The Implementation of Competition Law in Hong Kong and the Role of Judges

Talk to the Hong Kong Competition Association[1]

Lord Neuberger, President of the Supreme Court

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Introductory

1. Hong Kong is justifiably proud of its reputation for having one of the most thriving and dynamic economies in the world. And, while thriving and dynamic economies are highly beneficial for many reasons, anyone other than the most extreme and blinkered free marketer must accept, at least in the 21st century, that a successful economy also requires enforceable rules which ensure genuine competition and outlaws cartels, takes action against abuses of a dominant position or remedies mergers on concentrated markets. The passing by the Hong Kong Legislative Council in June 2012 of the Competition Ordinance (which came into force in December 2015) heralds a new era for the Special Administrative Region. But we are still, I think, at a time of heralds: so far, the Hong Kong Competition Commission ('HKCC') has not opened a formal investigation, imposed a fine or taken enforcement action for infringement, under the 2015 Ordinance.

2. This evening, I would like to consider some aspects of the implementation of competition law in Hong Kong, but I should preface my remarks by confessing that,

[1] I am grateful to John Townsend for all his help in the preparation of this talk

although I had to deal with some fairly difficult competition issues at an interlocutory stage, I never heard a competition case as a trial judge. Indeed, even as an appellate judge in the UK, I only have had experience of three competition appeals in the UK Supreme Court.[2] That may be because the UK's legislation banning monopolies and cartels is of relatively recent origin.

Competition law in the UK

3. I say that, but if one goes back into the mists of time, 750 years ago[3], there was English legislation criminalising what were then called forestalling, ingrossing and regrating. These offences involved buying up large quantities of any article with a view to raising prices, in particular by intercepting good on the way to the market (forestalling) or by buying wholesale and selling on wholesale (ingrossing or regrating)[4]. Successive statutes over the next 500 years repeated and extended this law. However, according to the great Victorian legal historian James Fitzstephen Stephen, these statutes proved "either ineffectual or mischievous"[5] and they were all repealed in 1772[6] in what at the time a future Lord Chief Justice, Lord Kenyon told a jury was "an evil hour"[7]. And in so far as these colourfully named activities survived as common law offences, they

[2] *Deutsche Bahn AG v. Morgan Advanced Materials Plc* [2014] UKSC 24 [2014] Bus LR 377; *British Telecommunications Plc v. Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] Bus LR 765; *Société Coopérative de Production SeaFrance SA v. Competition and Markets Authority* [2015] UKSC 75, [2014] Bus LR 765.
[3] Judiciaum Pillori 51 Hen 3. St 2, at least *per* Coke *Third Inst* pp 194-195
[4] J Fitzstephen Stephen, *A History of the Criminal Law of England*, 1883, Vol 3, pp 199-200, where it is explained that forestaller 'intercepted goods on the way to the market', whereas the ingrosser or regrator 'having bought goods wholesale, sold them again wholesale'.
[5] *Ibid*, p 201.
[6] Repeal of Certain Laws Act 1772, 12 Geo. 3, c. 71.
[7] Lord Kenyon in his summing-up in *R v Rusby*, quoted in *Campbell's Lives of the Lord Chancellors and Keepers of the Great Seal of England, from the earliest times till the reign of Queen Victoria* (1868) vol 4, p 131.

were all abolished in 1844[8], when, again to quote Stephen, "the opinions of political economists prevailed"[9].

4. Businessmen the world over have a tendency towards cartelisation which the father of what Stephen called "political economists", Adam Smith, recognized well over two hundred years ago. He wrote: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[10] Reflecting the laissez-faire attitude which Lord Kenyon had in mind, he continued, "It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty or justice"[11].

5. The influence of original political economists such as Adam Smith, whose view of freedom of contract was somewhat extreme, can be seen in subsequent cases in England in the latter half of the 19th century and the first half of the 20th century. Thus, in a judgment in a case in 1875[12], Vice-Chancellor Bacon described price-fixing arrangements as "perfectly lawful", and "very honest"[13] and this view was reflected in a number of cases up to and including the 1984 *Laker Airways* case in the House of Lords[14], where the principle that price-fixing was lawful in common law was described by Lord Wilberforce as "well-established".[15].

