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Competition Law Guidance Note (Tenth Issue) - Guidance Note on significant competition law cases and need for competition law compliance (Part 1)

Introduction

The Institute has consistently reminded governance professionals that competition law compliance is an important regulatory topic. As an overview, the competition law regime is a civil one. The Hong Kong Competition Commission (**Commission**) is tasked with enforcing competition law in Hong Kong. Enforcement proceedings for breaches of the Competition Ordinance (Cap. 619) (**Ordinance**) are brought by the Commission to the Competition Tribunal (**Tribunal**), chaired by judges of the Court of First Instance of the High Court. The Tribunal has the power to impose sanctions for contraventions of the Ordinance (e.g., pecuniary penalties, director disqualification orders).

Pecuniary penalties could be up to 10% of the annual Hong Kong turnover of the entire corporate group for the duration of contravention of competition law, capped at three years. Penalties can also be imposed on directors and employees and other facilitators, meaning personal liability exposure is a distinct possibility for their breaches in competition law.

In terms of the law, the First Conduct Rule deals with agreements to prevent, restrict or distort competition. While there is a general exemption for small and medium enterprises with less than $200M turnover annually, this exemption does not apply to serious anti-competitive conduct, i.e., price-fixing, market sharing, bid-rigging, and output restriction. Then there is the Second Conduct Rule which deals with abusing an undertaking's substantial degree of market power in the market to prevent, restrict or distort competition. The Commission has published a number of guidelines on its website (https://www.compcomm.hk/) with examples of the underlying ideas under the First and Second Conduct Rules, which all governance

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professionals should study to become knowledgeable.

An oft-made criticism of the Hong Kong competition law regime is that merger control rules apply only to the telecoms sector and not generally to other economic activities. Therefore, there is a possibility to merge two competitors and reduce competition in the marketplace or to 'buy' their way out of competition law compliance. Another 'characteristic' of the regime is the lack of private actions, which means that the enforcement of competition law is restricted by the cases the Commission chooses to prosecute.

In terms of competition law investigations, the Commission has a wide range of investigatory powers including compulsory powers, i.e., to search premises and seize documents (or what are known in the industry as "dawn raids"), to compel the production of relevant documents, and to conduct mandatory interviews with employees to elicit information relevant to its investigation. Criminal liabilities can arise where there is an attempt to mislead or obstruct the Commission's investigations. The criminal sanctions must, of course, be imposed by the Court.

The Commission predominantly relies on whistleblowing and self-reporting to identify potential breaches of competition law. The Commission has robust leniency programmes designed to incentivise both undertakings and individuals to come forward and report contraventions to the Commission. In exchange for assisting the Commission with its investigation, the undertaking or individual may be afforded absolute immunity or the Commission may propose a discount on any potential fine recommended to the Tribunal. Many competition law regimes around the world operate in a similar way.

Investigations aside, in certain circumstances, companies may also apply to the Commission for a decision as to whether certain conduct (or a class of agreements) is excluded or exempted from the First Conduct Rule. The Commission's decision in response to such application would generally provide clarity and legal certainty as to whether the conduct will be excluded or exempted.

Responding to an alleged violation of competition law invariably will require significant legal and professional expenses and complex commercial arguments. The Institute has consistently reminded governance professionals of the need for a competition audit to reduce these regulatory risks on business operations. In terms of day-to-day governance practices, there is a need to ensure the three lines of defences operate correctly, especially in business practices.

The above is at the risk of over-simplification. Still, it sets up this guidance note intended to provide an overview of the Commission's 7th enforcement year since the coming into force of the Competition Ordinance, which began with an announcement on its enforcement priorities aimed at bringing the most significant overall benefit to competition and consumers in Hong Kong. In this and the following guidance note, which are intended to impart general understanding and knowledge of competition law compliance to governance professionals, we take a look back at the top competition law developments in 2022 to see how this enforcement strategy has taken the course, and what we expect to come in 2023.

The year in review: prioritising cases close to home

On its 6th anniversary of antitrust enforcement in December 2021, the Commission announced that it would focus its investigations and enforcement actions on three priority areas, namely: (1) issues concerning people's livelihood or affecting the underprivileged; (2) potential exploitation of public funding and subsidies; and (3) cases involving digital markets. In line with these enforcement priorities, the Commission brought new cases in 2022 that were more relatable to the common Hong Kong consumer concerning air-conditioning services, consumer products (flavour enhancers), food delivery platforms and car repair/ maintenance services. We will summarise the developments relating to these cases before turning to other competition law issues under the next guidance note.

