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Hong Kong's competition ordinance: successes and challenges six years on

Sébastien Evrard, Hayley Smith and Katherine Tomsett

Abstract

This article considers the main achievements in the first six years of Hong Kong's Competition Ordinance (the 'Ordinance') and the pain points that have emerged. The article provides in-depth analysis of the Ordinance, cartel and non-cartel enforcement activity, ongoing investigations, private litigation and merger control. The article covers key policy developments and, looking ahead, what we can expect to see from the Hong Kong Competition Commission.

Introduction

Six years after the entry into force of Hong Kong's Competition Ordinance (the 'Ordinance'), the successes and pain points of the Hong Kong Special Administrative Region's competition regime are clear for all to see. This article considers the main achievements in these first years of the Ordinance and some of the challenges that have emerged.

First and foremost, in the space of six years, the Hong Kong Competition Commission (the 'Commission') has built up – from scratch – a competent, and trustworthy institution. The Commission has hired seasoned enforcers from overseas with impeccable reputations bringing 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 cartel leniency programme, although it remains to be seen whether cartel participants will take advantage of it. Since the Ordinance came into force, the Commission has achieved enforcement outcomes in 12 cases, nine of which were brought before the Competition Tribunal (the ‘Tribunal’). The Commission proceeded to win in all five cases ruled upon by the Tribunal.¹

Despite its successes, it has become clear that the Commission faces a number of roadblocks that have hampered its enforcement efforts.

First, the Tribunal’s 2019 decision in the *Nutanix* case² – that the criminal standard of proof applies where the Commission seeks to impose financial penalties – has potentially limited the Commission’s enforcement activities to clear cut cartel cases, preventing enforcement actions in relation to most cases of abuses of substantial market power.

Second, the structural design of the Ordinance means that the Commission must apply to the Tribunal to impose a financial penalty on any person it considers has contravened a competition rule.³ This reduces the Ordinance’s deterrent effect and incentives to self-report under the leniency policy, and significantly increases the costs of enforcement.

Third, to date, the merger control regime has been limited to the telecommunications sector.⁴

Fourth, there is no standalone right to private litigation. Rather, private litigation is limited to follow-on actions (and defences in cases before the Court of First Instance).

Lastly, the maximum fines are relatively low, which again reduces the Ordinance’s deterrent effect.

1 See www.compcomm.hk/en/media/press/files/PR_Anniversary_EN.pdf, last accessed 10 April 2022.

2 *Competition Commission v Nutanix Hong Kong Ltd and Others* [2019] HKCT 2, para 553 (‘[a]s these proceedings, which are brought by the Commission seeking orders for pecuniary penalties, involve the determination of a criminal charge within the meaning of Art. 11 of the Bill of Rights, the applicable standard of proof required of the Commission is proof beyond reasonable doubt.’) See also *Competition Commission v W Hing Construction Company Limited and others* (CTEA 2/2017) [2019] HKCT 3.

3 Part 6 and Schedule 3 to the Ordinance.

4 In 2021, Rasul Butt, then Senior Executive Director of the Competition Commission (and now Chief Executive Officer) signalled that the Commission’s merger control powers would be expanded, but there has been no indication of timeline or what the expansion will entail. See www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1164885&siteid=202&rdir=1, last accessed 10 April 2022.

While the Commission has the power and expertise at its disposal to bring perpetrators of anti-competitive behaviour to justice, enforcement appetite and structural roadblocks have limited the Commission's ability to effectively nurture competitive markets in Hong Kong.

However, we may have started to see a change of pace in the Commission's enforcement activity in 2021, set to continue in 2022. In January 2022 alone, the Commission: (1) commenced proceedings against five parties in the travel services sector; (2) conducted a joint dawn raid with the Organised Crime and Triad Bureau; and (3) in line with the Commission's recent announcement that it plans to pay particular attention to the digital economy in the seventh year of operation of the Ordinance, announced investigations into popular food delivery apps Foodpanda and Deliveroo.⁵

In addition, potential changes to the Ordinance have been floated, including an expansion of the merger control regime, which would grant the Commission power to police mergers outside the context of the telecommunications sector.

