Hong Kong Competition Law – Update

November 2021

In this article, we examine some of the recent developments in the Hong Kong competition regime and discuss what we believe is on the enforcement horizon.

Guidance on commitments process

On 10 November 2021, the Hong Kong Competition Commission (the "**Commission**") published its Policy on Section 60 Commitments.

Pursuant to section 60 of the Competition Ordinance, the Commission may accept a commitment from a party to take any action, or refrain from taking any action, that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule. If the Commission accepts a commitment, it will become binding on the parties that gave it and the Commission will not commence or continue any investigation or proceedings before the Competition Tribunal (the "**Tribunal**") regarding the matters addressed by the given commitment.

The new Policy sets out the factors the Commission may take into account when determining whether a commitment is an appropriate outcome to a case. These factors include:

- Whether the commitment is proportionate to the seriousness of the conduct in question. For example, the Commission is unlikely to accept a commitment in relation to a cartel.
- Whether the commitment addresses the Commission's competition concerns.
- If the commitment is capable of effective implementation and monitoring.
- Whether there are any severity factors present which would militate against the appropriateness of a commitment.
- Whether the parties acted in good faith in giving the commitment and the timing of the commitment, for example a commitment is unlikely to be accepted when the case is very advanced.

The new Policy also sets out the key steps in the Section 60 commitment process, including the initiation of the process either by the parties concerned or the Commission, the consultation procedure in relation to a proposed commitment, as well as matters following the acceptance of a commitment. The Policy also helpfully clarifies that the Commission will usually be willing to accept a commitment that does not contain an admission of a contravention, but it will generally not entertain or accept statements seeking to minimise the seriousness of the conduct in question.

The publication of the Policy on the commitment process is a welcome development. The principles set out in the Policy provide clarity and legal certainty to parties involved in a commitment process before the Commission. In addition, the Policy likely signals the willingness and keenness of the Commission to accept commitments in appropriate cases (something which has been hinted at publicly by Commission officials, please see below for further details).

Advisory Bulletin on the admission criteria set by trade associations

On 29 July 2021, the Commission published an Advisory Bulletin on the potential anti-competitive risks associated with the admission criteria set by trade, sporting, professional and industry associations/bodies.

According to the Advisory Bulletin, where membership of an association is an essential pre-condition for competing in a market, exclusion from the association could result in a significant or complete reduction of a company's or individual's ability to compete. The admission criteria set by an association should therefore exist only to safeguard the standards and quality of the trade, and not unreasonably exclude or marginalise any businesses or individuals.

Accordingly, the Commission states in the Advisory Bulletin that the admission criteria for trade associations should be:

(i) Transparent: The admissions criteria, procedures and deadlines to which aspiring members must adhere to enter into the association, must be certain, clearly laid out, readily available and set in advance of the application being made.

(ii) Proportionate: Rules for admission should be reasonable and proportionate and set at a level that is not excessively onerous for prospective applicants to fulfil. This applies to the substantive criteria, procedural requirements, and the admission fees relating to an association.

(iii) Non-discriminatory: Rules for admission should not be applied in an arbitrary manner, so as to exclude certain groups from admission. They should be applied consistently and uniformly.

(iv) Based on objective standards: Rules for admission must have a legitimate aim (for example, to improve the quality of the trade), and not be used to exclude certain groups from membership.

(v) Subject to an appeal procedure: All applicants which are refused membership should be provided with reasons for the refusal and be granted a chance to appeal the decision. The appeals body should partially consist of individuals who are not members of the trade association.

All of the above guidance is equally relevant to decisions to expel or suspend existing members. A member should only be expelled or suspended on grounds that are transparent, proportionate, non-discriminatory and objective. The member should be provided with reasons for the decision and should have the opportunity to appeal it.

The Commission states in the Bulletin that it may view rules that fail to satisfy these requirements as having the object or effect of harming competition.

The Advisory Bulletin issued by the Commission on admission criteria and procedures for trade associations' membership is a welcome development. In particular, it clarifies the key principles that should guide the admission criteria set by a trade association and provides some good insight into how those principles will be interpreted by the Commission. For example, in relation to the requirement for admission criteria to be "transparent", it is indicated that admissions should be assessed on a specified and exhaustive list of criteria. One way to gauge whether admission criteria are "proportionate" is to assess whether existing members would no longer be able to meet them if they were to reapply for admission.

The clarification that members of trade associations which are statutory bodies could be placing themselves at risk of falling foul of the Competition Ordinance if they implement anti-competitive decisions of the associations, notwithstanding the exemption for statutory bodies, is also a welcome clarification on the scope of section 3 of the Competition Ordinance.

