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THE INFRINGEMENT NOTICE SYSTEM UNDER HONG KONG'S COMPETITION LAW: USING THE EU AS A BENCHMARK

Sinchit Lai

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Sinchit Lai[*]

ABSTRACT

In late 2019, the then chairperson of the Hong Kong Competition Commission announced that the Commission would start making use of the three-track commitment system besides bringing cases to the court. Soon after, in early 2020, the chairperson's words were put into action. Among the three tracks, the infringement notice system that applies to severe violations of Hong Kong's Competition Ordinance is the strictest one. As a first attempt, this Article examines the impact on deterrence of Hong Kong's competition policy if the Commission further utilises the infringement notice system. To assess the deterrence level of Hong Kong's system, this Article uses a comparable system of the European Union—the settlement system—as a benchmark. Based on the observations made, this Article offers recommendations to HK legislators and the Commission.

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I. INTRODUCTION

In June 2012, Hong Kong passed its first cross-sector competition law, the Competition Ordinance (Cap 619).[1] The two primary functions of the Ordinance are to prohibit undertakings from engaging in anticompetitive agreements (First Conduct Rule)[2] or abusing their substantial market power (Second Conduct Rule).[3] To put the law into action, the Ordinance created two institutions. They are the Hong Kong Competition Commission (HKCC), which is the agency that enforces the Ordinance (e.g., handles complaints and conducts investigations),[4] and the Competition Tribunal (CT), which is the judiciary body that hears and decides cases connected with the Ordinance.[5]

Shortly before the Ordinance became effective, the HKCC issued the Enforcement Policy that detailed its programme.[6] In the policy, the HKCC acknowledged that its resources are limited for investigation and enforcement.[7] Thus, the HKCC indicated that it would prioritise investigating cases involving Cartel Conduct and "other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong."[8] As defined by the HKCC, Cartel Conduct refers to price-fixing, market allocation, output restriction and bid-rigging agreements formed between competitors.[9] In 1998, the Organisation for Economic Co-operation and Development (OECD) labelled these four types of conduct as "hardcore cartels" and described them as "the most egregious violations of

[1] Competition Ordinance, (2020) Cap. 619, §§ 1–2 (H.K.).

[2] The most comparable provisions in the US or EU competition laws to this First Conduct Rule in Hong Kong are section 1 of the Sherman Act and Article 101 of the Treaty on the Functioning of the European Union respectively. *Id.* at § 6.

[3] The most comparable provisions in the US or EU competition laws to this Second Conduct Rule in Hong Kong are section 2 of the Sherman Act and Article 102 of the Treaty on the Functioning of the European Union respectively. *Id.* at § 21.

[4] *Id.* at § 9.

[5] *Id.* at § 10.

[6] COMPETITION COMM'N, COMPETITION COMMISSION PUBLISHES ENFORCEMENT POLICY AND CARTEL LENIENCY POLICY (Nov. 18, 2015), https://www.compcomm.hk/en/media/press/files/20151119_PressRel_Policy_Documents_Eng.pdf.

[7] COMPETITION COMM'N, ENFORCEMENT POLICY 2–3 (Nov. 2015), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Enforcement_Policy_Eng.pdf.

[8] *Id.* at 3.

[9] *Id.* at 4.

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competition law."[10] Hence, it is proper for the HKCC to allocate its limited enforcement resources to combat Cartel Conducts (hereinafter, referred to as hardcore cartels).

In December 2015, the Competition Ordinance came into full effect.[11] Thereafter, the HKCC targeted its enforcement efforts solely on hardcore cartels. By October 2019, the HKCC had filed four cases with the CT.[12] The agency alleged that in these cases, the defendant competitors had colluded to rig bids[13] or share markets and fix prices,[14] violating the First Conduct Rule. Then, in November 2019,[15] the HKCC published its *Annual Report 2018/2019*.[16] In the report, the then chairperson of the HKCC, Ms. Hung-yuk Wu, highlighted the enforcement action taken by the agency.[17] After that, Ms. Wu announced that, looking forward, "the Commission will consider making use of different remedies, such as issuing warning and infringement notices as well as accepting commitments besides bringing cases to court."[18]

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[10] ORG. FOR ECON. COOP. AND DEV. COMPETITION COMM., RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS 2 (1998), https://www.oecd.org/daf/competition/2350130.pdf.

[11] COMP. COMM'N, COMPETITION ORDINANCE COMES INTO FULL EFFECT TODAY (Dec. 15, 2015), https://www.compcomm.hk/en/media/press/files/Competition_Ordinance_Comes_into_Full_Effect_Today_EN.pdf.

[12] *Current Cases in the Competition Tribunal*, COMPETITION COMM'N, https://www.compcomm.hk/en/enforcement/enforcement/competition_tribunal.html (last visited Feb. 9, 2022) (referencing cases CTEA1/2017, CTEA2/2017, CTEA1/2018 and CTEA1/2019).

[13] 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 (emphasizing CTEA1/2017 as bid-rigging case).

[14] CTEA2/2017, CTEA1/2018 and CTEA1/2019 are market sharing and price-fixing cases. COMPETITION COMM'N, COMPETITION COMMISSION TAKES MARKET SHARING AND PRICE FIXING CASE TO COMPETITION TRIBUNAL (2017), https://www.compcomm.hk/en/media/press/files/20170814_Competition_Commission_takes_market_shari.pdf; COMPETITION COMM'N, COMPETITION COMMISSION TAKES RENOVATION CARTEL CASE TO COMPETITION TRIBUNAL (2018), https://www.compcomm.hk/en/media/press/files/Competition_Commission_takes_renovation_cartel_case_to_Competition_Tribunal_EnglishPR.pdf; COMP. COMM'N, COMPETITION COMMISSION TAKES RENOVATION CARTEL CASE TO COMPETITION TRIBUNAL (July 3, 2019), https://www.compcomm.hk/en/media/press/files/20190703_Competition_Commission_takes_renovation_cartel_case_to_Competition_Tribunal_eng_PR.pdf.

[15] Email from HKCC announcing release of 2018/2019 Annual Report (Nov. 2019) (on file with author).

[16] COMPETITION COMM'N, ANNUAL REPORT 2018/2019 (2019), https://www.compcomm.hk/en/media/reports_publications/files/2018_19_CC_Annual_Report.pdf.

[17] *Id.* at 5.

[18] *Id.*

In a nutshell, the three alternatives are summary enforcement mechanisms whereby the HKCC refrains from continuing an investigation or bringing enforcement proceedings against suspected lawbreakers on the condition that the suspects make some commitments.[19] The distinctions between the three commitment procedures will be presented in part II of this Article. Noteworthy is the fact that these commitment procedures have always been available to the agency but were never utilised by the time this announcement was made.[20] Thus, the announcement set a milestone in the development of public antitrust enforcement in Hong Kong.

Soon after, in January 2020, the HKCC issued its first infringement notice in an IT cartel conduct case (see part II) and in May 2020, the HKCC accepted its first section 60 commitment in an online travel agent's case.[21] Although it is too early to tell whether settling with suspected lawbreakers as a remedy will become a new normal, in the wake of the chairperson's announcement[22] and the ever-strengthening of public enforcement,[23] it is reasonable to expect more settlements in Hong Kong in the foreseeable future. In light of this, it is worth reviewing the commitment systems to enhance our understanding of its impact on the region.

A few scholars have written about Hong Kong's commitment systems. Kwok (2014) highlighted the warning notice system as one of the peculiar

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[19] COMPETITION COMM'N, GUIDELINE ON INVESTIGATIONS 18–22 (July 27, 2015), https://www.compcomm.hk/en/legislation_guidance/guidance/investigations/files/Guideline_Investigations_Eng.pdf.