Overview of the Ordinance

The Ordinance prohibits three types of conduct:

- agreements and concerted practices having the object or effect of preventing, restricting or harming competition (the 'First Conduct Rule');
- abuses of a substantial degree of market power having the object or effect of preventing, restricting or harming competition (the 'Second Conduct Rule'); and
- mergers in the telecommunications sector that are likely to have the effect of substantially lessening competition (the '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 ten per cent of a company's Hong Kong turnover per year of infringement (up to a maximum of three years), impose a cease and desist order, disqualify directors, and award damages.⁶ The Commission may also seek to have fines imposed on individuals, and did so successfully for the first time in January 2021 in the case of *Competition Commission v Fungs E & M Engineering Company Limited and Others* (discussed further below).

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, and only after that, can a private party commence a follow-on action for damages.⁷

⁵ See n 1.

⁶ Part 6 and Schedule 3 to the Ordinance.

⁷ See Section 110 of the Ordinance.

Cartel conduct

The Commission has made it clear from the start that prosecuting cartels is its 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 the policy, adopting what is clearly a world-class framework. In addition, it attracted highly experienced officials from foreign competition agencies, reinforcing the programme's credibility.

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.

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 (a Type 1 applicant) or provides substantial assistance to an ongoing investigation by the Commission (a Type 2 applicant).⁸ 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.⁹

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 protects 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.

⁸ Leniency Policy for Undertakings Engaged in Cartel Conduct (Revised April 2020 version).

⁹ Section 93(1) of the Ordinance.

The Leniency Policy for Individuals allows individuals to self-report anti-competitive conduct, in exchange for the Commission not initiating any proceedings against the leniency applicant in relation to the reported conduct.¹⁰

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.¹¹ 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 ie, the Commission will 'ordinarily' assign the first undertaking to express its interest in cooperating to Band 1. Undertakings assigned to Band 1 will receive a discount of between 35 per cent and 50 per cent of the recommended penalty; those assigned to Band 2 will receive a discount of between 20 per cent and 40 per cent; and those assigned to Band 3 will receive a discount of up to 25 per cent. The Commission may recommend a discount of up to 20 per cent 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 ten per cent on the undertaking's recommended pecuniary penalty for its role in the first cartel.

Enforcement actions at the Tribunal

Competition Commission v Nutanix Hong Kong Limited and Others

In 2019, 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 Young Women's Christian Association (YWCA).¹²

In particular, to ensure that the YWCA would receive the required number of valid bids in order to award the contract, Nutanix asked several of its distributors and resellers to submit a dummy bid.

The Tribunal ruled in favour of the Commission, except in relation to one reseller 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

¹⁰ Leniency Policy for Individuals Involved in Cartel Conduct (April 2020 version).

¹¹ Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (April 2019 version).

¹² *Competition Commission v Nutanix Hong Kong Limited and Others* (CTEA1/2017) [2019] HKCT 2.

totalling about HKD 7 million (around US\$900,000) and the defendants were ordered to pay the Commission's costs of about HKD 9 million (around US\$1.1m).

This decision confirmed that where the Commission seeks to have financial penalties imposed, the criminal standard of proof will apply. The Commission therefore must demonstrate 'beyond a reasonable doubt' that an infringement has taken place. The adoption of a criminal standard of proof has a major impact on the Commission's enforcement powers as it makes 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. In practice, we can see that this is already ringing true. To date, the Commission has only enforced one non-cartel case before the Commission.¹³

*Competition Commission v Quantr Limited and Another*¹⁴

In January 2020, 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 organised by Ocean Park.

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 it.

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, which the Tribunal approved, where Quantr admitted to a contravention of the First Conduct Rule and agreed to pay a pecuniary penalty.

Competition Commission v W Hing Construction Company Limited and Others

In April 2020, the Tribunal found that ten decoration contractors entered into a market-sharing and price-fixing agreement, in contravention of the First Conduct Rule, regarding decoration works at a public rental housing estate.¹⁵ Crucially,

¹³ *Competition Commission v Linde HKO Limited, Tse Chun Wah and Linde GmbH*, CTEA 3/2020, 21 December 2020.

¹⁴ *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.

¹⁵ *Competition Commission v W Hing Construction Company Limited and Others* (CTEA2/2017) [2020] 2 HKLRD 1229, [2020] HKCT 1.

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 United Kingdom and the European Union. In particular, the Tribunal adopted a four-step approach in calculating the fine: (1) determining the base amount; (2) adjusting 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.

