Hong Kong warning: Hong Kong Competition Commission's continued enforcement against anti-competitive conduct

February 18, 2020

In brief

On 22 January 2020, the Hong Kong Competition Commission ("**Commission**") commenced proceedings in the Competition Tribunal ("**Tribunal**") in a case alleging cartel conduct in relation to a bidding exercise for the procurement of IT services. The case is notable in that it marks the first time in which the Commission has issued an infringement notice pursuant to Section 67(2) of the Competition Ordinance (Cap 619) ("**Ordinance**"), showing the Commission is now considering cases which may be appropriate for settlement rather than directly bringing cases to the Tribunal, and because it is the first proceedings which follow a successful leniency application. These proceedings follow an eventful 2019 for the competition law regime in Hong Kong, a year which also saw the Tribunal hand down its first two major judgments in cases brought before it by the Commission, in addition to a number of cases which remain pending before the Tribunal.

An overview of these recent developments is set out below.

In detail

Background to the competition law regime in Hong Kong

The Commission is a Hong Kong independent statutory body that is, amongst other things, responsible for investigating and bringing enforcement action against conduct that may contravene the competition rules under the Ordinance. The Tribunal is a specialist court established under the Ordinance which hears and decides cases which relate to competition law in Hong Kong or arise from the Ordinance. The Tribunal is functionally a part of the High Court of Hong Kong.

The Ordinance commenced operation in December 2015, and prohibits conduct which has the object or effect of harming competition in Hong Kong. In particular, Section 6(1) of the Ordinance (i.e. the 'first conduct rule') prohibits agreements and concerted practices between undertakings, and decisions of associations of undertakings, that have the object or effect of harming competition in Hong Kong, and Section 21(1) of the Ordinance (i.e. the 'second conduct rule') prohibits businesses with a substantial degree of market power from abusing that market power engaging in conduct that has the object or effect of harming competition in Hong Kong.

Commission v Quantr Limited and Cheung Man Kit (CTEA 1/2020)

On 22 January 2020, the Commission commenced proceedings in the Tribunal against Quantr Limited ("**Quantr**") and its director, Mr. Cheung Man Kit. It is alleged by the Commission that Quantr and Mr. Cheung had participated in cartel conduct in relation to a bidding exercise organised by the Ocean Park Corporation ("**Ocean Park**") in 2017 for the procurement of IT services on the basis of technology offered by Nintex Proprietary Limited ("**Nintex**").

In summary, the Commission alleges that:

- In early 2017, the IT department of Ocean Park held initial discussions with a representative of Nintex regarding its software solutions, and later conducted a procurement process for Nintex software and accompanying implementation services to develop and install the software.

- As Nintex did not provide such implementation services, Nintex recommended four Nintex resellers (including Quantr) which were capable of providing the requisite Nintex software and implementation services. The IT department of Ocean Park then requested quotations from each of the four recommended Nintex resellers.

- Shortly after, the representative of Nintex initiated communications between himself, Mr. Cheung of Quantr and a representative of one of the other recommended Nintex resellers. These communications resulted in the exchange of information regarding Quantr and the other Nintex reseller's intended fee quotes for the Ocean Park procurement.

The Commission alleges that the communications referred to above amount to an agreement or concerted practice with the object of harming competition, in contravention of the first conduct rule of the Ordinance. This is because the communications involve an exchange of competitively sensitive information regarding future pricing intentions (i.e. Quantr and the other Nintex reseller's intended fee quotes).

Infringement notice

This case is significant in that, in addition to the proceedings filed at the Tribunal referred to above, it is also the first case in which the Commission has issued an infringement notice. Section 67(2) of the Ordinance provides the Commission with the option to, instead of bringing proceedings at the Tribunal against a person, issue an 'infringement notice' to that person offering not to bring proceedings on the condition that the person makes certain commitments to comply with the infringement notice (generally, to refrain from taking or to take certain action, and may include a requirement to admit a contravention of a conduct rule). As such, the infringement notice regime provides an option for the Commission to settle a case with a respondent prior to bringing proceedings at the Tribunal.