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[8] Forestalling, Regrating etc Act 1844, 7 & 8 Vic. C. 24.
[9] Stephens, *op cit* p 204.
[10] Adam Smith, *The Wealth of Nations* (1776), chapter 10.
[11] *Ibid*
[12] *Jones v North* (1875) LR 19 Eq 426.
[13] *Ibid*, p 429.
[14] *British Airways Board v Laker Airways Ltd* [1985] AC 58.
[15] Per Lord Wilberforce at [1985] AC 58, 79: "The proposition is that, even if the allegations against B.A. and B.C. in the complaint in the American action can be proved, they disclose no cause of action on the part of Laker against B.A. or

6. This acceptance of cartels in the UK can be seen in the celebrated, 1880s *Mogul Steamship* case[16], where a group of shipowners had tried to maintain their monopoly of the tea trade between China and London in their own hands, by excluding new entrants[17]. They offered a very low rate and an agreed rebate to shippers who shipped tea on their vessels rather than on those of the plaintiff's – a classic unlawful cartel arrangement viewed through 21st century spectacles, given that the object of the agreement was to exclude the plaintiff from the trade. The trial judge, Lord Coleridge, the Lord Chief Justice, rejected the claim for conspiracy, but also refused to hold that the cartel was wrongful and held[18] that the agreement was not unlawful, wrongful or malicious. His decision was upheld by the Court of Appeal and House of Lords[19].

7. This acceptance of cartels should not surprise us. Taken to the extreme, cartelisation can fairly be claimed to have been one of the principal foundation-stones of capitalism, as the Marxist historian Paul Sweezy's landmark study of the Newcastle (England) "coal vend" shows[20].The "vend" was a long-standing arrangement between coal-producers to set prices and divide markets on the river Tyne. An identical arrangement in Australia, concerning the operation of a similarly-named "coal vend" in Newcastle

B.C. that is justiciable in an English court. The Clayton Act which creates the civil remedy with threefold damages for criminal offences under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application, while because the predominant purpose of acts of B.A. and B.C. that are complained of was the defence of their own business interests as providers of scheduled airline services on routes on which Laker was seeking to attract customers from them by operating its Skytrain policy, any English cause of action for conspiracy would be ruled out under the now well-established principle of English (as well as Scots) law laid down in a series of cases in this House spanning 50 years of which it suffices to refer only to *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25 and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435." See *Norris* [2008] UKHL 16 at para 18.

[16] *Mogul Steamship Co Ltd v McGregor,Gow & Co* (1888) 21 QBD 544.

[17] See per Lord Bingham in *Norris v USA* [2008] UKHL 16, paras 11-14.

[18] At (1888) 21 QBD 554.

[19] (1889) 23 QBD 598 and [1892] AC 25.

[20] Paul Sweezy *Monopoly and Competition in the English Coal Trade: 1550-1850* (Harvard PhD thesis, 1937). See also, Ben Fine, *The Coal Question: Political Economy and Industrial Change from the Nineteenth Century to the Present Day* (1990).

(New South Wales) was unsuccessfully challenged in proceedings which went all the way to the Privy Council in 1913[21]. In the course of his judgment, Lord Parker famously referred to the cartel among coal producers having been preceded by "a course of ruinous competition"[22], and said that "prices [had become] disastrously low owing to 'cut-throat' competition"[23]. He also observed that it was in the interest of the public that the cartel arrangement went ahead, as otherwise "collieries will be closed down, there will be a great loss of capital, miners will be thrown out of work, less coal will be produced, and prices will consequently rise … . The consumers of coal will lose in the long run"[24].

8. It is interesting to contrast this attitude towards producers agreeing to raise prices with that of the law relating to covenants in restraint of trade and to trades unions. In the same year as the "coal vend" case, the House of Lords reiterated the principle that covenants in restraint of trade were only enforceable in so far as they were reasonably necessary[25], and Lord Parker sought to explain the apparent dichotomy in the coal vend case[26]. As for trade unions, they did not initially benefit from the political economists' approach to freedom of contract. On the contrary. The Combination Acts of 1799 and 1800 rendered any strike action illegal, and it may fairly be said that there was perhaps one law for the rich producers and another for the poor employees who worked for them. However, through the 19th century, particularly following the famous, or infamous, *Tolpuddle Martyrs* case in 1834 (although they were actually

[21] *Attorney- General of the Commonwealth of Australia v The Adelaide Steamship Co Ltd* [1913] AC 781
[22] *Ibid*, p 803.
[23] *Ibid*, p 809.
[24] *Ibid*, p 810.
[25] *Mason v Provident Clothing* [1913] AC 724.
[26] [1913] AC 794-795.

convicted for administering unlawful oaths[27]), the law became more relaxed to trade unions and strike action, although the *Taff Vale* case[28] may be said to be a late hiccup.

