

Three years on: a brave new world for competition enforcement

December 2018

Introduction

Within three years since the Competition Ordinance (CO) came into full effect, the Hong Kong Competition Commission (**Commission**) has brought three cartel cases before the Competition Tribunal (**Tribunal**) and taken a range of other enforcement actions. It has sent a clear message that it is ready to take cartelists - both undertakings and individuals concerned - to court. This client briefing highlights the key developments in 2018 and over the past three years, as well as looking ahead to see what is still to come.

Three cartel cases in three years

The Commission's efficiency and speed in cartel investigations is commendable. One year ago, in our [December 2017 Client Briefing](#), we considered the Commission's cartel enforcement focus in its second year of enforcement. This year, the Tribunal heard the trials of the first two cartel cases. Even though the Tribunal has yet to rule on them, the Commission brought a third cartel case in *Competition Commission v Kam Kwong Engineering Company Limited and others*, seeking for the first time a pecuniary penalty against individuals involved in cartel conduct and a disqualification order against a director (see our [September 2018 Client Briefing](#)).

These early cases cover a range of cartel conduct, including bid rigging, price fixing and market sharing. They have raised a number of different legal and factual issues. During the trial, apart from issues of evidence, fundamental concepts of competition law such as the definition of "bid-rigging" were challenged. Some defendants pleaded "lack of authority" as a defence. Important procedural issues such as standard of proof, rules on discovery and admissibility were also considered. Assuming the Commission wins the case, we will gain insight into

the Tribunal's principles for calculating the pecuniary penalty. The development of jurisprudence and established procedures will lay down the foundation for future competition enforcement.

First decision on legal requirement exclusion

In October, the Commission issued its first decision that the Hong Kong Code of Banking Practice (**Code**) is not excluded from the application of the First Conduct Rule by or as a result of the legal requirement exclusion in the CO. The Commission adopted a narrow interpretation of the wording of the Code and the underlying statutory instruments and took into account the consequences for non-compliance with the Code. Slaughter and May advised on the application.

In addition to providing a detailed statement of reasons, the Commission issued a public statement to confirm that it has no current intention to investigate or pursue enforcement action in respect of the Code in its present iteration. This was helpful in removing a significant degree of uncertainty for authorized institutions from a practical enforcement perspective.

While the decision was specific to the application of the legal requirement exclusion to the statutory framework underlying the Code, the relevant principles will be relevant to any undertaking which wishes to rely on this exclusion, whether by self-assessment or applying for a decision.

Together with the block exemption order issued in August 2017, the Commission has, within the first three years, had the opportunity to exercise both its power to grant a block exemption for a category of agreements, as well as a decision for a specific agreement.

Non-cartel conduct

We have seen limited enforcement activity under the First Conduct Rule not involving “serious anti-competitive conduct”, for example, restrictions in vertical agreements. One reason is that, under the CO, the Commission cannot bring Tribunal proceedings without first issuing a “warning notice”. Given this prerequisite and the opportunity for alleged offenders to rectify their conduct after receiving a warning notice, development of jurisprudence on these issues would appear difficult under the current regime.

The Commission has also not yet brought any Tribunal proceedings against undertakings for abuse of a substantial degree of market power under the Second Conduct Rule. These cases tend to raise difficult questions about effects on competition and require complex legal and economic analysis. According to the Commission’s enforcement policy, it will prioritise exclusionary abuse by incumbents. This is an area in which selection of the right case(s) is very important, particularly in Hong Kong.

Alternative means of resolution

In addition to the warning notice, the Commission has not issued any infringement notices or accepted commitments in lieu of proceedings. In meritorious cases (e.g. where there are no proven or significant adverse effects on competition or there are legitimate commercial justifications behind the illegal conduct), these alternative methods of resolution may be preferable to commencing Tribunal proceedings to facilitate better allocation of resources.



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First private action (competition defence)

In September, the Tribunal heard the proceedings transferred from a civil action in the High Court to consider the merits of an alleged competition law defence. In *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Ltd v Meyer Aluminium Ltd*, Taching Petroleum Co., Ltd (**Taching**) and Shell Hong Kong Ltd (**Shell**) against Meyer Aluminium Ltd (**Meyer**) for payment of contractual debts for diesel oil sold and delivered.

Meyer raised a common defence that Taching and Shell engaged in price fixing in breach of the First Conduct Rule. The Tribunal is expected to hear evidence on the contravention of competition law. If a contravention is substantiated, the court will rule on the implications of this for the original action.

Looking ahead

Three cartel cases in three years is a significant achievement for the Commission and reflects its efficiency and dedication to enforcement. The Commission’s applications before the Tribunal will be thoroughly analysed, argued and subject to intense judicial scrutiny under the rule of law in Hong Kong. Whether the Commission is successful in these cases and the level of any penalty to be imposed by the Tribunal will have implications for the overall deterrent effect of competition law. As the competition law regime continues to take shape, time may be ripe for a review by Government and the legislature of what has worked well and how the regime can be further improved.



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