

FIVE YEARS OF ANTITRUST ENFORCEMENT IN HONG KONG

To Our Clients and Friends:

The substantive provisions of Hong Kong’s Competition Ordinance (“Ordinance”) came into force in December 2015. This note looks at the main achievements in the first five years and some of the challenges laying ahead.

The main achievements of the Hong Kong Competition Commission (“Commission”) are first and foremost building up—from scratch—a competent and trustworthy institution. The Commission has hired seasoned enforcers from overseas with impeccable reputations which has brought immediate credibility to the Commission. It has embarked on a wide range of educational activities, including seminars, advertising and publishing guidelines detailing its enforcement priorities and interpretation of the Ordinance. The Commission has also adopted a world-class leniency programme to facilitate the prosecution of cartels, its main priority. The Commission proceeded to win its first case in court thereby confirming that it is a force to be reckoned with.

Nevertheless, it is still early days and the Commission will face significant challenges in the next few years. The Competition Tribunal (“Tribunal”)’s decision in the *Nutanix* case that the criminal standard of proof applies where the Commission seeks to have financial penalties imposed is likely to limit the Commission’s enforcement activities to clear cut cartel cases, and prevent enforcement actions in relation to most cases of abuses of substantial market power. Also, while the Tribunal has vindicated the Commission’s decision to also prosecute individuals, the Tribunal still needs to rule on the level of fines that may be imposed on individuals. This will have a direct impact on the Ordinance’s deterrent effect and on incentives to self-report under the leniency policy.

Further, it remains to be seen whether the Government and the legislature will have any appetite to revise the Ordinance in order to foster more competition and give more teeth to the Ordinance. Among possible changes are an extension of the merger control regime, currently limited to the telecommunications sector, to apply generally to all sectors. Observers are also calling for an increase in the level of fines and the introduction of stand-alone private litigation.

1. The Competition Ordinance in a Nutshell

The Ordinance prohibits three types of conduct:

- agreements and concerted practices having the object or effect of preventing, restricting or harming competition (“First Conduct Rule”);

- abuses of a substantial degree of market power having the object or effect of preventing, restricting or harming competition (“Second Conduct Rule”); and
- mergers in the telecommunications sector that are likely to have the effect of substantially lessening competition (“Merger Rule”).

The Commission does not have the power to impose sanctions on its own, but must apply to the Tribunal for that purpose. The Tribunal has wide-ranging powers, including the authority to impose fines of up to 10% of the Hong Kong turnover per year of infringement (up to a maximum of 3 years), impose a cease and desist order, disqualify directors, and award damages.[1]

A private party cannot bring a stand-alone action before the Tribunal. Instead, the Tribunal must first rule on the legality of the alleged contravention in proceedings commenced by the Commission, after which time, a private party can commence a follow-on action for damages.[2]

2. Cartels

The Commission has from the start made it clear that prosecuting cartels would be a priority. The adoption of a leniency regime was an important step towards that goal. The initial leniency programme, while a step in the right direction, contained too many disincentives to self-report cartel conduct. In 2020, the Commission brought major changes to its leniency policy and adopted what is clearly a world-class framework. In addition, the Commission attracted highly experienced officials from foreign competition agencies reinforcing the level of credibility of its leniency programme.

It is unclear at this stage to what extent the new leniency programme has been successful. As with other leading regimes, it is likely that additional cases resulting in high financial penalties (or penalties on individuals) are necessary before companies widely see the benefit of self-reporting in Hong Kong.

2.1 The Leniency Programme

Section 80 of the Ordinance grants the Commission the ability to enter into a “leniency agreement”.

Under the *Leniency Policy for Undertakings*, leniency is available for the first cartel member that either reports participation in a cartel which the Commission is not already investigating (known as Type 1 applicant) or provides substantial assistance to an ongoing investigation by the Commission (known as Type 2 applicant).[3] In exchange for a successful applicant’s cooperation with the Commission, the Commission will agree not to take *any* proceedings against it before the Tribunal in relation to the reported conduct. Because the Tribunal may only impose pecuniary penalties on application by the Commission, successful leniency applicants will therefore receive full immunity from pecuniary sanctions.[4]

For successful Type 1 applicants only, the Commission will also agree not to require the applicant to admit to a contravention of the First Conduct Rule. Because follow-on actions may only be initiated in Hong Kong after the Tribunal or another Hong Kong court has made a decision that an act is a contravention of a conduct rule, or when a person has made an admission to the Commission that the

person has contravened a conduct rule, this will protect successful Type 1 leniency applicants from follow-on damages claims in Hong Kong. Type 2 applicants, on the other hand, may be required to admit to a contravention, potentially exposing them to follow-on damages claims.