[20] If the HKCC issues a warning or an infringement notice or accepts a commitment, the agency registers such activities on its official website. On the HKCC's website, one can see that there was no such registration on or before Nov. 2019 when the *Annual Report 2018/2019* was published. *Warning Notice Register*, COMPETITION COMM'N, https://www.compcomm.hk/en/enforcement/registers/warning_notices/warning_notices.html; COMPETITION COMM'N, INFRINGEMENT NOTICES REGISTER, https://www.compcomm.hk/en/enforcement/registers/infringement_notices/infringement.html; *Commitments Register*, COMPETITION COMM'N, https://www.compcomm.hk/en/enforcement/registers/commitments/commitments_reg.html (last visited Feb. 9, 2022).

[21] COMPETITION COMM'N, COMPETITION COMMISSION ACCEPTS COMMITMENTS OFFERED BY ONLINE TRAVEL AGENTS (May 13, 2020), https://www.compcomm.hk/en/media/press/files/EN_PR_Acceptance_of_commitments.pdf.

[22] COMPETITION COMM'N, *supra* note 16, at 4–6.

[23] *See* Sinchit Lai, *Enabling and Incentivizing Standalone Private Antitrust Actions in Hong Kong—Lessons from the United States*, 16 BERKELEY BUS. L.J. 463, 468–74 (2019) (commenting on the development of public antitrust enforcement in Hong Kong).

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aspects of Hong Kong's Competition Ordinance.[24] Kwok articulates that the mandatory requirement for HKCC to issue warning notices to parties engaged in non-serious anticompetitive conduct not only discourages the agency from investigating non-serious anticompetition conduct but also incentivises the agency to pursue some vertical cases under the Second Conduct Rule instead of the First Conduct Rule.[25] Mezzanotte (2015) reveals that Hong Kong legislators did not comprehensively evaluate the trade-off of issuing warning notices or infringement notices because although lawmakers broadly acknowledged its benefits, they either ignored or neglected the costs of using the notice.[26] Mezzanotte points out that one of the underdiscussed costs of using the notice systems is its curtailment of deterrence effects.[27] Lai (2018) identifies that the infringement notice system is applicable to not only hardcore cartels but also vertical agreements that involve price-fixing, output restriction, market allocation or bid-rigging. Lai argues that Hong Kong regulating less harmful vertical agreements on par with hardcore cartels creates inefficiencies in its economy.[28]

This Article contributes to the existing literature by assessing the impact on deterrence of Hong Kong's competition policy if the HKCC promotes the use of the infringement notice system. In this Article, *deterring* refers to making the sanction of competition law violations more likely or costly, thereby making violations less profitable and discouraging new violations. To assess the impact, this Article adopts a comparative approach. This approach is suitable because analysing the HK system alone will not help us determine if the system is too harsh or too lenient. For instance, it is possible that the infringement notice system, being the strictest one among the three-track commitment system in Hong Kong, is still too lenient in absolute terms. To better assess the deterrence level of Hong Kong's system, this Article uses a comparable system in the European Union—the settlement system—as a benchmark. The remainder of this Article is organised as follows. Parts II

[24] Kelvin H.F. Kwok, *The New Hong Kong Competition Law: Anomalies and Challenges*, 37 WORLD COMPETITION 541, 541 (2014).

[25] *Id.* at 562–63.

[26] Felix E. Mezzanotte, *Notices, Enforcement and the Making of the Hong Kong Competition Ordinance*, 4 CHINA-EU L.J. 201, 221–22 (2015), https://link.springer.com/article/10.1007/s12689-015-0058-z.

[27] *Id.*

[28] Sinchit Lai, Comment, *Defining and Regulating Hardcore Cartels in Hong Kong: Agency Reconciling the Divergence Between Legislators and International Standard*, 20 U. PA. J. BUS. L. 933, 947–48 (2018).

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and III review Hong Kong's infringement notice system and the European Union's settlement system, respectively. Part IV compares the two systems, then analyses the potential consequences if Hong Kong further utilises the infringement notice system. Part V offers suggestions to legislators and the antitrust authority in Hong Kong, and part VI provides a conclusion for the paper.

II. HONG KONG'S INFRINGEMENT NOTICE SYSTEM

If the HKCC successfully prosecutes a company and its personals in the Competition Tribunal (CT), the tribunal may impose on the company a pecuniary penalty of up to 10% of the company's annual turnover in Hong Kong for a period of up to three years[29] and impose on the individuals a pecuniary penalty or may disqualify them from serving as a director of the company for a maximum period of five years.[30] However, not all antitrust cases have to end up in the CT. In addition to bringing cases to the tribunal, the Competition Ordinance provides the HKCC with three remedies in response to suspected contravention of the Ordinance: (1) accepting section 60 commitments, (2) issuing warning notices and (3) issuing infringement notices.[31] These remedies constitute a three-track commitment system.

[29] Competition Ordinance, *supra* note 1, at § 93.
[30] *Id.* at § 101.
[31] COMPETITION COMM'N, GUIDELINE ON INVESTIGATIONS (July 17, 2015), *supra* note 19, at 18–22.

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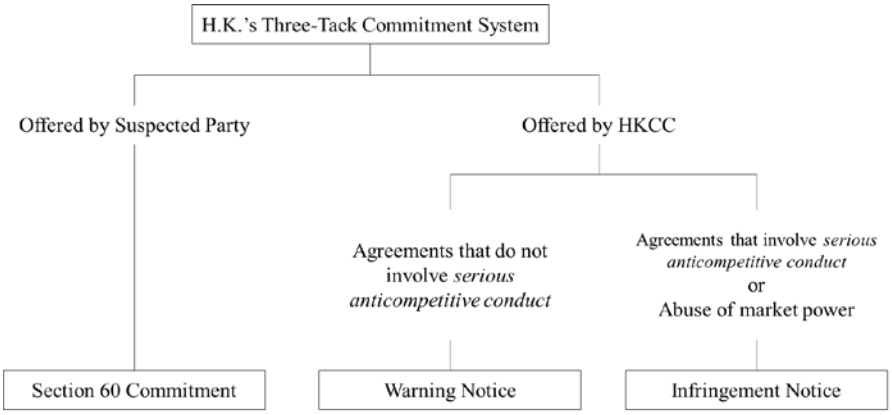

Figure 1

One of the key differences between the section 60 commitment system (i.e. (1)) and the two notices systems (i.e. (2) & (3)) is that the former is offered by suspected lawbreakers while the latter is offered by the CT (See Figure 1).[32] Moreover, simply speaking, the two notice systems are differentiated by the fact that the warning notice system is triggered by less serious violations of the law, and the infringement notice system is triggered by more severe violations.[33] Accordingly, the warning notice system provides more lenient measures for less severe violations and the infringement notice system provides more stringent measures for serious violations.[34] The focus of this Article is on the infringement notice system.

The infringement notice system can be found in section 66 to section 78 of the Ordinance.[35] Upon investigation, if the HKCC has reasonable cause to believe a party has violated the First Conduct Rule involving "serious anticompetitive conduct" and/or Second Conduct Rule, then the HKCC *may* issue an infringement notice to the party before bringing proceedings against them in the CT.[36] In the notice, the HKCC will identify the conduct rule

[32] COMM. AND ECON. DEV. BUREAU, RESPONSES TO FOLLOW-UP QUESTIONS ARISING FROM PREVIOUS MEETINGS APP. D, at 4 (Nov. 22, 2011), https://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121122cb1-389-2-e.pdf.

[33] *Id.*

[34] Lai, *supra* note 28, at 952.

[35] Competition Ordinance, *supra* note 1, at §§ 66–78.

