

Year 2019: a landmark year for competition enforcement in Hong Kong

December 2019

Introduction

This year has been an important year for the development of the competition law regime in Hong Kong. In May, the Competition Tribunal (**Tribunal**) handed down its first judgment for the first two cartel cases on the same day. Two months later, the Hong Kong Competition Commission (**Commission**) brought the fourth cartel case before the Tribunal, in which the Commission further pursued its focus on individual liability. The Commission has also been active in conducting initial assessments and formal investigations, including the investigation of the Hong Kong Seaport Alliance.

This client briefing provides the highlights of competition enforcement in 2019, and looks ahead towards the year to come.

The First Tribunal Judgments

Background

On 17 May 2019, the Tribunal handed down the judgments of the first two cases brought by the Commission (pending appeal) - one in relation to bid-rigging and the other in relation to price fixing and market sharing.

The first case, *Competition Commission v. Nutanix Hong Kong Ltd and Others*, concerns a call for tenders issued by YWCA in July 2016 for the supply and installation of a Nutanix cloud-based server system. Nutanix agreed with BT that Nutanix would obtain four “dummy bids” (in the sense of non-genuine bids) in order to satisfy YWCA’s procurement policy requiring a minimum of five bids for this tender. Subsequently, SiS, Innovix, Tech-21 and iCON submitted bids with

substantially higher bid prices than BT’s and BT won the bid.

The second case, *Competition Commission v. W. Hing Construction Co Ltd and Others*, concerns the provision of decoration works for tenants in a public housing estate in Kwun Tong. Ten decoration contractors, which were approved by the Hong Kong Housing Authority under its decoration contractors registration system, allocated amongst themselves designated floors in the three buildings and jointly produced a promotional flyer setting out “package” prices.

Key takeaways

The Tribunal laid down a number of important principles for cartel cases (see our [May 2019 Client Briefing](#) for more detailed discussion of the ruling).

1. Standard of proof: Following the Hong Kong Court of Final Appeal’s judgment in *Koon Wing Yee v. Insider Dealing Tribunal*, the Tribunal held in both cases that the standard of proof which the Commission must meet to prove its case is the criminal standard of proof beyond reasonable doubt. This is because the Commission was seeking an order for pecuniary penalties, which the Tribunal held involves the determination of a criminal charge within the meaning of Article 11 of the Hong Kong Bill of Rights. This differs from the civil standard of proof of “balance of probabilities” adopted in many other jurisdictions (including Australia, Canada, New Zealand, Singapore and the UK).

2. Concept of “undertaking”: The Tribunal considered contractors and their sub-contractors as a single economic unit, and hence one undertaking. As a result, the contractors were liable for their sub-contractors’ conduct, even though they had no knowledge and did not participate in the decoration works.
3. Attribution of conduct and knowledge: To attribute conduct and knowledge of an employee to the undertaking, there must be a “sufficient connection” between the acts of the employee in question and the undertaking, such that the employee can properly be regarded as part of undertaking in the relevant context.
4. Efficiency defence: In line with the tests under UK and EU law, the burden of proof lies on the relevant respondents to establish the economic efficiency defence on the balance of probabilities.

Significance of the judgments

While both of these judgments are being appealed, they are landmark cases and provide useful insight on the Tribunal’s approach to the interpretation of the Competition Ordinance (**Ordinance**). Further, the Tribunal’s decision on the level of fines to be imposed is due to be handed down in 2020. This will be significant for future First Conduct Rule cases, especially in determining how much of a deterrent effect the Ordinance creates against anti-competitive behaviour.

The Commission’s Fourth Case

As mentioned in our [September 2018 Client Briefing](#), in 2018, the Commission sought a pecuniary penalty for the first time against

individuals involved in cartel conduct and a disqualification order against a director.

In July 2019, the Commission issued further proceedings against three individuals in its fourth cartel case (its third case involving renovation and decoration contractors), seeking a pecuniary penalty against two individuals and a director disqualification order against the other individual.

This is in line with the Commission’s clear focus on holding individuals, as well as companies, accountable for cartel conduct. Both senior and junior employees are vulnerable, according to the Ordinance. Companies should ensure that sufficient competition law training and guidance are provided to the employees to reduce both corporate and individual exposure.

