Oxford Competition Law

7 Procedural Fairness in Hong Kong Competition Law

Kelvin Hiu Fai Kwok, Thomas K. Cheng

From: Antitrust Procedural Fairness
D. Daniel Sokol, Andrew T. Guzman

Content type: Book content
Product: Oxford Competition Law [OCL]
Published in print: 24 January 2019
ISBN: 9780198815426

Subject(s):

Fair, reasonable, and non-discriminatory terms (FRAND) — Unfair trading conditions — Basic principles of competition law — Enforcement and procedure

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1. Introduction

Procedural issues, while often overlooked, are of paramount importance to every competition law regime. Given the heavily punitive nature of competition law penalties in many jurisdictions and the stigma attached to being a violator of competition law, it is important that parties enjoy adequate procedural rights to allow them to mount an effective defense. Procedural issues are all the more important in a new regime like Hong Kong's, where many questions regarding the parties' procedural rights remain unsettled. These questions will need to be addressed before the competition law regime can hit its stride and focus on the important task of ferreting out anticompetitive practices and advancing consumer welfare.

This chapter explores the current state of a number of procedural issues under Hong Kong's competition enforcement regime, including the party's right to legal protection, access to case file, agency engagement, and the sufficiency of judicial oversight. Pertaining to the final issue, special attention will be paid to the hugely important matter of the applicable standard of proof under the competition legislation. The resolution of this issue will largely determine the effectiveness of competition law enforcement in Hong Kong.

2. General Procedural Issues under the Hong Kong Competition Ordinance

The Competition Ordinance[1] only came into effect on December 14, 2015 and the Hong Kong Competition Commission (hereafter the "HKCC") (p. 113) so far has only brought two cases in the Competition Tribunal,[2] neither of which has been decided on their substantive merits at the time of writing. It is important to consider the procedural safeguards provided by the CO. Therefore, one must refer to the procedural provisions in the CO and the enforcement guidelines[3] issued by the HKCC in order to gain a better understanding of the procedural safeguards that apply in Hong Kong's competition enforcement regime. The discussion that follows will focus on four key aspects: legal representation, parties' access to documents, agency engagement during the investigation process, and judicial oversight of agency decisions.

In trying to understand the extent of legal representation permitted during the investigation process, it is helpful to focus on the various investigative powers the HKCC is empowered by the CO to exercise, and whether legal representation is permitted when the target of an investigation responds to the HKCC's exercise of those powers. The CO gives the HKCC three main investigative powers: the power to issue document requests and requests for information under Section 41, the power to request attendance at an interview under Section 42, and the power to search a party's premises under warrant under Section 48.

Under Section 41 of the CO, the HKCC is allowed to request any person to produce a document or provide any specified information that may be of assistance in the investigation of a possible contravention of the CO.[4] The HKCC is required to specify in the notice to the party the nature and purpose of the investigation and the possible legal consequences for non-compliance. Section 41 provides further details on how a party may comply with a document or information request from the HKCC, such as the form in which the document or information is to be produced and the obligation of the party to provide appropriate personnel to explain the content of a document.[5] Section 41 did not specify whether a party is permitted to seek legal advice or representation in the process of responding to a Section 41 request. However, the reality is that the HKCC will not stop

parties subject to a Section 41 notice seeking legal advice. And the HKCC is aware that investigated parties have been assisted by outside counsel in responding to Section 41 notices and as far as these authors are aware, has raised no objection to it. Therefore, it is (p. 114) safe to assume that there is a right to legal representation when a party is responding to a Section 41 notice.

Section 42 authorizes the HKCC to compel an individual to appear before the HKCC to answer any questions which the HKCC believes to be reasonably related to an investigation.[6] Again, Section 42 makes no mention of the party's right to obtain legal representation in responding to a Section 42 notice. However, Section 44, which governs the applicable privileges and immunities of an individual appearing before the HKCC to give evidence, seems to shed light on this issue. Section 44 declares that the same privileges and immunities applicable in a civil proceeding in the Court of First Instance would apply to an individual appearing before the HKCC to give evidence and any counsel or solicitor who appears before the HKCC.[7] Although the section does not specify the capacity in which the counsel or the solicitor appears before the HKCC, common sense dictates that the section must be referring to counsel or a solicitor accompanying a client to give evidence before the HKCC. While this suggests that parties may be accompanied by lawyers when appearing before the HKCC, it falls short of supporting a reference of a right to legal representation. That a party may be accompanied by lawyers does not mean that it has a right to be legally represented. The HKCC's Guideline on Investigations (hereafter the "Investigations Guideline") further elucidates the issue. Section 5.19 of the Investigations Guideline states that "[a]ny person required by the [HKCC] to appear may be accompanied and represented by a legal adviser admitted to practice law in Hong Kong and, to the extent required by relevant professional regulations or rules of conduct, holding a current Hong Kong practising certificate."[8] Therefore, while it may not be a statutory right for the party to be legally represented when attending a Section 42 interview, the HKCC as a matter of policy provides such a right.