9. More broadly, until the 17th century, monopolies were regularly granted in England by the Crown to supplement the royal income, to keep potentially rebellious enemies quiet or to reward favourites. Objections were made in Parliament[29] about this practice at the time of Queen Elizabeth I, but she firmly defended her right to grant monopolies[30]. Around the time that she died in 1603, the courts[31] made it clear that such practices were unacceptable, but her successor, James I ignored them. Parliament intervened in 1624, passing a statute which outlawed all royal monopolies[32]. Although James and his ill-fated son, Charles I, continued to grant monopolies, albeit on a reduced scale, the Civil War in the 1640s finally put an end to royal monopolies.

10. However, even now, as any intellectual property lawyer knows, some monopolies are treated as positively desirable by the law of virtually every country. The grant of a patent for an invention, the grant of a trade mark, copyright, design right all involve a monopoly which is not merely tolerated, but is actually granted, by the state, now through legislation both in the UK[33], and in Hong Kong[34]. Competition law can fairly be said to be in tension with such well-established IP law, although, at least in EU law,

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[27] http://www.bl.uk/collection-items/newspaper-report-on-the-sentencing-of-the-tolpuddle-martyrs
[28] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.
[29] See e.g. 4 Parl. Hist. Eng. 420 (Feb. 9, 1598).
[30] She said, for instance, 'We are to let you understand, her Majesty's pleasure in that behalf that her Prerogative Royall may not be called in question for the valliditie of the letters
patents' – per E C Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 2)*, (1994) 76 J Pat &Tdmk Off Soc 849, 863.
[31] The so-called, *Case of Monopolies, Darcy v Allen* (1603) 11 Co Rep 84b, 86a.
[32] The Statute of Monopolies 1624.
[33] E.g. Patents Act 1977, Copyright Designs and Patents Act 1988 and Trade Marks Act 1994.
[34] E.g. Patents Ordinance Cap 514, Copyright Ordinance Cap 528, and Trade Marks Ordinance Cap 559.

there are circumstances where the terms of access may constitute an abuse of a dominant position.[35] The longstanding existence of such IP rights in English law no doubt partly serves to explain why for such a long time there was a prevailing view that monopolies and price fixing were not objectionable.

11. This view prevailed in the UK until after the Second World War, and in 1948, in the same sort of spirit which led to the founding of the welfare state, the first, rather faltering steps were taken to control monopolies and cartels[36] – but not to render them unlawful, let alone criminal. Similar, more detailed legislation with greater reach followed over the next 20 years or so. It was only when the UK joined the European Economic Community, as it was then called, in 1973 that monopolies and cartels were rendered unlawful in the UK and anyone harmed by a cartel or monopoly could recover damages.[37] And statutory criminalisation of cartels was first introduced into the UK by the Enterprise Act 2002.[38]

The position outside the UK

12. As in the UK, Hong Kong courts have long recognized the doctrine of restraint on trade, but this has been insufficient to prevent outright price fixing by Hong Kong companies. In the 2006 *Gammon Gate* case[39], the Court of First Instance recognized the harm caused by price-fixing practices in Hong Kong, in particular to the public, but it

[35] See the line of EU cases beginning with Case C-7/97 *Oscar Bronner GmbH v. Mediaprint* (1998).
[36] The Restrictive Practices (Inquiry and Control) Act 1948.
[37] The effect of the European Communities Act 1972 coupled with articles 81 and 82 of the EC Treaty: see the discussion in *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.
[38] Enterprise Act 2002., section 188
[39] *Sit Kam Tai v. Gammon Iron Gate Co Ltd* HCA 779/2006.

acknowledged that, in the absence of a statute prohibiting the practice, it remained entirely legal. In another Hong Kong decision the *Tai Po Market* case in 2010[40], where the participants to a tender for market stalls had organised a lottery prior to the tender to decide how the stalls should be allocated, the Court of Appeal and the Court of Final Appeal confirmed the insufficiency of the statutory offence of conspiracy to defraud to fight against anti-competitive practices.

