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Hong Kong, China, and the Disruption of Antitrust

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Cover Page Footnote

Lecturer (Assistant Professor) in Law, The University of Dundee. The work described in this paper was substantially supported by a grant from the General Research Fund of the Research Grants Council of the Hong Kong Special Administrative Region (SAR), China (Project No. CUHK 14600718). I am deeply grateful to Professor Sandra Marco Colino at The Chinese University of Hong Kong for her help and encouragement during my time in Hong Kong and thereafter. I also wish to thank Professor Roberto Caranta of the University of Turin for his continued support. Any errors are mine. The author can be reached via email at ELecchi001@dundee.ac.uk.

HONG KONG, CHINA, AND THE DISRUPTION OF ANTITRUST

Emanuela Lecchi*

Abstract: Under the “One Country, Two Systems” rule, Hong Kong and China maintain different legal systems. This dichotomy also applies in the antitrust context. China adopted its Anti-Monopoly Law in 2007, while Hong Kong waited until 2012 to introduce its Competition Ordinance (and another three years to fully implement it). This article compares the antitrust laws of these two jurisdictions and their enforcement in light of a turning point: the disruption caused by Big Tech. Interestingly, while the competition laws of Hong Kong and China are substantively similar to each other and to legal precedent in other jurisdictions, Hong Kong has adopted an adversarial system of enforcement, and China an administrative system. Through an analysis of recent antitrust developments in the two jurisdictions, this article shows the importance of agency independence, due process, and robust judicial scrutiny for the proper functioning of an administrative system of enforcement. This article also demonstrates that judicial scrutiny in an adversarial system needs the certainty of legal rules, particularly to clarify the burden of proof to be met by the competition authorities. In light of these findings, this article proposes a three-pronged competition and regulation approach for the scrutiny of Big Tech that does not water down the two principles of due process and robust judicial scrutiny. This is significant. The frustration with market concentration should not lead policymakers to propose changes to antitrust enforcement that could weaken these two principles and attribute a higher value to the speed of decision-making over the importance of a thorough analysis.

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INTRODUCTION

Digital platforms do not just disrupt “incumbent industries,” they also disrupt “academic imaginations about the future course of capitalism.”¹ And not just academic imaginations, but also the way that policymakers conceive of antitrust and how competition authorities view their mandate. The recent crackdown on the platform economy² in China has given a new dimension to this debate. On one hand, the manner and speed with which China has been able to curb its Big Tech companies³ appears enviable to enforcement agencies worldwide. But this approach shows that issues arise when agencies are granted wide discretion with limited judicial oversight. On the other hand, Hong Kong has so far escaped the international trend towards antitrust review of the power of Big

¹ Gernot Grabher & Jonas König, *Disruption, Embedded. A Polanyan Framing of the Platform Economy*, 14 SOCIOLOGICA 95, 95 (2020).

² In this article, the term platform economy is used to refer to economic and social activity facilitated by tech platforms. These provide services including “online intermediation services,” “online search engines,” “online social networking sites,” “video-sharing platform services,” “number-independent interpersonal communication services,” and “advertising services.” See Commission Regulation 2020/0374 of December 15, 2020, *Contestable and Fair Markets in the Digital Section*, 2020 O.J. (L 842) 34–35.

³ The term “Big Tech companies” is used to refer to the giants of the platform economy. In the West, these are often referred to by the acronym GAFAM (Google (Alphabet), Apple, Facebook (Meta), Amazon and Microsoft). When referring to the Chinese ecosystem, the acronym often used is BATX (Baidu, Alibaba, Tencent, and Xiaomi).

Tech. This may seem surprising in light of the cooperation between the competition authorities in the two jurisdictions. But looking at the provisions of the competition law and the judicial interpretation of the burden of proof,⁴ it becomes clear that, in Hong Kong, the competition authority faces challenges in seeking to tackle issues of antitrust in the platform economy effectively.

China and Hong Kong share several cultural norms,⁵ but have very different histories. Since 1997, Hong Kong has been part of China but has retained its own economic and administrative system under the constitutional principle known as the “One Country, Two Systems” rule. Both jurisdictions have adopted competition law recently, and the newly formed authorities are grappling with how to establish their legal authority whilst facing different constraints. In China, the main constraint is internal bureaucracy, resulting in a swinging pendulum between lax and strict regulation.⁶ What makes China exceptional in its regulation of Big Tech “is not *why* it regulates, but rather *how* it regulates its tech firms.”⁷ As more particularly detailed below,⁸ China’s administrative form of enforcement guarantees impressive results, often at the expenses of scrutiny, accountability, and due process. In Hong Kong, the main constraints faced by competition authorities are the business community and the judiciary. The business community views the application of competition law as imposing unnecessary constraints on existing free markets. And the judiciary is still unused to the enforcement of competition law and the difficulties of assessing complex economic evidence.⁹

Therefore, the comparison analysis in this article demonstrates that the form of antitrust intervention matters.

It is true that the glacial pace of competition law enforcement in some jurisdictions is cause for concern.¹⁰ But this does not mean that procedural guarantees should be watered down. The new mistrust of procedural guarantees, including judicial review,¹¹ shown by policymakers

⁴ The competition authority needs to meet the criminal standard of burden of proof to impose financial penalties, *see infra* Section III.A.

⁵ Chee Kiong Tong, *Rethinking Chinese Business*, in CHINESE BUSINESS, RETHINKING GUANXI AND TRUST IN CHINESE BUSINESS NETWORKS (Chee-Kiong Tong ed., 2014); *see also* Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms and Collectivist Business Cultures*, 37 J.L. & Soc’y 345, 354–65 (2010).

⁶ The “volatile style of policymaking” in China is a result of the interaction of four key players: the top leadership, the agencies, the firms and the public. *See* Angela H. Zhang, *Agility over Stability: China’s Great Reversal in Regulating the Platform Economy*, 63 HARV. INT’L L.J. (forthcoming 2022) [hereinafter Zhang, *Agility over Stability*].

⁷ *Id.* (manuscript at 5).

⁸ *See infra* Section III.B.

⁹ *See infra* Section III.A.

¹⁰ *See infra* Section IV.

¹¹ *See* Pablo Ibáñez Colomo, *When did the Rule of Law Come to be Seen as an Inconvenience?*, CHILLIN’ COMPETITION BLOG (June 30, 2021), <https://chillingcompetition.com/2021/06/30/when-did-the-rule-of-law-come-to-be-seen-as-an-inconvenience/> [hereinafter Colomo, *Rule of Law*].

and competition authorities in other countries when they make the case for expanding the powers of the competition authorities¹² and reducing procedural protections¹³ is a cause for concern.

Considering the Chinese approach within the context of different systems internationally, this article proposes a three-pronged approach to curbing anticompetitive practices in the platform economy.¹⁴ First, in fast-moving, dynamic markets where the need to act swiftly is greater, the authorities should consider limiting investigations to a narrow market and a specific issue. This focused approach would limit the complexity of the theory of harm to be proven and reduce the time it takes to issue a decision. Second, authorities should still bring cases that allege novel theories of harm to deal with a changing competitive landscape. These cases will be time-consuming to investigate and will be likely appealed. Far from viewing this negatively, taking the time to investigate and providing an avenue for appeals in novel cases are important avenues for the development of antitrust analysis. Third, regulation of “super platforms”¹⁵ should be encouraged. This allows for the imposition of regulatory requirements on platforms with market power. These powerful regulatory tools can be used to address the root causes of the anticompetitive behavior alongside the assessment of individual cases in competition law.

Section I of this article provides a brief background on the adoption of competition laws in Hong Kong and China and then covers the substantive provisions of the laws. Section II compares the tools available for detection and enforcement in the two jurisdictions. Section III assesses the advantages and disadvantages of the adversarial enforcement system in Hong Kong and compares it to the administrative enforcement system in China. Section IV reflects on the speed of action and effectiveness of remedies discussed in Section III. Assessing the findings as a whole, Section IV proposes a three-pronged approach for a competition and

¹² For example, there have been recent Government proposals in the U.K. to speed up merger investigations. *See, e.g.*, DEP’T FOR BUS., ENERGY & INDUS. STRATEGY, REFORMING COMPETITION AND CONSUMER POLICY, 49–51, 53–56 (2021) (pledging “stronger and faster enforcement against illegal anticompetitive conduct”) [hereinafter U.K. GOV’T PROPOSAL]. These proposals were the subject of extensive consultation. On 20 April 2022, the U.K. Government published its response. Not all the proposals will be brought forward. *See* DEP’T FOR BUS., ENERGY & INDUS. STRATEGY, REFORMING COMPETITION AND CONSUMER POLICY: GOVERNMENT RESPONSE (2022) [hereinafter U.K. GOV’T RESPONSE].

¹³ U.K. GOV’T PROPOSAL, *supra* note 12, at 70–72 (a proposal to limit judicial scrutiny of the authority’s decisions in competition law matters). In the end, the U.K. Government decided not to adopt this proposal. *See* U.K. GOV’T RESPONSE, *supra* note 12, at 41. Appeals against interim measure decisions by the competition authority will be determined by reference to the principles of judicial review. *See id.* at 33.

¹⁴ *See infra* Section IV.C.

¹⁵ Sandra Marco Colino, *The Incursion of Antitrust into China’s Platform Economy*, ANTITRUST BULL. (forthcoming Feb. 2022) (manuscript at 31) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031375) (describing the use of the term “super platforms”) [hereinafter Colino, *Incursion of Antitrust*].

regulation intervention. This could be a blueprint for other jurisdictions that are in the process of adopting regulatory measures to tackle Big Tech.

I. COMPETITION LAW IN CHINA AND HONG KONG

China and Hong Kong are both relatively new to competition law. Though the emergence of competition law in both jurisdictions has been markedly different, both regimes were met with substantial opposition by industry and government. In a socialist country like China, competition law was considered a tool towards the developments of free markets, which were viewed with suspicion. And in a capitalistic society like Hong Kong, competition law was seen with suspicion for the opposite reason—as imposing unnecessary constraints on existing free markets. Thus, the adoption of a comprehensive competition law in Hong Kong and China is equally surprising.

In Hong Kong, the Competition Ordinance (CO)¹⁶ was adopted after two decades of debate “as to whether such legislation was compatible with the region’s free market economy.”¹⁷ Following a three-year long implementation period, the CO entered into force only in December 2015. In China, the Anti-Monopoly Law (AML)¹⁸ entered into force in 2008 “after fourteen years of wrangling and debate.”¹⁹

Notwithstanding the differences in the two jurisdictions, when the AML and CO were adopted, the substantive provisions of the laws were remarkably similar. As will be discussed in this paper, both were modelled after similar laws from the European Union and Singapore. However, a key difference in each jurisdiction’s approach to competition law is that Hong Kong employs an adversarial system of enforcement and China utilizes an administrative one.

Subsection A below discusses the prohibition of anticompetitive agreements in Hong Kong and in China. In Hong Kong, the only case brought in the digital sector to date concerned vertical agreements.²⁰ The reported cases in China are mostly against domestic Big Tech for abuse of

¹⁶ Competition Ordinance, (2015) Cap. 619 (H.K.) [hereinafter Competition Ordinance].

¹⁷ Sandra Marco Colino, *Distribution Agreements under China’s Anti-Monopoly Law and the Hong Kong Competition Ordinance*, 1 CHINA ANTITRUST L.J. 1, 2 (2017) [hereinafter Colino, *Distribution Agreements*].

¹⁸ Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ (中华人民共和国反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) [hereinafter China Anti-Monopoly Law].

¹⁹ Angela H. Zhang, *Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?*, 51 STAN. J. INT’L L. 195, 196 (2015) [hereinafter Zhang, *Taming the Chinese Leviathan*].

²⁰ Competition Comm’n v. Online Travel Agents, [2020] H.K.C.C. 1, EC/02NJ (H.K.) [hereinafter *Online Travel Agents*]. In this case, the HKCC accepted commitments in May 2020 and settled the case. *Commitments Register*, COMPETITION COMM’N, https://www.compcomm.hk/en/enforcement/registers/commitments/commitments_reg.html (last visited May 25, 2022); see also *infra* Section II.B.

a dominant position or for non-compliance with the merger rules. Subsection B covers the prohibition of abuse of a dominant position in Hong Kong and in China with a focus on the decisions of the Chinese competition authorities against Big Tech. Subsection C considers the application of merger control in both jurisdictions, and Subsection D takes a close look at sanctions.

A. *The Prohibition of Anticompetitive Agreements: The Next Battleground for Big Tech?*

The only example of enforcement in the digital sector in Hong Kong to date is *Online Travel Agents*.²¹ In it, the Hong Kong Competition Commission (HKCC)²² investigated terms requiring suppliers using the platforms of online travel agents not to offer better terms on other platforms (“parity clauses”).²³

In China, agreements among online marketplaces or between online marketplaces and users of the platform do not appear to have been investigated as anticompetitive agreements under the AML, even though local e-commerce companies could have reportedly acted as whistleblowers on cartels in the courier industry.²⁴ This is so even though the Antimonopoly Guidelines of the Anti-Monopoly Committee of the State Council on the Platform Economy (Platform Economy Guidelines)²⁵ adopted in February 2021 make it clear that the main Chinese competition authority, the State Administration for Market Regulation (SAMR),²⁶ is very much aware of the anticompetitive nature that agreements between

²¹ See *Online Travel Agents*, *supra* note 20.

²² The HKCC’s functions are detailed in Section 130 of the Competition Ordinance. See Competition Ordinance, *supra* note 16.

²³ This case was settled by the HKCC and will be considered below. See *infra* Section II.B.2.

²⁴ MELBOURNE L. SCH., CHINA COMPETITION BULLETIN MARCH/APRIL 2014, 5 (Allan Fels. et al. eds., 31st ed. 2014), https://law.unimelb.edu.au/_data/assets/pdf_file/0008/1796462/China-Competition-Bulletin-March-April-2014.pdf [hereinafter COMPETITION BULLETIN MAR./APR. 2014]. E-commerce companies were said to have driven down the profits of the courier companies, and this was considered one of the reasons the cartel was formed. See also MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JANUARY/FEBRUARY 2015, 6 (Allan Fels. et al. eds., 35th ed. 2015), https://law.unimelb.edu.au/_data/assets/pdf_file/0006/1796424/China-Competition-Bulletin-Jan-Feb-2015.pdf [hereinafter COMPETITION BULLETIN JAN./FEB. 2015].

²⁵ Guówùyuan fǎn lǒngduàn wěiyuánhui guānyú píngtái jīngjì lǐngyù de fǎn lǒngduàn zhǐnán (国务院反垄断委员会关于平台经济领域的反垄断指南) [Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy] (issued by the Anti-Monopoly Committee of the State Council, Feb. 7, 2021) http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html (China) [hereinafter Platform Economy Guidelines].

²⁶ In China, the SAMR is the main competition authority, operating at the central level. The SAMR is supported by Anti-monopoly Enforcement Authorities [AMEAs] at the local level. On November 19, 2021, the State Council of the People’s Republic of China announced that a new body, the National Anti-Monopoly Bureau (NAMB) had been set up to deal with competition law matters. At the time of writing, the NAMB does not appear to have issued any public statements. In this article, the SAMR will be referred to as the main competition authority in China.

platform operators and platform users can have. In the same way that the adoption of the Platform Economy Guidelines spearheaded enforcement against Big Tech for abuse of a dominant position,²⁷ the prohibition of anticompetitive agreements may become the next battleground for Big Tech in China.

1. *Horizontal agreements*

Players in the digital economy have not been under investigation for entering into horizontal anticompetitive agreements in China or in Hong Kong. For now, as in many other countries, the main focus of enforcement against horizontal agreements is the fight against price-fixing cartels in both jurisdictions.

In China, Article 13 of the AML prohibits so-called “monopoly agreements.”²⁸ These include hard-core cartel agreements, such as price fixing,²⁹ output restrictions,³⁰ and agreements that restrict the development of new technologies,³¹ allocating markets,³² and boycotts.³³ Although the notion of a “monopoly agreement” seems to imply a measure of market power for the parties to the agreement, it is understood that this provision captures anticompetitive agreements, similar to Article 101 of the Treaty on the Functioning of the European Union (TFEU), or the First Conduct Rule under the Competition Ordinance of Hong Kong, referred to below.³⁴ Anticompetitive agreements can be exempted under Article 15 of the AML if the parties can prove that their agreements lead to improvements to technological development or research. Similar to the conditions for the application of Article 101(3) of TFEU, these exemptions only apply if gains are shared by the consumers and there are no severe restrictions on competition.³⁵

For the purposes of writing this article, the author conducted a review of Chinese case law and identified almost 100 cases at the central and local level where the antitrust authorities have acted against the parties

²⁷ See *infra* Section I.B.

²⁸ China Anti-Monopoly Law, *supra* note 18, art. 13.

²⁹ *Id.* art. 13(1).

³⁰ *Id.* art. 13(2).

³¹ *Id.* art. 13(4).

³² *Id.* art. 13(3).

³³ *Id.* art. 13(5).

³⁴ See Colino, *Distribution Agreements*, *supra* note 17, at 22–23.

³⁵ For example, in the case of the *Mayang Shale Brick Cartel*, the parties invoked Article 15, but the exemption was not granted because the cartel had caused serious harm to competition and harmed consumer interests. See MELBOURNE L. SCH., CHINA COMPETITION BULLETIN MAY/JUNE 2015, 5 (Allan Fels et al. eds., 37th ed. 2015), https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1796449/China-Competition-Bulletin-May-June-2015.pdf.

for, amongst others, “price fixing.”³⁶ This was a valuable exercise as, especially in the early stages of enforcement of the AML, decisions were not made public by the authorities and reports are mainly to be found in secondary sources. This review of cases in the public domain is not exhaustive. The cases in the public domain do not show the full picture in any event—many more cases appear to have been investigated than have been disclosed.³⁷ Nevertheless, this review has not highlighted any cases against players in the digital economy for entering into horizontal anti-competitive agreements. The SAMR is well aware of the potential issues, however. Article 5 of the Platform Economy Guidelines refers to the risk that platform operators “through data, algorithms, platform rules or other means” may be able to achieve “substantial coordination” such that the relevant undertakings may be unable to set the parameters of competition independently.

In Hong Kong, anticompetitive agreements or practices are prohibited under the so-called First Conduct Rule under the CO.³⁸ The CO includes a general exclusion from the First Conduct Rule for agreements that enhance overall economic efficiency, with the same cumulative requirements as those found in Article 101(3) of TFEU and Article 15 of the AML. The requirements are as follows: 1) the agreement contributes to improving production or distribution or technical or economic progress, 2) consumers receive a fair share of the efficiencies, 3) the restriction imposed must be indispensable, and 4) not eliminate competition altogether.³⁹ The HKCC interprets the relevant provisions as a “defense” that the parties can raise in response to an allegation that the First Conduct Rule has been contravened.⁴⁰ There is nothing to stop the parties from arguing that a cartel should be exempted. Indeed, this “defense” was already argued in one of the first cases to be brought by the HKCC to the Hong Kong Competition Tribunal (HKCT),⁴¹ the *Decoration Contractors* cartel case.⁴² In other jurisdictions, the parties to a cartel know the difficulty of proving efficiencies in collusion cases. In a jurisdiction relatively new to

³⁶ Reports of cases decided or investigations by the competition authorities in China are often not available. The information on the cases has been compiled from secondary sources. *See infra* app.

³⁷ ANGELA H. ZHANG, CHINESE ANTITRUST EXCEPTIONALISM: HOW THE RISE OF CHINA CHALLENGES GLOBAL REGULATION 94 (2011) [hereinafter ZHANG, ANTITRUST EXCEPTIONALISM].

³⁸ Competition Ordinance, *supra* note 16, at 25–26, §§ 6–8; *see also* COMPETITION COMM’N, GUIDELINE: THE FIRST CONDUCT RULE (2015) [hereinafter GUIDELINE: FIRST CONDUCT RULE], https://www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf.

³⁹ Competition Ordinance, *supra* note 16, div. 1.

⁴⁰ GUIDELINE: FIRST CONDUCT RULE, *supra* note 38, at ¶ 4.3.

⁴¹ Competition Ordinance, *supra* note 16, at 113, § 135.

