for an exemption of conduct rules, with their eligibility being assessed by the Competition Commission. Finally, the list would be further reviewed and approved by the LegCo. The non-listed SBs would be subject to competition law. Under this arrangement, the ExCo would be likely to place most SBs on the positive list so that the LegCo could play a greater role as a gatekeeper role via its examination of which should truly qualify for exemption. The four-step positive listing approach is described in greater detail below.

4.7.4.2 A Four-Step Exemption Application Procedure

As a first step, the ExCo would propose entities for exclusion. While the ExCo lacks sufficient expertise regarding competition for deciding the eligibility of public entities for exclusion, it may still recommend which public entities would be qualified for exemption according to the assessment rules set by the independent Competition Commission. Independence from politics and business is especially important in HK, where executive power is dominant in the design of the political system, with few checks and balances from legislature. Furthermore, there have been increasing allegations of collusion between commercial oligarchs and the centres of political power.[195] A number of recent corruption cases with top official involvement[196] have raised the question of whether governmental decision-making is free from influence from tycoons. Hence, assessment power would be better reserved for an independent body such as the Commission.

[195] Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (n 117) 300.

[196] The current chief executive (the highest governmental position), C Y Leung, faced separate investigations by the graft-buster agency and Australian police, in connection with a HK$50 million deal with an Australian firm. See Joyce Ng, James Griffiths and Benjamin Robertson, 'C Y Leung faces separate probes of HK$50 million deal with Australian firm' *SCMP* (HK, 10 October 2014). The Independent Commission Against Corruption (ICAC) has had an ongoing investigation against the former chief executive, Donald Tsang, substantiating the possibility that he had an unreasonably low rent deal with a businessman for a luxury flat in China, and accepted complimentary rides in private yachts for travelling. The former Commissioner of ICAC (Timothy Tong Hin-ming) has been facing a probe into the accusation that he had accepted expensive alcohol (mao-tai liquor) and given out expensive gifts to Chinese mainland officials. See Stuart Lau, 'Hong Kong justice chief Rimsky Yuen says outcome of Donald Tsang corruption probe will soon be known' *SCMP* (HK, 11 March 2015). The former chief secretary for administration (second highest governmental position), Rafael Hui, was sentenced a seven-year jail term and was fined HK$11.8 million due to his acceptance of corruption from a real estate tycoon. See Sneha Shankar, 'Hong Kong court orders jail terms to ex-government official Rafael Hui Si-Yan, Billionaire Thomas Kwok' (23 December 2014) International Business Times.

In the next stage, the Commission could then prepare a list of SBs for the LegCo to approve by simple majority voting in whole house rather than through separate voting.[197] Given that the ExCo's decision-making process is not transparent, it would be better to minimize its discretionary power and to allow the LegCo to make the final decision. Stakeholders in the economy and society would likely accept the decisions of elected legislators. The LegCo could consult the opinions of the ExCo and the Competition Commission at any stage if necessary. The unlisted public entities would automatically be subject to the competition law framework. Although the ExCo might initiate the list, public entities appearing in the list would be examined by the Commission, with its competition law expertise, and then re-examined by the LegCo, a process which has greater democratic legitimacy.

At step three, due to the large number of SBs, reasonable time is required to complete the vetting process. Therefore, a three-year transitional period in which all public entities would be given temporary exemptions would be appropriate so as to avoid an unnecessary postponement of the Ordinance's approval, in order to give enough time for the outcomes of the vetting process to be known. Postponement would also allow the government to make the necessary adjustments for the economic activities of those public entities which are likely to be subject to competition rules if the government still wishes to retain them in the positive list for exemption. Accordingly, there are two types of public entities which may enjoy exemptions during the vetting period: qualified ones for a standard exemption[198] and uncertain ones for temporary exemption.[199] After three years of temporary exemption, the uncertain public entities would become subject to competition rules if they still engage in economic activities without an overriding reason. They may reapply if they believe they are eligible to comply with the law in due course.

The final step would be comprised of the Competition Commission, after the granting of a temporary exemption, conducting a periodic review of renewal applications from the

[197] See note 137 of Chapter 2.

[198] Qualified public entities refer to those which are exempted from competition law due to their fulfilment of all substantive and procedural requirements.

[199] Uncertain public entities refer to those which have not yet fulfilled the necessary requirements for exemption but are still temporarily not subject to competition during the three-year transitional period.

qualified public entities on an annual basis. Thus, the Commission can be a gatekeeper to regularly assess the latest changes, if any arise.

In summary, the current proposal for the ExCo to provide exemptions after an opaque decision-making process is unacceptable. This is against procedural justice and raises serious conflict of interest concerns. The government should ensure not only that justice is done, but also that justice is seen to be done. Accordingly, due process can be fostered under the law. The process suggested above aims to provide a fair, open and transparent process for approving the applications. The benefits of this approach are that it not only prevents the abuse of executive power for its own interests, but that it also has a greater chance of earning the support of the private sector and the general public.

4.7.5 Substantive Consideration for Exemption

Substantively, in order to effectively evaluate whether a public enterprise should be awarded an exemption, the Competition Commission should adopt guidelines for categorising eligible entities' activities, make exemptions temporarily, decide cases on a rule of reason basis and preliminarily list public entities for exemption. Furthermore, the exemption application process must be headed by someone credible and independent.

4.7.5.1 Categorisation of Public Entities' Activities

Government activities should be divided into three categories when considering whether they should be bound by competition rules. In the first category, sensitive policy-making functions, and those with strategic importance (e.g., disease control, law enforcement, judiciary, security and defence[200]) should never be subject to competition law. The second category is comprised of necessary public service areas (e.g., education, health care) where public entities may compete with private providers, wholly or partly, directly or indirectly. However, owing to possible overriding social value such as the solidarity elements that Article 106(2)

[200] Central People's Government is responsible for the defence of Hong Kong. See Basic Law, arts 14, 18, 19.

TFEU acknowledges, it is arguable that temporary and revocable exemptions may be given in these sectors. Any exemption under this category should be clearly specified to limit market distortions. The last category is purely business and commercial activities that private companies can adequately carry out, such as express post, entertainment in theme parks, airport operation, trade shows and exhibitions. For public entities in this category, exclusions or exemptions should never been given. This thesis argues that, at a minimum, the third category should certainly fall into the jurisdictional scope of competition legislation.

In the interests of legal certainty, the law should set out objective and economically-based criteria to distinguish these three categories. As regards the second category, the substantive principle applies: this is when there is a substantial societal interest in consumer welfare, and there is no way to achieve the objective other than by granting an exemption, and the exemption is narrowly tailored to assure the minimum negative impact on consumer welfare, then it may be given. To further clarify the interpretation of criteria, it is suggested that the Competition Commission in HK issue some guidelines and examples for its interpretations. The guidelines and criteria set out in Article 101(3) TFEU[201] are good starting points for reference.

4.7.5.2 Exemption on a Time-Limited and Revocable Basis

International bodies maintain that exemptions should be granted only on a time-limited basis. All jurisdictions referenced in this study follow this advice. In line with the international standard, the author suggests that the proposal for ‘permanent exclusions’ should be converted to ‘time-limited exemptions’, which may be adjusted to changing market realities. Temporary exemptions are preferable, as they may be revoked or removed in cases where a detrimental effect on competition or a violation of the law occurs. Therefore, each exemption application should be precisely defined in scope and in duration, and the approval may be granted with a ‘sunset’ clause and provision for periodic review.

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[201] The present guidelines examine four conditions of Article 101(3) TFEU: efficiency gains; fair share for consumers; indispensability of the restrictions; and no elimination of competition.

4.7.5.3 Rule of Reason Basis

After the enactment of competition law, eligible public entities can seek an 'exemption on public policy grounds', as discussed above. The author agrees that this exemption should be maintained for implementing essential public policies. Nonetheless, the proposal for a *per se* exemption granted at the ExCo's discretion raises the question of whether an entity enjoys an exemption due to its real achievement of public policy objectives or because of favouritism. Serious doubt may be cast on the impartiality of the ExCo's decisions, and public confidence can hardly be built in this context. Instead, it is more appropriate to adopt a rule of reason basis in the exemption process to assess whether the particular public entity is subject to competition on a case-by-case basis.

The review of each case should identify whether there are indeed overriding benefits that serve broader economic or consumer interests. Exemptions, in principle, should be as little restrictive of competition as possible. As in the UK, approval should only be granted on 'exceptional and compelling reasons of public policy'.[202] The HK Competition Commission should be the institution to assess and approve a case after consulting with the ExCo. This not only ensures that a quality decision is made by the appropriate professional body, but also assures the public of a decision's procedural fairness.

4.7.5.4 Services of General Economic Interest (SGEI)

Another exclusion for public entities under the Competition Ordinance is in undertakings 'entrusted by the government with the operation of services of general economic interest', but only in so far as the competition rules would obstruct the performance of the particular tasks assigned.[203] Similar provisions can be found in the competition laws of the EU,[204] the UK,[205]

[202] The Competition Act 1998 (Public Policy Exclusion) Order 2006 No. 605, 1.

[203] Schedule 1 (3) of Competition Ordinance. Consumer Council, *Feedback to Detailed Proposals for a Competition Law* (2008) 52.

[204] TFEU, art 106(2).

and Singapore.[206] SGEI in Article 106(2) TFEU can be commonly considered to include: publicly accessible supply of energy, telecommunication, postal services, transport, water, and waste disposal services.[207] The Ordinance already has an exclusion for SGEI, which ensures that SBs will not be prevented from carrying out their statutory missions, without the need for a blanket exclusion of such bodies.

In order to enhance legal certainty in enforcing this vague clause, it is recommended that any regulations issued under the law includes a list of services that are designated to be of general economic interest. Such regulations may also reduce costly and time-consuming litigation. In the government's interpretation, 'general economic interest' is viewed mainly as benefits which can ensure efficiency in the market place.[208] Unfortunately, consumer interest is almost ignored in the Ordinance.[209] Contrary to this stance, a high level of consumer protection is part of EU's mission.[210] Therefore, the author suggests that 'consumer interest' should be given a higher profile in the Ordinance to ensure that HK develops a competitive environment in which consumer welfare is emphasised, as discussed in Chapter 1.

4.7.5.5 Enhancing the Roles of the Competition Commission

The ICN's recommendations to enhance the enforcement roles of a competition authority during privatisation and liberalisation[211] are all beneficial to tackling the problem of State-created monopolies. However, a prerequisite to implementing the ICN's recommendations is that the HK Competition Ordinance needs to be amended so as to give the Competition

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[205] UK Competition Act, Sch. 3, paras 4-5.

[206] Singapore Competition Act (Ch. 50B), Third sch., paras 1-2.

[207] Green Paper on Services of General Interest, COM (2003) 270 final, para 20: 'The term 'public service obligations' is used in this Green Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met.

[208] HK Competition Ordinance, C879, C889, C1027.

[209] The term 'consumer' is only briefly mentioned once in the entire Ordinance, in which there are 176 sections and 142 pages.

[210] Stephen Weatherill and others, 'EU Treaty Revision and Consumer Protection' (n 168) 5-7, 13-14, 18; See also Stephen Weatherill and others, *Consumer Protection Law* (n 168).

[211] ICN: 'Practices on State-Created Monopolies Analysis Pursuant or Unilateral Conduct Laws' (2006-07) <http://www.internationalcompetitionwork.org/media/ >accessed 14 July 2011.

Commission sufficient powers of assessment, investigation, and adjudication for handling complaints against public entities. Its powers currently appear to focus on anti-competitive behaviour in the private sector only. As mentioned above, the independence of the Commission from politics and business is essential to prevent collusion between the government and industrial tycoons. In order to maintain public confidence and a positive perception of the Commission when public bodies are involved in the complaints process, the Commission has to be free from intervention from the government.

Structurally, one would recommend that the Commission Board members who are appointed by the CE should be approved by the LegCo. Further, the relevant committee of the LegCo should closely monitor the selection and appointment of the chairperson to the Commission Board. With increased power, enhanced independence, and sensible procedural reform, the HK Competition Commission could become comparable to other jurisdictions' competition authorities in terms of policing public entities.[212]

In summary, there are many suggested improvements that would counter the defects that this thesis finds in the HK Competition Ordinance, from taking a functional approach to the assessment of SBs, getting rid of blanket exemptions and permanent exemptions in favour of transparently assessed, time-based exemptions, maintaining a positive- instead of negative-listing strategy and adhering to a rule of reason basis for decisions through an increased role of the Competition Commission's expertise. With these procedural and substantive improvements, the scope of exemptions on public entities in the Ordinance tends to be more limited, the procedure more accountable and transparent, and the substance would have greater legal and economic coherence.

4.8 Conclusion

This chapter questions the government's stated reasons for the exclusion of public entities. While the comparable standards of other jurisdictions are examined and can cast light on the

[212] For example, the UK's OFT has the power to apply competition rules to government enterprises under the Competition Act 1998. The Singapore Competition Commission issued its first infringement decision against a government-linked company in 2010 under its Competition Act 2004.