Various Ongoing Investigations (including Second Conduct Rule)

Over the past year, the Commission remains active in conducting initial assessments and formal investigations. Between 1 April 2018 and 31 March 2019, the Commission escalated 28 cases for further investigation.¹

In January, the Commission opened a formal investigation into the “Hong Kong Seaport Alliance”,² an arrangement between numerous terminal operators to operate and manage their 23 berths across 8 terminals in Hong Kong, to see whether the arrangement contravenes the First Conduct Rule. The Commission mentioned in its press release that this investigation will be a priority but it has yet to reach a decision.

Consistent with the past few years, the Commission’s focus has been on cartel conduct but Second Conduct Rule contraventions are also on its radar. According to the Commission’s recent Annual Report, there are two Second Conduct

¹ 2018/2019 Annual Report of the Hong Kong Competition Commission

² Hong Kong Competition Commission’s press release dated 10 January 2019

Rule cases in the initial assessment and/or investigation phase.

Cooperation and Settlement Policy

The Cooperation and Settlement Policy was issued by the Commission in April (see our [May 2019 Client Briefing](#) for further information). This is a useful supplement to its earlier Leniency Policy (which applied only to the “first in”), as it allows companies which do not benefit from the Leniency Policy to cooperate with the Commission in its investigation in order to get up to 50% discount on the pecuniary penalty the Commission would recommend to the Tribunal. An admission of liability is required to benefit from this policy. This formalises the settlement procedure, thereby allowing companies to know clearly the steps of approaching the Commission and the likely outcome if they opt to settle the case with the Commission instead of defending the allegations against them.

Commission’s Decision on HKAPI’s Exemption Application

Since 2017, the Commission has published one decision on an application for an exclusion/exemption each year. 2019 was no exception. In October, the Commission published a decision, finding that the pharmaceutical sales survey (**Proposed Survey**) proposed by the Hong Kong Association of Pharmaceutical Industry’s (HKAPI) is not excluded from the application of the First Conduct Rule by the economic efficiency exclusion.

The purpose of the Proposed Survey was to collect sales data from pharmaceutical companies on their prescription and over-the-counter pharmaceutical products in Hong Kong and Macau. The data collected would be compiled into a quarterly report which would then be made available for purchase.

Key takeaways

(a) Information sharing

In the context of this application, the Commission considered that the aggregation of three or fewer products of a particular company was insufficient

and thus could give rise to competition concerns. Quarterly sales data with 1 month delay was also not considered by the Commission as “historical” in this context. Therefore, companies should not assume that the sharing of “historical” and “aggregated” data is automatically exempted from the operation of the First Conduct Rule, but should take care in interpreting these terms in the specific context in question.

(b) Standard of proof for claiming economic efficiencies

Consistent with the liner shipping block exemption order, the Commission requires a high standard of proof for claiming economic efficiencies. In particular, the Commission opines that HKAPI has failed to provide “convincing” or “cogent and compelling” evidence to prove that the Proposed Survey will in fact give rise to the five economic efficiencies suggested by HKAPI itself.

Significance of the decision

This decision highlights the difficulty for companies and trade associations to seek an exemption from the Commission for information exchange and raises the question of whether the application process is the most appropriate for proposed activities of this nature.

Looking Ahead

Following the successful application in the first two cartel cases before the Tribunal, we expect the Commission to pursue cartel cases with continued rigour, including perhaps the first cases involving use of the Cooperation and Settlement Policy. We will also see the first fines imposed by the Tribunal in 2020. Whilst noting that Second Conduct Rule cases may take longer to investigate, next year will be an interesting one indeed if we see the Commission bring its first abuse case before the Tribunal.

Further, as the competition regime in Hong Kong becomes more mature, it might be a suitable time for the government to consider introduction of a general cross-sector merger control regime, to bring Hong Kong in line with many other jurisdictions around the world.



Natalie Yeung

Partner

T +852 2901 7275

E natalie.yeung@slaughterandmay.com



Alexander Lee

Associate

T +852 2901 7202

E alexander-pc.lee@slaughterandmay.com



Jonathan Kwok

Associate

T +852 2901 7340

E jonathan.kwok@slaughterandmay.com