13. So far as other countries are concerned, the USA was of course the early leader in competition law: the 19th century antitrust movement was inspired at the federal level by the growth of large conglomerates operating across the individual states by businessmen such as John D Rockefeller. These conglomerates were known as "trusts" (confusingly to an equity lawyer, but it was because trusts were used for corporate transactions) and monopolised trade across the American continent.[41] By contrast, EU competition policy first saw the light of day in 1957 in the Treaty of Rome. It started its development in the 1920s and 1930s and had its origins in the "ordoliberal" philosophical traditions of continental Europe, which regarded market entry by smaller businesses as an essential aspect of human freedom. In particular the German concepts of *Wettbewerbsordnung* and *Wettbewerbsfreiheit* "competitive order" and "freedom to compete" were central to the thinkers who sought a common European competition policy.[42]

[40] *HKSAR v Chan Wai-yip and 16 others*, (2010) 13 HKCFAR 842.
[41] For example, the Standard Oil Trust was formed in 1882 in order to integrate the Standard Oil Company vertically with other oil companies operating downstream. Under the Standard Oil Trust Agreement, the companies transferred their stock "in trust" to nine trustees headed by John D Rockefeller, in exchange received a beneficial interest in the trust. Eventually, the trustees governed some 40 corporations, all of which the trust wholly owned.
[42] See Ignacio Herrera Anchustegui, *Competition Law through an Ordoliberal Lens*, Oslo Law Review, 2015, Issue 2, 139-174.

14. More broadly, since 1945, and particularly in the last couple of decades, most countries round the world have enacted and implemented a substantive cross-sector competition law. An example in the Middle East is Saudi Arabia (in 2004) in the Middle East, and, in the ASEAN region Singapore (in 2004) and the Philippines (in 2015). And now Hong Kong has its own competition law: it appears to have been the last of the major developed economies to do so[43], although since 2000 it has enjoyed competition laws relating to telecoms and broadcasting[44].

The development of competition law

15. The way in which competition law has developed in the past fifty years has been the subject of much interesting academic discussion. In a controversial polemic (now nearly twenty years old), Professor Giuliano Amato suggested that the technicality of modern competition law risks the law running far beyond its initial legislative intent, possibly creating a culture of market intervention and general control in the economy.[45] This opinion was based on the foundational perspective of Professor Robert Bork in a book which was written nearly 40 years ago, and in which Bork conceived of competition law as a heroic battle between the "saltwater" Harvard economists who took a relatively "hands-on" interventionist approach to problems and "freshwater" Chicago economists, who adopted a more "hands-off" *laissez faire* perspective.[46] In advancing the debate beyond Bork, Professor Amato recast the issue from one concerning the appropriate degree of market intervention to the socio-political effect

[43] Sweet & Maxwell's *Competition Ordinance (Cap 619)*, part 2.
[44] *Ibid.*
[45] Giulano Amato, *Antitrust and the Bounds of Power* (1997).
[46] Robert Bork, *The Antitrust Paradox* (1978).

of enforcing competition law through the coercive apparatus of a state, and the various ways in which this apparatus might be used for ends rather different from market efficiency (such as the role of competition law in bringing together markets within the EU region a tendency which may now also be occurring in the ASEAN region).

16. Whatever one's view about such issues, the introduction of competition law into any country inevitably requires the involvement of enforcement bodies and courts (including judicial tribunals). This in turn leads to the development of rules and principles, sometimes procedural, sometimes economic and sometimes legal. And, while every country has its own legal, social and economic traditions and cultures, the approach to competition issues in different countries is strikingly similar.

17. This similarity of approach is welcome, and it is not surprising. Whether one is talking about problems thrown up by monopolies, market abuse, human economic behaviour, or fundamental principles of the rule of law the basic issues are close to universal (if not perhaps always timeless). Furthermore, the increasingly globalised world in which we live means that many issues raised by competition issues are cross-border in nature, which requires national authorities, even national courts, to work together, and this in turn leads to a need for, and reinforces the likelihood of, consistency of approach internationally. And it is not just courts. Arbitral tribunals are well advised to consider points of competition law, lest their awards be void or unenforceable under the New York Convention for error of law.[47]