HK government's failings, it is important to remember at the same time that one should not merely transplant the laws from one jurisdiction to another without adjusting for domestic realities. While the experiences in other jurisdictions and the opinions of international bodies provide a useful framework for HK within which to draft its exemptions and exclusions in the competition law, the author has carefully reviewed the scope of competition law application in these other jurisdictions and suggested accordingly the adoption of more appropriate measures tailored to HK's competition environment. Recognising that there is no magic formula for reform, one should not expect all anti-competitive problems to be resolved immediately. However, the recommendations are able to improve the scope of competition law so as to bring a step closer towards a level playing field between the public and private sectors in HK. More importantly, there is a need for political will to give up the current protective approach in favour of public undertakings.

5 Correlations between the Three Spheres, Land Hegemony, and Political Regime

5.1 Introduction

The previous chapters considered how each of three distinct dimensions (objectives, institutions, and scope) individually influences the effectiveness of the competition system. This chapter reflects on the interaction and interdependence between these dimensions and their susceptibility to external forces.

This chapter comprises of two parts. The first part serves as an integrative discussion, which utilizes the preceding chapters' analysis to illustrate the correlations between the three dimensions. The second part will investigate two significant external factors – land hegemony, which produces a significant ripple and spiral effect within the competition environment, and the political regime, which may hold a key to providing a long term solution.

5.2 Objectives and Institutions

Chapter 1 has identified economic efficiency as a prime objective, and consumer welfare as a secondary objective in the HK competition regime. The following sections are set to explore how the institutions may be responsible to pursue these objectives. The relevant institutions can broadly include competition institutions (Competition Policy Advisory Group and the Competition Commission), other law enforcement institutions (Securities and Futures Commission, Hong Kong Monetary Commission, Independent Commission Against Commission, and the police) and political institutions (government and Legislative Council).

5.2.1 Competition Institutions

This section will explore how effectively the competition institutions (Competition Policy Advisory Group (COMPAG) and the Competition Commission) have been able to achieve their objectives. The oldest competition institution, COMPAG, is unable to investigate complaints and impose penalties because no law has provided such powers to COMPAG. The weaknesses and lack of determination of COMPAG to combat the anti-competitive conducts of both public and private undertakings can be seen in its statement as follows:

> COMPAG will *invite* all government entities to adhere to the Statement [on Competition Policy], propose initiatives for furthering policy objective.[1]
>
> The Government calls upon all businesses to cease existing, and refrain from introducing, restrictive practices that impair economic efficiency or free trade on a *voluntary basis*.[2]

It is noticeable that COMPAG merely performs as an advisory body which seems to politely ask the undertakings to comply with competition policy by invitation and on voluntary basis. Even the government has admitted that such an institution without appropriate statutory power is unable to cope with the alleged anti-competitive behaviour.[3] As a result, the public are compelled to put their trust in the Competition Commission with its actual power given by the Competition Ordinance. In the following, we will examine the management team composition, senior executive arm, and the performance of the Competition Commission in its first year. As will be illustrated, the composition of position holders may have a direct influence on the effectiveness and enforcement attitude of the regime.

Although the Competition Commission should implement competition policy and law in accordance with the objectives, the management team has discretion to decide how they achieve the objectives. When the board members are provided with flexible and broad objectives, there is scope for the members' own affiliations and interests to be taken into account. Additionally, there is only one expert in competition law among the fourteen board members.[4] These members possess vital power to approve or disapprove all major decisions

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[1] COMPAG Secretariat, 'Agenda Item 5: Effective Implementation of Hong Kong's Competition Policy' (2003) Third Meeting of the Economic and Employment Council EEC Paper 11/04 , para 11 (emphasis added).

[2] ibid para 12 (emphasis added).

[3] Legislative Council, 'Report of the Bills Committee on Competition Bill' (2012) LC paper No CB(1)1919/11-12, para 3.

[4] Thomas Cheng has been a member since the establishment of the Commission. He has specialized in competition law in his teaching.

and oversee the work of the executive arm of the Commission.[5] Its composition indicates that the majority of representatives are from or closely associated with the business sector. Eight out of thirteen or fourteen votes (depending on whether the chairperson takes part in the voting) is sufficient to determine whether investigations or other actions will take place. This has been reviewed in Section 2.3.3 of Chapter 2. The ex-legislator and former vice chairman of the Competition Bill Committee of LegCo, Ronny Tong, commented that the board is 'largely composed of former businessmen who were once connected to conglomerates and opposed to the rules. I hope those people will not be an obstacle to future investigations.'[6]

The management of the senior executive arm may have its own limitations in handling local anti-competitive conducts. Among five senior executive positions, four of them are expatriates from either Australia or the UK.[7] Moreover, HK is a city where 96 per cent of its population speak Cantonese.[8] Many anti-competitive issues occur in undertakings involving local people who do not speak English. Many suspected big-rigging contractors or sub-contractors in the construction industry do not speak English at all. Their written and verbal commercial agreements are conducted in Chinese. Language limitation, therefore, could be another barrier preventing them from effectively implementing their duties. They are made to rely on interpreters or middle-ranking staff's translated reports, which, to a certain extent, impair the accuracy of the investigation data received. As a result, the implanting of officials in an environment where they may lack understanding may hinder the efficacy of the Commission's operation.

Although competition law has been in action since December 2015, the Competition Commission has been slow in using it against even hard-core anti-competitive conducts in the first fifteen months, perhaps due to the time it takes to adjust to a new process. Bid-rigging is so widespread within contracts for building maintenance and renovation in HK that the price

[5] Hong Kong Competition Commission, 'Annual Report' (2016) 18.

[6] Denise Tsang, 'Head of Hong Kong's new Competition Commission warns private firms there's no escape from regulatory net' *SCMP* (HK, 14 December 2015).

[7] The executive management include Ms Rose Webb from Australia as chief executive officer, Mr. Timothy Lear from Australia as executive director (operations), Mr. Philip Monaghan from the UK as executive director (general counsel) and Mr. Dennis Beling from the UK as chief economist.

[8] Ester Tran Le, 'Hong Kong: Mandarin Supplants English as Second Most Popular Language' (24 Feb 2012) International Business Times.

for the works has often been marked up at least 100 per cent.[9] In HK, there are 19,000 private buildings over thirty years old.[10] It is mandatory to implement inspections and conduct repair works. The government launched a US$450 million Operation Building Bright (OBB) scheme to subsidize the work for these buildings. It is tempting for unscrupulous contractors to commit bid-rigging for this gold mine under OBB.[11] The Commission has conducted a study on 700 confidential tender records from 500 maintenance projects, and from observing the link between the cost and the bid, it is evident that the results have already suggested that bidding patterns are not in line with a competitive environment. Nonetheless, the Commission has hesitated to conclude that any collusive activities had taken place, although it has received substantial complaints from property owners urging a bid-rigging investigation on tenders of building maintenance.[12]

Up until December 2016, the HK Competition Commission received a sizable number of complaints − close to 1,900 − about anti-competitive conducts.[13] The Commission stated that they have mainly been carrying out education and campaign work in the community. Of course, this may be a legitimate agenda, but one cannot help wonder about the enforcer's zeal. The Democratic Party chief executive and lawmaker Cheuk-ting Lam commented that 'relying on the Competition Commission can't solve the problem as the market is now highly controlled by bid-rigging syndicates.'[14] Although the Commission had launched the 'fighting bid-rigging cartels' campaign, the phenomenon of on-going and intensive bid-rigging has not disappeared. In the Commission's annual review in 2016, chairlady Anna Wu admitted that

[9] Samuel Chan, 'Planned rally to urge for crackdown on bid-rigging in renovation projects' *SCMP* (HK, 11 March 2014).

[10] Thirty-year-old buildings are regarded as old in Hong Kong. Yvonne Liu, 'Clean up buildings renovation sector, Hong Kong Institute of Surveys says' *SCMP* (HK, 28 May 2014).

[11] Tanna Chong, 'Four more Sha Tin flat owners threatened for opposing HK$260m renovation' *SCMP* (HK, 6 June 2014).

[12] Richard Wong, 'Hong Kong is the kind of crony capitalism and that should be a worry for the Competition Commission' *SCMP* (HK, 7 June 2016).

[13] The Competition Commission chairlady said, 'what worries me more is that we are going to get a lot of appeals and judicial reviews.' This was interpreted that the Commission's fears of appeals of judicial reviews. See Policy and Regulatory Report, 'Hong Kong authority to take two or three cases to tribunal annually,' PaRR, 14 Dec 2016. In comparison with other young competition regimes, the India Competition Commission has received about 500 complaints since 2009 while the Singapore Competition Commission has received less than 400 complaints since 2006. See Arpinder Singh, 'Calibrating the pulse of Competition Law in India' (2016) Ernest & Young 6; Singapore Competition Commission, 'Annual Report' (2016) 19.

[14] Timmy Sung, 'Watchdog urged to investigate building maintenance bid-rigging' *SCMP* (HK, 28 August 2016).

the Commission has not settled well in its law enforcement role.[15] The Commission was under severe criticism for relying solely on education and campaigning whilst failing to prevent anti-competitive behaviour by taking cases to the Competition Tribunal.[16] Eventually, the Commission began an initial proceeding before the Competition Tribunal against five information technology companies accused of bid-rigging in March 2017.[17] Enforcement should soon extend to the construction industry, which is amongst the most affected by bid-rigging.

5.2.2 Other Law Enforcement Institutions

In additional to the competition institutions, it is important to illustrate how other law enforcement institutions such as the Securities and Futures Commission (SFC), Hong Kong Monetary Authority (HKMA), Independent Commission Against Commission (ICAC), and the police force may prosecute the related anti-competitive practices. As previously mentioned, a practice which the Competition Commission aims to eliminate with priority is bid-rigging.[18] However, bid-rigging was not an offence before the implementation of the Competition Ordinance. The SFC, HKMA, ICAC, and police are the law enforcement institutions which people are accustomed to turning to when tackling bid-rigging.

Under the Securities and Futures Ordinance and Banking Ordinance, the SFC and HKMA have jurisdiction in combating price rigging which has similar provisions to the Competition Ordinance.[19] In 2012, a day after the US Department of Justice charged two former UBS Bank traders with conspiracy for manipulating London Interbank Offered Rate,[20] the HKMA launched an investigation into the bank for allegedly rigging the Hong Kong

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[15] Hong Kong Competition Commission, 'Competition Commission marks one year anniversary of full commencement of the Competition Ordinance' (14 December 2016) Competition Commission News.

[16] Wong, 'Hong Kong is the kind of crony capitalism and that should be a worry for the Competition Commission' (n 12).

[17] Competition Commission, 'Competition Commission takes bid-rigging case to Competition Tribunal' (23 March 2017) Press Release . The proceedings concern a tender, which is related to the supply and installation of a new IT sever system. The IT companies are accused of submitting dummy bids.

[18] Competition Ordinance, s 2; Competition Commission, 'Competition Matters' (November 2016) 2 Newsletter 1.

[19] Henry Wheare and P J Kaur, 'Stand-alone actions possible for anti-competitive behaviour in Hong Kong?' (21 November 2016) kluwer Competition Law Blog.

[20] Sharon Foster, 'LIBOR Manipulation and Antitrust Allegations' (Spring 2013) 11 DePaul Business & Commercial Law Journal 291.

Interbank Offered Rate. The HKMA found that the bank traders had attempted to rig the interest rate and ordered the bank to penalise the employees.[21] However, both HKMA and SFC's jurisdictions only apply to their registered members, i.e., financial institutes or agents.

The police can only launch an investigation if the supposed bid-rigging involves criminality; likewise the ICAC cannot entertain an allegation without apparent elements of corruption. The ICAC has freedom to take action because allegations of corruption and bribery are commonly associated crimes in bid-riggings in reliance of Sections 7 and 9 of the Prevention of Bribery Ordinance, which deals with strategies to manage this practice of offering an advantage to others to refrain from bidding at a public auction.

The first bid-rigging case resulted in a jail sentence (following a confession), rather than involving complex investigations of law enforcement institutions. The fact that the defendant received a criminal penalty is based on the Bribery Ordinance, not the Competition Ordinance; the latter does not have criminal punishment. While the Competition Commission insisted there was no conclusive proof of collusive activities, the defendant in the *Yau Shui-tin* case pleaded guilty to conspiracy over bid-rigging after colluding with others to offer a bribe to an agent of ten years in order to win tenders on a consultancy contract and a renovation contract based on agreement.[22] Ironically, even though the *Yau Shui-tin* case was handled by the Competition Commission, it is the ICAC which is responsible for handling building management irregularity.[23] Nevertheless, if no advantage has been offered, there is nothing the ICAC can do about the bid-rigging.

Police may also take up a bid-rigging case if it involves a criminal element. However, there is no guarantee that the court will regard it as a serious offence and impose a penalty. The president of the Hong Kong Institute of Surveyors, Vincent Ho Kui-yip, stated, 'illegal cases of renovation work rely on criminal prosecution, but it is difficult to establish sufficient legal proof, so many cases fail in the end.'[24] The burden of proof in criminal law (beyond reasonable doubt) is higher than civil standards of proof (balance of probabilities). The

[21] Katherine Griffiths, 'Hong Kong to probe interbank rates' (20 December 2012) The Times; Wheare and Kaur, 'Stand-alone actions possible for anti-competitive behaviour in Hong Kong?'.