⁴² Competition Comm’n v. W. Hing Construction Co. Ltd., [2019] 3 H.K.C.T. 46 (H.K.) [hereinafter *Decoration Contractors*]. Although the parties argued this “defense” to justify their agreement, they failed.

competition law, such as Hong Kong, there remains an open question as to whether the law may in time move “away from standard best practice.”⁴³

The HKCC acknowledges that the investigation of price-fixing cartels is a priority for enforcement⁴⁴ and this is supported by case law. In its six years of operation, nine investigations were commenced by the HKCC,⁴⁵ eight of them concerning hard-core cartel agreements, involving serious anti-competitive conduct.⁴⁶ In seven cases, price fixing was an issue.⁴⁷ Only one case related to the prohibition on abuse of market power (the so-called Second Conduct Rule).⁴⁸ The HKCC has increasingly used non-judicial enforcement tools, such as accepting commitments, to conclude investigations that do not involve serious anti-competitive conduct. As discussed further below,⁴⁹ the high bar set for the burden of proof to be met by the HKCC may explain the reluctance to start proceedings before the HKCT in such cases.

2. *The different flavors of the prohibition of vertical agreements*

Because online platforms exercise control over user data, in the digital economy algorithms and other technical means may facilitate vertical anticompetitive agreements. In China, this concern is identified in the Platform Economy Guidelines, but has not yet led to enforcement action. In Hong Kong, the only example of enforcement in the digital sector to date is *Online Travel Agents* concerning vertical agreements. In both

⁴³ Ping Lin & Thomas W. Ross, *Toward a More Robust Competition Policy Regime for Hong Kong*, 9 J. ANTITRUST ENF'T 109, 112, 120 (2021).

⁴⁴ See Press Release, H.K. Competition Comm'n, Competition Commission Launches “Combat Price Fixing Cartels” Campaign (Nov. 9, 2020), https://www.compcomm.hk/en/media/press/files/EN_PR_CC_launches_Combat_Price_Fixing_Cartels_Campaign_20201109.pdf.

⁴⁵ All cases in the HKCT and all judgments are published on the website of the HKCC. *Cases in the Competition Tribunal*, H.K. COMPETITION COMM'N, www.compcomm.hk/en/enforcement/enforcement/competition_tribunal.html (last visited May 25, 2022).

⁴⁶ As defined in the Competition Ordinance, *supra* note 16, §§ 2(1), 2(2).

⁴⁷ Competition Comm'n v. Nutanix H. K. Ltd., [2017] H.K.C.T. 1 (H.K.); Competition Comm'n v. W. Hing Construction Co. Ltd., [2020] H.K.C.T. 6 (H.K.); Competition Comm'n v. Kam Kwong Eng'g Co. Ltd., [2020], H.K.C.T. 3 (H.K.); Competition Commission v. Fungs E&M En'g Co. Ltd., [2020], H.K.C.T. 5 (H.K.); Competition Comm'n v. Quantr Ltd., [2020], H.K.C.T. 10 (H.K.); Competition Comm'n v. T.H. Lee Book Co. Ltd., [2020], H.K.C.T. 12 (H.K.); Press Release, H.K. Competition Comm'n, Notice Under Rule 19 of the Competition Tribunal Rules, Competition Enforcement Action No. 1 of 2021 (Nov. 25, 2021), [https://www.comptribunal.hk/filemanager/case/en/upload/23/\(Eng\)%20Rule%2019%20notice%20\(CTEA1-2021\).pdf](https://www.comptribunal.hk/filemanager/case/en/upload/23/(Eng)%20Rule%2019%20notice%20(CTEA1-2021).pdf); Press Release, H.K. Competition Comm'n, Competition Commission Takes Travel Services Sector Price-Fixing Cartel Case to Competition Tribunal (Jan. 20, 2022), https://www.compcomm.hk/en/media/press/files/PR_Travel_Services_Sector_Cartel_EN.pdf.

⁴⁸ Competition Comm'n v. Linde HKO Ltd., [2020] H.K.C.T. 2 (H.K.); see Press Release, H.K. Competition Comm'n, Competition Commission Brings First Case on Abuse of Substantial Market Power to Competition Tribunal (Dec. 21, 2020), https://www.compcomm.hk/en/media/press/files/EN_PR_SCR_Final.pdf [hereinafter Competition Comm'n Press Release].

⁴⁹ See *infra* Section III.A.

jurisdictions, the focus of enforcement against anticompetitive vertical agreements to date has been on retail price maintenance (“RPM”).

In China, Article 14 of the AML specifically prohibits “monopoly agreements” between “business operators and their trading parties” that “fix the price” for “resale to a third party.” Although this provision may appear to outlaw RPM agreements, looking at Articles 13, 14 and 15 together, it seems that the AML establishes a “prohibition plus exemption” regime for both anticompetitive horizontal and vertical agreements. These are unlawful, unless an exemption applies under Article 15. However, Chinese case law⁵⁰ suggests that RPM is subject to a prohibition rule, making it unlawful irrespective of its impact on competition.⁵¹ The authorities often treat such agreements as if they were a form of price fixing cartel. This is also the approach taken by the Supreme People’s Court of China in the only appeal to date that was successful in the first instance (and then reversed).⁵² As has been remarked,⁵³ the adoption of a “bright line approach” of per se illegality of RPM agreements is likely a side effect of a new competition law regime.

Article 7(3) of the Platform Economy Guidelines identifies that anticompetitive agreements can be reached by the use of technical means, platform rules, data, and algorithms.⁵⁴ Article 8 targets the possibility that digital tools could facilitate the creation and maintenance of so called “hub-and-spoke agreements.” These agreements consist of vertically organized collusion where the parties are not directly in contact but communicate through a central intermediary (the hub) to align their commercial activity.

⁵⁰ Investigations can be carried out under Articles 13 and 14 of the AML. For example, see the cases against foreign car distributors. MELBOURNE L. SCH., CHINA COMPETITION BULLETIN SEPTEMBER/OCTOBER 2014, 1–2 (Allan Fels et al. eds., 34th ed. 2014) (discussing the Hubei Car Distribution Cartel), https://law.unimelb.edu.au/_data/assets/pdf_file/0006/1796478/China-Competition-Bulletin-September-October-2014.pdf [hereinafter COMPETITION BULLETIN, SEPT./OCT. 2014]; MELBOURNE L. SCH., CHINA COMPETITION BULLETIN SEPTEMBER/OCTOBER 2015, 1, 6 (Allan Fels et al. eds., 38th ed. 2014) (discussing the Guangdong Nissan Distributors Cartel), https://law.unimelb.edu.au/_data/assets/pdf_file/0009/1796445/China-Competition-Bulletin-September-October-2015-3.pdf; see also HANNAH HA ET AL., *China, in* CARTELS: ENFORCEMENT, APPEALS & DAMAGES ACTIONS 42 (Nigel Parr & Euan Burrows eds., 2d ed. 2014) (discussing the Infant Formula Milk Cartel). The Infant Formula Milk Cartel case was an RPM case in which, very unusually, three companies received total immunity, against the NDRC’s own guidelines.

⁵¹ On the difference between rules and standards, see PABLO IBÁÑEZ COLOMO, THE SHAPING OF EU COMPETITION LAW: PAST AND PROSPECTS 23, 64–67 (2018) [hereinafter COLOMO, SHAPING OF EU COMPETITION LAW].

⁵² See sources cited *infra* note 303. Interestingly, reforming the treatment of RPM towards an effects-based approach is one amongst the most recent proposals to amend the AML. See Shichāng jiānguǎn zǒngjú jiù <fǎn lǒngduàn fǎ> xiūdìng cǎo'àn (gōngkāi zhēngqiú yìjiàn gǎo) gōngkāi zhēngqiú yìjiàn de gōnggào (市场监管总局就《<反垄断法>修订草案（公开征求意见稿）》公开征求意见的公告) [Press Release, State Admin. for Mkt. Regul., Announcement of the State Administration for Market Regulation on the Public Consultation on the “Anti-Monopoly Law” Amendment Draft (Jan. 2, 2020), https://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html [hereinafter AML Amendment Proposal].

⁵³ Colino, *Distribution Agreements*, *supra* note 17, at 34.

⁵⁴ Platform Economy Guidelines, *supra* note 25, art. 7.

It is possible that the SAMR may therefore concentrate on these two areas in its future enforcement against anticompetitive vertical agreements in the digital economy.

In Hong Kong, the HKCC investigated parity clauses in *Online Travel Agents*. Parity clauses require suppliers using the platform of online travel agents not to offer better terms on other platforms or to their own costumers in. This case provides the only example of enforcement in the online/digital sector in Hong Kong to date and was settled by the HKCC. It will be considered below.⁵⁵

The HKCC takes the view that vertical arrangements are generally unlikely to be considered serious anti-competitive conduct. However, a literal reading of Section 2(1) of the CO would not exclude this possibility and, “in certain circumstances, Retail Price Maintenance may constitute an instance of Serious Anti-Competitive Conduct.”⁵⁶ Although theoretically the imposition of RPM could be an abuse of dominance, the HKCC has specified that RPM will always be investigated under the First Conduct Rule.⁵⁷ This may reflect that vertical restraints are often reached by agreement and requested by retailers to protect their investment.

In the *Nutanix Bid Rigging* judgment,⁵⁸ the HKCT took a strict view of a case where the anticompetitive conduct in question consisted of several bilateral vertical agreements between an upstream supplier and downstream resellers in an arrangement reminiscent of a “hub-and-spoke” agreement. Unlike precedents from the European Union and the United Kingdom, the HKCT did not consider whether the resellers were aware of the arrangement, therefore making it possible to sanction a series of vertical agreements with a “horizontal element” as a cartel.⁵⁹

B. Abuse of Dominance: China’s Big Tech Under the Spotlight

In both China and Hong Kong, the prohibition of abuse of a dominant position is drafted in line with European (and Singaporean) precedent. In China, firms that have a dominant position are required under article 6 of the AML⁶⁰ not to abuse it. Article 17 provides a list of practices considered abusive,⁶¹ including exclusive dealing. The recent abuse of dominance cases against Big Tech with record fines levied against

⁵⁵ See *infra* Section II.B.2.

⁵⁶ The exclusion is found in the Competition Ordinance. See Competition Ordinance, *supra* note 16, sched. 1, § 5; see also GUIDELINE: FIRST CONDUCT RULE, *supra* note 38, at ¶¶ 5.5–5.6.

⁵⁷ GUIDELINE: FIRST CONDUCT RULE, *supra* note 38, at ¶¶ 6.71–6.77.

⁵⁸ Competition Commission v. Nutanix Hong Kong Ltd. [2019] HKCT 2 (Legal Reference System).

⁵⁹ See also Marcus Pollard & Kathleen Gooi, *Work in Progress: Hong Kong’s Competition Law Five Years On*, 11 J. EUR. COMPETITION L. & PRAC. 372, 375–76 (2020).

⁶⁰ China Anti-Monopoly Law, *supra* note 18, art. 6.

⁶¹ *Id.* art. 17.

Alibaba⁶² and other platforms⁶³ have stolen the limelight. These cases tend to focus on anticompetitive practices of dominant marketplace platforms that favor certain merchants over others. Perhaps unsurprisingly, the loss of control over personal data,⁶⁴ which is one of the most pressing concerns against platforms throughout Europe, does not appear to be a concern in China.

There has been very little enforcement of the prohibition on abuse of a dominant position in Hong Kong. The need for the HKCC to meet the criminal standard of proof (beyond reasonable doubt) for the imposition of all pecuniary penalties in antitrust cases⁶⁵ may explain this cautious approach.

The Second Conduct Rule⁶⁶ prohibits businesses with substantial market power from abusing it. The Guideline issued by the Competition Commission makes it clear that the notion of a “substantial degree of market power” is interpreted in line with the notion of dominance in European Union law.⁶⁷ To date, only one proceeding has been brought to the HKCT for a breach of the Second Conduct Rule. In *Linde*,⁶⁸ the respondent, Linde HKO Limited, is alleged to have abused its position of substantial market power in the market for the supply of medical gases in Hong Kong during the Covid-19 pandemic. Linde is accused of engaging in exclusionary practices against the only other potential competitor in the supply to public hospitals. According to the HKCC, these practices included unjustified denial of supply of medical gases, and the imposition of unreasonable terms. This is the first case in Hong Kong where one of the respondents, Linde GmbH, was a non-Hong Kong-based business.

It may seem strange that the Anti-monopoly Enforcement Authorities’ (AMEAs) investigations against Big Tech in China have not yet resulted in parallel action in Hong Kong,⁶⁹ but this may change soon. In January 2022, the HKCC issued a press release asking the restaurant industry to provide information about online food delivery platforms in

⁶² See *supra* Section I.B.1.

⁶³ Such as Meituan (*infra* Section I.B.3) and Sherpa’s (*infra* Section I.B.2).

⁶⁴ *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources*, BUNDESKARTELLAMT (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Press_erteilungen/2019/07_02_2019_Facebook.html. (The Bundeskartellamt finding that Facebook had engaged in ‘abusive data processing policy’).

⁶⁵ See *infra* Section III.A.

⁶⁶ Competition Ordinance, *supra* note 16, § 21.

⁶⁷ COMPETITION COMM’N, GUIDELINE: THE SECOND CONDUCT RULE 15–24 (2015), https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf.

⁶⁸ *Competition Comm’n v. Linde HKO Ltd.*, [2021] 5 H.K.L.R.D. 175 (H.K.). At the time of writing, the case is pending before the HKCT.

⁶⁹ Apart from the desire to first concentrate resources on the most problematic forms of anticompetitive activity, namely cartels, the HKCC faces objective difficulties in meeting the judicially required burden of proof (the criminal standard, beyond reasonable doubt) for the imposition of pecuniary penalties in an adversarial system of enforcement. See *infra* Section III.A.

Hong Kong. This is part of an ongoing investigation into possible anticompetitive conduct by Delivery Hero Food Hong Kong Limited (trading as Foodpanda) and Deliveroo Hong Kong Limited (trading as Deliveroo).⁷⁰ Depending on the evidence collected, a positive judgment of the HKCT in *Linde* could embolden the HKCC to prosecute these platforms next.

Up until October 2020, there were no cases for abuse of dominance against Big Tech in China. Through the end of June 2020, there had reportedly been forty-eight investigations and the most frequently targeted industries were: public utilities and active pharmaceutical ingredients (API), followed by high tech and IP.⁷¹ At that time, although the SAMR had “started to pay closer attention to the conduct of the major internet giants,” it had not yet “officially penalized any internet platform companies.” This was so, even though in 2019 the SAMR had issued its “Interim Provisions on Prohibiting Abuse of Market Dominant Position”⁷² whose Article 11 mentioned factors to be considered in assessing “the Internet and other new economic business operators.” In fact, notwithstanding these pronouncements, for a period it appeared that the SAMR would investigate the players in the digital economy under regulations that pre-dated the adoption of the AML. On February 8, 2021 the SAMR reportedly⁷³ fined Vipshop ¥3,000,000 under the Anti Unfair Competition Law and Price Law (but not the AML) for imposing traffic limits on sellers also active on other platforms (an early instance of the so-called “choose one from two” practice that was the main theory of harm in the Alibaba decision considered below).⁷⁴ In an even earlier case on December 30, 2020, the SAMR reportedly announced “in a social media post” that it had issued fines of ¥500,000 for unspecified issues of “irregular pricing” against Alibaba’s Tmall; Jingdong (Alibaba’s

⁷⁰ Press Release, H.K. Competition Comm’n, Competition Commission Invites Restaurant Industry to Provide Information in its Investigation into Online Food Delivery Platforms (Jan. 27, 2022), https://www.compcomm.hk/en/media/press/files/PR_Online_Delivery_Platform_EN.pdf. The two platforms under investigation are Delivery Hero Food Hong Kong (a/k/a Foodpanda) and Deliveroo Hong Kong (a/k/a Deliveroo).

⁷¹ Chen Liu et al., *Most Targeting Industries and Conduct in China’s Antitrust Investigations against Abuse of Dominance*, COMPETITION POL’Y INT’L (July 30, 2020), <https://www.competitionpolicyinternational.com/most-targeted-industries-and-conduct-in-chinas-antitrust-investigations-against-abuse-of-dominance/>.

⁷² Interim Provisions on Prohibiting Abuse of Market Dominant Positions (promulgated by the State Admin. for Mkt. Regul., June 26, 2019, effective Sept. 1, 2019) (Lawinfochina).

⁷³ CLIFFORD CHANCE, ANTITRUST IN CHINA AND ACROSS THE REGION 5 (2021), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/04/asia-pacific-quarterly-antitrust-briefing---q1-2021.pdf>

⁷⁴ See *infra* Section I.B.1.

competitor) and Vipshop;⁷⁵ this appears to be the first case when fines were imposed on tech companies in China.

In February 2021, the SAMR published the Platform Economy Guidelines,⁷⁶ signaling a renewed focus on dominance and abuse in the digital sector. Under these Guidelines, the “ability to master and process relevant data”⁷⁷ is a factor to be considered when assessing market dominance together with “ease of data acquisition,” one of a number of barriers to entry or expansion.⁷⁸ The SAMR expressly considers that platforms may constitute an essential facility⁷⁹ and that big data and algorithms can aid price differentiation and other anticompetitive differential treatment.⁸⁰ Behaviors “that require operators on the platform to “choose one from two” among competing platforms or restrict the counterparty to the transaction to conduct exclusive transactions with them” can constitute abuse of dominance.⁸¹ The SAMR recognizes that punitive measures (“such as blocking stores, searching rights, traffic restrictions, technical obstacles and deducting deposit”) are more serious than seeking to incentivize users to choose only one platform. In the latter case, the dominant player may seek to grant “subsidies, discounts, preferential treatments, traffic resource support etc.” and this may have positive effects on “the interests of operators and consumers on the platform, and the overall welfare of society.”

In the Platform Economy Guidelines, the SAMR also lists a number of “legitimate reasons” that the owners of dominant digital platforms may have for restricting transactions.⁸² Judging from the cases below, however, none of these reasons must have been applicable to the practices of Alibaba Group, nor Meituan, nor a lesser-known platform, Sherpa’s, which specializes in online food delivery to the expat communities in Shanghai, Beijing, and Suzhou.

Three main points stand out from a review of these cases. First, market definition and analysis are based on established methods of assessment and well-understood theories of harm in exclusive dealing

⁷⁵ Yilei Sun et al., *China Fines JD.Com, Alibaba’s Tmall, Vipshop for Irregular Pricing*, REUTERS (Dec. 30, 2020), <https://www.reuters.com/article/us-china-market-regulation-idUSKBN29413C>. For more details on the sanctioned behavior see Xu Wei, *China Fines JD, Tmall, and Vipshop for Shady Double-11 Shopping Event Promos*, YICAI GLOB. (Dec. 31, 2020), <https://www.yicaiglobal.com/news/chinese-e-tailers-jdcom-tmall-vipshop-get-slapped-with-usd77000-each-for-shady-promos>. However, it is not possible to understand the legal basis for this fine from this article.

⁷⁶ Platform Economy Guidelines, *supra* note 25.

⁷⁷ *Id.* art. 11(3).

⁷⁸ *Id.* art. 11(5).

⁷⁹ *Id.* art. 14.

⁸⁰ *Id.* art. 17(1).

⁸¹ *Id.* art. 15(1). The Chinese term for “choose one from two” is èr xuǎn yī (二选一).

⁸² *Id.* For example, see articles stating that operators in the platform economy may have legitimate reasons for selling below cost (art. 13); refusing to trade (art. 14); restricting transactions (art. 15); tying and bundling (art. 16).

cases. Speed in decision-making can be partly attributed to the choice to focus on a relatively clear market definition and on one single instance of abuse. Second, the decisions do not include any consideration of possible objective reasons that may justify the conduct, despite what the Platform Economy Guidelines clearly state.⁸³ This is a fundamental difference with the legal test developed by the European Court of Justice and applied in the European Union.⁸⁴ Third, the parties waive their rights to appeal the decision. They are eager to confirm their wish to comply with the findings and rectify their behavior. This is a very specific trait of Chinese antitrust enforcement, setting it apart not only from enforcement in mature systems of competition law, but also from the practice of enforcement in Hong Kong.