The *Leniency Policy for Individuals* allows individuals to self-report anticompetitive conduct, in exchange for the Commission not initiating any proceedings against the leniency applicant in relation to the reported conduct.^[5]

The *Cooperation Policy* establishes a framework by which cooperating cartel members that are not the first to report may receive a *discount* on the penalty that the Commission would otherwise recommend to the Tribunal.^[6] The policy lays out several “bands” of discounts on the recommended pecuniary penalty based on the order in which participating undertakings express their interest in cooperating. Undertakings assigned to Band 1 will receive a discount of between 35% and 50% of the recommended penalty; those assigned to Band 2 will receive a discount of between 20% and 40%; and those assigned to Band 3 will receive a discount of up to 25%. The Commission will “ordinarily” assign the first undertaking to express its interest to cooperate to Band 1. Later applicants will be assigned to Band 2 or 3, depending on the order in which they came forward. The Commission may recommend a discount of up to 20% if an undertaking cooperates with the Commission only after enforcement proceedings against it have commenced. Finally, the Cooperation Policy offers an additional “leniency plus” discount: if a cooperating undertaking finds that, in addition to the first cartel, it has engaged in a completely separate cartel and enters into a leniency agreement with the Commission for its role in the second cartel, the Commission will apply an additional discount of up to 10% on the undertaking’s recommended pecuniary penalty for its role in the first cartel.

2.2 Enforcement Actions at the Tribunal

The Commission has initiated six enforcement actions before the Tribunal and they all concern cartel conduct. Decisions have been issued in two actions and the remaining four are pending as of the date of this article.

Competition Commission v Nutanix Hong Kong Limited and others: In its first enforcement action before the Tribunal, the Commission alleged that a supplier of IT equipment (Nutanix) had engaged in bid rigging with four of its distributors and resellers in relation to a tender conducted by the YWCA.^[7] In particular, in order to ensure that YWCA would receive the required number of valid bids in order to award the contract, Nutanix had asked several of its distributors and resellers to submit a dummy bid. The Tribunal ruled in favor of the Commission, except in relation to one of the resellers for which it decided that the isolated conduct of the employee who prepared the dummy bid could not be attributed to its employer. The Tribunal imposed fines totalling about HKD 7 million and the defendants were ordered to pay the Commission’s costs for about HKD 9 million. This case is now before the Court of Appeal.

The main lesson from this decision is that the Tribunal confirmed that where the Commission seeks to have financial penalties imposed, the criminal standard of proof will apply. The Commission therefore has to demonstrate “beyond a reasonable doubt” that an infringement has taken place. This is likely to

have a major impact on the Commission's enforcement powers as it will make it very difficult for the Commission to have financial penalties imposed where the infringement does not have the "object" of restricting competition but only a possible "effect". This would include, for example, most abuses of substantial market power, some forms of exchange of information, or agreements between competitors that have some pro-competitive effects. The Commission's enforcement powers against these types of conduct may be limited to obtaining a cease and desist order, which should be subject to the civil standard of the balance of probabilities, which may not have a strong deterrent effect.

A second lesson from that case is that an employer does not enjoy privilege against self-incrimination with regard to statements made by its employees in the competition law context.^[8] Section 45(2) of the Ordinance provides that no statements made by a person in responding to the Commission's requests for information is admissible against that person in proceedings. The Tribunal found that, where the Commission's requests for information are addressed to a natural person, the responses given by the individual are personal to him and do not bind his employer, such that the individual, and not the employer, is liable for any false or misleading answers. As such, the individual could not be perceived to be acting on behalf of his employer when he attends an interview before the Commission, even if he attends the interview with the employer's lawyers. The Tribunal's decision limits the beneficiary of the statutory protection against self-incrimination under Section 45(2) to the person compelled to attend before the Commission.