[22] *HKSAR v Yau Shiu Tin* [2015] DCCC 552/2015.

[23] ibid; Chong, 'Four more Sha Tin flat owners threatened for opposing HK$260m renovation' (n 11).

[24] Liu, 'Clean up buildings renovation sector, Hong Kong Institute of Surveys says' (n 10).

penalty for falsifying bids is not serious. In the *Cheung Kin Man* case, defendants were convicted of a charge of 'conspiracy to defraud' which is based on criminal law. They only received suspended sentences after being found guilty of rigging tenders for production contracts.[25] Even more concerningly, after considering a criminal charge of conspiracy to defraud in the case of *Chan Wai Yip*, the Court of Final Appeal (CFA) upheld an acquittal of seventeen stallholders who agreed to bid-rigging in auction. The Court treated the knock out agreement as a restraint of trade because it was restrictive of freedom of competition,[26] but hesitated to conclude that it was a criminal conspiracy to defraud.[27] When an agreement to compete in an auction has no deceptive element to it, any agreement made in secret does not render the agreement dishonest in the eyes of law.[28] Thus, any pre-auction agreement between the stall-holders is not counted as a criminal conspiracy.[29] The concluding remark of judgment was, 'This expedient leaves unresolved the question whether there should be a criminal sanction against the making of collusive knock out agreements.'[30] The CFA is aware of the existence of this anti-competitive behaviour, but it cautiously treats bid-rigging related acts as a criminal offence.[31] Therefore, it follows that despite some degree of involvement, other law enforcement institutions are limited in helping to achieve the competition objectives.

5.2.3 Political Institutions

The design of political institutions could directly affect the achievement of competition law and policy objectives. HK does not have a democratic government as the chief executive is not democratically elected by public. The policy objectives are not always in line with the

[25] *HKSAR v. Cheung Kin Man* [2005] CACC199/2005; Patsy Moy, 'Clean up buildings renovation sector' *SCMP* (HK, 13 April 2005).

[26] *HKSAR v Chan Wai Yip and others*, Final Appeal No.4 of 2009 (criminal) FACC No. 4 of 2010, para 71.

[27] *HKSAR v Chan Wai Yip and others*, para 75.

[28] ibid para 17.

[29] ibid para 12.

[30] ibid para 76.

[31] The author does not necessarily believe that the more intervention from law enforcement agencies, the better the result. If a market functions properly, minimal or no action is preferable. In the event of a market failure caused by hard-core anti-competitive conduct, eg, bid-rigging, the author firmly believes that intervention is necessary.

wishes of people. For example, under the implementation of competition policy in the past two decades, promotion of consumer welfare appeared not to be a pressing objective.

LegCo has the authority to decide the budget allocated to the Competition Commission,[32] summon persons concerned to testify or give evidence – including members of the Commission,[33] and debate the competition issues raised by lawmakers.[34] With such powers, LegCo exerts a significant amount of influence over the Competition Commission. However, the election method of LegCo, which is not found in any other jurisdiction, broadly misrepresents consumers. LegCo is mainly composed of the geographical constituency (GC) and the functional constituency (FC). The electoral method for the lawmakers from GC is based on the democratic 'one person one vote' system. The FC is the controversial special interest group in which the lawmakers are either from uncontested seats or elected by a very limited eligible number of voters – in some sectors fewer than 200.[35] Such quasi-democratic legislative design may not adequately reflect the opinions of consumers.

The 'corporate vote' design is an improper mechanism as it distorts the representation of consumers. It means that only corporate directors have the right to vote but not individual employees in their business and professional sectors. In some cases, these corporate voters have a say in more than one constituency; in other cases, one corporation can effectively control several seats.[36]

The 'separate voting system' is another system designed to protect special interest groups – one which does not apply to government motions. Any motion put forward by a lawmaker must be passed by a majority of lawmakers in the GC which are elected by the

[32] Competition Ordinance, pt 5, s 21(a).

[33] The powers and privileges of the Legislative Council and its members are provided in Article 73 of Basic Law and the Legislative Council (Powers and Privileges) Ordinance (Cap. 382).

[34] Basic Law, art 73(8).

[35] The number of eligible voters who elect one seat can be as few as 125, eg, in the FC of finance. As long as a candidate can control 63 votes, he can guarantee one seat. Other examples in FC include the following: 147 voters in Heung Yee Kuk (local rural interest), 154 votes in agricultural and fisheries, 134 votes in insurance, 195 votes in transport, etc. See Hong Kong Voter Registration, 'Functional Constituency' <http://www.voterregistration.gov.hk/eng/statistic20163.html> accessed 19 October 2016.

[36] Theoretically, if a tycoon has 10 corporations in the related FCs, he as a director could have 10 votes. See Tanna Chong, 'Legco election 2016' *SCMP* (HK, 6 February 2016).

public at large, as well as a majority of lawmakers in the FC which are mainly controlled by stakeholders in business sectors. As a result, many popular motions in the interests of consumers supported by the general public have failed to be passed in the LegCo due to the FC. Needless to say, the FC would continue to protect their vested interests at the expense of a competitive business environment. Without a democratically elected political institution, the objective of promoting consumer welfare can hardly be realised.

Furthermore, the Bills Committee is responsible for the amendments of bills and formation of final versions of competition law.[37] This is an important part of the legislation process. Obviously, the chairman plays an important role in ensuring impartiality during the legislation process in the Committee.[38] The president of the LegCo is another important position which incorporates both leadership and administrative aspects and ensures the smooth conduct of meetings. Both positions are elected from among members of the LegCo. Andrew Leung was controversially re-elected as both chairman of the Bills Committee on Competition Bill in 2010, and as a president of LegCo in 2016. He continued, unchallenged, as a FC lawmaker for a total of 16 years.[39] In his constituency there are only 544 electorate voters, as opposed to 7.3 million population.[40] All of these voters are restricted by the 'corporate vote system', meaning that only the directors in certain large corporates have a right to vote. Given his long established stakes in the business sector, consumers may have little hope that he would hold fair meetings and debates in relation to anti-competition issues in the LegCo under his presidency. As a result, the designs of both executive and legislature appear to not reflect the wishes of the people, and public accountability is far from

[37] Mary Yuen, 'Hong Kong elections: new generation, new political agenda' (13 September 2016) AisaNewsit.

[38] Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 3) para 9. Under his chairmanship, the Bills Committee has held a total of 38 meetings and met with representatives of various organizations and individuals, mostly corporate, in five rounds of meetings.

[39] He has been a chairman of the Federation of Hong Kong Industries representing the interests in the industry sector. See Legislative Council, LC paper No. CB(1) 348/10-11, Bills Committee on Competition Bill, 25 October 2010. He is also the managing director of 18 companies, some of which are listed in HK. See also Register of Interests of Legislative Council 2016. There are at least two overseas companies in the UK where he holds huge amount of shares that require him to report into the Register of Interests but he has failed to do so, causing a direct conflict of interests under the Rules of Procedure in LegCo. See Joyce Ng, 'Andrew Leung's business ties raise conflict of interest question for Hong Kong Legco president hopeful' *SCMP* (HK, 10 October 2016).

[40] Hong Kong Voter Registration, 'Functional Constituency' (n 35).

sufficient.[41] The objective of promoting consumer welfare is undesirably restricted, as explained here.

In summary, competition institutions, other law enforcement institutions, and political institutions have the potential to play their part in achieving the objectives of competition law and policy. However, concerning anti-competitive conduct within the scope of duties of the Commission Competition, the COMPAG and other law enforcement institutions should gradually reduce their involvement or remove themselves altogether, if appropriate. Only by doing so can the Commission develop as an effective regulatory agency. It is the undemocratic political institutions which are regarded as hindering the pursuit of consumer-friendly competition law and policy. Related challenges and solutions are explored in Section 5.5 below.

5.3 Objectives and Scope

In Chapter 4, we saw how the restrictiveness of the Competition Ordinance is owing to the blanket exclusion of almost all statutory bodies and the excessive power of the Chief Executive in Council. During the legislation process, the final Competition Bill was eventually passed after 200 government amendments.[42] There are at least several major concessions to further restrict the application of the Ordinance, directly hindering achievement of the objectives.

[41] The unpopular bills tabled to the LegCo by the government passed eventually due to support from the FC. To name a few, the high speed link and third airport runway projects with very high budgets are regarded as white elephants − unpopular and controversial, but the government insisted on their implementation. Conversely, bills that had lots of support from the general public were rejected by semi-democratic LegCo, e.g., the Fair Competition Bill proposed in 2001. Also, the government has declined the public's requests to put forward bills in connection with standard working hours and the retirement protection scheme. Peace Chiu, '44 is the limit? Renewed calls on standard working hours see 300 march in Wan Chai' *SCMP* (24 July 2016); See David Webb, 'Hong Kong Needs a Competition Law' (13 July 2001) </www.webb-site.com/articles/noncompete.asp > accessed 20 December 2013; Jessie Lau, 'Hong Kong retirement protection debate prompts protests and criticism' *SCMP* (HK, 25 June 2016); S C Yeung, 'Hong Kong's third white elephant: the new airport runway' (*ejinsight,* 18 March 2015) <http://www.ejinsight.com/20150318-hong-kongs-third-white-elephant-the-new-airport-runway/> accessed 15 April 2017; Ma Ruohan, 'Extra Funds for High-speed Rail Approved in LegCo' (11 March 2016) <http://english.cri.cn/12394/2016/03/11/4082s920091.htm> accessed 15 April 2017.

[42] Danny Mok and Tanna Chong, 'Competition law finally passed after years of debate' *SCMP* (HK, 15 June 2012).

5.3.1 Cancelling the Private Enforcement

Stripping away the private enforcement of competition law is a direct reduction of consumer rights for corrective justice and compensation. Given that neither class action nor consumer laws exist in HK, private enforcement becomes significantly important for consumers to protect their interests. Based on experience, worldwide private enforcement could be effective in supplementing the public enforcement of competition law cases. For instance, private actions constitute about ninety per cent and over thirty per cent of all antitrust cases in the US and Australia respectively.[43] Consumers have been disappointed that the stand-alone right of private action was taken away from the Competition Bill by the government, which was under the influence of the business deputations.[44] Thomas Cheng, the chairman of the Consumer Council's working group in the Competition Bill, said that it was especially concerning that the government had removed the right of individuals to file lawsuits complaining about anti-competitive behaviour. Cheng added, 'The right to take private legal action is an important part of protecting consumers and small and medium enterprises. We believe there should be dual ways to implement the law, and to sufficiently curb anti-competitive behaviour – taking away the right to private lawsuits is removing one'.[45] As a result, there is now an over reliance on public enforcement by the Competition Commission, with a huge investigative workload attached.

Private enforcement enables the following benefits. Firstly, if private enforcement is available, the Commission is unlikely to receive 1,900 complaints over a year. Compensation for victims provides an incentive for private investment into the detection of cartel conducts. Therefore, private enforcement could leave the Commission free to focus its attention and resources on economically significant cases. Secondly, private enforcement can also

[43] This figure does not include proceedings which were settled. See Caron Beaton-Wells and Kathryn Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35 UNSW Law Journal 648, 648; David Evans, 'From the Editor: Autumn 2008' (Autumn 2008) 4 Competition Policy International 1.

[44] See Part 7 of the original Competition Bill provides for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a conduct. Such private actions could either follow on from a determination of a contravention by the court or could be 'stand-alone' actions seeking a judgement on particular conduct and remedies. The Administration has removed the relevant provisions from Competition Bill on stand-alone right of private action from clauses 111 to 114 in the original Bill. See also Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 3) paras 75-77. Now Clause 106 of the Competition Ordinance would preclude all stand-alone private actions, whether under the common law or any enactment.

[45] Tanna Chong, 'Competition Bill is weakening, watchdog says' *SCMP* (HK, 25 October 2011).

maximise the deterrent effect of the Competition Ordinance because of the additional monetary penalty on top of public law sanctions. An undertaking will help determine whether it is worth taking the risk to breach the Ordinance if one does not get to keep the profit from the anti-competitive conduct or has to even suffer a loss by paying for damages in an action brought by private enforcement. Lastly, private enforcement can compensate the victims directly. Based on EU experience, the ECJ held that each person who has suffered loss as a result of a competition violation is entitled to damages for that loss.[46] For the EU Commission, compensating cartel victims in full is the principal objective of its policy on private enforcement.[47] As a whole, the cancellation of private enforcement from the Competition Ordinance in HK is not in the interests of consumers, nor the Competition Commission in terms of its investigation workload and cost.

5.3.2 Cancelling the Merger Control Rule

The cancellation of the merger control rule is yet another reduction of the scope of application of competition law.[48] Under the First Conduct Rule of Competition Ordinance, it is against the law to agree and fix prices. However, owing to another concession, which removes the merger control rule except in the sectors of telecommunication and broadcasting, it is perfectly legitimate to merge without being scrutinized in all other sectors, ultimately causing a reduction of choices and a rise in prices. The government attempted to justify its change of stance with the following reasons. The Secretary for Commerce and Economic Development (SCED) said,

> [I]t was not the aim of the new competition law to regulate market structures at this stage. In fact, it was not unusual to see high market concentration in a small market like Hong Kong, whilst some mergers had in effect brought about healthy integration and enhanced overall economic efficiency.[49]

[46] Case C-453/99, *Courage v Crehan* [2001] ECR I-6297 and Joined Cases C-295/04 to C-298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619.