1. *Alibaba meets the SAMR*

In April 2021, the SAMR imposed a fine of ¥18.23 billion⁸⁵ (approximately US \$2.8 billion) against Alibaba Group Holdings Limited for abuse of a dominant position. The decision was widely reported in the global media,⁸⁶ although the practice of “choose one from two” has been a concern in Chinese antitrust since at least 2017.⁸⁷ The notoriety of Alibaba and the magnitude of the fine—more than double the previous highest fine imposed under the AML in China—captured the public’s attention. It is sobering to reflect, however, that the fine equates to only four percent of Alibaba’s revenue in China in the previous year.⁸⁸

⁸³ *Id.*

⁸⁴ Sandra Marco Colino makes a similar point in her article. See Colino, *Incursion of Antitrust*, *supra* note 15, at 11–18.

⁸⁵ Shìchǎng jiānguǎn zǒngjú yīfǎ duì ālǐ bābā jítuán kònggǔ yǒuxiàn gōngsī zài zhōngguó jìngnèi wǎngluò língshòu píngtái fúwù shìchǎng shìshī“èr xuǎn yī”lǒngduàn xíngwéi zuòchū xíngzhèng chǔfǎ (市场监管总局依法对阿里巴巴集团控股有限公司在中国境内网络零售平台服务市场实施“二选一”垄断行为作出行政处罚) [Press Release, State Admin. for Mkt. Regul., The State Administration for Market Regulation Imposes Sanctions on Alibaba’s “Choose One From Two” Policy in the Online Retail Platform Service Market in China in Accordance with the Law] (Apr. 10, 2021), http://www.samr.gov.cn/xw/zj/202104/t20210410_327702.html [hereinafter SAMR Press Release]. The press release includes two documents: a “Penalty Notice” and an “Administrative Instructions” document.

⁸⁶ See, e.g., Raymond Zhong, *China Fines Alibaba \$2.8 Billion in Landmark Antitrust Case*, N.Y. TIMES (Apr. 9, 2021), <https://www.nytimes.com/2021/04/09/technology/china-alibaba-monopoly-fine.html>; Ryan McMorro & Yuan Yang, *Chinese Regulators Fine Alibaba Record \$2.8bn*, FIN. TIMES (Apr. 10, 2021), <https://www.ft.com/content/bb251dcc-4bff-4883-9d81-061114fee87f>.

⁸⁷ A March 2021 article reported that this practice has triggered at least eight antitrust and unfair competition investigations in the platform economy since 2017. See Wei Huang et al., *Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny*, CPI ANTITRUST CHRON. (Mar. 29, 2021), <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/03/10-Antitrust-Guidelines-for-the-Platform-Economy-in-the-Era-of-Enhanced-Antitrust-Scrutiny-By-Wei-Huang-Wendy-Zhou-Xiumin-Ruan-Xi-Zhang.pdf>.

⁸⁸ Scott Murdoch & David Stanway, *China Fines Alibaba Record \$2.75 Bln for Anti-Monopoly Violations*, REUTERS (Apr. 9, 2022), <https://www.reuters.com/business/retail-consumer/china-regulators-fine-alibaba-275-bln-anti-monopoly-violations-2021-04-10/>.

Because of its importance, it is worth considering the Alibaba decision in detail.⁸⁹ First, substantively, the SAMR applies the law against abuse of a dominant position in the AML and in the Platform Economy Guidelines. The SAMR found that Alibaba held a dominant position in the market for online retail platform services in China. The market was defined by looking at supply-side and demand-side substitutability, but without recourse to application of the small but significant non-transitory increase in price (SSNIP) test.⁹⁰ From 2015 to 2019 Alibaba held an eighty-six percent share of this market by total sales value and a seventy-six percent share of total revenues. The market appeared to be extremely concentrated and characterized by imbalance in the power of Alibaba as compared to the weak position of the sellers using the platform.

Alibaba was found to have abused its dominant position through the imposition of restrictions on merchants seeking to use platforms other than Alibaba's platforms. Broadly, the abuse therefore consists of seeking to impose restrictive dealings by implementing sophisticated penalty measures on firms that do not comply with the exclusivity requirement. Exclusivity obligations in the absence of objective justification are presumed illegal in many jurisdictions around the world.⁹¹ It is interesting, however, that there is no mention in the *Alibaba* decision of the possible role of objective justifications.

Second, the decision is published in two documents attached to a press release: a Penalty Notice comprising twenty-seven pages of analysis and leading to the order to stop the illegal acts and pay the fine, and an Administrative Instruction Document providing details of the actions that Alibaba is expected to undertake in order to comply with the order. Under the Administrative Instruction Document, Alibaba must draw up a rectification plan and submit annual compliance reports for the next three years. Contrary to the practice of other authorities—namely the European Commission—the SAMR chose to focus on the role of Alibaba as a marketplace and on one type of abuse only, namely “choose one from two.” As noted,⁹² this is in sharp contrasts with other cases, such as the *Amazon*

⁸⁹ For an in-depth review of the Alibaba decision, see Sandra Marco Colino, *The Case Against Alibaba in China: Merits and Wider Policy Repercussions*, 10 J. ANTITRUST ENF'T 217 (2022) [hereinafter Colino, *Case Against Alibaba*].

⁹⁰ See SAMR Press Release, *supra* note 85; see also Colino, *Case Against Alibaba*, *supra* note 89, at 222.

⁹¹ In the European Union, see Case T-85/76, *Hoffman-La Roche & Co. v. Comm'n*, 1979 E.C.R. 464 (landmark case on exclusivity rebates). More recently, exclusive dealings were considered by the Court of Justice of the European Union in *Intel Corp. Inc. v. European Commission*. See Case C-413/14, *Intel Corp. Inc. v. Comm'n*, 2017 ECLI:EU:C:2017:632 (Sept. 6, 2017). The Court remitted the case to the General Court. See Case T-286/09, *Intel v. Comm'n*, ECLI:EU:T:2014:547 (June 12, 2014). The judgment was issued on January 26, 2022. The Court quashed the Commission decision.

⁹² Colino, *Case Against Alibaba*, *supra* note 89, at 220–23.

Marketplace case under the European Commission,⁹³ where the investigation focused on the dual role of Amazon as both the provider of the marketplace platform and a retailer on the very same platform. The narrow focus of the Chinese case may explain the relatively short length of the investigation and the short decision. It could also provide a valuable template for other authorities in cases where speed is of the essence. At the same time, such an approach raises questions as to whether the imposed penalties and remedies will be sufficient to address the underlying concerns for the competitiveness of the online marketplace. This aspect is considered further below.⁹⁴

Third, procedurally, in the Penalty Notice, “the parties waived the right to make statements, defenses and to request a hearing.” From a Western perspective, this is a startling admission. The companies that are subject to a large fine in countries of mature enforcement of the competition laws tend to appeal the decisions through different grades of appeal.⁹⁵ Not so in China. The reasons for this are complex and will be considered below,⁹⁶ but the ready acceptance of the findings may also explain the short length of the decisions. Knowing there will be no appeal, the authorities do not need to prove their case to the same extent.

Finally, the decision was reached with incredible speed by Western standards. It took only three months to close the investigation, leading some commentators to praise the decision, and characterize it as “thoughtful and impressive.”⁹⁷ While one can sympathize with the frustration generated by the length of time that antitrust investigations can take in Western countries, it is important to consider it in its context. This will be considered further below.⁹⁸

2. *The Sherpa’s decision: smaller platforms are not safe*

Also in April 2021, one of the AMEAs, the Shanghai Administration for Market Regulation (Shanghai AMR), announced that in December

⁹³ European Commission Press Release IP/20/2077, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practices (Nov. 10, 2020).

⁹⁴ See *infra* Section IV.B.

⁹⁵ For example, according to its 2020 Annual Report, the General Court of the European Union (the court of first instance) completed forty-one state aid and competition cases. Seventy-eight competition cases were still pending at the end of 2020. One-hundred and four state aid and competition cases were pending on appeal before the Court of Justice at the end of 2020. See CT. OF JUST. OF THE EUR. UNION, THE YEAR IN REVIEW: ANNUAL REPORT 2020, 58, 61 (2021), https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf.

⁹⁶ See *infra* Section III.B.

⁹⁷ See CLIFFORD CHANCE, *supra* note 73, at 7.

⁹⁸ See *infra* Section IV.

2020 it fined *Sherpa's*,⁹⁹ an online food delivery platform, for abuse of dominance in violation of Article 13 of the AML. The investigation lasted eighteen months, concluding in December 2020. The publication of the decision coincides with publication of the *Alibaba* decision.

In a document comprising seventeen pages, the Shanghai AMR applied the SSNIP test and found that the relevant market was the market for online food delivery through apps in the English language. This is because there is limited substitutability with Chinese language apps for non-Chinese speakers. In this market, the Shanghai AMR identified four competitors and found that *Sherpa's* share accounted for half the total of the relevant market. The Shanghai AMR quoted Article 19(1) of the AML for its finding that such a level of market share supports a finding of dominance.¹⁰⁰ Other factors considered were that *Sherpa's* was in a better financial position than its competitors and possessed better technical capabilities and scale. Similar to *Alibaba*, the investigation was narrow in scope. *Sherpa's* was found to have imposed an exclusivity deal between 2017 and 2019, requiring all catering businesses using the platform to be using *Sherpa's* platform exclusively.¹⁰¹ *Sherpa's* was fined ¥1.17 million (approx. US \$180,000) equivalent to three percent of the company's turnover in 2018. Like *Alibaba* (and Meituan, see below), *Sherpa's* "sincerely accepted the penalty, proactively cooperated with the authority's investigation, and took the initiative to rectify its work and completed rectification in November 2019."¹⁰²

3. *Meituan: the Alibaba Blueprint*

Later in the same year, in October 2021,¹⁰³ the SAMR fined the food delivery platform Meituan in a decision that follows the blueprint of the *Alibaba* decision.

First, the SAMR substantively applied the law against abuse of a dominant position in the AML and in the Platform Economy Guidelines. The SAMR found that Meituan held a dominant position in the market for

⁹⁹ Aiping Bao, *SAMR Imposed Record Fine on Alibaba for Abuse of Dominant Position*, CMS (Apr. 15, 2021), <https://cms.law/en/chn/publication/samr-imposed-record-fine-on-alibaba-for-abuse-of-dominant-position>.

¹⁰⁰ China Anti-Monopoly Law, *supra* note 18, art. 19 ("[T]he conclusion that an undertaking holds a dominant position can be deduced from any of the following circumstances: (1) the market share of one undertaking accounts for half the total in a relevant market").

¹⁰¹ Hu Min, *Sherpa's Hit with 1.17m Yuan Fine*, SHANGHAI DAILY.COM (Apr. 13, 2021), <https://archive.shine.cn/metro/Sherpas-hit-with-117m-yuan-fine/shdaily.shtml>.

¹⁰² *Sherpa's Fined \$178,351 for Monopoly Behaviors in China in 2020*, GLOB. TIMES (Apr. 12, 2021), <https://www.globaltimes.cn/page/202104/1220821.shtml>.

¹⁰³ Guójiā shìchǎng jiāndū guǎnlǐ zǒngjú xíngzhèng chǔfǎ juédìng shū guó shì jiān chǔfǎ (国家市场监督管理总局 行政处罚决定书 国市监处罚〔2021〕74号) [State Administration for Market Regulation on Administrative Penalty Decision] (promulgated by the State Admin. for Mkt. Regul., Oct. 8, 2021), https://www.samr.gov.cn/xw/zj/202110/t20211008_335364.html.

online retail platform services in China. As in *Alibaba*, the market was defined by looking at factors for supply-side and demand-side substitutability, without recourse to the SSNIP test. In a market extremely concentrated and characterized by imbalance in the power of Meituan as compared to the weak position of the platform users, Meituan's share in the years 2018 to 2020 exceeded sixty percent, by revenue and by volume, and increased year-on-year.¹⁰⁴

Similar to *Alibaba*, the SAMR focused narrowly on Meituan's abusive conduct through the imposition of exclusivity by way of restrictions on merchants seeking to use competitors' platforms ("choose one from two" policy). Users that did not agree were required to pay higher commissions and were penalized in the rankings and publicity of their services. Meituan had the ability to monitor the merchants' compliance with the requirements and used algorithms to secure loyalty. Like in *Alibaba*, there is no mention of any objective justification that could have excused the practice.

Second, like *Alibaba*, *Meituan* is published in two documents attached to a press release: a Penalty Notice comprising twenty-five pages of analysis and leading to the order to stop the illegal acts and pay the fine, and an Administrative Instruction Document which is four pages long and provides details of the actions that Meituan is expected to undertake in order to comply with the order: Meituan must draw up a rectification plan to improve the platform's "charging mechanism and algorithm rules," and submit annual compliance reports for the next three years. In light of the special circumstances of the company, Meituan is also required to consider the interests of the users of the platform and to improve the working conditions of the riders.

Third, like in *Alibaba*, in the Penalty Notice "the parties waived the right to make statements, defenses and to request a hearing."¹⁰⁵ *Meituan* shows that the paragraph in *Alibaba* was not a one-off, perhaps attributable to the personal situation of its founder, Jack Ma.¹⁰⁶ Indeed, Sherpa's issued a similar statement, as seen above. As did Huya Inc. and Douyu International in accepting the decision to block their merger in two identical press releases.¹⁰⁷

Finally, the decision was reached with similar, if not equal, speed as *Alibaba*: the investigation was opened in April 2021 (following *Alibaba*) and the decision issued six months later in October 2021.¹⁰⁸ Again, the

¹⁰⁴ By revenue, Meituan's share was 67.3 percent in 2018, and increased to 69.5 percent in 2019, and then to 70.7 percent in 2020. By volume of takeaway orders in China, Meituan's share increased from 62.4 percent in 2018, to 64.3 percent in 2019, and was calculated as 68.5 percent in 2020. *Id.* at 9.

¹⁰⁵ *Id.* at 2.

¹⁰⁶ See *infra* Section III.B; see also *infra* note 298.

¹⁰⁷ See *infra* Section I.C; see also sources cited *infra* note 134.

¹⁰⁸ See CLIFFORD CHANCE, *supra* note 73.

short length of the decision, and the speed of reaching it, can be explained by the narrow focus of the investigation. The speed of decision-making in China will be considered further below.¹⁰⁹

C. Merger Control Comes of Age in China but Remains in Infancy in Hong Kong

The other main area of enforcement against Big Tech in China after abuse of a dominant position is merger control. This is not the case in Hong Kong where, due to the legal position, the merger rules do not apply to the digital sector.

In Hong Kong, the CO includes a prohibition of mergers that substantially lessen competition or that are likely to do so (“Merger Rule”).¹¹⁰ Although the Merger Rule is drafted in general terms, for historical reasons it only applies to mergers in the telecommunications sector where one of the parties is a telecommunications carrier licensee.¹¹¹ Given this, the main authority that will consider mergers in Hong Kong is the Communications Authority, which has concurrent jurisdiction in competition law matters with the HKCC.¹¹² The rationale to subject the telecommunications industry to more intrusive merger scrutiny than other sectors dates back to the days when communications were entirely reliant on traditional networks. There remain sound reasons to subject telecommunications acquisitions to merger control, but it is difficult to think of a rationale for exempting all other sectors, including Big Tech platforms offering voice and data communications services.

The authorities in Hong Kong are also specifically barred from assessing the compatibility of merger agreements with the First or the Second Conduct Rule:¹¹³ the HKCC takes the view¹¹⁴ that any ancillary restrictions to mergers (such as non-compete clauses) are also excluded from review when they are directly related and necessary to the implementation of the merger.¹¹⁵

¹⁰⁹ See *infra* Section IV.A.

¹¹⁰ Competition Ordinance, *supra* note 16, sched. 7, § 3.

¹¹¹ The Merger Rule in the CO is substantially similar to the relevant provision of the Telecommunication Ordinance, (1963) Cap. 106, § 7P(1) (H.K.) (repealed 2012).

¹¹² See Memorandum of Understanding between the Competition Comm’n and the Comm. Authority 3, ¶ 1.2 (Dec. 14, 2015), https://www.compcomm.hk/en/about/inter_agency/files/MoU_e_final_signed.pdf.

¹¹³ Competition Ordinance, *supra* note 16, sched. 1, § 4.

¹¹⁴ COMPETITION COMM’N, GUIDELINE: THE MERGER RULE 9, ¶¶ 2.18–2.19 (2015), https://www.compcomm.hk/en/legislation_guidance/guidance/merger_rule/files/Guideline_The_Merger_Rule_Eng.pdf.

¹¹⁵ See also Stephen Crosswell et al., *The Merger Control Review: Hong Kong*, THE LAW REVIEWS (Aug. 1, 2021), <https://thelawreviews.co.uk/title/the-merger-control-review/hong-kong>.

This blanket exclusion has a number of consequences which are very well understood by the HKCC,¹¹⁶ as shown by hopeful statements by senior officials that it was not a matter of whether they will have merger review powers—it was a matter of when.¹¹⁷ First, other jurisdictions may have more of a say on mergers that affect consumers in Hong Kong than the Hong Kong authorities themselves. For example, when Cathay Pacific acquired Hong Kong Express Airways in 2019, the transaction was reviewed and approved by the Taiwan Fair Trade Commission¹¹⁸ for the competition aspects affecting Taiwanese passengers but could not be assessed for its effect on the relevant markets in Hong Kong. Moreover, the phenomenon of so-called “killer acquisitions” in some sectors,¹¹⁹ including Big Tech,¹²⁰ cannot be effectively policed. Killer acquisitions are said to occur when an established business acquires promising start-ups or nascent competitors with a view to delay or suppress the commercialization of new products.¹²¹

Not so in China. Article 19 of the Platform Economy Guidelines specifically clarifies that mergers that do not meet the thresholds for notification can be proactively investigated by the SAMR and allows for the merging parties to notify mergers voluntarily when these do not meet the thresholds. The Q&A¹²² accompanying the publication of the Platform Economy Guidelines suggests that the authority had killer acquisitions very much in mind: “the field of (the) platform economy may be more

¹¹⁶ Although in 2019 there were indications suggesting that the Merger Rule could be made operational for all sectors, this has not yet materialized. See Kanis Leung, *Tightening of Hong Kong's Competition Laws to Cover Mergers on the Horizon, Says Competition Commission Chairwoman*, S. CHINA MORNING POST (Jan. 17, 2019), <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2182425/tightening-hong-kongs-competition-laws-cover>.

¹¹⁷ Comment attributed to Rasul Butt, then senior executive director of the HKCC and currently chief executive officer, during an online event in April 2021. See also Crosswell et al., *supra* note 115; Lin & Ross, *supra* note 43, at 125.

¹¹⁸ Andrew Curran, *HK Express Acquisition Completed by Cathay Pacific*, SIMPLE FLYING (July 22, 2019), <https://simpleflying.com/cathay-pacific-hk-express/>.

¹¹⁹ Notably, in the pharmaceutical sector. See Colleen Cunningham et al., *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021).

¹²⁰ The existence of killer acquisitions in Big Tech is currently subject to review by the Federal Trade Commission (FTC) in the United States. See Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

¹²¹ On the concept and the definition of killer acquisitions, see ORG. FOR ECON. COOP. AND DEV., START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL (2020).

