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I. INTRODUCTION

Before the end of 2015, Hong Kong's first cross-sector competition law will at long last be fully operational. The Hong Kong Competition Ordinance ("Ordinance") was passed in June 2012,[2] and its adoption put an end to what appeared to be an interminable discussion as to the pros and cons of introducing such legislation for the region's economy.[3] The government recently announced that all provisions of the Ordinance are to enter into force on December 14, 2015,[4] three-and-a-half years to the day since the law was adopted.

During this seemingly long implementation period, things have begun to take shape, albeit slowly: The government has published the list of statutory bodies that will be exempt from the application of the law; the institutional framework has been set up, with the creation of the Competition Commission and the Competition Tribunal; the final version of the Competition Commission's first six Guidelines is expected to see the light anytime now, following the publication of initial drafts in October 2014 and revised drafts in March 2015;[5] and a draft leniency policy for cartels has just been announced, with a public consultation currently underway.[6]

This article examines whether the new law is adequately equipped to tackle cartels in Hong Kong, and it does so by focusing on the penalties available under the Ordinance. Cartels are contrary to the First Conduct Rule, which prohibits joint conduct between companies with

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[2] Hong Kong S.A.R., Competition Ordinance, Ordinance No. 14 of 2012 A1347.

[3] Already in the mid-1990s, the Consumer Council recommended setting up a competition authority to tackle anticompetitive practices, but the Competition Bill did not materialize until 2010. *See* www.scmp.com/article/715317/15-years-draft-competition-law-comes-legco.

[4] Competition Ordinance (Commencement) No. 2 Notice 2015, L.N. 156 of 2015, B2567, *available at* www.gld.gov.hk/egazette/pdf/20151929/es220151929156.pdf.

[5] Three substantive guidelines (First Conduct Rule, Second Conduct Rule, and Mergers) and three procedural guidelines (complaints, investigations, and applications for exclusions and exemptions) were adopted. The texts are *available at* www.compcomm.hk/en/draft_guidelines_2015.html.

[6] The draft leniency policy is *available at* http://compcomm.hk/en/pdf/consultations/Draft_Leniency_Policy_Eng.pdf.

anticompetitive object or effect in Hong Kong.[7] However, since such practices tend to be highly lucrative and difficult to detect, they are still terribly enticing for firms.

In order to successfully deter collusion, the Ordinance ought to remove the temptation by implementing penalties that are sufficiently frightening to encourage compliance, and that are high enough to eradicate the financial benefits of cartels. The need for robust punishment is even more notorious in Hong Kong, where even the most harmful collusive practices have traditionally been regarded as perfectly acceptable forms of business.

At first glance, the sanctions in the Ordinance certainly seem to have the ability to act as a potent deterrent for lucrative cartels. When a company is found to have breached the Ordinance, corporate remedies and pecuniary penalties may be imposed. In addition, individual sanctions are also available, and directors may be disqualified in certain cases. Harsher sanctions may be imposed on individuals who breach the procedural rules, including fines and even imprisonment.

However, the resilient skepticism towards competition legislation in Hong Kong did require making certain concessions in order to find sufficient support in the Legislative Council for the law to pass. With respect to fines, it was agreed that the turnover to be considered when calculating the amount of the fines would be local, rather than global. In addition, although the Ordinance does refer to damages for harm stemming from anticompetitive conduct,[8] the exclusion of a stand-alone private right of action effectively reduces the possibility of obtaining compensation to those cases where there has been a finding of a breach of the law.

This article discusses the suitability of these penalties now available in Hong Kong. Part II examines punishment under the sector-specific competition rules in telecommunications and broadcasting, which were the only competition regulations in the region before the Ordinance was adopted. The penalties introduced by the Ordinance are assessed in Part III. Finally, conclusions are drawn.

II. BEFORE THE COMPETITION ORDINANCE: SECTOR-SPECIFIC COMPETITION RULES FOR TELECOMMUNICATIONS AND BROADCASTING

The only competition provisions applicable in Hong Kong before the Ordinance can be found in the Telecommunications Ordinance ("TO")[9] and the Broadcasting Ordinance ("BO"),[10] and affect only these sectors. The TO and the BO contain prohibitions of anticompetitive agreements and abuse of dominance, but being sector-specific, their scope is very narrow. Within broadcasting, the application of the BO is further restricted to the television program service market. Moreover, in the *Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance*, subsequently issued by the Broadcasting Authority (now

[7] Competition Ordinance, First Conduct Rule (Subdivision 1, Section 6).
[8] Schedule 3(1)(k).
[9] Telecommunications Ordinance (Cap 106), sections 7K and 7L.
[10] Broadcasting Ordinance (Cap 562), Sections 13 and 14, hereinafter "BO."