[47] In *Mitsubishi Moters v. Soler Chrysler Corp* 473 U.S. 614 (1985) the US Supreme Court held that public policy dictates the application of US antitrust law by a Japanese arbitral tribunal, despite the fact that the *lex causae* was Swiss law and not US

18. The need for cross-border co-operation between competition authorities located in different countries with different legal traditions has led to the development of enforcement organisations such as the European Competition Network. As a result, the EU Member State competition authorities have a great deal of experience, and regional co-operation is now also occurring across the ASEAN region and elsewhere. Officials from enforcement authorities participate in global meetings of the International Competition Network (founded in 1997), in order to share their experience and best practice in the enforcement of competition law. The work of these and other cross-border and international organisations, such as the EU Competition Network and pan-EU regulatory bodies such as BEREC (the Body of European Regulators for Electronic Communications), reinforces a common regional approach to common issues. Complementary sector-specific regulatory approaches are taken to "network industries" such as energy, water, telecommunications or aviation to introduce and improve competition to the network and regulate access to the assets of powerful privatized incumbents.

19. Reverting to the point that there cannot be effective competition law without competition authorities, the experience of almost all countries unsurprisingly appears to be that such authorities need to prioritise the use of their resources for the purpose of effective competition law enforcement, always taking into account the possibility of future court review of the exercise of their administrative discretion. Experience also

law. A similar result was reached before the European Court of Justice in Case C-126/97 *Eco Swiss China Time v. Benetton International NV* (1999) ECR I-3055.

suggests that in all countries, such authorities need to consider questions about desirable market structure, industry profitability, access to regulated markets at the wholesale or business-to-business level, and related aspects of consumer protection. In addition, it seems to be virtually universal practice for competition law to be enforced primarily by a competition authority with standard methods which enable that authority to review after the event (*ex post*) market conduct by companies large and small through the evaluation of competitive behaviour. So far as other aspects are concerned, there also appears to be a general consensus: (i) as to what should be the content of substantive competition law to take action against cartels, dominant companies and mergers on concentrated markets; (ii) as to the proper approaches to competition law enforcement by the exercise of administrative discretion; and (iii) as to the role of courts in reviewing the enforcement process and facilitating follow-on damages actions.

20. So far as judicial consideration and approval of economic approaches and legal principles is concerned, competition policy globally is rich in cases and enforcement action taken in many countries, not least in the People's Republic of China, which implemented a comprehensive system of competition law under its Anti-Monopoly Law on 1 August 2008. Enforcement action is taken on mainland China by the Ministry of Commerce (MOFCOM), which applies the Anti-Monopoly Law throughout the PRC with the exception of the Special Administrative Regions of Macau and Hong Kong. In addition, across the world, court-based actions by private parties are growing in importance and complexity, as claims are brought effectively in order to fill gaps in competition law enforcement.

Competition law in Hong Kong

21. Competition law in Hong Kong can – and, I suggest, should – draw on what is, at least in many areas, an effectively established legal and economic consensus among members of the International Competition Network across the world. Competition law cases not only raise issues of general and competition law, they also raise complex questions of economic theory, econometric evidence and the exercise of regulatory discretion by competition authorities. Resolution of such matters normally involves detailed analysis of a lot of factual material, and often assessment of the effect of technical economic evidence. In the light of the experience of the past fifty years, there are many examples and precedents for the new Hong Kong Competition Tribunal to draw upon. There is no need to reinvent the wheel. Indeed, that is one of the advantages of coming relatively late to the competition party.

22. It is apparent that the drafters of the 2012 Competition Ordinance have drawn from the experience of legislators, commissions and courts in the UK, the EU, Singapore, Canada and Australia. It is also apparent that they have included provisions which are more Hong Kong specific[48]. There are three categories of prohibited behaviour – concerted practices aimed at distorting competition, unilateral abuses of market power, and competition-lessening mergers in the telecoms world[49]. Those are familiar categories of anti-competitive behaviour, but they are perhaps rather more limited than

[48] The First and Second Conduct Rules, Division 1, Division 2 of Cap 619. And see Ingen-Housz, Mitchell and Fournier, *Practical Guide to the Hong Kong Competition Ordinance* (2016), paras 1.008 and 1.009.
[49] See Sweet & Maxwell *op cit*, para 1.1.

the categories in most other jurisdictions, which may be explicable by reference to Hong Kong specific considerations. Such considerations may also perhaps explain the absence of a direct right of private action, and of a cross-sector merger regime[50], the ceiling on fines[51], the provision for warning notices (giving infringers a chance to out things right and avoid any sanction) [52] and the exemption accorded to statutory bodies[53]. A potentially interesting development to watch out for in this connection may well be the effect of the absence of a direct right of private action on the attitude of the Commission to bringing competition cases to court. Initially at any rate, it may encourage a more aggressive attitude on the part of HKCC then that which it would otherwise adopt.