¹²² Guówùyuàn fǎn lǒngduàn wěiyuánhui bàngōngshì fùzé tóngzhì jiù “guówùyuàn fǎn lǒngduàn wěiyuánhui guānyú píngtái jīngjì lǐngyù de fǎn lǒngduàn zhǐnán” dá jìzhě wèn (国务院反垄断委员会办公室负责同志就《国务院反垄断委员会关于平台经济领域的反垄断指南》答记者问) [Press Release, State Admin. for Mkt. Regul., The Responsible Comrade of the Off. of the Anti-Monopoly Comm'n of the State Council Answered Reporters' Questions on the Anti-Monopoly Guidelines of the Anti-Monopoly Comm'n of the State Council on the Platform Economy] (Feb. 7, 2021), http://gkml.samr.gov.cn/nsjg/xwxc/202102/t20210207_325971.html.

prone to this situation due to the characteristic of new business formats and new models, or involving start-ups, emerging platforms, etc.”¹²³

Acquisitions by Chinese tech companies have become a concern of the authorities more generally. In China, mergers that meet certain requirements need to be notified to the SAMR.¹²⁴ Similar to European precedent (and unlike in Singapore, or in Hong Kong, for the limited application of the Merger Rule), merger notification is mandatory, and the parties cannot by law complete a transaction before clearance.¹²⁵ On October 20, 2020, the SAMR issued its Interim Provisions on the Review of Concentration of Business Operators,¹²⁶ which came into force in December 2020 and consolidated six prior regulations issued by different authorities on merger filings. These constitute the main guidelines, but there are also different Guidance Opinions issued by the SAMR on mergers.¹²⁷

If access to and ownership of data can be a factor in assessing dominance, in merger control, data can be a factor in assessing the competitive impact of a concentration. The ability to “master and process data” and to control data interfaces, whether one of the parties can control data interfaces, and the existence of exclusive rights are all important factors.¹²⁸ It is also noteworthy that the Platform Economy Guidelines specifically highlight that data can form part of a remedy package imposed to assuage concerns about the anticompetitive effects of mergers. Possible remedies include the divestiture of tangible assets, such as data,¹²⁹ and “behavioral conditions such as opening up network, data or platform infrastructure,” “terminating exclusive agreements, modifying platform rules or algorithms, promising compatibility or not reducing interoperability.”¹³⁰

The adoption of the Platform Economy Guidelines has already been felt by the sector. First, mergers have been abandoned. For example, the parties did not proceed with the proposed acquisition of a controlling stake in iQIYI, a video platform owned by Baidu, in which reportedly both

¹²³ *Id.*

¹²⁴ China Anti-Monopoly Law, *supra* note 18, art. 5, ch. IV.

¹²⁵ *Id.* art. 21.

¹²⁶ Jīngyíng zhě jízhōng shěncá zhàn háng guǐdìng (经营者集中审查暂行规定) [Interim Provisions on the Review of Concentrations of Business Operators] (promulgated by the State Admin. for Mkt. Regul., Oct. 23, 2020, effective Oct. 27, 2020), https://web.archive.org/web/20210117021941/http://gkml.samr.gov.cn/nsjg/fgs/202010/t20201027_322664.html.

¹²⁷ See Wei Yingling & Gong Minfang, *Merger Control in China: Overview, Practical Law Q&A*, THOMPSON REUTERS (2021), [https://uk.practicallaw.thomsonreuters.com/5-500-8611?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a803926](https://uk.practicallaw.thomsonreuters.com/5-500-8611?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a803926).

¹²⁸ Platform Economy Guidelines, *supra* note 25, art. 20.

¹²⁹ *Id.* art. 21(1).

¹³⁰ *Id.* art. 21(2).

Alibaba and Tencent were interested,¹³¹ citing the tightening of the rules as a reason. Second, the authority has blocked mergers. The notified proposed merger between Huya Inc. and Douyu International, two online game streaming platforms backed by Tencent that collectively control more than eighty percent of China's online game streaming market,¹³² was blocked in July 2021. This was only the third merger ever to be blocked in China.¹³³ In statements reminiscent of the waivers of all rights to appeal in *Alibaba* and *Meituan*, both Huya Inc. and Douyu International accepted the decision in two identical press releases that they issued.¹³⁴

Second, the SAMR has stepped up enforcement against parties for non-reporting mergers. Under the AML, the maximum sanction that can be imposed for non-notification currently is ¥500,000. In July 2021, it was reported that Tencent would be fined the maximum amount for failing to notify the acquisition of two apps, Kuwo and Kugou.¹³⁵ Overall, it has been reported that in 2021 the competition authorities in China imposed almost one-hundred fines of the maximum amount on companies that failed to report a notifiable transaction or completed a merger prior to obtaining clearance.¹³⁶ In November 2021, forty-three penalties were announced in a single day.¹³⁷ The companies sanctioned include Tencent, Alibaba, Baidu, Didi, and Meituan. The sheer number of fines suggests that, prior to 2021, merging parties were not too concerned about not notifying transactions.

The increase in enforcement action shows that merger control is properly coming of age in China. Sanctions are an essential part of a well-functioning system of antitrust enforcement and deterrence.

¹³¹ Julie Zhu et al., *Exclusive: Alibaba, Tencent Put Talks to Buy iQIYI Stake on Hold Due to Price, Regulatory Concerns—Sources*, REUTERS (Nov. 27, 2020), <https://www.reuters.com/article/us-baidu-m-a-iqiyi-exclusive-idUSKBN2870SI>.

¹³² Shìchǎng jiānguǎn zǒngjú guānyú jìnzhǐ hǔyá gōngsī yǔ dòu yú guójì kònggǔ yǒuxiàn gōngsī hébīng àn fǎn lǒngduàn shěnchá juédìng de gōnggào (市场监管总局关于禁止虎牙公司与斗鱼国际控股有限公司合并案反垄断审查决定的公告) [Press Release, State Admin. for Mkt. Regul., Announcement of the State Admin. for Mkt. Regul. on the Anti-Monopoly Review Decision on Prohibiting the Merger between Huya Co. and DouYu International Holdings Co., Ltd.] (July 10, 2021), http://www.samr.gov.cn/fldj/tzgg/ftjpz/202107/t20210708_332421.html.

¹³³ See Colino, *IncurSION of Antitrust*, *supra* note 15, at n.83.

¹³⁴ Each company “fully respects and will abide by the SAMR Decision, and will comply with all regulatory requirements, conduct its businesses in accordance with the applicable laws and regulations, and fulfill its social responsibilities.” DouYu Announces Termination of Merger Agreement with Huya, PR NEWswire (July 12, 2021), <https://www.prnewswire.com/news-releases/douyu-announces-termination-of-merger-agreement-with-huya-301331404.html>; HUYA Inc. Announces Termination of Merger Agreement with DouYu, PR NEWswire (July 12, 2021), <https://www.prnewswire.com/news-releases/huya-inc-announces-termination-of-merger-agreement-with-douyu-301331407.html>.

¹³⁵ Pei Li, *EXCLUSIVE China to Order Tencent Music to Give Up Music Label Exclusivity—Sources*, REUTERS (July 12, 2021), <https://www.reuters.com/world/china/exclusive-china-order-tencent-music-give-up-music-label-exclusivity-sources-2021-07-12/>.

¹³⁶ See GIBSON DUNN, *ANTITRUST IN CHINA: 2021 YEAR IN REVIEW* 5, § 2.3 (2021).

¹³⁷ *China Fines Tech Giants for Failing to Report 43 Old Deals*, REUTERS (Nov. 19, 2021), <https://www.reuters.com/technology/china-finds-43-anti-trust-law-violations-involving-alibaba-baidu-jdcom-2021-11-20/>.

D. *Sanctions: The Missing Ingredient?*

Due to a combination of legal provisions and practices by the competition authorities, the level of fines imposed for breaches of competition law by the authorities in China and in Hong Kong appears to be relatively low. In absolute terms, the fines imposed in *Alibaba* and *Meituan* in China appear to be astronomical, but they amount to “only” four percent of Alibaba’s turnover in the preceding year¹³⁸ and three percent of Meituan’s turnover.¹³⁹ Given the importance of sanctions to ensure the deterrent effect of antitrust laws, relatively low fines have the character of a “missing ingredient” for effective enforcement.

As a preliminary point, and as explained in more detail below, the fines imposed are set with reference to the parties’ turnover (defined as “the total gross revenue” of a firm “obtained in Hong Kong.”)¹⁴⁰ in Hong Kong and to the parties’ amount of sales (or revenue) in China. The two concepts differ in accounting terms, as it is possible to conceive of turnover (such as inventory turnover) that does not produce revenue, and of revenue (such as reimbursements) that does not depend on turnover of goods or services.¹⁴¹ In the context of competition law, where pecuniary sanctions are related directly to the value of sales of the businesses in question, the concepts of relevant turnover and revenue can be used interchangeably.¹⁴²

In Hong Kong, the HKCT can impose fines of up to ten percent of the business’s turnover obtained in Hong Kong for each year of infringement up to a maximum of three years.¹⁴³ It can also order payment of the costs of the HKCC’s investigation and disqualify directors for up to five years.¹⁴⁴

As has been remarked,¹⁴⁵ this is a low level of fines, for two reasons: because there is a limit on the number of years considered (unlike, say, in the United States and in Canada) and because the turnover considered is limited to Hong Kong (unlike the case of other systems, such as the European Union’s system that considers the turnover on a global scale). The HKCC published a Policy on Recommended Pecuniary Penalties in

¹³⁸ See Murdoch & Stanway, *supra* note 88.

¹³⁹ Li Xuanmin & Yin Yeping, *China Fines Meituan \$533m for Monopolist Practices, Milder than Alibaba Due to Difference in Rectification Moves*, GLOB. TIMES (Oct. 8, 2021), <https://www.globaltimes.cn/page/202110/1235798.shtml>.

¹⁴⁰ Competition Ordinance, *supra* note 16, § 93(4).

¹⁴¹ For a primer about the difference between revenue and turnover, see *Turnover vs Revenue: Do They Mean the Same Thing?*, REVOLUT (July 6, 2020), <https://blog.revolut.com/a/turnover-vs-revenue/>.

¹⁴² Yannis Katsoulacos et al., *Penalizing Cartels—A Spectrum of Regimes*, 7 J. ANTITRUST ENF’T 339, 342 (2019).

¹⁴³ When the contravention spanned more than three years, the fine is based on the three years when the business achieved “the highest, second highest and third highest turnover.” Competition Ordinance, *supra* note 16, § 93.

¹⁴⁴ *Id.* § 101.

¹⁴⁵ Lin & Ross, *supra* note 43, at 117–18.

June 2020,¹⁴⁶ adopting the methodology indicated by the HKCT in *Competition Commission v. W Hing Construction Company*.¹⁴⁷ To date, all fines imposed concerned cartels.

In China, under Article 46(1) of the AML, the authority “shall order” the undertaking to: 1) stop the illegal act, 2) confiscate the illegal gains, and 3) pay a fine up to ten percent of its sales in the preceding year. The text of Article 46 suggests that the three should be adopted in parallel (so that the infringers should be ordered to stop the illegal act and pay a fine and return the illegal gains they made, thereby increasing the deterrent effect of the fines). However, due to lack of clear guidance and administrative convenience (as it can be difficult to determine what constitutes an illegal gain), illegal gains were confiscated only in about thirty percent of cases decided between January 2015 and June 2020, whereas a fine was imposed in more than sixty percent of cases.¹⁴⁸ When determining the amount of a fine, authorities must consider factors such as the nature, seriousness, and duration of the illegal acts.¹⁴⁹ Based on the information available, it seems that the SAMR has never imposed the maximum possible fine of ten percent of turnover in the relevant year in the cases considered.

As seen above,¹⁵⁰ the fines in *Alibaba* and *Meituan* amount to “only” four percent and three percent of the companies’ turnover in the previous year, respectively. The fines for cartels may also appear noticeably high in absolute terms (especially against international cartelists), but not in percentage terms. For instance, in *12 Japanese Auto Parts Cartel*,¹⁵¹ Sumitomo received one of the highest fines imposed for cartels in China in absolute terms, at ¥290.4 million (approximately US \$148 million), and this equated to six percent of relevant revenue. Among the cases reviewed,¹⁵² only one company was fined nine percent of its relevant

¹⁴⁶ COMPETITION COMM’N, POLICY ON RECOMMENDED PECUNIARY PENALTIES (2020), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Policy_on_Recommended_Pecuniary_Penalties_Eng.pdf.

¹⁴⁷ *Competition Comm’n v. W. Hing Construction Co. Ltd.*, [2019] 3 H.K.L.R.D. 46 (H.K.).

¹⁴⁸ Josh Yi Xue, et al., *Confiscating Illegal Gains in Chinese Anti-Monopoly Law Enforcement Practice*, ZHONG LAW FIRM 2 (2020), http://www.zhonglun.com/upfile/file/20200820_Confiscating%20Illegal%20Gains%20in%20Chinese%20Anti-monopoly%20Law%20Enforcement%20Practice_en_clean.pdf.

¹⁴⁹ China Anti-Monopoly Law, *supra* note 18, art. 49,

¹⁵⁰ See Murdoch & Stanway, *supra* note 88; see also Xuanmin & Yeping, *supra* note 139.

¹⁵¹ See Michael Gu, *NDRC Imposes Record Fines on 12 Japanese Auto Parts and Bearing Manufacturers*, LEXOLOGY (Sept. 25, 2014), <https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/ndrc-imposes-record-fines-on-12-japanese-auto-parts-and-bearing-manufacturers>; MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JULY/AUGUST 2014, 2 (Allan Fels et al. eds., 33d ed. 2014).

¹⁵² See cases cited *infra* app.

revenue in a cartel case (EUKOR Car Carriers in the *Roll-On/Roll-Off Services Cartel*).¹⁵³

In some cases, the fine that can be imposed under the AML is legally capped. For example, the maximum fine to be levied against industry associations is ¥500,000 (approximately US \$79,000), although in serious cases the trade association can also be de-registered. As seen above,¹⁵⁴ the fine for non-notification of a merger is also currently subject to a ¥500,000 cap.

However, proposals to amend the AML are afoot. Proposals were first published by the SAMR for consultation on January 2, 2020,¹⁵⁵ and this was followed by a second round of proposals by the Standing Committee of China's National People's Congress published on October 23, 2021¹⁵⁶ (together, the AML Amendment Proposals). A number of important changes to the AML could result in substantive changes on RPM, cartels, and mergers. Specifically on sanctions, the AML Amendment Proposals envisage increased penalties for breaches by trade associations,¹⁵⁷ against businesses and individuals for obstruction of investigations,¹⁵⁸ and in merger control (for failure to notify and for breach of remedies).¹⁵⁹ For the first time, the AML Amendment Proposals also appear to allow for the possibility of criminal liability for breaches of competition law, stating that criminal liability may arise where the violation constitutes a crime.¹⁶⁰ The digital economy features prominently in the second round of amendments published: abusing data and algorithms are specifically mentioned as an area of focus alongside new regulation.¹⁶¹

¹⁵³ See Michael Gu & Sihui Sun, *NDRC Rules in First International Shipping Company Monopoly Case*, LEXOLOGY (Aug. 4, 2016), <https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/ndrc-rules-in-first-international-shipping-company-monopoly-case>.

¹⁵⁴ See *supra* Section I.C.

¹⁵⁵ See AML Amendment Proposal, *supra* note 52.

¹⁵⁶ Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ xiūdìng cǎo'àn (gōngkāi zhēngqiú yìjiàn gǎo) (中华人民共和国反垄断法修订草案(公开征求意见稿)) [Draft Amendment to the Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 25, 2021) [hereinafter AML Amendment Proposal].

¹⁵⁷ From the current upper limit of ¥500,000 to an upper limit of ¥5,000,000 (approximately \$789,000).

¹⁵⁸ The proposal is for fines for obstructions for individuals to increase from the current upper limit of ¥100,000 to ¥1,000,000. For businesses, from ¥1,000,000 to up to one percent of turnover in the last year (or ¥5,000,000 if the business did not generate revenues in the past year).

¹⁵⁹ From the current upper limit of ¥500,000 to a fine of up to ten percent of the turnover of the business concerned for the preceding year.

¹⁶⁰ AML Amendment Proposal, *supra* note 156, art. 21.

¹⁶¹ It appears that the authorities intend for competition law and regulation to work hand in hand in monitoring the use of algorithms. New sweeping algorithm regulations came into force in China in March 2022. Two main regulatory requirements apply, namely operational transparency and user control over the data that can be fed to the algorithms. In addition, the regulations mandate that algorithm operators follow an ethical code for cultivating "positive energy" online and preventing the spread of undesirable or illegal information. See Rogier Creemers, Graham Webster, & Hellen Toner, *Translation: Internet Information Service Algorithmic Recommendation Management Provisions—Effective March 1, 2022*,

II. TOOLS FOR DETECTION AND ENFORCEMENT: SETTLEMENTS AND PRIVATE ACTIONS; LENIENCY AND WHISTLEBLOWING.

Authorities have a number of tools for detection and enforcement of the competition rules. Comparing the positions of Hong Kong to those in China, it appears that tools of enforcement in Hong Kong are less comprehensive than the equivalent tools in China. This holds true for government enforcement and settlements as well as for private actions. Additionally, as far as tools of detection are concerned, Hong Kong appears to have embraced broader leniency policies. In both jurisdictions, whistleblowing is encouraged.

A. *Fining the Infringers*

First, competition authorities seek to fine the infringers. Hong Kong and China differ fundamentally in the requirements to be met for issuing a fine, however. In China, as explained above,¹⁶² although the level of fines imposed appears to be relatively low, the SAMR has wide latitude to impose fines.

In Hong Kong, to the contrary: 1) as a result of the adoption of an adversarial system of enforcement¹⁶³ the HKCC must institute proceedings before the HKCT,¹⁶⁴ but 2) agreements and conduct “of lesser significance” are statutorily exempt from investigation.¹⁶⁵ Specifically, agreements between parties with a combined turnover of less than HK\$200 million are exempt from application of the First Conduct Rule,¹⁶⁶ although this exemption does not apply to instances of serious anti-competitive conduct.¹⁶⁷ Firms with less than HK\$40 million of turnover per year are exempt from the Second Conduct Rule.¹⁶⁸ This is potentially a serious impediment to effective enforcement—deciding not to investigate *de minimis* agreements should be a matter for the authorities’ discretion based on factors such as the size and competitiveness of the market, rather than

DIGICHINA (Jan. 10, 2022), <https://digichina.stanford.edu/work/translation-internet-information-service-algorithmic-recommendation-management-provisions-effective-march-1-2022/>; see also Kimberly Adams & Daniel Shin, *A Closer Look at China’s New Algorithm Regulations*, MARKETPLACE (Mar. 1, 2022), <https://www.marketplace.org/shows/marketplace-tech/a-closer-look-at-chinas-new-algorithm-regulations/>.

¹⁶² See *supra* Section I.D.

¹⁶³ See *infra* Section III.A.

¹⁶⁴ Competition Ordinance, *supra* note 16, pt. 6, §§ 93–93 (Enforcement before Tribunal); *id.* sched. 3 (Orders that may be made by Tribunal in Relation to Contraventions of Competition Rules).

¹⁶⁵ *Id.* sched. 1, § 5.

¹⁶⁶ *Id.* sched. 1, § 5(a).

¹⁶⁷ For an explanation of what constitutes serious anti-competitive conduct see *supra* Section I.A.1 and note 46.

¹⁶⁸ Competition Ordinance, *supra* note 16, sched. 1, § 6(1).

the turnover of the parties. For example, in 2011 the HK\$200 million exemption could have resulted in agreements of up to eighteen¹⁶⁹ small and medium enterprises potentially being exempted from the First Conduct Rule. Further: 3) in the case of breaches of the First Conduct Rule that are not cartels or other instances of serious anti-competitive conduct,¹⁷⁰ the HKCC must first issue a “warning notice” against the infringing parties and can only institute proceedings against the parties in the HKCT if the misconduct persists.¹⁷¹ This enforcement scheme can be difficult to administer, as it may not always be clear that a course of conduct meets the requirements of serious anti-competitive conduct.¹⁷²

B. Reaching Settlements

Second, the authorities can reach a settlement with the parties under investigation. Unlike the settlement system in Europe,¹⁷³ if the parties to an investigation reach a settlement with the authorities and the settlement is accepted, in China and in Hong Kong, the authorities will end the investigation and will not issue a fine.

In Hong Kong, section 60 of the CO specifically allows for the HKCC to end an investigation by accepting commitments offered by the parties. This procedure does not require that the parties admit to a breach of a conduct rule: if they do not, third parties do not have a follow-on right of action for damages against the infringers.¹⁷⁴ This procedure has been used in two cases, namely *Seaport Alliance*¹⁷⁵ and *Online Travel Agents* (OTAs),¹⁷⁶ mentioned above. In *Online Travel Agents* major OTAs (Expedia.com, Booking.com, and Trip.com) entered into so-called “parity” clauses with hotels in Hong Kong. The hotels were required to give to the

¹⁶⁹ See Lin & Ross, *supra* note 43, at n.40. The average annual turnover of small and medium enterprises in Hong Kong was HK\$11 million in 2011.

¹⁷⁰ For an explanation of what constitutes serious anti-competitive conduct see *supra* Section I.A.1 and note 46.

¹⁷¹ Competition Ordinance, *supra* note 16, § 82.