Communications Authority, stipulate that only conduct in downstream markets is considered for the application of the competition provisions.[11]

Both the TO and the BO expressly refer to the possibility of bringing an action for damages or "other appropriate remedy, order or relief."[12] In practice, such actions are very limited, in part because of the narrow scope of application of the competition provisions and in part because most of the remedies imposed do not go further than a warning letter equivalent to a cease-and-desist order.

Importantly, in addition to these remedies, fines can be imposed for "very serious" breaches of competition rules. The default system is the application of fines of a fixed amount set at HK $200,000 for first-time wrongdoers, which could increase up to HK $1 million in the case of repeated violations of the law.[13] Fines based on turnover are only exceptionally contemplated in the TO and BO for extremely serious breaches, in which case the financial penalties described above would "not be adequate."[14] In such cases, the Court of First Instance could choose the more substantial fine of either up to 10 percent of the licensee's turnover in the relevant market,[15] or HK $10million.

Various guidelines have been issued by the Telecommunications and the Broadcasting Authorities with respect to competition law enforcement. Of particular interest for our purposes are the *Guidelines on the Imposition of Financial Penalty under Section 36C of the Telecommunications Ordinance*,[16] published in 2002. There is a three-stage process described for the calculation of the amount of the fines:

- the basic amount is obtained on the basis of the gravity of the infringement;
- that amount will be adjusted upwards in the case of recidivism, allowing enforcers to multiply the penalty by the number of previous infringements; and
- the amount will once again be amended upwards or downwards depending respectively on a series of aggravating and mitigating factors.

Although it is safe to assume that cartels would be considered one of the most serious violations of the law, there are no details as to the kinds of breaches that are to be considered serious enough for financial penalties to apply. Nor is it clear, when they do apply, whether they will be set according to the fixed amounts referred to in the law, or how are they to be calculated in relation to turnover.

In principle, the sector-specific legislation could allow cartels in these sectors to be fought with the imposition of stiff fines of up to 10 percent of turnover. Also, the remedies available—in particular the possibility to obtain damages—could be used to repair the harm caused by the

[11] Guidelines, ¶ 13.

[12] Section 29A of the TO, and Section 15 of the BO.

[13] Section 36C of the TO and Section 28 of the BO.

[14] Section 36C of the TO and Section 28 of the BO.

[15] There is no reference to this turnover being limited to Hong Kong, so it can be understood to refer to global, rather than local, turnover.

[16] *Available at* http://tel_archives.ofca.gov.hk/en/legislation/guideline_6d_1/guideline_6d_1_150402.pdf (last visited on August 14, 2013).

illegal anticompetitive behavior, and to make unlawful behavior even more costly. Yet the limited scope of the ordinances and the reservation of the more severe fines for extreme and blatant violations have meant that, in practice, very few cases have led to the imposition of any substantial penalties. The lack of enforcement is particularly notorious in the broadcasting sector. To date, the only fines imposed for the infringement of the BO's competition provisions amounted to HK $500,000 (imposed on TVB) and HK $350,000 (imposed on Galaxy) for TVB's infringement of the firewall provisions in the license of Galaxy.[17] No cases of collusion have prospered.

Even without entering into specific calculations, it is clear that such fines are nowhere near sufficient to remove all illegally earned profits, and they are far from constituting a substantial percentage of the turnover of these companies. Needless to say, the deterrent effect of such a regime is, at best, extremely low. The chances of being investigated and punished are minimal, and punishment is virtually insignificant.

III. PENALTIES UNDER THE COMPETITION ORDINANCE

The Ordinance contains a relatively wide spectrum of penalties that may be used both against corporations and individuals, including fines, director disqualification, and even imprisonment. With respect to administrative fines for breaching a competition provision, once the Competition Commission has issued an infringement decision, the Tribunal has the power to order the person who has breached the law "to pay to the Government a pecuniary penalty of any amount it considers appropriate."[18]