[36] *Id.* at § 67(a).

alleged to have been violated, describe the alleged illegal conduct, specify the recipient involved and identify the evidence the agency possesses to support its allegation.[37] More importantly, the notice will set forth the requirements with which the notice recipient has to comply within a compliance period.[38] The requirements *may* include, but are not limited to, refraining from any specified conduct or taking a specified action and admitting to illegal conduct.[39] The notice recipient is not obliged to commit, and they will be informed of such a right.[40] However, if the recipient does commit within the notification period specified by the HKCC, the agency cannot bring proceedings in the tribunal against the recipient unless it fails to keep its promise.[41] When provided with a good reason, the HKCC could extend the compliance period before the original period expires.[42] The Ordinance requires the HKCC to register all commitments that it has made under the infringement notice system.[43] However, it is optional for the HKCC to publish an infringement notice after reaching a settlement.[44]

The HKCC first issued an infringement notice on January 10, 2020 in an IT cartel conduct case. The background of this case is as follows. In early 2017, Ocean Park Corporation decided to purchase an IT workflow automation software for the company.[45] Then Ocean Park approached Nintex Proprietary Limited, a software supplier, to inquire about buying the software from it.[46] However, Nintex did not provide implementation services for the software; hence, it recommended four of its resellers that could do the job.[47] Ocean Park then invited the four resellers to submit bids for procuring both the software and implementation services.[48] Shortly after that, Nintex put

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[37] *Id.* at § 69(a)-(d).
[38] *Id.* at §§ 66 & 69(e)-(f).
[39] *Id.* at § 67(3).
[40] *Id.* at §§ 68–69(g).
[41] *Id.* at §§ 75–76.
[42] *Id.* at § 74.
[43] *Id.* at § 77.
[44] *Id.* at § 78.
[45] COMPETITION COMM'N, NOTICE ISSUED UNDER SECTION 67 OF THE COMPETITION ORDINANCE (CAP. 619) REGARDING ANTI-COMPETITIVE CONDUCT IN OCEAN PARK BIDDING EXERCISE 3 (2020), https://www.compcomm.hk/en/enforcement/registers/infringement_notices/files/Infringement_Notice_Eng_20200110.pdf.
[46] *Id.*
[47] *Id.*
[48] *Id.*

pressure on two of the resellers, Quantr Limited and an unnamed company to communicate and co-ordinate over who would win the tender before submitting their bids.[49] The two resellers then acted accordingly and kept Nintex posted.[50] Eventually, Quantr won the bid from Ocean Park[51] and the unnamed company reported the incident to the HKCC by submitting a leniency application.[52] This act of whistleblowing led the HKCC to investigate the case. Upon completing the investigation, the HKCC issued an infringement notice to both Nintex and Quantr, offering to resolve the issue between the parties so that they could comply with the HKCC's requirements in lieu of litigation.[53] Nintex accepted the offer; thus, the agency did not bring enforcement proceedings against Nintex.[54] In contrast, Quantr refused.[55] Hence, HKCC sued Quantr and its director in the CT for price-fixing by exchanging competitively sensitive information and thus violating the First Conduct Rule.[56]

As only Nintex accepted HKCC's offer, the agency merely published the notice sent to and the commitment submitted by Nintex.[57] In the notice, the agency offered not to institute proceedings against Nintex if it admitted to its alleged violation of the First Conduct Rule and was committed to adopting and implementing a competition compliance programme.[58] Such a compliance programme consists of five parts. First, Nintex would have to circulate via E-mail copies of HKCC's materials (e.g. brochures) to its staff

[49] *Id.* at 4–5.
[50] *Id.* at 5–6.
[51] *Id.* at 6.
[52] COMPETITION COMM'N, COMPETITION COMMISSION TAKES IT CARTEL CONDUCT CASE TO COMPETITION TRIBUNAL 2 (Jan. 22, 2020), https://www.compcomm.hk/en/media/press/files/20200122_ENG_PR_Competition_Commission_takes_IT_cartel_conduct_case_to_Competition_Tribunal.pdf; Pursuant to the Leniency Policy, a company that engaged in a hardcore cartel could seek immunity from the HKCC by being the first to blow the whistle of the cartel. COMPETITION COMM'N, THE LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT 3 (2015), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Eng.pdf.
[53] COMPETITION COMM'N (2020), *supra* note 52, at 1–2.
[54] *Id.*
[55] *Id.* at 1.
[56] COMPETITION TRIBUNAL, NOTICE UNDER RULE 19 OF THE COMPETITION TRIBUNAL RULES (Jan. 4, 2020), https://www.comptribunal.hk/filemanager/case/en/upload/20/(Eng)%20Rule%2019%20notice%20(CTEA1of2020).pdf.
[57] COMPETITION COMM'N, *supra* note 20.
[58] COMPETITION COMM'N, *supra* note 45, at 14–15.

and resellers.[59] Second, Nintex should create and adopt a competition compliance policy approved by the HKCC.[60] Such a policy should be promulgated to Nintex's staff and resellers as well.[61] Third, Nintex should revise its standard reseller agreement by adding requirements for resellers to comply with the Competition Ordinance and pay attention to Nintex's competition compliance policy.[62] The revised agreement would have to be approved by the HKCC and would apply to new resellers recruited thereafter.[63] Fourth, all of Nintex's staff based in Hong Kong must attend one of the public seminars or workshops on competition law offered by the HKCC.[64] Moreover, Nintex should persuade its resellers to attend one of these training sessions.[65] Fifth, Nintex should appoint a solicitors' firm as its representative with whom the HKCC may correspond and inspect Nintex's performance in fulfilling its commitment.[66] The infringement notice required Nintex to notify the HKCC in writing its decision on whether it would comply with the above requirements by January 15, 2020 (i.e. the notification period is five days).[67] If Nintex notified the HKCC that it intended to comply, then Nintex would have to submit a commitment to the agency by January 17, 2020.[68] Eventually, Nintex accepted the offer and submitted a commitment to the HKCC on January 16, 2020.[69]

III. EUROPEAN UNION'S SETTLEMENT SYSTEM

As mentioned earlier, this Article uses the European Union's settlement system as a benchmark to assess the deterrence level of Hong Kong's infringement notice system. The European Union serves as an excellent

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[59] COMPETITION COMM'N, ANNEX (1)—COMMITMENT TO COMPLY WITH REQUIREMENTS OF INFRINGEMENT NOTICE ISSUED TO NINTEX PROPRIETARY LIMITED BY COMPETITION COMMISSION 3–4 (Jan. 10, 2020), https://www.compcomm.hk/en/enforcement/registers/commitments/files/Commitment_Eng_20200116_.pdf.

[60] *Id.* at 4.

[61] *Id.* at 4–5.

[62] *Id.* at 5.

[63] *Id.*

[64] *Id.* at 6.

[65] *Id.*

[66] *Id.* at 6–7.

[67] COMPETITION COMM'N, *supra* note 45, at 14.

[68] *Id.* at 14–15.

[69] COMPETITION COMM'N, *supra* note 59, at 2.

comparison for Hong Kong. This is because the European Union one of the leading antitrust jurisdictions around the globe, and the EU system was referenced heavily during the drafting and deliberation process of Hong Kong's competition law.[70] In the European Union, competition law is enforced by the European Commission (EC).[71] As in the HK regime, the EU regime empowers the EC to accept negotiated remedies from suspected lawbreakers to resolve cases. The EU system includes two tracks—(1) a commitment system that applies to less severe anticompetitive conduct and (2) a settlement system that applies to more severe anticompetitive behaviour. The former system is comparable to Hong Kong's warning notice system, while the latter system is comparable to Hong Kong's infringement notice system. In this part, I will provide a brief overview of the European Union's settlement system. Then, part IV compares it with Hong Kong's infringement notice system to identify the differences between the two systems.