In this case, the Commission had initially attempted to resolve the matter with Quantr by way of infringement notice, but Quantr did not agree to make a commitment, resulting in the Tribunal proceedings against Quantr and Mr. Cheung referred to above. On the other hand, Nintex had cooperated with the Commission's investigation and had accepted the Commission's infringement notice, and was therefore not named as a respondent in the proceedings at the Tribunal.

As part of Nintex's acceptance of the infringement notice, it made commitments to the Commission admitting that it has contravened the first conduct rule of the Ordinance, and committing to adopt and implement an effective competition compliance programme which includes, amongst other things, the circulation of certain Commission publications to Nintex staff, the implementation of a competition compliance policy and revisions to Nintex's standard reseller agreement.

The commitments provided by Nintex provide helpful guidance on how the Commission may seek to settle future cases. In particular, it appears that the Commission will seek for commitments to contain admissions of contravention in appropriate cases. The significance of such admissions is that they may open the person making the admission to the possibility of private claims from follow-on litigants who have been harmed by the contravention, pursuant to Section 110 of the Ordinance. Overall, the published commitments (including the requirement to implement a compliance policy and changes to reseller agreements) show an interest by the Commission to promote durable compliance with competition laws.

Leniency regime

The case is also significant in that it is the first case brought by the Commission to the Tribunal that was brought to the Commission's attention by a leniency application under the Commission's '*Leniency Policy for Undertakings Engaged in Cartel Conduct*'. Under the Leniency Policy, the Commission may agree not to bring proceedings against a business or its officers or employees, in exchange for their cooperation in an investigation and subsequent proceedings. The Leniency Policy provides that only the first successful leniency applicant is eligible for leniency.

In this case, the successful leniency applicant was the Quantr's co-bidder, namely the Nintex reseller who had engaged in communications with Quantr (and Nintex) regarding their respective quotations for the Ocean Park procurement. As such, neither the leniency applicant nor any of its officers or employees are named as respondents in the proceedings before the Tribunal.

This case illustrates the potential for the leniency regime in Hong Kong, as it has been in other jurisdictions, to be an important tool for the detection of anti-competitive conduct by the Commission. The case also demonstrates the potential benefits of being a leniency applicant. Whilst cooperation with a Commission investigation pursuant to leniency may involve significant time and potential legal costs, the successful leniency applicant in this case avoided costly proceedings before the Tribunal and commitments pursuant to an infringement notice.

The Commission's decision not to name the leniency applicant in the Tribunal action should provide businesses with greater clarity on the benefits and risks associated with making a leniency application, and may make the Commission's leniency program more attractive to businesses who are considering an application in the future.

First judgments handed down by the Tribunal

On 17 May 2019, the Tribunal handed down its judgements in *Commission v Nutanix & Ors (CTEA 1/2017)* and *Commission v W. Hing & Ors (CTEA 2/2017)*, the first cases brought by the Commission under the Ordinance. These judgments provide further clarity on the competition law regime in Hong Kong, in particular on how the Tribunal will approach serious anti-competitive conduct, which is defined in the Ordinance to include bid-rigging, market sharing and price fixing. These judgments should also act as guidance to companies in Hong Kong to identify and avoid engaging in conduct that could result in possible penalties under the Ordinance.

A summary of these judgments are set out below.

Commission v Nutanix & Ors (CTEA 1/2017)

Overview of facts:

- The Commission commenced proceedings against IT firms Nutanix Hong Kong Limited (Nutanix), BT Hong Kong Limited (BT), SiS International Ltd (SiS), Innovix Distribution Limited (Innovix) and Tech-21 Systems Limited (Tech-21), seeking pecuniary penalties for bid-rigging.

- BT planned to submit a bid in response to the Hong Kong Young Women's Christian Association's invitation to supply and install a Nutanix IT system.

- The first tender failed as BT was the only bid out of a minimum of five bids.

- In the second bid Nutanix and BT made a bilateral agreement to procure the submission of four dummy bids to make up the minimum five bids.

