Competition Law: An Economics Perspective

Lilla Csorgo

Disclaimer: The views expressed herein are my own and do not necessarily reflect those of Hong Kong Competition Commission.
FCR v SCR

• FCR – “An undertaking must not make or give effect to an agreement; engage in a concerted practice ... if the object or effect of the agreement, concerted practice ... is to prevent, restrict or distort competition in Hong Kong.”

• SCR – “An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.”
FCR v SCR

- FCR – “An undertaking must not make or give effect to an agreement; engage in a concerted practice ... if the object or effect of the agreement, concerted practice ... is to prevent, restrict or distort competition in Hong Kong.”

- SCR – “An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.”
Equivalent Conduct

• e.g., tying agreement, technical tying
• e.g., exclusive dealing agreement, refusal to deal
• e.g., bundling agreement, bundling no agreement
Requirements

• Different - substantial degree of market power (SDMP)

• Same – effect may or may not be required to be shown

• Could be argued that effect is unlikely under either FCR or SCR absent SDMP
Role of SDMP?

• SDMP is to “filter out instances in which the conduct at issue would not harm (or is unlikely to harm) the competitive process.” (Unilateral Conduct Workbook, ICN, chapter 2, para 12)

• not playing that role under FCR
Unclear

- SDMP with or without the conduct in place?
- SDMP where?
With or without?

• “In using dominance/substantial market power as filter, prohibitions on exclusionary unilateral conduct are concerned ... with [a dominant firm’s] distinct ability to maintain or strengthen the position of dominance...”
  (Unilateral Conduct Workbook, ICN, chapter 2, para 12)

• Requiring “prior dominance, paradoxically asserts that one cannot monopolize without already having a monopoly. This conflates the nature of the offender with the nature of the offense and undercuts claims that alleged abuses have competitive relevance.”
  (Brennan, “Saving Section 2: Reframing Monopolization Law”, 2005)
Where?

• Tying – SDMP typically in the tying product and the potential lessening of competition is in the tied market.

• Exclusive dealing – to raise rivals’ costs of accessing buyers. Lessening of competition is in the upstream market, presumably the same market in which there is SDMP.