

— **Check against Delivery** —

Keynote speech by
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at Comparative Approaches to Regulation in India and China Conference
University of Pennsylvania, US
24 Oct 2015

Ladies and gentlemen, thank you for giving me this opportunity to introduce to you the Hong Kong Competition Commission, the new kid on the block, one of the youngest agencies in the world.

To put the importance of the conference in context, let's take a moment to consider these facts:

- China and India have a combined population of over 2.5 billion, one in three of the world's people lives in either India or China.
- They are the two fastest growing economies in the world; and
- Their economic success has lifted millions of people out of extreme poverty.

Asian economies have experienced astounding growth in the last century. As these economies mature, the region is shifting to structural reforms aimed at achieving longer term sustainable growth. This means that competition policies and laws are increasingly being taken seriously. Microeconomic reforms for sustainable growth in Asia have the potential to enhance the wellbeing of more than half the world's population.

As we embark today on a comparative review of competition laws of different areas, we are in fact examining very significant initiatives for sustainable development and consumer protection.

So what can Hong Kong bring to this equation? In terms of geography, Hong Kong is a very very small place. It is no more than a tiny dot on a world map. But don't let our size fool you.

Hong Kong is home to one of the biggest, most vibrant, economies in the world. It is home to:

- The world's eighth largest trading economy;
- Fifth largest foreign exchange market;
- Eighth largest banking sector;
- The second largest stock market in Asia¹ and
- For 21 years in a row, the freest economy in the world².

Hong Kong is a very developed economy heavily reliant on the service industry and is highly import and export orientated. Its economy is becoming more and more integrated with that of Mainland China and we are very significant trading partners of each other.

Uniquely, post 1997 Hong Kong is the only Chinese city with 'common law characteristics', derived from our colonial past, a feature that we share with India.

SMEs constitute over 98% of Hong Kong's businesses. The role played by SMEs is common to many areas in Asia including China and India.

How the Competition Ordinance Came About?

The idea of a competition law for Hong Kong first surfaced in 1994, when the Hong Kong Consumer Council commenced a series of studies on business

¹ http://www.gov.hk/en/about/abouthk/docs/2014HK_in_brief.pdf

² <http://www.scmp.com/news/hong-kong/article/1693954/hong-kong-ranked-worlds-freest-economy-21st-year-row-think-tank?page=all>

competitiveness in Hong Kong. These studies looked into sectors such as banks, supermarkets, fuel, broadcasting, telecommunications, and residential property.

The Consumer Council studies confirmed the then widely held suspicion that despite the outward looking and free market in Hong Kong, there was a low level of competition especially in the non-traded sectors. Its findings also reflected a fear that Hong Kong was becoming more and more high cost. A prominent banker said in 1996 that:

“The world does not owe us a living. Think of Hong Kong as a product. If this becomes too expensive, if it fails to offer good value for money, people will find alternatives”.³

We need a competition law to help the economy become more efficient, competitive and innovative and to better protect consumers. A free economy needs to stay free, level and contestable and fair to the public.

The liberalization of the telecommunications market which began in the 1990s demonstrated the benefits a competition framework could bring. Following the end of the domestic telephone monopoly, number portability, interconnectivity and shared use of network facilities were introduced to facilitate new operators entering the market and to bring in new technology. A substantial and definitive drop in price followed.

In August 1994, the Consumer Council was partially successful in lobbying government to curb the deposit interest rate cartel entrenched in law for the Hong Kong Association of Banks. It was certainly important to depositors that interest rate be allowed to compete.

³ David Li of the Bank of East Asia, Dateline Hong Kong, South China Morning Post, 19 August 1996.

On the international front and also in the 1990s, it was discovered that the vitamins cartel overcharged Hong Kong businesses and consumers by over USD178 million.

Today distortions in the market continue to exist. Bid rigging and bribery allegations arising from renovation projects of residential estates are frequent.

In response to the Consumer Council's call for action, the Government established the Competition Policy Advisory Group in 1997, and after a decade and a half of further studies and consultation, the Competition Ordinance was enacted in 2012. The Commission members were appointed in May 2013 and full implementation is expected on 14 Dec 2015.

What does the Ordinance provide?

Like most competition jurisdictions around the world, the Ordinance provides for three overarching rules:

- **The First Conduct Rule** targets all agreements which harm competition. The most serious of these are cartels that seek to price fix, share markets, limit output or rig bids.
- **The Second Conduct Rule** prevents undertakings with substantial market power from abusing that power. The law does not say big is bad - it is only a problem when you are big and bad.
- **The Merger Rule** prohibits mergers that may substantially lessen competition. At present, this is only of relevance to telecommunications.