- Nutanix prepared and arranged bids for SiS, Innovix and Tech-21 to be submitted to the tender, with prices substantially higher and less competitive than BT's.

- For SiS, a junior employee (Shek) privately agreed to and submitted the bid on behalf of SiS.

Decision of the Tribunal:

- Justice Lam held that Nutanix, BT, Innovix and Tech-21 had engaged in agreements with the object of preventing, restricting or distorting competition and therefore were in contravention of the First Conduct Rule and are liable to have pecuniary penalties made against them at a later hearing. Importantly, he held that the standard of proof in pecuniary penalty cases is beyond reasonable doubt.

- The agreements of Nutanix, BT, Innovix and Tech-21 constituted "bid-rigging" and thus "serious" anti-competitive conduct under the Ordinance. As a result, no warning notice was required to be given prior to commencing proceedings.

- The application against SiS was dismissed as Shek's conduct was found not to be attributable to SiS. In assessing the attribution of Shek's actions to SiS, Justice Lam took into consideration whether his general duties involved the submission of tenders, whether he had the authority to bind SiS to any commercial commitment, and whether SiS management were aware of these arrangements, all of which were not able to proven.

Appeals of the decision have been lodged by Nutanix, BT and Innovix. In the appeal notices, some of the appellants have invoked the attribution argument (i.e. employees acting beyond their roles), which was the basis on which the application against SiS was dismissed. It was reported that some of the respondents are also arguing that Justice Lam failed to correctly apply the standard of proof (i.e. beyond reasonable doubt) in identifying relevant economic and legal context for the purpose of establishing a contravention of the first conduct rule "by object". The evidential threshold for establishing a "by object" contravention under the Ordinance, as opposed to the alternative ground of "by effect", is of substantial practical significance as if the Commission establishes that certain conduct is a contravention "by object", it will not need to adduce any economic evidence showing that the conduct has harmful effects in order to establish a contravention. The appeal will test the implications of a criminal standard on the definition of what constitutes bid rigging.

Competition Commission v W. Hing & Ors (CTEA 2/2017)

Overview of facts:

- Between Jun-Nov 2016, 10 decoration contractors (respondents) made and gave effect to a 'Floor Allocation Agreement' where they were each allocated a certain number of floors to provide decoration services at in 3 separate buildings in On Tat Estate, a public housing estate in Kwun Tong in Hong Kong. The decoration contractors were alleged to have agreed to only service tenants of their allocated floors and to redirect business of tenants of other floors to their allocated service provider.

- During the same period, the respondents made and gave effect to a 'Price Package Arrangement', whereby they created a joint flyer promoting decoration services for the On Tat Estate, with agreed pricing. Such prices were subsequently used as-is or as reference in a number of successful decoration contracts.

Decision of the Tribunal:

- Justice Lam found that the agreements had the object of preventing, restricting or distorting competition in Hong Kong, and that the 10 respondents are found to have contravened the First Conduct Rule and are liable to have orders made against them. Again, he held that the standard of proof in pecuniary cases is beyond reasonable doubt.

- The conduct flowing from the Floor Allocation Arrangement constituted market sharing, and the conduct flowing from the Package Price Arrangement constituted price fixing, both considered acts of "serious anti-competitive conduct" under the Ordinance.

- Nine of the respondents failed in their attempt to rely on the exclusion to the First Conduct Rule found in the Efficiency Defence under the Ordinance. The Tribunal was not satisfied that the respondents could prove, on the balance of probabilities, that the economic efficiencies generated from the agreements outweighed the anti-competitive effects. In assessing this, the Tribunal considered whether the agreements:

    - generated efficiency benefits to consumers, or whether disproportionate returns were earned by the respondents by virtue of these exclusionary practices;

    - allowed consumers a fair share of the any resulting benefits;

- do not impose restrictions that are not absolutely necessary to the attainment of the objectives; and
- have no possibility of eliminating competition.