[47] European Commission, White Paper on Damages actions for breach of the EC antitrust rules, COM (2008).

[48] Competition Ordinance, sch 7.

[49] Legislative Council, 'Panel on Economic Development' (28 June 2010) LC Paper No CB(1)2758/09-10, para 16.

The SCED added,

> [T]he report of the Competition Policy Review Committee which recommended that the competition law should aim to sanction anti-competitive conduct but not to intervene in market structures by targeting mergers and acquisitions. […] given the complexity of and time constraint in assessing merger activities, it would pose a significant challenge to the Commission if it had to shoulder such onerous burden at the outset of the implementation of the new law.[50]

There is no indication that the Commission is understaffed. Moreover, market structure and anti-competitive conduct may not be entirely separate from each other. On the contrary, market structure could give rise to anti-competitive conduct. Without a merger control rule, there is a big loophole in the law in terms of its enforcement; wrongdoers in the market could circumvent this regulation to fix prices by merging. Whereas other competition regimes can equip themselves with a merger control rule at the outset of implementing a law at the same time as enforcing cartel and dominance provisions, there is no ground for HK to defer the implementation of merger control.

Such an explanation was not accepted by the lawmakers who predicted that the small size of the local market would easily give rise to merger activities leading to an abuse of market power, and the Bill should extend to more sectors instead of just maintaining existing control in the telecommunications sector.[51] Given the proven effectiveness of merger control in telecommunications sector, the government should at least take the opportunity to extend the merger control to other sectors on a trial basis for the benefits of enhancing market competition and consumer welfare.[52]

The preambles of both the Competition Bill and Competition Ordinance clearly state the goal which is to prohibit mergers that substantially lessen competition in HK. A cancellation of the merger control rule would create a loophole for law enforcement, although the Competition Commission may rely on the other two conduct rules to prohibit anti-

[50] ibid para 18.

[51] ibid para 15.

[52] ibid para 17.

competitive agreements and the abuse of market power. Accordingly, SCED's explanation is contradictory to the aim of competition law.

The mainstream international competition regimes such as the EU, US, UK, and even the new regimes like Singapore and China have their comprehensive merger control rules. Internationally, any horizontal merger which is over 25 per cent of the combined market share would trigger a review in the US and UK.[53] In HK, a 70 per cent combined market share involving two dominant supermarkets pursuing a merger is still not subject to regulation. A striking example of this was the acquisition of Neway Karaoke Box by California Red. Thanks to the absence of merger control rules, these two companies have successfully transformed from duopolies to a monopoly in the karaoke industry in HK without any legal challenge.[54] Doubtlessly, taking away the merger control rule would only harm the competition law's objectives.

5.3.3 Reducing the Scope of the First Conduct Rule

It is believed that increasing the *de minimis* arrangement serves as a major concession for SMEs' interests, reducing the scope of the first conduct rule application with respect to the prohibition of anti-competitive agreements. In reference to the discussion of the implicit objective of protecting SMEs in Chapter 1, this concession is to benefit the SMEs' position under the amendment of law. During legislation, some members in the Bills Committee of Competition Bill even suggested a complete exemption of SMEs from the Bill, arguing that because of their small size, SMEs should have limited influence in the market.[55] Although the government refused this proposal,[56] it generously made the following concession in favour of almost all SMEs.

[53] Dennis C Mueller, 'Merger policy in the United States: a reconsideration' (1997) 12 Review of Industrial organization 655; Alexis Jacquemin and Margaret E Slade, 'Cartels, collusion, and horizontal merger' (1989) 1 Handbook of industrial organization 415; Alan Hughes, 'Mergers and economic performance in the UK: A survey of the empirical evidence 1950-1990' (1993) European mergers and merger policy 9.

[54] Austin Chiu, 'Neway acquires karaoke rival' *SCMP* (HK, 8 March 2010).

[55] Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 3) para 38.

[56] ibid para 39.

In respect of the first conduct rule which deals with anti-competitive agreements, the government amended the bill so that all agreements, concerted practices and decisions between undertakings with a combined turnover not exceeding HK$100 million (US$12.8 million) in the proceeding financial year (or the preceding calendar year if the undertakings do not have a financial year) will be excluded from the application of this rule.[57] Since some LegCo members and deputations have strongly argued for the interests of SMEs, the government agreed to adjust the figure to HK$200 million (US$25.6 million) for various types of business conduct such as resale price maintenance, distribution agreements, bundling, etc.[58] The government explained that such an amount was comparable to the small agreement threshold of 20 million GBP adopted with the UK's Competition Act.[59] Inevitably, this would cause a shrinking scope of an application of the competition law.

5.3.4 Reducing the Scope of the Second Conduct Rule

In the second conduct rule which deals with the abuse of market power,[60] another reduction of the scope of competition law concerning SMEs occurred when the government proposed to suspend an undertaking if its turnover is below HK$11 million (US$1.4 million) in the first instance.[61] It subsequently increased the turnover threshold to HK$40 million (US$5.1 million) – almost four times the original proposed amount to address the concerns of LegCo members and deputations.[62] With this new threshold, the proportion of SMEs to be excluded from the jurisdiction of the second conduct rule increased from 86 per cent to almost 95 per

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[57] Competition Ordinance, s 6.

[58] Competition Ordinance, sch 1, s 5. The exclusion does not apply to the four types of hard core anti-competitive activities (i.e., price-fixing, bid-rigging, market allocation, and output control). See Legislative Council, 'Report of the Bills Committee on Competition Bill' (18 May 2012) LC Paper No CB(1)1882/11-12, para 41.

[59] ibid para 43.

[60] Competition Ordinance, s 21.

[61] To paraphrase what the government said- with above 40 per cent of the market share a business is likely to reach the threshold; below 25 per cent a business is unlikely to do so; and anything in between is up for consideration. See Marc Waha and Julienne Chang, 'HK's antitrust model offers clear separation of powers' *SCMP* (HK, 15 August 2012). However, according to the Commission former chief executive, Dr Stanley Wong, there was no magic formula to determine market power. He said, 'A threshold of 40 per cent is the wrong emphasis. Market share, entry barriers and other factors would be considered.' See also Amy Nip, Toh Han Shih and Benjamin Robertson, 'Competition watchdog sounds warning on exchange of industry secrets' *SCMP* (HK, 10 October 2014).

[62] Competition Ordinance, sch 1, s 6(1).

cent.[63] The government explained that based on the Census and Statistics Department's figures, undertakings with a turnover below HK$40 million would be unlikely to have a substantial share of the market anyway.[64]

Furthermore, in terms of payment requirement under an infringement notice, the Competition Commission had the power to ask an undertaking to pay a sum not exceeding HK$10 million (US$1.3 million) to the government. In addressing SMEs' concern again, the government completely removed this payment requirement.[65]

The above amendments inevitably reduce the scope of application of the Ordinance, both first and second rules, to SMEs. On one hand, such measures are in line with the implicit objective of the Competition Ordinance to protect SMEs. On the other hand, such a narrow scope could potentially have a negative impact on fair competition. If SMEs act collectively, this could be detrimental to the pursuit of the objectives of competition law and policy: economic efficiency and consumer welfare.

5.3.5 Lowering the Pecuniary Penalty

Another illustration of the narrowing scope of law application can be seen in the lowering of pecuniary penalties. The original proposed cap on the pecuniary penalty was ten per cent of the 'global' turnover for each year in which the contravention has continued.[66] Such a penalty was amended to a maximum of ten per cent of the 'local' turnover for each year of infringement, for up to a maximum of three years.[67] Doubtlessly, a penalty of this nature reduces the power of the Commission to impose penalty. HK is an international city in which many registered companies are doing international trade and business. For example, Cheung Kong Holdings (Cheung Kong) is one of the giant international corporations in HK whose net

[63] Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 58) para 50(c).

[64] ibid para 50(b).

[65] ibid paras 69-70; Competition Bill, s 66(3).

[66] Competition Bill, ss 91(3) and (4).

[67] Competition Ordinance, ss 93(3) and (4).

profit was HK$15,684 million (US$2,011 million) in 2015.[68] It takes less than a few hours for it to generate the amount of the maximum penalty for engaging with hard-core anti-competitive conducts, based only on local turnover. Comparatively, EU competition law allows financial liability of each undertaking up to ten per cents of global turnover from the preceding business year.[69] The competition regimes in the US[70] and Asian neighbours such as Japan[71] and South Korea[72] are open to imposing fines on the basis of global turnover.

Other nations' jurisdictions allow criminal liability for hard-core anti-competition offences along with fines, whereas HK's competition regime has yet to implement criminal liability. The US imposes a maximum penalty of imprisonment of ten years.[73] There are 14 member states of the EU which have introduced criminal penalties for competition law infringements. For instance, in Ireland the maximum prison sentence imposed on individuals who commit hard-core cartel offences has been raised from five to ten years in 2014.[74] A number of neighbouring countries to HK including South Korea, Taiwan, Malaysia, and Japan are implementing criminal sanctions.[75] Thus, lowering the civil pecuniary penalty and not including a criminal penalty significantly diminishes the deterrent effect in HK.

The government has made a number of concessions under the pressure of the business sector. In addition to a blanket exclusion of statutory bodies, the cancelling of the merger control rule, the stripping away of private enforcement, the shrinking of penalties, and

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[68] See http://www.ckh.com.hk/upload/attachments/en/pr/ckhp150226.pdf, Annual report of Cheung Kong (Holdings) Limited, 2014, 1.

[69] EU Council Regulation (EC) No 1/2003, ch VI, art 4.

[70] The Sherman Act of the US imposes penalties of up to US$100 million for a corporation. Under the federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over US$100 million. See Federal Trade Commission <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> accessed 24 Jan 2017.

[71] Japan Antimonopoly Act, art 95; Clifford Chance, 'A guide to antirust and competition law in Asia Pacific' (Jan 2014) 63.

[72] South Korea Monopoly Regulation and Fair Trade Act, art 18; ibid 87.

[73] 15 U.S.C. §§ 1, 2, 3.

[74] Malgorzata Cyndecka, 'Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield' (25 April 2013) <http://kluwercompetitionlawblog.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/> accessed 1 November 2016.

[75] Clifford Chance, 'A guide to antirust and competition law in Asia Pacific' (n 71) 6-7.

reduction of the scope for conduct rule application have watered down the Ordinance to such an extent that its deterrent effect becomes questionable. Some Bills Committee members have cautioned against making unjustifiable changes to the Bill that would compromise its effectiveness in combating anti-competitive activities.[76] The vice-chairman of the Bills Committee, Ronny Tong, argued, 'the various concessions made have already reduced the bill's power to protect consumers, who are also important stakeholders of the bill.'[77] Such changes would risk making the measure ineffective.

In summary, the narrowing down of the scope of competition law through the above concessions (cancelling private enforcement and the merger control rule, reducing the scope of application of first and second conduct rules, and lowering pecuniary penalty) would further hinder achievement of the competition law's objectives. Aside from the internal factors (objectives, institutions and scope), land hegemony is an important external factor which alters the effectiveness of the competition regime.

5.4 Land Hegemony

Analysing HK's severely distorted land system could be instrumental in solving its competition problems. In brief, the city's land and housing policies are said to have caused land hegemony as an external factor, which in turn has caused other anti-competitive problems in HK. All land in HK belongs to the government and can only be sold on a leasehold basis. Land hegemony is not a new socio-economic problem. It is ironic that HK reached a GDP per capita in 2016 of about US$43,000 which is above Germany, United Kingdom and Japan,[78] whereas it ranked itself on the Gini Index at 53.7 in 2011 which was just in between Zambia and Columbia.[79] Out of a 7.3 million population, 1.23 million HK residents were below the poverty line[80] and around 100,000 people were living in 6 feet by 2

[76] Legislative Council, 'Report of the Bills Committee on Competition Bill' (n 58) para 10.

[77] Tanna Chong, 'Calls for more exemptions in competition law ' *SCMP* (HK, 11 April 2012).

[78] International Monetary Fund, *World Economic Outlook Database* (IMF, October 2016).

[79] Central Intelligence Agency, 'The World Factbook' <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html> accessed 23 November 2016.

[80] Jennifer Ngo, '1.3 million Hongkongers live in poverty, government says, but offers no solution' *SCMP* (HK, 28 September 2013).

feet cage homes in 2012.[81] Thanks to the high land price policy, HK is almost the most expensive city in which to own a home, (at between US$1,800 and US$3,000 per square foot in HK island),[82] and to rent a business office (at between US$6 and US$22 per square feet in HK central area) in 2016.[83] An extremely high proportion of up to 60 to 70 per cent of disposable income was expended mortgage payment.[84] HK is also ranked as the most expensive city in terms of its living costs in a survey conducted by Mercer in 2016.[85]

5.4.1 High Demand and Low Supply

HK's high demand for land and housing is due to its constant and continual rise in population. As part of the 'The One-Way Permit Scheme,' 150 immigrants move from China to HK every day for the purpose of family reunion, totalling 54,750 immigrants per annum.[86] And this figure does not include domestic natural birth, domestic helpers, nor immigrants from other countries with investment and working visas. The persistent rise of population creates a high demand for residential accommodation.