Section 48 permits a judge of the Court of First Instance, upon an application by the HKCC, to issue a warrant to search the premises of an investigated party.[9] Section 50 provides the HKCC a broad range of search and seizure powers when conducting a search under warrant. Again, Sections 48 and 50 are silent on whether a party being searched under warrant is entitled to on-site legal representation. The HKCC is of the view that a searched party has no statutory right to legal representation during a search. (p. 115) In Section 5.31 of the Investigations Guideline, the HKCC asserts that "[it] is not required by the [CO] to wait for a person's legal advisers to attend the premises before commencing its search."[10] However, the HKCC proceeds to clarify that as a matter of policy, "where parties have requested that their legal advisers be present during a search, and there is no in-house lawyer already on the premises, [the HKCC] officers will wait a reasonable time for external legal advisers to arrive."[11] This policy is subject to the further qualification that the HKCC reserves the right to begin the search immediately if (1) [HKCC] staff cannot be assured that evidence will not be tampered with during the wait or (2) the relevant legal advisers cannot commit to a timely arrival.[12]

Lastly, there is the question of whether legal representation must be provided by locally qualified lawyers or whether foreign lawyers are permitted to represent an investigated party as well. First, it is worth pointing out that this issue takes on a lower degree of importance in Hong Kong because, in reality, it is relatively easy for a foreign lawyer to obtain a local qualification. All it takes is at least two years of practical experience (or five years for non-common law jurisdictions) in her home jurisdiction and she will be entitled to sit for the Overseas Lawyers Qualification Examination.[13] Upon passing this examination, a foreign lawyer will be admitted as a qualified overseas lawyer. Short of becoming a qualified overseas lawyer, it seems that foreign lawyers are not permitted to accompany a client to appear before the HKCC. The HKCC has long maintained a policy that only locally

qualified lawyers may appear before the HKCC. As to whether foreign lawyers may assist an investigated party in responding to a Section 41 request or be present at a search under Section 48, there is a good argument that that would amount to the practice of Hong Kong law, which is only allowed for a locally qualified lawyer or a qualified overseas lawyer.[14] In short, it seems that an investigated party would need to obtain local legal representation during a HKCC investigation.

With respect to the parties' access to documents or the authority's case file during the investigation process, it is important to distinguish between a prosecutorial system and an administrative system. In an administrative system like that in the European Union and many Asian countries such as China, Korea, Japan, and Singapore, access to case file features prominently (p. 116) in the discussion of the procedural safeguards provided by a competition enforcement regime. After all, in a regime that provides limited access to case file, an investigated party could conceivably be subject to a hefty fine without much opportunity to confront and challenge the evidence relied on by the authority. However, in a prosecutorial system such as Hong Kong's, where the HKCC must bring a case before the Tribunal to establish a contravention and fines can only be imposed by the Tribunal, the same danger does not exist. Defendants can always seek discovery from the HKCC after the case has been filed in the Tribunal. This is expressly provided for by Rule 24 of the Competition Tribunal Rules.[15] This explains the lack of reference to a party's right to access the investigation file during the investigation process in the Investigations Guideline. Due to the nature of the prosecutorial system, the HKCC has taken the view that parties do not have the right of access to case files during the investigation.

With respect to the existence of meaningful engagement with agency investigative staff and decision-makers during the investigative process, neither the CO nor the Investigations Guideline bears any mention of it. Neither of them imposes any obligation on the HKCC to actively engage with parties during the investigation process. However, it is the understanding of these two authors that, so far, it has been the practice of the HKCC to engage actively with the parties, at least as far as the executive staff is concerned. HKCC staff is generally willing to meet with investigated parties during the investigative process to discuss matters of concern. The practice is different for HKCC members, who ultimately authorize a prosecution. At present, it is not part of the HKCC's practice to allow investigated parties to meet with the members directly. Parties may only present their arguments to the HKCC members via the HKCC staff.

Finally, with respect to judicial oversight, again, the issue takes on less importance in a prosecutorial system such as Hong Kong's, where fines and other penalties can only be imposed by the Tribunal. Cases are tried in the first instance by the Competition Tribunal, with the possibility of appeal to the Court of Appeal, and ultimately, to the Court of Final Appeal. Therefore, it can be said that there is very active judicial involvement and oversight in the decision-making process under the competition enforcement regime in Hong Kong. However, a procedural issue that will have far-reaching implications for the competition enforcement regime in Hong Kong was recently considered by our Court of First Instance.

(p. 117) 3. Case Study on Institutional Design and Procedural Fairness: The Case of TVB in Hong Kong

Significant issues of institutional design and procedural fairness[16] were lately considered in the Hong Kong Court of First Instance judicial review case of *Television Broadcasts Ltd v Communications Authority* (hereafter the "TVB Case").[17] The applicant, Television Broadcasts Ltd (hereafter "TVB"), was a free television broadcaster in Hong Kong. TVB signed contracts with some actors and singers with the effect of *de facto* exclusivity, and was fined by the Communications Authority (hereafter the "CA") as TVB's conduct was found to be an anti-competitive practice infringing the competition provisions in the Broadcasting Ordinance (Cap 562). TVB then applied for judicial review of the CA's

decision. The TVB case was concerned with competition provisions applicable only to television programme service licensees regulated by the CA, but these sectoral provisions are now substituted by the cross-sector conduct rules established under the CO. Despite this, some of the issues addressed in the TVB Case remain relevant to the future development of antitrust procedural fairness in Hong Kong and elsewhere. Also, the case was decided by Godfrey Lam J, who is now appointed as the President of the Competition Tribunal constituted under the CO.

The CA's decision was challenged by TVB on two main procedural grounds.[18] First, TVB argued that it was deprived of the benefit of "a fair and public hearing by a competent, independent and impartial tribunal" guaranteed under Article 10 of the Hong Kong Bill of Rights Ordinance.[19] This article is in terms identical to Article 14(1) of the International Covenant on Civil and Political Rights (hereafter the "ICCPR") and in content corresponding to Article 6(1) of the European Convention on Human Rights (hereafter the "ECHR"). Pursuant to Article 39 of the Basic Law, Hong (p. 118) Kong's mini-constitution, constitutional force is given to rights protected under the ICCPR implemented through the HKBR. Secondly, TVB argued that an incorrect standard of proof had been applied by the CA in reaching its conclusion that the impugned conduct was anti-competitive. Specifically, it was argued that the CA erred in applying the civil standard of proof on the balance of probabilities instead of the criminal standard of proof of beyond reasonable doubt, as Article 11(1) of the HKBR provides for the presumption of innocence.[20] This article is in terms identical to Article 14(2) of the ICCPR, and in content corresponding to Article 6(2) of the ECHR. We shall consider these two procedural arguments in turn.