The main antitrust provisions of the European Union are Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU).[72] Article 101 prohibits concerted practices that restrict competition and Article 102 prohibits the abuse of a dominant position; hence, they are most comparable to First Conduct Rule and Second Conduct Rule, respectively, under Hong Kong's Competition Ordinance. Recall that in Hong Kong, the HKCC merely possesses investigative and prosecutorial powers. Thus, the HKCC must seek a tribunal judgment to establish an infringement of the Competition Ordinance. In contrast, the EC combines not only investigative and prosecutorial powers but also adjudicative power.[73]

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[70] Hong Kong's legislative body has studied competition laws of the European Union, United Kingdom, United States and Singapore early in the deliberation process of Hong Kong's competition law. *See* JACKIE WU, COMPETITION POLICIES IN SELECTED JURISDICTIONS (2010), https://www.legco.gov.hk/yr09-10/english/sec/library/0910rp02-e.pdf (an example of such studies).

[71] *Antitrust Overview*, EUR. COMM'N, https://ec.europa.eu/competition-policy/antitrust/antitrust-overview_en (last visited Feb. 9, 2022).

[72] Consolidated Version of the Treaty on the Functioning of the European Union art. 101-102, 2016 O.J. (C 202) 88, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN.

[73] ARIANNA ANDREANGELI ET AL., ENFORCEMENT BY THE COMMISSION—THE DECISIONAL AND ENFORCEMENT STRUCTURE IN ANTITRUST CASES AND THE COMMISSION'S FINING SYSTEM 3–4 (2009), http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf.

Article 7 of Council Regulation (EC) No. 1/2003 provides that when there is a violation of Article 101 or Article 102 of TFEU, the EC could not only require concerned parties to end their offence but also impose any necessary remedy, such as behavioural or structural remedies and a fine (up to 10% of the parties' total turnover in the preceding business year).[74] Besides, the EC is the granted authority for resolving cases that give rise to competition concerns in virtue of a *commitment decision*. However, such an alternative is not applicable in cases where a fine would be more appropriate.[75] Hence, hardcore cartels are excluded from the privilege of commitment procedures.[76]

Nevertheless, this does not mean that hardcore cartels enjoy no negotiated procedures under EU law. In 2008, the European Union created a settlement system by amending the Council Regulation (EC) No. 773/2004[77] and introducing a commission notice on the subject.[78][79]Such a settlement procedure is exclusive to cartels that are largely, if not entirely, hardcore cartels.[80] *Settlement decisions* are EC decisions based on Articles 7 and 23 of the Council Regulation (EC) No. 1/2003. Just like other violations of Article

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[74] Council Regulation (EC) No. 1/2003 of 16 December 2002 art. 7 & 23, 2002 O.J. (L1) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=en.

[75] European Commission Memorandum MEMO/04/217, Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernized framework for antitrust scrutiny of company behavior) (Sept. 17, 2004), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_04_217.

[76] *Id.*

[77] Commission Regulation (EC) No. 622/2008 of June 30, 2008 Amending Regulation (EC) No. 773/2004, as Regards the Conduct of Settlement Procedures in Cartel Cases, 2008 O.J. (L 171) 3, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171:0003:0005:EN:PDF.

[78] 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. (C167) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2008:167:FULL&from=EN [hereinafter Commission Notice].

[79] Organization for Economic Cooperation & Development [OECD], *Experience with Direct Settlements in Cartel Cases*, at 79, OECD Doc. DAF/COMP (2008) 32 (Oct. 1, 2009), http://www.oecd.org/competition/cartels/44178372.pdf.

[80] The EC described cartels as:

> [A]greements and/or concerted practices between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article [101 TFEU].

Commission Notice, *supra* note 78, at 1.

101 of the TFEU, settlement decisions establish the existence of an infringement and impose a fine on lawbreakers.[81] The key differences between the standard procedure and settlement procedure are that (1) the latter is streamlined and (2) settling cartel members will obtain a reduction of a fine of 10%.[82] Settlements could be attractive to cartels, but they are not guaranteed. Cartel members neither have a right nor an obligation to settle, while the EC has the discretion of deciding whether to discuss a settlement[83] or, ultimately, settle with cartel members.[84]

There are two ways to initiate a settlement discussion. First, during an investigation, suspected members of a cartel may express their interest in a settlement.[85] Second, after investigation, if the EC has sufficient elements to proceed with a cartel case in formal proceedings, at any time before drafting a Statement of Objections (SO) against the cartel members, the EC may send a letter to invite each member to express their interest in engaging in settlement discussions.[86] Once the cartel members have confirmed their interest in writing, the EC may then decide to open settlement discussions.[87] After the discussions, if a common understanding has been achieved with all the cartel members, the EC may invite the members to introduce a formal request to settle, which is known as "settlement submission."[88] Pursuant to the Commission Notice, the settlement submission must contain the following elements:

> (a) an acknowledgement [. . .] of the parties' liability for the infringement [. . .]; (b) an indication of the maximum amount of the fine the parties foresee to be imposed by the Commission [. . .]; (c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them [. . .]; (d) the parties' confirmation that [. . .] they do not envisage requiring access to the file or requesting to be heard again in an oral hearing [. . .];

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[81] Flavio Laina & Elina Laurinen, *The EU Cartel Settlement Procedure: Current Status and Challenges*, J. EURO. COMPETITION L. & PRAC. 1, 5 (2013), https://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlement_procedure_en.pdf.

[82] OECD, *supra* note 79, at 80.

[83] *Id.*

[84] *Id.* at 83.

[85] *Id.* at 80.

[86] *Id.*

[87] *Id.*

[88] Laina & Laurinen, *supra* note 81, at 4.

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> (e) the parties' agreement to receive the statement of objections and final decision [. . .] in an agreed official language of the European Community.[89]

If the settlement submissions correspond to the understanding reached during the settlement discussions, the EC adopts a streamlined SO along with the contents of the submissions.[90] Upon notification of the SO, cartel members reply in writing to confirm that the SO reflects their settlement submissions.[91] A draft settlement decision will be prepared based on the streamlined SO.[92] After this, the EC will seek opinions from the Advisory Committee and then adopt a final settlement decision.[93]

IV. COMPARISON AND ANALYSIS

After reviewing the settlement systems of Hong Kong and the European Union, I will now compare the two. Doing so will allow us to (1) identify the differences between the HK and EU systems and (2) study the impact on the deterrence of Hong Kong's competition policy if the HKCC further utilises the notice system as announced in late 2019.

Comparing the commitment systems in Hong Kong and the European Union reveals two critical differences. Firstly, settling parties in the European Union are subject to fines, but not in Hong Kong.[94] In the European Union, the EC possesses all investigative, prosecutorial and adjudicative powers.[95] Settlement decisions made by the EC are prohibition decisions based on Articles 7 and 23 of Council Regulation (EC) No. 1/2003.[96] Therefore, settling parties in the European Union are subject to fines imposed by the EC; however, they can enjoy a reduction of 10% in their fines for the settlement. In contrast, HKCC possesses merely investigative and prosecutorial powers, but not adjudicative powers. Under standard proceedings, HKCC prosecutes cases in the CT, and it is for the tribunal to decide cases. Therefore, if the HKCC terminates its proceedings after the utilisation of the three-track

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[89] Commission Notice, *supra* note 78, at para. 20.
[90] Laina & Laurinen, *supra* note 81, at 4.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Supra* part II & part III.
[95] ANDREANGELI ET AL., *supra* note 73, at 5.
[96] Laina & Laurinen, *supra* note 81, at 5.

commitment system, the cases would not be heard by the tribunal. As a result, no infringement will be established, and no fine will be imposed on the committed party. Furthermore, according to section 67(4) of the Competition Ordinance, the HKCC is not allowed to require infringement notice recipients to make a payment to the Government.[97] Therefore, parties settling under the infringement notice system in Hong Kong are not subject to any fine.

