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A History of Competition: The Impact of Antitrust on Hong Kong's Telecommunications Markets

Sandra Marco Colino*

Hong Kong has only had cross-sector competition law since 2015, but the city's telecommunications markets have been subject to sector-specific antitrust provisions for over two decades. The importance of nurturing an efficient, innovative, and competitive telecoms industry for Hong Kong's economic prosperity was acknowledged already at the time the sector was liberalized in the 1990s. Yet until the late 2000s, the government vehemently opposed the adoption of competition law in virtually all other sectors of the economy. This paper examines the effectiveness of the regulatory framework set up to guarantee the protection of competition in the telecommunications sector in Hong Kong. The results of the liberalization process are certainly remarkable, and the city boasts very competitive telecoms markets. However, it is argued that the enthusiasm over the results of the liberalization process may have eclipsed important competition issues in local markets, which could have been tackled through the development of a robust antitrust policy, but which were sadly left unheeded. On the basis of the analysis of the history of (sector-specific) competition law in the telecoms sector, this Article assesses the

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potential of the new Competition Ordinance to address the principal threats to competition in these markets. In doing so, the paper finds that, while the new regulatory framework may be generally suitable to combat collusion, it is less clear that it will effectively combat the problems associated with the creation of market power through mergers, or the abuse of that power.

INTRODUCTION

Hong Kong is one of the latest jurisdictions to implement a fully-fledged competition law regime. The Hong Kong Competition Ordinance ("CO") has been in force since December 14, 2015,[1] following an unusually lengthy three-and-a-half-year implementation process.[2] The CO may be the city's first cross-sector competition act, but it is not the first piece of antitrust law to ever apply in this part of the world. Before 2015, two particular industries were subject to sector-specific legislation: telecommunications and broadcasting. In the mid-1990s, when telecommunications markets began to be liberalized, antitrust provisions were included in the licenses granted to telecoms operators. Shortly afterwards, in the early 2000s, competition law rules were added to the Telecommunications Ordinance ("TO"),[3] and similar provisions were included in the Broadcasting Ordinance ("BO") when it was adopted that same decade.[4] At the time, a resilient hostility towards competition law reigned in Hong Kong, despite a burgeoning clamor in favor of its adoption. Until 2007, the government categorically opposed the introduction of comprehensive antitrust legislation, which was viewed as incompatible with the city's fondness of minimal market intervention.[5] The prompt embrace of competition law for telecommunications speaks volumes of the importance given by the Hong Kong legislator to the protection of competition in this fundamental industry. Moreover, if there was any doubt as to the sector's antitrust uniqueness, the CO's Merger Rule is currently

1 Competition Ordinance, (2015) Cap. 619 (H.K.).

2 During this period, the Hong Kong Competition Commission and the Hong Kong Competition Tribunal were created. The former actively promoted various competition advocacy initiatives, issued substantive and procedural guidelines, and published leniency and enforcement priorities policy papers.

3 Telecommunications Ordinance, (2000) Cap. 106, § 7K–N (H.K.). The conduct rules were added in 2000, while the merger rule was introduced in 2003.

4 Broadcasting Ordinance, (2001) Cap. 562, § 13–14 (H.K). For an analysis of this sector, see Kelvin H. F. Kwok, *Abuse of Dominance in the Hong Kong Television Industry*, *in* COMPETITION LAW IN TELECOMMUNICATIONS MARKETS: KEY REGULATORY CHALLENGES (Sandra Marco Colino ed., forthcoming 2019).

5 Thomas K. Cheng, *A Tale of Two Competition Law Regimes—The Telecom-Sector Competition Regulation in Hong Kong and Singapore*, 30 WORLD COMPETITION L. & ECON. REV. 501, 502 (2007).

only applicable to mergers affecting telecommunications, and the first case brought by the Hong Kong Competition Commission ("HKCC") before the Hong Kong Competition Tribunal ("HKCT") relates to the alleged bid rigging practices of various information technology ("IT") companies in relation to the installation of an IT server system.[6]

The efforts to foster competition in this sector reflect an understanding of the importance of nurturing a "dynamic, innovative, efficient and competitive telecommunications industry" for the region's economic prosperity.[7] In an increasingly globalized world, connectivity is fundamental for both personal and business interactions and requires the wide availability of consistent, affordable telecommunications services. In fact, there is a stark conviction that Hong Kong's "coveted position as the regional centre for tertiary and quaternary activities . . . has been achieved through its unique mix of geographical advantages, regulatory framework, human capital, and not least, *the availability of high quality telecommunications services at competitive prices*."[8] Yet as a network industry—that is, one requiring the existence of a solid, widely accessible infrastructure—,[9] its markets may be inclined to depart from the model of perfect competition and be prone to market failures: "products are heterogeneous, differentiation in products is common, the life

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6 Competition Tribunal Enforcement Action No. 1 of 2017, Notice Under Rule 19 of the Competition Tribunal Rules, (Mar. 24, 2017), https://www.comptribunal.hk/filemanager/case/en/upload/11/CTEA1-2017(E).pdf [https://perma.cc/S7S5-QUDG]; *see also* Adrian Emch, *New Developments in Hong Kong's First Case Under the Competition Ordinance* (May 9, 2018), KLUWER COMPETITION L. BLOG, http://competitionlawblog.kluwercompetitionlaw.com/2018/05/09/new-developments-hong-kongs-first-case-competition-ordinance [https://perma.cc/M59G-B65V]. *See infra* Section III.B.

7 OFF. TELECOMM. AUTH., REPORT ON THE EFFECTIVENESS OF COMPETITION IN HONG KONG'S TELECOMMUNICATIONS MARKET: AN INTERNATIONAL COMPARISON 2 (June 2003), http://tel_archives.ofca.gov.hk/en/report-paper-guide/report/rp20030620.pdf [https://perma.cc/2VHH-XSY7] [hereinafter REPORT ON THE EFFECTIVENESS OF COMPETITION] (drafting of the paper completed by Spectrum Strategy Consultants).

8 Cliff Lui, *Telecommunications Competition Regulation in Hong Kong* 4 (2007), http://www.viperfusion.com/wordpress/wp-content/uploads/2007/05/telecommunications-competition-regulation-in-hk.pdf [https://perma.cc/3J3U-W4JL] (emphasis added).

9 HANS-WERNER GOTTINGER, ECONOMIES OF NETWORK INDUSTRIES 1, 4 (2003).

cycles of products are short, sunk cost is significant, innovation is essential. . . ."[10] A reminiscence of the old legal monopolies may be that one company retains a particularly strong market position, which it might employ strategically to hurt competitors. Taking into account these peculiarities, it is perhaps unsurprising that, in a jurisdiction traditionally unswayed by the merits of exerting legislative control over anti-competitive behavior, there was an awareness that competition in telecommunications required exceptional legislative attention. Such special care came in the shape of both sector-specific regulation and sector-specific competition law provisions. The regulation-antitrust interplay is not uncommon in network industries, since it can be difficult to achieve competition by relying solely on market forces: what is efficient may not always socially desirable, and social and private benefits do not necessarily coincide.[11] As a consequence, industry-focused competition law provisions were seen as a necessary complement to the sectoral regulation that formed the backbone of a liberalization policy aimed at promoting competitive telecommunications markets.

This paper assesses the effectiveness of the regulatory framework set up to guarantee the protection of competition in the telecommunications sector in Hong Kong. Through various initiatives and reforms implemented in the past couple of decades, the markets have indeed been progressively liberalized, and with remarkable achievements. They are among the most competitive telecom markets in the world, with a high number of competitors, low market concentration ratios, impressive penetration rates, reasonable prices, and outstanding quality and reliability.[12] Yet the enthusiasm over the results of the liberalization process may have served to eclipse important issues that could have, at least in part, been tackled through the development of a robust antitrust policy. It is often overlooked that competitiveness and market competition are two different issues: while the figures usually cited as a

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[10] *Id.* at 1.

[11] Nicholas Economides, *Competition Policy in Network Industries: An Introduction*, *in* THE NEW ECONOMY AND BEYOND: PAST, PRESENT AND FUTURE 96, 97 (Dennis W. Jansen ed., 2006).

[12] *See supra* notes 38–47 and accompanying text; *see also supra* Section I.B.

testament to the achievements may be a good indicator of the former, they do not necessarily reflect accurately on the latter. Rivalry ought to put pressure on market players to compete, but it does not rule out the existence of market power—held either individually or collectively—with the potential to threaten the proper functioning of the market.[13] And the fact remains that the profits that may be reaped from anti-competitive behavior are too tempting to be ignored. Unfortunately, when problems have been identified in Hong Kong, thus far the reaction of the relevant authorities has been disappointing at best, downright deficient at worst. In this context, the question arises as to whether the shortcomings have been a consequence of the existence of intrinsic limitations within the sector-specific competition provisions that were applicable to the industry until 2015, or if they can instead be attributed to a flawed enforcement policy. The present study reflects on the potential of the new cross-sector competition legislation to foster a more vigorous antitrust strategy.

In order to explore these fundamental issues, the paper looks at the four principal telecoms markets: domestic and international fixed telephone network services, mobile telephony, and data (Internet) access. The second part provides an overview of the history of liberalization of the Hong Kong telecom industry and the results of the process on each of those markets. The third part covers the sector-specific legislative framework and its practical application. Thereafter, the fourth part considers the impact of the CO on the effectiveness of the protection of competition in the industry. Finally, conclusions are drawn in the fifth and final part.