3.1 The requirement of effective judicial protection

The requirement under Article 10 of the HKBR can be described as the requirement of "effective judicial protection."[21] Article 10 is engaged when proceedings involve the determination of either the "civil rights and obligations"[22] of, or a "criminal charge" against, a person. In the judge's view, Article 10 was applicable not because the TVB Case involved a criminal charge against TVB,[23] but because the proceedings could potentially affect TVB's civil rights and obligations, as in its present and future contractual rights against artistes and singers. It is noteworthy that this idea can be generalized to all instances in which the applicable competition law prohibitions (on restrictive agreements and abuse of market power) represent legal limitations on the defendant's freedom of contract.[24] The judge also noted that TVB's civil rights and obligations could be affected by its exposure to potential follow-on private actions in light of the CA's infringement decision. It is worth noting that the CO likewise provides for follow-on private actions,[25] so the same point can be made in relation to cases brought under the CO.

The question was, then, whether the requirement of effective judicial protection could be fulfilled by either the CA, the Chief Executive in Council (hereafter the "CEIC") (hearing an appeal from the CA), or the Court of First Instance upon judicial review. The judge held that none of these authorities could. The CA was not only responsible for adjudicating competition matters brought under the Broadcasting Ordinance, but was also the Hong Kong government's policy advisor on competition-related issues concerning the broadcasting markets in Hong Kong. This included advising on whether to issue new television programme service licences. Both its adjudicatory and (p. 119) advisory functions would require the CA to form an opinion on the relevant broadcasting market conditions. In view of these overlapping functions, "an objective observer may legitimately doubt whether [the CA] could decide the [antitrust] issues solely on their legal and factual merits with the detachment and objectivity required by art.10, uninfluenced by any policy considerations."[26]

The CEIC, in deciding an appeal from the CA, was mandated by law to "act in an administrative or executive capacity and not in a judicial or quasi-judicial capacity."[27] The CEIC did not have to confine itself to evidence and legal principles pertaining to the competition provisions and could "take into account any evidence, material, information or advice in his absolute discretion."[28] This included advice from the CA itself.[29] The CEIC was also part of the Hong Kong government and was directly involved in policy-making in broadcasting markets upon the advice of the CA. In light of the above considerations, an appeal to the CEIC "would essentially be an appeal to the executive from a decision by its adviser on market and competition policies involving questions closely related to such policies."[30] In these circumstances the CEIC could not provide the necessary judicial protection.

The Article 10 requirement could nevertheless be fulfilled if the Court of First Instance upon judicial review was a court with "full jurisdiction."[31] The judge noted that competition law decisions are largely decisions on factual disputes rather than decisions on "policy or expediency."[32] The judge also observed that competition law was not so "specialised" a legal area that it should be "left in the hands of administrators";[33] this observation is supported by the fact that competition cases brought under the new Competition Ordinance are adjudicated by the judiciary (the Competition Tribunal) in the first instance. As such, a court with "full jurisdiction" ought to be one which could set aside decisions on account of any incorrectness "in fact or in merits."[34] The Court of First Instance upon judicial review was, accordingly, not a court with "full jurisdiction," as it could only set aside the CA's decision on rather restricted grounds, such as "a finding of fact or inference from the facts which is perverse or irrational, or where there was no evidence to support it, (p. 120) or where it was made by reference to irrelevant factors or without regard to relevant factors."[35]

Godfrey Lam J made some interesting comparative observations of the antitrust regimes under the Broadcasting Ordinance and in the European Union (hereafter the "EU") respectively. First, the judge compared the CA to the European Commission. Both the CA and the European Commission were administrative authorities playing the "commingled role" of "the investigator, the prosecutor and the judge" as the first-instance decision-maker in competition cases.[36] The EU jurisprudence[37] suggests that the European Commission is not a "tribunal," let alone an "independent and impartial tribunal." Nevertheless, the requirement of effective judicial protection (under Article 6(1) of the ECHR, the European equivalent of Article 10) could still be satisfied by the possibility of appeal to a court with "full jurisdiction."

In the EU, competition decisions of the European Commission could be appealed to the General Court and eventually to the Court of Justice. The judge hence compared the jurisdiction of the Hong Kong Court of First Instance upon judicial review to that of the EU General Court hearing a competition case on appeal. According to Article 31 of the Council Regulation No 1/2003,[38] the General Court has "unlimited jurisdiction" to review the European Commission's penalty decisions concerning infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter the "TFEU"). It follows from this "unlimited jurisdiction," and the requirement of effective judicial protection under Article 6(1) of the ECHR, that the General Court ought to be in a position to "examine all questions of fact and law" and, if necessary, to "quash in all respects, on questions of fact and law, the decision" of the European Commission.[39] The General Court previously suggested in *Microsoft*[40] that it should be slow to intervene in the European Commission's decisions on "complex economic appraisals," in that it ought to confine itself to "checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any *manifest error of assessment* or (p. 121) a misuse of powers."[41] It has been doubted whether such a high standard for intervention (requiring a "manifest error of assessment" or some

"procedural" defect[42])—or a low standard of review—is compatible with Article 6(1) of the ECHR.[43] Recent EU decisions nevertheless indicate that the standard of review has been elevated to an "in-depth review of the law and of the facts."[44] It is noteworthy, however, that the General Court's "unlimited jurisdiction" to conduct "in-depth review" only applies to penalty decisions but not remedial decisions.[45] Hence, whether the current EU regime affords the necessary judicial protection under Article 6(1) of the ECHR remains a moot point. In any event, as the judge noted, the General Court's "unlimited jurisdiction" to conduct "in-depth review" is much more expansive than the limited jurisdiction of the Hong Kong Court of First Instance upon judicial review.