- The 'subcontractor defence' relied on by two respondents, W Hing and Wide Project, failed. In reaching this decision, Justice Lam found that the respondents each formed a "single economic unit" with their sub-contractor, and therefore an undertaking within the meaning of the Ordinance, therefore liable for contraventions under the First Conduct Rule.

A hearing before the Tribunal for sanctions and costs was heard in January 2020. An appeal has been lodged by one of the respondents, namely Tai Dou Building Contractor.

Other cases pending before the Tribunal and the High Court

Competition Commission v Kam Kwong & Ors (CTEA 1/2018)

On 6 September 2018, the Commission commenced proceedings at the Tribunal against Kam Kwong Engineering Company Limited ("**Kam Kwong**"), Goldfield N & W Construction Company Limited ("**Goldfield**"), Pacific View Engineering Limited ("**Pacific View**") and two individuals, seeking pecuniary penalties against all respondents for alleged participation in cartel conduct and a director disqualification order against one of the individuals.

The Commission's allegation in this case are similar to those in *Commission v W. Hing*, referred to above. In brief, the Commission alleges that between June to November 2017, Goldfield, Kam Kwong and Pacific View breached the first conduct rule by engaging in cartel conduct where they allocated customers among themselves, exchanged commercially sensitive information and coordinated pricing in relation to the provision of decoration services at King Tai Court, a public housing estate in Hong Kong developed by the Hong Kong Housing Authority.

Whilst the case is similar in substance to *Commission v W. Hing*, the case is noteworthy in that it marks the first time that the Commission has sought pecuniary penalties and director disqualification orders against individuals who are alleged to have been involved in cartel conduct, and not only companies.

Pursuant to Section 91 of the Ordinance, a person can be 'involved' in the contravention of a competition rule of the Ordinance by directly or indirectly, attempting, aiding, abetting, counselling, procuring, inducing or conspiring with any other person to contravene any competition rule. An individual found to be involved in the contravention of a competition rule can be liable for a pecuniary penalty. An individual can also be subject to a disqualification order pursuant to Section 101 of the Ordinance, where it has been determined that a company of which the person is a director has contravened a competition rule. The Tribunal may also and issue other orders that it deems to be appropriate against an individual.

This case reinforces the message sent by the Commission that not only companies, but also individuals who engage in or are involved anti-competitive conduct, are subject to prosecution and penalties under the Ordinance.

The timeline for the case was delayed pending the Tribunal's determination in *Commission v W. Hing*, given the similar substance of the two cases. The case is presently pending trial before the Tribunal.

Commission v Fungs E & M Engineering Company Limited & Ors (CTEA 1/2019)

On 3 July 2019, the Commission commenced proceedings against six decoration contractors, namely Fungs E & M Engineering Company Limited, Yee Hing Metal Shop, Cheung Min trading as Accord Construction & Decoration Co., Hing Shing Construction Company, Luen Hop Decoration Engineering Company Limited and Dao Kee Construction Company Limited, and three individuals, for engaging in a market sharing and price fixing arrangement in relation to the provision of renovation services at Phase 1 of On Tai Estate, Kwun Tong Hong Kong.

The Commission is seeking pecuniary penalties against all six decoration contractors and two individuals for their participation in the alleged market sharing and price fixing cartel. They are also seeking a director disqualification order against one individual, and declarations against the six decoration contractors and two individuals that have contravened the first conduct rule.

This is the third market sharing and price fixing case that the Commission has filed over the past two years in the public estate building decoration sector. The conduct alleged in this case are similar to those alleged in earlier building decoration cases referred to above, namely in *Commission v W. Hing & Ors* and *Commission v Kam Kwong & Ors*.

Whilst this case is similar in substance to previous cases involving decoration contractor cartels, the Commission considered that the alleged conduct was particularly egregious given Hong Kong's most vulnerable consumers were the victims. The Commission also considered that the Tribunal's judgment in *Commission v W. Hing*, in which all ten respondents were found liable, reinforced the view that the conduct alleged amounted to serious contraventions of the Ordinance.

The case is presently pending trial before the Tribunal.