I. THE LIBERALIZATION OF HONG KONG'S TELECOMS MARKETS

The narrative of the evolution of competition in the Hong Kong telecommunications sector is often presented as a major success story. According to the Office of the Communications Authority ("OFCA"), the executive arm of the current telecoms regulator, the region boasts "one of the most sophisticated and successful

13 On the risks of market power, see Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law,* J. BUS. L. (forthcoming 2019).

telecommunications markets in the world," a feature that has been crucial for its "development as a leading business and financial centre."[14] The most recent figures reflect a gross output of HKD 93 billion for the industry, which employs over 20,000 people.[15] The government frequently brags about the city's position as "a leading market in terms of effectiveness of competition in telecommunications."[16] However, the conditions for competition to thrive did not exist until the telecoms markets were liberalized through a series of regulatory initiatives launched mainly in the 1990s and 2000s. Liberalization was propelled by the convergence of two principal factors: first, the external pressure of global developments and the international obligations assumed by the government; second, an internal force, based on the growing conviction that heralding a competitive telecommunications industry was a must. The latter factor also led to the adoption of competition legislation, initially specific to telecommunications and eventually applicable to all sectors. This part of the paper focuses on the liberalization process. The implementation of competition law in the liberalized markets is addressed in the following part.

A. How the Telecoms Markets Progressively Opened Up to Competition

In 1994, the government ratified the Marrakesh Agreement, which established the World Trade Organization ("WTO").[17] Hong Kong is thus a founding WTO member, and it was a party to the General Agreement on Trades and Services ("GATS") when it entered into force in January 1995. The GATS constituted a multilateral effort to liberalize trade in services, including

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14 OFFICE OF THE COMMC'NS AUTH., TELECOMMUNICATIONS 2 (Dec. 2018), https://www.ofca.gov.hk/filemanager/ofca/en/content_113/telecommunications.pdf [https://perma.cc/TR9L-G2N9] [hereinafter TELECOMMUNICATIONS 2018].

15 *Id.*

16 Press Release, Office of the Telecommunications Authority, Study Finds Hong Kong a Competitive Telecommunications Market (June 20, 2003), http://www.info.gov.hk/gia/general/brandhk/0620245.htm [https://perma.cc/2FGQ-KFD6].

17 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf [https://perma.cc/5QDM-Z52Q].

telecommunications.[18] Annexed to the GATS in a Protocol was the WTO Agreement on Basic Telecommunications Services ("BTSA"),[19] to be implemented by 1998, by virtue of which the signatories committed to opening up their telecommunications services. The principal objective of the BTSA was to ensure reasonable, non-discriminatory access to telecommunications markets for service providers, equipment manufacturers, and vendors alike.[20] In this context, Hong Kong was forced to take the necessary measures to ensure that any telecommunications markets that were not fully liberalized progressively opened up to competition.

Already a year before signing the WTO Agreement, the Office of the Telecommunications Authority ("OFTA") was set up as the executive arm of the former Hong Kong telecom watchdog, the Telecommunications Authority ("TA").[21] Vested with regulatory powers and entrusted with the task of enforcing competition in the telecommunications sector, the OFTA implemented and oversaw the liberalization process. Given that the TO, which has regulated the local telecom markets since 1963,[22] requires a license to offer telecom services in Hong Kong,[23] the first fundamental step towards liberalization necessarily had to imply awarding licenses to new operators. The first market in which liberalizing measures were implemented was that of local fixed telephone network

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18 Heidi Ullrich, *Assessing the Interaction Between Multiple Levels of Rule-Making in Trade in Telecommunications Services*, CSGR CIGI UNU-CRIS ANNUAL CONFERENCE (2005), https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/csgr-events/conferences/2005_conferences/8_annual_conference/ulrich.doc [https://perma.cc/2ZSC-52K8].

19 Laura B. Sherman, *World Trade Organization*: *Agreement on Basic Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services)*, 36 INT'L LEGAL MATERIALS 354, 354 (1997).

20 For a brief summary of the content of the BTSA, see M. Fredebeul-Krein & A. Freytag, *Telecommunications and WTO Discipline. An assessment of the WTO Agreement on Telecommunication Services*, 21 TELECOMM. POL'Y 447, 478–83 (1997).

21 *See About Us*, OFF. TELECOMM. AUTH., http://tel_archives.ofca.gov.hk/en/aboutOFTA/main.html [https://perma.cc/NUF6-VKXS] (last revised Feb. 19, 2010).

22 Although the TO's competition provisions have now been replaced by the CO, the rest of the TO remains in force. *Compare* Telecommunications Ordinance, (2000) Cap. 106, § 8 (H.K.), *with* Competition Ordinance, (2015) Cap. 619 (H.K.).

23 Telecommunications Ordinance, (2000) Cap. 106, § 8 (H.K.).

services ("FTNS"). The company Cable & Wireless Hong Kong Telecommunications Limited (which would later become HKT Limited, a subsidiary of PCCW since 2000) had a monopoly over the domestic sector until 1995. That year, the OFTA started issuing additional FTNS licenses. By 2003, the market was fully liberalized[24] and as of 2018, there were twenty-seven fixed network operators providing local services.[25]

External telecommunications took a little longer to open up. Hong Kong Telecom International ("HKTI") was granted an exclusive license until 2006, which gave the company exclusive rights over fundamental external services, including voice telephony and international direct dial ("IDD") calls.[26] However, pressure was mounting on the Hong Kong government to honor the obligations it had assumed under the GATS and the BTSA. In addition, a 1991 study by Milton Mueller recommended ending HKTI's privileges after showing that it was using the profits it made in the international services to cross-subsidize local calls.[27] Eventually, the government and HKTI agreed on the early termination of the exclusive rights. The international telecommunications services market was thus liberalized in 1999 and a year later, the international circuits and facilities market followed suit.[28] Currently, a plethora of international FTNS licensees operate through both cable and satellite. By 2016, there were 266 providers of external telecommunications services ("ETS")[29] and in 2017, the total capacity of external telecommunications facilities reached almost 53,000 Gigabits per

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24 Bus. Monitor Int'l, Hong Kong Telecommunications Report Q4 2011 88 (2011).

25 *Key Communications Statistics*, OFF. COMM. AUTH., https://www.ofca.gov.hk/en/media_focus/data_statistics/key_stat/index.html [https://perma.cc/AZ7H-KD2H] (last modified Jan. 16, 2019).

26 IDDs are international calls which can be placed directly by dialling a country code. *Liberalisation of Hong Kong's External Telecommunications—A Policy Statement*, ECON. SERVS. BUREAU, at 2 (Jan. 20, 1998), http://tel_archives.ofca.gov.hk/en/esb/980120/pl120e.pdf [https://perma.cc/7MHW-83QP].

27 *See* MILTON MUELLER, INTERNATIONAL TELECOMMUNICATIONS IN HONG KONG: THE CASE FOR LIBERALIZATION 55, 94 (Chinese Univ. Press ed. 1992) (1991).

28 OFF. TELECOMM. AUTH., *supra* note 7, at 14.

29 *Telecommunications*, OFF. COMM. AUTH., at 2 (June 2016), https://www.gov.hk/en/about/abouthk/factsheets/docs/telecommunications.pdf [https://perma.cc/C5ZF-TMYC].

second ("Gbps"). Market concentration is currently low in both the local and international fixed telephony sectors, and there is no dominant undertaking in either environment.

The mobile telephony market has been fully liberalized since the government refrained from setting a cap on the number of licenses to be assigned or on the level of foreign investment.[30] Three licenses were issued as far back as 1984 with a another six personal communications services ("PCS") licenses granted in 1996.[31] In 2001, third generation ("3G") wireless mobile telecommunications technology licenses were allotted by the OFTA and subsequently the market opened up to fourth generation ("4G") services, to the extent that it is now almost entirely 3G/4G enabled.[32] By 2020, the fifth generation ("5G") era is expected to begin. By 2021, further expansion is anticipated with the expiration of the fifteen-year licenses over certain spectrums.[33] The government plans to re-assign around sixty percent of the spectrum through auction, and Chinese operators are expected to bid and possibly enter the market.[34] There are currently four major mobile telephony operators serving 7.43 million people. As of December 2017, the number of subscribers was around seventeen million with a penetration rate of 247.5 percent—among the highest in the world.[35] The Herfindahl-Hirschman Index ("HHI"), which

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30 *Arrangements for the Frequency Spectrum in the 1.9–2.2 GHz Band upon Expiry of the Existing Frequency Assignments for the Provision of 3G Mobile Services and the Spectrum Utilization Fee*, OFF. OF COMM. AUTH., at 2 (Jan. 13, 2014), https://www.legco.gov.hk/yr13-14/english/panels/itb/papers/itb0113cb4-292-1-e.pdf [https://perma.cc/KME6-W5LL].

31 OFF. TELECOMM. AUTH., *supra* note 7, at 9. PCS are defined as "[d]igital mobile service[s] which generally operate[] in the 1800–1900 MHz bands." They rely on technology such Time Division Multiple Access ("TDMA"), Code Division Multiple Access ("CDMA") and Global System for Mobile ("GSM"). *Id.* at 31.

32 Office of the Telecomms. Auth., Report on the Effectiveness of Competition in Hong Kong's Telecommunications Market in 2005: An International Comparison 24 (Spectrum Strategy Consultants 2005), http://tel_archives.ofca.gov.hk/en/report-paper-guide/report/rp20051229.pdf [https://perma.cc/F23T-ZE4T].

33 DBS VICKERS (H.K.) LTD., HONG KONG TELECOM SECTOR 2 (Apr. 25, 2017) https://www.dbs.com/aics/pdfController.page?pdfpath=/content/article/pdf/AIO/042017/170425_insights_cautious_on_hk_mobile_market.pdf [https://perma.cc/B8YL-9QML].