The Ordinance refers to any "person," potentially including both legal and natural persons. Although the reference to "any amount" apparently gives the Tribunal absolute discretion to set the amount of the penalty, the powers of the Tribunal do have boundaries. Fines are capped at 10 percent of the undertaking's local turnover for each year of infringement and for a maximum of three years, taking into consideration the years with the highest turnovers in the case that the violation lasted longer.[19] When it comes to determining the specific level of the fine within these parameters, the Tribunal is required to take various factors into consideration, including the nature and extent of the conduct, any loss or damage consequential to the illegal act, the circumstances of the case, and recidivism.[20]

The double limitation—local turnover, and turnover during maximum three years—imposed on the discretion to set fines is fairly disappointing, more so as the original 2010 Competition Bill included potentially harsher penalties, with the consideration of worldwide turnover. The Bill was amended in order to respond to concerns of small- and medium-size enterprises ("SMEs") regarding the penalties that they could face. However, small businesses are less likely to operate internationally, and the exclusion of turnover obtained outside Hong Kong

[17] For the analysis of this and other cases in the broadcasting sector, *see* T. Cheng, *Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies,* 33(2) WORLD COMPETITION (2010).

[18] Ordinance, Section 93(1).

[19] *Id.* Section 93(3).

[20] *Id.* Section 93(2).

is bound to have very little impact on the fines they would be subject to. Yet larger firms engaged in wider cartel activity beyond national borders may benefit. Guidelines on the method for calculating fines have to date not been published, so how these issues will be addressed in practice is still pending clarification.

Adding to these limitations is the removal of a stand-alone private right of action from the Ordinance.[21] Private proceedings will only be pertinent where "a contravention of a conduct rule" has been previously established, and must stem from a follow-on action.[22] This amendment noticeably restricts the possibility of obtaining damages resulting from anticompetitive conduct.

More generally, the Ordinance gives the Tribunal considerable powers to adopt behavioral and structural remedies when there has been a contravention of the competition provisions. Among the most important powers, the Tribunal is given the possibility to require paying damages on its own initiative to "any person who has suffered loss or damage" relating to the breach.[23] It may also ask for the payment, "to the Government or to any other specified person," of any profit gained or loss avoided for engaging in the anticompetitive conduct.[24]

Whether this task can be easily attained in practice is far from clear. For instance, the disgorgement of profits is a remedy that is hardly ever used in those jurisdictions in which it is available, like the United States.[25] Nonetheless, discarding disgorgement appears to be related to a conscious choice by U.S. enforcers to prevent over-deterrence in a system in which courts are allowed to triple the amount of damages a defendant must pay to a plaintiff.[26] Therefore, whereas the value of this remedy might be questionable in jurisdictions with many punitive and compensatory measures, it might prove very valuable in Hong Kong to ensure compliance with the law.

There are additional sanctions that might make up for some of the limitations of corporate penalties described above. Of particular importance is the power of the HKCC to issue director disqualification orders, which can be applied for substantive breaches of the law.[27] The disqualification may be of up to five years, and will prevent the person affected from being a director, liquidator, receiver of a company's property, or directly involved "in promotion formation or management of a company." A requirement for this penalty to apply is that the Tribunal considers that the performance of director duties "makes the person unfit to be concerned in the management of a company." As a result, the Tribunal is afforded wide discretion to order disqualification. The extent to which this potential deterrent may be useful in practice depends on the interpretation given in case practice. The Guidelines enacted to date do not provide any explanations in this regard.

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[21] *Id.* Section 108.

[22] *Id.* Section 110.

[23] *Id.* Schedule 3 (k).

[24] *Id.* Schedule 3 (p).

[25] Disgorgement as a remedy has been recognized by the U.S. Supreme Court in, *inter alia*, *US* v. *Paramount Pictures* 334 U.S. 131, 171–72 (1948); *US* v. *Grinnell* 384 U.S. 563, 577 (1966); and *US* v. *United Shoe Machinery Corporation* 391 U.S. 244, 250 (1968).

[26] E. Elhauge, *Disgorgement as an Antitrust Remedy* 76(1) ANTITRUST L.J. 79-95, at 83 (2009).

[27] Ordinance, Sections 101 and 102.

In addition to these sanctions, further penalties may be imposed on both individuals and corporations that commit an offense relating to an investigation. Pressure is placed on those individuals in charge of making corporate decisions in two ways: first, there may be individual fines and jail terms; and second, when a company is found guilty of an offense, for the application of the penalties of the Ordinance it is understood that the "director, manager, company secretary or other person also commits the offence."[28]

Although cartel participation itself does not constitute an offense, some procedural breaches are criminalized. Among the most severely punished offenses are: destroying, falsifying, or providing false documents;[29] obstructing a search; contravening a disqualification order;[30] or violating the preservation of confidentiality (even in the case of third parties).[31] In such cases, the fines on individuals may be as high as HK $1 million, and there may be additional jail terms of up to two years. If convicted on a summary basis for these same offenses, level six fines may be imposed (currently up to HK $100,000) as well as six months' imprisonment.