However, the Advisory Bulletin could have made clearer what types of admission criteria or practices are likely to be viewed as of particular concern by the Commission (i.e. object restrictions). Moreover, there could have been greater elaboration on other areas such as the use of discontinuance fees or the scenario where a business which runs or is part of a competing association seeks membership of another association. It may well be that the Commission clarifies some of these matters by way of enforcement action in the near future. Indeed, on 23 September 2021, the Commission announced that it is looking into the decision of the Volleyball Association of Hong Kong, China to exclude certain members from full membership rights.

Court of Appeal

In May 2021, the Court of Appeal declined to overturn the Commission's challenge to the criminal standard of proof (i.e. proof beyond reasonable doubt), which applies in competition proceedings under the Competition Ordinance.

This standard was first established in *Competition Commission v Nutanix & Ors* [2019] HKCT 2, by the sitting President of the Tribunal at the time, Godfrey Lam J. The Tribunal considered itself bound by the precedent of the Court of Final Appeal's decision (*Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170) by virtue of which Article 11 of the Bill of Rights and the presumption of innocence applies to cases involving financial penalties.

In a cross-appeal to an appeal launched by two partners of one of the cartel members in *Competition Commission v. W. Hing Construction Co Ltd and Others* [2019] HKCT 3, the Commission claimed that: (a) the criminal standard would be too stringent in cases that involve economic analysis (i.e. abuse of substantial market power and mergers); and (b) it would also hinder the Commission's operations because the standard of proof impacts what cases to pursue, the way the Commission conducts investigations and what cases to bring to the Competition Tribunal. Notably, the Commission did not provide supporting evidence in relation to their claims and the cross-appeal was formulated on a hypothetical basis for which the Commission was seeking an advisory opinion from the Court of Appeal.

Given that the Commission had already successfully won the case despite the higher standard applying and there was insufficient evidence to argue the issue in the current cross-appeal, the Court of Appeal concluded the issue should be revisited in an actual case. The Commission commented that the refusal to redetermine the standard of proof in the current case would lead to fewer successful cases being brought, which would: (a) undermine the overall enforcement system; and (b) create inefficiency when processing cases (for example, due to cases being brought which cannot be sufficiently proven).

In practical terms, the impact of the higher criminal standard of proof applying in competition proceedings is likely to come to the fore in the abuse of substantial market power case filed by the Commission against Linde HKO Limited in December 2020. This is the type of case which typically requires the analysis of the economic effects of conduct by the undertaking with a substantial degree of market power, coupled with analysis around market definition and market power, which are usually hotly contested topics.

Shell v Meyer: first judgment in Hong Kong involving private litigation antitrust trial

On 12 October 2021, the Tribunal decided that there was no contravention of the First Conduct Rule by Shell Hong Kong Limited (**Shell**) and Taching Petroleum Company Limited (**Taching**) in the first privately litigated antitrust trial in Hong Kong. The High Court referred the case to the Tribunal in 2018 when Meyer Aluminium Limited (**Meyer**) pled a competition law defence in response to a suit brought by Taching for non-payment of a debt relating to the supply of diesel oil. Meyer argued that Shell and Taching had colluded to move the price of diesel oil at the same time and by the same magnitude.

The Tribunal found that Meyer had "failed to show even a prima facie case of agreement or concertation". The judgment clarifies and confirms that where a case involves parallel conduct with no evidence of any explicit collusion there is a need to show that collusion constituted the only plausible explanation for the parallel conduct. Meyer had failed to do this to the requisite standard. The finding that this is not equivalent to a beyond reasonable doubt standard applying but rather a reflection of the fact that the civil standard requires strong and convincing evidence, taking into account any reasonable doubt there may be, where a serious allegation is made (which is in line with EU precedent) is to be welcomed.

More generally, the reliance on established EU and UK precedent on the quality of evidence in this tricky area is a positive development in terms of the progress of Hong Kong competition law jurisprudence and the trickledown effect that this may have on enforcement motivation by the Commission (although the judgment makes clear that the criminal standard applies to enforcement cases, at para 70).

Procedurally, it is good to see the Tribunal allowing some witness evidence to be given in camera where the testimony could reveal commercially sensitive information belonging to one party (in this case Shell) in open court to the detriment of that party. A sensible approach was taken by the Tribunal insofar as only that part of the witness's evidence which related to commercially sensitive information was given in camera. This procedure may become more commonplace in competition proceedings.

