Second year of competition law enforcement: a turning point

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Introduction

2017 has seen a landmark shift from investigation to commencing court proceedings. Within less than two years after the Competition Ordinance (**Ordinance**) came into full effect, the Hong Kong Competition Commission (**Commission**) has begun to flex its muscles in bringing two cartel cases before the Competition Tribunal (**Tribunal**). This client briefing considers highlights and lessons that could be drawn from these new cases and the Commission's other enforcement activities and developments over the past year.

Two Cartel Cases taken to Tribunal

One year ago, in our December 2016 Client Briefing, we considered the Commission's activities in its first year of enforcement, including its clear focus on cartel behaviour. 2017 marks a turning point in the history of enforcement of competition law in Hong Kong. This year, the Commission completed its investigation of two cartel cases and commenced substantive proceedings before the Tribunal. These ongoing Tribunal proceedings send a strong message to the public that there will be consequences for contraventions of competition law.

The first two cases both concern cartel conduct, which is consistent with the Commission's enforcement priority and typical of any new competition regime. The first case, *Competition Commission v Nutanix and others*, alleged bid rigging behaviour by five information technology companies in a tender for the supply and installation of a new server. The alleged collusion consisted of a series of bilateral vertical agreements (orchestrated by Nutanix) and a trilateral "hub and spoke" arrangement. The second case, *Competition Commission v W Hing Construction Company Limited and others*, alleged market sharing and price fixing agreements between ten home decorating firms in the supply of renovation services to tenants of a public rental housing estate. The respondents allegedly agreed to allocate specific floors among themselves and determine or influence prices by use of joint promotional flyers containing the same package prices.

Insights into the first cases

It is an impressive achievement for a young agency to act so quickly and to have taken two cases to court within only the second year of the Competition Ordinance coming into effect. For instance, in the *Nutanix* case, formal investigation commenced only eight days after receipt of the complaint, and proceedings before the Tribunal commenced after only nine months of investigation. This demonstrates a commendable level of efficiency in the Commission's internal complaint handling process, prioritisation of resources and conduct of investigations and prosecutions.

These cartel cases raise largely questions of fact; the key question is whether the Commission will be able to prove the agreements as alleged to the requisite standard before the Tribunal. The alleged contravention conduct itself does not require complex economic analysis on effects on competition or involve difficult competition law issues.

Pursuing cartel behaviour in its first two cases may be perceived by some as the Commission picking "low-hanging fruit". However, since the competition law regime is still relatively new in Hong Kong, it is sensible to allocate resources to the most egregious forms of conduct. It also avoids the need for complex economic analysis, which would be required under an "effects" based analysis or for Second Conduct Rule cases. Furthermore, to put this in context, the Commission cannot bring proceedings in Hong Kong for non-cartel anti-competitive conduct (i.e. not involving "serious anti-competitive conduct") under the First Conduct Rule without first issuing a warning notice.

These cases shed light on the Commission's investigation methods. Taking the *Nutanix* case as an example, the investigation was prompted by a complaint and the Commission exercised its investigation powers to, *inter alia*, conduct raids, seize documents and compel the attendance of interviews. Apart from physical documents, the Commission seized employees' personal mobile phones and computers and is relying on evidence from emails and WhatsApp messages. The Commission also issued notices to require employees to attend interviews. These enforcement activities underline the need for companies to be prepared for potential investigations and dispel the common misconception that one can hide anti-competitive conduct by using personal mobile phones.

During the preliminary proceedings of the *Nutanix* case, the Tribunal laid down an important ruling on the issue of admissibility of statements obtained from employees under a notice of interview (issued to the employee) against the employer, where such evidence would tend to incriminate the employer (as well as the employee). This raises questions of statutory interpretation of the Ordinance, in particular, on what a "person" means and the scope of the direct use prohibition under section 45 of the Ordinance (which protects such statements from being admissible against the person who made these statements in substantive proceedings before the Tribunal). The Tribunal held that this depended on the construction of the interview notice and only the person under compulsion (i.e. the person who was required to attend and answer questions) could benefit from the direct use prohibition. In the *Nutanix* case, the Commission issued separate notices to the company and the individual employees, and the Tribunal held that the employee's incriminating evidence could be used against the employers.