Godfrey Lam J was hence correct in holding that the regime under the Broadcasting Ordinance failed to meet the effective judicial protection requirement under Article 10 and was, accordingly, unconstitutional. TVB's application for judicial review was successful on this basis. It is important to note that the CO has gone much further than the current EU regime in providing judicial protection to antitrust defendants. This is because, in contrast to the "administrative model" in the EU (and other jurisdictions such as the UK and Singapore) whereby the first-instance decision-maker is involved from the investigation stage to making infringement (as well as penalty and remedy) decisions,[46] the CO uses the prosecutorial model of enforcement. Under the prosecutorial model, the functions of investigation and adjudication are in the hands of the HKCC (an enforcement agency) and the Competition Tribunal (a court) respectively.[47] The HKCC only has limited powers of enforcement, such as accepting commitments, issuing infringement and warning notices, and entering into leniency agreements.[48] (p. 122) Decisions on infringement, penalty, and remedy are made by the Tribunal following the HKCC's decision to bring a case to court.[49]

The choice between the prosecutorial model and the administrative model involves a trade-off between efficiency and procedural fairness. On the problem of inefficiency of the prosecutorial model, Daniel Zimmer argues that the model:

> not only leads to delays, but … it can be a disadvantage to the enforcement process when a court cannot guarantee the same level of professional specialisation as exists within the competition authorities. … [A] specialised competition authority, in order to obtain, say, a prohibition order, would have to convince a not particularly specialised court that its … own—even economic—assessment of the case is correct in every respect. The unspecialised court would be faced with the submissions of, on the one hand, the specialised authority, and on the other, the just as specialised representatives of the companies. … [I]t seems as if this must naturally result in a decrease in the intensity of enforcement.[50]

The prosecutorial model nevertheless has the benefit of ensuring procedural fairness.[51] Commentators have therefore noted that the prosecutorial model:

> not only provides for better procedural safeguards against partiality and prosecutorial bias, but also enjoys higher legitimacy for those undertakings on which sanctions are imposed, with the result that there is a higher degree of acceptance of the decision and that fewer appeals are being brought before superior courts.[52]

The procedural safeguards that come with the prosecutorial model are especially important in an antitrust regime where the proceedings are "criminal" for human rights purposes. As argued below, despite Godfrey Lam J's ruling that the previous sector-based antitrust regime under the Broadcasting Ordinance was "non-criminal," the new cross-sector regime under the CO will likely be considered "criminal" for human rights purposes. This has potential implications for not only the standard of proof,[53] but also the level of (p. 123)

judicial protection required.[54] The European Court of Human Rights held in *Jussila v Finland*[55] that the principle of effective judicial protection:

> is particularly important in the criminal context, where *generally there must be at first instance a tribunal which fully meets the requirements of Article 6* … and where an applicant has an entitlement to have his case "heard", with the opportunity inter alia to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.[56]

In other words, where the proceedings are "criminal" for human rights purposes, the defendant's right to effective judicial protection is such that the first-instance decision-maker shall, generally speaking, be an "independent and impartial tribunal" as specified under Article 6(1) of the ECHR and Article 10 of the HKBR.[57] It follows that the so-called "curative principle," according to which effective judicial protection only requires the first-instance decision-maker to be "subject to subsequent control by a judicial body that has full jurisdiction,"[58] does not (generally) apply to "criminal" proceedings. Exceptions have been made for minor criminal offences.[59] However, it is difficult to justify an exception for proceedings under the CO given the potentially severe financial penalties that can be imposed on infringers.[60]

It is hence submitted that, from the perspective of ensuring procedural fairness and full compliance with Article 10 of the HKBR, Hong Kong has made a wise decision to follow the prosecutorial model in designing the CO, notwithstanding potential enforcement inefficiencies that might result from the prosecutorial model.

3.2 The standard of proof: civil or criminal?

Godfrey Lam J nonetheless rejected TVB's second argument, namely that the CA wrongly applied the lower, civil standard of proof. This argument was based on Article 11(1) of the HKBR, which is only applicable to proceedings in which a person is "charged with a criminal offence." The judge took (p. 124) the view that the proceedings at issue did not involve a "criminal charge" against TVB, upon considering the three criteria emphasized in *Engel v The Netherlands*.[61] These factors are "the classification of the offence under domestic law," "the nature of the offence," and "the nature and severity of the potential sanction."[62] In *obiter*, the judge opined that, even if the proceedings were "criminal" from a human rights perspective, the civil standard of proof would still apply.

It is interesting to note that, although the judge found that the second and the third criteria in *Engel* disfavored a "criminal" classification of the sector-based competition provisions within the Broadcasting Ordinance, the same factors would conversely seem to support a "criminal" classification of the CO's cross-sector conduct rules. While there was no explicit indication in the decision by the judge that he would support that result, the judge did hint at his inclination towards a "criminal" view of the conduct rules, in the following statement:

> [A] finding of infringement of the competition provisions of the [Broadcasting Ordinance] did not carry with it the same stigma or obloquy as it would under *a general competition law representing a pervasive societal norm of acceptable behaviour*.[63]

The judge was also of the view that the amount of the penalty under Section 28(3) of the Broadcasting Ordinance, "even at the highest of HK$1 million, is in the scheme of things not a very substantial figure."[64] This figure can be compared to the more flexible cap of 10% of the undertaking's local turnover under the CO,[65] which permits a considerably heavier penalty to be imposed on undertakings.