Two individual partners of one of the contractors appealed against the Tribunal's judgment.¹⁶ The Commission cross-appealed, challenging the application of the criminal standard of proof, arguing that the heightened standard may frustrate enforcement of the Ordinance. The Court of Appeal rejected the appeal in both respects and found that the question of standard of proof was not an issue appropriate to be determined on the present appeal.¹⁷

The Court noted that 'On the facts ... the contravention of the first conduct rule was proved on the criminal standard. We could discern nothing in the evidence that had been adduced in the trial which can give rise to potential frustration of the enforcement objective because the criminal standard of proof was applied.'¹⁸

Hence, while the Court of Appeal declined to revisit *Nutanix* on this occasion, the Court left open the possibility that in an appropriate case, likely one in which the Commission is able to satisfy a *civil* but not a *criminal* standard of proof, such that the standard of proof makes a practical difference to the Commission's ability to enforce the Ordinance, the Court may be more willing to reconsider this issue. However, if the Court of Appeal refuses to revisit the issue, the Competition Commission may have to seek a change to the Competition Ordinance to apply the civil standard of proof.

Competition Commission v Kam Kwong Engineering Company Limited and Others;¹⁹ and *Competition Commission v Fungs E & M Engineering Company Limited and Others*²⁰

Also in 2020, the Commission commenced proceedings in two cases involving price-fixing and market-sharing in relation to decoration works, notably against a number of individuals as well as companies. In the former, the Commission commenced proceedings against three decoration contractors and two individuals. Three of

16 *Competition Commission v W Hing Construction Company and Others* [2021] HKCA 877.

17 *Ibid*, para 96.

18 *Ibid*, para 86.

19 *Competition Commission v Kam Kwong Engineering Company Limited and Others* (CTEA1/2018) [2020] 4 HKLRD 61, [2020] HKCT 3.

20 *Competition Commission v Fungs E & M Engineering Company Limited and Others* (CTEA1/2019) [2020] HKCT 9.

the parties admitted to the contravention and entered into a settlement with the Commission, which was approved by the Tribunal in July 2020.²¹

In the latter case, the Commission commenced proceedings against six decoration contractors and three involved individuals. 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.

Competition Commission v Quadient Technologies Hong Kong Limited and Others

The Commission commenced proceedings in November 2021 against three undertakings, alleging that they entered into price-fixing, market-sharing and bid-rigging agreements in contravention of the First Conduct Rule.²²

In a first for the Commission, all parties cooperated during the investigation pursuant to the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (the 'Cooperation Policy'). As a result, the Commission agreed to enter into cooperation agreements with the parties and apply jointly to the Tribunal to dispose of the case, which was fully settled.

Cases Pending before the Tribunal

Competition Commission v TH Lee Book Company Limited and Others

In March 2020, 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.²³

Although the cartel arrangements were arrived at prior to the full implementation of the Ordinance, the Commission alleged that the companies continued to give effect to them after the Ordinance came into effect. Notably, this is the first case in which the Commission has sought to hold a parent company accountable for the acts of its subsidiary. The Commission sought declarations of contravention of the First Conduct Rule, orders for pecuniary penalties and a director disqualification.

21 *Competition Commission v Kam Kwong Engineering Company Ltd & Others* [2020] HKCT 3

22 *Competition Commission v Quadient Technologies Hong Kong Limited and Others* (CTEA1/2021).

23 *Competition Commission v TH Lee Book Company Limited and Others* (CTEA2/2020).

Competition Commission v Hong Kong Commercial Cleaning Services Limited and others

In December 2021, the Commission commenced proceedings in the Tribunal against two cleaning companies and their respective directors, for allegedly exchanging commercially sensitive information in order to procure cleaning contracts with the Hong Kong Housing Authority.²⁴

The Commission alleged that the conduct of the parties amounted to price fixing in contravention of the First Conduct Rule. Notably, the Chief Executive Officer of the Commission, Rasul Butt, stated that '[t]he cartel conduct in this case affected 17 tenders organised by the Housing Authority with a total contract amount of around HK\$180 million'.²⁵

Competition Commission v Gray Line Tours of Hong Kong Limited and Others

In January 2022, the Commission commenced proceedings against a travel service provider and its manager and three hotel owners and operators.