Finally, this case shows that although fines may be on the low side, the costs of defending a case before the Tribunal are significant. The defendants have likely spent over a combined USD 20 million to defend themselves (solicitors, barristers, experts,...), in addition to paying part of the Commission's costs. The high cost of litigation in Hong Kong is a significant incentive to comply with the law or to promptly self-report problematic conduct.

Competition Commission v W. Hing Construction Company Limited and others: In April 2020, the Tribunal issued its second dispositive judgment and found that ten decoration contractors entered into a market sharing and price fixing agreement, in contravention of the First Conduct Rule, regarding the decoration works at a public rental housing estate.^[9] Importantly, in this case, the Tribunal set out the methodology that it will follow when imposing fines on undertakings in breach of the prohibition on cartel conduct. The methodology is similar to the approaches taken in the UK and the EU. The Tribunal followed, by and large, the recommendations of the Commission but emphasized that while that there were strong public interest in facilitating cooperation by parties, at the same time that the Tribunal, as an independent Tribunal, is not bound by any recommendation of the Commission.

In particular, the Tribunal adopted a four-step approach in calculating the fine: (1) determining the base amount; (2) making adjustments for aggravating, mitigating and other factors; (3) applying the ceiling which a penalty may not exceed under the Ordinance; and (4) applying any fine reductions based on cooperation or an inability to pay. However, it should be noted that it remains unclear how the framework adopted by the Tribunal would apply in case of fines on individuals. Moreover, the facts did not require the Tribunal to assess a recommendation by the Commission on the fine reductions based on a party's cooperation pursuant to the Commission's Cooperation and Settlement Policy.

The noteworthy development in the four other pending cases is that the Commission decided to enforce the Ordinance against individuals. In *Competition Commission v Kam Kwong Engineering Company Limited and others*, the Commission commenced proceedings against three decoration contractors and two individuals at the Tribunal alleging that the parties entered into a market sharing and price fixing agreement regarding the decoration works at a subsidized sale flats housing estate.^[10] Three of the parties admitted to the contravention and entered into a settlement with the Commission, which was approved by the Tribunal in July 2020.

In *Competition Commission v Fungs E & M Engineering Company Limited and others*, the Commission commenced proceedings against six decoration contractors (and three involved individuals) alleging that the parties entered into a market sharing and price fixing agreement regarding the decoration works at a public rental housing estate.^[11] In this case, one of the involved directors admitted liability for a contravention of the First Conduct Rule and the Tribunal issued its first ever director disqualification order against that director, prohibiting him from serving as a director for one year and ten months.

In *Competition Commission v Quantr Limited and another*, the Commission issued its first infringement notices to Quantr Limited and Nintex Proprietary Limited alleging that the two companies exchanged information regarding the intended fee quotes in relation to a bidding exercise organized by Ocean Park.^[12] Nintex accepted the Commission's infringement notice and committed to comply with the requirements imposed by the Commission, which resulted in the Commission not commencing proceedings against Nintex. Quantr disputed the infringement notice and the Commission commenced proceedings against it and its sole director. In November 2020, Quantr and its sole director entered into a settlement with the Commission, where is admitted to a contravention of the First Conduct Rule and agreed to pay pecuniary penalty.

In *Competition Commission v T.H. Lee Book Company Limited and others*, the Commission commenced proceedings against three publishing companies (and one of their directors) alleging that the companies engaged in price fixing, market sharing, and/or bid-rigging in relation to tenders for the supply of textbooks to primary and secondary schools in Hong Kong.^[13]

3. Other Nonmerger Enforcement Actions taken by the Commission

3.1 Court cases

On 21 December 2020, the Commission initiated its first abuse of market power case before the Tribunal. It alleged that Linde had a substantial degree of market power in the medical gases supply market in Hong Kong and that it had committed a breach of the Second Conduct Rule by refusing to supply a competitor in the downstream market of medical gas pipeline system maintenance, in what seems an essential facility case. It is unclear at this stage when the case will be heard.

3.2 Block Exemptions

Section 15 of the Ordinance grants the Commission the ability to issue "block exemption orders" to exempt a particular category of agreements because they enhance overall economic efficiency.