¹⁷² Kelvin Hiu Fai Kwok, *The New Hong Kong Competition Law: Anomalies and Challenges*, 37 WORLD COMPETITION 541, 562 (2014) [hereinafter Fai Kwok, *New Hong Kong Competition Law*]; Lin & Ross, *supra* note 43, at 121.

¹⁷³ In Europe, under Article 10(a) of Commission Regulation (EC) No. 773/2004, the parties can engage in settlement discussions with the European Commission. If they agree upon a settlement, they can benefit from a ten percent fine reduction. See also Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in Cartel Cases, 2008 O.J. (C 167) 1.

¹⁷⁴ Competition Ordinance, *supra* note 16, § 110; see also *infra* section II.C.

¹⁷⁵ H.K. Competition Comm’n, Case EC/03AY Notice Regarding the Commission’s Acceptance of Commitments in the Hong Kong Seaport Alliance Case (Oct. 30, 2020), https://www.compcomm.hk/en/enforcement/registers/commitments/files/Notice_of_Acceptance_Eng.pdf.

¹⁷⁶ H.K. Competition Comm’n, Notice Issued under Section 4 of Schedule 2 of the Competition Ordinance Regarding the Commission’s Acceptance of Commitments in Online Travel Agents Case (EC/02NJ) (May 13, 2020), https://www.compcomm.hk/en/enforcement/registers/commitments/files/ENG_Note_of_Acceptance_OTA.pdf.

OTAs terms regarding room prices, conditions, and availability that were at least the same as those they offered to any other sales channels. The HKCC accepted a settlement that the three OTAs would not enter into parity clauses for a period of five years and would self-report their compliance. Compared to similar cases in Europe, this is a cautious approach. In 2015, Booking.com announced that they were amending parity provisions in their contracts throughout Europe, following commitments accepted in France, Italy, and Sweden.¹⁷⁷

Commitments can also be accepted to terminate an investigation after the HKCC issues an infringement notice under section 67(2) of the CO. This settlement possibility applies in cases of breaches of the First Conduct Rule that involve serious anti-competitive conduct¹⁷⁸ and actions under the Second Conduct Rule. The HKCC has applied it in two First Conduct Rule cases to date, *Tourist Attraction Tickets* and *Quantr*. In both cases, the HKCC required the parties to admit infringement of the Rule as part of the settlement. As indicated below,¹⁷⁹ this is significant for the availability of private actions for damages in Hong Kong.

In *Tourist Attraction Tickets*, six hotel groups and an operator of tour counters were issued infringement notices.¹⁸⁰ The HKCC found that the defendants acted as facilitators in a price-fixing agreement for tourist attractions and transportation tickets sold in Hong Kong hotels. The defendants also facilitated a cartel between two travel service providers, Gray Line Tours of Hong Kong and Tink Labs Limited.¹⁸¹ The parties accepted the settlement, which included admitting that they contravened the First Conduct Rule and a commitment to increase competition compliance within their businesses.¹⁸² The HKCC subsequently terminated the investigation.

¹⁷⁷ See *Booking.com to Amend Parity Provisions throughout Europe*, BOOKING.COM (June 25, 2015), <https://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europe/>.

¹⁷⁸ For breaches of the First Conduct Rule that do not involve serious anti-competitive conduct, the HKCC needs to issue a “warning notice.” See Competition Ordinance, *supra* note 16, § 82.

¹⁷⁹ See *infra* Section II.C.

¹⁸⁰ See *Infringement Notices Register*, COMPETITION COMM’N, https://www.compcomm.hk/en/en/forcement/registers/infringement_notices/infringement.html (last visited May 25, 2022) (detailing the infringement notices and the commitments accepted).

¹⁸¹ Separately, the HKCC has also taken the case against the two travel service providers to the HKCT. Press Release, H.K. Competition Comm’n, Competition Commission Takes Travel Services Sector Price-fixing Cartel Case to Competition Tribunal (Jan. 20, 2022), https://www.compcomm.hk/en/media/press/files/PR_Travel_Services_Sector_Cartel_EN.pdf.

¹⁸² Press Release, H.K. Competition Comm’n, Competition Comm’n Issues Infringement Notices to Six Hotel Groups and a Tour Counter Operator for Facilitating a Price-fixing Cartel (Feb. 17, 2021), https://www.compcomm.hk/en/media/press/files/EN_PR_Infringement_Notices_Tourist_Attraction_Tickets.pdf [hereinafter *Infringement Notices*].

In *Quantr*,¹⁸³ infringement notices were issued against both Quantr and a software supplier, Nintex Proprietary Limited, for their involvement in a bid-rigging cartel for the provision of IT services. Quantr did not accept the commitments and the case was then brought in the HKCT, where the company was fined HK\$37,702.26 (less than \$5,000).¹⁸⁴ By contrast, Nintex did accept the infringement notice,¹⁸⁵ admitted they had infringed the First Conduct Rule, and took steps to strengthen their compliance program. The HKCC terminated the investigation.

In China, in the published guidelines on monopoly agreements,¹⁸⁶ the SAMR specifies that the parties to an investigation can offer commitments and request a suspension of an investigation¹⁸⁷ for all AML violations, *except for hardcore cartels* (i.e., for price fixing, output restrictions and market allocation).¹⁸⁸ In this sense, the procedure available in China is similar to the commitment procedure available in Europe.¹⁸⁹ This is an important difference respecting the position in Hong Kong, where the settlement procedure is available to hardcore cartelists. If defendants' commitment and settlement proposal is accepted, the SAMR will suspend or terminate an investigation. When this happens, similar to the position in Hong Kong, there is no finding as to the liability of the businesses in question and therefore no pecuniary sanctions are levied.¹⁹⁰ The parties that enter into a settlement agreement with the SAMR can still be sued in civil litigation, however, as will be seen below.

¹⁸³ Competition Comm'n v. Quantr Ltd., [2020] H.K.C.T. 2 (H.K.). The case is summarized in the Commission's 2020 Annual Report. See COMPETITION COMMISSION, ANNUAL REPORT 2020/2021, 32 (2021), https://www.compcomm.hk/en/media/reports_publications/files/2020_21_CC_Annual_Report.Pdf [hereinafter COMPETITION COMM'N 2020/2021 ANNUAL REPORT].

¹⁸⁴ Competition Comm'n v. Quantr Ltd., [2020] H.K.C.T. 2 (H.K.).

¹⁸⁵ H.K. Competition Comm'n, Notice Issued Under Section 67 of the Competition Ordinance (Cap. 619) Regarding Anti-Competitive Conduct in Ocean Park Bidding Exercise of 10 January 2020, https://www.compcomm.hk/en/enforcement/registers/infringement_notices/files/Infringement_Notice_Eng_20200110.pdf (last visited May 25, 2022).

¹⁸⁶ Jìnzhǐ lǒngduàn xiéyì zhàn háng guīdìng (禁止壟斷協議暫行規定) [Interim Provisions on Prohibiting Monopoly Agreements] (promulgated by the State Admin. for Mkt. Regul., July 1, 2019, rev'd March 24, 2022, effective May 1, 2022) (Lawinfochina) [hereinafter Interim Provisions on Prohibiting Monopoly Agreements].

¹⁸⁷ *Id.* This is the first time that a Chinese competition authority has issued guidelines in a published book. See Zhaofeng Zhou, *China: Settling Conduct Matters with the SAMR*, GLOBAL COMPETITION REV. (Feb. 2, 2021), <https://globalcompetitionreview.com/guide/the-settlements-guide/first-edition/article/china-settling-conduct-matters-the-samr>.

¹⁸⁸ Interim Provisions on Prohibiting Monopoly Agreements, *supra* note 186, art. 22.

¹⁸⁹ In the European Union, under Article 9 of Council Regulation 1/2003, the parties can offer commitments to settle an investigation. European Commission Memorandum MEMO/04/217, Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behavior) (Sept. 17, 2004). *Id.*

¹⁹⁰ China Anti-Monopoly Law, *supra* note 18, art. 45.

C. Private Enforcement

There is widespread acknowledgment that private litigation in China is on the rise, generally.¹⁹¹ Over the years, there has also been a gradual increase of private actions against State-Owned Enterprises (SOEs) and governmental agencies.¹⁹² In China, private actions are available, both as stand-alone claims (brought for an alleged breach when a competent authority has not already declared it an infringement) and as follow-on private actions (brought for damages arising from a breach that has been established in a decision of a competent authority). In Hong Kong, only follow-on private actions can be brought.

Private actions for breaches of competition law are available in China under Article 50 of the AML. The Supreme People's Court (SPC) has issued guidance on both stand-alone claims and follow-on private actions.¹⁹³ Beginning in 2017, there has been a growing number of private antitrust actions against tech companies.¹⁹⁴ In 2017, JD.com filed a lawsuit against Alibaba for “choose one from two” abusive conduct.¹⁹⁵ This case has dragged on, as Alibaba argued that the appropriate forum is not Beijing, but Hangzhou, Alibaba's headquarters. The SPC held in 2019 that the Beijing court had jurisdiction,¹⁹⁶ but the case is not yet concluded. Similarly, in February 2021, Douyin, an app that specializes in short videos owned by ByteDance, reportedly sued Tencent Holdings for abuse of dominance.¹⁹⁷

The combined pressure of antitrust infringement decisions in the sector, new regulations, and private actions seems to have borne fruit. Although these cases remain pending, in September 2021, Tencent opened access to its giant WeChat app to competitors (including Taobao and

¹⁹¹ GIBSON DUNN, *supra* note 136, at 7.

¹⁹² See BAKER MCKENZIE, GLOBAL GUIDE TO COMPETITION LITIGATION 53 (2016), https://www.bakermckenzie.com/-/media/files/expertise/antitrust/global_guide_to_competition_litigationfinal.pdf?la=en.

¹⁹³ Zuìgāo rénmin fǎyuàn guānyú shěnlǐ yīn lǒngduàn xíngwéi yīnfā de mínhì jiūfēn ànjiàn yìngyòng fǎlǜ ruògān wéntí de guīdìng (最高人民法院关于审理因垄断行为引发的民事纠纷案件适用法律若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct [2012] (promulgated by the Sup. People's Ct., May 3, 2012, effective June 1, 2012), art. 4 (Lawinfochina).

¹⁹⁴ GIBSON DUNN, *supra* note 136, at 8–9; see also Fay Zhou et al., *The Private Competition Enforcement Review: China*, THE LAW REVS. (Feb. 25, 2022), <https://thelawreviews.co.uk/title/the-private-competition-enforcement-review/china>.

¹⁹⁵ The practice of Chinese platforms to impose a requirement that users choose exclusively one platform is known as “choose one from two.” See *supra* section I.B and note 81.

¹⁹⁶ Jīngdōng sù tiān māo jí ālǐ lànyòng shìchǎng zhīpèi dìwèi “èr xuǎn yī” dì yī àn jiāng kāitíng (京东诉天猫及阿里滥用市场支配地位“二选一”第一案将开庭) [*JD.com Sues Tmall and Alibaba for Abuse of Market Dominance*], SOHU (Nov. 26, 2020), https://www.sohu.com/a/434515914_260616.

¹⁹⁷ ByteDance's Douyin Sues Tencent for Monopolistic Behaviour, REUTERS (Feb. 2, 2021), <https://www.reuters.com/article/us-china-bytedance-idUSKBN2A2153>.

ByteDance), possibly due to litigation pressures.¹⁹⁸ In a jurisdiction where judicial scrutiny of the authorities' decisions is weak,¹⁹⁹ private enforcement may become a preferred route to redress.

The original Bill for the introduction of a competition law in Hong Kong allowed victims of anticompetitive actions to claim damages in stand-alone private actions.²⁰⁰ However, this provision was ultimately deleted due to the government's effort to secure the business community's support for the adoption of the CO.²⁰¹ Nonetheless, there is certainly an appetite in Hong Kong for stand-alone private actions. In an early case, *Loyal Profit International Development Ltd v. Travel Industry Council of Hong Kong*,²⁰² the plaintiff sought to obtain a declaration and an injunction against the practices of the Travel Industry Council of Hong Kong.²⁰³

The CO provides for a right to bring a follow-on private action against "a person" who "has contravened," "is contravening,"²⁰⁴ or "has been or is involved in the contravention of" a conduct rule.²⁰⁵ At the time of writing (April 2022), these provisions remain untested in the Hong Kong courts.

It follows that a finding that an infringement has taken place is a precondition for a follow-on private action in Hong Kong. As mentioned above,²⁰⁶ under the settlement procedure, the HKCC has the option to require settling defendants to admit their infringement. In both *Tourist Attractions Tickets*²⁰⁷ and *Quantr*²⁰⁸ the defendants admitted the breach of the First Conduct Rule, allowing for the possibility of a follow-on private action. However, unlike in many other jurisdictions, including in Europe, admission of guilt is not a requirement for a settlement. If the HKCC does not request admission of liability, aggrieved third parties cannot bring a follow-on action against the infringers.

¹⁹⁸ Zheping Huang & Coco Liu, *Tencent Opens WeChat to Rivals' Links as China App Walls Crumble*, TIME (Sep. 17, 2021), <https://time.com/6099059/tencent-wechat-rivals/>.

¹⁹⁹ See *infra* Section III.B.

²⁰⁰ Mark Williams, *The Lion City and the Fragrant Harbour: The Political Economy of Competition Policy in Hong Kong and Singapore Compared*, 54 THE ANTITRUST BULL. 517, 568 (2009).

²⁰¹ The original bill was more ambitious in its proposals. Due to opposition from the business community (including from small and medium enterprises (SMEs)), the original provisions were watered down. On private actions, SMEs expressed the concern that large companies could make use of the provision to harass them. For an overview of the changes between the original proposals and what became the CO, see John M. Hickin et al., *Hong Kong Government Announces Significant Changes to Its Competition Bill*, LEXOLOGY (Oct. 19, 2011), <https://www.lexology.com/library/detail.aspx?g=320ea56e-ad58-4e59-a0c9-a670591ec5f5>.

²⁰² *Loyal Profit Int'l Dev. Ltd. v. Travel Industry Council of H.K.*, [2016] H.C.M.P. 256 (C.F.I.).

²⁰³ The court held that under the terms of the CO it is "for the Competition Commission (not private parties) to bring a complaint of infringement of competition rules to the Competition Tribunal for adjudication." *Id.* at ¶ 47.

²⁰⁴ Competition Ordinance, *supra* note 16, § 110(1)(a).

²⁰⁵ *Id.* § 110(1)(b).

²⁰⁶ See *supra* Section II.C.

²⁰⁷ *Infringement Notices*, *supra* note 182.

²⁰⁸ *Competition Comm'n v. Quantr Ltd.*, [2020], H.K.C.T. 10 (H.K.).

D. Leniency

When a business involved in a cartel self-reports its anticompetitive conduct and submits significant evidence, the competition authorities in both China and Hong Kong may, at their discretion, grant full immunity or a reduction in fines.

In Hong Kong, the HKCC adopted leniency policies that encourage self-reporting (unusually, the CO allows for leniency to be granted for a breach of the First or the Second Conduct Rule,²⁰⁹ but to date the HKCC has only enacted policies to deal with leniency for cartel conduct, under the First Conduct Rule). The HKCC issued its first leniency policy in 2015 and substantially revised it in 2020.²¹⁰ At the same time as the 2020 revision, the HKCC also adopted a leniency policy for individuals, such as employees or former employees of a company.²¹¹ The leniency policy has already been successful. In *Quantr*,²¹² the cartel was brought to the HKCC's attention by the co-bidder as a leniency applicant. Businesses that do not qualify for the leniency policy can enter into a cooperation agreement with the HKCC under the Cooperation and Settlement Policy,²¹³ which allows parties cooperating with an investigation to receive a discount of up to fifty percent on the applicable fine. The Cooperation and Settlement Policy also introduces a "leniency plus" regime. If a business enters into a cooperation agreement in relation to a cartel and discloses the existence of a second cartel, the HKCC can apply an extra discount of ten percent of the recommended pecuniary penalty against the first cartel.

In China, the legal basis for the availability of leniency is Article 46(2) of the AML. Leniency is only available for horizontal monopoly agreements between competitors, as defined in Articles 13 and 14 of the AML (in particular cartels). This follows precedent from other jurisdictions, and indeed is the same in Hong Kong. The SAMR issued its own Leniency Guidelines in June 2020.²¹⁴ The first applicant to provide evidence of a cartel not yet under investigation, and to provide material

²⁰⁹ Competition Ordinance, *supra* note 16, § 80.

²¹⁰ COMPETITION COMM'N, LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT (2020), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Undertakings_E.pdf [hereinafter LENIENCY POLICY FOR UNDERTAKINGS].

²¹¹ COMPETITION COMM'N, LENIENCY POLICY FOR INDIVIDUALS INVOLVED IN CARTEL CONDUCT (2020), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Individuals_E.pdf [hereinafter LENIENCY POLICY FOR INDIVIDUALS].

²¹² Competition Comm'n v. *Quantr Ltd.*, [2020], H.K.C.T. 10 (H.K.).

²¹³ COMPETITION COMM'N, COOPERATION AND SETTLEMENT POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT (2019), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Cooperation_Policy_Eng.pdf.

²¹⁴ Héngxiàng lǒngduàn xiéyì ànjàn kuāndà zhìdù shìyòng zhǐnán (横向垄断协议案件宽大制度适用指南) [Guidelines for the Application of Leniency Program in Horizontal Monopoly Agreement Cases] (promulgated by the State Admin. for Mkt. Regul., Jan. 4, 2019, effective Sept. 18, 2020) [hereinafter SAMR Leniency Policy].

evidence not yet in possession of the SAMR can be granted immunity or leniency of not less than eighty percent.²¹⁵ The second applicant's fine can be mitigated between thirty to fifty percent, and the third by between twenty to thirty percent. Subsequent applicants can receive a discount of no more than twenty percent.

Although formal leniency policies are a relatively new tool in China, leniency (in exchange for cooperation with authorities) seems to have been a feature in the enforcement of the AML from the start. Amongst the cases reviewed,²¹⁶ leniency was granted in at least nineteen cases, beginning with the *Rice Noodles Cartel* sanctioned by the Guanxi Price Bureau in March 2010, one of the first cases decided under the AML and Price Law.²¹⁷ In the international *LCD Panel Manufacturing Cartel* case,²¹⁸ decided under the Price Law (as the breaches preceded the entry into force of the AML), the sanctions imposed²¹⁹ were "relatively low" due to the participants' cooperation. Leniency in the formal sense of being recognized as a specific tool for detection under the terms of the AML²²⁰ was applied for the first time in the *Sea Sand Cartel* case²²¹ by the Guangdong Price Bureau under guidance from the National Development and Reform Commission (NDRC), one of the precursor competition agencies to the SAMR. Of the ninety-five cases identified,²²² leniency considerations led to firms receiving total exemption from fines in twelve cases.²²³

²¹⁵ *Id.* art. 13.

²¹⁶ *See infra* app.

²¹⁷ Memorandum from Cleary Gottlieb on First Price Cartel Cases Under the Chinese AML (May 21, 2020), <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/first-price-cartel-cases-under-the-chinese-aml.pdf> (discussing the Rice Noodles Cartel); *see also* Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS §§ 6.01, 6.03[A][8] (Adrian Emch & David Stallibrass eds., 2013) (discussing the Rice Noodles Cartel).

²¹⁸ Xue & Yang, *supra* note 217, § 6.03[A][8] (discussing the LCD Panel Manufacturing Cartel).

²¹⁹ By the National Development and Reform Commission (NDRC), the predecessor agency to the SAMR.

²²⁰ SAMR Leniency Policy, *supra* note 214, art. 46(2).

²²¹ Xue & Yang, *supra* note 217, § 6.03[A][7] (discussing the Sea Sand Cartel).

²²² *See sources cited infra* app.