Secondly, admission of liability is mandatory in the European Union, but not in Hong Kong. EU law clearly specifies admission of guilt as one of the essential elements in the settlement submission of concerned parties,[98] as opposed to HK law that provides that the HKCC *may* require infringement notice recipients to admit their illegal conduct.[99] In Hong Kong, whether a notified party is required to admit to violating the Ordinance has significant consequences for the party. This is because Hong Kong's competition law provides private parties a follow-on right of action, but not a standalone right of action.[100] Pursuant to the Ordinance, victims have a right to file a private action against wrongdoers in CT only after (1) the CT determines that there has been a contravention of the Ordinance (e.g. a result from public enforcement), or (2) the wrongdoer admits their contravention in a commitment.[101] To infringement notice recipients, this means that if the notice does not require an admission of guilt, settling with the HKCC would not expose them to a risk of facing private actions. Hence, these settling parties are not subject to damages. On the contrary, whether there is an admission of guilt matters less in the European Union because EU victims have a full right of action.[102] Even though the treaties and regulations that govern EU competition law (e.g. the then EC Treaty and the now TFEU) have no provision that provides for a private right of action before an EU

[97] Competition Ordinance, *supra* note 1, at § 67(4).

[98] Laina & Laurinen, *supra* note 81, at 4.

[99] Competition Ordinance, *supra* note 1, at § 67(3).

[100] COMPETITION COMM'N, ANNUAL REPORT 2012/2013, at 23 (2013), https://www.compcomm.hk/en/media/reports_publications/files/2012_13_CC_Annual_Report.pdf.

[101] Competition Ordinance, *supra* note 1, at § 110.

[102] *Antitrust Damages Actions in Europe*, EUR. COMM'N, https://ec.europa.eu/competition-policy/antitrust/actions-damages_en (last visited Feb. 9, 2022).

court,[103] the EU Court of Justice has long held that private parties who suffered harm from a violation of the EU competition law have a right of action before national courts of the EU Member States.[104] Therefore, regardless of whether a party settles with the EC (and if the law requires an admission of guilt), the settling parties are always subject to damages.

The comparison between the two jurisdictions reveals that Hong Kong's regime is far more lenient than the European Union's. It is because settling parties in the European Union always face the threat of fines and damages while settling parties in Hong Kong are only at risk of paying damages.[105] Moreover, if there is no admission of guilt, settling parties in Hong Kong could walk away without paying any fine or damages.[106] It is not ideal for the law to provide the possibility of no financial punishment to serious violations of the law. Here, one may argue that the HKCC is aware of the harm of serious anticompetitive conduct and would not easily settle with wrongdoers who participated in such conduct. However, the actuality is that the HKCC finds it suitable to settle with hardcore cartels. Taking the IT cartel conduct case as an example, it is worth noting that the HKCC issued an infringement notice to Nintex and Quantr, two bid-riggers.[107] Although the infringement notice required the two bid-riggers to adopt and implement a competition compliance programme,[108] these consequences are incomparable to fines and damages and would not generate much deterrence. Fortunately, the infringement notice also required the two bid-riggers to admit to the alleged violation.[109] Therefore, Nintex, which accepted the HKCC's offer, could be sued by the victim of the case, Ocean Park, and may need to pay damages for its illegal behaviour. However, there is no guarantee that the HKCC will always require infringement notice recipients to admit their guilt in future settlements.

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[103] Georg Berrisch et al., *E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law*, 24 NW. J. INT'L L. & BUS. 585, 587 (2004), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1582&context=njilb.

[104] *The Damages Directive—Towards More Effective Enforcement of the EU Competition Rules*, at 2, EC (Jan. 2015), https://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf [hereinafter *The Damage Directive*].

[105] Competition Ordinance, *supra* note 1, at § 67(4).

[106] *Id.* at § 110.

[107] COMP. COMM'N (2020), *supra* note 52, at 1–2.

[108] COMP. COMM'N, *supra* note 45, at 14–15.

[109] *Id.*

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As Hong Kong's infringement notice system is more lenient than the European Union's settlement system, the HKCC increasing its use of the infringement notice system reduces the deterrence in Hong Kong to a greater extent than in the European Union. This is because the utilisation of the settlement system reduces the expected penalty of violating the law[110] far more in Hong Kong than in the European Union. Wrongdoers that are subject to the systems, e.g. hardcore cartels, after being detected by the antitrust authority, face the following expected penalty:[111]

$$\text{P(Settle)} \times \textit{Liability of Settle} + [(1 - \text{P(Settle)}) \times \textit{Liability of Not Settle}]$$

As shown in the above equation, the expected penalty of violating the law (after detection) is the sum of the expected penalty of resolving the case by settlement (i.e. P(Settle) × *Liability of Settle*) and the expected penalty of resolving by adjudication (i.e. [(1 – P(Settle)) × *Liability of Not Settle*]). P(Settle) is the probability of wrongdoers reaching a settlement with an antitrust authority, which depends on the free will of both the wrongdoers and the antitrust authority.[112] When an antitrust authority settles more frequently with wrongdoers, it would be perceived as increasing the P(Settle) of would-be wrongdoers. For example, prior to the 2019 announcement, the HKCC never settled with a wrongdoer, so the P(Settle) perceived by would-be wrongdoers was close to zero. Then, the HKCC made the announcement and issued its first infringement notice in the IT cartel conduct case, causing the perceived P(Settle) to rise. Since cases could only be resolved by either settlement or adjudication, whenever P(Settle) rises, the probability of resolving cases by adjudication (i.e. 1 – P(Settle)) drops simultaneously. In other words, if the HKCC is more eager to settle with wrongdoers, it is less likely to pursue cases in the tribunal.

As for *Liability of Settle* and *Liability of Not Settle*, our analysis only takes into account the two major sources of deterrence—fines and damages. In general, *Liability of Settle* is usually structured to be lower than *Liability*

[110] For the sake of simplicity, I use the term "expected penalty" instead of "expected cost of violating the competition law." Expected cost is a broader concept than expected penalty, as the former incorporates litigations cost, but the latter does not. This explains why my equation does not include the parameter of litigation cost.

[111] Expected penalty is defined as the penalty wrongdoers expect on average and is calculated as the probability-weighted average of all the possible outcome penalties.

[112] Since P(Settle) is a probability, its value must lie between 0 and 1.

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of Not Settle to incentivise wrongdoers to settle with an antitrust authority.[113] This statement holds true for both Hong Kong and the European Union. Therefore, in the two jurisdictions, an increase in P(Settle) always reduces the expected penalty of violating competition laws and reduces deterrence. However, the resulting change in the expected penalty varies between the two jurisdictions because the initial P(Settle), *Liability of Settle* and *Liability of Not Settle* differ. To illustrate how the differences between Hong Kong and EU laws affect a change in expected penalty (hence a change in deterrence), I assume that (1) the initial P(Settle) of the two jurisdictions is the same and (2) both Hong Kong and the European Union experience an identical increase in P(Settle).

As said earlier, when an antitrust authority settles with wrongdoers more frequently, P(Settle) increases. Settling more cases implies that the authority pursues fewer cases in courts, so (1 – P(Settle)) decreases. Thus, the expected penalty of settlement (i.e. P(Settle) × *Liability of Settle*) increases, and the expected penalty of adjudication (i.e. [(1 – P(Settle)) × *Liability of Not Settle*]) reduces.