34 *Id.* at 3.

35 *See Arrangements for Assignment of the Spectrum in the 3.4–3.6 GHz Band for the Provision of Public Mobile Services and the Related Spectrum Utilisation Fee*, COM.

measures market concentration by adding up the squared market shares of the various players, is among the lowest of developed economies,[36] and no company holds a market share of more than thirty percent.[37] It comes as no surprise, therefore, that Hong Kong would have the "most affordable mobile and fixed telecom services" in the OECD.[38]

With regard to data access, commercial Internet service providers ("ISPs") entered the market in 1993, only two years after the first Internet connection for the intra-city traffic, the Hong Kong Internet eXchange ("HKIX") was established at the Chinese University of Hong Kong. At the time of writing, there were about 250 ISPs[39] operating in a city that boasts some of the region's most sophisticated computer installations.[40] Broadband is available in virtually all of the city's residential and commercial buildings. Up to 2.64 million registered users—equivalent to ninety-two percent of households—have residential broadband connection with speeds of up to ten Gbps. However, there are just four principal providers of home broadband services. The incumbent PCCW-HKT holds as much as sixty percent of the market,[41] and the only other competitor with a strong presence is Hong Kong Broadband Network ("HKBN"), with a market share of just over twenty-two percent.[42] Besides broadband, the population may connect to the Internet through over ten thousand public wireless fidelity ("WiFi") hotspots.[43] Indeed, recent figures point to a high level of

ECON. DEV. BUREAU & OFF. COMM. AUTH. (May 2, 2018), https://www.coms-auth.hk/filemanager/en/content_711/cp20180502.pdf [https://perma.cc/V8TF-Q5C9].

36 Cheng, *supra* note 5, at 504.

37 *Id.*

38 YUN ZHAO, CYBER LAW IN HONG KONG 26 (2d ed. 2011).

39 *List of Internet Service Providers (ISP)*, OFF. OF COMM. AUTH., https://www.ofca.gov.hk/en/data_statistics/data_statistics/internet/list_of_internet_service_providers [https://perma.cc/DDW8-R2KT] (last modified Feb. 1, 2019).

40 ZHAO, *supra* note 38, at 26.

41 Anthea Lai & Sam Cheung, *Hong Kong's Next Twenty Years*, BLOOMBERG PROF'L SERVS. fig.2 (June 9, 2017), https://www.bloomberg.com/professional/blog/hong-kongs-next-20-years-telecom [https://perma.cc/DEQ4-KE3B].

42 *Hong Kong Telecom Sector*, DBS VICKERS (H.K.) LTD., at 5 fig.4 (Dec. 8, 2017), https://www.dbs.com/aics/templatedata/article/industry/data/en/GR/042016/telecommunications_honglong.xml [https://perma.cc/3FKP-54SQ].

43 ZHAO, *supra* note 38, at 27.

mobile internet usage. Almost half of the population connects with their phones more frequently than their computers,[44] and about seventy percent of the population is in possession of a smartphone.[45] It should thus come as no surprise that research conducted by the Society for Consumer Research ("GfK")[46] shows that Hong Kong remains the world's most connected place.[47] This reputation is further enhanced by the growth of connecting wearables such as smart watches, described as the "in thing" of the late 2010s, and of connected cars.[48]

B. The Regulatory Framework that Enabled Liberalization

The above insights into the liberalization process of the principal telecoms markets show that, in order to open up regulated industries to competition, it is necessary to first do away with any existing limitations on the obtaining of licenses to provide the relevant services. To this end, since the 1990s, "[t]here is no pre-set limit on the number of licenses issued [to operate in Hong Kong's telecom markets], nor deadline for applications. Furthermore, there is no specific requirement on network rollout or investment. The level of investment is determined by the market."[49] Even then, the license system is not considered to be the

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44 *See* Dustin Sodano, *Nearly Seven in 10 Hong Kong Residents Use Smartphones*, EMARKETER (Jan. 4, 2017), https://www.emarketer.com/Article/Nearly-Seven-10-Hong-Kong-Residents-Use-Smartphones/1014941 [https://perma.cc/2M3G-PAPD].

45 *Id.*

46 The abbreviation derives from the German name of the Society, Gesellschaft für Konsumforschung.

47 Jamie Carter, *Hong Kong Still the World's Most Connected Place; Singapore Not Even in Top 10*, SO. CHINA MORNING POST (May 11, 2016), http://www.scmp.com/lifestyle/article/1943505/hong-kong-still-worlds-most-connected-place-singapore-not-even-top-10 [https://perma.cc/S3TK-VTP4]. The GfK applies the Connected Consumer Index ("CCI"), which considers "how much, and on what devices, consumers in each of 78 countries and 8 world regions digitally connect with each other and with digital content." *See* Claudia Spadoni, *Connected Consumer Index*, GFK, https://connected-consumer.gfk.com/connected-consumer-index/?no_cache=1 [https://perma.cc/UM8Q-VZ8X] (last visited Feb. 4, 2019).

48 *See* Press Release, GfK, Hong Kong, North America and UAE are World's Most "Connected" Populations (May 10, 2016), https://www.gfk.com/insights/press-release/hong-kong-north-america-and-uae-are-worlds-most-connected-populations [https://perma.cc/ZHX3-LMLW].

49 OFF. COMM. AUTH., *supra* note 14.

optimal framework in which to nurture competition. In 2003, the OFTA acknowledged that "competition is neither created nor fostered simply by the process of licensing new operators but by the ability of new entrants to access end-users and the extent to which the incumbent is able to constrain the development of competition."[50] Therefore, at a time when the adoption of antitrust legislation was not on the agenda, the government was aware that merely facilitating the issuance of licenses to newcomers would not suffice for the markets to work adequately. While such a strategy would remove the most significant barrier to entry (i.e. regulatory constraints), the market power held by the former monopolists would allow them to erect other barriers. The most common ways to do so would be either adopting a pricing strategy that makes it impossible for rivals to compete, or not allowing new entrants access to their network.[51]

As a consequence of these concerns, in 1995, at the very outset of the liberalization process (and before the introduction of competition rules in the TO), basic operator-specific competition rules were inserted into the General Conditions ("GCs") of the FTNS licenses issued to fixed line service providers.[52] The GCs included relatively standard prohibitions of both anti-competitive conduct by non-dominant licensees (including collusion and tying)[53] and abuses of dominance.[54] But the licenses went further and effectively regulated the accounting[55] and pricing policies[56] of dominant firms. They would, *inter alia*, need to seek prior

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50 OFFICE OF THE TELECOMMUMINCATIONS AUTHORITY, *supra* note 7, at 5.

51 One of the allegations most frequently met by monopolists is that "in order to protect a profitable position, [they] may erect barriers that prevent new entrants coming into the market . . . ." SANDRA MARCO COLINO, COMPETITION LAW OF THE EU AND UK 303 (8th ed. 2019).

52 *Directions Issued Under Licenses–FTNS/Fixed Carrier Licenses*, OFF. TELECOMM. AUTH., http://tel_archives.ofca.gov.hk/en/ta-directions/ta-directions-ftns.html [https://perma.cc/34L7-R4AY] (last visited Feb. 2, 2019) (archiving the relevant FTNS licenses); *see also* Cheng, *supra* note 5, at 505.

53 Cheng, *supra* note 5, at 505; *see also*, Lui, *supra* note 8, at 9.

54 Cheng, *supra* note 5, at 505.

55 *See, e.g.*, Telecomm. Auth. Direction to H.K. Tel. Co., DR-07/1995 (June 29, 1995), https://tel_archives.ofca.gov.hk/en/ta-directions/ta-directions-ftns.html [https://perma.cc/96CY-CG7B] (exemplifying operation of GC 17).

56 Cheng, *supra* note 5, at 505.

approval to implement discounts, which would otherwise be prohibited.[57] The aim of such a rule was precisely that former monopolists would not be able to prevent market entry by setting prices at a level that would make it difficult, if not impossible, for newcomers to flourish.[58] Dominant companies would also be precluded from giving and receiving unfair advantages to and from associates, so as to ensure that providers needing to use networks controlled by the former monopolists would have access to these on the same conditions as their affiliates, without experiencing exclusionary discrimination.[59] There provisions were fundamental since, as Cliff Lui has noted, "[w]ithout the force of law or authority, the incumbent would have used all resources necessary to eradicate new competing firms fighting for pieces of its profits pie."[60] Licensees holding a dominant position, which felt that their dominance had all but vanished, could request a review of their classification.[61] If successful, they would no longer have to comply with the specific obligations attached to dominance.

These rules constitute the first attempt to introduce boundaries on the freedom of market operators in order to protect competition in Hong Kong. It is interesting that, in a jurisdiction so reluctant to the adoption of antitrust legislation, the restrictions imposed on dominant undertakings in the GCs are significantly harsher than those that would normally be imposed under modern competition law systems. They respond to the rationale that the market power of dominant players in previously regulated network industries

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57 Cheng, *supra* note 5, at 505; *see also*, Lui, *supra* note 8, at 9.

58 Ling Ping & Edward Chen, *Competition Policy Under Laissez-faireism: Market Power and Its Treatment in Hong Kong*, 21 REV. INDUS. ORG. 145, 148, 150 (2002).

59 For an analysis of the extent to which exclusionary discrimination should be considered abusive and unlawful, see Pablo Ibáñez Colomo, *Exclusionary Discrimination under Article 102 TFEU*, 51 COMMON MKT. L. REV. 141 (2014).

