

It's getting personal: first cartel case against individuals

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First case against individuals

On 6 September 2018, the Hong Kong Competition Commission (**Commission**) took its third cartel case to the Competition Tribunal (**Tribunal**), seeking for the first time a pecuniary penalty against individuals involved in cartel conduct and a disqualification order against a director. This reflects the Commission's continued focus on enforcement against cartels and sends a stern warning that individuals can also be liable for engaging in cartel conduct. From the Commission's perspective, individual liability has an important deterrent effect against anti-competitive practices.

Brief facts of the case

In *Competition Commission v Kam Kwong Engineering Company Limited and others*, the Commission alleged market sharing and price fixing agreements between three local decoration contractors in the supply of renovation services to a residential estate developed by the Housing Authority. The alleged conduct consisted of an agreement to allocate specific floors/units among themselves and the exchange or coordination of the content and price of decoration packages for unit owners of the estate through distributing substantially similar leaflets (with identical designs) in which contractors' prices differed only marginally. In substance, the alleged cartel conduct is very similar to the Commission's second case currently before the Tribunal (*Competition Commission v W Hing Construction Company Limited and others*).

The key distinguishing feature of the present case is that the Commission has commenced proceedings against two individuals involved, namely, Chan Kam Shui (**Chan**) and Lam Po Wong (**Lam**). It is argued that they should be liable for having either: (i) aided, abetted, counselled or procured others to engage in conduct that contravenes the First Conduct Rule; or (ii) been, directly or indirectly, knowingly concerned in or party to the contravention.

Both Chan and Lam were managers responsible for day-to-day business activities of their respective contractor at the estate. Chan was the sole shareholder and a director of Kam Kwong Engineering Company Limited (**Kam Kwong**). Lam was entrusted to be the manager with a 30% share of profits generated by the relevant works, and was the "most senior representative" of Pacific View Engineering Limited (**Pacific View**). Both recruited relevant personnel and instructed staff to engage in cartel activity, and personally gave effect to the cartel through implementing the allocation agreement and/or coordinating the printing of leaflets with package prices for all three contractors.

In addition, the Commission is seeking a director disqualification order against Chan, being a director of Kam Kwong. It is alleged that (consistent with section 103 of the Competition Ordinance (**CO**)) Chan either: (i) knowingly participated in the cartel; or (ii) had reasonable grounds to suspect or ought to have known that the conduct of Kam Kwong constituted a contravention and was grossly negligent in failing to take steps to prevent or terminate such conduct.

This case was triggered by a complaint received from a member of the public in August 2017, subsequent to the publicity surrounding the *W Hing Construction* case. It is interesting that the Commission chose to bring another case in the same sector, addressing very similar conduct, before the Tribunal has even heard the previous case.

The Commission's enforcement approach towards individuals

The CO confers broad powers on the Commission to sue any "person being involved in a contravention of a competition rule". The term "person" is not limited to individuals of any particular seniority or rank. Being "involved in a contravention" is very widely defined and includes attempting, aiding, abetting, counselling or procuring any other person, or in any way being a party to the contravention of a competition rule. The Commission's enforcement approach therefore plays a

central role in limiting the scope of individuals caught under the CO. One key question arising out of this case will be why the Commission chose to bring proceedings against these two particular individuals.

The Commission's Enforcement Policy does not set out in detail how its enforcement discretion is exercised against individuals, except to state that it *may* prioritise taking actions against officers, including directors and managers, of undertakings who participated or were otherwise involved in the cartel conduct. Similarly, in its Q&A regarding these proceedings, the Commission's priority is stated to be those who are "*in the management of the contravening company or otherwise directed the cartel conduct, rather than frontline staff who follow their directions*".

Based on the roles of Chan and Lam, as described in its initial application to the Tribunal, the Commission appears minded to pursue only the most senior individuals who are responsible for day-to-day management and closely involved in the cartel conduct. The Commission did not bring proceedings against other individuals; in particular, it is not clear why no proceedings were brought against any officer of the third contractor, Goldfield N & W Construction Company Limited.

Other observations

Within a small- or medium-sized business (such as the alleged cartelists), it may be easier to identify the senior staff involved in the cartel conduct. However, this could be a very different question with officers of a larger undertaking, who may have less visibility or involvement over the day-to-day operations.

This case provides the opportunity for the Tribunal to clarify the principles for individual liability under the

CO, which appear grounded either on participation or accessory liability. In the present case, the Commission is pleading both as alternative bases. The conceptual basis for liability is clearly not the same, and in each case the requisite degree of knowledge and participation is likely to be the key issue. This also raises interesting legal questions about the relationship between individual liability and corporate liability of the undertaking.

This case also addresses the question of the appropriate amount of pecuniary penalty for individuals (assuming the Commission is successful in establishing liability). On the face of the CO, individuals could be fined up to 10% of the turnover of the relevant undertaking, but it would clearly be disproportionate to use the company's turnover as a benchmark for individual liability.

Conclusion

This case marks an important milestone as the enforcement regime in Hong Kong continues to gather momentum. With each new case, the Commission is demonstrating its resolve to use all of its enforcement powers at its disposal. This breadth of enforcement actions is positive for the advancement of competition law in Hong Kong, as cases must be tried before the Tribunal in order for the law to develop.

Directors and other officers with managerial responsibility should be mindful of not only corporate exposure but also their own potential individual exposure to liability for cartel conduct in the day-to-day operations. Compliance with competition law is a matter of priority and needs to be taken seriously from the very top, particularly in the context of the current enforcement environment.



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