Given the same initial P(Settle) and change in P(Settle), on the one hand, the increase in the expected penalty of settlement (i.e. P(Settle) × *Liability of Settle*) is less in Hong Kong than in the European Union, as *Liability of Settle* is lower in Hong Kong. This is because, as explained, settling parties are subject to both fines and damages in the European Union, but at the most, only subject to damages in Hong Kong.[114]

On the other hand, given the same initial P(Settle) and change in P(Settle), the decrease in the expected penalty of adjudication (i.e. [(1 – P(Settle)) × *Liability of Not Settle*]) tends to be more considerable in Hong Kong than in the European Union as *Liability of Not Settle* is likely to be higher in Hong Kong. *Liability of Not Settle* includes both fines and damages. In both jurisdictions, the maximum fine for violating a competition law is 10% of the turnover of the lawbreaker.[115] However, there are two differences regarding maximum fine between Hong Kong and the European

[113] Tembinkosi Bonakele & Liberty Mncube, *Designing Appropriate Remedies for Competition Law Enforcement: The Pioneer Foods Settlement Agreement*, 8 J. COMP. L. & ECON. 425, 434 (2012), https://academic.oup.com/jcle/article-abstract/8/2/425/857063?redirectedFrom=fulltext.

[114] *Supra* part IV.

[115] Competition Ordinance, *supra* note 1, at § 93; Council Regulation, *supra* note 74, art. 7 & 23.

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Union. First, the maximum fine is capped in *local* turnover in Hong Kong, while capped in *global* turnover in the European Union.[116] Second, in the European Union, fines are limited to the turnover of the preceding business year of the infringement,[117] while in Hong Kong, fines are imposed on each year of infringement, for a maximum of three years.[118] To determine the impact the two differences in maximum fine has on *Liability of Not Settle*, one needs to consider two groups of lawbreakers separately. Firstly, concerning lawbreakers with most or all their turnovers are generated locally (i.e., a Hong Kong lawbreaker with all its revenue generated in Hong Kong, and a lawbreaker in an EU member state with all its revenue generated in its EU member state). In this case, whether the fine cap is set at 10% of the *local* or *global* turnover is irrelevant. Therefore, the *Liability of Not Settle* in Hong Kong is strictly higher than that in the European Union because lawbreakers could be fined for their local turnover up to three years in Hong Kong, but only one year in the European Union. Secondly, concerning lawbreakers with most of their turnover generated abroad. In this case, it is undetermined, but still quite likely that fine in Hong Kong is higher than that in the European Union. To lawbreakers with most of its revenue generated internationally, whether the fine cap is set at 10% of the *local* or *global* turnover matters. It is because European law that calculates fine using global turnover creates greater liability to this group of lawbreakers. That said, as explained, lawbreakers could be fined for their local turnover up to three years in Hong Kong, but global turnover for only one year in the European Union. Hence, taking this into account, the maximum fine in Hong Kong could be "effectively higher than that under EU law" even capped in *local* turnover.[119]

Liability of Not Settle includes not only fines but also damages. After being fined, settling parties in both Hong Kong and the European Union face the risk of a follow-on private action. In both jurisdictions, private victims are only allowed to recover compensatory damages, but not punitive or multiple damages. In 2014, the EC adopted Directive 2014/104/EU on

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[116] *Id.*; Kwok, *supra* note 24, at 565–56.

[117] Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, Sept. 1, 2006, 2006 O.J. (C 210) 32, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN.

[118] Competition Ordinance, *supra* note 1, § 93(3).

[119] THOMAS CHENG & KELVIN KOWK, HONG KONG COMPETITION LAW: COMPARATIVE AND THEORETICAL PERSPECTIVES 7 (2022).

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Antitrust Damages Actions (hereinafter Damages Directive).[120] Article 3(3) of this directive states that victims of competition cases should not be overcompensated; therefore, multi-fold damages are prohibited.[121] Similarly, Hong Kong's Competition Ordinance does not specify that private parties have the right to recover damages beyond what they have suffered.[122] As the two laws provide for the same level of damages (i.e. single damages), the difference in fines dictates the difference of *Liability of Not Settle* between the two jurisdictions. Since *Liability of Not Settle* tends to be higher in Hong Kong than in the European Union, an increase in P(Settle) is very likely to cause the expected penalty of adjudication to drop more in Hong Kong.

To sum up, a rise in P(Settle) leads to a smaller increase in the expected penalty of settlement and likely a more massive decrease in the expected penalty of adjudication and a smaller increase in the expected penalty of settlement in Hong Kong than in the European Union, resulting in a more significant drop in the expected penalty of violating the competition law. Therefore, a rise in P(Settle) tends to cause deterrence to fall more in Hong Kong than in the European Union, thus driving up the number of violations more.

V. RECOMMENDATIONS

A. To the Legislators

It is not ideal for Hong Kong's infringement system to provide settling parties with the possibility of no financial punishment (i.e. fines and damages), especially when the system is applicable to hardcore cartels and is already considered the strictest one among the three-track commitment systems. Note that regardless of the jurisdiction, Hong Kong or the European Union, when the antitrust authority increases its use of the settlement system, it will generate certain benefits, such as saving time and resources from dealing with the cases in hand.[123] However, as explained earlier, doing so will cost society by reducing deterrence and encouraging violations.

[120] *The Damages Directive*, *supra* note 104, at 1.

[121] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014, 2014 O.J. (L 349) § 3(3), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN.

[122] Competition Ordinance, *supra* note 1, at § 112 & Sch. 3.

[123] OECD, *supra* note 79, at 7.

Moreover, my analysis reveals that the reduction in the expected penalty of violating the law will be higher in Hong Kong than in the European Union due to the differences identified between the two regimes. This means that keeping other factors constant, the cost of utilising the settlement system is more likely to outweigh its benefits in Hong Kong.

To improve Hong Kong's infringement notice system, HK legislators could make two amendments to the Ordinance. Firstly, taking the lessons from the European Union, lawmakers in Hong Kong could empower the HKCC to require infringement notice recipients to make a payment to the Government. Doing so could increase *Liability of Settle*, and hence, reduce the loss in deterrence when P(Settle) rises in Hong Kong. In fact, the HK Government that drafted the Competition Bill also intended to give HKCC the power to fine settling parties. However, the present proposal is not the same as that of the Government. First the Government's plan will be explained, then the proposed one.

The HK Government gazetted the Competition Bill on July 2, 2010.[124] In the Bill, the Government included settlement procedures in the form of a single-track *notice* system known as the infringement notice system.[125] The infringement notice system in the Bill is the prototype of the system of the same name in the Ordinance passed later. According to the notice system of the Bill, if the HKCC has reasonable cause to believe that a company violated the First or Second Conduct Rule and no proceeding in the CT has already been brought, the HKCC *may* issue an infringement notice to the concerned company.[126] In the notice, the HKCC should propose some requirements. If the notice recipient commits to complying with the requirements, then the HKCC will not bring proceedings against them in the CT.[127] As enumerated in the Bill, the requirements the HKCC proposes may include, but is not limited to, paying a sum not exceeding 10 million HK$, refraining from any specified conduct, taking any specified action and/or admitting to illegal conduct.[128] Despite the similarities between the 2010 bill version and the

[124] *Competition Bill gazetted*, GovHK (July 2, 2010), https://www.info.gov.hk/gia/general/201007/02/P201007020101.htm.

[125] Competition Bill, 2010, C879, §§ 65–77 (H.K.), https://www.legco.gov.hk/yr09-10/english/bills/b201007022.pdf.

[126] *Id.* § 66(1).

[127] *Id.* § 66(2).