Notwithstanding the potential "criminal" classification of the new conduct rules, the judge's *obiter dictum* would suggest that the civil standard of proof still applies. Insight can be derived from the result reached by the UK Competition Tribunal (hereafter the "CAT") in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*[66] as regards the Chapter I and II prohibitions under the Competition Act 1998.[67] In *Napp*, the CAT ruled that the civil standard of proof applies in civil proceedings regarding the said prohibitions (which exist distinctly from the criminal cartel offence under the Enterprise Act 2002 that adopts the criminal standard of proof). In its (p. 125) reasoning, the CAT explained that, albeit the parties in *Napp* accepted that such proceedings involve the determination of a "criminal charge" against the defendant under Article 6 of the ECHR, the said prohibitions "are not classified as criminal offences in domestic law" and, accordingly, should be subject to the civil standard of proof.[68] The CAT held that:

> [n]either the ECHR itself nor the European Court of Human Rights has laid down a particular standard of proof that must be applied in proceedings to which Articles 6(2) or (3) apply, and still less that the standard should be that of "proof beyond reasonable doubt" … In our view the standard of proof to be applied under the Act is to be decided in accordance with the normal rules of the United Kingdom domestic legal systems.[69]

Complication nevertheless exists in the Hong Kong situation due to a decision rendered by the jurisdiction's highest court. In the Hong Kong Court of Final Appeal (hereafter the "HKCFA") case of *Koon Wing Yee v Insider Dealing Tribunal*,[70] Sir Anthony Mason NPJ, who delivered the unanimous decision of the Court, ruled that "… in our criminal jurisprudence proof beyond reasonable doubt is the standard to be applied once proceedings have been classified as involving the determination of a criminal charge."[71]

The default rule that the criminal standard of proof is applicable in all legal proceedings classified as "criminal" may find support in the below passage within the United Nations Human Rights Committee's General Comment No. 32 of the ICCPR which his Lordship cited in *Koon Wing Yee*:[72]

> The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.

His Lordship therefore came to the view that the criminal standard of proof should have been applied by the Insider Dealing Tribunal in insider dealing proceedings classified as "criminal" on account of the "potentially swingeing" penalty that intended to serve a "punitive and deterrent" purpose.[73]

One possible reading of *Koon Wing Yee* is that the aforementioned default rule is applicable in all cases involving "criminal" proceedings. However, the blanket application of this default rule was rejected by Godfrey Lam J in the TVB Case, where the judge wisely laid out the intricacies of competition law proceedings as distinct from other types of "criminal" proceedings:

(p. 126)

> [I]t is to be recalled that the Court of Final Appeal was [in *Koon Wing Yee*] adjudicating upon an insider dealing case, and would not have been required to consider the implications of the nature of issues including economic analysis and assessment involved in competition law … I would be inclined to the view that his Lordship was not intending to preclude the application under any circumstances of

> the civil standard to any type of proceedings classified as criminal with reference to the *Engel* criteria, including competition law cases, which raise issues of a particular nature to which the application of the criminal standard has been found in certain jurisdictions to be inapt.[74]

The judge therefore propounded the view that proper exceptions stand to the default rule in *Koon Wing Yee*, such that competition law proceedings should be carved out of the default rule, as the criminal standard of proof is not suitable. Such flexibility is nevertheless not clear from *Koon Wing Yee* itself, where Sir Anthony Mason NPJ stated that any "degree of flexibility" within Article 11(1) of the HKBR for "sensible and reasonable deviations in certain situations" does not mean that "the substitution of the civil standard of proof for the criminal standard of proof in a proceeding classified as criminal would be a sensible or reasonable deviation."[75] Godfrey Lam J's *obiter dictum* that the *Koon Wing Yee* rule should not apply in competition law proceedings is hence subject to challenge.

Whether the civil or criminal standard of proof applies to Hong Kong competition law proceedings is an issue that can only be conclusively resolved by the HKCFA. This is certainly an issue of central importance to Hong Kong, as it affects all future proceedings initiated under the CO. The HKCFA can decide whether to uphold the default rule in *Koon Wing Yee*, which favors the criminal standard, or instead opt for the English position in *Napp*, which favors the civil standard, and in the latter case, the HKCFA may be required to overrule its previous decision in *Koon Wing Yee*. At the end of the day, this is a policy question which requires careful consideration of factors relevant to the suitability of the standards.

This chapter will proceed to pinpoint two especially relevant factors that tend to support the adoption of the civil standard of proof in civil antitrust proceedings classified as "criminal" from a human rights perspective. The analysis which follows may be of relevance to the development of antitrust procedural fairness in Hong Kong, as well as other common law jurisdictions which distinguish between the criminal and civil standards of proof against the backdrop of similar human rights provisions. It is noteworthy that, unlike common law jurisdictions such as Hong Kong, the EU regime does not have (p. 127) well-defined, "probabilistic" standards of proof.[76] The discussion below will hence focus on Hong Kong and the UK.