60 Lui, *supra* note 8, at 8.

61 GC 44. *See, e.g.*, Gracie Foo, *Direction Issued under Fixed Telecommunications Network Services License General Condition 44 to H.K. Cable Television Ltd.*, DR-48/2004, TELECOMM. AUTH. (Aug. 20, 2004), https://tel_archives.ofca.gov.hk/en/ta-directions/dir20040820.pdf https://perma.cc/LQW4-E2VQ (exemplifying operation of GC 44).

needs to be not just controlled, but actively undermined.[62] In the *Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS License*, issued by the OFTA in 1995,[63] it seems that the government attempts to downplay the relevance and intrusiveness of the rules, specifying that the GCs were to be interpreted as a standard of conduct and not as comprehensive competition or consumer protection regulation. However, it is evident that they follow the logic of modern antitrust regimes. This suggests that the awareness of the pressing need to regulate competition existed even in the 1990s, despite the assiduous denial of its significance in other sectors. Unfortunately, the GCs were not just specific to the telecoms industry, but addressed to particular licensees only. Their scope was thus extremely limited.

C. The Shortcomings of Fostering Competition Through Regulation

In view of the impact of liberalization on Hong Kong's telecoms markets, explored above,[64] it is understandable that the government would take pride in the achievements of the process. It has not been shy to take credit for its role in fostering competitive market structures. By way of example, in 2003, when commenting on the swift expansion of the new entrants, an OFTA spokesperson was quoted as saying that it was "the result of *our* liberalization policy and pro-competition regulations."[65] In addition to the growth of new market players, additional achievements are frequently cited to illustrate just how competitive the telecoms industry is. Penetration rates are among the highest in the world,

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62 Pablo Ibáñez Colomo, *EU Competition Law in the Regulated Network Industries*, *in* INTERSECTIONS OF ANTITRUST: POLICY AND REGULATION (Jonathan Galloway ed., forthcoming 2019).

63 *Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS Licence*, GN-01/1995, OFF. TELECOM. AUTH. (June 1995), https://tel_archives.ofca.gov.hk/en/report-paper-guide/guidance-notes/in95f211.html [https://perma.cc/NT8A-NHFM].

64 *See supra* Section I.A.

65 Press Release, H.K. Gov't, Study Finds Hong Kong a Competitive Telecommunications Market (June 20, 2003), http://www.info.gov.hk/gia/general/brandhk/0620245.htm [https://perma.cc/BJG7-4EC4] (emphasis added).

and its telecoms markets are among the least expensive. Between 1996 and 2002, the cumulative savings from competition in mobile telephony were calculated to be HKD 70 billion, while customer savings from IDD calls from 1999 to 2001 were estimated to be around HKD 31 billion.[66] Scholars have seconded the merits of the government's strategy. Yun Zhao, for instance, finds that the process led to "open and effective competition, voluntary and industry-led standards and wide consumer choices."[67] Significantly, the success is often attributed to Hong Kong's minimalist approach to regulation and the predominant belief that market forces (virtually) alone are the optimal way of allocating resources.[68] As a consequence, the assumption has been that, once the markets were opened up, competition flourished, and there was little or no need to take any further action.

The view that the achievements referred to above are necessarily a reflection of healthy competition is nonetheless imprecise. As the Hong Kong Consumer Council has noted, there appears to be a conflation of the concept of international competitiveness with that of domestic competition,[69] when they are in fact not equivalent. International competitiveness is a fairly broad concept that is frequently referred to but seldom defined.[70] It refers generally to the ability of a country's firms to compete in export markets, or against imports in their domestic market.[71] According to a 1985 House of Lords Report,

> [a] firm is competitive if it can produce products and services of superior quality and lower costs than its domestic and international competitors. Competitiveness is synonymous with a firm's long-

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66 *Id.*

67 ZHAO, *supra* note 38, at 26.

68 Ping & Chen, *supra* note 58, at 145.

69 CONSUMER COUNCIL, COMPETITION POLICY: THE KEY TO HONG KONG'S FUTURE ECONOMIC SUCCESS ¶ 3.5 (1996), https://www.consumer.org.hk/sites/consumer/files/competition_issues/199611/competitionpolicy_report.pdf [https://perma.cc/TV84-JFSY] [hereinafter COMPETITION POLICY].

70 Jan Fagerberg, *International Competitiveness*, 98 ECON. J., 355, 355 (1998).

71 Nick Godfrey, *Why is Competition Important for Growth and Poverty Reduction?*, 7 OECD GLOB. FORUM ON INT'L INV. 1, 5 (2008), http://www.oecd.org/investment/globalforum/40315399.pdf [https://perma.cc/SZ9M-2G3R].

> run profit performance and its ability to compensate its employees and provide superior returns to its owners.[72]

Whether a region is competitive is calculated, *inter alia*, with reference to a mix of macroeconomic, microeconomic, structural, and qualitative aspects ranging from gross domestic product (GDP) to the openness of domestic markets and the rule of law.[73] Domestic competition, on its part, is a crucial factor for competitiveness.[74] It is measured by issues such as the size of firms in the markets, product substitutability, market contestability, the existence of barriers to entry, and consumer welfare.[75] As Ping and Chen have highlighted, "[w]hile Hong Kong is truly competitive in international markets in terms of exports and the ability to attract foreign investment, this competitiveness does not mean, nor does it ensure, that competition exists among firms in domestic markets."[76]

In this sense, Hong Kong may have been a victim of its own success, and the acceptable levels of competitiveness may have eclipsed the resilient obstacles that dampen competition in its domestic telecoms markets. Even more importantly, the assumptions made about the operation of Hong Kong's telecommunications markets appear to obviate the basic premise that a specific market structure is not always a valid indicator of the level of competition in that market. Competition is not an end in itself, but a means to achieve other goals, including efficiency. A monopolistic market structure is certainly inferior to a model of perfect competition.[77] Yet even in the absence of concentration, the

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72 SELECT COMMITTEE ON OVERSEAS TRADE, REPORT, 1984-85, HL 238-I, at 468 (UK).

73 CONSUMER COUNCIL, *supra* note 69, at 23; *see also* Peter J. Buckley, Christopher L. Pass & Kate Prescott, *Measures of International Competitiveness: A Critical Survey*, 4 J. OF MKTG. MGMT. 175–200 (1988).

74 Issue Note, UNCTAD Secretariat, The Relationship Between Competition, Competitiveness and Development, U.N. Issue Note TD/B/COM.2/CLP/30, at 4 (May 23, 2002) http://unctad.org/Sections/ditc_ccpb/docs/ditc_ccpb0020_en.pdf [https://perma.cc/7PPW-37LZ]; *see also* Godfrey, *supra* note 71, at 5.

75 CONSUMER COUNCIL, *supra* note 69, at 23.

76 Ping & Chen, *supra* note 58, at 146.

77 MICHAEL E. WETZSTEIN, MICROECONOMIC THEORY: CONCEPTS AND CONNECTIONS 488 (2d ed. 2013).

behavior of the participants may stifle the process that antitrust laws were designed to protect. The link between perfect and actual competition was an idea defended by Neoclassical economics,[78] but more recent, elaborate theories and extensive evidence show that placing the focus of antitrust intervention solely on market structure is not sufficient. While some market structures lend themselves to anti-competitive behavior, and require special attention, it is possible that firms behave anti-competitively in virtually every market scenario. Market competition should instead be understood as a dynamic process affected by multiple factors, one of which is the configuration of the market.[79]

As a consequence of the above, while the structure of Hong Kong's main telecommunications markets (with the notable exception of data access) is healthy, this does not imply that those markets are free from all ills, nor that competition is necessarily stark. The existence of a desirable market structure is not enough to guarantee competition, as demonstrated by some of the issues that have come to light post-liberalization, discussed in the next section.[80] The regulatory changes that opened up the markets and put pressure on the incumbents to compete fairly managed to level the playing field, but that field needs to be adequately cared for to reap the expected fruits of strong competition. For this purpose, the adoption of antitrust legislation is paramount.

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[78] *See, e.g.*, AUGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (A.M. Kelley Publishers 1838). For an overview of Neoclassical economics, see Tony Lawson, *What is This 'School' Called Neoclassical Economics?,* 37 CAMBRIDGE J. ECON. 947, 947 (2013).

[79] *See generally* THORSTEIN VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM (1921). For an analysis from a Hong Kong perspective, see generally KUI-WAI LI, ECONOMIC FREEDOM: LESSONS FOR HONG KONG (2012).

[80] *See infra* Section III.C.