[128] *Id.* § 66(3).

existing infringement notice system, one can see that a major difference between the two is that the former empowers the HKCC to fine committed parties but the latter does not. However, during the deliberation process of the Bill, some legislators and many in the business sector opposed giving HKCC the power to require infringement notice recipients to make a payment.[129] On the one hand, some argued that the amount of the payment is unreasonably high for small and medium-sized enterprises (SMEs).[130] Moreover, SMEs with limited resources to confront the HKCC in the CT would be forced to accept the HKCC's requirement of making a payment.[131] On the other hand, some contended that the payment amount is too low to act as a real deterrent for sizable companies.[132] Eventually, to address the abovementioned concerns, the Government revised the Bill by deleting the provision that would empower the HKCC to demand payment.[133]

Currently, if an infringement notice recipient does not settle with the HKCC, they may be fined by the CT. As said, the CT can impose a pecuniary penalty of up to 10% of the company's annual turnover in Hong Kong for a period of up to three years.[134] It is proposed that an amendment be made to the Ordinance allowing the HKCC to require infringement notice recipients to make a payment of a lower percentage, such as 5% or 3%, of the recipients' annual turnover, for a maximum of three years. Since this percentage is lower than the CT's 10%, notice recipients will still have an incentive to settle with the HKCC. However, compared to the 10 million payment cap proposed before by the Government in the Bill, the present proposal can ease concerns raised by legislators and the business sector because the impact of the proposed payment will be more proportional to the size of the notice-receiving companies. As such, the proposed payment is less likely to be too burdensome for SMEs and too insignificant to sizable companies. At the same time, keeping the possibility of making such payment in mind, if the HKCC increases the use of the infringement notice system, the rise in *Liability of Settle* would be higher. Hence, the drop in overall deterrence

[129] Legislative Council, *Report of the Bills Committee on Competition Bill*, 16–17, LC Paper No. CB(1)1919/11-12 (May 23, 2012), https://www.legco.gov.hk/yr09-10/english/bc/bc12/reports/bc120530cb1-1919-e.pdf.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Competition Ordinance, *supra* note 1, at § 93.

would be smaller. As for how much lower than 10% the percentage should be, this is a policy question and should be determined by lawmakers.

My second recommendation to HK lawmakers is to make it mandatory for parties settling under the infringement notice system to admit their guilt, no matter whether the HKCC has asked for payment be made to the Government (i.e. assuming the first proposal has been adopted). If so, settling parties always face the threat of paying damages, so *Liability of Settle* becomes higher. Thus, when the HKCC further utilises the infringement notice system, the expected penalty of settlement increases more. As a result, the decline in overall deterrence would be smaller. Additionally, during a public consultation on Hong Kong's competition policy, the Law Society of Hong Kong once stated that "[w]e considered that in any binding settlement, the rights of third parties to take private action should be preserved."[135] Unfortunately, this advice was not taken. The Ordinance merely provides a follow-on right of action that already substantially limits victims' fundamental right to recover damages. The fact that admission of guilt is not mandatory for settling parties has only worsened the situation. Of course, one may argue that this could be remediated by the HKCC exercising its discretion and always requiring the infringement notice recipient to admit to their guilt. Proponents of this view could then cite the IT cartel conduct case to support their argument because the HKCC did require an admission of guilt there.[136] However, there is no guarantee that the HKCC will do the same in future settlements. The IT cartel conduct case is just an isolated case and gives us insufficient cause to predict HKCC's future actions. Moreover, the HKCC is controlled by a handful of people, that is, around fifteen Commission Members and one CEO;[137] thus, it would not be difficult for the authority to become lenient on settling parties. Therefore, adopting this second proposal could not only improve the infringement notice system but also guarantee the committed parties' right to recover damages or at least those who settled under the infringement notice system.

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[135] Competition Law 12 (2008), https://www.cedb.gov.hk/citb/doc/en/publication/Consultation_Report_30_9.pdf.

[136] COMP. COMM'N, *supra* note 45, at 14–15.

[137] COMP. COMM'N, *supra* note 16, at 19.

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B. To the HKCC

The two proposals that were offered to the legislators required an amendment of the Ordinance. However, the opportunity to amend the law may not present shortly. Therefore, three suggestions have been provided to the HKCC on how to mitigate the low deterrence problem while increasing its use of the infringement notice system.

First, provided that the social cost of issuing more infringement notices might be higher than what the HKCC has thought, the authority should rethink how frequently it should issue the notices. As explained, the increase in the use of the infringement notice system probably reduces deterrence too much, causing too many new violations. To mitigate this problem, the HKCC could target issuing infringement notices in cases that involve less severe violations of the law. It is because, by nature, less serious violations are less harmful to society. Therefore, the targeted use of the infringement notice system could minimise the harm done to society by the new violations. The existing infringement notice system applies to parties that allegedly violated the First Conduct Rule involving "serious anticompetitive conduct" and/or the Second Conduct Rule.[138] As discussed earlier, among the applicable conduct, hardcore cartels that fall under the legal definition of "serious anticompetitive conduct" are internationally recognised as "the most egregious violations of competition law."[139] Therefore, the HKCC should prioritise issuing infringement notice to specimens of applicable conduct that does not include hardcore cartels, such as vertical price-fixing, vertical output restriction, vertical market allocation, vertical bid-rigging and abuse of monopoly power.

In addition to mitigating the low deterrence problem, prioritising the issue of infringement notice to conducts that do not include hardcore cartels could enhance the clarity of the law in relation to these conducts. As of January 2022, the HKCC has initiated ten enforcement actions before the CT.[140] Among the ten cases, nine are hardcore cartel cases and only one case

[138] Competition Ordinance, *supra* note 1, at § 67(a).

[139] OECD, *supra* note 10, at 2.

[140] Sébastien Evrard et al., *Five Years of Antitrust Enforcement in Hong Kong*, Gibson, Dunn & Crutcher LLP 3&5 (2020), https://www.gibsondunn.com/wp-content/uploads/2020/12/five-years-of-antitrust-enforcement-in-hong-kong.pdf (Summary of enforcement actions up to Dec. 2020); The Competition Commission took three cartel cases to the Competition Tribunal between Jan. 1, 2021 and

is for abuse of monopoly power.[141] So far, the HKCC has yet to pursue a vertical agreement case in the tribunal.[142] Since the HKCC has limited resources, the enforcement tilting towards hardcore cartels is understandable. However, the tilt inevitably limits the chance of the HKCC and the CT to clarify and develop the law in relation to vertical agreements and the abuse of monopoly power. To address this problem, instead of bringing more relevant cases to the tribunal, which is very costly, the HKCC could adopt the present proposal to issue more infringement notices in these cases. Considering the status quo of public enforcement in HK, an increased use of infringement notice in vertical agreement cases and abuse of monopoly power cases could provide the public with more legal clarity and prevent SMEs from unwittingly falling foul of the competition law.

Second, it is suggested that the HKCC exercise its discretionary power and always require infringement notice recipients to admit their guilt. It is just for the HKCC to make such a request despite it not having adjudicative power because for the HKCC to issue an infringement notice, the HKCC is required by the Ordinance to have a reasonable cause to believe there was an infringement. Moreover, if notice recipients genuinely believe that they are innocent, they always have the right to decline HKCC's offer and clear their name in the CT. In addition, as the OECD has pointed out, antitrust authorities requiring admissions of guilt in settlements could "avoid the public perception of a 'nuisance settlement,' in which the company can claim that it settled not because it was guilty but because it wanted to avoid the experiences of protracted litigation, buy peace and move on."[143] Furthermore, when strictly followed, the proposed practice would de facto have the same effect as amending the Ordinance by introducing the mandatory rule as described in the previous subpart. Therefore, similarly, the current proposal could lessen the low deterrence problem.

Nevertheless, the HKCC always requiring an admission of guilt could entail a follow-on right of action, but whether such a right would be exercised is a different story. If the right is rarely exercised, then the rise in the expected

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Jan. 31, 2022. *Press Releases & Announcements*, COMP. COMM'N, https://www.compcomm.hk/en/media/press/press_announce.html (last visited Feb. 9, 2022).

[141] *Id*.

[142] *Id*.

[143] OECD, *supra* note 79, at 8.