The case started following the Commission's investigation into the travel services sector. It had found that between May 2016 and May 2017, two competing travel services providers agreed to fix the prices at which tourist attractions and transportation tickets were sold at hotels belonging to nine hotel groups in Hong Kong. The Commission alleged that the hotel groups, as well as a tour counter operator in one of the hotels, acted as facilitators of price-fixing by passing on pricing information between the competitors.

The Commission issued infringement notices to six hotel groups and one of the travel service providers: these seven recipients cooperated with the Commission during its investigation and made commitments as required by the infringement notice.

One of the hotel groups and the other travel service provider agreed to cooperate with the Commission under the Cooperation Policy, resulting in a joint application to the Tribunal to dispose of the case following settlement. The Commission is seeking remedies before the Tribunal in relation to the two remaining hotel groups.

Ongoing Investigations

In January 2022, the Commission announced a joint dawn raid with the Organised Crime and Triad Bureau into two offices of a property management company, following allegations of anti-competitive conduct relating to a tender exercise. Four individuals were arrested in connection with the tender, which related to an industrial building maintenance project. A representative of the company allegedly engaged in a series of behaviours that the Commission considered suspicious and construed as potential attempts to manipulate the outcome of the tender.

²⁴ *Competition Commission v Hong Kong Commercial Cleaning Services Limited and Others* (CTEA2/2021).

²⁵ See www.compcomm.hk/en/media/press/files/PR_Cleansing_Service_Cartel_EN.pdf, last accessed 10 April 2022.

Non-cartel conduct

Enforcement action at the Tribunal

On 21 December 2020, the Commission initiated its first abuse of market power case before the Tribunal.²⁶ It alleged that Linde had a substantial degree of market power in the medical gases supply market in Hong Kong and 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.

This is the only non-cartel, non-merger enforcement action the Commission has initiated before the Tribunal thus far. While this is in line with the Commission's public commitment to prioritise enforcement against cartels, it is likely also a product of the difficulty in surmounting the criminal standard of proof to impose financial penalties in cases that are not clear-cut cartel cases.

This case will be key to gauge the effect of the application of the criminal standard of proof to the imposition of financial penalties for breaches of the Ordinance and the potential limitation of the Commission's powers.

A potential outcome could be that the Tribunal accepts to impose a cease-and-desist order (because the Commission meets the civil standard of proof) but refuses to impose financial penalties (because the Commission has not met the criminal burden of proof). If that is the case, this will renew and justify potential legislative changes.

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. However, the Commission has only issued one block exemption order to date.²⁷

*Vessel Sharing Agreements Block Exemption*²⁸

In 2017, the Hong Kong Liner Shipping Association, which represents most shipping liners 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).

²⁶ *Competition Commission v Linde HKO Limited, Tse Chun Wah and Linde GmbH*, CTEA 3/2020, 21 December 2020.

²⁷ See www.compcomm.hk/en/enforcement/registers/block_exemption/block_exemption.html, last accessed 10 April 2022.

²⁸ Competition (Block Exemption for Vessel Sharing Agreements) Order 2017.

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. The block exemption is subject to the following conditions: (1) parties to a particular VSA do not have a combined market share in excess of 40 per cent; (2) the VSA does not authorise or require its members to engage in price fixing, capacity or sale limitations, or market/customer allocation; and (3) parties can withdraw from a VSA without penalty or unreasonable notice period. However, the Commission's block exemption order does not extend to VDAs.²⁹

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 or more exclusions or exemptions to the Ordinance apply. The Commission has made the following two decisions to date.³⁰

*Code of Banking Practice*³¹

In December 2017, a series of banks applied to the Commission for a decision that the Code of Banking Practice (the 'Code') – issued by the Hong Kong Association of Banks and endorsed by the Hong Kong Monetary Authority – was exempted from the First Conduct Rule because it was adopted to comply with legal requirements, a ground for exemption under 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 intention to pursue an investigation or enforcement action in respect of the Code.

29 VDAs 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.

30 See www.compcomm.hk/en/enforcement/registers/decisions/decision_reg.html, last accessed 10 April 2022.

31 Commission Decision under section 11(1) of the Competition Ordinance in respect of the Code of Banking Practice, 15 October 2018.