23. As in other countries, the Competition Commission in Hong Kong has power, where appropriate, to take action against cartels and abuses of dominant positions by businesses in the Special Administrative Region[54]. It also can review mergers[55] and joint ventures[56] and their effect on market competition, and, as in the UK, it shares concurrent jurisdiction with the Communications Authority for enforcement across telecommunications and broadcast markets[57]. But in what I think is a unique departure from the international consensus in competition policy, the HKCC is given the role of prosecuting infringements against businesses in the Competition Tribunal where

[50] *Ibid*, para 1.010. Schedule 7 only applies to the telecom industry.
[51] Cap 619, section 93(3).
[52] *Ibid*, section 82.
[53] *Ibid,* section 30 and para 3 of Schedule 1.
[54] *Ibid*, Part 3 (Complaints and Investigations) and Part 4 (Enforcement Powers of Commission).
[55] *Ibid*, Schedule 7, which is limited to the telecommunications sector.
[56] First Conduct Rule Guideline, Part 6.
[57] Telecommunications Ordinance (Cap 106) and Broadcasting Ordinance (Cap 562).

serious anti-competitive conduct is identified[58]. Such a prosecutorial model is not employed in the UK or Europe, where a competition authority concludes its investigation in the form of a non-judicial decision, which can then be challenged in the court, in the UK initially in the UK Competition Appeal Tribunal (UKCAT) by way of an appeal. And it means that, at least in this connection, Hong Kong's practice will be closer to that of the US rather than Europe.

Sector Regulation and Concurrent Jurisdiction

24. A cross-sector competition law is new for Hong Kong.[59] As mentioned, before the coming into force of the new Ordinance, the only competition law lay in the telecoms and broadcast sectors, and the HKCC now shares jurisdiction with the new converged Hong Kong Communications Authority in these communications markets. A key justification for concurrent jurisdiction is to ensure that the telecoms regulator shares with the competition authority, and therefore can perform a "peer review" to guard against regulatory capture. Substantively, in addition to merger control, the principal legal tools used in fixed line markets has been the "margin squeeze" (or a "price squeeze" under U.S. antitrust law), which has generated a rich enforcement experience.[60]

[58] Cap 619, section 92.
[59] Until the new Competition Ordinance, only the telecommunications and broadcast sectors were subject to competition law in Hong Kong under the Telecommunications Ordinance (Cap 106).
[60] For a recent discussion of the latest authorities, see Christian Bergqvist and John Townsend, *Enforcing Margin Squeeze Ex Post Across Converging Telecommunications Market*, Working Paper in Law and Economics, Konkurrensverket (Swedish Competition Authority), (2015:2).

25. Under the EU model (including the UK), a sectoral regulator with concurrent jurisdiction has a dual function, namely (i) to look backwards (*ex post*) and assess how competition actually occurred on the markets it regulates, and (ii) to look forward (*ex ante*) to plan for future market place developments. *Ex ante* economic regulation is a matter of theory, based on forecasts of performance and market development. Although it also involves theory, *ex post* enforcement is based more on fact, and so it inevitably is based on evidence. The assessment performed by a concurrent competition authority like the HKCC is this: within the boundaries of lawful competition set *ex ante*, was the conduct which actually took place *ex post* exclusionary to competitors? Under Article 102 TFEU, unlawful conduct can take two forms: exclusion of competitors and exclusion of consumers. As already indicated, I hope that, in the exercise of concurrent jurisdiction in different sectors of the economy, Hong Kong can look to the experience of European markets to understand different challenges and problems involved in the market liberalisation process.

