

Competition & Regulatory Newsletter

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First case brought by the Hong Kong Competition Commission before the Competition Tribunal

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 (HKCC) brought its first case before the Competition Tribunal for alleged bid-rigging by five information technology companies.

The HKCC has also been using its investigatory powers, and is expected to step up the use of its enforcement powers as discussed below.

The first case

On 23 March 2017 the HKCC **announced** that it had commenced proceedings in the Tribunal against five information technology companies (Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited and Tech-21 Systems Limited) over alleged bid-rigging in a tender for the supply and installation of a new server. The HKCC 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 HKCC to the Tribunal. In its press release relating to the commencement of proceedings, the HKCC 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 HKCC for leniency. It added that members of the public should also be alert and encouraged them to report suspected bid-rigging to the HKCC. The HKCC 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:

- (i) This case was prompted by a complaint and the HKCC decided to open a formal investigation only eight days after receiving the complaint, suggesting that the HKCC is able to move quickly where needed;

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- (ii) The HKCC alleges a series of bilateral vertical arrangements (orchestrated by Nutanix) and a trilateral arrangement, which confirms the HKCC's approach towards "hub and spoke" arrangements;
- (iii) The HKCC 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
- (iv) The evidence which the HKCC relies on includes emails, WhatsApp messages, statements and interview transcripts.

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

The HKCC's activities in 2016

Over the past year, the HKCC 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 HKCC 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 HKCC 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 HKCC is reported to have carried out six dawn raids. Pursuant to the Ordinance, the HKCC 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 HKCC.

As the HKCC 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 HKCC's power to carry out dawn raids.

Outlook for 2017

The HKCC is expected 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 HKCC's investigative powers. The HKCC 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 HKCC will continue to

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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 HKCC 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 HKCC on secondment from the Competition Bureau of Canada. The HKCC 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 HKCC, it is even more important that companies understand the wide scope of investigative powers available to the HKCC, including dawn raids, and are prepared to respond in the event they are subject to an investigation.

Other developments

Merger control

European Commission blocks proposed merger between Deutsche Börse and London Stock Exchange

On 29 March 2017 the European Commission **announced** that it has prohibited the proposed merger between Deutsche Börse AG and the London Stock Exchange Group (LSE), the two largest European stock exchange operators. Together the parties own the German, Italian and UK stock exchanges, as well as several of the largest European clearing houses.

The Commission concluded that the merger would create a “*de facto* monopoly” in the markets for clearing of fixed income instruments (such as bonds and repurchase agreements) in Europe. This would also have a knock-on effect on the downstream markets for settlement, custody and collateral management, as Deutsche Börse’s Clearstream competes with service providers in those markets and the merged entity would therefore have the ability and incentive to foreclose competitors. In addition, the merger would reduce horizontal competition for the trading and clearing of single stock equity derivatives as Deutsche Börse’s Eurex currently competes with a bundled product offered by LCH.Clearnet SA (the LSE’s France-based clearing house) and Euronext.

The Commission had formally communicated its concerns to the parties in a Statement of Objections in December 2016. In response, the LSE committed to divest LCH.Clearnet SA. The Commission held that although this would have resolved its concerns relating to single stock equity derivatives, this would not be adequate to remedy the concerns regarding the *de facto* monopoly in fixed income clearing, as the market test had shown that LCH.Clearnet SA’s fixed income clearing business is vitally dependent on trading feeds from the LSE’s Italy-based fixed income trading platform MTS (in which the LSE holds a controlling 60% stake, the remaining 40% being widely held by various financial institutions). The Commission therefore could not establish the viability of an independent LCH.Clearnet SA as a competitor in fixed income clearing.

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The Commission's decision to block the merger is not completely unexpected. The Commission had told the parties that it would consider the divestment of MTS to be an adequate remedy. The LSE however **announced** on 26 February 2017 that it was not prepared to commit to sell its stake in MTS, and that in light of this it seemed "unlikely" that the Commission would clear the merger.

This is the third attempt at a merger between Deutsche Börse and the LSE, after two previous potential deals in 2000 and 2005. Prior to this, the Commission's last prohibition decision was in relation to the proposed Three/O2 merger in May 2016. Including the current case, it has prohibited seven mergers in the last 10 years.