*Pharmaceutical Sales Survey*³²

In January 2019, the Hong Kong Association of the Pharmaceutical Industry (HKAPI) applied for a decision that a proposed arrangement to conduct and publish a quarterly survey comprising data on the sales of prescriptions and over-the-counter pharmaceutical products in Hong Kong did not infringe the First Conduct Rule, on the ground that 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 each product's class under the European Pharmaceutical Market Research Association classification system. 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.

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.

In November 2021, the Commission published a formal policy on section 60 commitments (the 'Commitments Policy'). The Commitments Policy sets out: (1) factors that the Commission will have regard to in considering whether commitments are appropriate in a particular case, including the seriousness of the conduct; (2) guidance on the content of a commitment; and (3) the process of accepting commitments.

*Online travel agents*³³

In May 2020, 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

³² Commission Decision under section 11(1) of the Competition Ordinance in respect of a proposed pharmaceutical sales survey, 26 September 2019.

³³ Commitment by Booking.com BV, 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.

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 seek 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 aforementioned provisions.

To address the Commission's concerns, the three online travel agents dropped these provisions. As a result, the Commission terminated its investigation.

*Seaport Alliance*³⁴

In November 2020, the Commission accepted commitments in relation to the Seaport Alliance (the 'Alliance'). This was a cooperative joint venture by four of the five terminal operators at Kwai Tsing Container Terminal to pool and share capacity, coordinate prices, commercial terms and customer allocation, and share profit and losses.

The Commission considered that the Alliance was likely to result in anti-competitive effects, as it eliminated competition between the largest operators at Kwai Tsing, covered between 80–90 per cent 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.

To address the Commission's concerns, the Alliance proposed a series of behavioural commitments. The Alliance agreed to: (1) cap the charges for services to customers and maintain a minimum service level; (2) maintain reciprocal overflow arrangements with the remaining port operator; and (3) eliminate cross-directorships in specified other ports in Mainland China.

Ongoing investigations

In January 2022, the Commission announced an investigation into local food delivery apps Foodpanda and Deliveroo in relation to suspected anti-competitive conduct as a result of the contractual arrangements to which partner restaurants are subject.³⁵

³⁴ Commitments by Modern Terminals Limited and HPHT Limited (Case EC/03AY), 30 October 2020.

³⁵ See www.compcomm.hk/en/media/press/files/PR_Online_Delivery_Platform_EN.pdf, last accessed 10 April 2022.

The investigation is focused on: (1) requirements that restaurants acquire self-pickup services if they offer food delivery services; (2) restrictions that prevent restaurants from registering with other food delivery platforms; and (3) requirements that restaurants list menu items on food delivery apps for the same or lower price than on their own menus.

The food delivery giants, who are understood to command a combined total of around 97 per cent of the food delivery market in Hong Kong,³⁶ have both confirmed their compliance with the investigation.³⁷

In March 2022, the Commission announced an investigation into agreements between car manufacturers and their respective importers, distributors or authorised dealers (collectively the ‘Distributors’).³⁸ The Commission is particularly interested in whether these agreements require the use of restrictive warranty terms and conditions that tie the validity of certain warranties to car owners carrying out car repair and maintenance at ‘authorised repair centres’ (which are typically owned by the Distributors).

The Commission is concerned that these restrictions may: (1) deter car owners from using independent car repair workshops; and (2) restrict the ability for independent car repair workshops to compete, which may ultimately lead to higher prices for maintenance and repair services.

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 (and only the Commission can initiate a case before the Tribunal).

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.

Section 113(3) of the Ordinance states that if ‘a contravention, or involvement in a contravention, of a conduct rule is alleged as a defence, the Court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are within the jurisdiction of the Tribunal’.

36 See <https://hongkongfp.com/2022/01/28/hong-kong-investigates-delivery-giants-foodpanda-and-deliveroo-for-anti-competitive-behaviour/>, last accessed 10 April 2022.

37 See www.lexology.com/library/detail.aspx?g=e190f7af-0446-4507-b1fa-34e40519daf0, last accessed 10 April 2022; and n 36.