Judges and Competition Law

26. Enforcement of competition law requires many different types of expertise. In particular, it requires economists (whose role includes the defining of markets and the evaluation of the exercise of market power) and accountants (whose role includes evaluating business profitability and considering whether profits earned are "supra-competitive"), both of whom should bear in mind the importance of giving full and honest advice to their clients and impartial and honest evidence in court. Competition law also, of course, requires lawyers, whose role, as I see it, is to evaluate and advise

on the prospective likely processes employed by a competition authority and then to advise of the lawfulness of such processes; to assess the economic evidence likely to be, or actually, relied upon to take decisions; to consider whether the decision and reasoning of the authority is sound; and, if necessary, to justify or undermine such decisions and reasoning before the appropriate tribunal.

27. Hong Kong's implementation of the prosecutorial model will mean that there will be cases in the newly-created HKCT involving a court-based examination of many issues which in other jurisdictions are only examined by professional economists employed by competition authorities. The role of the judge in such a tribunal raises some points which may be worth mentioning.

28. First, there is the simple fact that the fundamental function of a judge is the same whatever the court or tribunal and whatever the issue, namely to ensure as far as possible an efficient and fair hearing conducted in accordance with the law, and to give a clear judgment in accordance with the law, and to perform those functions, to use the well-established phrase in England, "without fear or favour, affection or ill-will" [61], or, in Hong Kong, "conscientiously, dutifully, in full accordance with the law, honestly and with integrity"[62].

29. Secondly, and more broadly, judges perform a fundamental and essential function in any society which claims to be governed by the rule of law. The importance of having

[61] Included in the judicial oath still used in England and Wales, now under the Oaths Act 1978; it can be traced back to 20 Edw 3, c. 1 in 1346.
[62] Oaths and Declarations Ordinance 1997, Schedule 2, Part V.

a highly competent and wholly independent judiciary, worthy of respect and free from outside influences, whether emanating from the government or from interested parties, cannot be over-stated. And that is as true in relation to competition cases, which have challenging complexities, and which often give rise to considerable public and private interests involved, as it is in many other areas. I can say from my own knowledge that, like the United Kingdom, Hong Kong has the benefit of such an expert and independent judiciary, and it is fitting that Hong Kong judges are to determine issues of law, fact and economic and accountancy expertise when they arise in the context of competition cases.

30. Thirdly, judges are not the most obviously appropriate people to make economic policy. Their task is normally to decide relatively narrow questions of fact or law raised by a particular case, rather than to express general views about desirable outcomes of regulatory intervention or market interactions. Judges are experts in legal matters, not economic ones, and anyway their primary role is to decide individual disputes, not to lay down general principles – unless they have to. Courts do sometimes gratuitously stray into making non-legal general statements, which risk backfiring down the corridors of history. For instance, the U.S. Supreme Court in the *Brown Shoe* case talked of the: "desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets." [63] These

[63] *Brown Shoe Co Inc. v United States* 370 U.S.294 (1962) at 344.

justifications were typical of the US Supreme Court in the 1960s, when economic thinking led to a prioritization of market efficiency above all else.

31. Fourthly, by contrast, in competition cases, as in so many other areas, judges, as the final arbiters, are often called on to make decisions which are on subjects which involve no law at all, and sometimes judges are positively required by legislation to make policy decisions. For instance, as was mentioned in the Introduction to this talk, the US Supreme Court developed the rule of reason in relation to monopolies[64], which the EU law has adopted to an extent[65] (on what are now Articles 34-36 of the Lisbon Treaty[66]). Although rule of reason is a policy developed by the courts, it is one mandated by the relevant legislation, and it is a policy within the envelope of the principles laid down by the legislator. Incidentally, the rule of reason/proportionality, is also an example of the similarity of approach in different jurisdictions to which I have referred.

32. Fifthly, and very much connected with these first two points, judges need proper training in economic and associated issues if they are to be reliable assessors of competition cases. The importance of judicial training, both for new judges and for continuing development, is now generally accepted. In our common law systems with a 'late entry' judiciary, i.e. judges who are appointed from experienced and successful lawyers, such education should, in my view, normally concentrate on what one might

[64] See *Addyston Pipe and Steel Co. v US* 175 U.S. 211 (1899), *Standard Oil Co. of New Jersey v US* 221 U.S. 1 (1911), and *Chicago Board of Trade v US* 246 U.S. 231 (1918).
[65] See e.g. the *Cassis de Dijon* case, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 – see eg Elspeth Berry, Matthew J. Homewood, Barbara Bogusz, *Complete EU Law: Text, Cases, and Materials* (2nd ed, 2013), para 10.8.
[66] Or the Treaty for the Functioning of the European Union as it is more properly called.