II. THE BOUNDARIES OF SECTOR-SPECIFIC COMPETITION LAW

A. *The Consumer Council's (Unheeded) Efforts to Spur the Adoption of Competition Law*

Competition has long been considered "instrumental to the rapid development of the local telecom market."[81] Giving customers a choice of service providers, it was believed, would encourage competing firms to act more efficiently, reduce prices, enhance innovation, and improve service quality.[82] Coinciding with the time when the seed of the liberalization process was planted, and despite the prevailing partiality towards laissez-faireism, the debate as to whether competition law should be adopted in Hong Kong was gaining momentum. In 1992, Chris Patten, the last British Governor of Hong Kong, insisted that both the Consumer Council and the Legislative Council (LegCo) ought to help the government to "defend free markets and to give consumers the full redress against unscrupulous business practices to which they are entitled."[83]

Indeed, the Hong Kong Consumer Council was instrumental in shedding light on the problems related to the lack of competition in Hong Kong's markets and in putting pressure on the government to take action. In the early 1990s, it conducted a series of studies—one of which focused on telecommunications—which showed the poor intensity of competition in various sectors of the local economy.[84] In 1996, it published the report "Competition Policy: The Key to Hong Kong's Future Success" (the 1996 Report).[85] *Inter alia*, it highlighted that Hong Kong's strong performance could not be taken for granted, since growing international pressure increasingly threatened its competitive edge.[86] It also found that maintaining a monopoly on international calls as a

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81 Lui, *supra* note 8, at 4.
82 *Id.*
83 *Official Record of Proceedings*, H.K. LEG. COUNCIL 16 (Oct. 7, 1992), http://www.legco.gov.hk/yr92-93/english/lc_sitg/hansard/h921007.pdf, [https://perma.cc/8A34-XKBK].
84 CONSUMER COUNCIL, *supra* note 69, at 9.
85 *See generally* CONSUMER COUNCIL, *supra* note 69.
86 *Id.* at 73.

consequence of HKTI's exclusive license (which would be revoked three years later) was contradictory with the general trend of opening up the markets.[87] By the time the 1996 Report was published, services had overtaken manufacturing to become the major economic activity of the city, and the export of services was viewed as fundamental for the economic growth of Hong Kong.[88] While the government, already committed to liberalizing the industry, had vowed to ensure that service markets remain open and highly competitive, the absence of intervention would not work for all markets. In particular, in the case of utilities, international competition was hampered by the fact that they were provided locally. The main conclusion was that "Hong Kong must map out a pragmatic development strategy in which a comprehensive competition policy should play a vital part."[89] The Consumer Council ultimately advocated for the adoption of cross-sector comprehensive competition legislation and the creation of an authority with the power to investigate potential breaches of the law.[90]

The government's reaction to the study came only a year after the publication of the 1996 Report, in the shape of the creation of a Competition Policy Advisory Group ("COMPAG") to assess the recommendations put forward by the Consumer Council.[91] Rather disappointingly, in May 1998, the COMPAG issued a formal policy statement saying that, rather than introducing a general competition law, the government would opt for continuing to focus on sector-specific competition policy.[92] A general ban on anti-competitive practices, according to the COMPAG, would be an "overkill," and the creation of an antitrust agency would only lead to the duplication of regulatory bodies.[93] The COMPAG further claimed that cross-sector competition law would not deal with the peculiarities of each industry.[94] As a consequence, it announced

87 *See supra* Section I.A.
88 CONSUMER COUNCIL, *supra* note 69, at 1.
89 *Id.* at 73.
90 *Id.* at 75.
91 Ping & Chen, *supra* note 58, at 148.
92 *Id.*
93 *Id.*
94 *Id.*

that different rules for different sectors would be enacted, to be enforced by sector-specific bodies.[95] This was the context in which competition provisions were added to the TO and included in the BO when it was enacted. Unfortunately, until 2015, they remained the only two sectors vested with antitrust rules. While this development dealt a blow to the proposals of the Consumer Council, and to those advocating for competition law in Hong Kong, it was an important step forward in the path towards the adoption of cross-sector legislation.

B. *The Substantive Provisions of the Telecommunications Ordinance*

The TO's main substantive antitrust provisions, applicable to telecoms licensees, came into force in June 2000 in the shape of Sections 7I to 7N.[96] They were accompanied by new procedural rules so as to enable their enforcement: Sections 32N to 32R dealt with appeals,[97] Section 35A conferred on the TA investigatory powers,[98] and Section 36C contained the relevant penalties.[99] Mergers in the sector remained free from scrutiny until July 2004, when Section 7P, introduced by the Telecoms (Amendment) Ordinance 2003, became applicable.

Essentially, the provisions added to the TO did little else than extend to the entire telecoms industry the rules contained in the GCs of the FTNS licenses, discussed in the previous section.[100] Anticompetitive joint conduct was covered in Section 7K, which prohibited licensees in telecoms markets from engaging in conduct with "the purpose or effect of preventing or substantially restricting competition."[101] The second paragraph of the provision contained a non-exhaustive list of the circumstances that would be taken into account when assessing the legality of a conduct. It included the ubiquitous references to price fixing, refusals to

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95 *Id.*
96 *See* Telecommunications Ordinance, (2000) Cap. 106, § 7I-N (H.K.).
97 *See id.* at §32.
98 *See id.* at §35.
99 *See id.* at §36.
100 *See supra* Section I.B.
101 Telecommunications Ordinance, (2000) Cap. 106, § 7K(1) (H.K.).

supply competitors, and market sharing arrangements, plus a general clause allowing the assessment of the conditions of the relevant licenses.[102] Section 7K(3) specified the kind of conduct that would be forbidden, mentioning three categories: any "agreement, arrangement or understanding" with an anticompetitive purpose or effect; exclusive agreements imposing obligations not to acquire from others;[103] and giving or receiving unfair advantages to or from associates, to the detriment of competitors.[104] This last category was invoked in the 2003 *Banyan Garden Estate* case, discussed below.[105]

Section 7L forbids the abuse of dominance on the part of telecoms licensees.[106] A rather loose definition of what constitutes a dominant position can be found in the second paragraph of the prohibition, which is described as the ability of a licensee to act "without significant competitive restraint from its competitors and customers."[107] Whether a company is dominant is to be determined by considering, *inter alia*, the licensee's market share, its power to make pricing decisions, the existence of barriers to entry in the market, and the degree of product differentiation.[108] Abuse was defined as "conduct which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market."[109] Specific forms of abuse would include predatory pricing, price discrimination (that is, price differences that are not justified by actual or likely differences in the supply costs), the imposition of harsh contractual terms or terms unrelated to the subject of the contract, tying arrangements, and discrimination in the supply of services to competitors.[110] Section 7N refers to various forms of discrimination that will be considered abusive when carried out by a dominant licensee,[111] but only where the TA

[102] *Id.* at § 7K(2).
[103] Unless the TA has given written authorization for such an arrangement.
[104] Telecommunications Ordinance, (2000) Cap. 106, § 7K(3) (H.K.).
[105] *See infra* Section II.C.
[106] Telecommunications Ordinance, (2000) Cap. 106, § 7L(1) (H.K.).
[107] *Id.* at § 7L(2).
[108] *Id.* at § 7L(3).
[109] *Id.* at § 7L(4).
[110] *Id.* at § 7L(5).
[111] *Id.* at § 7N(1), (2).

finds that there is an anticompetitive purpose or effect.[112] Discrimination, in the context of the application of the TO, can be in relation to charges (unless they reflect cost), performance characteristics, or other terms or conditions of supply.[113]

By virtue of Section 7P of the TO, the TA also had the power to oversee mergers affecting carrier licenses. The test adopted was whether the merger would tend to substantially lessen competition ("SLC"),[114] employed in jurisdictions such as the UK, US, or other parts of the world.[115] Like in UK merger control, notification was not compulsory under the TO, but consent could be sought by the affected licensee or any interested person.[116] Regardless of whether a merger had been notified, in the event that the TA believed that an SLC could occur, it had the power to issue a written notice asking the licensee to take such action as it considered necessary "to eliminate or avoid any such effect."[117] An exception was provided for those concentrations which could result in efficiencies that would outweigh any potential detrimental consequences.[118] After considering the concentration and giving the interested parties a reasonable opportunity to make representations,[119] if the concerns still persisted and no countervailing efficiencies were identified, the TA could refuse consent or make consent conditional upon the adoption of specified remedies targeted at eliminating the SLC.

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[112] *Id.* at § 7N(4).

[113] *Id.* at § 7N(3).

[114] Telecommunications Ordinance, (2011) Cap. 106, §7P(1)(a) (H.K.).

[115] *See* Thomas O. Barnett, *Substantial Lessening of Competition—the Section 7 Standard*, COLUM. BUS. L. REV. 293, 296 (2005) (discussing the SLC test, *inter alia*); Ioannis Kokkoris, *Do Merger Stimulation and Critical Loss Analysis Differ under the SLC and Dominance Test?*, 27 EUROPEAN COMPETITION L. REV. 249, 250 (2005).

[116] Telecommunications Ordinance, (2000) Cap. 106, § 7K(1) (H.K.); Telecommunications Ordinance, (2011) Cap. 106, §7P(6) (H.K.).

[117] *Id.* at § 7P(1)(b).

[118] *Id.*

[119] Telecommunications Ordinance, (2000) Cap. 106, § 7K(1) (H.K.); Telecommunications Ordinance, (2011) Cap. 106, §7P(3) (H.K.).

C. The Limitations of the Sectoral Antitrust System

In principle, if adequately enforced, the scope of the TO's antitrust and merger review clauses would have been apt for attacking a wide range of anti-competitive practices and for preventing concentrations that could pose a threat to competition. Their effectiveness would have been limited to telecoms markets, yet within those sectoral boundaries, they could have been used to protect the hard-earned competitive environment in the sector. A robust industry-specific competition policy could also have served to showcase the benefits of applying antitrust to combat anti-competitive conduct, which could have proved crucial at a time of prevailing skepticism towards such regulation. Regrettably, important procedural and practical limitations, discussed here, drastically reduced the significance of the regime.