(JOINT) Taching Petroleum Company Limited v Meyer Aluminium Limited (CTA 1/2018) and Shell Hong Kong Limited v Meyer Aluminium Limited (CTA 2/2018)

Taching Petroleum Company Limited ("**Taching**") and Shell Hong Kong Limited ("**Shell**") had respectively been supplying industrial diesel oil to Meyer Aluminium Limited ("**Meyer**") for a number of years. Both Taching and Shell commenced proceedings at the High Court of Hong Kong against Meyer for outstanding invoices for the industrial diesel oil supplied.

Meyer has raised illegality as a defence, alleging that Taching and Shell breached the first conduct rule of the Ordinance by colluding to fix prices and/or exchange price information which has resulted in the two petrol companies overcharging Meyer for years. Meyer submitted that if such a contravention is found, it would be entitled to loss and damages, which could be set off against the outstanding amount claimed.

The competition law-related elements of the cases had been referred to the Tribunal, which heard the parties' arguments in January 2020.

Takeaways

- Through the cases it has brought before the Tribunal, the Commission has made clear that its priority in the early years of enforcing the Ordinance has been tackling serious anti-competitive conduct, such as bid-rigging, market sharing and price fixing.

- The Tribunal's judgment *in Commission v W. Hing* suggest it will be very difficult to successfully argue an efficiency defence in relation to serious anti-competitive conduct, as the Tribunal is likely to heavily scrutinise arguments that efficiencies outweigh the anti-competitive effects generated by such conduct. Businesses who wish to rely on an efficiencies argument in the context of an investigation by the Commission or Tribunal proceedings should be prepared with cogent and well-substantiated evidence of economic efficiencies arising from their relevant conduct, which should be prepared by qualified economic advisors.

- A breach of the first conduct rule can potentially give rise to a defence in illegality in a civil claim. It should be expected that breaches of the conduct rules of the Ordinance may be raised more frequently in the future by defendants as a defence in a civil claim. Businesses who are facing a civil claim may wish to consider the potential for raising a defence on the basis of the breach of a conduct rule of the Ordinance (e.g., if an agreement they are being sued under is 'tainted' by anti-competitive conduct).

Recommendations

- Make sure that proper training is delivered to employees in regards to compliance with the Ordinance, including how to identify serious anti-competitive conduct such as bid-rigging, market sharing and price fixing, how to avoid engaging in anti-competitive conduct and what steps should be taken if employees believe anti-competitive conduct is occurring.

- Companies may seek to reconsider their strategy for handling potential regulatory inquiries, including engaging with the Commission if approached in relation to an ongoing inquiry or investigation.

- Review any agreements with competitors, suppliers and customers to ensure they are in line with the Ordinance.

- If sub-contracting of services is involved, ensure that the sub-contractors are aware of, and comply with, the requirements and rules under the Ordinance.

- Be prepared for an emboldened Commission ready to commence further cases, using their expanded litigation budget.

Let's talk

For a deeper discussion of how this impacts your business, please contact:

Martyn Huckerby
Partner, Tiang & Partners
Tel: +852 2833 4918
Fax: +852 2833 4902
martyn.p.huckerby@tiangandpartners.com

Simon J Booker
Partner, PwC Hong Kong
Tel: +852 2289 2788
Fax: +852 2289 8888
simon.j.booker@hk.pwc.com

Dickie Mok
Senior Solicitor, Tiang & Partners
Tel: +852 2833 4938
Fax: +852 2833 4902
dickie.hd.mok@tiangandpartners.com

Yijia Tu
Senior Attorney, Xin Bai Law Firm
Tel: +86 (21) 5368 4027
Fax: +86 (21) 5368 4112
yijia.tu@xinbailaw.com

Roy Chan
Associate Director, PwC Hong Kong
Tel: +852 2289 6756
Fax: +852 2289 9888
roy.kf.chan@hk.pwc.com

www.pwchk.com
www.xinbailaw.com
www.tiangandpartners.com

pwc

Tiang & Partners
程偉賓律師事務所