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penalty of settlement (i.e. (P(Settle) × *Liability of Settle*)) is minimal. Thus, the reduction in the drop of overall deterrence would be minimal while issuing more infringement notices. This is not a problem in the European Union. In the European Union, private antitrust actions are brought before national Member States' courts. Hence, these European actions are governed by national procedural rules.[144] Legal frameworks vary across the Member States; thus, it is impossible to comment in this Article on the incentives each EU country provides for private parties to sue. However, it is well known that long after the creation of the EU competition law, private antitrust enforcement remained unpopular in the European Union.[145] Subsequently, the EC adopted the 2014 Damages Directive that put forward a number of measures to facilitate the process of private parties making claims for damages that arose from EU competition law violations.[146] By early 2018, all Member States have completed the transposition of the directive.[147] In mid-2018, a commentator pointed out that the new norm in Europe is that "antitrust infringement decisions by the Commission or Member States authorities will almost always result in follow-on private litigation."[148] By contrast, Hong Kong's legal system, in general, provides insufficient incentives for private parties to sue. This is because, in addition to lacking a standalone right of action, Hong Kong (1) only awards compensatory damages in competition cases (i.e. no punitive damages), (2) has a two-way fee-shifting rule instead of a one-way fee-shifting rule, (3) prohibits the use of conditional/contingency fee agreements and (4) has not yet introduced a class action regime.[149] In fact, as of January 2022, no private damages action has been successfully brought in the CT yet.[150] Thus, in Hong Kong, it is

[144] Berrisch et al., *supra* note 103, at 587.

[145] *The Damage Directive*, *supra* note 104, at 1.

[146] *Id.*

[147] Jurgita Malinauskaite & Caroline Cauffman, *The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective*, 9 J. OF EUR. COMP. L. & PRAC. 496, 496–97 (2018).

[148] Tom Bainbridge, *The EC Leniency Programme—Hamstrung by Private Litigation?*, 17 COMP. L. INSIGHT. 1, 2 (2018), https://awards.concurrences.com/IMG/pdf/4_the_ec_leniency_programme_-_hamstrung_by_private_litigation.pdf?46602/88157fb4ca0d10c6dc36aae3f800acc91c416200.

[149] Lai, *supra* note 23, at 509–19.

[150] In Hong Kong, there had been two attempts to bypass the statutory bar on standalone actions, but both failed. *Id.* at 475–79; *see* Taching Petroleum Co. Ltd. v. Meyer Aluminum Ltd., CTA1/2018, para. 208–20 (C.T. May 29, 2020) (Legal Reference System), https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=128269&currpage=T (The CT rejected Meyer Aluminum Ltd.'s damage claim that

expected that very few victims will bring a follow-on right of action based on an admission of guilt in a settlement.

In view of the above, the third proposal to the HKCC would be to prioritise issuing infringement notices in cases where the victims are companies or institutions, rather than individual consumers like us. A perfect example of a company-victim case is the IT cartel conduct case, with the victim being Ocean Park. Note that it is not being suggested that the HKCC should proceed with fewer cases that harmed consumers to the investigation phase. The HKCC should continue to prioritise investigating alleged violations that are more severe, regardless of whether the victims of those violations are companies or consumers. To illustrate this proposal, let us imagine that the HKCC investigated two severe cases in which one of them is a company-victim case and the other one is a consumer-victim case and concluded that both contain a contravention of the Ordinance. In this hypothetical scenario, if the HKCC decides to resolve only one of the two cases under the infringement notice system, it is suggested that the HKCC select the company-victim case. When adopted together with the previous proposal on always requiring admission of guilt, the current recommendation could ensure deterrence on both would-be consumer-victim cases and would-be company-victim cases more evenly. The rationale behind this recommendation is that company-victims tend to be more resourceful than consumer-victims; hence, the formers are more likely to bring a follow-on private action against lawbreakers that harmed them. This is particularly true as Hong Kong lacks a class action regime, disabling consumers from pooling their resources to sue as a group.[151] To illustrate the benefit of these proposals, let us consider two possible scenarios following the above hypothetical.

First, assuming that the second and third proposals to the HKCC are *not* adopted. Under this scenario, the HKCC could issue an infringement notice in the consumer-victim case and prosecutes the company-victim case in the CT. Then, the likely outcome would be that on the one hand, the lawbreaker

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was brought by raising a breach of the Competition Ordinance as a defense in a civil litigation); as of Jan. 2022, other than the two attempts mentioned above, the CT has not heard or scheduled to hear any private cases. *Latest Judgements*, COMPETITION TRIBUNAL, https://www.comptribunal.hk/en/judgment/latest/index.html; *Archived Judgments*, COMPETITION TRIBUNAL, https://www.comptribunal.hk/en/judgment/archived/index.html; *Forthcoming Hearings*, COMPETITION TRIBUNAL, https://www.comptribunal.hk/en/diary/trials/index.html (last visited Feb. 9, 2022).

[151] Lai, *supra* note 23, at 514–19.

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that harmed consumers ends up paying no fines or damages. This holds true because, under the existing system, HKCC has no authority to demand payment from the notice recipient. Also, the lawbreaker is less likely to be sued by the consumer-victims after settlement because, as explained earlier, consumer-victims have fewer recourses to sue. On the other hand, the lawbreaker that harmed companies is likely to end up paying both fines and damages. This is because the lawbreaker will first be fined by the CT. Then, the lawbreaker is likely to be sued by the company-victims who are more resourceful and, thus, will need to pay damages.

Second, assuming that the two proposals are adopted. In this case, conversely, the HKCC issues an infringement notice in the company-victim case and prosecutes the consumer-victim case in the CT. The likely outcome now is that the lawbreaker that harmed consumers is fined by the CT and is not sued by consumer-victims, while the lawbreaker that harmed companies escapes from the fine but is sued by company-victims and has to pay damages. From the two scenarios, we learn that, when prioritising settlement with the consumer-victim case, the tendency is that only the lawbreaker that harmed companies is financially penalised for its wrongdoing (i.e. paying both fine and damages). In comparison, when settling with the company-victim case, the tendency is that both lawbreakers are financially penalised, with the lawbreaker that harmed consumers paying fines and the lawbreaker that harmed companies paying damages. Therefore, adopting these proposals could not only minimise the chance of lawbreakers not being financially penalised at all but also provide a more balanced deterrence on company-victim and consumer-victim cases in Hong Kong.

VI. CONCLUSION

HK's Competition Ordinance was passed in 2012. The Ordinance allows the Hong Kong Competition Commission to settle with suspected parties who engaged in serious violations of the law under the infringement notice system. However, such a system has never been utilised until in the IT cartel conduct case in early 2020. This set a milestone in the development of the infringement notice system in Hong Kong. It is expected that the Commission will continue to issue more infringement notices in the future. Therefore, this Article studies the impact on deterrence of Hong Kong's competition policy if the Commission further utilises the infringement notice system.

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After contrasting Hong Kong's infringement notice system with the European Union's settlement system, this Article identifies that the former as being far more lenient than the latter. Most alarmingly, it is possible for lawbreakers, even hardcore cartels, to walk away without paying any fines or damages in Hong Kong. This Article reveals that when both jurisdictions increase the use of their corresponding settlement system, the reduction in deterrence will be higher in Hong Kong than in the European Union, and will, thus, lead to a higher upsurge in newer violations in Hong Kong. Therefore, the cost of utilising the settlement system is more likely to outweigh its benefits in Hong Kong.

To mitigate the abovementioned problems, in the short run, the Commission should exercise its discretion and do the following. First, it should prioritise issuing infringement notices to violations that are not hardcore cartels. Second, it should always require notice recipients to admit to their guilt. Third, it should prioritise issuing infringement notices to company-victim cases over consumer-victim cases. In the long run, HK legislators should amend the Ordinance to empower the Commission to require infringement notice recipients to make a payment to the Government. Additionally, lawmakers should make it mandatory for settling parties to admit their guilt.

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