The first factor is the practicality of the standards in view of the technical, economic evidence featured in competition cases. This was a point emphasized by Godfrey Lam J observed in the earlier passage. The CAT rightly observed in *Napp* that issues typically arising from abuse of dominance cases—such as market definition, the existence of a dominant position, and the extent to which abusive conduct can be "economically justified"—call for "complex assessment of mainly economic data and perhaps conflicting expert evidence."[77] Cases concerning restrictive agreements may also feature intricate economic issues. The CAT also recognized in *JJB Sports plc v Office of Fair Trading*[78] that, in view of the economic nature of questions such as whether the arrangement at issue is restrictive of competition and whether it fulfills the conditions of the efficiency exception, there is "no sensible way of resolving such issues by the application of the criminal standard."[79] In an "effect" analysis of an arrangement or conduct, not only are the "actual" anti-competitive effects of the arrangement or conduct considered, but also the "potential" anti-competitive effects.[80] As the judge observed in the TVB Case:

> Reliance on potential or likely effect is readily understandable where there is concern that an agreement or conduct may exert a continuing or future effect on competition. … [T]he power to order an undertaking to cease and desist from certain conduct … ought in principle to be capable of being exercised not only

> where its substantial restrictive effect on competition has been actualised but also where it is sufficiently anticipated and legitimately feared.[81]

The probabilistic and forward-looking nature of an "effect" analysis, which is based on complex and imperfect economic information, and assumptions about market circumstances, may render the criminal standard of proof beyond reasonable doubt unworkable in such cases.

For "plain and simple" price-fixing cartel cases, it may appear that the gist of the matter is whether prices have been agreed or exchanged between the defendants, thus involving an exclusively non-economic analysis of the issues that could be dealt with under the criminal standard of proof.[82] However, economic evidence may still be alluded to in such cases. For example, absent direct evidence of a price-fixing cartel (such that its existence must be established by circumstantial evidence), the competition authority or the (p. 128) defendants may want to rely on economic evidence to buttress or undermine a case built solely on non-economic evidence (such as correspondence between the defendants) which is inconclusive as to whether there has been an agreement on, or exchange of, prices.[83] Further, even if the existence of a restrictive agreement is undisputed, the parties may however set up a defence based on the efficiency exception.[84] If the standard of proof were to change depending on whether it is a case involving economic evidence,[85] the competition authority would inevitably be incentivized to argue its case on at least some economic evidence to take advantage of the lower, civil standard regardless of the necessity of the economic evidence to the authority's case. Moreover, as the CAT had observed, it would be "unnecessarily complicated" to alter the standard of proof depending on whether the legal issue is economic or non-economic in nature.[86]

The second factor relevant to the choice between the civil and the criminal standard of proof is the severity of the potential penalty; this was not something stressed in the TVB Case nor the aforementioned CAT decisions. A potentially serious penalty may justify a higher degree of procedural protection to antitrust defendants by way of adopting a higher standard of proof, namely the criminal standard.[87] Some might argue that only punishment by imprisonment, which involves the deprivation of freedom and income-earning ability, is severe enough to justify the criminal standard of proof.[88] However, it may be rather simplistic and arbitrary to draw the line between proceedings that could potentially lead to imprisonment of the defendant, and proceedings that would at most result in a criminal fine or a civil financial penalty. If a defendant in civil antitrust proceedings, which is usually a corporate defendant, is potentially exposed to a very severe financial penalty that one might consider to be the economic equivalent of imprisonment of a human defendant, the adoption of the criminal standard might be necessary. Nonetheless, for the analogy to work, that penalty would need to have such a drastic effect that it would make the company insolvent, or, at minimum, unprofitable for quite some time.

It is unlikely for such a drastically high penalty to feature in civil antitrust proceedings in Hong Kong. First, any penalty imposed is capped at the statutory maximum of 10% of the local turnover of the defendant undertaking.[89] Secondly, guidance from the Competition and Markets Authority (hereafter (p. 129) the "CMA"), UK's competition authority, states that the CMA may, exceptionally, "reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position."[90] Thirdly, research suggests that the level of penalty for optimal deterrence is somewhere "between 150 and 200% of annual turnover in the product market concerned,"[91] which far exceeds the starting point penalty of "up to 30 per cent [of] an undertaking's relevant turnover" under the CMA's guidance.[92] Considering the above factors, the penalties imposed in Hong Kong or UK civil antitrust

proceedings do not appear to be severe enough to require the application of the criminal standard of proof in such proceedings.

It is important to distinguish the question of the appropriate standard of proof in civil antitrust proceedings from the question of the quality of evidence required to meet the standard. As to the latter question, Godfrey Lam J opined in the TVB Case that, "… given the consequence of the imposition of a financial penalty and loss of contractual rights, the case against TVB must be proved by commensurably cogent and compelling evidence."[93]

This is consistent with the view held by Lord Nicholls in *Re H & Others (Minors)*,[94] namely that:

> [w]hen assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.[95]

The above proposition needs to be approached with caution. While it is right for the court or authority to require more "cogent and compelling evidence" to establish something that is less likely to happen, "there is no logical or necessary connection between seriousness and probability."[96] One should not simply assume that firms are less likely to be part of anti-competitive activities which entail a more serious penalty, especially when the law limits the penalty (p. 130) to a level that is unlikely adequate from the perspective of achieving effective deterrence.

Some types of anti-competitive activity may be more unlikely to occur than others. For example, predatory pricing is an inherently unlikely activity as it is a "rarely successful" anti-competitive strategy[97] (in view of the difficulties of forcing market exit of rivals and subsequently raising prices for the sake of recoupment of initial losses), and it is easy to confuse predatory pricing with pro-competitive price competition pursuant to a promotion or loss-leading strategy). Therefore, a competition authority or court may appropriate require "cogent and compelling evidence" to substantiate predatory pricing allegations. The justification is nonetheless based on inherent probabilities, instead of the severity of the financial penalty that may be imposed.