²²³ The cartels were the Infant Formula Milk Cartel, the Zhejiang Car Insurance Cartel, the Hubei Car Distribution Cartel, the 12 Japanese Auto Parts and Bearing Manufacturers Cartel, the Roll-on/Roll-off Freight Service Cartel, the Yongzhou Concrete Industry Cartel, the Tianjin Port Yard Cartel, the Zhejiang Concrete Manufacturers Cartel, the Hunan Liquefied Gas Suppliers Cartel, the Ningxia Used Car Dealers Cartel, the Jiangxing Used Car Industry Cartel, and the Bulk Cement Supply: Sichuan Cement Association Cartel. *See* HANNAH HA ET AL., *supra* note 50, at 42 (discussing the Infant Formula Milk Cartel); COMPETITION BULLETIN SEPT./OCT. 2014, *supra* note 50, at 1 (discussing the Zhejiang Car Insurance Cartel); MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JANUARY/FEBRUARY 2016, 8 (Allan Fels et al. eds., 40th ed. 2016), https://law.unimelb.edu.au/_data/assets/pdf_file/0004/1950520/China-Competition-Bulletin-Jan-Feb-2016.pdf (discussing the Hubei Car Distribution Cartel, the 12 Japanese Auto Parts and Bearing Manufacturers Cartel, the Roll-on/Roll-off Freight Service Cartel, and the Yongzhou Concrete Industry Cartel); MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT 17 (2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end-2018_190022.pdf (discussing the Tianjin Port Yard Cartel); Yong Bai, *China: Overview*, GLOB. COMPETITION REV.

E. Whistleblowing

Finally, whistleblowing is also a powerful tool for detection. Whistleblowing is a relatively common practice in Hong Kong. In the period since its inception in 2013 through November 2020, the HKCC received “around 4,600 enquiries and complaints, of which sixty percent were on the First Conduct Rule with cartel conduct, including price fixing, being a major concern.”²²⁴ The press release issued by the HKCC after the HKCT handed down its first two judgments makes it clear that the two cases in question were “[d]iscovered as a result of complaints from members of the public.”²²⁵ These findings are also in line with survey results, such as the Freshfields 2020 whistleblowing survey, where [forty-eight percent] of respondents in Hong Kong reported “they had been involved in whistleblowing.”²²⁶ This is so even though there are limited specific protections for whistleblowers in Hong Kong and no financial incentives for blowing the whistle. Possible reasons include that a successful whistleblowing mechanism exists in Hong Kong in the finance sector and the Hong Kong Stock Exchange is very focused on corporate governance issues, including ensuring that listed companies have an escalation policy that allows employees to report wrongdoings.²²⁷

Like in Hong Kong, in China individuals are increasingly blowing the whistle.²²⁸ This is borne out by the case law: the reasons range from recent legislative developments incentivizing whistleblowing, to the influence of social media.

The very first cartel fines issued under the AML, in the *Concrete Industry - Jiangsu Cartel* case²²⁹ was investigated following complaints by whistleblowers unhappy about the cartel set up by the Committee for

(Apr. 21, 2021), <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2021/article/china-overview> (discussing the Zhejiang Concrete Manufacturers Cartel); CLIFFORD CHANCE, *supra* note 73, at 12 (discussing the Hunan Liquefied Gas Suppliers Cartel, the Ningxia Used Car Dealers Cartel, the Jiangxing Used Car Industry Cartel, and the Bulk Cement Supply Cartel).

²²⁴ Press Release, H.K. Competition Comm’n, Competition Commission Launches “Combat Price Fixing Cartels” Campaign (Nov. 9, 2020), https://www.compcomm.hk/en/media/press/files/EN_PR_C_C_launches_Combat_Price_Fixing_Cartels_Campaign_20201109.pdf.

²²⁵ Press Release, H.K. Competition Comm’n, Competition Commission Welcomes Judgments in Hong Kong’s First Two Competition Cases (May 17, 2019), https://www.compcomm.hk/en/media/press/files/20190517_Competition_Commission_welcomes_judgments_in_Hong_Kong_s_first_two_competition_cases_eng.pdf.

²²⁶ Nicola Jones & Stephanie Chiu, *Whistleblowing in the Spotlight: Why are Managers in Hong Kong More Likely to Blow the Whistle?*, LEXOLOGY (Oct. 15, 2020), <https://www.lexology.com/library/detail.aspx?g=293001aa-ab47-447d-b1d7-204fb1172a99>.

²²⁷ *Id.*

²²⁸ Fan Li & Stephanie Chiu, *Whistleblowing in the Spotlight—What is Happening in Mainland China?*, FRESHFIELDS BRUCKHAUS DERINGER (Nov. 6, 2020), <https://riskandcompliance.freshfields.com/post/102gjm1/whistleblowing-in-the-spotlight-what-is-happening-in-mainland-china>.

²²⁹ See Henry L.T. Chen & Frank Schoneveld, *First Cartel Fines in China Following New Regulations*, LEXOLOGY (Feb. 25, 2011), <https://www.lexology.com/library/detail.aspx?g=cf8c3355-2c04-44b6-985f-72590f37896b>.

Concrete of Lianyungang City Construction Material and Machinery Association. The same year, in the *Package Industry Cartel* case,²³⁰ whistleblowers complained about a cartel coordinated by the industry association. In 2012, an investigation of the *Wuxi Quarry Operators Cartel*²³¹ started based on information received from the Wuxi County Public Security Bureau. A “public complaint” filed in July 2013 triggered the investigation of the *Mayang Shale Brick Cartel*.²³² In the later *Haier RPM* case,²³³ the investigation began in response to multiple reports made through the NDRC’s “12358 price supervision platform” in June 2015. As seen above, local e-commerce companies have allegedly been reporting cartels in the courier industry (e.g. *Ningxia Courier Companies Cartel*).²³⁴ In the *Xiamen Courier Industry Price Self-Discipline Convention Cartel*,²³⁵ fourteen courier companies agreed to minimum shipping prices, seemingly in response to concerns regarding the development of e-commerce. The Xiamen Price Bureau intervened to stop this conduct and increase AML compliance. Although not explicitly stated, it is possible that this action by the Xiamen Price Bureau was the result of whistle blowing by e-commerce companies.

Notwithstanding these recent developments, and although there is no official translation of the term in Chinese, whistleblowing is “an age-old practice dating back to the imperial time[.]”²³⁶ The term *Jubao* (舉報: literally, “reporting”) is a new term which emerged from recent anticorruption campaigns.²³⁷ The main aim of *jubao* is to report the wrongdoing of public officials and managers of companies. This is different from the narrow Western concept of an employee reporting their organization, usually after having exhausted internal procedures. In China, the concept is both “broader in terms of who can blow the whistle” (any ordinary citizen can do so) and “slightly narrower as to whistleblowing channels” (it often consists of reports made to official centers and supervisory organs).²³⁸

²³⁰ See Xue & Yang, *supra* note 217, § 6.06 (discussing the Package Industry Cartel).

²³¹ For a discussion of the Wuxi Quarry Operators Cartel, see COMPETITION BULLETIN JAN./FEB. 2015, *supra* note 24, at 4.

²³² See cases cited *infra* app.

²³³ MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JULY/AUGUST 2016, 3 (Allan Fels et al. eds., 43d ed. 2016), https://law.unimelb.edu.au/_data/assets/pdf_file/0003/2105238/China-Competition-Bulletin-July-August-2016.pdf (discussing the Haier RPM case).

²³⁴ COMPETITION BULLETIN MAR./APR. 2014, *supra* note 24.

²³⁵ *Id.*

²³⁶ Ting Gong, *Whistleblowing: what does it mean in China?*, 23 INT’L J. PUB. ADMIN. 1899, 1900 (2000).

²³⁷ *Id.* at 1902.

²³⁸ *Id.* at 1903.

As of yet, there is no formal centralized policy to deal with whistleblowing in antitrust matters,²³⁹ but regulatory measures sometimes promise rewards to whistleblowers, for example to those reporting safety and counterfeiting issues.²⁴⁰ In September 2019, the State Council issued “Guiding Opinions on Strengthening and Standardizing In-process and Ex-post Regulation”²⁴¹ (Whistleblowing Guiding Opinions). This required provincial governments and various ministries and agencies under the State Council to establish reward systems for whistle-blowers. In November 2019, the SAMR issued draft provisions purporting to grant financial rewards for whistleblowers that report serious violation of law,²⁴² including violations of competition law.²⁴³ These provisions remain in draft form. If adopted, whistleblowers under this reward scheme would receive substantially more than what is currently available under other financial reward provisions: they could receive as much as five percent of the fine paid,²⁴⁴ up to a maximum of ¥1,000,000, or, for reporting violations of “systemic and regional risks” or that “have or may cause major social harm,” up to ¥two million.²⁴⁵

III. THE INSTITUTIONAL SETUP

Hong Kong has adopted an adversarial system²⁴⁶ and China an administrative system²⁴⁷ of enforcement of the antitrust rules. There is limited evidence as to the relative merits of the two regimes. Based on simplified economic models, adversarial methods of enforcement have been found to be more effective against decision-maker bias, while administrative systems arguably have a better mechanism for uncovering

²³⁹ And because individuals in China are not liable for breaches of the competition law, there is no equivalent to the Hong Kong Leniency Policy for Individuals. This may change if the second round of proposals to amend the AML are adopted. *See supra* Section I.D.

²⁴⁰ For example, a whistle-blower who reports on product quality or food and drug safety may receive a reward of up to ¥500,000 from the regulatory agency. *See Li & Chiu, supra* note 228.

²⁴¹ *Id.*

²⁴² Guójiā shìchǎng jiāndū guǎnlǐ zǒngjú guānyú “shìchǎng jiānguǎn lǐngyù zhòngdà wéifǎ xíngwéi jǔbào jiānglì zhàn xíng bànfǎ (xiūdìng zhēngqiú yìjiàn gǎo)” gōngkāi zhēngqiú yìjiàn de gōnggào (国家市场监督管理总局关于《市场监管领域重大违法行为举报奖励暂行办法（修订征求意见稿）》公开征求意见的公告) [Announcement of the State Administration for Market Regulation on Public Consultation on the Interim Measures for Reporting and Rewarding Major Illegal Acts in the Field of Market Supervision (Revised Draft for Comment)] (promulgated by the State Admin. for Mkt. Regul., Nov. 19, 2019).

²⁴³ *Id.* art. 4.

²⁴⁴ *Id.* art. 12.

²⁴⁵ *Id.* art. 13.

²⁴⁶ The adversarial process is characterized by an impartial decision-maker (often a judge) with a relatively passive role. *See infra* Section III.A.

²⁴⁷ The administrative process is characterized by agency discretion in the application of the rules, from evidence gathering to issuing a decision. *See infra* Section III.B.

hidden information.²⁴⁸ On the other hand, though, administrative systems are said to compound the issue of prosecutorial bias due to undue deference by the courts,²⁴⁹ particularly when undertaking “complex economic assessments[.]”²⁵⁰ But adversarial systems are often characterized as “more expensive and protracted”²⁵¹ than administrative ones. This is especially true in jurisdictions with only a modest history of applying competition law, as judges often lack the expertise and resources required to assess complex economic evidence.²⁵²

A comparative analysis of the systems of China and Hong Kong shows that a properly functioning adversarial system must provide the competition authority with access to the tools needed to carry out their prosecutorial role. The judiciary interpretation of the burden of proof that the HKCC must meet for the imposition of pecuniary penalties (the criminal standard of proof beyond reasonable doubt) makes it very difficult for the HKCC to enforce competition law in cases other than cartel cases where evidence of wrongdoing is readily available. Obstacles to enforcement proceedings can have a knock-on effect on the very ability of the law to deter infringements, particularly in a system where the CO only allows for the imposition of relatively low levels of fines on infringers in Hong Kong anyway.²⁵³

For the proper working of administrative systems, the corrective power of judicial scrutiny, some measure of independence between the agency and the executive, and procedural limits on the discretion of the authorities are all necessary to counter the potential for prosecutorial bias. In China, all agencies are part of a very powerful overarching bureaucracy. Within it, different agencies collaborate: a company that has a conflict with one agency exposes itself to possible action by multiple agencies. Judicial scrutiny, including of antitrust decisions, is weak and procedural safeguards embryonic. This leads to impressive results and an enviable speed of decision, but speed needs to be considered against the risks posed by “unrestrained arbitrariness[.]”²⁵⁴

²⁴⁸ Soojin Nam, *An International Due Process Standard for Competition Adjudication? A Critical Approach*, 15 ASIAN J. COMPAR. L. 310, 327 (2020).

²⁴⁹ COLOMO, SHAPING OF EU COMPETITION LAW, *supra* note 51, at 10.

²⁵⁰ *Id.* at n.91.

²⁵¹ Nam, *supra* note 248, at 328.

²⁵² See, e.g., ORG. FOR ECON. COOP. & DEV., EXECUTIVE SUMMARY OF THE DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMM. ON JUDICIAL PERSPECTIVE ON COMPETITION LAW (Apr. 24, 2018), [https://one.oecd.org/document/DAF/COMP/GF\(2017\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2017)4/en/pdf).

²⁵³ See *supra* Section I.D.

²⁵⁴ See also Colino, *Incursion of Antitrust*, *supra* note 15, at 36–39.

A. *The Adversarial System of Hong Kong*

It has been said that the competition law regime in Hong Kong is a “curious Frankenstein regime”²⁵⁵: while the substantive prohibitions are based on the EU and Singapore models, procedurally Hong Kong has adopted an adversarial regime. The adversarial process is characterized by an impartial decision-maker (often a judge) with a relatively passive role. The judge is not involved in gathering evidence or identifying the issues but instead plays an adjudicative role. The parties “bear primary responsibility for determining the sequence and manner in which evidence is presented and legal issues are argued.”²⁵⁶ Generally speaking, common law jurisdictions tend to adopt the adversarial system of competition law enforcement, as, for example, in the United States, Australia, and Canada (but not in the United Kingdom). In Hong Kong, the decision-maker with adjudicative function is the HKCT.

The HKCC carries out both investigative and prosecutorial functions, alongside other competition policy responsibilities,²⁵⁷ including an advisory role (although it generally encourages businesses to carry out a self-assessment of the legality of their agreements under the competition rules, businesses can also ask for guidance).²⁵⁸ The HKCC is an independent statutory body in corporate form²⁵⁹ with a board of members that manages an executive arm. The members are appointed by the head of the Hong Kong Special Administrative Region (“SAR”), the Chief Executive, but are removable only in specified circumstances.²⁶⁰ The HKCC’s executive arm is not part of the civil service,²⁶¹ further enforcing its independence.

Considering that it only began recruiting staff in May 2013,²⁶² the HKCC has been very active and has brought nine cases before the HKCT since then. This level of activity has been possible due to substantial government funding.²⁶³ In its latest annual report,²⁶⁴ the HKCC reported government subvention of approximately HK\$124.3 million (approximately \$16 million) and sixty-one staff members “as of March

²⁵⁵ Pollard & Gooi, *supra* note 59, at 373.

²⁵⁶ Laverne Jacobs et al., *The Nature of Inquisitorial Processes in Administrative Regimes*, 24 CANADIAN J. ADMIN. L. & PRAC. 261, 262–63 (2011).

²⁵⁷ Competition Ordinance, *supra* note 16, § 130.

²⁵⁸ *Id.* § 9.

²⁵⁹ *Id.* § 129.

²⁶⁰ *Id.* sched. 5, § 5.

²⁶¹ *Id.* § 132 (“The Commission is not servant or agent of Government.”)

²⁶² See Anna Wu Hung-yuk, *Hong Kong: Competition Commission*, GLOB. COMPETITION REV. (Feb. 19, 2015), <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/the-asia-pacific-antitrust-review-2015/article/hong-kong-competition-commission>.

²⁶³ Lin & Ross, *supra* note 43, at 129.

²⁶⁴ COMPETITION COMM’N, ANNUAL REPORT 2019/2020 (2020), https://www.compcomm.hk/en/media/reports_publications/files/2019_20_CC_Annual_Report.pdf.

2020.”²⁶⁵ These figures show an increase from the previous year (when the HKCC reported government funding of approximately HK\$105.3 million and fifty-seven staff members). It has been noted that these high levels of funding and staffing are broadly similar to Singapore competition authority (before the latter also acquired consumer protection functions).²⁶⁶ Interestingly, as detailed below, the SAMR in China reportedly only has forty staff members dealing with antitrust matters at the central level.

The HKCT carries out the adjudicative function. Although its name, Hong Kong Competition Tribunal, suggests competition law expertise, it is in fact a specialist division of the Court of First Instance, which is entirely comprised of generalist judges.²⁶⁷ Its judgments can be appealed to the Court of Appeal and then the Court of Final Appeal. It also has powers to determine follow-on actions that may be brought following the HKCC’s finding of breach.

The HKCC has been remarkably successful in securing liability and penalty judgments. However, the cases to date concerned instances of serious anti-competitive conduct, where the HKCC had gathered incontrovertible evidence of cartel activity. Following the *Nutanix Bid Rigging* judgment,²⁶⁸ the standard of proof that the HKCC must meet in proceedings for pecuniary penalties is now the criminal standard of proof beyond reasonable doubt rather than the lower civil standard of proof on the balance of probabilities.²⁶⁹ Due to this higher standard of proof, uncertainty hovers over the continued ability of the HKCC to impose sanctions with a deterrent effect. The HKCC’s focus on hard-core cartels may also be partly dictated by the need to meet the required burden of proof before the HKCT.

The workability of the standard is even more doubtful for competition law cases where complex assessments of economic data and often conflicting expert evidence are required, such as for breaches of the Second Conduct Rule. The judgment in *Linde* should clarify the judiciary’s thinking on this issue. Indeed, as competition law enforcement becomes more widespread and parties to cartels become more circumspect, even direct evidence of price-fixing cartels may be hidden. If so, even in cartel

²⁶⁵ *Id.* at 50.

²⁶⁶ Lin & Ross, *supra* note 43, at 130.

²⁶⁷ Competition Ordinance, *supra* note 16, § 135(1). Under Section 141, the HKCT can appoint “specially qualified assessors” to assist with its determinations.

²⁶⁸ Competition Comm’n v. Nutanix H.K. Ltd., [2019] H.K.C.T. 2 (H.K.). This case concerned bid rigging in Hong Kong.

²⁶⁹ On June 18, 2021, the Court of Appeals issued its Reasons for Judgment in an appeal against the Liability Judgment in the *Decoration Contractors* case. The HKCC had asked the Court to reconsider the issue of the standard of proof in proceedings for pecuniary penalties. The Court however “did not wish to consider this point on a notional basis” and therefore the issue remains to be decided. See Edmund Wan et al., *The First Appeal Case from the Competition Tribunal*, KING & WOOD MALLESONS (Sept. 24, 2021), <https://www.kwm.com/hk/en/insights/latest-thinking/appeal-on-liability-judgment.html>.

cases, the HKCC may have only circumstantial proof, let alone the evidence required to satisfy the criminal standard of proof.

As has been remarked,²⁷⁰ the criminal standard of proof in competition law cases may be justified if the severity of the penalty warrants it. This may be the case for individuals facing “truly criminal sanctions for offences that are *per se* in nature”²⁷¹ or, for businesses, “a very high level of financial penalty that can be said to constitute the functional equivalent of imprisonment of a human being,”²⁷² possibly rendering the company insolvent or “at least unprofitable for some significant period of time.”²⁷³ This is very far from the case here, given that the penalty that can be imposed cannot exceed the statutory maximum of ten percent of the turnover in Hong Kong for a maximum of three years. As has been remarked, this leaves Hong Kong in an awkward position, “an odd middle ground” on hard-core cartels, “without the deterrent power of true criminal law..., but with a legal process that gives respondents the protections of criminal law approach.”²⁷⁴

B. *The Administrative System of China*

China has adopted a system of administrative enforcement.²⁷⁵ Administrative enforcement is characterized by agency discretion in the application of the rules, with the decision-maker playing an “active role in identifying issues, gathering evidence[,] and controlling the proceedings.”²⁷⁶ Overall, administrative systems of enforcement are adopted in the majority of jurisdictions that have enacted a competition law, including the European Union and its member States, Japan, South Korea, India, Malaysia, and the majority of Latin American countries.

The enforcement record of the AML by the SAMR and the AMEAs in China is very impressive, particularly as the authorities have traditionally been “extremely understaffed[.]”²⁷⁷ It was reported in April 2021 that the SAMR “plans to expand its antitrust workforce by around 20

²⁷⁰ Kelvin Hiu Fai Kwok, *The Standard of Proof in Civil Competition Law Proceedings*, 132 L.Q. REV. 541 (2016). In this article, the author contrasts the position in Hong Kong with the U.K. application of the civil standard of proof.

²⁷¹ Lin & Ross, *supra* note 43, at 132–33.

²⁷² Fai Kwok, *New Hong Kong Competition Law*, *supra* note 172, at 546.