HK's shortage of land and housing is also due to its public policy. The government owns all land in HK, which can only be leased with a maximum period of 50 years from 1997 to 2047. The government has blamed the high prices on the scarcity of land, however large

[81] Hans Mahncke, 'Hong Kong's Competition Problem' (3 November 2008) Hong Kong Lawyer ; Damien Gayle, 'Cage dogs of Hong Kong: The tragedy of tens of thousands living in 6ft by 2ft rabbit hutches - in a city with more Louis Vuitton shops than Paris' (11 January 2012) <http://www.dailymail.co.uk/news/article-2084971/Hong-Kongs-cage-homes-Tens-thousands-living-6ft-2ft-rabbit-hutches.html> accessed 23 November 2016.

[82] Centadata, 'Latest Transaction Summary' (2016) <http://www1.centadata.com/ephome.aspx> accessed 23 November 2016. Prices of residential land reached an average of over US$3,145 per square foot in 1997. Consumer Council, 'How Competitive is the Private Residential Property Market?' (1996) Consumer Council Special Report.

[83] Primeoffice, 'Investment, Sales & Office Leasing' (2016) <http://www.primeoffice.com.hk/rent-office-in-central-1.html> accessed 23 November 2016; CB Richard Ellis' Survey (www.cbre.com).

[84] Consumer Council, 'How Competitive is the Private Residential Property Market? ' (1996) Consumer Council study showed 58 per cent of disposable income from 1985 to 1994 and 73 per cent in 1995 was expended on mortgage payments.

[85] Mercer 2016 Cost of Living Rankings <https://www.imercer.com/content/2016-cost-of-living-infographic.aspx> accessed 4 November 2016.

[86] The Task Force on Population Policy, 'Task Force keen on lifelong learning, skills upgrading' (26 February 2003) Hong Kong Government News .

plots were left abandoned without development and without justifications.[87] The government has been criticised for inadequate land and housing policies, e.g., under-supplying or withholding land, and the suspension of the housing ownership scheme (HOS), which is supposed to provide discounted private accommodation to the under-privileged. The aim of the HOS is to meet social needs and this intervention for social and public services could qualify as an exception to competition law. Nonetheless, the HOS was condemned by developers for being an intervention policy which went against the *laisse faire* principle. Facing pressure from developers, the government suspended the HOS indefinitely in 2003. This policy decision passed yet more market power to large developers and further distorted the housing market.

When demand is persistently greater than supply, prices remain high. Furthermore, the government has delegated control over the timing of land supply release to developers, as well as price-setting and site selection initiative.[88] This has further aggravated the distorted land system in HK. Under the high land price policy, it is the government and a few giant developers who benefit. This generates substantial income for the public exchequer of the government and massive revenues for property oligopolies. The losers are the end-consumers who are forced to buy overpriced properties, pay high rent and consume a series of associated products and services derived from land hegemony.

The Consumer Council study pointed out that land supply was limited to giant developers, revealing that from 61 per cent of new housing from five developers, 55 per cent was from the top four and 46 per cent from the top three. They possess huge financial power and large amounts of land, forming an oligarchy of developers, so to speak. There is a lack of competitiveness but high degree of market concentration in the new private housing market.[89]

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[87] For example, there was an old and unused airport left abandoned for eighteen years. See Rebecca Males, '17 amazing abandoned airports around the world' (19 October 2016) <https://www.skyscanner.net/news/14-worlds-most-amazing-abandoned-airports> accessed 15 November 2016. The plan to build 17,000 public houses on a massive brownfield sites in Wang Chau was ever abandoned without explanation. See also Shirley Zhao, 'Study on clearing Hong Kong's brownfield sites won't be ready for nearly two years' *SCMP* (HK, 21 September 2016).

[88] In November 2002, the government implemented the 'nine point plan' in which only when a developer applies for a site to be auctioned by offering to bid at a certain minimum price, then an auction will subsequently be held for sale of that site. The effect is that the release of sites would be dictated solely by developers' demand. See Alice Poon, *Land and the Ruling Class in Hong Kong* (Enrich Professional Publishing 2011) 137.

[89] Consumer Council, 'How Competitive is the Private Residential Property Market?' (n 84) para 12.

The study revealed that the market was not contestable, i.e. there were no new entrants to the market and that it was likely being abused by a number of dominant powers. Accordingly, there has been the opportunity to charge higher prices and engage in anti-competitive behaviour.[90] A Task Force report confirmed that developers were dictating flat supply without scrutiny so as they could benefit from an uncompetitive market.[91] As a result, consumers in the new residential market have been suffering from limited choice, higher prices and reduced ability to make accurate price comparisons. In fact, an effective competition regime should be able to tackle the above-mentioned possible anti-competitive conduct – abuse of market power under the Second Conduct Rule of the Competition Ordinance. Section 5.4.3 further explores the consequences of economic concentration in associated sectors caused by the leading developer conglomerates.

5.4.2 Other land Policies in Favour of Large Developers

Large developers have inherent advantages due to other public policies which have been in place for a long time. First, the huge developers had the chance to acquire plots of agricultural lands for relatively low prices without competition several decades ago. Purchasing these agricultural lands was done by negotiation, rather public auctions, between the government and the developers. These developers are at liberty to hold large sections of land for a very long period without starting any new developments.[92]

Second, a land policy known as Letters A and B have distorted the land system. Letter B is a land exchange entitlement document which allows the landowner to either obtain a lump sum of cash or gives them the right to be granted building land in the future, for example when the landowners allow their private lands to be taken for public use by land resumption. Almost all landowners chose the land grant option. Letter A refers to a document that landowners surrendered their lands to the government voluntarily without going through

[90] ibid para 14.

[91] Hong Kong Director of Information Services, 'Report of the Task Force on Land Supply and Property Prices ' (June 1994) Planning, Environment and Lands Branch.

[92] Poon, *Land and the Ruling Class in Hong Kong*, 72 (n 88).

statutory resumption. All the rights and terms were identical with Letter B.[93] In the 1970s and 1980s, the four major developers (Cheung Kong Holdings Ltd., Sun Hung Kai Properties Ltd., Henderson Land Development Company Ltd. and New World Development Company Ltd.) purchased these Letters A/B on mass from the landowners before the government terminated issuing them in 1983.[94] Their land bank could comfortably support the continuation of land development even if the government suspended land auctions in the market. Any small or new entrant developers did not have this land bank and faced severe hardship during this suspension of land auctions. The Consumer Council's study indicated that land costs for purchasing Letters A/B were merely 10 to 20 per cent of the price of a unit. The estimated profit margins for normally auctioned sites ranged only from 6 to 109 per cent whereas Letters A/B could range from 77 to 364 per cent of total development costs.[95]

Third, developers still need to pay for land premium to convert agricultural purposes into residential or commercial purposes via lease modification policy. However, developers can always negotiate with the government to amend covenants on the use of land. Such negotiation, however, has been conducted in a black box without competition. The government officials have huge discretionary power in land conversion purpose, as opposed to the land in public auctions. It is solely developers who can decide when to submit an application. If developers are not satisfied with the offer, they can withdraw their application anytime. Under such circumstances, those developers who own vast agricultural lands could pay much lower costs compared with the other small developers who have to bid fiercely in auction.

5.4.3 Monopoly, Duopoly and Oligopoly in Associated Sectors

Once the dominant property developers control the land, they selected relatively risk-free economic assets which have land-related components. For instance, the developers have leverage in other sectors and control the prices of the rental market, natural utilities, transport and food. Currently developers charge exorbitant rent for consumers' private residential

[93] Roger Nissim, *Land Administration and Practice in Hong Kong* (Hong Kong University Press 1998).

[94] Poon, *Land and the Ruling Class in Hong Kong*, 74 (n 88).

[95] Consumer Council, 'How Competitive is the Private Residential Property Market?' (n 84).

accommodation and business places. There are only two electricity companies, one gas supply company, three main bus operators, and two major supermarkets in these sectors, which are all under a monopoly, duopoly or oligopoly. The owners of these companies have been steadily involving themselves, directly or indirectly, in the business of property development.

5.4.3.1 Rental Sector

The high land price policy plus shortage of supply and huge demand gives rise to an unreasonable increase of rents in both the residential and business market, in particular for those who cannot afford to purchase property. These developers charge consumers and business operators exorbitant rents with huge profit margins.[96] This benefits the developer conglomerates who own huge rental-producing properties consisting of service apartments, hotels, office properties, industrial spaces, shopping malls, retailer stores, etc.[97] In 2002, for example, Oracle shifted Asia Pacific research and development division from HK to Shengzhen, a city located immediately north of HK in China.[98] This acted as a warning bell to other international companies that renting space for a business in HK was unaffordable. The former chairman of the HK Retail Management Association, Pang-chun Yu, expounded the adversity of retailers,

> Given the high cost structure of our industry, in particular areas of retail rental … We have seen a lot of worldwide international brands opening up stores in neighbouring countries but bypassing HK. We have also seen prominent international retailers and quality department stores exit HK's retail market due to high retails rental and operating costs – for example, Carrefour, Daimaru, Matsuzakaya, Isetan, etc.[99]

Turnover-linked surplus rent is a way for the developers who are also the landlords to make exorbitant revenues from tenants renting commercial places. Usually, on top of the basic rent, a significant part of the tenant's profit is required to be shared with the landlords,

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[96] Mahncke, 'Hong Kong's Competition Problem' (n 81).

[97] Poon, *Land and the Ruling Class in Hong Kong* (n 88) 84.

[98] ibid 148.

[99] ibid.

namely, surplus rent. In economically difficult times, landlords do not reduce rent but are still entitled to the agreed rent. In order words, they share commercial tenants' profit but never any loss.[100] Furthermore, it is not uncommon for developers to retain their associated businesses such as the provision of management services in the same properties.[101] Air-conditioning is another big outlay for commercial tenants to bear with. Sometimes the overall unit fee (combination of the management fee and air-conditioning fee per square foot of floor area) is more than the unit rent.[102] Occasionally, telecommunication services are bundled with the rental properties.[103] All of these features secure developer-landlords a constant source of income. Naturally, commercial tenants pass these costs to end-consumers who are the ultimate ones to suffer in the market.

Property management is not confined to the commercial sector. In accordance with purchase agreements in HK, developers often reserve the right to property management in order to manage the common areas,[104] after a residential project has been sold. Thereafter, financial obligations to the developers continue. Management fees increase every year and the increase has been recorded as larger than the annual inflation rate.[105] Ultimately, consumers are paying unjustly high fees due to the lack of competition.

5.4.3.2 Electricity Sector

It is imperative that essential utilities such as electricity should be managed in a socially and economically responsible manner. There are only two electricity companies in HK: HongKong Electric Company (HongKong Electric) and CLP Holdings Ltd (CLP). The former is wholly owned by Cheung Kong Holdings which is the largest developer in HK while the latter, owned by the Kadoories family, has engaged in cross-sector business activities including property development undertaken jointly with the former. They cannot be regarded as a duopoly because each company is de facto a monopoly in its own territory.

[100] ibid 85.

[101] Crista Lau, 'One-stop property management service of private residential property in Hong Kong: a case study of "LeSommet"and "The Parcville"', University of Hong Kong 2006) 24.

[102] Poon, *Land and the Ruling Class in Hong Kong* 89 (n 88).

[103] Mercer 2016 Cost of Living Rankings.

[104] Common areas include lobbies, corridors, parking lots, driveways, storerooms, stairways, elevators, etc.

[105] Poon, *Land and the Ruling Class in Hong Kong* 88-89 (n 88).

Hong Kong Electric generates and transmits power with its own network exclusively for residents in HK Island, Lamma Island and Ap Lei Chau while CLP does so in the rest of the city including Kowloon, New Territories, Lantau and most of the outlying islands.[106] Accordingly, competition is entirely absent and this is not expected to change unless a new entrant is allowed access to existing networks by the government. The developers are choosing this relatively risk-free economic asset to accumulate wealth at the expense of their consumers.

Under the 'Scheme of Control Agreements' (Scheme), these two electricity companies signed an agreement with the government guaranteeing a rate of return based on the fixed assets. The guaranteed rate of return is now 9.99 per cent,[107] whereas in 2008 it was between 13.5 and 15 per cent.[108] However, there is no regulatory mechanism to control these companies' fixed asset enlargement. They have incentives to boost their assets in order to earn a higher return. In the event of over investment, consumers are required to pay higher tariff levels for unnecessary capacity.[109] Thus, the monopolisation of power and distortion of incentives by the Scheme has been in existence for a long time.[110] Political parties, civil society and the academic world have long been demanding the competition needed to reduce tariffs and improve efficiency.[111]

5.4.3.3 Gas Sector

The Hong Kong and China Gas Company (Towngas) have a monopoly on supplying gas in HK. Another developer giant, Henderson Land Development Company, is its largest

[106] Thomas Cheng and Jolene Lin, 'Introduction of Competition and Environmental Regulation in the Electricity Sector in Hong Kong' (2014) 37 World Competition 569, 573.

