The Commission's Day in Court: Hong Kong Competition Tribunal Hands Down First Two Judgments Under the Competition Ordinance

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On 17 May 2019, the Hong Kong Competition Tribunal (**Tribunal**) handed down two judgments in respect of the first two cases to have been brought before the Tribunal by the Hong Kong Competition Commission (**Commission**) since the Competition Ordinance (**Ordinance**) came into effect in December 2015.

This Client Briefing provides an overview of the Tribunal's findings, and the key points of general significance to take away from these landmark cases.

Background

The first case to be brought by the Commission before the Tribunal was brought against *Nutanix Hong Kong Limited and others* on 23 March 2017, and involved allegations of bid-rigging (**the *Nutanix* case**). The second case was brought against *W. Hing Construction Company Limited and others* on 14 August 2017, and involved allegations of market sharing and price fixing (**the *decoration works* case**).

Although the cases involve distinct fact patterns, and were heard separately, Mr. Justice Godfrey Lam, President of the Tribunal, handed down both judgments on the same day. It was an important day for competition law in Hong Kong.

The *Nutanix* case

Facts

The case was brought 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 proceedings concerned a tender issued by the Hong Kong Young Women's Christian Association (**YWCA**), a social services organisation, in July 2016. The tender related to the supply and installation of a new IT server system based on Nutanix technology. Each of BT, SiS, Innovix and Tech-21 submitted bids in response to the tender. The Commission contended that, in response to YWCA's invitation to tender, the respondents entered into various agreements to submit "dummy bids".

Findings

In summary, the Tribunal found as follows:

- The applicable standard of proof required of the Commission is the criminal standard of proof beyond reasonable doubt.
- Nutanix and BT made an agreement to procure the submission of four dummy bids. In addition, Nutanix entered into separate bilateral and trilateral agreements with the other respondents to help BT win the bid.

> *...the applicable standard of proof required of the Commission is proof beyond reasonable doubt"*
>
> - The *Nutanix* case

- Each of the agreements falls within the definition of "bid-rigging" and, as such, within the definition of "serious anti-competitive conduct" in the Ordinance for which no warning notice needed to be issued.
- However, in the case of SiS, the Tribunal found that the SiS employee's conduct was not attributable to SiS. In particular, he was a junior employee whose general duties did not include submission of tender or even provision of any binding quotation, and had no authority to bind SiS in relation to any commercial commitment. In addition (and perhaps more importantly), SiS's business did not include sale to end-users such as YWCA; it sold only to resellers. It was not within the job description of *anyone* in the company to be tendering to YWCA. The Commission also failed to show that the relevant SiS employee's seniors were cognisant of his arrangements with the representative of Nutanix.

The Tribunal therefore concluded that Nutanix, BT, Innovix and Tech-21 are persons who have contravened the First Conduct Rule and liable to have orders made against them accordingly. The application as against SiS (and as against Nutanix in relation to the alleged agreement with SiS) was dismissed. The orders that should be made consequent upon the Tribunal's findings and conclusions will be dealt with in a further hearing.

The *decoration works* case

Facts

The case was brought against ten construction and engineering companies for engaging in market sharing and price fixing conduct in the provision of decoration works at a public rental housing estate.

The ten respondents were W. Hing Construction Company Limited, Sun Spark Construction Limited, Mau Hang Painting & Decoration Co, Tai Dou Building Contractor, Kam Kee Machine Electrical Iron Works Company Limited, Hip Yick Construction Company, Tai Wah Civil Engineering, Wai Sun Iron & Decoration Co, Wide Project Engineering & Construction Co and Luen Hop Decoration Engineering Co Limited.

The alleged market sharing conduct concerned the allocation by the contractors amongst themselves of specific floors of a housing estate project in Hong Kong, whereby they would not actively seek or accept business from tenants on floors allocated to other contractors and/or would direct such tenants to the allocated contractor of that floor (**the Floor Allocation Arrangement**). The alleged price-fixing conduct concerned the joint production and use of promotional flyers in advertising decoration works, which contained package prices for different services and were used by all the relevant contractors (**the Package Price Arrangement**).

Findings

In summary, the Tribunal found as follows:

- The Floor Allocation Arrangement consisted of the allocation of market for the supply of services and hence constituted "serious anti-competitive conduct".
- The Package Price Arrangement consisted of fixing the price for the supply of services and therefore also constituted "serious anti-competitive conduct".

...the burden of establishing the efficiency defence on the balance of probabilities lies on the respondents"

- The *decoration works* case

- Both the Floor Allocation Arrangement and the Package Price Arrangement had the object of preventing, restricting or distorting competition in Hong Kong.
- The respondents tried to argue that the Floor Allocation Arrangement gave rise to efficiencies outweighing the competitive harm. The judgment considers the cumulative limbs of the efficiencies exclusion (contained in section 1 of schedule 1 of the Ordinance), but ultimately the Tribunal held that the respondents failed to demonstrate that any of the limbs of the exclusion were satisfied.

The Tribunal therefore concluded that each of the 10 respondents is a person or (in the case of partnerships) are persons who have contravened the First Conduct Rule. The orders sought by the Commission (for a pecuniary penalty, for declarations of contravention, for an order that each of the respondents pay to the Government sums in respect of the costs of and incidental to the investigation into their conduct, and costs of the proceedings in the Tribunal), will be determined after a further hearing.