4. Conclusion

This chapter provides an overview of the various issues pertaining to procedural safeguards under Hong Kong's competition enforcement regime. It reviews the party's right to legal representation, access to case file, agency engagement during the investigation process and the sufficiency of judicial oversight. It further examines the TVB case, which is arguably the only competition law case in Hong Kong. The case concerns an issue of overriding importance that is bound to be litigated under the recently enacted CO: the applicable standard of proof under the CO. Suffice it to say that should the courts decide that the criminal standard of proof of beyond reasonable doubt applies under the CO, enforcement of most of the provisions in the CO will be rendered practically impossible. It may not be an exaggeration to say that such a ruling would be tantamount to a judicial repeal of the CO. It is sincerely hoped that the courts will pay heed to the practical consequences of its ruling and reach a conclusion that is in line with the practice in almost every single competition law jurisdiction in the world.

Acknowledgment: The support of the Small Project Funding program of the University of Hong Kong is acknowledged.

Footnotes:

1 Competition Ordinance (Cap 619) (hereafter the "CO").

2 *Competition Commission v Nutanix Hong Kong Limited and Others* [2017] CTEA 1/2017; *Competition Commission v W Hing Construction Company Limited and Others* [2017] CTEA 2/2017.

3 HKCC, "Guidance" (July 27, 2015) <www.compcomm.hk/en/legislation_guidance/guidance/guidance.html> accessed September 13, 2017.

4 CO (n 1) s 41(2).

5 CO (n 1) s 41(4)(b).

6 CO (n 1) s 42(1).

7 CO (n 1) s 44(1).

8 HKCC, "Guideline on Investigations" (July 27, 2015) 9 <http://www.compcomm.hk/en/legislation_guidance/guidance/investigations/files/Guideline_Investigations_Eng.pdf> accessed September 13, 2017 (hereafter HKCC, "Guideline on Investigations").

9 CO (n 1) s 48(1).

10 HKCC, "Guideline on Investigations" (n 8) 11.

11 Ibid.

12 Ibid.

13 The Law Society of Hong Kong, "Admission as a Solicitor in Hong Kong for Overseas Lawyers 2017 Information Package" (April 3, 2017) 4 <http://www.hklawsoc.org.hk/pub_e/admission/OLQE2017/OLQE%20INFO%20PACK.pdf> accessed September 13, 2017.

14 Foreign Lawyers Registration Rules (Cap 159S), s 12.

15 Competition Tribunal Rules (Cap 619D).

16 Section 3 of this chapter draws in part from Kelvin Kwok, "The Standard of Proof in Civil Competition Law Proceedings" (2016) 132 LQR 541; Kelvin Kwok, "*Television Broadcasts Ltd v Communications Authority*: Implications for the New Competition Ordinance" (April 2016) Hong Kong Lawyer 27; Kelvin Kwok, "The New Hong Kong Competition Law: Anomalies and Challenges" (2014) 37 World Competition 541 (especially section 3.8).

17 *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41 (hereafter *TVB v CA*). The rest of this section draws on the Court of First Instance's decision in *TVB v CA*, with paragraph references provided occasionally (e.g., for block quotations).

18 TVB also challenged the CA's substantive antitrust analysis by way of judicial review. For discussion of the substantive antitrust issues in *TVB v CA*, see Kelvin Kwok, "Abuse of Dominance in the Hong Kong Television Sector," in Sandra Marco Colino (ed), *Competition in Telecommunications Markets: Key Regulatory Challenges* (Wolters Kluwer, forthcoming).

19 See Hong Kong Bill of Rights Ordinance (Cap 383) (hereafter the "HKBR"), s 8.

20 Ibid.

21 *TVB v CA* (n 17) [98].

22 Ibid, [93].

23 See further discussion of this issue later.

24 *TVB v CA* (n 17) [94].

25 CO (n 1) s 110.

26 *TVB v CA* (n 17) [118].

27 Interpretation and General Clauses Ordinance (Cap 1), s 64(4).

28 Ibid.

29 Broadcasting Ordinance (Cap 562), s 35(1)(a).

30 *TVB v CA* (n 17) [131].

31 *Wong Tak Wai v Commissioner of Correctional Services* [2010] 4 HKLRD 409 [67] (hereafter *Wong Tak Wai v Commissioner of Correctional Services*), as cited in *TVB v CA* (n 17) [139].

32 *TVB v CA* (n 17) [151]–[152].

33 *TVB v CA* (n 17) [154].

34 *TVB v CA* (n 17) [166].

35 *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 [99], as cited in *TVB v CA* (n 17) [146].

36 *TVB v CA* (n 17) [117]–[118].

37 *Heintz van Landewyck Sarl v Commission of the European Communities*, Cases 209–215 and 218/78 [1980] ECR 3125 [80]–[81], as cited in *TVB v CA* (n 17) [119].

38 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.

39 *Kone Oyj v European Commission* [2014] 4 CMLR 10 [22], as cited in *TVB v CA* (n 17) [161]); *Telefónica SA v Commission* [2014] 5 CMLR 18 [51]–[52] (hereafter *Telefónica SA v Commission*).

40 *Microsoft v European Commission*, Case T-201/04 [2007] ECR II-3601 (hereafter *Microsoft v EC*).

41 Ibid, [87] (emphasis added).

42 *Saint-Gobain Glass France v Commission* [2014] EU:T:2014:160, para 79, as cited in *TVB v CA* (n 17) [164].