[107] Hong Kong Government and CLP Power Hong Kong Limited, 'The Scheme of Control Agreement ' (1 January 2008) Clause 2(a) and (b). Hong Kong Government and Hong Kong Electric Company, 'The Scheme of Control Agreement ' (7 Jan 2008) Clause 4(2). On top of rate of return, eleven per cent of the total value of their average renewables net fixed assets is allowed.

[108] The Scheme allowed an additional 1.5 per cent for equity-financed assets. See P. Lam, *The Scheme of Control on Electricity Companies* (The Chinese University Press 1996) 21.

[109] Poon, *Land and the Ruling Class in Hong Kong* (n 88).

[110] S. Luk, 'Electricity tariffs in hong kong: What went wrong and what can we do about it?' (2005) 33 Energy Policy 1085; Lam, *The Scheme of Control on Electricity Companies*; P. Lam, ' Regulatory effects on electricity prices in hong kong' (1999) 21 Energy Economics 529; P. Lam, 'Hong kong's electricity market beyond 2008' (2004) 32 Energy Policy 851.

[111] Cheng and Jolene Lin, 'Introduction of Competition and Environmental Regulation in the Electricity Sector in Hong Kong' 569.

shareholder. Unlike the two electricity companies, Towngas is kept in check by government regulations. A Consumer Council report pointed out that Towngas had been making excessive profits at the expense of its customers, and recommended a number of ways to introduce competition. First of all, it suggested creating a common carrier system so that Towngas would be obliged to allow competitors to have access to its distribution network. It also mentioned the introduction of a price-cap regulation as an interim measure before the common carrier system is in place, in order to encourage industry players to bring natural gas to HK, as well as the introduction of an Energy Commission to oversee all energy issues. And, most importantly, it recommended forcing the property developers to provide three-phase electrical wiring plus gas piping in new residential developments to allow consumers a real choice.[112] There are plenty of examples internationally where a gas market tariff has been lowered by utilities deregulation.[113] However, the government is reluctant to adopt any new measures. The lack of action is a missed opportunity to better the competition dynamic in the gas market.

5.4.3.4 Bus Services Sector

There are three main public bus operators in HK which the government allows to monopolise the industry. The Kowloon Motor Bus Company (KMB) is one of the world's largest private bus companies, and is owned by Sun Hung Kai Properties Limited, which is the second biggest property developer in HK.[114] The second largest bus company is New World First Bus (NWFS), and third largest is City Bus Limited (City Bus). Despite there being three main operators (KMB, NWFS and City Bus), we in fact find ourselves with a duopoly, as NWFS and City Bus are under the control of the same parent company – the leading property developer New World Development.[115]

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[112] Consumer Council, 'Assessing Competition in the Domestic Water Heating and Cooking Fuel Market' (1995).

[113] The gas market has been deregulated in many jurisdictions. In the UK, consumers can choose the company from which to buy their gas supply. In the US such as Alberta, California, Pennsylvania, Ontario, New York, Georgia and Maryland, gas can be bought directly from a supplier at a competitive price rather form the gas utility. See Energy Shop <https://www.energyshop.com/es/general/gas/default.cfm> accessed 30 Novermber 2016.

[114] Mahncke, 'Hong Kong's Competition Problem' (n 81) 3.

[115] NWFS & City Bus <http://www.nwstbus.com.hk/home/default.aspx?intLangID=2> accessed 1 December 2016.

In terms of bus route operation, KMB runs mainly in Kowloon and the New Territories[116] whereas the routes operated by both NWFS and City Bus are mostly on HK Island.[117] Both run a monopoly in their respective regions. Similar to the relationship between the two electricity companies, the bus operators avoid competition with each other to protect their interests. Likewise, there is a 'Profit Control Scheme' in the Public Bus Services Ordinance stipulating the rate of return based on the operator's average net fixed assets. Before 1997 it was 16 per cent, and has been 13 per cent since. In order to increase fares, the scheme creates incentives for the operators to boost their assets by buying more buses regardless of actual need. Ultimately, consumers are once again the losers who pay more than they should. And again, there is a lost opportunity for the introduction of competition within the bus services sector.

5.4.3.5 Extra Cheap Sources of Land

Apart from the stable income generated by public utility and transport, the site owners, i.e. developer conglomerates, can profit from converting land. The two main electricity companies own numerous power plant sites and other auxiliary facilities. Towngas also owns many gas work station sites, and the three main bus operators own a large number of bus depots, all in prime urban locations.

When those public utility or transportation sites are no longer needed for their original purpose, the owners can convert the site into residential land.[118] Such a conversion mechanism, however, is based on internal negotiation with the government rather than open tender. The site owners, who are giant developers, have a competitive edge over smaller developers who have to rely on government land auctions. The site owners can appeal if they are not satisfied with the government's offer. They can also withdraw the application and wait for a downturn in the market to obtain the lowest possible offer by the government.[119]

[116] KMB <http://www.kmb.hk/tc/> accessed I December 2016.

[117] NWFS & City Bus (n 115).

[118] Cases of private housing estates constructed on former power plant sites include Laguan Verde in Hung Hom, South Horizons in Ap Lei Chau and City Garden in North Point. Examples of former bus depots having been converted into residential projects are Manor Center in Shamshuipo, Island Place in North Point, and another residential project over a million square feet in Cheungshawan. See Poon, *Land and the Ruling Class in Hong Kong* 77 (n 88).

[119] ibid 116.

The government has been criticised for not reclaiming unused sites and putting them to good social use, as well as for keeping the public in the dark as to how such agreements are arrived at. Lacking such information, the public has no way of gauging the efficiency or fairness of the lease modification policy. This kind of government policy is antithetical to competition objectives of economic efficiency and consumer welfare.

5.4.3.6 Supermarket Sector

Owning large amount of land and property affirms the dominance of the leading supermarket chains, (which are operated by the developer conglomerates). The supermarket sector illustrates high level of concentration with unhealthily low level of competition. There are two main players in the market: the Park'N Shop chain controlled by the largest property giant, Cheung Kong Holdings, and the Wellcome supermarket chain which is the subsidiary of another developer, Hong Kong Land group. A Consumer Council survey showed that these two chains controlled over 70 per cent of the market share in the sector.[120] Comparatively, the two largest UK supermarket chains – Tesco and Sainsbury's – occupy 32.7 per cent of food retails sales, a situation which nonetheless has been labelled as a duopoly market structure with a low degree of competition.[121]

Carrefour, the second largest global supermarket chain from France, attempted to break this HK duopoly in 1996. Unfortunately, the resale price maintenance (RPM) practice of these dominant supermarkets caused Carrefour to launch an official complaint to the Consumer Council which confirmed the existence of RPM. The suppliers refused to supply products to Carrefour under pressure from the dominant supermarkets.[122] Furthermore, the Consumer Council survey showed that 80 per cent of the supermarket outlets belong to these leading dominant chains.[123] The retail industry commented that the dominant supermarkets

[120] Consumer Council, 'Report on the Supermarket Industry in Hong Kong' (1994) Hong Kong.

[121] Poon, *Land and the Ruling Class in Hong Kong* (n 88) 101.

[122] The suppliers admitted that if a supermarket marks a price below the retail price, other supermarkets would ask them for a compensatory payment which was the difference between the recommended price and the lower price. In such cases, the suppliers would prefer stopping supplies to the discounting supermarket as a penalty than make compensatory payments to other supermarkets; ibid 103.

[123] Consumer Council, 'Report on the Supermarket Industry in Hong Kong' (n 120).

had also blocked Carrefour from renting larger sites in order to stop its growth.[124] Developer conglomerates restricted competition in the supermarket sector by preventing competitors operating in the vicinities of their properties.[125] Eventually, such vertical constraint and shortage of supermarket sites caused Carrefour to leave HK in 2000. The new competition regime has done little to confront this duopoly and the pro-competition potential is wasted. With a *laissez faire* attitude, the government continues to allow developer conglomerates to manipulate the market without intervention.

5.4.4 Ripple and Spiral Effect

In order to grasp the breadth of the anti-competitive problems in HK, it is important to look at the ripple and spiral effect existed in associated sectors in the following pattern. Ripple effect happens when one sector produces effects which spread and produce further effects in other sectors. Consumers buy flats from developers by paying mortgages and property management fees every month. Mortgage payments can last for 25 to 30 years and maintain a stable income for the developers. The developers may offer bundling services including broadband internet access and telephone services in the estate.[126] When consumers eat in restaurants or buy products in the shopping mall, they are indirectly paying the developers. When they pay electricity and gas bills, buy food in the supermarkets or take buses to work, all profits go to the developers again.

Spiral effect occurs when developer oligarchs have maintained a vicious upwards price spiral in the property market. Thanks to the government's high land price policy and under-supply of land or suspension of land supply, property prices and rent likewise increase. The public is led to believe that developers would not run a money-losing business. Subsequently, higher property prices and rent push up product and service prices. Higher consumer prices give rise to an expectation of higher land prices. This ripple and spiral effect

[124] Ben Kwok and Suzanne Harrison, 'Carrefour bails out after failing to reach critical retail mass' *SCMP* (30 August 2000).

[125] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 247; Suk-Ching Ho and Chi-Fai Chan, 'In Search of a Competition Policy in a Competitive Economy: The Case of Hong Kong' (2003) 37 The Journal of Consumer Affairs 80.

[126] Editorial, 'A freer market for HK' *SCMP* (HK, 27 May 2011).

encourages property speculation, harming consumers through exorbitant property prices[127] and reinforcing the anti-competitive phenomenon which is showing no signs of ceasing.

More than a century ago, Winston Churchill elucidated the evils of land monopoly in a speech delivered to House of Commons; ‘Land monopoly is not the only monopoly, but it is by far the greatest of monopolies – it is a perpetual monopoly, and it is the mother of all other forms of monopoly’.[128] One century later, land monopoly and hegemony still very much exists, creating incessant ripple and spiral effects in its associated sectors, guaranteeing exorbitant profits for the developers, generated from a distorted competition market.

5.4.5 Close Ties between the Government and Developer Tycoons

The government has long since been regarded as a collaborator with developer oligarchy in terms of its unjust land and housing polices. As detailed in the previous chapter, the government, statutory bodies and associated enterprises are either excluded or exempted from the Competition Ordinance. The government closes an eye to developers’ unethical and fraudulent practices such as giving misleading information in sales brochures, withholding crucial information such as price lists until the last minute, concealing the true efficiency ratio of the units, manipulating prices through selectively announcing furtive internal sales, using dribbling sales to increase prices in short intervals, having property agents use pressuring tactics on customers, and many others.[129] Based on the high price land policy, the income from land lease goes to the ‘Capital Works Reserve Fund’ controlled by the government. The spending of this fund is restricted to industrial and infrastructure works for which the developers are able to obtain the related construction contracts and receive a substantial piece of fund. Nonetheless, many white elephant projects are unpopular, controversial, over budget and delayed in their completion.[130]

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[127] Yu-hung Hong and Alven Lam, *Opportunities and risks of capturing land values under Hong Kong's leasehold system*, vol WP98YH1 (Lincoln Institute Land Policy Working Paper, 1998); Poon, *Land and the Ruling Class in Hong Kong* (n 88) 10.

[128] Winston Churchill, 'on Land Monopoly' (4 May 1909) <http://www.grundskyld.dk/pdf/Winston-Churchill-Land-Monopoly.pdf> accessed 3 December 2016.

[129] Poon, *Land and the Ruling Class in Hong Kong* (n 88) 10.

[130] Medhavi Arora, 'Money pits: 8 Hong Kong government ‘white elephant’ projects' *Hong Kong Free Press* (HK, 13 Oct 2015)

Furthermore, it is easy to spot vested interests between the senior government officials and the developers. The former chief executive's brother, Yam-Pui Tsang who was the former police commissioner, was recruited by a leading property developer, New World Development, to work as the executive director in 2004 immediately after his retirement in 2003. This company has interests in the hotel business, telecommunication and retail, and is involved with the Trade and Development Council (TDC),[131] a council that operates outside of competition law jurisdiction due to its statutory body status.[132] A controversy was sparked when New World Development's application to convert the TDC car park into a used car venue was soon approved after Tsang's appointment.[133] It was believed that Tsang's new position was very much to do with his connections in the police force and the position of his brother as head of the government.

In another case, Chin-Man Leung, the former permanent secretary for housing, planning and lands, was in charge of the Hung Hom Peninsula project which was sold far below the market price to New World Development in 2004. He had been offered a well-paid contract by a subsidiary of this developer after his retirement which has been perceived as a 'delayed reward' for a favour to this developer while holding his official position.[134] In another development project — Grand Promenade under Henderson Land developer, Leung was criticized by the Audit Commission in 2005 for having used his discretionary power over the grant of an developable floor area, which caused the government to lose hundreds of millions in land revenue.[135]

The 2013 Rafael Si-yan Hui case is a recent court case which also reveals confirmed collusion between the government and property tycoons. Hui was given a seven year sentence for conspiracy within a public office and the acceptance of a bribe of HK$11.182 million (US$1.43 million) from Sun Hung Kai Properties, the second largest developer, while he was working as chief secretary — the second highest position in government. The two property tycoons, Thomas Kwok and Raymond Kwok, bribed Hui to be favourably disposed

[131] Mahncke, 'Hong Kong's Competition Problem' (n 81).