Vessel Sharing Agreements Block Exemption.^[14] The Hong Kong Liner Shipping Association, which represents most shipping lines in Hong Kong, applied for a block exemption order in relation to liner shipping agreements, including vessel sharing agreements (“VSA”) and voluntary discussion agreements (“VDAs”).

The Commission granted a block exemption in relation to VSAs. These are operating arrangements between shipping lines in relation to the provision of liner shipping services, including the coordination of joint operation of vessel services, and the exchange or charter of vessel space (these agreements are commonly called “alliances”, “consortia”, “slot charter agreements” joint services agreements” or “slot swap agreements”). The block exemption is subject to the following conditions: (i) parties to a particular VSA do not have a combined market share in excess of 40%, (ii) the VSA does not authorize or require its members to engage in price fixing, capacity or sale limitations, market/customer allocation, and (iii) parties can withdraw from a VSA without penalty or unreasonable notice period.

However, the Commission’s block exemption order does not extend to VDAs. These are agreements between carriers in which parties discuss commercial issues relating to a particular trade, including prices (freight rates and surcharges), agreements on recommended freight rates and surcharges, and exchanges of commercial information (such as statistics on costs, capacity, deployment, etc.). The Commission considered that exchanges of future price intentions and an agreement on recommended prices constituted infringements by object of the First Conduct Rule and could not benefit from a block exemption.

3.3 Decisions

Section 9(1) of the Ordinance empowers the Commission to issue a decision that the First Conduct Rule does not apply to a particular agreement because one of more exclusions or exemptions in the Ordinance apply.

Code of Banking Practice.^[15] A series of banks applied to the Commission for a decision that the Code of Banking Practice (“Code”) issued by the Hong Kong Association of Banks (“HKAB”) and endorsed by the Hong Kong Monetary Authority (“HKMA”) was exempted from the First Conduct Rule because it was adopted to comply with legal requirements, a ground for exemption under the Ordinance. After a detailed assessment of the regulatory framework and the specific language in the Ordinance, the Commission concluded that agreeing to the Code is not the result of a legal requirement and that the application of the First Conduct Rule is therefore not excluded. However, the Commission indicated that it had no current intention to pursue an investigation or enforcement action in respect of the Code. The Commission noted indeed that the Code is intended to promote good banking practices through setting out minimum standards, that the Code has been formulated with input and support from the Consumer Council, the HKMA and other public bodies, and was endorsed by the HKMA.

Pharmaceutical Sales Survey.^[16] The Hong Kong Association of the Pharmaceutical Industry (“HKAPI”) applied for a decision that a proposed arrangement to conduct and publish a survey comprising data on the sales of prescriptions and over-the-counter pharmaceutical products in Hong Kong did not infringe the First Conduct Rule, including because such exchange of information will

enhance economic efficiency. The Commission ruled against the HKAPI, finding that the proposed exchange of information was not excluded or exempted from the First Conduct Rule under the efficiency exclusion.

In particular, the Commission took issue with the proposed exchange of product level sales data, this is sales data for specific, named products by sector (government, private, trade and Macau) grouped by supplier or according to the ATC3 class. The proposed survey would have been published on a quarterly basis, one month after the end of each quarter. According to the Commission, the exchange of product level sales data would enhance transparency on the market and reduce independent decision-making and/or facilitate coordination. In particular, the Commission considered that quarterly data published one month after the end of the quarter did not constitute “historical data”.

The exchange of other data was considered as unlikely to raise concerns, such as the exchange of total sales data per company (unless a particular company only has one product on the market). In addition, the Commission did not object to the exchange of sales data per ATC3 category, unless a particular class only included a limited number of products or competitors.

The precedential value of this decision may be limited. Indeed, as the Commission itself recognized, assessing the competition concerns relating to an exchange of information require consideration of the context of the exchange and can differ depending on the products, markets and characteristics of the information exchange in question. Therefore, the analysis in the decision may not apply to exchanges of information in other contexts.

3.4 Commitments

Section 60 of the Ordinance allows the Commission to accept commitments from undertakings in exchange for terminating an investigation or not initiating proceedings before the Tribunal.

