



INTERNATIONALISING COMPETITION LAW: PROSPECTS AND CHALLENGES

31 August 2022

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Presenter's Profile

Kelvin Kwok is an Associate Professor at the Faculty of Law of The University of Hong Kong. His book *Hong Kong Competition Law: Comparative and Theoretical Perspectives* (co-authored with Thomas Cheng) was published by Cambridge University Press in 2021. He has served on the Bar Association's Special Committee on Competition Law, the Consumer Council's Consumer Protection Law and Policy Committee, and the Hong Kong Competition Association's Executive Committee, and formerly as a Non-Governmental Advisor to the International Competition Network. He is also a practising Hong Kong barrister and a member of Des Voeux Chambers with considerable experience advising on competition law issues.


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Topics for today

- ▷ The basics of competition law
- ▷ Overview of major competition regimes
- ▷ The internationalisation of competition law
- ▷ Cross-border anti-competitive practices: Challenges and potential solutions

I. The Basics of Competition Law



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What is competition law?

- ▷ “Competition law is concerned with ensuring that firms operating in the free market economy do not prevent the market from functioning optimally by acting anti-competitively.”
- ▷ “Competition law is concerned with preventing restrictive agreements between firms, dealing with oligopolistic markets, preventing the anti-competitive consequences of the exercise of substantial market power, and preventing mergers which lead to concentrations in market power with anti-competitive consequences.”

(Source: Jones, Sufrin and Dunne, 2019)

Goals of competition law

- ▷ Maintenance of the competition process or free competition
- ▷ Prevention of abuse of economic power
- ▷ Achievement of economic efficiency

(Source: Khemani, 1999)

Do we need competition law?

- ▷ Market self-correction?
- ▷ Import-discipline hypothesis?

(Source: Cheng and Kwok, 2021)

Major areas of competition law – agreements

- ▷ Horizontal agreements
 - Cartels
 - Joint ventures
 - Facilitating practices – eg information exchanges

- ▷ Vertical agreements
 - Resale price maintenance
 - Exclusive distribution
 - Exclusive dealing

(Source: Khemani, 1999)

Major areas of competition law – mergers

- ▷ Horizontal mergers
 - Unilateral effects
 - Coordinated effects
- ▷ Vertical mergers
- ▷ Conglomerate mergers

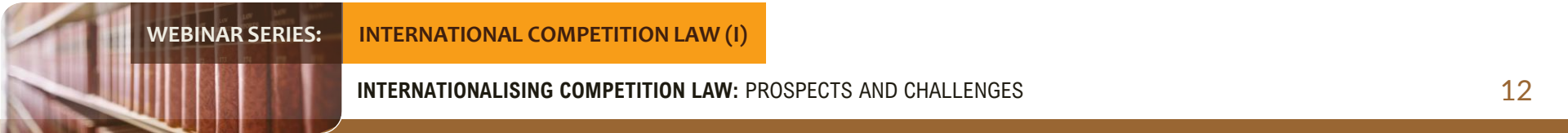
(Source: Khemani, 1999)

Major areas of competition law – abuse of dominance

- ▷ Excessive prices
- ▷ Tie-ins
- ▷ Refusal to deal
- ▷ Predatory pricing
- ▷ Vertical restraints

(Source: Khemani, 1999)

II. Overview of Major Competition Regimes



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China

- ▷ Anti-Monopoly Law (AML) (2007, amended 2022)
 - Chapter II: Monopoly Agreements
 - Chapter III: Abuse of Dominant Market Position
 - Chapter IV: Concentration of Undertakings
 - Chapter V: Abuse of Administrative Power to Exclude or Limit Competition

- ▷ Enforced by the State Administration for Market Regulation (SAMR)

(Source: LexisNexis, 2022)

European Union

- ▷ Articles 101 & 102 of the Treaty on the Functioning of the European Union (dating back to 1957)
- ▷ European Union Merger Regulation (dating back to 1989)
- ▷ Enforced by the European Commission
- ▷ Examples of jurisdictions following the EU model:
 - China
 - Hong Kong SAR
 - Singapore
 - UK


United States

- ▶ Sherman Act (1890)
 - Section 1: restraint of trade
 - Section 2: monopolization
- ▶ Clayton Act (1914)
 - Section 7: mergers and acquisitions
- ▶ Enforced by the Federal Trade Commission and the Department of Justice

Hong Kong SAR

- ▷ Competition Ordinance (Cap 619) (2012)
 - 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
- ▷ Enforced by:
 - Competition Commission
 - Competition Tribunal
 - Communications Authority

III. The Internationalisation of Competition Law



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Does “international competition law” exist?

- ▷ No international antitrust agreement
 - Progress in the WTO
- ▷ No international competition authority

- ▷ Transnational regimes: eg EU, CARICOM, COMESA
- ▷ Extraterritorial application of competition law (examined later)
- ▷ Enforcement cooperation arrangements (examined later)

(Sources: Bradford, 2010; Whish and Bailey, 2018 & 2021)


“Soft” convergence in competition law

- ▷ National level
 - Resale price maintenance
 - Cartels

- ▷ International level
 - ICN
 - OECD
 - UNCTAD

(Sources: Cheng, 2011; Whish and Bailey, 2021)

IV. Cross-border Anti-competitive Practices: Challenges and potential solutions



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Case study – export cartel

- ▷ “Pure” export cartel
- ▷ Does competition law apply?
- ▷ What is the territorial scope of competition law?

(Source: Cheng and Kwok, 2021)

Hong Kong Competition Ordinance

▷ 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.”

China AML

▷ Article 2

“This Law is applicable to any monopolistic conduct in economic activities carried out within the People's Republic of China. This Law is also applicable to monopolistic conduct outside of the People's Republic of China which has an effect of excluding or limiting the competition in China's domestic market.”

(Source: LexisNexis, 2022)

Case study – export cartel

- ▷ Negative effect on domestic competition
 - *Centraal Stikstof Verkoopkantoor* [1978] OJ L242/15
- ▷ Exemption for export cartels

(Source: Cheng and Kwok, 2021)

Case study – export cartel

- ▷ Extraterritorial application of competition law
 - Difficulties in gathering evidence
 - Potential solution: enforcement cooperation arrangements

- ▷ Example: EU/US cooperation
 - Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws [1995] OJ L95/47 (corrigendum [1995] OJ L131/38)
 - Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws [1998] OJ L173/28

(Source: Cheng and Kwok, 2021)

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Questions & Answers



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