The penalties for breaches of the competition law provisions are disappointing for a number of reasons. First, most cases were resolved with a mere warning letter or a direction, which would in effect amount to nothing more than a cease-and-desist order requiring the companies in breach of the rules to put an end to the alleged violation. Such lax consequences would hardly have had any deterrent effect, and they would not be sufficient to restore competition and/or fix the damage caused by anticompetitive behavior. While financial penalties were contemplated in the TO, they were reserved for serious breaches and were usually capped at a modest HKD 200,000 for first-time wrongdoers, which could be increased up to a maximum of HKD 1 million in the event of recidivism.[120] As the author has argued elsewhere, a fixed maximum penalty does not affect all companies equally, and the excessive predictability invites strategic behavior as to whether it is profitable to breach the law.[121] Moreover, the TO's fixed fines were too low to be threatening to those "making substantial profits from cartel activity."[122] Harsher fines based on turnover and sanctions such as the suspension of the license were reserved for

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[120] Telecommunications Ordinance, (2000) Cap. 106, § 36C(3) (H.K.).

[121] MARCO COLINO, *supra* note 51, at 135–37.

[122] Sandra Marco Colino, *Punishing Cartel Conduct: Means to Encourage Compliance with the Hong Kong Competition Ordinance*, *in* CARTELS IN ASIA: LAW AND PRACTICE 315–32 (T. Cheng, S. Marco Colino & B. Ong eds., 2015).

the most serious breaches and never applied in practice.[123] A second issue was the late adoption of merger control. No merger was ever blocked, and the scarce analysis of the concentrations that took place before the entry into force of the CO would not have been sufficient to effectively identify anticompetitive harm.[124]

Third, the Consumer Council and commentators insisted on the weaknesses intrinsic to the nature of the sectoral approach. According to the Consumer Council, the resulting approach would be "piece meal" and could lead to inconsistencies if the different regulators reached different outcomes in similar investigations. Moreover, contrary to the government's claims, Lin and Chen argued that it would be inadequate to have regulatory bodies take on the additional role of antitrust enforcers, as this would require them to perform dual roles and would force them to judge complaints relating to the companies they themselves regulated. They further insisted on the potential negative consequences of the rules "on the efficient allocation of resources across different sectors of the economy," given that private actors' investment decisions take into account the "institutional costs" of being active in specific markets.[125]

Fourth, beyond the limitations of the law, an even more significant obstacle for the effectiveness of the sector-specific competition law provisions was the absence of enforcement initiative on the part of the TA to take action against anticompetitive conduct. In 2002, Lin and Chen assessed the cases completed by the TA, in which the GCs of the FTNS licenses and/or the TO had come into play.[126] In the very few examples that had arisen, the TA had seldom acted on its own volition and mainly limited himself to acting "as a referee in resolving complaints" from consumers, competitors, or the Consumer Council.[127] As outsiders to the allegedly illegal activity, it was often difficult for those parties to meet the standard of proof

123 Telecommunications Ordinance, (2000) Cap. 106, § 7K(1) (H.K.).
124 Ping & Chen, *supra* note 58, at 150.
125 *Id.* at 156–57.
126 *Id.* at 152–53.
127 *Id.* at 161.

required to show that an infringement had taken place.[128] Moreover, the lack of competition culture in the city made it difficult for victims of anti-competitive conduct to identify the illegality of the actions that could be affecting them in their daily lives and having a significant impact on their welfare.[129]

The passive role of the TA was perhaps most noticeable when it came to tackling the most significant suspected violations of the sector-specific competition rules, with three particularly notorious examples. The first was a case of price fixing between competitors.[130] In January 2000 (only months prior to the entry into force of the competition law provisions of the TA), all licensed mobile telephone operators individually announced a twenty to twenty-five percent price increase in the subscription fees for all of their major service plans, which would take effect on the same day.[131] Contrary to what the GCs of their licenses required, the TA had not been notified of the price increase in advance.[132] According to the service providers, their actions did not amount to collusion, as they were simply attempting to make up for the losses they had been experiencing since 1999.[133] They did admit, however, that representatives from their companies had met to discuss common concerns in the months immediately before the price hike, and they did touch upon the issue of passing the license fee to customers.[134] While the TA came to the conclusion that "*some* kind of arrangement between the companies with regard to their prices must have existed," no penalties were imposed, given that they all agreed to modify their conduct to ensure that they complied with their obligations.[135] The lenient response to what is generally accepted to be the most harmful kind of anticompetitive conduct was highly unsatisfactory and would in no way have served to deter collusive practices.[136]

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128 *Id.*
129 *Id.*
130 *Id.* at 155.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.* at 156 (emphasis added).
136 *See id.* at 149.

The second case was the implementation of what may possibly have amounted to abusive bundling in *Banyan Garden Estate*, decided in 2003.[137] Bayan Garden Estate is a housing complex in the city's Kowloon district, developed by Cheung Kong (Holdings) Limited (CKH).[138] Its residents complained that Citybase, the estate's management company, had included in the (compulsory) monthly management fee the cost of telephone and Internet services to be provided by Hutchison Multimedia, HGCL, and PowerCom—all subsidiaries of the property developer, who also owned Citybase.[139] Resorting to the services of an alternative operator would have led to payment in addition to the management fee.[140] The case was brought before the TA, citing an advantage given to affiliates that violated Section 7K(3)(c) TO by restricting the residents' freedom to resort to alternative operators.[141] Citybase claimed that there had been a bidding process for the provision of the Internet services,[142] as a consequence of which the providers had been selected. The TA concluded that this process was not unfair (a requirement for the provision at stake to be applicable), since the favored telecoms operators "had no apparent knowledge that they were being advantaged, and had either acted competitively for the right to be selected or were recommended by an unrelated third party."[143] The focus of the analysis of these practices is entirely flawed. As Cheng has noted, the economic impact was completely overlooked, and the intention and actual harm were not taken into consideration.[144] The lack of jurisdiction on the part of the TA to scrutinize the real estate market precluded a full analysis of the possibly unlawful bundling.[145]

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[137] OFF. TELECOMM. AUTH., COMPLAINTS ABOUT ARRANGEMENTS FOR THE PROVISION OF TELEPHONE AND INTERNET ACCESS SERVICES AT BANYAN GARDEN ESTATE 1 (2004), https://tel_archives.ofca.gov.hk/en/c_bd/completed-cases/t261_03.pdf [https://perma.cc/5BRA-HV5E].

[138] *Id.* at 3.

[139] *Id.* at 4, 14.

[140] *Id.* at 1.

[141] *Id.*

[142] *Id.* at 6–9.

[143] *Id.* at 2.

[144] Cheng, *supra* note 5, at 523.

[145] *Id.* at 523–24.

The problems in the residential broadband market endured. In May 2007, the OFTA published the results of a survey it conducted on consumer satisfaction with home broadband services, after receiving over 4,000 complaints.[146] The survey reflected that sixty-two percent of respondents had experienced problems with their service in the previous 12 months.[147] They cited reliability, connection speed, and customer services as the most significant issues.[148] In its statement, the OFTA placed the emphasis on the need for greater transparency and consumer information.[149] No mention was made of the possible link between these issues and the level of competition in the market.[150] Many customers, for instance, did not have a choice, not as a result of a lack of information, but because their properties had been fitted with the infrastructure to connect to only one residential broadband provider that was owned by the property developer.[151] This once again reflects the insufficiencies of the industry-specific legislation in a city dominated by tycoons who control powerful conglomerates in multiple sectors of the economy.

III. THE CONSEQUENCES OF THE ADOPTION OF CROSS-SECTOR COMPETITION ON TELECOMMUNICATIONS

By the late 2000s, Hong Kong's resistance to cross-sector competition law had become an anachronism. In 2008, there were

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146 OFF. TELECOMM. AUTH., PANEL ON INFORMATION TECHNOLOGY AND BROADCASTING 4 (Mar. 10, 2008), https://www.legco.gov.hk/yr08-09/english/panels/itb/papers/itb0630cb1-2017-5-e.pdf [https://perma.cc/9G9F-MEMR]; *Survey on Residential Broadband Internet Services,* OFFICE OF THE TELECOMM. AUTH. (Jan. 2007), http://tel_archives.ofca.gov.hk/en/press_rel/2007/May_2007_r1.html [https://perma.cc/4AZV-Z4YR] [hereinafter OFF. TELECOMM. AUTH., Survey on Residential Broadband Internet Services]; J. BACON-SHONE, SURVEY REPORT OF TELEPHONY SURVEY IN STAGE I ON BROADBAND CONSUMER SURVEY IN HONG KONG (Jan. 2007), https://tel_archives.ofca.gov.hk/en/tas/others/ta20070502a.pdf.

147 OFF. TELECOMM. AUTH., Survey on Residential Broadband Internet Services, *supra* note 146.

148 *See id.*

149 *See generally, id.*

150 *Id.*

151 *See* OFF. TELECOMM. AUTH., *supra* note 137.

already 111 competition law regimes in the world.[152] China's first antitrust legislation, the Anti-Monopoly Law, came into force in August that year, marking the "symbolic commencement of a new era of competition for China."[153] Yet, in Hong Kong, the Consumer Council's efforts remained unheeded during the mandate of Chee-hwa Tung, the first Chief Executive after the Handover,[154] who was well connected to the local tycoons.[155] It was in 2005, when Donald Tsang became Chief Executive, that things took a sharp turn. Convinced of the virtues of introducing antitrust legislation, he set up the Competition Policy Review Committee ("CPRC"), which presented the Competition Bill in July 2010.[156]

While it was initially met with strong opposition, on June 14, 2012, the CO was finally adopted by LegCo,[157] and it entered into force on December 14, 2015.[158] During the implementation period, the Hong Kong Competition Commission ("HKCC") and the Hong Kong Competition Tribunal ("HKCT") were set up, six guidelines were adopted, and two policy documents—one on leniency and one on enforcement priorities—were published.[159] The HKCC also developed multiple competition advocacy initiatives, with a view to educating the population about the harms of anticompetitive conduct and to furnishing businesses with compliance

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152 ANESTIS S. PAPADOPOULOS, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY 15 (2007).