Other offenses carry somewhat lighter penalties, ranging from fines of HK $200,000 and imprisonment up to a year to level four fines (HK $25,000) and jail terms of up to three months. These include failure to comply with a requirement or prohibition,[32] ordering not to disclose material,[33] providing false information in criminal proceedings,[34] taking revenge on employees who may have cooperated in the investigation and provided incriminatory evidence,[35] or obstructing persons in the enforcement of the Ordinance.[36]

While the Ordinance seems to fall short of setting solid corporate penalties for substantive breaches of competition law, the individual sanctions on individuals that are available for substantive and procedural violations in the terms set out above are second to none. In the European Union, for instance, procedural breaches carry at most fines of up to 1 percent of turnover in the preceding business year.[37] There are no disqualification orders in EU competition law, although some Member States such as the United Kingdom do provide that possibility in the application of national competition law.

The new Hong Kong competition law seems to place the weight of punishment on the individuals who are in charge of corporate decisions relating to collusion. Since it is people who are responsible for a company's participation in a cartel, and they may benefit from the illegal conduct may revert on them more or less directly, focusing on punishing natural persons seems not only justifiable, but also necessary given the limitations of the corporate penalties. Moreover, penalties on individuals undeniably carry an enormous pressure to comply with the law.

[28] *Id.* Section 175(1).
[29] *Id.* Sections 53-55.
[30] *Id.* Section 105.
[31] *Id.* Sections 125 and 128.
[32] *Id.* Section 52.
[33] *Id.* Section 151.
[34] *Id.* Section 172.
[35] *Id.* Section 173.
[36] *Id.* Section 174.
[37] Article 23(1) of EU Regulation 1/2003.

It is questionable whether sanctions on individuals will fully compensate the relatively limited corporate fines for cartel involvement. With the exception of director disqualification orders, the more severe individual penalties are aimed at sanctioning collusion, but at offenses committed during the investigation. Therefore, the impact of the envisaged punishment might be drastically reduced.

One example might be in the case of a company with a substantial worldwide turnover—of which the Hong Kong turnover is only a small fraction—which is found to be part of a lucrative cartel, in operation for decades, contrary to the First Conduct Rule. The company might well cooperate with the authorities and comply with the procedural requirements of the Ordinance. In such a scenario, the fines that might be imposed on the company will only affect its Hong Kong turnover in three of the years the infringement took place, and no individual fines or jail terms will come into play. Disqualification orders would be available, but the effectiveness of this weapon depends on the Tribunal's interpretation of the requirements contained in the Ordinance.

IV. CONCLUSIONS

Adequate punishment for cartel behavior is fundamental for ensuring compliance with competition law. The absence of any form of cross-sector competition law in Hong Kong in the past, until 2012, coupled with the very limited scope and strength of the penalties available in those sectors with competition provisions, meant that virtually any cartel could go by scot-free. In a jurisdiction in which cartels were until recently considered a valid form of business, it is imperative that the early enforcement decisions send out the right signal and lay down the ground for a robust cartel-busting regime.

The new Ordinance is certainly bound to improve the current state of play when it comes into full operation in mid-December 2015. The corporate and individual sanctions available, if used to their full potential, could really force businesses to think twice before colluding. But the lengthy and challenging process for adopting the Ordinance has undeniably left a mark on its potential to effectively punish and deter.

In order to maximize the deterrent effect of the penalties envisaged in the Ordinance, it would be very useful if enforcers would, first and foremost, clarify the way fines are to be calculated. In addition, the sanctions for individuals, including director disqualification and fines, should be used to their full potential in cartel cases, given the severity of the violation. Guidelines clarifying these aspects would be welcome.

Despite these concerns, Hong Kong's new competition law has the potential to transform how cartels are perceived in this jurisdiction. The cost of detection has undoubtedly been raised, and there are now significant personal consequences for those seeking to increase profits through collusion. The message of the new regime is clear: Cartels are serious breaches of competition law, and the law provides harsh punishment for such violations. It is hoped that enforcement that will follow the imminent entry into force of the Ordinance will confirm the tough stance on cartels.