Seaport Alliance.^[17] The Commission accepted commitments in relation to the Seaport Alliance (“Alliance”). This was a cooperative joint venture by four of the five terminal operators at Kwai Tsing Container Terminal. The purpose of the joint venture was to pool and share their capacity, coordinate prices, commercial terms and customer allocation, and sharing profit and losses. In essence, this was a model similar to the “metal-neutral” joint ventures in the airlines business.

The Commission considered that the Alliance was likely to result in anticompetitive effects as it eliminated competition between the largest operators at Kwai Tsing, covered between 80-90% of all the throughput at that port and the remaining operator had limited ability to expand capacity to operate as an alternative to the Alliance. As such, the Alliance’s members would be able to increase prices or decrease service levels.

In order to address the Commission’s concerns, the Alliance proposed a series of behavioural commitments. In essence, the Alliance agreed to (i) cap the charges for services to customers and maintain a minimum service level, (ii) maintain reciprocal overflow arrangements with the remaining port operator, and (ii) eliminate cross-directorships in specified other ports in Mainland China.

Online Travel Agents. [18] The Commission accepted commitments from three large online travel agents operating in Hong Kong, namely Booking.com, Expedia.com and Trip.com, in respect of the agreements entered into between the online travel agents and hotels. These agreements included provisions requiring hotels to provide the same or better room price, room condition and room availability to the online travel agents as the hotel provided to other third party sales channels.

The Commission considered that these provisions, which were akin to most-favoured nation clauses, were likely to have the effect of softening competition between travel agents by reducing the incentives for travel agents to lower the commission charged. As an effect of these provisions, hotels have limited incentives to offer better terms to new or smaller travel agents who seeks to attract business by charging less commission, as the hotels would have to offer the same terms to the three online travel agents pursuant to the abovementioned provisions.

In order to address the Commission’s concerns, the three online travel agents dropped these provisions. As a result, the Commission terminated its investigation.

4. Private Litigation

Private litigation is limited under the Ordinance. Parties can only initiate a case before the Tribunal after the Tribunal has ruled that an infringement has taken place. As an exception to that rule, private parties can raise defences based on the Ordinance in any litigation before the Court of First Instance. In that case, there is a possibility to transfer the case (or parts of it) to the Tribunal. For example, in *Taching Petroleum Company, Limited and Shell Hong Kong Limited v Meyer Aluminium Limited* [19], Taching and Shell commenced proceedings in the Hong Kong High Court against Meyer to recover outstanding unpaid invoices in relation to the supply of diesel. In defending such proceedings, Meyer alleged that Taching (a reseller of Sinopec diesel) and Shell had breached the First Conduct Rule by colluding to, inter alia, fix prices and exchange price information (the “Defence”), possibly with other suppliers. Meyer referred to a series of parallel price announcements by Taching and Shell. The case was transferred from the Hong Kong High Court to the Tribunal and the case remains pending before the Tribunal. Whilst the Defence was transferred to the Tribunal for determination and set down for trial in late 2020, as a result of the introduction by Meyer of expert evidence, along with other interlocutory applications, which the Tribunal largely determined against Meyer and which are subject to possible appeals, the trial has been adjourned to a future date. The Tribunal did allow expert evidence, but limited to “whether the uniformity in the pricing mechanisms and adjustments of Taching and Shell between January 2011 and June 2017 could be better explained on the hypothesis of collusion or on the hypothesis of independent conduct”.

Meyer’s claims of a conspiracy seems inconsistent with the findings of the Commission in its autofuel market study in which it came essentially to the conclusion that there was no evidence of collusion among suppliers of gasoline despite the similarity in retail prices and the fact that suppliers would increase/decrease prices at the same time.[20] Although the Tribunal should be commended for allowing Meyer to state its case, it seems that the various procedures amount to a waste of resources. If Shell and Taching prevail, Meyer risks being faced with a costs claim that is without proportion to the amounts at stake.

5. Mergers

The Merger Rule only applies to the telecommunications sector. Therefore, the Communications Authority (“CA”) will ordinarily take the lead in enforcing the Merger Rule.