²⁷³ *Id.*

²⁷⁴ Lin & Ross, *supra* note 43, at n.85.

²⁷⁵ Administrative systems are often called “inquisitorial,” in opposition to “adversarial.” Due to unfortunate historical associations between the term “inquisitorial” and lack of due process, in this article reference is made to “administrative” systems and “adversarial” systems.

²⁷⁶ For an overview based on the Canadian experience, see Jacobs et al., *supra* note 256, at 262.

²⁷⁷ Across the three agencies, there were fewer than 100 officials in charge of antitrust enforcement at the central level, many of whom were also in charge of other matters. See ZHANG, ANTITRUST EXCEPTIONALISM, *supra* note 37, at 24–25.

to 30 staff, up from about 40 now”.²⁷⁸ Although as a central authority the SAMR can call on the AMEAs at local and regional levels, it is strikingly that it has centrally twenty-one fewer enforcer than the sixty-one members of staff reported in Hong Kong.

Low levels of staffing seem to be on the radar of policymakers in Beijing. On November 19, 2021, the State Council of the People’s Republic of China announced the establishment of a National Anti-Monopoly Bureau (NAMB) to deal with competition matters. The NAMB reportedly will have larger staff than the current SAMR.²⁷⁹

As has been extensively documented and analyzed,²⁸⁰ in China, the SAMR and the AMEAs have very broad enforcement discretion in a system characterized by limited judicial scrutiny. What has been called “China’s great reversal in regulating the platform economy”²⁸¹ provides a good focal point to consider the policy control mechanisms of China more generally. Specific to antitrust, while China’s administrative form of enforcement guarantees efficiency and impressive results, this is often at the expense of scrutiny, “agency accountability, legal consistency and due process.”²⁸² This is due to several reasons.

First, agencies that enforce the AML are part of the bureaucracy. In countries with established competition and regulatory regimes, the independence of regulatory and competition law agencies, especially from government, is an aspiration.²⁸³ In the European Union, independence of public bodies is frequently required by the Treaties and secondary law.²⁸⁴ While “independence” is not specifically defined, it generally refers to a situation where a public body “can act completely freely, without taking any instructions or being put under any pressure[,]”²⁸⁵ particularly by the executive. As seen above, in Hong Kong the institutional setup of the HKCC guarantees it a measure of independence. In the United States, although the federal government retains control over the agencies, which

²⁷⁸ Cheng Leng, et al., *EXCLUSIVE China’s Antitrust Regulator Bulking Up as Crackdown on Behemoths Widens*, REUTERS (Apr. 11, 2021), <https://www.reuters.com/world/china/exclusive-chinas-antitrust-regulator-bulking-up-crackdown-behemoths-widens-2021-04-11/>.

²⁷⁹ *China Establishes Anti-Monopoly Bureau to Secure Fair Competition*, THE STATE COUNCIL, PEOPLE’S REPUBLIC OF CHINA (Nov. 19, 2021), http://english.www.gov.cn/statecouncil/wangyong/202111/19/content_WS61973e4cc6d0df57f98e52d9.html; see also Adrian Emch, *Chinese Competition Law 2.0*, KLUWER COMPETITION LAW BLOG (Nov. 24, 2021), <http://competitionlawblog.kluwercompetitionlaw.com/2021/11/24/chinese-competition-law-2-0/>.

²⁸⁰ See Zhang, *Taming the Chinese Leviathan*, *supra* note 19; ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 36; Zhang, *Agility over Stability*, *supra* note 6.

²⁸¹ Zhang, *Agility over Stability*, *supra* note 6, at 1.

²⁸² *Id.* at 12.

²⁸³ See, e.g., ORG. FOR ECON. DEV., *CREATING A CULTURE OF INDEPENDENCE: PRACTICAL GUIDANCE AGAINST UNDUE INFLUENCE* (2017), <https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf>.

²⁸⁴ *EU Agencies and Conflicts of Interests* (Jan. 2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU\(2020\)621934_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU(2020)621934_EN.pdf).

²⁸⁵ *Id.*

“remain susceptible to shifting policy winds in Washington[.]”²⁸⁶ the clear delineation of authority between federal, state, and county governments, press scrutiny, and strict judicial oversight give agencies a relatively high degree of independence from the executive, compared to China.²⁸⁷

In China, the SAMR, like its predecessors, is a Ministry-level agency with multiple duties, including enforcement of the competition rules. It sits directly under the State Council of China.²⁸⁸ The new NAMB would appear to enjoy higher bureaucratic status²⁸⁹ than the current Anti-Monopoly Bureau within SAMR. While the latter is a small division fully integrated within the SAMR, the NAMB is likely to be a “semi-autonomous body *under* the SAMR[.]” Continuity with the SAMR will be ensured: the NAMB’s headquarters are in the same building as the SAMR and the deputy head of the SAMR, Gan Lin, has been appointed head of the NAMB.²⁹⁰ The NAMB should have a higher level of independency and visibility, but it will obviously still be part of the overarching bureaucracy of the Chinese state, where the leadership in Beijing “enjoys the highest authority and wields tremendous power.”²⁹¹ Because all agencies derive their legitimacy from the delegation of power by the top leadership and the central government, “the whole bureaucracy is organized based on an upward accountability system.”²⁹²

This structure highlights the second point to be made, namely that inter-agency and inter-ministry cooperation is essential in China for antitrust enforcement. Decisions are reached by consensus, with the agency in charge of an investigation requesting the input of other organizations.

This practice is known as “*huiqian*” (會簽, “countersign”):²⁹³ if the different Ministries and agencies agree with a proposed course of action, the State Council will ratify it. If not, the State Council must reach its own decision after extensive research and more consultation with different ministries. Inevitably, decisions are influenced by different views, which makes them appear, on occasion, inconsistent with economic principles and international standards. Interestingly, as discussed below,²⁹⁴ the behavioral remedies imposed by the SAMR in *Meituan* included a commitment to treating drivers fairly, reflecting concerns about the treatment of drivers across different agencies. The Ministry of Transport,

²⁸⁶ Zhang, *Agility over Stability*, *supra* note 6, at 13.

²⁸⁷ *Id.*

²⁸⁸ Ding Liang, *China*, in CARTELS & LENIENCY LAWS & REGULATIONS 2022, ¶1.3 (15th ed. Matthew Readings & Elvira Aliende Rodriguez eds., 2021).

²⁸⁹ See Emch, *supra* note 279.

²⁹⁰ Zhang, *Agility over Stability*, *supra* note 6, at 12.

²⁹¹ Liang, *supra* note 288, at 7–8.

²⁹² *Id.* at 8.

²⁹³ ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 37, at 61.

²⁹⁴ See *infra* Section IV.B.

the Cyberspace Administration of China (CAC) and the Ministry of Industry and Information Technology have all intervened against ride-hailing apps, ordering them to treat drivers more fairly.²⁹⁵

It follows that antitrust rules are but one potential enforcement action Big Tech now faces, and the SAMR is only one of a number of agencies they need to deal with. For example, immediately after their listing on the New York stock exchange,²⁹⁶ the CAC announced a “Cybersecurity review”²⁹⁷ of Didi, the Chinese ride-hailing and mobility app. Financial authorities have taken the lead against Ant Financial (Ant), the fintech giant set up by Alibaba’s founder, Jack Ma,²⁹⁸ days before it was due to be listed in an initial public offering (IPO) on the New York stock exchange. After the IPO was halted on November 3, 2020, Ant was summoned to a meeting by the People’s Bank of China (PBOC), the Insurance and Banking Regulatory Commission, the China Securities and Exchange Commission, and the Foreign Exchange Commission.²⁹⁹

More generally, in January 2021, the PBOC made public its draft regulations on non-banking payment institutions (such as Ant Group, Alipay, Tencent, and WeChat Pay).³⁰⁰ If finalized, the PBOC will have the power to send alerts to SAMR whenever a non-banking payment institution reaches certain market shares (lower than the shares for dominance under the AML).

This interdependence between agencies makes companies operating in China particularly susceptible to an array of regulatory attacks: a conflict with any one of them can aggravate a company’s relationship with the

²⁹⁵ Yujie Xue & Minghe Hu, *Beijing Orders Meituan, Didi Chuxing and Other Ride-hailing Providers to Give Drivers a Fair Share of Revenue*, S. CHINA MORNING POST (May 15, 2021), <https://www.scmp.com/tech/big-tech/article/3133614/beijing-orders-meituan-didi-chuxing-and-other-ride-hailing-providers>.

²⁹⁶ Jessica Bursztynsky & Steve Kovach, *Didi Shares Fall after China Announces Cybersecurity Review Just Days after IPO*, CNBC (July 2, 2021), <https://www.cnbc.com/2021/07/02/didi-shares-fall-after-china-announces-cybersecurity-review.html>.

²⁹⁷ Lauren Dudley et al., *The Final Cybersecurity Review Measures for ‘Critical Information Infrastructure’ Come Three Years after the Cybersecurity Law Went into Effect*, NEW AMERICA (Apr. 27, 2021), <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/chinas-cybersecurity-reviews-eye-supply-chain-security-critical-industries-translation/>. This includes an English translation of the primary source.

²⁹⁸ This happened shortly after Ma’s widely reported speech on October 24, 2020, at the 2020 Bund Summit in Shanghai. In it, he criticized China’s financial regulation and banking institutions. Kevin Su, *Bund Finance Summit Speech* (Nov. 9, 2020), <https://interconnected.blog/jack-ma-bund-finance-summit-speech/>.

²⁹⁹ Eliza Gkritsi, *Ant Group to Meet Regulators ‘in the Coming Days,’* TECHNODE (Dec. 24, 2020), <https://technode.com/2020/12/24/ant-group-to-meet-regulators-in-the-coming-days/>.

³⁰⁰ Zhōngguó rénmin yínháng guānyú “fēi yínháng zhīfù jīgòu tiáolì (zhēngqiú yìjiàn gǎo)” gōngkāi zhēngqiú yìjiàn de tōngzhī (中国人民银行关于《非银行支付机构条例（征求意见稿）》公开征求意见的通知) [Chinese Bank’s Notice on the Public Solicitation of Comments on the Regulations on Non-Bank Payment Institutions (Draft for Comment)] (promulgated by the People’s Bank of China (Jan. 21, 2021); see also *China to Toughen Supervision of Non-Bank Payment Institutions*, THE STATE COUNCIL, PEOPLE’S REPUBLIC OF CHINA (Jan. 21, 2021), http://english.www.gov.cn/statecouncil/ministries/202101/21/content_WS6008b939c6d0f725769443b7.html,

others. This may explain the reluctance of the parties to an investigation to challenge the authorities, as we have seen in *Alibaba*, *Meituan*, and *Sherpa*'s, amongst others.³⁰¹

Third, judicial scrutiny of the authorities' decisions tends to be weak in China. By way of example, of the ninety-five cases on anticompetitive agreements identified,³⁰² only three were appealed. The appeals were against the local AMEAs (rather than the all-powerful central authorities). They were all unsuccessful.³⁰³ The most interesting case concerned an appeal by Yutai, a fish feed company fined by the Hainan DRC for RPM.³⁰⁴ The company challenged the decision and won in the first instance at the Haikou Intermediate People's Court. After this, "NDRC officials travelled to Hainan to lobby the local government"³⁰⁵ and the Hainan High Court reversed the judgment. Yutai subsequently appealed to the SPC and lost. While the SPC acknowledged that RPM could have procompetitive effects, it found that the *per se* illegality of RPM was justified "on the grounds that the Chinese market was not yet fully developed, and competition continues to be weak."³⁰⁶ According to the SPC, "requiring the administrative agency to satisfy a high burden of proof could have a chilling effect on public enforcement."³⁰⁷ This sharply contrasts with the case law in Hong Kong.

The fourth point concerns the nature of the companies investigated. The current backlash against the platform economy in China can also be seen as a "dramatic clash between public and private power[.]"³⁰⁸ The Chinese platform economy is dominated by private companies but much of Chinese traditional economy relies on SOEs. These are part of the bureaucracy, with a rank determined by their governance. The 2011 antitrust investigation of China Telecoms and China Unicom, two powerful SOEs owned by the central government, is illustrative of the stringent

³⁰¹ *Supra* section I.B.

³⁰² *See infra* app.

³⁰³ The first case was an appeal in December 2014 against the decision by the Jiangsu Price Bureau regarding the Nanjing Concrete Industry Cartel. The Nanjing Intermediate People's Court dismissed the appeal, finding that the limitation period had expired. *See* BULLETIN JAN./FEBRUARY 2015, *supra* note 24, at 9. The second case was an appeal in May 2017 by seven of twenty-five accounting firms sanctioned by the Shandong AIC in the Shandong Accounting cartel. The Beijing Intermediate People's Court dismissed the appeal as to whether the Shandong AIC had determined the facts and applied the law correctly. *See* MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JUNE 2017, 6 (Allan Fels et al. eds., 47th ed 2017), https://law.unimelb.edu.au/_data/assets/pdf_file/0007/2459185/China-Competition-Bulletin-June-2017.pdf [hereinafter COMPETITION BULLETIN JUNE 2017].

³⁰⁴ The third appeal is referred to in ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 37, at 77–78.

³⁰⁵ *Id.* at 78 (quoting an interview in November 2018 with a judge privy to the case).

³⁰⁶ *Id.* at 78; *see also* Lester Ross & Tingting Liu, *China's Supreme People's Court Rules RPM is illegal Per Se*, WILMERHALE (July 3, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190703-chinas-supreme-peoples-court-rules-rpm-is-illegal-per-se>.

³⁰⁷ ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 37, at 78.

³⁰⁸ Brian Liu & Raquel Leslie, *China's Tech Crackdown: A Year in Review*, LAWFARE (Jan. 7, 2022), <https://www.lawfareblog.com/chinas-tech-crackdown-year-review>.

bureaucratic constraints that apply.³⁰⁹ In the Chinese bureaucracy, the rank of the leaders of China Unicom and China Telecom was equal to that of the leader of the investigating agency (the precursor to the SAMR, the NDRC), outstripping that of the Director General of the Antitrust Bureau within the NDRC, which was responsible for antitrust matters. Central SOEs are also overseen by the powerful State-owned Assets Supervision and Administration Commission (SASAC), whose goal is to maximize the value of the assets it oversees—antitrust penalties impact share performance and asset value. Ultimately, the investigation of China Unicom and China Telecom resulted in a commitment on the part of the SOEs to reduce fees but not a fine; the investigation was effectively suspended.³¹⁰

Finally, procedural safeguards appear to be less developed in China than in other jurisdictions, including Hong Kong, which has developed strict due process procedures. As discussed above,³¹¹ until recently, direct reporting by the agencies has been haphazard, obliging researchers to rely on second-hand accounts. Even high-profile decisions of the SAMR, such as *Alibaba*, are relatively short on details. Further, although authorities issue guidance, this is not always followed in practice. For example, despite the authorities' guidance that only one applicant should receive total immunity under the Leniency Policy, in fact immunity has been granted to more than one party.³¹² Overall, therefore, the Chinese authorities enjoy a level of discretion unprecedented in other jurisdictions.

IV. SPEED, EFFECTIVE REMEDIES, AND REGULATORY ACTION

Comparing the applicable laws and practice of the competition authorities in Hong Kong and in China also invites comparison of the efficiency of investigations and effectiveness of the remedies adopted. In subsection A below, data on the length of the judicial process is used to conclude that investigations in Hong Kong are likely to take on average about as long as the average for investigations in other jurisdictions, notably the European Union. In Hong Kong, the parties and the HKCC exercise their rights to appeal vigorously. In China, the incredible speed in issuing decisions in *Alibaba* and *Meituan* is not matched by the (still impressive) speed of other investigations, particularly by AMEAs at the

³⁰⁹ ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 37, at 53–56.

³¹⁰ Although the NDRC took the unusual step of televising its investigation and this still resulted in a loss of value for the companies in question. See Angela H. Zhang, *Strategic Public Shaming: Evidence from Chinese Antitrust*, 237 CHINA Q. 174 (2019).

³¹¹ See *infra* app.

³¹² See HA ET AL., *supra* note 50 (discussing the Infant Formula Milk Cartel).

local level. The analysis of the three abuse of dominance cases above³¹³ indicates that speed is not achieved at the expense of thorough legal analysis, but by focusing on narrow conduct in a market where dominance of the platform is not in doubt. This could be a blueprint for authorities in other countries seeking to reach a decision in cases where speed is of the essence, for example to signal that a particular practice is not acceptable in a dynamic, fast-paced market that is still developing.

Still, if competition law remedies are adopted alongside fines, they should be proportionate to the issues identified and seek to restore competition. The analysis of behavioral remedies in Hong Kong and in China in subsection B below shows that the authorities take a high-level approach. Particularly in China, it is difficult to see how the remedies imposed in *Alibaba* or *Meituan* could address competition-related concerns effectively.

It is possible that China intends to tackle the root causes of competition concerns through forthcoming regulation, rather than competition law. If so, China could adopt a competition and regulation model under which competition law is intended mostly to serve as a mechanism to punish infringers (rather than to remedy the concerns), and regulation (including penalty for non-compliance) to address market failures. At a time where regulation for Big Tech is on the cards internationally, authorities the world over will have access to an expanded toolkit, allowing them to adopt the same competition and regulation approach. This article suggests this approach as a possible way forward, considered further in subsection C.

A. *Length of Antitrust Procedure in Hong Kong and China*

1. *Hong Kong: not that fast*

As aforementioned,³¹⁴ there is evidence that adversarial systems are “often more expensive and protracted”³¹⁵ than administrative ones. Looking at the judgment of the HKCT, the length of the judicial process from beginning of the proceedings before the HKCT to issuance of the penalty judgment lasts, on average, two years and two months. The slowest was three years and nine months, in *Nutanix*. The quickest was ten months from case filing, in *Quantr*.

Judicial resolution is, however, only the final part of an investigation. As the HKCC does not publicize the exact date of commencement of its investigations, it is difficult to know the average

³¹³ See *supra* Section I.B.

³¹⁴ See *supra* section III.A.

³¹⁵ Nam, *supra* note 248, at 328.

length of a procedure from the time that the parties first become aware that they are under investigation, to the HKCT issuing a penalty judgment. Considering the need for the HKCC to collect the evidence and instruct proceedings, it would not be unreasonable to speculate that the average length of investigations in Hong Kong to date would have been at least around four years, which is also the average for European Commission (administrative) antitrust investigations.³¹⁶

The timing of the judicial process in the main cases in Hong Kong is detailed below. A number of appeals against HKCT's judgments are pending.

In the much-awaited abuse of dominance *Linde* judgment, the HKCC filed the case on December 21, 2020.³¹⁷ At the time of writing (April 2022, one years, and four months after commencement of proceedings), the case is pending.

In *Nutanix*,³¹⁸ the HKCC commenced proceedings on March 23, 2017.³¹⁹ The HKCT handed down its liability judgment on May 17, 2019, and the penalty judgment on December 16, 2020,³²⁰ three years, and nine months after commencement of the proceedings.

In *W. Hing Construction Company*,³²¹ the HKCC commenced proceedings on August 14, 2017.³²² This was the first of three cases brought for cartel behavior in the renovation of Hong Kong public housing estates (the *First Decoration Contractors* case). The HKCT issued its liability judgment on May 17, 2019, the same day as in *Nutanix*, and its penalty judgment on April 29, 2020 (two years, and eight months after commencement of the proceedings). One of the defendants appealed the decision, but the appeal was dismissed. The HKCC is also appealing the HKCT's penalty judgment that some respondents should receive a one-third discount on the penalties because they subcontracted the work to a third party.³²³

³¹⁶ *Special Report of the European Court of Auditors on The Commission's EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight*, at ¶ 54 (2020), https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf

³¹⁷ Competition Comm'n Press Release, *supra* note 48.

³¹⁸ Competition Comm'n v. Nutanix Hong Kong Ltd., CTEA 1/2017 (H.K.).

³¹⁹ Press Release, H.K. Competition Comm'n, Competition Commission Takes Bid-Rigging Case to 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.

³²⁰ COMPETITION COMM'N 2020/2021 ANNUAL REPORT, *supra* note 183.

³²¹ Competition Comm'n v. W. Hing Construction Company Ltd., [2018] H.K.C.T. 2 (H.K.).