Antitrust

European Commission proposes Directive to enhance NCAs' enforcement powers

On 22 March 2017 the European Commission published a **proposal** for a Directive (the so-called "ECN+ Directive") to further empower the national competition authorities (NCAs) of EU Member States and ensure consistency and effectiveness in their enforcement of EU antitrust rules.

Council Regulation (EC) No 1/2003¹, which came into force in May 2004, has contributed to stronger enforcement of EU antitrust rules generally and enabled NCAs and national courts to make a more significant contribution in this area. It also established the European Competition Network (ECN), through which the Commission and NCAs co-ordinate the application of EU competition law. The Commission published a **communication** 10 years on from the coming into force of the Regulation which identified several potential areas of action to boost the enforcement powers of NCAs. A **public consultation** held between November 2015 and February 2016 confirmed the Commission's view that there is "untapped potential" for more effective enforcement of the EU antitrust rules by NCAs.

The proposed ECN+ Directive therefore aims to fully realise the potential of the decentralised system provided for by the Regulation by establishing a set of minimum guarantees, including in the following areas:

- (i) **Independence and resources:** ensuring that NCAs have the necessary human, financial and technical resources and that they act independently and in a fully impartial manner, without political or other external influence;
- (ii) **Powers:** providing a set of core minimum powers to investigate (including by inspecting premises and issuing requests for information) and to take decisions (including by adopting prohibition decisions, imposing behavioural or structural remedies and imposing interim measures), as well as providing effective sanctions for non-compliance;
- (iii) **Sanctions:** ensuring that NCAs can impose effective, proportionate and deterrent fines for breach of EU antitrust rules. The proposal includes setting a common legal maximum for fines of not less than 10% of total worldwide turnover and rules on parental and successor liability;

¹ Council Reg. (EC) 1/2003 (OJ L1, 04.01.2003).

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- (iv) **Leniency**: setting common leniency rules (based on the ECN Model Leniency Programme) that enable NCAs to grant immunity from or a reduction in fines, thereby increasing legal certainty for infringing companies and maintaining their incentives to co-operate with the authorities;
- (v) **Mutual assistance**: allowing one NCA to carry out inspections on behalf of another NCA (including giving the requesting NCA the right to assist with the inspections) and to enforce decisions imposing fines at the request of another NCA against companies that do not have a legal presence or sufficient assets in the requesting NCA's territory.

The choice of a directive as the instrument for the reform will allow Member States to set higher standards than those prescribed and adapt the rules to fit with national specificities. The Directive will now have to pass through the European Parliament and Council before it can be adopted. Once it has entered into force, Member States will have two years to transpose its provisions into national law.

General competition

CMA update on market study into digital comparison tools and decision not to make market investigation reference

On 28 March 2017 the Competition and Markets Authority (CMA) published an [update paper](#) on its ongoing market study into Digital Comparison Tools (DCTs)² across sectors including insurance, credit cards, energy, broadband and flights.

The CMA views DCTs as beneficial to competition, with a potential to “disrupt the status quo” where they operate. They encourage consumers to shop around and switch and make it easier for new or small suppliers to enter the market. While the CMA considers that competition in the DCT market is generally effective, it identified certain conduct which may raise competition concerns including agreements between DCTs and suppliers containing wide or narrow MFN (Most Favoured Nation) clauses, restrictions on bidding for online branded search terms and non-resolicitation clauses restricting the ability of a DCT to re-contact a consumer for a specific period after the DCT has facilitated a sale in respect of a particular product.

The CMA has however **decided** not to make a reference for a market investigation and intends instead to use a combination of consumer and competition enforcement cases, recommendations to regulators and/or government and working with firms in the relevant sectors to increase the benefits delivered by DCTs to consumers. The CMA identified in its update paper certain areas of focus for the next stage of its market study: (i) maximising consumer confidence and building trust, (ii) improving DCT access to necessary inputs, (iii) making competition more effective and (iv) improving regulation. The CMA has identified a lack of transparency in relation to complaints policies, market coverage, business models and ranking methods and data storage and use as a concern. It intends to improve industry practice and review cases for enforcement action in order to maximise consumer confidence and build trust. To make the

² The CMA defines DCTs as “web-based, app-based or other digital intermediary services used by consumers to compare and/or switch between a range of products or services from a range of businesses”.

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regulation of DCTs more effective, it is considering the introduction of cross-sector regulation or principles.

Stakeholders are [invited to comment](#) on the update paper and certain specific questions before 24 April 2017. The CMA will issue a final report by 29 September 2017.

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