153 Angela Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULLETIN 630 (2011).

154 J.D. Ho, *From Free Port to Competition: Is Asia's World City Playing Catch-Up?*, *in* THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN ITS FIRST DECADE 422 (Joseph Y.S. Cheng ed. 2007).

155 Sandra Marco Colino, *Distribution Agreements under China's Anti-Monopoly Law and the Hong Kong Competition Ordinance*, 1 CHINA ANTITRUST L. J. 22 (2017).

156 *See* THOMAS CHENG, CARTELS IN ASIA: LAW AND PRACTICE 295–314 (Thomas Cheng, Sandra Marco Colino & Burton Ong eds., 2015).

157 *See* Sandra Marco Colino, *Wake Up and Smell the Competition: Hong Kong's New (Caffeinated?) Competition Law*, CHILLIN' COMPETITION (Sept. 9, 2012), https://chillingcompetition.com/2012/09/10/wake-up-and-smell-the-competition-hong-kongs-new-caffeinated-competition-law [https://perma.cc/H795-2538].

158 Competition Ordinance, (2015) Cap. 619 (H.K.).

159 *Overview*, COMPETITION COMMISSION, https://www.compcomm.hk/en/legislation_guidance/legislation/overview.html [https://perma.cc/9M29-R5EY] (last visited Feb. 22, 2019).

information.[160] In 2012, the TA and the OFTA were abolished, and their functions were assumed by the Communications Authority ("CA") and the Office of the Communications Authority ("OFCA").[161] This section covers the CO's most important features and explores its potential to control anticompetitive practices in general, and in the telecommunications industry in particular.

A. *The Shape of the Antitrust Regime Laid Down in the Competition Ordinance*

The CO's main substantive rules are in keeping with the general principles of modern competition law regimes. They include: a prohibition of joint conduct, which may have an anticompetitive object or effect, enshrined in the First Conduct Rule ("FCR"); a condemnation of abuses of market power, in the shape of the Second Conduct Rule ("SCR"); and a Merger Rule, which aims to control concentrations involving telecoms carrier license holders that substantially lessen competition in Hong Kong.[162]

The FCR applies to agreements, decisions by associations, or concerted practices between undertakings with the object or effect of preventing, distorting, or restricting competition in Hong Kong.[163] Its wording is thus very similar to that of Article 101(1) of the Treaty of the Functioning of the European Union ("TFEU") and evidences that the European Union ("EU") system was one of the regimes on which the CO was modelled.[164] The Guideline on the First Conduct Rule ("Guideline FCR"), published by the HKCC in July 2015,[165] specified that both horizontal and vertical

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160 *Role & Functions*, COMPETITION COMMISSION, https://www.compcomm.hk/en/about/comm/role_functions.html [https://perma.cc/Q5JB-ZDJP] (last visited Feb 22, 2019).

161 OFF. COMM. AUTH., *supra* note 29, at 1.

162 Competition Ordinance, (2015) Cap. 619, Sched. 7, Part 2 (H.K.).

163 Kelvin H.F. Kwok, *The New Hong Kong Competition Law: Anomalies and Challenges,* 37 WORLD COMPETITION L. & ECON. REV. 541, 543 (2014).

164 On the influence of international regimes on the CO, see *id.* at 544.

165 *Guideline on the First Conduct Rule,* COMPETITION COMM'N (July 27, 2015), https://www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf [https://perma.cc/B8D2-2STE].

agreements may be caught.[166] Schedule 1 CO contains some exclusions and exemptions.[167] It excludes agreements that enhance "overall economic efficiency" and some of the conduct that may be carried out by small and medium-sized enterprises ("SMEs").[168] Moreover, it contains what is in effect a *De Minimis* rule for agreements of "lesser significance," by virtue of which the FCR will not apply to arrangements where the combined turnover of the undertakings does not exceed HKD 200 million, unless the behavior constitutes serious anti-competitive conduct.[169] This is different from the EU *De Minimis* rule, which, rather than using a fixed amount, excludes agreements that do not meet certain market share thresholds, and is inapplicable in the case of restrictions of competition by object.[170] The only exception to the Hong Kong exclusion is for serious anti-competitive conduct, a more limited concept: not all restrictions by object will fall under this rubric.[171]

The conduct of powerful undertakings is controlled by the SCR, which forbids abuses of a substantial degree of market power (thereby seemingly adopting the standard of Australian and New Zealand competition law, rather than the dominance requirement of the EU).[172] The HKCC considers market power to exist where an undertaking is able "profitably to raise prices above the competitive level for a sustained period."[173] With regard to what is considered abusive conduct, Section 21 CO refers to predatory behavior and to "limiting production, markets or technical development to the prejudice of consumers," which is said to include "anti-competitive tying and bundling, refusals to deal and exclusive dealing."[174] Unlike the EU or US regimes, which do not

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166 *Id.* at 72.
167 Competition Ordinance, (2015) Cap. 619, Sched. 1 (H.K.).
168 *Id.* at §1.
169 *Id.* at §5(1).
170 Kwok, *supra* note 163, at 547.
171 *See* Competition Ordinance, (2015) Cap. 619, Sched. 1, §5(2) (H.K.).
172 Kwok, *supra* note 163, at 551.
173 COMPETITION COMM'N, GUIDELINE ON THE SECOND CONDUCT RULE ¶ 1.7, at 3 (2015), https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf [https://perma.cc/K3EX-XGZ7].
174 *Id.* at 5.

contemplate exceptions in the case of abuses, the CO refers to various exclusions, including for services of general economic interest and for conduct of lesser significance, applicable to undertakings with an annual turnover of HKD forty million or less.[175] It is unusual to have a *De Minimis* rule for these practices, and the adequacy of its inclusion in the CO has been questioned.[176]

Breaches of the FCR and the SCR can be sanctioned in various ways, the most common of which is financial penalties of up to ten percent of an undertaking's local turnover for each year of infringement, for up to a maximum of three years (which would be the three years with the highest turnovers if the violation lasted longer).[177] The choice of local (as opposed to global) turnover and the three year cap respond to compromises that had to be made to get sufficient support in LegCo for the law to be passed.[178] Directors can also be disqualified for up to five years,[179] provided that the illegal conduct "makes the person unfit to be concerned in the management of a company."[180] Further penalties may be imposed on both individuals and corporations that breach the CO's procedural rules during an investigation, which include fines and even incarceration.[181] It should be noted that the CO adopts a judicial model, and, therefore, penalties are imposed by the HKCT,[182] not the HKCC.[183]

Currently, the telecommunications industry is the only sector of the economy where concentrations can be controlled under the CO, since the Merger Rule ("MR") only applies to mergers involving carrier licensees.[184] It is possible, therefore, that a company that is not itself active in a telecoms market may be subject to the MR, if it is part of a conglomerate or vertical

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175 Competition Ordinance, (2015) Cap. 619 Sched. 1, § 6(1) (H.K.).
176 Kwok, *supra* note 163, at 567.
177 *Id.* at § 93(3).
178 The author has described the penalties as "disappointing." *See* Marco Colino, *supra* note 122, at 315–32.
179 Competition Ordinance, (2015) Cap. 619, §§ 101, 102 (H.K.).
180 *Id.* at § 102.
181 *See id.* at §§ 53–174.
182 *See* Kwok, *supra* note 163, at 547.
183 On the judicial model, see *id.* at 563–566.
184 Competition Ordinance, (2015) Cap. 619 Sched. 7, Part 2, § 4 (H.K.).

concentration involving at least one telecoms licensee. Like in the UK or Australia, notification is voluntary, and the substantive test used to assess a merger is whether it leads to a substantial lessening of competition ("SLC").[185] The Guideline on the Merger Rule ("Guideline MR") explains that the HKCC will consider structural factors ("market shares, market concentration, barriers to entry, vertical integration, buying power and import competition")[186] as well as non-structural factors (like the "strategic behaviour" of firms directed at altering the market structure).[187] The HKCC refers to two indices, the market concentration ration and the HHI, as reliable indicators of the situations in which it may decide to scrutinize a merger. Normally, it will intervene where the CR4 (that is, the post-merger combined market share of the four largest companies in the market) is over seventy-five percent, and the merged firm's market share exceeds forty percent. It may also look at mergers where the CR4 is in excess of seventy-five percent, and the market share of the merged company is over fifteen percent.[188] According to the Guideline MR, markets with a post-merger HHI[189] of more than 1,800 will be considered highly concentrated, and mergers in those markets are likely to be investigated unless the increase after the merger HHI is less than fifty.[190] In moderately concentrated markets, where the HHI is between 1,000 and 1,800, mergers may be subject to scrutiny if they produce an increase of 100 in the HHI.[191] Below 1,000, the HKCC does not expect to have to intervene, but it is worth noting that these are only indicative safe harbors, and it may decide to examine operations even below those thresholds.[192] There is no timetable for the HKCC to provide advice, although it vows to act in an "efficient and timely manner."[193] The remedies that may be offered according to Section 60 CO are both structural

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185 *Id.* at § 6.
186 COMPETITION COMM'N, GUIDELINE ON THE MERGER RULE ¶ 3.22, at 13 (2015).
187 *Id.* ¶ 3.23, at 13.
188 *Id.* ¶ 3.15, at 12.
189 On the HHI, *see supra* Section I.A.
190 COMPETITION COMM'N, *supra* note 186, ¶ 3.19, at 13.
191 *Id.* ¶ 3.18, at 13.
192 *Id.* ¶ 3.20, at 13.
193 *Id.* ¶ 5.5, at 32.

and behavioral, although, where possible, the former are preferred.[194]

B. *The Potential of the New Rules to Address Telecoms-Specific Problems*

Any assessment of the impact of the CO is unavoidably hampered by its very limited practical application to date. As of August 2018, the HKCC has only brought proceedings before the HKCT in two cartel cases, and the outcome of both is still pending. However, the antitrust mileage of the telecoms sector at least serves to identify the most significant threats to competition in this industry. It is possible, therefore, to make accurate predictions as to the potential of the new rules to address those problems.

