

Competition Law in Hong Kong: Recent Developments and Outlook for 2017

30 March 2017

Background

The Hong Kong Competition Ordinance (Ordinance) is now into its second year after coming into full effect on 14 December 2015. On 23 March 2017, the Hong Kong Competition Commission (Commission) brought its first case before the Competition Tribunal for alleged bid-rigging by five information technology companies.

In this update, we look at this case and other recent developments in competition law in Hong Kong, including the use of the Commission's investigatory powers by way of dawn raids, requests for information and interviews, as well as more informal queries and public announcements. We also consider the implications of this case and our outlook for 2017.

The first case

On 23 March 2017, the Commission [announced](#) that it had commenced proceedings in the Competition Tribunal against five information technology companies (Nutanix Hong Kong Limited (Nutanix), BT Hong Kong Limited (BT), SiS International Limited (SiS), Innovix Distribution Limited (Innovix) and Tech-21 Systems Limited (Tech-21)) over alleged bid-rigging in a tender for the supply and installation of a new server. The Commission is seeking pecuniary penalties and a declaration that each party has contravened the First Conduct Rule of the Ordinance.

This is the first case to be brought by the Commission to the Competition Tribunal. In its press release relating to the commencement of proceedings, the Commission warned that market participants in all sectors should steer clear of bid manipulation practices, while those already involved in bid-rigging should consider approaching the Commission for leniency. It added that members of the public should also be alert and encouraged them to report suspected bid-rigging to the Commission. The Commission noted that it will use the full extent of its powers to combat bid-rigging.

Considering the facts of the case (as set out in the originating notice of application that was filed with the Tribunal), there are several points of interest:

- this case was prompted by a complaint and the Commission decided to open a formal investigation only eight days after receiving the complaint, suggesting that the Commission is able to move quickly where needed;
- the Commission alleges a series of bilateral vertical arrangements (orchestrated by Nutanix) and a trilateral arrangement, which confirms the Commission's approach towards "hub and spoke" arrangements;
- the Commission refers to EU and UK case law in its notice (which is unsurprising given the similarities between the provisions of the Ordinance and EU/UK law); and
- the evidence which the Commission relies on includes emails, WhatsApp messages, statements and interview transcripts.

In commencing these first proceedings, the Commission has placed particular emphasis on bid-rigging. The Chairperson of the Commission, Ms. Anna Wu, has described bid-rigging as 'one of the most blatant and harmful forms of anti-competitive conduct', noting that the Commission 'takes this type of conduct very seriously because of its potential to cause significant harm to consumers and the economy as a whole'.

Enforcement activities in 2016

Over the past year, the Commission has exercised its investigatory powers by way of dawn raids, requests for information and interviews, as well as more informal queries and public announcements.

The Commission is [reported](#) to have received more than 2,000 complaints since the full commencement of the Ordinance in December 2015. Of these complaints, around 130 were selected for further assessment, of which 13% proceeded to an “in-depth investigation phase”. The Commission has referred 70 cases in relation to the telecommunications/broadcasting sector to the Communications Authority, and 25 cases to other law enforcement agencies and the Competition Policy Advisory Group. Half of the complaints and enquiries received related to the First Conduct Rule, with alleged cartel conduct comprising the bulk of these complaints. It has been reported that about one in six of all complaints related to bid-rigging, with the bulk of these relating to the property maintenance sector.

In the course of 2016, the Commission is reported to have carried out six dawn raids. Pursuant to the Ordinance, the Commission has the power to appear at a company’s premises unexpectedly to investigate potentially anti-competitive activities, commonly referred to as ‘dawn raids’. From the perspective of a company operating in Hong Kong, the ‘dawn raid’ is one of the more intimidating investigative tools available to the Commission.

As the Commission expects to carry out more investigations and step up the use of its enforcement powers over the next year, companies will need to be prepared for increased use of the Commission’s power to carry out dawn raids.

Outlook for 2017

We expect the Commission to reach a decision on the Hong Kong liner shipping industry’s

application for a block exemption order during the first half of 2017, and to release its report into its study of the auto fuel market in Hong Kong by the end of April or early May 2017.

Going forward, companies should be prepared for increased use of the Commission’s investigative powers. The Commission expects to see an increase in cartel investigations over the course of the year, and an increased use of its enforcement powers. To cope with the growing number of cases, the Commission will continue to strengthen its enforcement arm by training local professionals and leveraging overseas experience and expertise. Furthermore, the Hong Kong Legislative Council very recently passed a special resolution to approve additional funding for enforcement and investigations. The Commission is also exploring various options with the Hong Kong government in relation to additional funding for conducting competition litigation (to bring cases before the Tribunal).

In early 2017, a special advisor joined the Commission on secondment from the Competition Bureau of Canada. The Commission has said that the experience of the special advisor will strengthen and facilitate its growing enforcement arm and its activities.

In view of greater enforcement by the Commission, it is even more important that companies understand the wide scope of investigative powers available to the Commission, including dawn raids, and be prepared to respond in the event they are subject to an investigation.

We have produced a separate [First Aid Kit](#) covering the “dos” and “don’ts” of how you should handle a dawn raid by the Commission.



Natalie Yeung
T +852 2901 7275
E natalie.yeung@slaughterandmay.com



Mark Hughes
T +852 2901 7204
E mark.hughes@slaughterandmay.com

© Slaughter and May 2017

This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.