43 *TVB v CA* (n 17) [160], [163]; Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (6th edn, Oxford University Press 2016) 1000, 1002–3 (hereafter Jones and Sufrin, *EU Competition Law*).

44 *Telefónica SA v Commission* (n 39) [56]; Jones and Sufrin, *EU Competition Law* (n 43) 1002–6; *Groupement des Cartes Bancaires v Commission*, Case C-67/13 P [2014] EU:C:2014:2204, para 45.

45 *Galp Energia España and Others v Commission*, Case C-603/13 P [2016] EU:C:2016:38, paras 76–77; Jones and Sufrin, *EU Competition Law* (n 43) 1006.

46 *TVB v CA* (n 17) [117], [119]–[120].

47 Legislative Council, "Report of the Bills Committee on Competition Bill" (May 23, 2012) 7 <http://www.legco.gov.hk/yr09-10/english/bc/bc12/reports/bc120530cb1-1919-e.pdf> accessed September 13, 2017.

48 CO (n 1) Part 4.

49 CO (n 1) Part 6.

50 Daniel Zimmer, "Competition Law Enforcement: Administrative verses Judicial Systems," in Paul Nihoul and Tadeusz Skoczny (eds.), *Procedural Fairness in Competition Proceedings* (Cheltenham: Edward Elgar Publishing 2015) 262–3.

51 Ibid, 259–60; Donald Slater, Sébastien Thomas, and Denis Waelbroeck, "Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?" (2009) 5 European Competition Journal 97, 129–32 (hereafter Slater, Thomas, and Waelbroeck, "Competition Law Proceedings"); Commerce and Economic Development Bureau, "Bills Committee on Competition Bill: Overview of Major Components of the Competition Bill" (November 2010) 4 <http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121109cb1-320-2-e.pdf> accessed September 13, 2017.

52 Slater, Thomas, and Waelbroeck, "Competition Law Proceedings" (n 51) 131.

53 See further analysis later.

54 For general discussion of procedural implications for civil proceedings classified as "criminal" for human rights purposes, see Simon N M Young, "Enforcing Criminal Law Through Civil Processes: How Does Human Rights Law Treat 'Civil for Criminal Processes'?" (2017) 4 JICL (forthcoming).

55 *Jussila v Finland*, App no 73053/01, November 23, 2006.

56 Ibid, [40] (emphasis added).

57 Slater, Thomas, and Waelbroeck, "Competition Law Proceedings" (n 51) 125.

58 *Wong Tak Wai v Commissioner of Correctional Services* (n 31) [67], as cited in *TVB v CA* (n 17) [139].

59 *Öztürk v Germany*, App no 8544/79, February 21, 1984, [56].

60 See further analysis later, in the context of standard of proof.

61 *Engel v The Netherlands*, App nos 5101/71 etc, June 8, 1976.

62 *TVB v CA* (n 17) [62].

63 *TVB v CA* (n 17) [76] (emphasis added).

64 *TVB v CA* (n 17) [85].

65 CO (n 1) s 93(3)–(4).

66 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 (hereafter *Napp*).

67 It is worth noting that these prohibitions, and the new conduct rules in Hong Kong, are both modeled after Articles 101 and 102 of the Treaty on the Functioning of the European Union.

68 *Napp* (n 66) [105].

69 *Napp* (n 66) [102], [104].

70 *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 (hereafter *Koon Wing Yee*).

71 Ibid, [103].

72 Ibid, [98].

73 Ibid, [49], [66], [103].

74 *TVB v CA* (n 17) [294].

75 *Koon Wing Yee* (n 70) [102].

76 *TVB v CA* (n 17) [284].

77 *Napp* (n 66) [106], as cited in *TVB v CA* (n 17) [286].

78 *JJB Sports plc v Office of Fair Trading* [2004] CAT 17 (hereafter *JJB Sports*).

79 Ibid, [193], as cited in *TVB v CA* (n 17) [287].

80 *TVB v CA* (n 17) [252].

81 Ibid, [255].

82 *JJB Sports* (n 78) [194].

83 Ibid.

84 Ibid, [193].

85 Ibid, [194].

86 Ibid.

87 *Re D* [2008] 1 WLR 1499 [48].

88 Erik Lillquist, "Recasting Reasonable Doubt: The Virtues of Variability" (2002) 36 UC Davis L Rev 85, 91, 194–5; Richard Lippke, "Justifying the Proof Structure of Criminal Trials" (2013) 17 E & P 323, 336–8.

89 CO (n 1) s 93(3)–(4).

90 Office of Fair Trading, "OFT's guidance as to the appropriate amount of a penalty" (September 2012) [2.27] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf> accessed September 13, 2017 (hereafter OFT423). In Hong Kong, any detailed guidance on financial penalties similar to that in OFT423 will have to come from the Competition Tribunal, which, at the time of writing, has yet to hand down its first penalty decision.

91 Peter Whelan, "Cartel Criminalization and the Challenge of 'Moral Wrongfulness'" (2013) 33 OJLS 535, 541.

92 OFT423 (n 90) [2.5].

93 *TVB v CA* (n 17) [296].

94 *Re H & Others (Minors)* [1996] AC 563.

95 Ibid, [586], as cited in *TVB v CA* (n 17) [296].

96 *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 AC 11 [72]; Peter Mirfield, "How Many Standards of Proof Are There?" (2009) 125 LQR 31, 32, 35; Hodge Malek, et al. (eds.), *Phipson on Evidence* (18th edn, London: Sweet & Maxwell 2013) ss 6–56.

97 *Matsushita Electric Industrial Co v Zenith Radio Corp* (1986) 475 US 574, 589.