There is no mandatory pre-closing notification system so there is no need to obtain approvals from the CA in order to close a transaction. The CA may initiate a preliminary investigation within thirty days after becoming aware that a merger took place. If, after carrying out that investigation, the CA has reasonable cause to believe that a merger could be in breach of the Ordinance, it has six months (starting from the day it became aware of the merger or the day the merger closed, whichever is the later) to initiate proceedings before the Tribunal to stop the merger process or unwind the merger. Merger parties can voluntarily notify their merger to obtain (confidential) informal advice. This is likely to be a process of limited value because the CA will not reach out to third parties to obtain their views. Parties may also apply for a decision that their transaction does not breach the Ordinance but the CA is only required to consider such application if the merger raises essentially novel questions. Finally, the CA is empowered to accept commitments from the merger parties.

Enforcement activity in the merger space has been limited. The only decision relates to a merger between two fixed network operators, Hong Kong Broadband Network Limited and WTT HK Ltd, essentially a 4-to-3 merger. The CA initiated a preliminary investigation into the merger but the merger parties offered a set of commitment to address the concerns raised by the CA.^[21] These commitments included (i) an obligation to facilitate access to non-residential buildings where both merging parties have already installed their own communications lines, and (ii) an obligation to continue to provide wholesale inputs to downstream rivals (e.g. mobile backhaul services).

Looking forward, the key issue is whether Hong Kong will extend the scope of the Merger Rule and adopt a cross-sector prohibition on anticompetitive mergers.

[1] Part 6 and Schedule 3 of the Ordinance.

[2] See Section 110 of the Ordinance.

[3] Leniency Policy for Undertakings Engaged in Cartel Conduct (Revised April 2020 version).

[4] Section 93(1) of the Ordinance.

[5] Leniency Policy for Individuals Involved in Cartel Conduct (April 2020 version).

[6] Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (April 2019 version).

[7] *Competition Commission v Nutanix Hong Kong Limited and others* (CTEA1/2017) [2019] HKCT 2.

- [8] *Competition Commission v Nutanix Hong Kong Ltd and Others* (CTEA1/2017) [2017] 5 HKLRD 712.
- [9] *Competition Commission v W. Hing Construction Company Limited and others* (CTEA2/2017) [2020] 2 HKLRD 1229, [2020] HKCT 1.
- [10] *Competition Commission v Kam Kwong Engineering Company Limited and others* (CTEA1/2018) [2020] 4 HKLRD 61, [2020] HKCT 3.
- [11] *Competition Commission v Fungs E & M Engineering Company Limited and others* (CTEA1/2019) [2020] HKCT 9.
- [12] *Competition Commission v Quantr Limited and another* (CTEA1/2020) [2020] HKCT 10; Commitment to Comply with Requirements of Infringement Notice issued to Nintex Proprietary Limited by Competition Commission, 16 January 2020.
- [13] *Competition Commission v T.H. Lee Book Company Limited and others* (CTEA2/2020).
- [14] Competition (Block Exemption For Vessel Sharing Agreements) Order 2017.
- [15] Commission Decision under section 11(1) of the Competition Ordinance in respect of the Code of Banking Practice, 15 October 2018.
- [16] Commission Decision under section 11(1) of the Competition Ordinance in respect of a proposed pharmaceutical sales survey, 26 September 2019.
- [17] Commitments by Modern Terminals Limited and HPHT Limited (Case EC/03AY), 30 October 2020.
- [18] Commitment by Booking.com B.V., 13 May 2020; Commitment by Expedia Lodging Partner Services Sarl, 13 May 2020; and Commitment by Trip International Travel (Hong Kong) Limited and Ctrip.com (Hong Kong) Limited, 13 May 2020.
- [19] [2018] HKCFI 2095, [2019] HKCFI 515, [2019] HKCT 1 and [2019] HKCT 2.
- [20] Report on Study into Hong Kong's Auto-fuel Market, 4 May 2017.
- [21] Notice of Acceptance by the Communications Authority of Commitments Offered by Hong Kong Broadband Network Limited, HKBN Enterprise Solutions Limited and WTT HK Limited under Section 60 of the Competition Ordinance in relation to the Proposed Acquisition of WTT Holding Corp. by HKBN Ltd., 17 April 2019.



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