When it comes to investigating suspected contraventions, the Ordinance has provided an arsenal of powers to the Commission. These include the power to:

- Require the production of documents;
- Compel the provision of information;
- Apply for warrants for search and seizure; and

- Where appropriate, offer leniency in exchange for cooperation.

As for adjudication of contraventions and the imposition of sanctions, it is the Competition Tribunal, rather than the Commission, that is the decision maker. This differs from jurisdictions such as Europe and Singapore – and indeed China and India. The Tribunal has a wide discretion to make orders, including:

- Imposing a fine of up to 10% of an undertaking's Hong Kong turnover;
- Ordering director disqualification;
- Ordering restitution; and
- Disgorgement of any profit gained or loss avoided as a result of the contravention.

What is the approach adopted in our law?

One of the key approaches adopted in this law, as with others, is cross referencing it against international norms and best practices. Our competition law is similar to laws you would find in common law jurisdictions and the European Union. When it comes to litigating competition issues, we will be drawing from precedents overseas. In terms of training and development of procedures, we have actively sought the assistance of agencies overseas and have been touched by their overwhelming response.

Hong Kong's economy is extremely international. Thus our law provides for extra territorial effect whereby actions taken outside our jurisdiction that result in effects felt within Hong Kong may also be subject to our law.

The international nature of HK's economy makes it necessary for us to take a wider international perspective in our enforcement strategy. We will need to think about strategic collaboration with overseas jurisdictions and send a message to incoming business that it should treat Hong Kong fairly.

The HK Competition Ordinance has de minimis rules to ease the pain for SMEs⁴ and no cross industry merger regulations at this point except for telecommunications.

Private actions could only follow after there has been an admission of liability or an adjudication of violation relating to a party. Thus the Commission becomes the gatekeeper for private actions delicately balancing between settling or providing leniency and the litigation interest of third parties.

These limitations and other exclusions in our law have resulted in a modest start for the law. In time I hope the government will review the need to maintain them. I would have preferred to have sunset provisions for the lapse of some of these which would create impetus for business to move forward towards a more liberal regime.

So what then, is the critical factor for successful regulation?

From detecting contraventions to monitoring compliance, no regulator or law enforcement agency can operate successfully without the confidence of the public.

This means that, as an agency, we must be seen to be fearlessly discharging our duties. The Competition Commission is a statutory body with its remit, function and operation defined by law. Thus its allegiance is owed to the law that set it up and not to the government, its funder. Most administrative decisions and any enforcement excesses are subject to judicial review by the Tribunal.

In line with the principle of open justice, all proceedings must, by default, be heard in open court and it is expected that our cases will be widely reported and closely scrutinized both in Hong Kong and abroad.

⁴ The first conduct rule does not apply to agreements between undertakings not exceeding HKD200 million in annual turnover in respect of non-serious offenses and the second conduct rule does not apply to any undertaking below HKD40 million in annual turnover.

How can we change the culture?

The law does more than prohibiting and punishing bad behavior. It induces a change in culture and increases the public buy-in of competition policies.

We will be judged by the effectiveness of our enforcement actions as well as of our advocacy and the mindset change must begin well before enforcement. Our message is “ready, willing and able to comply” before and after the law’s full commencement.

When it comes to advocacy and education, we must recognize that we will be dealing with persons from all walks of life, from the CEO of a multinational corporation endowed with an army of lawyers, to the food stall owners in rural wet markets. We must be prepared to adapt the form and content of our messages without compromising the integrity of what we are trying to say.

To help the public understand our law, extensive guidelines in both English and Chinese and targeted “easy to read” brochures have been published. We also provide outreach initiatives and free seminars. A mini-drama series has been aired on prime time television to highlight the “dos and don’ts” under the Ordinance and the response has been excellent.

We have been urging business to undertake risk assessment and take remedial measures before the law comes into full force.

Conclusion

I am a firm believer in competition and I am confident that we will win the support of the public. I am also well aware though of the challenges that lie ahead. I hope that in future you will be writing, discussing, and debating issues relating to the Hong Kong competition law. We would be particularly interested to hear your views on how the competition framework impacts on a market such as Hong Kong.



On this note, I wish to convey my heartfelt congratulations to the University of Pennsylvania for putting together such a topical event. I wish you all well in your deliberations over the next 2 days.