THE QUIET EXPERIMENT IN THE HONG KONG COMPETITION LAW

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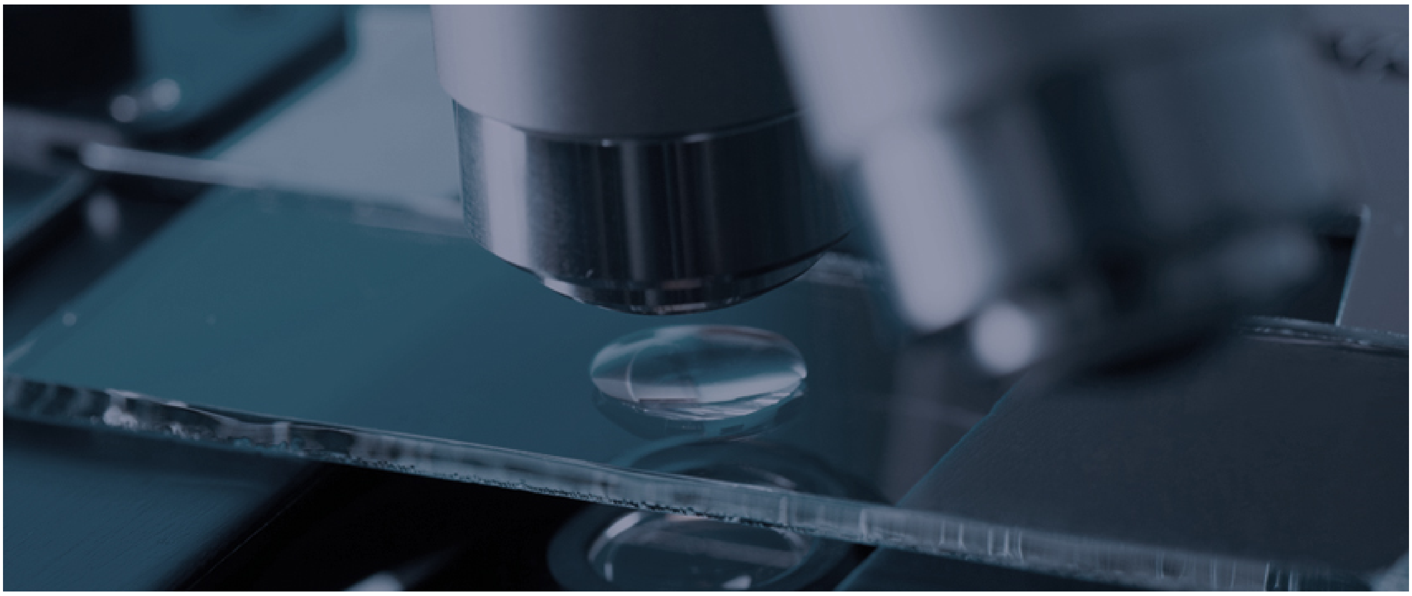

The Hong Kong Competition Ordinance, Cap. 619 came into effect just over seven years ago. Designed to promote and protect competition in the market and prohibit anti-competitive conduct, it applies to all business sectors in Hong Kong, including local and international companies that operate there. The Competition Ordinance aims to create a level playing field for business, encouraging innovation and efficiency, and enhancing Hong Kong's competitive reputation as a business hub. However, the longer-term impact of the Ordinance is probably yet to be seen. Its influence has steadily evolved over time, a slow burn rather than a swift remedy. So why is this the case? As with all things, it's important to look at the past in order to understand the influence on tomorrow.

When the original bill for the Ordinance was published for consultation, critics were decidedly underwhelmed, directing their reproval mostly against a statutory cap on the penalty being 10% of the domestic, rather than international, turnover. There would be no blockbuster fines like those heavy sanctions we saw in other jurisdictions. As such, anti-competitive businesses, especially those international conglomerates, probably felt like they had dodged a bullet and would simply absorb fines as a cost-to-compete. But the devil is always in the details.

Back in 2015, much less attention was paid to some of the special features in the bill, features that were not present in the EU regime (the backbone of the HK regime) but have the potential to make the latter much more effective than it looked at first glance. One such feature was the extension of the subject of punishments from the infringing undertakings to a widely defined category of secondary parties under Sections 91 and 107. The recent judgment of the Competition Tribunal in [Competition Commission v Kam](#)

Kwong & Ors has brought this to light. So, to fully understand the impact of the Competition Tribunal's decision, as well as the relevant features in the Hong Kong regime in general, the most appropriate starting point of analysis is the prototype of the regime, namely the EU regime. And it all begins with the most well-known feature of EU competition law: the concept of undertaking.

The commercial world controls risk via the use of corporate vehicles, and it is not unusual for subsidiaries to be deployed by the parent company in the operation of a normal business. It was the original intent behind the creation of a fictitious legal person known as an incorporated company, after all. But it does pose challenges to effective regulation of anti-competitive conduct. So, the EU regulations were designed to regulate undertakings, the economic units to be defined by business or economic interests, rather than the legal personalities under the corporate laws of the relevant jurisdictions. As such, the conventional legal problems with regards to circumvention of responsibility posed by corporate veils are side-stepped. All corporate entities within the same undertaking would be jointly and severally liable for each other's anti-competitive conduct.

