

Antitrust Enforcement and State Restraints at the Mainland China-Hong Kong Interface: The Importance of Bilateral Antitrust Co-operation

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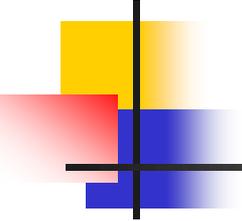


Today

- Argument:
Effective cooperation between Mainland and HK antitrust authorities (and government authorities)
- Promotion of market competition, free trade and economic integration between Mainland and HK

For full article, see Kelvin Kwok, 'Antitrust Enforcement and State Restraints at the Mainland China-Hong Kong Interface: the Importance of Bilateral Cooperation between Antitrust Authorities' 12 Asian Journal of Comparative Law 335-369, accessible at:

<https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/antitrust-enforcement-and-state-restraints-at-the-mainland-chinahong-kong-interface-the-importance-of-bilateral-antitrust-cooperation/18D13B2EBC4FE8EB86BF968A316684F7>



I. Trade and Competition Law between Mainland China and HK



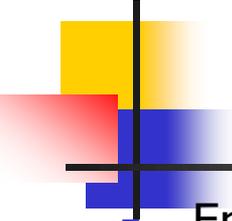
Legal-economic relationship

- Distinctive legal-historical tradition
 - One Country, Two Systems
 - Civil law vs Common Law
- Intimate economic relationship
 - Closer Economic Partnership Agreement 2003 (CEPA)
 - One Belt One Road 2013 (OBOR)
 - Very close trade ties (2016 figures)
 - China as largest product supplier to HK (USD 255.9bn, 49%)
 - HK is China's 2nd largest export destination (USD 331.6bn, 14.6%)
 - HK re-exports to and from China (USD 410.3bn, or 89.4%) of its bulk



PRC Antimonopoly Law (AML)

- Enacted 2007, came into force 2008
- Chapter II: Monopolistic Agreements
Chapter III: Abuse of Dominance
Chapter IV: Concentration of Undertakings
Chapter V: Abuse of Administrative Power
- Antimonopoly Commission
- Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (NDRC)
- Antimonopoly and Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce (SAIC)
- Antimonopoly Bureau of the Ministry of Commerce (MOFCOM)



Hong Kong Competition Ordinance (Cap 619)

- Enacted 2012; commenced on 14 Dec 2015
 - First conduct rule (s 6) – ‘anti-competitive agreements, concerted practices and decisions’
 - Second conduct rule (s 21) – ‘abuse of market power’
 - Merger rule (Sch 7, s. 3) – telecom sector only
- Competition Commission
- Competition Tribunal
- Communications Authority
- 6 Guidelines:
 - Guideline on Complaints
 - Guideline on Investigations
 - Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders
 - Guideline on the First Conduct Rule
 - Guideline on the Second Conduct Rule
 - Guideline on the Merger Rule



Extraterritorial application: ss. 8 and 23 of HKCO

- Section 8 Territorial application of first conduct rule

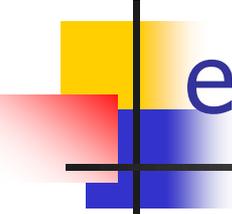
The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if—

- (a) the agreement or decision is made or given effect to outside Hong Kong;
- (b) the concerted practice is engaged in outside Hong Kong;
- (c) any party to the agreement or concerted practice is outside Hong Kong; or
- (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.



Extraterritorial application: art 2, AML

“This Law is applicable to **monopolistic conducts in economic activities within the territory** of the People's Republic of China; and it is applicable to **monopolistic conducts outside the territory** of the People's Republic of China, which **serve to eliminate or restrict competition** on the domestic market of **China.**”



Is there a need for extraterritorial enforcement?

- **Classic case: export cartel**

- “Pure” export cartel: products sold abroad only
- May still have negative effect on domestic competition
 - Export cartel as a facilitator of local (tacit) collusion
 - Information sharing theory
 - Retaliation theory
- But applicability of domestic law \neq incentives to enforce domestic law
 - Enforcement priority (depends on e.g. extent of domestic sales)
 - Local protectionism
- Extraterritorial enforcement of foreign competition law may fill the gap
 - But note difficulties in gathering evidence (documents and personnel)
 - Solution: bilateral co-operation between competition authorities (see full article for details)



State restraints leading to state compulsion

- Classic example of state compulsion:

domestic law or state policy requiring price fixing for exported products

US: foreign sovereign compulsion – the Vitamin C case

Facts:

MOFCOM

Chamber of Commerce of
Medicines and Health Products
Importers and Exporters

Vitamin C Subcommittee

Vitamin C manufacturers
claimed that they are required
under state policy to fix prices
for Vitamin C exports

Q: Can sellers, if sued in the US, rely on a state compulsion defence to their antitrust liability for price fixing?





US: Foreign sovereign compulsion – the Vitamin C case

- “The defense of foreign sovereign compulsion ... focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states ... [and] recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's. ... In addition to fairness concerns, the FSC defense also acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments. ...”



US: Foreign sovereign compulsion – the Vitamin C case

- On appeal to the 2nd Circuit:
 - The issue of foreign sovereign compulsion analysed under the broader principle of “international comity”.
 - Held: District Court erred in not finding “a true conflict” on the basis of MOFCOM’s amicus brief, to which the District Court was “bound to defer”.



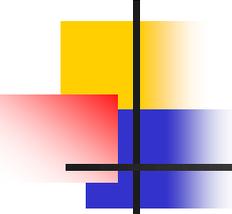
EU State Compulsion Defence

- See *Commission v Ladbroke Racing*
- Applicable not only to state compulsion within the EU, but also outside the EU (see *Airfreight*)
- Arguably less stringent than the traditional US defence (see the full article for details)



State compulsion defence between Mainland China and HK?

- Is this or can this be recognised as a matter of Hong Kong law?



Hong Kong legal compulsion defence

- Cap 619 Schedule 1 GENERAL EXCLUSIONS FROM CONDUCT RULES

2. **Compliance with legal requirements**

(1) The first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement.

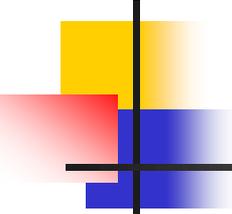
(2) The second conduct rule does not apply to conduct to the extent that it is engaged in for the purpose of complying with a legal requirement.

(3) In this section—

"legal requirement" (法律規定) means a requirement—

(a) imposed by or under any enactment in force in Hong Kong; or

(b) imposed by any national law applying in Hong Kong."



Hong Kong legal compulsion defence

- Cap 1, s. 3 Interpretation of words and expressions

"national law applying in Hong Kong" means a national law applied in Hong Kong pursuant to the provisions of Article 18 of the Basic Law

- Article 18 of the Basic Law

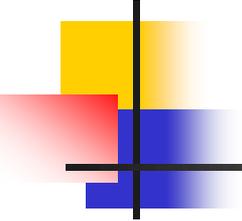
National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.



Proposed solution

- Non-enforcement by the Competition Commission as a matter of discretion
- Remove state restraints through diplomatic means with the assistance of bilateral co-operation



Questions & Answers