Key takeaways

As noted by Ms. Anna Wu, Chairperson of the Commission, in the Commission press release, published on the day of the judgments, the two judgments "*represent a key milestone for the Hong Kong competition law regime*". The judgments contain a number of important points of precedent and provide helpful guidance and clarity on aspects of the Ordinance.

Within the lengthy judgments, there are a number of important points to note that are of general significance.

Foreign jurisprudence

References to the decisions of foreign antitrust authorities, and foreign courts, are made throughout the judgments. The *Nutanix* case contains a section on "overseas jurisprudence", in which the Tribunal considers the position primarily in EU and English case law (as the Commission submitted that its contention is consistent with the position in both these jurisdictions). The Tribunal also refers to Australian and US law and cases. It is clear that the decisions of authorities and courts in these jurisdictions, and Europe in particular, will be very influential in the Tribunal's decision making going forward.

Definition of an "undertaking"

The Tribunal considered the definition of "undertaking" in detail in the *decoration works* case. Consistent with the references to EU law throughout the judgments, the Tribunal considered the definition of "undertaking", and the related concept of a "single economic unit", by reference to the EU-law definitions.

In the *decoration works* case, two of the respondents contended that they were not liable for any contravention of the First Conduct Rule on the ground that the sub-contractors who carried out the works were separate undertakings. However, the Tribunal concluded that each relevant respondent and their respective subcontractor formed a single economic unit, and therefore a single undertaking. The analysis did not focus on either control, decisive influence or financial risks (as in parent-subsidiary cases or principal-agent cases), but instead considered, by reference to statute: (i) what is the relevant economic activity that was engaged in; (ii) what is the entity engaged in that activity; and (iii) what persons are comprised in that entity.

The standard of proof

The Tribunal concluded that it was "*not at liberty to apply any other standard than proof beyond reasonable doubt*", as the proceedings, seeking orders for pecuniary penalties, involve the determination of a criminal charge within the

meaning of Article 11 of the Hong Kong Bill of Rights.[1]

It is not necessary for every item of evidence produced to satisfy the standard of proof in relation to every aspect of the contravention. It is sufficient if the body of evidence relied on, viewed as a whole, satisfies the burden. Nevertheless, this is a high threshold for the Commission to reach.

Application of the efficiency defence

In the decoration works case, the Tribunal analysed in detail the efficiency defence raised by certain of the respondents. Mr. Justice Godfrey Lam's judgment indicates that the Tribunal is likely to look upon efficiency arguments raised in defence of a cartel with a high degree of scrutiny and scepticism. The burden is on the respondents to raise and establish the defence on the balance of probabilities.

Mr. Justice Lam was particularly critical of the parties in the decoration works case for both (i) denying the existence of the alleged agreements on the one hand and (ii) pleading that the agreements were necessary to deliver efficiencies on the other hand, describing this as "*regrettable and opportunistic*".

In interpreting the efficiency exclusion in section 1 of schedule 1 of the Ordinance, the Tribunal noted the similarities with the equivalent provisions in UK and EU law. The Tribunal followed closely the approach taken in these jurisdictions in interpreting and applying the exclusion.

Attribution of liability

In the *Nutanix* case, SiS escaped liability by demonstrating that its employee's conduct was not attributable to SiS. In particular, it was not within the job description of anyone in SiS to be tendering in the relevant market, and the Commission could not show that there was a sufficient connection between the acts of the employee in question and the undertaking so that the former can properly be regarded as part of the latter in the relevant context. The employee had "*gone rogue*". This could prove to be an important defence in future cases, if respondents are able to prove that an employee engaging in cartel conduct was acting outside his/her scope of work and without authority.

The judgment refers to SiS's employee Code of Conduct and internal compliance training, both of which cover competition compliance, in analysing attribution of liability. This is a useful reminder to companies of the importance of competition compliance training.

Requirement for a "warning notice"

In the *Nutanix* case, the Tribunal considered whether the conduct in question involved "serious anti-competitive conduct" and in particular "bid-rigging" as defined in the Ordinance. Section 82 of the Ordinance requires a warning notice to be issued before any enforcement proceedings may be brought by the Commission in the Tribunal in specified circumstances. No such warning notice is required if the conduct in question is "serious anti-competitive conduct". The Tribunal concluded that the conduct fell within the statutory definition of "bid rigging", despite the respondents' argument that, among other things, YWCA knew about the anti-competitive agreements in question at or before the time the bids were submitted. Therefore, no warning notice was required to have been issued.

[1] Following the Hong Kong Court of Final Appeal's judgment in Koon Wing Yee v Insider Dealing Tribunal (2008) 11 HKCFAR 170.

The time for carrying out the relevant assessment is at the time of commencement of proceedings, at which point the Commission must have reasonable cause to believe that the conduct is "serious anti-competitive conduct".

Conclusion

This Client Briefing covers just some of the key points in the two judgments, which are likely to be explored and unpacked in future decisions. The handing down of these judgments marks a pivotal moment in Hong Kong's competition regime. Some important points of law have been decided and, perhaps most importantly from the Commission's perspective, the Commission has come away with a positive result that sends a powerful warning to companies doing business in Hong Kong.

The decisions of the Tribunal can be appealed to the Hong Kong Court of Appeal. It remains to be seen whether the respondents have any appetite for this.

A factor in the decision whether to appeal is likely to be the quantum of pecuniary penalties imposed. This remains to be decided by the Tribunal. The Commission is likely to push for significant fines to "*send a powerful warning to businesses*", as per Ms. Anna Wu's statement in the Commission press release. The Tribunal's decision on quantum of the penalty will set an important benchmark for future fines.

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