Madam Justice Au-Yeung decided not to assess whether the alleged conduct was an object offence. However, she seemed to suggest that where the conduct in question is limited to just two participants in a market with a large number of players (here 80 to 100 players) and involves the alleged fixing of list prices but not discounts, in a context where the customer could switch to other players in the market and there was still some competition between the allegedly colluding undertakings, an effects analysis may be required. Madam Justice Au-Yeung referred to the issue being "fact sensitive" but declined to embark on a "wholly academic exercise" on whether the conduct in question would constitute an object infringement given Meyer's case on the First Conduct Rule had already been rejected.

Appointment of new CEO and recent comments made by senior Commission officials

Mr. Rasul Butt was appointed the Chief Executive Officer (CEO) of the Commission for a term of three years commencing 3 May 2021, succeeding veteran competition law enforcer Brent Snyder. Mr. Butt joined the Commission in April 2015 as Executive Director (Corporate Services & Public Affairs). He was subsequently appointed to the position of Senior Executive Director in July 2016 overseeing the policy advisory, advocacy and corporate functions of the Commission. Prior to joining the Commission, Mr. Butt was the General Manager (Corporate Planning) at the Urban Renewal Authority, Hong Kong, where he spent 16 years. It remains to be seen what direction the Commission will take under Mr. Butt.

In July 2021, Executive Director of Operations Mr. Jindrich Kloub stated that the Commission is now capable, in terms of its capacity and resources, to tackle harmful conduct in the digital economy that might impact consumers. Mr. Kloub further stated at a regulator's roundtable discussion that competition issues such as big data and algorithms, are increasingly coming into the Commission's radar. Mr. Kloub mentioned that there are several relevant investigations ongoing, a few of which are "fairly promising" and may result in future regulatory announcements by the Commission.

Mr. Kloub further explained that the Commission is developing "good" sector knowledge in key Hong Kong markets such as the financial technology sector. The Commission is also staying abreast of certain investigations by other agencies, including China's State Administration for Market Regulation (SAMR), in relation to the conduct of companies that are also active in Hong Kong.

Mr. Kloub also revealed that a dedicated team has been set up within the Commission's Operations Division which is proactively monitoring certain sectors, with a view to bringing more *ex officio* (or own initiative) investigations. Moreover, the Commission is also developing relationships with local government agencies, which it hopes will be a means to obtain information and intelligence that could lead to enforcement actions.

Mr. Samuel Chan, the Chairman of the Commission, stated in August 2021 that certain aspects of competition law need to become more firmly established in Hong Kong, including parental liability and the way pecuniary penalties should be imposed. Mr. Chan stated that "as more and more cases are brought to the Tribunal and to the appellate courts, these aspects of competition law which are taken for granted in other jurisdictions will become more settled in Hong Kong"[1]. Mr. Chan also stated that the Commission plans to issue more guidance on the use and process relating to voluntary commitments. He explained that the use of non-litigation measures could in appropriate cases be beneficial for both the Commission and companies under investigation. One further message delivered by the Chairman was to encourage the use of the revised leniency policy for undertakings engaged in cartel conduct. Mr. Chan emphasised that immunity is available for the first cartel member or undertaking that cooperates with the Commission and complies with the conditions under the policy.

Enforcement horizon – what to expect

The last significant enforcement outcome reached by the Commission was in January 2020 when it issued infringement notices to six hotel groups and a tour counter operator for facilitating a price-fixing cartel. Mr. Kloub stated in August 2021 that more enforcement decisions may be expected from the Commission by the end of 2021.

We anticipate that the Commission will reach a variety of enforcement outcomes in the short to medium term (possibly with greater activity in the first quarter of next year). As the COVID-19 crisis eases, we also expect the Commission to conduct dawn raids more frequently.

In the longer term, we expect that the Commission will continue to focus on cartel conduct (with a view to being aided by greater leniency applications) and on pursuing individual liability. Moreover, we predict that the Commission will tackle more complex cases as it continues to mature as a competition regulator, with a focus on both traditional industries and more advanced sectors, such as the digital economy. We also expect the Commission to be involved in more ex-officio initiatives, whether they are market studies or investigations, in the medium to long term.

[1] Hong Kong Lawyer Publication, August 2021 edition.

Let's talk

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

Tiang & Partners

Martyn Huckerby
Head of Competition Law, Asia Pacific
+852 2833 4918
martyn.p.huckerby@tiangandpartners.com

Ajit Kainth
Registered Foreign Lawyer
+852 2833 4915
ajit.kainth@tiangandpartners.com

PwC Hong Kong

Simon Booker
Partner
+852 2289 2788
simon.j.booker@hk.pwc.com

Roy Chan
Partner
+852 2289 6756
roy.kf.chan@hk.pwc.com

www.pwchk.com
www.tiangandpartners.com

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