³²² Press Release, H.K. Competition Comm'n, Competition Commission Takes Market Sharing and Price Fixing Case to Competition Tribunal (Aug. 14, 2017), https://www.compcomm.hk/en/media/press/files/20170814_Competition_Commission_takes_market_shari.pdf [hereinafter HKCC Press Release, Market Sharing and Price Fixing].

³²³ COMPETITION COMM'N 2020/2021 ANNUAL REPORT, *supra* note 183, at 30.

In *Kam Kwong Engineering Company*,³²⁴ the HKCC commenced proceedings on September 6, 2018.³²⁵ This was the second of three cases for cartel behavior in the renovation of Hong Kong public housing estates (the *Second Decoration Contractors* case). Following the judgment in *W. Hing Construction Company*, some of the respondents agreed to admit liability. Jointly with the Commission, they applied to the HKCT to dispose of the proceedings by consent, in a procedure that became known as the *Kam Kwon procedure*. The liabilities of five respondents were established by September 2020.³²⁶

In the *Third Decoration Contractors* case, *Fungs E& M Engineering*,³²⁷ concerning cartel behavior in the renovation of Hong Kong public housing estates, the HKCC commenced proceedings on July 3, 2019. All respondents agreed to adopt the *Kam Kwong procedure*, and on October 14, 2020, the HKCT issued a liability judgment based on agreed statements of fact. In judgments dated October 30, 2020, and January 5, 2021, one and a half years after commencement of the proceedings, the HKCT decided on sanctions. Six contractors and two individuals were ordered to pay fines and one individual was given a twenty-two-month disqualification order.³²⁸

In *Quantr*,³²⁹ proceedings were begun by the HKCC on January 22, 2020. Liability was resolved pursuant to the *Kam Kwong procedure* and the Tribunal handed down penalty judgment on November 3, 2020. As discussed above, one party investigated, Nintex Proprietary Limited, accepted the infringement notice, adopted compliance measures for two years, and thus avoided a pecuniary fine. The HKCT ordered Quantr to pay a penalty fee of HK\$37,702.76 and the HKCC's legal costs. Quantr also agreed to a set of compliance measures for three years. This case was started by a leniency application and is the first case in Hong Kong to include behavioral remedies as part of a settlement package endorsed by the HKCT. It is also "the fastest case resolved by way of settlement[.]"³³⁰ in which the HKCT "gave the orders sought by the parties within 10 months from case filing[.]"³³¹

³²⁴ Competition Comm'n v. Kam Kwong Engineering Co. Ltd., [2020] 4 H.K.L.R.D. 61 (H.K.).

³²⁵ Press Release, H.K. Competition Comm'n, Competition Commission Takes Renovation Cartel Case to Competition Tribunal (Sept. 6, 2018), https://www.compcomm.hk/en/media/press/files/Competition_Commission_takes_renovation_cartel_case_to_Competition_Tribunal_EnglishPR.pdf.

³²⁶ HKCC Press Release, Market Sharing and Price Fixing, *supra* note 322, at 31–32.

³²⁷ Competition Comm'n v. Fungs E&M Eng'g Co. Ltd., [2020] H.K.C.T. 5 (H.K.).

³²⁸ HKCC Press Release, Market Sharing and Price Fixing, *supra* note 322, at 32.

³²⁹ Competition Comm'n v. Quantr Ltd., [2020] 5 H.K.L.R.D. 528 (H.K.).

³³⁰ HKCC Press Release, Market Sharing and Price Fixing, *supra* note 322, at 33.

³³¹ *Id.*

2. *China: remarkable speed, with some nuances*

The analysis undertaken shows that in China, it generally takes competition authorities at the local level longer to reach a decision than it does the central authorities (the SAMR and its predecessors). This finding is likely due to the greater expertise and focus available at the central level, as local authorities have a number of functions besides antitrust enforcement.

As seen above, it took the Shanghai AMR eighteen months to reach a decision in *Sherpa*'s. This is remarkable, both compared to the situation in Hong Kong detailed above, and especially when compared to the average of around four years for the European Union,³³² which can be longer for cartel investigations and complex anticompetitive cases.³³³ However, the decision against Alibaba was reached in less than five months,³³⁴ and the decision against Meituan in six months. This is truly impressive.

In terms of cartel investigations, the Chinese case law review reveals eleven cases where information as to the length of the investigation is available. Based on this, the competition authorities appear to take, on average, about two years to conclude an investigation in price-fixing cases in China.

Among those reviewed, the longest investigation, the Guangxi Administration for Industry and Commerce (AIC) proceedings in the *Hechi Insurance Cartel*,³³⁵ lasted three and a half years, from December 2013 to March 20, 2017. The case ultimately led to fines of five percent of the revenue of nine insurance companies in 2013 and of RMB100,000 against the Hechi Insurance Association. In the *Wuhan Car Insurance Cartel*,³³⁶ the Hubei AIC fined the Hubei Insurance association and four enterprises after an investigation that lasted more than three years, from March 2013 to May 2016. Similarly, the Zhejiang AIC took more than three years to conclude its investigation of the *Shangyu Concrete Industry Cartel*, from August 2011 to September 2014.³³⁷ This resulted in fines against the industry association and eight members. By contrast, it took only just over one year (from August 2014 to December 2015) for the

³³² *Special Report No. 24/2020 of the European Court of Auditors on the Commission's EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight* (Nov. 19, 2020), <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=56835>.

³³³ *Id.* at 54.

³³⁴ The investigation started in December 2020 and the decision is dated April 10, 2021.

³³⁵ See COMPETITION BULLETIN JUNE 2017, *supra* note 303, at 4.

³³⁶ JINGYUAN MA, COMPETITION LAW IN CHINA: A LAW AND ECONOMICS PERSPECTIVE 73 (2020).

³³⁷ See COMPETITION BULLETIN JAN./FEB. 2015, *supra* note 24, at 5.

central NDRC to impose fines against eight companies involved in the high-profile international *Roll-on/Roll-off Freight Services Cartel*.³³⁸

B. Effectiveness of Remedies

Quite apart from the issues surrounding the imposition of fines, which have been dealt with above,³³⁹ in Hong Kong and in China the authorities have sought to impose behavioral remedies. As has been noted,³⁴⁰ imposition of remedies in antitrust actions should not only punish the infringers but also restore competition in the relevant market.³⁴¹ So far, in Hong Kong it seems that the adoption of behavioral remedies has been confined to committing infringers to adopt internal compliance measures.³⁴²

In China, the behavioral remedies imposed by the SAMR in *Alibaba*, *Sherpa's* and *Meituan*, appear to be simultaneously narrow for the purpose of restoring competition, as befits the narrow focus of the investigation; and wide, going beyond the scope of antitrust scrutiny, as Chinese authorities can do, given their interdependencies.³⁴³ In *Alibaba*, the Administrative Instruction³⁴⁴ obliges the company to “carry out a comprehensive and in-depth self-examination against the AML[,]”³⁴⁵ meet various requirements to ensure that they do not exclude or restrict competition,³⁴⁶ adopt internal governance³⁴⁷ and compliance systems,³⁴⁸ and notify mergers. Alibaba is required to adopt a rectification plan and submit compliance reports for three years. As has been remarked, “there is not much in there as far as restorative remedies go, meaning that the measures are unlikely to reduce the profitability of the illegal conduct.”³⁴⁹ In *Sherpa's*, the company proactively issued a statement committing to implementing a rectification plan.³⁵⁰ In *Meituan*, the company has to submit compliance report similar to the requirements in *Alibaba* but in addition, they are asked to commit to improving the working conditions of

³³⁸ See Gu & Sun, *supra* note 153.

³³⁹ See *infra* Section I.D.

³⁴⁰ Colino, *Incursion of Antitrust*, *supra* note 15, at 21; see also *supra* note 192.

³⁴¹ *Id.*

³⁴² See, e.g., Competition Comm'n v. Quantr Ltd., [2020], H.K.C.T. 10 (H.K.).

³⁴³ See *supra* Section III.B.

³⁴⁴ An English translation of the Alibaba Administrative instruction is provided by Zichen Wang, *Beijing Anti-Monopoly Findings on Alibaba: A Deep Dive*, PEKINOLOGY (Apr. 11, 2021), https://pekingnology.substack.com/p/beijings-anti-monopoly-findings-on?utm_source=url.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Colino, *Incursion of Antitrust*, *supra* note 15, at 15.

³⁵⁰ *Sherpa's fined \$178,351 for monopoly behaviors in China in 2020*, GLOB. TIMES (Apr. 12, 2021), <https://www.globaltimes.cn/page/202104/1220821.shtml>.

their drivers. A remedy of this kind would likely be *ultra vires* the jurisdiction of most competition authorities and be challenged in countries with a tradition of robust judicial review of administrative action. It also introduces an extraneous element that detracts from addressing the market concerns.

C. *A Three-Pronged Approach?*

Looking at legislative changes in China in the whole, alongside the antitrust crack-down against Big Tech, the SAMR is seeking to introduce regulatory measures to be imposed on “super platforms.” In October 2021, it published draft Guidelines for the Classification of Platforms (“Draft Classification Guidelines”) and draft Guidelines on the Responsibility of Internet Platforms (“Draft Responsibilities Guidelines”).³⁵¹ A detailed analysis of these draft Guidelines is beyond the scope of this article,³⁵² but the system envisaged would first identify those platforms that, by virtue of factors such as number of users, market valuation, or essentiality of services offered to competitors, are presumed to have market power. Under these proposals, super platforms should be subject to a number of requirements such as to ensure interoperability and data protection, among others. The system is comparable to similar regulatory proposals in other jurisdictions, notably in the European Union, where under the Digital Markets Act,³⁵³ “digital gatekeepers” will be subject to wide-ranging regulatory obligations.

This article proposes a three-pronged approach for investigating competition concerns by Big Tech.

Firstly, swift action by the competition authorities can be achieved by zooming in on narrow, well-understood instances of abuse of dominance. This focused approach limits the complexity of the theory of harm to be proven, reducing the time it takes to issue a decision. In fast-moving, dynamic markets where the need to act swiftly is greater, it is more effective to issue an early, easily understood decision than to try to carry out investigations on multiple markets and novel theories of harm. The parties to the investigation must have access to a robust system of appeals and must be able to put forward evidence as to the objective justification

³⁵¹ Guidelines for the Classification and Grading of Internet Platforms (Draft for Comments) (互联网平台分类分级指南 (征求意见稿)), and Guidelines for the Implementation of Entity Responsibilities of Internet Platforms (互联网平台落实主体责任指南(征求意见稿)) (promulgated by the State Admin. for Mkt. Regul., Oct. 29, 2021), http://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html (China).

³⁵² For an overview, see Colino, *Incursion of Antitrust*, *supra* note 15, at 31.

³⁵³ See Commission Regulation 2020/0374 of December 15, 2020, Contestable and Fair Markets in the Digital Section, 2020 O.J. (L 842) 34–35.

of their practices, if any. Particularly in novel cases, these are necessary measures to reduce the risk of Type I errors.

Secondly, competition authorities should still seek to execute comprehensive investigations in cases that require a formulation and assessment of novel theories of harm across a number of markets, leading to the imposition of hefty fines. Bringing unavoidably time-consuming and resource intensive cases is necessary for the development of antitrust analysis.

Thirdly, regulation can be used to identify and address the root causes of the observed anticompetitive behavior and impose appropriate remedies alongside the competition law assessment of individual cases in an overarching competition and regulation framework of intervention.

CONCLUSION

A comparative review of the competition laws in China and in Hong Kong demonstrates that, whatever the method of enforcement and the institutional set-up, adversarial systems still need to provide the competition authorities with the tools they need for enforcement and detection. Administrative systems need the corrective power of judicial scrutiny and procedural limits to the discretion of the authorities. The two aspects go together.

Unless businesses and individuals understand that there are significant penalties for non-compliance, they will be unlikely to take antitrust seriously. This is a risk in Hong Kong, where the adversarial system operates within significant constraints, in terms of coverage of the law (particularly of merger control), enforcement (specifically, the need to issue warning notices and the mandatory statutory exemptions for *de minimis* agreements), and punishment of violations (with generally low sanctions and a high burden of proof for the HKCC to discharge). However, unless a regime is subject to appropriate checks and balances, it may end up prioritizing “swift and decisive intervention”³⁵⁴ over the importance of fairness and “getting it right[.]”³⁵⁵ This is a risk in China, where the administrative system operates outside the constraints of robust judicial scrutiny and agencies are interlinked across different functions and sectors, highlighting the danger of prosecutorial bias that is inherent in any administrative system. This aspect will be further exacerbated when the AML Amendment Proposals³⁵⁶ will become law, as the competition authorities will obtain greater powers to sanction and intervene.

³⁵⁴ Colomo, *Rule of Law*, *supra* note 11.

³⁵⁵ *Id.*

³⁵⁶ AML Amendment Proposal, *supra* note 52.

Some aspects of the enforcement practice of the SAMR, notably the focus on a specific abusive conduct in a market where the dominance of the players is beyond doubt, could be adopted by other competition authorities seeking to speed up their investigations to send a clear signal that certain conduct will not be tolerated. Antitrust and regulation could work hand-in-hand for swift actions against infringers and for tackling the causes of market imperfections. However, there remains a risk that policymakers the world over will see the competition aspects in isolation. Dazzled by the speed of action of the SAMR and the AMEAs against the perceived market power of Big Tech in China, they could make the case for expanding the powers of the competition authorities and reduce procedural protections, including availability of judicial review, forgetting that mastery of details and fairness also matter.

APPENDIX

Reports of Cases and Investigations by Competition Authorities in China

1. **Xiamen Courier Industry Price Self-Discipline Convention Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN MARCH/APRIL 2014, 5 (Allan Fels. et al. eds., 31st ed. 2014).
2. **Ningxia Courier Companies Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JANUARY/FEBRUARY 2015, 6 (Allan Fels. et al. eds., 35th ed. 2015).
3. **Wuxi Quarry Operators Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JANUARY/FEBRUARY 2015, 6 (Allan Fels. et al. eds., 35th ed. 2015).
4. **Nanjing Concrete Industry Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JANUARY/FEBRUARY 2015, 9 (Allan Fels. et al. eds., 35th ed. 2015).
5. **Shangyu Concrete Industry Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JANUARY/FEBRUARY 2015, 9 (Allan Fels. et al. eds., 35th ed. 2015).
6. **Guandong Nissan Distributors Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN SEPTEMBER/OCTOBER 2015, 6 (Allan Fels et al. eds., 39th ed. 2015).
7. **Infant Formula Milk Cartel.** HANNAH HA ET AL., *China, in ENFORCEMENT, APPEALS & DAMAGES ACTIONS* 37, 42 (Nigel Parr & Euan Burrows eds., 2014); *see also* ANGELA H. ZHANG, CHINESE ANTITRUST EXCEPTIONALISM: HOW THE RISE OF CHINA CHALLENGES GLOBAL REGULATION 43–44, 81–82 (2021).
8. **Automakers Cartel.** Samson Yuen, *Taming the “Foreign Tigers:” China’s Anti-Trust Crusade Against Multinational Companies*, 4 CHINA PERSPECTIVES 53, 53 (2014).
9. **12 Japanese Auto Parts and Bearing Manufacturers Cartel.** Michael Gu & Sihui Sun, *NRDC Imposes Record Fines on 12 Japanese Auto Parts and Bearing Manufacturers*, LEXOLOGY (Sept. 25, 2014), <https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/ndrc-imposes-record-fines-on-12-japanese-auto-parts-and-bearing-manufacturers>; *see also* MELBOURNE L. SCH. CHINA COMPETITION BULLETIN JULY/AUGUST 2014, 2 (Allan Fels et al. eds., 33d ed. 2014).
10. **Aerated Bricks Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JULY/AUGUST 2014, 3 (Allen Fels et al. eds., 33d ed. 2014).

11. **Inner Mongolia Fireworks and Firecrackers Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JULY/AUGUST 2014, 2 (Allen Fels. et al. eds., 33d ed. 2014).
12. **Wuhan BMW Distributors Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN JULY/AUGUST 2014, 2 (Allen Fels. et al. eds., 33d ed. 2014).
13. **Mayang Shale Brick Cartel.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN MAY/JUNE 2015, 5 (Allen Fels. et al. eds., 37th ed. 2015).
14. **Yunnan Telecoms Administrative Monopoly Case.** MELBOURNE L. SCH., CHINA COMPETITION BULLETIN MAY/JUNE 2015, 5 (Allen Fels. et al. eds., 37th ed. 2015).
15. **Roll-on/Roll-off Services Cartel.** Michael Gu & Sihui Sun, *NDRC Rules in First International Shipping Company Monopoly Case*, LEXOLOGY (Aug. 4, 2016), <https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/ndrc-rules-in-first-international-shipping-company-monopoly-case>.
16. **Tableware Disinfection Cartel.** Alert Memorandum from Cleary Gottlieb on the First Price Cartel Cases Under the Chinese AML (May 21, 2010), <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/first-price-cartel-cases-under-the-chinese-aml.pdf>.
17. **Rice Noodles Cartel.** JINGYUAN MA, COMPETITION LAW IN CHINA: A LAW AND ECONOMICS PERSPECTIVE 67 (2020); *see also* Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS § 6.03[A][1] (Adrian Emch & David Stallibrass eds., 2013).
18. **LCD Panel Manufacturing Cartel.** Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS § 6.03[A][8] (Adrian Emch & David Stallibrass eds., 2013).
19. **Sea Sand Cartel.** Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS § 6.03[A][7] (Adrian Emch & David Stallibrass eds., 2013).
20. **Fuyang Paper Manufacturing Cartel.** Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS § 6.03[A][5] (Adrian Emch & David Stallibrass eds., 2013).
21. **Package Industry Cartel.** Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS § 6.03[A][6] (Adrian Emch & David Stallibrass eds., 2013).

22. **Book Resale Price Cartel.** Xue Qiang & Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey*, in CHINA ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS § 6.03[A][3] (Adrian Emch & David Stallibrass eds., 2013).
23. **Zhejiang Car Insurance Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN SEPTEMBER/OCTOBER 2014, 1 (Allan Fels et al. eds., 34th ed. 2014).
24. **Jilin Cement Clinker Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN SEPTEMBER/OCTOBER 2014, 2 (Allan Fels et al. eds., 34th ed. 2014).
25. **Driving School Associations Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN JANUARY/FEBRUARY 2014, 4 (Allan Fels et al. eds., 30th ed. 2014).
26. **Qiqihar City Bathhouses Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN MARCH/APRIL 2015, 4 (Allan Fels et al. eds., 36th ed. 2015).
27. **Jiangsu Mercedes-Benz Distributors Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN MARCH/APRIL 2015, 3 (Allan Fels et al. eds., 36th ed. 2015).
28. **Shandong GPS Platform Administrative Monopoly Case.** MELBOURNE L. SCH., COMPETITION BULLETIN MARCH/APRIL 2015, 3 (Allan Fels et al. eds., 36th ed. 2015).
29. **Gansu GPS Platform Administrative Monopoly Case.** MELBOURNE L. SCH., COMPETITION BULLETIN JANUARY/FEBRUARY 2016 (Allan Fels et al. eds., 40th ed. 2016).
30. **Wuwei Secondary Car Maintenance Services Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN JANUARY/FEBRUARY 2016, 8 (Allan Fels et al. eds., 40th ed. 2016).
31. **Yongzhou Concrete Industry Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN JANUARY/FEBRUARY 2016, 8 (Allan Fels et al. eds., 40th ed. 2016).
32. **Jiangxi Car Insurance Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN JANUARY/FEBRUARY 2016, 10 (Allan Fels et al. eds., 40th ed. 2016).
33. **Allopurinol Tablets Cartel.** MELBOURNE L. SCH., COMPETITION BULLETIN JANUARY/FEBRUARY 2016, 11 (Allan Fels et al. eds., 40th ed. 2016).
34. **Tianjin Port Yard Cartel.** MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT 17 (2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end2018_190022.pdf.
35. **Tallying Services Cartel.** MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT 18 (2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end2018_190022.pdf.

36. **Guangdong River Sand Mining.** MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT 18 (2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end2018_190022.pdf.
37. **Henan Construction Engineering Quality Inspection.** MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT 19 (2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end2018_190022.pdf.
38. **Gas Management Cartel.** MORGAN LEWIS, GLOBAL CARTEL ENFORCEMENT REPORT 18 (2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end2018_190022.pdf.
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