The invention of the concept of an undertaking is a step towards removing the technicalities that hamper effective regulation of anti-competition. However, the European regulations still seem to be lenient on the management teams who control the undertakings and direct anti-competitive conduct. The EU regulations do not provide for sanctions against management teams for infringing undertakings merely in their capacity as such, but rather leave such issues to individual member states.

The concept of an undertaking is intended to be flexible, and therefore one may argue that management teams who are also substantial shareholders or directly benefit from anti-competitive conduct, could be regarded as part of the infringing undertaking, as their personal economic interests converge with their professional duties. Such argument, however, remains a theory as the European Commission, which is the enforcement agency of the EU regime, has not taken any enforcement actions on such a basis.

Individual member states of the EU have taken different efforts to hold the management teams responsible. In the Netherlands, the Dutch Courts recently allowed the liquidators of Heiploeg, a North Sea shrimp supplier, to recover part of the €27m cartel fine paid to the European Commission from a former director on the basis that his personal involvement in the relevant cartel arrangements amounted to serious mismanagement of the company. However, the UK Courts refused to take a similar line. In Safeway Stores Limited & Ors v Twigger & Ors, the EWCA held that the fine imposed by the Office of Fair Trading was intended to be a "personal" liability of the undertaking under the Competition Act 1998, therefore, the undertaking in question cannot recover the fine from former employees.

It seems that the UK regime turned to the tools of criminalising cartel agreements and director disqualification, instead of seeking to impose financial penalties on management teams. Section 188 of the Enterprise Act provides for an offence against an individual who agreed with others that undertakings will engage in direct or indirect price fixing, limitation of supply or production, market sharing and/or bid rigging. Instead of establishing a comprehensive criminal jurisdiction in respect of all kinds of anticompetitive conduct, the act only provides for a narrow criminal offence. Such cartel offence applies only in respect of reciprocal horizontal agreements. Vertical agreements are completely left out. Also, there is no attempt to criminalise the management teams for causing the undertakings to abuse the market dominance under Article 102 of the TFEU, the other major form of anti-competitive conduct regulated by the EU regime.

The Company Directors Disqualification Act 1986, as amended by Enterprise Act 2002, empowered the Competition and Markets Authority to seek an order from the court to disqualify an individual from being a company director for a period of up to 15 years. The court must make a disqualification order if it considers that a company of which that person is a director commits a breach of competition law and the court considers that person's conduct as a director makes them unfit to be concerned in the management of a company.

Finally, in the UK, parties that have suffered damages as a result of the anti-competitive conduct may seek redress in the follow-on actions before the civil courts. However, instead of being able to invoke straightforward statutory causes of action, the victims would have to rely on the traditional common law causes of action in tort, namely a director's tortuous liability for the company's breach of statutory duty and/or conspiracy to injure. However, such causes of action are difficult to establish and are often exceptions to the general rule that a director of a limited company cannot be held liable for the torts of the employees unless they ordered and procured the acts to be done. Therefore, establishing the claim requires a high degree of participation of a director in the infringing conduct, placing a high evidential burden on the claimants.

If the efforts of the EU and the UK in holding management teams responsible have faced difficulties and setbacks through the lack of a unified approach, how has the HK regime evolved? Perhaps the individuals responsible for drafting the Competition Ordinance were fully apprised of the shortcomings of the EU regime and decided to take a much more robust approach. As Harris J commented in Competition Commission v Kam Kwong & Ors: "Hong Kong has decided to take a different approach at the penalties stage to the European Union. This is clear from sections 91 to 93."

Sections 91 to 93 are the major provisions for the Competition Tribunal's power to impose penalties and other sanctions. Instead of referring to undertakings, those provisions refer to persons as the subject of sanctions. More significantly, the persons that are caught by the regime are not confined to those constituent entities within the infringing undertaking and include those who have been involved in a contravention of a competition rule, as opposed to directly contravening it.

The definition of persons involved in a contravention under section 91 includes the well-known concepts of accessories under the criminal law, namely attempting to, or aiding/abetting/counselling/procuring/inducing or attempting to induce/conspiring with any other person to contravene a competition rule. Empowering the Competition Tribunal to sanction the accessories is a major expansion of the scope of the regulations compared to the EU regime. It has significantly enhanced the effectiveness in deterring all kinds of contravention of the competition rules. What is arguably the most noteworthy category of persons under section 91 are those who are "in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule" under section 91(d). In the securities regulations, a "person knowingly concerned in or a party to contravention" has been held to include executive directors of a listed company: Securities and Futures Commission v Qunxing Paper Holdings Co Ltd (No. 2). Section 91(d) should have the same application in the competition context, which would send a chill in the spine of the management teams of the infringing undertakings.