[132] Please refer to Chapter 4 for discussion of exclusion of statutory bodies.

[133] Editorial, 'Tsang denies influence in brother's job at NWS' *The Standard* (HK, 19 July 2005).

[134] Teddy Ng, 'Demolition of Hung Hom flats scrapped' *The Standard* (HK, 11 December 2004).

[135] Editorial, 'Audit chief back lawmakers in Promenade row' *The Standard* (HK, 17 May 2006).

to Sun Hung Kai.[136] Thomas Kwok was sentenced for five years for bribery and Raymond Kwok was acquitted in his appeal.[137]

Up to now there have been a total of three chief executives who occupy the highest positions in the HK government after its handover to China. All of them, unfortunately, have colluded with the developer tycoons. The first former chief executive, Chee-hwa Tung, was the chairman of Orient Overseas Container Line (OOCL), one of the major players in the highly cartelized shipping industry. In the early 1990s, OOCL and four other firms were found to have rigged the overland transport of containers market, and were fined US$18.3 million by the EC Commission. OOCL and Cheung Kong, the largest developer, were financially connected as Cheung Kong owned 9.08 per cent of OOCL.[138] The second former chief executive, Donald Tsang, has been criticized for accepting money from property tycoons whilst mingling with the ultra-rich on private yachts and jets.[139] Tsang was sentenced for twenty months for his misconduct in public office in January 2017 and is facing a retrial for bribery in September 2017 for accepting a 6,500 square feet retirement penthouse redecoration from a developer, costing HK$3.35 million.[140] The third and current chief executive, Chun-Ying Leung, was condemned by LegCo members in September 2016 after he chaired the task force on the Wang Chau housing project in which collusion was found between not only the government and the developer, but also between rural leaders and trail members. Leung approved a step to change the original plan, which would have meant developing 13,000 public housing flats in a large site controlled by rural leaders, to constructing only 4,000 flats — an arrangement which displaced three villagers of local residents who were forced to move out of their homes.[141] At the same time, a government-commissioned consultancy firm has been penalised for breaching a contract by leaking confidential internal data about a housing project in Wang Chau to a private developer, New

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[136] *HKSAR v Hui Si-yan Rafael* [2013] HCCC 98/2013; *HKSAR v Hui Si-yan Rafael* [2014] CACC 555/2014.

[137] *HKSAR v Hui Si-yan Rafael* [2014] CACC 555/2014 .

[138] Editorial, 'Tung firm buys back 9pc Li stake' *The Standard* (HK, 9 August 2003).

[139] Alex Frew McMillan and James Pomfret, 'Hong Kong property tycoons muscle in on leadership poll' *Reuters* (London, 23 Mar 2012).

[140] *HKSAR v Tsang Yam-Kuen Donald* [2015] HCCC484/2015. The retrial was due to the jurors were unable to reach a verdict.

[141] Joyce Ng, 'Revealed: decision behind Wang Chau rural housing scandal reaches very top of Hong Kong government' *SCMP* (HK, 21 September 2016).

World Development.[142] Instead of trying to aid the current shortage of housing, Leung chose to protect the vested interests of the developer and rural leaders.

The above cases reveal just the tip of the iceberg. It is not uncommon for the members of LegCo and ExCo to be representatives of the business sector or affiliated with commercial entities, in particular the developer conglomerates. There is an urgent call to review the institutional safeguards for disclosure of conflict of interests and the acceptance of bribes. Continuous collusion between the government and large developers only intensifies the factor of land hegemony which cripples the effectiveness of the new competition regime.

5.5 The Competition Regime and the Political Regime

Another prominent external factor affecting the effectiveness of the competition regime is the political regime. Due to the ongoing tacit understanding between the government and business tycoons, it is worthwhile exploring whether a political reform is the answer to HK's defective competition regime. In a democratic country the configuration of the government should reflect the will of the public, whose interests and welfare are expected to be taken into account. Should a bad government be in power, a democratic regime would limit and contain its governing power, whereas an undemocratic political regime could allow it a damaging amount of freedom. Democracy itself should not be without limits. Samuel Huntington argues that a premature democratic regime could potentially destabilize a fragile political system in the developing world.[143] HK, however, as a developed rather than a developing region[144] should be well placed to implement political fairness in tandem with its thriving market economy to ensure sustained economic growth. Amartya Sen suggests that strands of economic rectitude coupled with rule of law and efficient, impartial and uncorrupted government all seem necessary pre-requisites for a system of competition regulation adoption and appropriate implementation.[145] William Kovacic concurred with this argument.[146] Mark

[142] Ernest Kao, 'Company who won government tender penalised for leaking confidential data to private developer' *SCMP* (HK, 13 November 2016).

[143] Samuel Huntington, *Political Order in Changing Societies* (Yale University Press 2006).

[144] United Nations, 'The Developing Countries - the United Nations' (2012) statistical annex.

[145] Amartya Sen, 'Democracy as a universal value' (July 1999) 10 Journal of Democracy ; Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* 420 (n 125).

[146] William Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001-2002) 77 Chicago-kent Law Review 293-297.

Williams, a scholar pioneering research on the HK competition policy, asserts that HK fulfils most of the requirement of a functioning democracy, in that it already has a good government, thriving civil society, the rule of law, low corruption rates and therefore only needs to pass a political reform bill to adopt universal suffrage.[147] At the same time, he added that simply introducing a pro-competition policy would not be effective because a functioning democracy is absent.[148]

Furthermore, the roles played by the elected chief executive in government and elected lawmakers in the legislature directly affect the competition regime as a whole. For example, the chief executive has the power to appoint the chairperson, members of the board of Competition Commission, the president and deputy president of the Competition Tribunal as well as judges in other levels of judiciary. He has the power to decide on the formation and implementation of competition policy, the authority to propose the related resource allocation for the competition policy, as well as the annual budget for the Competition Commission. He can also initiate an amendment of the Competition Ordinance.

Regarding the roles of the lawmakers on the competition law and policy, the lawmakers have the power to pass or veto a motion to amend the Competition Ordinance. They also have the power to examine and approve budgets for the Competition Commission and to scrutinize its operations. They can debate issues and raise questions on the work of the government in connection with competition law and policy.

In the absence of universal suffrage, the chief executive and lawmakers have neither a popular mandate nor direct accountability to the people. While amending the competition law or implementing the competition policy within an undemocratic system, the outcome is unlikely to reflect the needs of consumers. However, adopting universal suffrage in HK needs to overcome three power giants: economic power, political power and legal power.

[147] Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* 424 (n 125).

[148] ibid 422.

5.5.1 Economic and Political Powers

To illustrate how economic and political structures in HK are resisting democratization, an examination of the election system of the chief executive and legislature is needed. Generally, the electoral base is divided into three camps: a pro-Beijing camp, a business camp, and a pro-democratic camp. In order to elect a chief executive, 230,000 people (out of a total population of 7.3 million) from particular sectors are eligible to vote for a 1,200 member panel[149] which in turn will have the privilege of selecting the chief executive. Notably, only around 3 per cent of the population have a right to vote for the panel, which is thoroughly undemocratic. Out of 1,200 election committee members, around 400 seats are controlled by the business camp while another 450 seats are occupied by the pro-Beijing camp. Therefore it is in fact just 850 (400 plus 450) out of 1,200 votes which decide on the next chief executive. This system is mocked as a small circle election with a very narrow electorate base dominated by the business camp and the pro-Beijing camp.

As discussed earlier in the section ‘Objectives and Political Institutions,’ about half of LegCo members are from the FC and naturally favour less regulation of the business sector. Again, the FC electorate base could be as few as three or four hundred voters. With such a narrow electorate, the election outcome is easily manipulated to guarantee seats. Under a separate voting system, a motion put forward by a lawmaker must be approved by a majority of all lawmakers in both the FC and GC. In addition to the corporate voting system,[150] this separate voting system could also strengthen the power of the business camp to block a motion from the democratic camp. No matter how supported the motion is by the GC representing the public, the FC (representing the commercial oligarchy) can veto it. As an example of this, the Democratic Party initiated a Fair Competition Bill in 2001, which had majority support in the GC. The bill, however, was rejected after a separate round of voting

[149] It comprises of four sectors: I) 300 seats for industrial, commercial and financial sectors, II) 300 seats for professions, III) 300 seats for labour, social services and other sectors, and IV) 300 seats for ex officio members. These four sectors are subdivided into 38 subsectors.

[150] A corporate voting system enables corporate entities to have the right to vote. Thus, corporate owners or directors enjoy this special right. In other words, a director could possibly have more than one vote if he is holding more than one company.

by the FC.[151] Thus, the election methods for voting in the chief executive and the legislature stand opposed to democracy, but are in favour of both the pro-Beijing and business camps.

Given the increasing economic integration between HK and China, the business camp is in fact becoming less and less likely to exercise an independent vote but increasingly subject to Beijing's choice. It is not surprising that the business oligarchy camp and pro-Beijing camp are reluctant to change the undemocratic system but want to maintain their control in the present political regime. Therefore, the HK government is unwilling to put forward a universal suffrage motion. Such economic and political powers are continuing to shape competition law and policy in the interests of the business camp.

5.5.2 Legal Power

Apart from dominating the economic and political spheres, Beijing uses its legal power to prohibit the possibility of universal suffrage. Although the pro-democratic camp has been pushing very hard to realize universal suffrage, Beijing has postponed its promise three times so far. In accordance with the legal-political principle 'one country two systems,' HK was promised a high level of autonomy after the handover.[152] Basic law (the supreme constitution in HK) has promised HK universal suffrage in the elections of both the chief executive[153] and legislature[154] since 2007. Nonetheless, in 2004 the Standing Committee of the National People's Congress (NPCSC) officially interpreted the relevant provisions of the Basic Law[155] in such a way that no universal suffrage of the chief executive or legislature election would

[151] Although the pro-democratic camp has been distorted by the FC effect, changing from a majority to a minority in terms of the number of seats in the whole house of legislature. See Hong Kong Voter Registration, 'Geographical constituency' <http://www.voterregistration.gov.hk/eng/statistic2016.html> accessed 10 October 2016.

[152] Sino-British Joint Declaration, para 3.2; Basic Law, art 2.

[153] Basic Law, art 45 and annex I(6).

[154] Basic Law, art 68 and annex II(III).

[155] Basic Law, art Article 158.

happen in 2007 and in 2008 respectively.[156] Subsequently, the NPCSC disallowed universal suffrage for both chief executive and legislature in 2012 again.[157]

In respect of the chief executive election in 2017, the NPCSC made a decision on 31 August 2014 (The 'Decision') to introduce 'Chinese style' universal suffrage, screening out pro-democratic candidates before they could run for election.[158] At the same time, the Decision did not abolish the highly controversial FC in the LegCo election. This is the third time the NPCSC has banned genuine universal suffrage. The Decision deprives HK residents of their constitutional right to be elected, and fails to recognise the local Bill of Rights,[159] Basic Law,[160] and the international law, i.e. the International Covenant on Civil and Political Rights, which has been constitutionally incorporated into Basic Law.[161] After the vetting process, there is a 'one person one vote' opportunity open to all HK voters. Beijing seemingly attempts to transfer a fake 'Chinese style' democracy onto HK.[162]

In protest against the Decision, an historic political campaign took place – the 'Umbrella Movement' which occupied the Central for 79 days.[163] Chris Patten, the last

[156] Decision of the NPCSC on Issues Relating to the Methods for Selecting the chief executive of the HKSAR in the Year 2007 and for Forming the LegCo of the HKSAR in the Year 2008, adopted by the Standing Committee of the Tenth NPC at its Ninth Session on 26 April 2004.

[157] Decision of the NPCSC on Issues Relating to the Methods for Selecting the chief executive of the HKSAR and for Forming the LegCo of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage, adopted by the Standing Committee of the Tenth NPC at its Thirty-first Session on 29 December 2007.

[158] For example, the candidate is required to be patriotic to Beijing but such a requirement is ambiguous and subjective, on the basis that Beijing decides who is patriotic or not. Another requirement is that each candidate must have the endorsement of more than half of all members of the election committee. In other words, a candidate has to receive support from at least 601 out of 1,200 committee members in order to take part in the chief executive election race. This virtually screens out all candidates from the pro-democratic camp because it is very difficult for them to secure support from 601 members, at least in the present stage, due to the composition of the election committee as explained before. The Decision was even more conservative than any proposal made by the pro-Beijing camp and caused outrage.

[159] Bill of Rights Ordinance, art 21(b).

[160] Basic Law, art 26.

[161] Basic Law, art 39(1); International Covenant on Civil and Political Rights, art 25.

[162] Andrew Nathan, *Chinese Democracy* (Knopf 1985) 227-228.

