

TAKING CASES CLOSER TO HOME

THE 7TH YEAR OF ANTITRUST ENFORCEMENT IN HONG KONG

The Hong Kong Competition Commission (**Commission**) started its 7th enforcement year with an announcement on its enforcement priorities aimed at bringing the greatest overall benefit to competition and consumers in Hong Kong. In this briefing, we take a look back at the top 10 competition developments this year to see how this enforcement strategy has taken 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.

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

In June, the Commission commenced proceedings in the Tribunal against two firms for alleged price fixing, market sharing and/or bid-rigging in the supply of air-conditioning works in Hong Kong (after conducting the dawn raid in December 2019). 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 in the sum of 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 biggest 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 bigger cases, and to bring cases with more impact to competition and consumers in Hong Kong.

2. First case of resale price maintenance in Hong Kong

In September, 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 case is the Commission's first case involving "vertical agreements" between a supplier and its distributor/reseller. If this case goes all the way to trial, 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. Continuing the case against the *Tourist Attraction Tickets Cartel*

In January, the Commission commenced new enforcement proceedings in the Tribunal against a travel services provider and four other parties for their involvement in the Tourist Attraction Tickets case. This case was notable because it was the first case in Hong Kong involving the concept of "facilitation" of a cartel, in which a number of other parties have already admitted to facilitating the cartel and the exchange of pricing information between two competing travel services providers (see our [February 2021 Newsletter](#)).

In July, three parties - being two companies and an individual - settled the proceedings with the Commission, resulting in the Tribunal ordering pecuniary penalties in the sum of HK\$4.2 million (approx. US\$537,000) and HK\$1.6 million (approx. US\$206,000), together with a director disqualification order against the managing director of the travel services provider. Enforcement proceedings against the two remaining parties are ongoing and are not expected to be heard until 2024.

This case is a prime example of the Commission adopting a truly hybrid approach in the use of its enforcement tools, namely: (i) issuing infringement notices to the seven early cooperating parties, (ii) a settled outcome in the Tribunal proceedings (including an agreed recommended pecuniary penalty) for three parties that cooperated later in the process, and (iii) the full set of remedies (including a pecuniary penalty) before the Tribunal for the two remaining non-cooperating parties. This demonstrates that even when the Commission is willing to "settle" a case early (by issuing an infringement notice), it will generally be confident enough in the merits of the case to be willing to take it all the way through the Tribunal process.

4. Public investigation into food delivery platforms

In January, 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 cases that touch upon digital markets and are more relatable to consumers in Hong Kong.

5. 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 maintenance or repair item was covered by the warranty.

In August, 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.

6. Successful appeal against pecuniary penalty discounts

Following the Commission's appeal against the Tribunal's penalty decision in the 1st and 3rd Decorators Cartel cases, the Court of Appeal confirmed in June that undertakings that had no direct participation in the cartel but had subcontracted their works should not be given a lower pecuniary penalty. In particular, as the contractors had loaned their licences to the subcontractors in breach of the licensing terms of the Housing Authority, the appellate court held that it was against public interest to recognise such unlawful conduct as a mitigating factor for pecuniary penalties.

While it is not surprising for the Court of Appeal to rule that sub-contracting is not a defence or mitigating factor in competition law, the principles enunciated in its judgment may have wider applications to other day-to-day business relationships (e.g. distributors, agents, subsidiaries). In particular, businesses looking to minimise competition law risk may have to extend their compliance efforts to external business partners - see our [June Briefing](#) for details.

7. Joint search operations with other law enforcement agencies

An interesting development in 2022 was the emergence of the Commission's new practice of conducting search operations jointly with other Hong Kong public bodies.

In January, the Commission and the Organised Crime and Triad Bureau of the Hong Kong Police Force conducted a joint search at the premises of two companies suspected to have engaged in anti-competitive conduct in the tender exercise for a building maintenance project for a building in Tuen Mun. In November, the Commission conducted another joint operation with multiple government bodies - this time at the Aberdeen Wholesale Fish Market. The joint raid was conducted after receiving a complaint alleging that wholesalers at the fish market had engaged in price-fixing in the sale of fisheries products. A further raid was conducted at the same fish market by the Commission, assisted by the Police, in December.

These joint operations continue a trend of closer cooperation between the Commission and other government agencies in Hong Kong (it first referred a suspected case of obstruction of its search of premises to the Police for investigation in 2021). The collaboration between the Commission and other law enforcers is expected to continue in 2023, as this is considered part of the Commission's strategy to enhance effectiveness as a law enforcement agency.

8. Renewal of the Block Exemption Order for Vessel Sharing Agreements

In July, the Commission decided to renew the Block Exemption Order for Vessel Sharing Agreements between liner shipping companies for a further four years, following a public consultation conducted in August 2021. The renewed Block Exemption Order is in line with the substantive terms of the Commission's original Block Exemption Order issued in 2017. In essence, the Block Exemption Order exempts certain operational arrangements between shipping lines from the prohibition against anti-competitive agreements.

The decision to renew the Block Exemption Order on substantively the same terms is a welcomed one for the industry, as it keeps Hong Kong in line with similar exemptions available in major maritime jurisdictions, including Australia, Canada, China, the European Union, Israel, Japan, Malaysia, New Zealand, Singapore, South Korea and the United States.

9. Advisory Bulletin on sharing employment information in joint employer/employee negotiations

In August, the Commission published an Advisory Bulletin on joint negotiations between groups of employers and groups of employees, recognising that in certain circumstances where joint negotiations may have a positive impact, leading to improved compensation and conditions for employees. Provided that certain conditions are satisfied, the Commission noted that it had no intention to pursue a case against employers participating in these joint negotiations.

Businesses (and human resource professionals) should take note that the conditions are only applicable in a very narrow set of circumstances. Information relating to what an employer intends to offer prospective employees (e.g. pay, leave,

training, working hours and other benefits) could be categorised as competitively sensitive information. Sharing this type of information is rarely advisable - see our [September Briefing](#) for further guidance.

10. Aligning Cartel Leniency Policies for individuals and undertakings

In September, the Commission revised its *Cartel Leniency Policy for Individuals* first introduced in 2020 (see our [2020 Briefing](#)). The revised policy creates a new queue for individuals that report his/her involvement in cartel conduct (previously individuals and companies compete in the same queue for leniency). In line with the *Cartel Leniency Policy for Undertakings*, the revised *Cartel Leniency Policy for Individuals* retains the distinction between cartels reported before the Commission opens an initial assessment or investigation (Type 1), and cartels reported after the Commission commences such assessment or investigation (Type 2).

The Commission expects the revised Cartel Leniency Policy for Individuals would help obtain evidence and secure the cooperation of individuals who may want to be shielded from enforcement proceedings. These incentives will indeed be important going forward, as the Commission continues its strategy of pursuing both companies and individuals for involvement in cartel conduct.

What's to come in 2023

2022 has been a busy year for the Commission. We have seen the Commission bring various enforcement actions and outcomes in line with its enforcement strategy announced in 2021, which is positive for the development of competition law in Hong Kong. The Commission has also demonstrated growing experience and confidence in deciding how to best deliver enforcement outcomes efficiently via contested and non-contested means. In line with historical trends, we expect the Commission to maintain course in 2023, with more cases to be brought before the Tribunal. The developing practice of joint investigation operations with other government agencies and soliciting public comments and views to aid its fact-finding process are also areas to watch out for.

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