call judge-craft rather than actual law. But where judges are expected to assess issues involving an unfamiliar field of law or a field of expertise outside law, they need to be educated in such fields. In patent cases, that is often achieved by a "primer" for the judge prepared by the experts in the particular case. In competition cases, that may sometimes be necessary, but it may also be possible to have talks, seminars and written material prepared by appropriate experts on generally relevant economic, accountancy and associated issues. On scientific issues, this notion of primers on general topics such as DNA evidence or the role of memory are being developed in the UK in discussions between the judiciary and the Royal Society[67], and it seems to me that the same course would merit consideration for a judicial competition court or tribunal.

33. Sixthly, it seems to me that it would be highly desirable for the HKCT actively to control cases, with a view to minimising the evidence and arguments. Many competition cases in the UKCAT seem to me to involve a remarkably extensive amount of detailed documentary and oral evidence and argument, which has obvious adverse implications in terms of delay and cost. For example, UK regulatory appeals in the telecommunications sector concerning an intended three-year price control can often take up most of the three-year so-called glidepath period. This has led to calls for appeal rights to be circumscribed[68]. Similarly, in the USA antitrust cases can take many years. So judges in the Hong Kong Competition Tribunal should, I suggest, be astute in matters of case management to ensure that issues brought before by parties can be dealt with not only fairly but expeditiously. The detailed nature of the factual

[67] http://www.nature.com/news/stop-needless-dispute-of-science-in-the-courts-1.19466
[68] See the UK consultation paper, *Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform*, 19 June 2013.

and economic analysis means that it is extraordinarily easy to lose sight of the wood for the trees. The parties to any litigation, as well as the judge, should do their best to identify the issues which really matter and concentrate on them. I accept that experience shows that this sort of aim is much more easily described than achieved when it comes to litigation, and many lawyers, indeed some judges, see it as little more than pious hope. But with experienced and responsible lawyers and able and informed judges, I would hope that such a course could be adopted with at least a degree of success in Hong Kong competition cases.

34. Seventhly, I should like to say something about judgments of the HKCT. Again, it cannot be denied that UKCAT judgments are often very long, detailed and technical, and therefore are not user-friendly. To an extent this is unavoidable: it is the nature of the beast. However, judges should try and concentrate on the real issues not only during the hearing but also in their judgments. Proper training of judges in competition issues, and generally in judge-craft, should help achieve this. Further, I suggest that it would normally be best to produce a single judgment of the Tribunal. I accept that concurring judgments can help to ensure that each judge writes a clear and coherent answer. I also accept that they are sometimes unavoidable (eg where the concurring judge agrees with the result but not with all the reasoning in the lead judgment. However, in the absence of that sort of reason, I would suggest concurring judgments should be avoided: they can lead to confusion, especially in competition cases. Even where no real difference of judicial view is intended, reconciling concurring judgments, especially in complex cases, is often difficult, although it provides much sport for academics and much income for ingenious lawyers.

35. Finally, when it comes to appeals, appellate courts should, I would urge, be very slow to interfere with conclusions of a first instance competition tribunal which involve findings of fact, discretionary decisions and expert assessments. That was a point which the UK Supreme Court made in two recent competition appeals, the *BT* and *SeaFrance* cases.[69] The more ready an appellate court is to reverse a first instance court, the greater the incentive to appeal, and consequently the greater delay expense and uncertainty.

Conclusion

36. Hong Kong's new competition law represents a creative mix of its common law heritage and the contemporary international consensus as to the correct approach to competition law enforcement embodied in the International Competition Network. To a significant extent, the Competition Ordinance tries to draw on the best of contemporary competition law throughout the world. In terms of implementation of the substantive law, Hong Kong's approach is an imaginative compromise, with its use of court-based prosecutorial model to deal with infringements. Hopefully, with the help of qualified and independent experts, competent and sensible lawyers, and suitably qualified judges, these diverse foundations should ensure that competition law in Hong Kong is as great a success as many other features of life in the Special Administrative Region are proving to be.

37. Thank you very much.

[69] *British Telecommunications Plc v Telefónica* [2014] UKSC 42, [2014] Bus LR 765, paras 46, 51; and *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority* [2015] UKSC 75, [2015] Bus LR 157, para 44.

David Neuberger Hong Kong, 13 September 2016