Without a doubt, the most important improvement relates to cartel cases. Hypothetically, before the introduction of the FCR, Section 7K TO (and even the GCs of the licenses) could have been used to strike down cartels. However, the seemingly evident price fixing collusion between mobile phone operators that took place in 2000 exposed the shortcomings of relying on a sectoral regulator, without specific antitrust expertise, as the only authority empowered to decide on both the existence of illegal conduct and the suitable punishment.[195] By contrast, now there is a solid institutional framework in place, with an agency and a tribunal that, unlike the TA, specialize in competition law issues. The executive arm of the HKCC comprises experts who have first-hand knowledge of the application of antitrust rules in experienced jurisdictions, including the UK, Australia, the US, France, and Portugal. The current CEO, Brent Snyder, was Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division of the US Department of Justice and prosecuted a plethora of cartels before coming to Hong Kong.[196] Moreover, in both the CO and the Guideline FCR, it is crystal clear that hardcore

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194 *Id.* ¶ 5.13, at 34.

195 *See supra* Section II.C.

196 Paul Carlyle and Alison Rochester, *Hong Kong Competition Commission Announces Appointment of New Chief*, LEXOLOGY (June 28, 2017), https://www.lexology.com/library/detail.aspx?g=8f5bf531-d2e1-438e-8237-486ce3359d35 [https://perma.cc/9WX2-265M].

cartels constitute serious anticompetitive conduct, considered anticompetitive by object, and are harshly treated. The law further specifies that the *De Minimis* exception will not apply. The availability of leniency, one of the most valuable cartel detection mechanisms, ought to assist greatly in the complex process of gathering the necessary proof of the existence of a cartel.[197] And the practice of the HKCC thus far reflects a tough stance on cartels. Interestingly, the first case the Commission brought before the HKCT related to the alleged bid-rigging practices of five IT companies. Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited, and Tech-21 Systems Limited may have breached the FCR in relation to a tender issued by the Hong Kong Young Women's Christian Association ("YWCA") for the supply and installation of a new IT server system. The bids submitted by the competitors purportedly included "dummy" bids and may thus have amounted to bid rigging.[198]

The CO ought to further allow for investigating exclusionary bundling/tying practices in scenarios similar to the *Banyan Garden Estate* case discussed above, which was so disappointingly tackled under the previous legal framework.[199] The HKCC has the power to conduct investigations into every market, and thus the obstacle which existed in that case—that the enforcer lacked the authority to look into the real estate market—would be easily overcome. Tying and bundling are expressly listed as being abusive in the Guideline SCR, as they may enable a dominant undertaking in one market to leverage its power into a second market where it faces tougher competition.[200] However, the Guideline SCR also makes clear that the authority will have to show the negative effects of such practices, since they are considered "common commercial

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[197] On leniency, see Sandra Marco Colino, *The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions*, 50 VAND. J. TRANSNAT'L L. 535 (2017).

[198] Press Release, Competition Commission, Competition Commission Takes Bid-Rigging Case to the Competition Tribunal (Mar. 23, 2017), https://www.compcomm.hk/en/media/press/files/20170323_Competition_Commission_takes_bid_rigging_case_to_Competition_Tribunal_e.pdf [https://perma.cc/9SDW-FYKP].

[199] *See supra* Section II.C.

[200] COMPETITION COMM'N, *supra* note 173, ¶ 4.2, at 24.

arrangements that generally do not harm competition and often promote competition," even if the company in question is powerful.[201] Therefore, in addition to the existence of a substantial degree of market power, the HKCC will need to demonstrate foreclosure effects.[202] This will require careful scrutiny of the economic impact of the practice. Thus far, no cases or investigations on the basis of the SCR have been announced. It is also unclear whether the possibility of attacking tying as a concerted practice, which is common in the US, will be contemplated in Hong Kong, since neither the law nor the relevant guideline mention anything in this regard.[203]

The insertion of the MR in the CO might be used to prevent the creation of market power which could threaten competition in the relevant market. However, this would only be possible if a telecom company is involved in the operation. The logic for this regrettable limitation to merger control in Hong Kong is difficult to grasp. As Cheng observed in 2007 when assessing the rationale behind the sector-specific antitrust rules applicable at the time,[204] and as our analysis in Part I of this Article showed, post-liberalization, the telecoms markets would not appear to be affected by particular problems, and most display a good level of competition. Importantly, at the time of writing and almost three years after the entry into force of the CO, no mergers had been investigated. This is in spite of Hutchinson Telecom, the city's second largest mobile operator, announcing in 2017 its intention to bid for fixed line businesses.[205] In the meantime, Hutchinson's UK subsidiary "Three" was prevented from purchasing competitor O2 by the European Commission.[206] Of course, it could be argued that the

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201 *Id.* ¶ 5.9, at 31.

202 *Id.* ¶¶ 5.10–5.12, at 31–32.

203 *See, e.g.*, Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHICAGO L. REV. 147 (2005).

204 Cheng, *supra* note 5, at 524.

205 Bien Perez, *Hutchinson Telecom Shares Soar on Speculation over Bidding for Its Fixed-Line Network Business*, S. CHINA MORNING POST (July 18, 2017), https://www.scmp.com/tech/enterprises/article/2103173/hutchison-telecom-shares-soar-speculation-over-bidding-its-fixed [https://perma.cc/LSY4-M2CQ].

206 European Commission Press Release IP/16/1704, Mergers: Commission prohibits Hutchison's proposed acquisition of Telefónica UK (May 11, 2016).

latter operation would entail more harm, since the merger was horizontal, and would have likely led to the creation of a dominant position. Yet, without a detailed assessment, it is difficult to rule out damaging consequences for competition even in non-horizontal mergers. It appears that, for the time being, the HKCC is devoting most of its resources to cartel investigations. In addition, the fact that notification is voluntary in a jurisdiction where businesses are not used to antitrust enforcement makes it rather unlikely that companies will decide to report their operations.

The CO does suffer from two principal general shortcomings which are bound to affect its potential to effectively fight anticompetitive practices in telecoms and beyond. The first is the absence of hefty fines. In light of the profits that can be made from the activities it punishes, the deterrent effect is likely to be minimal, particularly for companies that operate internationally and that only earn a modest part of their worldwide turnover in Hong Kong. Another issue is the absence of stand-alone private rights of action.[207] This will make it very challenging for customers and competitors of companies that behave anticompetitively to seek damages, as they will only be able to do so in the event that the HKCT has ruled that there has been an infringement. The Tribunal can, however, compel companies to pay damages on its own initiative to "any person who has suffered loss or damage" as a consequence of the breach.[208] Therefore, provided that the HKCC takes the necessary steps to investigate potential breaches of the CO and brings proceedings against the infringements that it identifies before the HKCT, the negative effects of this limitation of the law might be minimized. Thus far, despite having received thousands of queries and complaints, only two cartel cases have been pursued. It is hoped that enforcement will soon pick up after these relatively uneventful warm-up years.

[207] Competition Ordinance, (2015) Cap. 619, § 108 (H.K.).

[208] *Id.* at Sched. 3(k).

CONCLUSION

When discussing the potential of competition law in network industries, the unique antitrust history of the telecommunications sector in Hong Kong makes for a particularly interesting case study. By the time the first cross-sector legislation of the city was adopted, telecom-specific antitrust rules had been in place for two decades. They were seen as indispensable to opening up markets that had been operating as legal monopolies until then. The provisions designed to control the pricing and accounting strategies of the incumbents did their job at creating a level playing field, which would have been unattainable had they been allowed to price excessively low or to make access to their networks unduly onerous or altogether impossible. However, this success largely concealed the disappointing performance of the more traditional competition law rules when it came to putting an end to anticompetitive conduct and preventing the accumulation of market power through mergers. The shortcomings were in part due to the insufficiency of the sectoral regime to address the power of the conglomerates that dominate the city's markets, and in part attributable to a flawed institutional enforcement. The sectoral regulator did not have the experience nor the means to assess the economic impact of the practices it had to scrutinize, and, at the same time, it found itself in the difficult position of having to evaluate the conduct of the companies it simultaneously regulated.

The CO, Hong Kong's first cross-sector antitrust legislation, has the potential to tackle some of these issues. It has served to create the HKCC, a suitably specialized, independent competition authority with strong investigatory powers and the expertise required to conduct the intricate analysis antitrust violations entail. The potential to combat cartels is evidenced by the firmness with which collusion is condemned in the law, and by the cases the HKCC has thus far brought before the HKCT. Yet, the absence of attempts to tackle both the abuse and the creation of market power places a question mark on the extent to which the authority is committed to putting up a much-needed fight against the mighty local conglomerates that continue to stifle competition in industries as vital as telecommunications. This is particularly noticeable in the data access market. Overlooking the threat that excessive power poses for the local economy in a city where inequality is increasing at an alarming rate would mean squandering much of the potential of the new antitrust legislation.