[163] The name, Umbrella Movement, comes from the use the umbrellas to resist the Hong Kong police and their pepper spray and tear gas. The Movement, which started on 26 September 2014, involved hundreds of thousands who began their protests, with the principle of non-violent civil disobedience and willingness to assume the consequential legal responsibility to demand recession of the NPCSC's Decision. Almost all university students boycotted class and many secondary school students set up political reform concern groups to echo the Movement. Rallies occurred in front of Hong Kong trade offices or Chinese consulates in 64 cities

British governor in HK and current Chancellor of the University of Oxford, praised many brave young people for taking part.[164] In the end, the movement was unable to force Beijing to make any concessions on the universal suffrage proposal. A political reform would require consent from two-thirds of all LegCo,[165] and the pro-democratic camp vetoed against this electoral reform proposal. The next election reform opportunity for chief executive and legislature has been postponed to 2020 and 2022 respectively. In view of these repeated setbacks, the prospect of a reform in the next four to five years is slim. It is also unlikely that the effectiveness of the current competition regime will significantly improve as democracy serves as a pre-requisite for the optimal performance of a competition regime.

5.5.3 Genuine Universal Suffrage – Mission Impossible?

Due to the dominance of the commercial oligarchs, the pro-Beijing camp and Beijing's supreme legal power, the government is unlikely to make a public motion to amend competition law. If a private motion is raised by a pro-democratic lawmaker, it is very probable to be blocked by the FC in the same way that the Fair Competition Bill was in 2001. We can conclude that genuine universal suffrage is an impossible mission at the present moment.

Mark Williams added that an effective competition regime will not be achieved unless the political institution substantially improves.[166] An undemocratic government with control

globally. The activists alleged that they have been intimidated with threats, victims of hacking, put under surveillance, and subjected to privacy invasion and harassment that was similar to the way mainland Chinese activists and their families have long been targeted. Police used elevated levels of violent suppression against peaceful demonstrations. Trail members were employed by anti-Umbrella Movement groups to cause chaos in the mass protests so that the government did not assume responsibility but the police had an excuse to step in to scatter the movement. At least 500 movement activists' names have been blacklisted so that they are not allowed to return to mainland China. A number of political activists were arrested, prosecuted and sentenced. Young protesters were treated as juvenile delinquents to deter them from protesting. This was regarded as 'white terror'. See e.g., Chris Lau, 'Police won't seek protection order for Hong Kong teen arrested during Occupy clearance' *SCMP* (HK, 13 January 2015); Verna Yu, 'Hong Kong's 'Occupy' leaders now face quiet but persistent harassment' *SCMP* (HK, 18 February 2015); Didi Kirsten Tatlow, 'Images of Hong Kong's 'Umbrella Revolution' Tell a Story' *SCMP* (HK, 29 September 2014).

[164] Benjamin Haas, 'Hong Kong independence activists hit back after Chris Patten's criticism' *The Guardian* (London 25 November 2016).

[165] Basic Law, annex 1(7).

[166] Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* 428 (n 125).

over various sectors is likely to have an irreconcilable conflict of interest between promoting competition and seeking its own gain. Pro-competition principles will inevitably yield to anti-competitive forces when the two collide.[167] In brief, a functioning democracy to ensure a broad representation in the electoral base is a necessary condition for choosing not only the chief executive but also the lawmakers who would have the chance to process a competition reform.

Nevertheless, it is worth pausing to celebrate the fact that HK people are becoming increasingly pro-active and engaged with politics. After the Umbrella Movement in 2014, the turnout rate of the 2016 LegCo election reached a historically high number.[168] The number of LegCo seats won by the pro-democratic camp increased from 27 to 30 out of 70. Furthermore, many of the new lawmakers have joined the pro-democratic camp are young people. The average age of elected lawmakers has decreased from 58 to 49 years, with the youngest one aged 23. There is high hope for these new young lawmakers to contribute to political reform in HK over the coming years. In the next LegCo election in 2020, many secondary school students will become eligible voters with a minimum voting age of 18. Similarly, the 2016 election committee vote for the new chief executive, had a turnout rate 20 per cent higher than the previous election.[169] The pro-democratic camp increased its seats significantly from 173 to 325, although it is still a minority within the 1,200 member panel. A high number of eligible voters (many of whom are victims of land hegemony) who had previously supported pro-Beijing and business camps voted most recently for the pro-democratic camp.

Statistically, the number of young people and eligible voters to support the pro-democratic camp has grown in both the LegCo and election committee, and is soon expected to be sizable enough to start blocking unhelpful government motions and rejecting Beijing's pre-vetted candidates. Once a genuine universal suffrage is in place, this will open the gates to a truly elected chief executive and LegCo representatives, who will be accountable to the public. Only under this system will there be hope to bring an end to government and tycoon collusion, an eradication of land hegemony with its ripple and spiral effect in associated

[167] ibid 433-434.

[168] 58 per cent of the registered voters in 2017- five per cent higher than 53 per cent in 2012 election.

[169] There was a 47 per cent turn out rate in 2017 election compared to 27 per cent in 2011.

sectors, and the beginning of consumer-friendly land and competition policies. Ultimately, a transformation of the political regime will be an important pillar for building a healthy competition market and economy as a whole.

5.6 Solutions and Conclusion

Looking to the future and considering the necessary steps to realising this vision, it would seem that the Competition Commission, as the main competition law enforcement agency, should pro-actively fulfil its duty in enforcing the law, relying less on other law enforcement institutions – such as the SFC, HKMA, ICAC and police, to tackle bid-rigging and other cartel activities. More importantly, the Commission should not be accustomed to referring any cases back to COMPAG, a powerless body.

Furthermore, it is strongly recommended that private enforcement and merger control rules should be adhered to, as they are key in completing a successful competition market. There needs to be a reduction of the scope of law application through the raising of the *de minimis* threshold on the first conduct rule and turnover threshold on the second conduct rule, with the obvious aim of protecting the SMEs. The author does not disagree with maintaining these thresholds as a two or three year transitional period. However, in order to maintain a level playing field in the long term, protection of SMEs should not be encouraged. Thus, such thresholds should be normalized to a certain level, with proper coverage of jurisdiction. Lastly, the pecuniary penalty should return to ten per cent of the global turnover rather than local turnover. Such a weighty penalty is essential in providing a sufficient deterrent for huge international conglomerates.

In terms of tackling land hegemony and its ripple and spiral effect, there are several solutions including but not limiting to the following:

- A reform of the land and tax system is needed so that it does not rely on high land prices. ‘Land value taxation’ has been adopted by many developed countries to deter speculative land holding, and support a stronger economy and more efficient land market.

- The government can impose a hefty charge on developers or use the Lands Resumption Ordinance to take back the land for public purposes, if the developers are still holding the land without developing it after a reasonable period.

- As the sole owner of large amounts of idle land, the government should actively increase land supply by auctioning off more land, and reduce the lot sizes to encourage more bidders.

- The government might consider legislating to stop 'turnover-linked surplus rent' in the rental market so as to reduce the cost of running a business.

- The government should increase market transparency by facilitating consumers' access to reliable property information.

- Once the original purpose of a piece of land (power plant sites, gas workstations and bus depots) no longer exists, the government should take back control of the land from the site owners. When the land hegemony phenomenon is tackled, its ripple and spiral effects will start to disappear.

No matter how many appropriate suggestions are put forward, however, there clearly needs to be a democratic regime in place for their proper implementation. Since young people are becoming more and more politically active as evidenced earlier in the chapter, it is crucial for the pro-democratic camp to spend time and effort uniting and galvanizing as many young people and professionals as possible. The new generation brings hope for a better political system which, in turn, will help to improve the competition regime in the future.

This chapter has laid out the correlation between the objectives, institutions and scope of application, and how together they have a far-reaching effect on the competition regime. We have seen how the current competition and political systems are hardly fulfilling the objective of consumer welfare. The applicability of the law is pitifully constrained by a plethora of concessions which undermine the objectives, as well as land hegemony which has acted as a major source of anti-competition practice across many sectors. In short, the present competition regime is clearly sub-optimal.

It has become apparent that the new competition law was created for the profiting of business oligarchs, and both the executive and legislature have far from sufficient accountability to consumers. A range of short-term solutions improve the situation, however, the ultimate solution has to be a political regime reform which realises true democracy, and HK is already well positioned for this transformation with its well-functioning legal system, a strong media, freedom of speech, and a literate population. Once a true democracy is established in HK, the long awaited mission of sustaining an effective competition regime can finally be completed.

Conclusion

This thesis set out to examine how Hong Kong's new competition regime can optimise its effectiveness at the dimensions of objectives, institutional design, and scope of application. It further considers how the HK experience can add to our theoretical understanding of how an effective competition law regime can be achieved. This thesis pointed out the misconception of HK being the world's freest economy, given its fundamentally flawed competitive environment, with a cynical *laissez-faire* policy existing alongside longstanding anti-competitive culture in many sectors. It is submitted that government intervention is necessary to correct such market imperfections.

Regarding objectives, the Competition Ordinance remains unspecific on objectives. It can be inferred from policy statements and official discourse that economic efficiency is the primary objective and consumer welfare the secondary objective. A codification of objectives in the Ordinance is desirable for legal certainty and predictability. A 'purely economic' approach, highlighting efficiency but undermining consumer welfare and neglecting non-economic objectives, significantly constrains the regime's optimisation. In order to ameliorate the domination of the market by a few business oligarchs who unduly influence policy making, this thesis advocates placing consumer welfare in at least equal importance to economic efficiency. Moreover, adopting a spectrum approach in pursuing an ultimate objective of promoting well-being is recommended.

Institutions have an enormous effect on enforcement outcomes. The newly-established enforcement agency, the Competition Commission, is still in the process of gaining credibility in HK. It has a number of institutional problems revolving around the nature of appointments, its register of interests, member selection process, independence, and accountability. This thesis has suggested recruiting full-time Commission board members, improving the selection process of board members, expanding the coverage of register of interests to China and overseas to prevent conflicts of interest, reducing the chief executive's power to remove board members, and increasing the Commission's accountability to the semi-democratic Legislative Council. The consequences of ignoring these issues may be serious.

In looking at the virtues and limitations of the three main competition regime models (administrative, judicial, and semi-judicial), it has been worthwhile to examine the HK government's decision to shift from an administrative model to a semi-judicial model. This came about because of the Final Court of Appeal case of *Koon Wing Yee*, human rights issues, and possible due process challenges. The thesis has found that an unintended process of judicialisation might occur under the current semi-judicial model, likely leading to a cyclical pattern which brings back a de facto judicial model. After analysing the features of the Competition Tribunal, it appears acceptable to choose a semi-judicial model for this new competition regime in light of the unique political environment, history, and legal culture. Nonetheless, the Tribunal faces potential challenges – threats to judicial independence, the titular role of assessors, and the absence of private enforcement.

Concerning the competition law's limited scope of application, it troublingly maintains an almost-blanket exclusion of all public entities. Although Section 5 of the Ordinance provides an opt-in provision that may enable a statutory body to not be excluded from the law, the conditions are extremely difficult to satisfy. The thesis argues against the structural approach used by the HK government to determine the scope of exclusion. Instead, a functional approach is preferred to create a level playing field between public and private sectors. The author has proposed a series of procedural and substantive considerations to improve the scope of application.

In terms of correlation between objectives and institutions, the insufficient representation of consumers in the Competition Commission board undermines the pursuit of consumer welfare. The Commission should be more pro-active in achieving its aim of eradicating anti-competitive conducts, rather than relying on other law enforcement bodies to do so. Regarding the relationship between objectives and scope, objectives are detrimentally affected by the shrinking scope of competition law application, given the major concessions made in cancelling merger control rules and private enforcement, reducing the application scope on both the first and second conduct rules involving SMEs, as well as hugely decreasing the pecuniary penalty.

In addition to analysis of the above three internal dimensions, the thesis has also explored two external factors – land hegemony and the political regime, which both diminish the effectiveness of the competition regime. Land hegemony has been the source of many competition problems in HK as the land system has long been manipulated by the government and property developer oligarchs. Due to ripple and spiral effects, land hegemony has led to monopolies, duopolies, and oligopolies forming in various associated sectors. Although there could be many adequate solutions to these problems, the current flawed political regime lacks an accountable government and legislature, and does not reflect the wishes of consumers at large.

Imperfectly designed competition legislation causing a sub-standard competition regime has directly resulted from the interplay of the oligarchy commercial interests and their control of extant political power, which exacerbated by the democratic deficit in the government and legislature. The competition environment worsens when government officials collude with businessmen. Since a competition regime of this nature is unlikely to achieve the desired outcome of combating anti-competitive practices, one can conclude that it is less than effective.

In order to achieve a fully-functioning competition regime, reform of the political regime is necessary. Increased democracy via political reform would stimulate competition reform, which would begin to undo the entrenched powers of the oligarchs. Likewise, genuine universal suffrage would likely lead to rectification of the non-competitive, biased, and distorted land system. It might also improve anti-competitive conduct in associated sectors, thereby achieving the objectives of economic efficiency and consumer welfare. However, genuine universal suffrage is unlikely, if not impossible, under the current economic, political, and legal atmosphere in HK. It is hoped that the pro-democratic camp can inspire and unite more young people and professionals, paving the way for truly democratic politics and an environment in which an effective competition regime can flourish.

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