1. Record-breaking fines in the *Air-conditioning Works* Cartel

In June 2022, the Commission commenced proceedings in the Tribunal against two firms for alleged price-fixing, market sharing and/or bid-rigging (all of which constitute serious anti-competitive conduct) in the supply of air-conditioning works in Hong Kong (after conducting the dawn raid in December 2019) in violation of the First Conduct Rule. The alleged cartel conduct lasted for four years and affected over 50 tenders for works in buildings all over Hong Kong. In line with the Commission's strategy of maximising deterrence through attributing antitrust liability to parent entities and individuals involved, the enforcement proceedings named the parent entities of the two firms and employees involved in the alleged cartel.

A few months after the lodging of the enforcement proceedings, one of the two firms, ATAL Building Services Engineering Limited (the subsidiary entity), admitted liability and jointly applied (with the Commission) to the Tribunal for settlement, with the Commission making a recommendation for a record pecuniary penalty for HK$150 million (approx. US$19.3 million) covering this case and an additional case that is yet to be brought before the Tribunal regarding a related subject.

If the Tribunal agrees with the recommended pecuniary penalty, this will be the most significant pecuniary penalty for anti-competitive conduct to date. It will also make the case against the remaining firm (and its employee) much more difficult to defend, as they will have to contest its case after the Tribunal has already made a finding that the settling parties had entered into an anti-competitive agreement with the contesting parties. This case demonstrates the Commission's preparedness to take on more prominent issues and to bring cases with more impact on competition and consumers in Hong Kong.

2. The first case of resale price maintenance in Hong Kong

In September 2022, the Commission filed a Tribunal enforcement case against a wholesale supplier, alleging that it had contracted with two main local distributors to set minimum resale prices for a certain type of monosodium glutamate, better known as MSG, which is widely used as a flavour enhancer in restaurants across Hong Kong.

Interestingly, the Commission noted that it did not intend to bring Tribunal proceedings initially, as this was the first resale price maintenance case in Hong Kong. Instead, the Commission attempted to resolve the matter by way of an infringement notice with specific requirements to be fulfilled by the MSG supplier. Enforcement proceedings were only brought to the Tribunal after the MSG supplier refused to agree to offer a commitment to comply with those requirements.

This is the Commission's first case involving 'vertical agreements' between a supplier and its distributor/ reseller. Suppose this case goes all the way to trial. In that case, the Tribunal's assessment of resale price maintenance, and perhaps vertical agreements more generally, particularly in relation to whether they can constitute 'serious anti-competitive conduct', may have important implications on all supplier-distributor relationships in Hong Kong.

3. Public investigation into food delivery platforms

In January 2022, the Commission announced that it was looking into possible anti-competitive practices carried out by the two major food delivery platforms in Hong Kong, namely Deliveroo and foodpanda. The conduct under investigation concerned certain requirements imposed by the platforms on their partner restaurants, such as exclusivity clauses and clauses requiring partner restaurants to offer menu

items on the platform at prices that are equal to or lower than those offered on the restaurants' own menu and/or on other online food delivery platforms.

This was one of the few instances where the Commission publicly announced an ongoing antitrust investigation and the first case where it sought public input on business practices to support its fact-finding process. The case also resonates with the Commission's enforcement goal of bringing issues that touch upon digital markets and are more relatable to consumers in Hong Kong.

4. Commitments in the Car Warranties case

The Commission conducted a similar public fact-finding exercise in relation to an investigation into agreements between certain manufacturers of passenger cars and their respective importers, distributors or authorised dealers in Hong Kong. In particular, the Commission sought public views on restrictive warranty terms and conditions that required maintenance and/or repair services to be carried out at authorised repair centres only, regardless of whether the warranty covered the maintenance or repair item.

In August 2022, the Commission conducted a further consultation on commitments offered by seven car distributors to remove the restrictive warranty terms and conditions in question. The Commission was of the view that the clauses likely limited the ability of independent workshops to compete with authorised repair centres, restricted car owners' choice over providers of repair and maintenance services for their vehicles, and led to higher prices for maintenance and repair services. After the consultation, the Commission accepted the commitments, which will remain in force for a period of five years.

In the past, the Commission opted for remedies such as commitments for competition concerns of a less serious nature. This allows the Commission to resolve competition concerns quickly and efficiently without bringing enforcement proceedings before the Tribunal. We expect the Commission will continue to do so in 2023.