There are no official explanations for the policy reason behind the Ordinance's significant departure from the EU regime. However, it is apparent that Section 91 was inspired by section 75B of the Competition and Consumer Act 2010 in Australia ("CCA"). Plus, certain features of the CCA may allow us to predict the future trend of enforcement. Australian competition law does not adopt the concept of undertaking, it directly targets a corporation. Rather than being guided by policy considerations, the drafters of the TPA/CCA were probably more constrained by the peculiarity of the Australian constitutional law.

The TPA/CCA was also a Commonwealth legislation. Under the constitutional arrangement of Australia, the Commonwealth Parliament's legislative powers are confined to specific subject matters, including "foreign, trading and financial corporations" under section 51 of the Australian Constitution, which was chosen to be the basis of the TPA/CCA. Owing to such constraint in the legislative power, the Commonwealth Parliament could only regulate individuals by providing for accessory liability. In fact, as a result of a major reform of the relevant law at the State level in Australia in 1995 and 1996, all individuals are now directly subject to the relevant provisions under TPA/CCA. In practice, the Australian Competition and Consumer Commission ("ACCC") and its predecessor have been robust in enforcing the TPA/CCA against the directors and senior employees of an infringing corporation by way of secondary liability under section 75B (for example, ACCC v Giraffe World Australia and Rural Press Ltd. v ACCC)

It is undeniable that section 91 has cast the net of anti-competition as wide as possible. Whilst critics may have been underwhelmed by the statutory cap for the pecuniary penalty, the fact that senior management teams could be held directly liable for the conduct of the undertakings they manage is arguably no less effective or deterring than a blockbuster fine to be imposed on the undertakings. Not only will they face the risk of public enforcement, but they are also exposed to follow-on actions. The definition of the scope of the persons subject to public enforcement actions under section 91 is replicated in section 107 which defines the scope of the potential defendants in the follow-on actions under section 110(1)(b). On the face of such a definition, it is arguably much more straightforward to bring about statutory follow-on actions than the traditional common law claims based on breach of statutory duty or conspiracy to injure, as still practiced in the UK.

So, what does the future hold for the regime in Hong Kong? The drafters of the Competition Ordinance in Hong Kong do not explain the degree to which the EU and the Australian models are intended to be amalgamated. Nor does the concept of secondary liability exist in the EU regulations. Therefore, the Competition Commission and the Tribunal are facing a challenge, with very limited materials made available during the legislative process to assist the statutory interpretation. This may well have influenced the Competition Commission's notably cautious manner in enforcing the Competition Ordinance.

Whilst section 91 catches senior management teams conceptually, the Competition Commission has just started invoking it in the more recently commenced proceedings which are yet to be decided by the Competition Tribunal. In Competition Commission v Kam Kwong & Ors, section 91 was invoked against a sole proprietor (R5) who "borrowed" the license from another contractor (R3) under the relevant scheme run by the Housing Authority. R5 ran the contravening business in the name of R3, which effectively rendered the relationship as one of agent and principal. On the other hand, section 91 was not invoked against R4, which was the sole shareholder and director of R1. Only a disqualification order under section 101 was sought and granted against R4. Such prudent enforcement is certainly welcome by practitioners as it is conducive to a solid development of competition jurisprudence.

Given the unprecedented amalgamation of the EU and Australian regimes, it is foreseeable that certain interesting legal issues will arise for arguments in the future. For example, how should the pecuniary penalty be calculated for persons who are found liable based on section 91? Conceptually, it is difficult to apply the same EU formula against the principal contraveners as there is no "value of sales" (i.e. step 1) that can be attributed to the accessories. The relevant Australian jurisprudence fails to provide a solution here. The calculation of the penalty against R5 in Competition Commission v Kam Kwong & Ors was not detailed, so the issue is certainly subject to future developments when suitable cases arise. Plus, will a separate fine against, for example, a substantial stakeholder of various companies constituting the infringing undertaking on top of a fine against those companies give rise to the issue of double jeopardy? And to what extent the principle of totality will feature in the calculation of the penalty?

What clues have all of these events and the examination of the underlying legal frameworks can we discern, as to how the enforcement of the competition law will evolve in Hong Kong? It is undeniable that since the inception of the Hong Kong regime seven years ago, the business world has experienced an unprecedented level of disruption and change. As corporations have struggled to navigate the very real prospect of insolvency through reigniting supply chains, refreshing capital stacks and building up stronger balance sheets, management teams have never faced so much pressure to perform. And that, of course, is why we face record levels of fraud, corruption, and business crime. The temptation to survive through anti-competitive conduct would be more real than ever. In such a tough economic climate, the daring experiment in implanting the Australian ideas under sections 91 and 107 into the otherwise EU-modelled Ordinance may pay off. For the Competition Commission, section 91 could be a formidable means to effectively police anti-competitive practices. For practitioners, both sections 91 and 107 may become fertile ground for litigation in the years to come.

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