This case serves as a good reminder that sound legal advice is crucial for clients to understand how they may protect themselves (and employees) when attending Commission interviews or answering oral questions during dawn raids. There are still questions left unanswered, for example, the Tribunal has not excluded the possibility of a company benefiting from the direct use prohibition of employee evidence and we will have to wait and see how this plays out in future cases. Although this was strictly a question of statutory interpretation (rather than competition law), the Tribunal's interpretation of important terms such as the "person" may potentially have implications for other aspects of the Ordinance.

New leadership

2017 has seen significant changes of personnel within the Commission's executive leadership and the appointment of: (i) Mr. Brent Snyder, Chief Executive Officer (formerly Deputy Assistant Attorney General at the US Department of Justice); (ii) Mr. Jindrich Kloub, Executive Director (Operations) (formerly official from Directorate General for Competition, European Commission); and (iii) Mr. Steven Parker, new Executive Director (Legal Services) (formerly Chief Litigation Counsel at the Hong Kong Monetary Authority).

Mr. Snyder and Mr. Kloub have significant cartel enforcement experience in the United States and Europe respectively. This will prove a valuable asset for the Commission's first cases in court. Coupled with the recent announcement that the Commission will receive an injection of dedicated litigation funding of HK$200 million, clients should be mindful that the Commission is continuing to equip itself with the expertise and resources to pursue more cases.

First Block Exemption Order

The Commission issued its first block exemption order (BEO) on 8 August 2017 to exclude certain agreements between liner shipping companies from the application of the First Conduct Rule, subject to certain conditions. The overall review process lasted over one and a half years, following submission of the application on behalf of the Hong Kong Liner Shipping Association three days after the full effective date of the Ordinance in 2015. During this period, the Commission also sought views from the public on the application and proposed BEO.

The Commission granted an exemption for Vessel Sharing Agreements (VSAs), but not for Voluntary Discussion Agreements (VDAs). The shipping industry in Hong Kong has expressed concerns about the potential effect that the Commission's decision regarding VDAs could have on Hong Kong's competitiveness as an international maritime centre especially as VDAs are exempt in other countries including China, Japan, Korea, Malaysia, Singapore and the USA. The full impact of the decision remains to be seen.

Looking more broadly beyond the shipping industry, this first BEO decision provides helpful insight into the Commission's approach for future block exemption applications. In particular, this decision demonstrates its narrow interpretation of the criteria for the economic efficiency exclusion in Schedule 1 of the Ordinance and emphasis on empirical evidence. The Commission has, for instance, indicated a particular reluctance to take into account "broad efficiencies" (i.e. to the wider Hong Kong economy) without sufficient supporting evidence.

Developments to watch

As the *Nutanix* case proceeds to trial in June 2018, there will be opportunities for the Tribunal to clarify various issues, including whether the nature of competition law proceedings is civil or criminal, important procedural issues such as disclosure, discovery, the standard of proof for establishing a contravention of the First Conduct Rule as well as the applicable law on evidence such as the admissibility of hearsay evidence. In establishing the substantive contravention, we would expect the Commission to seek to persuade the Tribunal to follow a consistent approach with the Commission's guidelines and EU/UK jurisprudence in expounding concepts such as what constitutes an "agreement" and "bid-rigging".

In the first two cases, the Commission has not sought relief (including pecuniary penalties and director disqualification orders) against specific individuals (except in their capacity as undertakings for individuals in partnership). However, following the appointment of new leadership, the Commission has indicated that seeking remedies against individuals is an important part of its enforcement tool box; it will as a matter of course assess the weight of evidence against individuals and is prepared to bring proceedings where there is sufficient evidence of their involvement in the contravention. In relation to another aspect of the enforcement framework, the Commission also indicated it may expand its leniency policy to provide further incentive for whistleblowers to report on cartels (e.g. reduction of fines for companies that do not qualify for immunity and potentially immunity for individuals).

Conclusion

Whilst the competition law regime is still in its early days, the Commission's first two cases before the Tribunal are an important opportunity for it to demonstrate its ability to successfully prove a contravention of the Ordinance in court, secure an order to pay pecuniary penalties as well as defend its investigation practices. The outcome of these cases will be crucial to the public's perception of the effectiveness of the enforcement of the Ordinance and could be the next turning point in shaping the future development of the competition law regime in Hong Kong.

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