38 See www.compcomm.hk/en/media/press/files/En_car_warranty_PR.pdf, last accessed 10 April 2022.

For example, in 2018 in *Taching Petroleum Company, Limited and Shell Hong Kong Limited v Meyer Aluminium Limited*,³⁹ Taching and Shell commenced proceedings in the Hong Kong High Court against Meyer to recover outstanding invoices in relation to the supply of diesel. As its sole defence in 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, possibly with other suppliers. Meyer referred to a series of parallel price announcements by Taching and Shell. The Hong Kong High Court transferred the defence to the Tribunal, where Hong Kong's first privately litigated competition trial took place.

The Tribunal found that Meyer had 'failed to show even a prima facie case of agreement or concertation', concluding that there was no collusion between Taching and Shell.⁴⁰ However, Justice Godfrey Lam, who heard the case in the Court of First Instance (CFI), made some helpful statements which clarify the ways in which the courts can manage the procedural issues that arise as a result of a transfer pursuant to section 113 of the Ordinance.⁴¹

First, he clarified that transfer to the Tribunal is not mandatory where the Ordinance is raised as a defence. Where a defence clearly lacks substance, it may be struck out in the lower court such that no transfer to the Tribunal is necessary. Second, Justice Lam noted that where the lower court judge is also a member of the Tribunal, the judge may exercise the Tribunal's power pursuant to section 114(3) of the Ordinance to transfer a case back to the CFI where doing so is 'in the interests of justice'. As a result, he noted that cases in which section 113 is raised should be heard in consultation with the Tribunal President, or with the Tribunal President acting as CFI judge.

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 to close a transaction. The CA may initiate a preliminary investigation within 30 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

39 [2018] HKCFI 2095, [2019] HKCFI 515, [2019] HKCT 1 and [2019] HKCT 2.

40 *Taching Petroleum Company, Limited and Shell Hong Kong Limited v Meyer Aluminium Limited* [2021] HKCT 2.

41 *Taching Petroleum Company, Limited and Shell Hong Kong Limited v Meyer Aluminium Limited* [2018] HKCFI 1074.

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 commitments to address the concerns raised by the CA.⁴² These commitments included: (1) an obligation to facilitate access to non-residential buildings where both merging parties have already installed their own communications lines; and (2) an obligation to continue to provide wholesale inputs to downstream rivals (eg, mobile backhaul services).

Conclusion and outlook

There is much to be celebrated in the first six years of Hong Kong's Competition Ordinance. Since its inception, the Commission has achieved enforcement outcomes in a total of 12 cases, with a particular focus on enforcing against cartels, in line with the Commission's priorities.

While the Commission may have had a slow start, the increase in enforcement activity seen in 2021, coupled with the busy start to 2022, signals that the Commission is building momentum. In December 2021, the Commission stated that in its seventh year of operation it will focus on three key areas:⁴³

1. anti-competitive behaviours that affect people's livelihood, especially low income or grassroots groups;
2. cartels that aim to take advantage of government funding or subsidy schemes; and
3. cases involving the digital economy.

⁴² 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.

⁴³ See n 1.

Making a quick start on its enforcement agenda, the Commission has already in 2022 opened investigations into suspected anti-competitive conduct of local online delivery platforms, Deliveroo and Foodpanda,⁴⁴ and into potentially anti-competitive agreements between car manufacturers and their respective importers, distributors or authorised dealers (which may result in higher prices and fewer options for car owners in the car repair and maintenance market).⁴⁵

Nevertheless, it remains to be seen the extent to which this momentum will be slowed by the pain points we have identified. In this respect, at the time the Ordinance was enacted, the government promised to review the scope and operation of the law three years after its effective date. In 2019, the Commerce and Economic Development Bureau (CEDB) confirmed that it was conducting the scheduled review, but only in respect of the applicability of the Ordinance to statutory bodies.⁴⁶

While the CEDB did not seem to take the opportunity to address some of the key deficiencies in the Ordinance as part of its review, the Commission has thus far been public about its desire to tighten Hong Kong's competition regime.

A particular area of the Commission's focus is the expansion of the scope of the merger control regime beyond the telecommunications sector. At an event in April 2021, Rasul Butt, then Senior Executive Director of the Competition Commission (and now Chief Executive Officer), stated: 'it's not a matter of whether we will have merger [review] powers. It's a matter of when we will have it.'⁴⁷

Similarly, former Chairwoman of the Commission, Anna Wu, said in 2019 that merger review was one of her focus points.⁴⁸ An expansion of the Commission's jurisdiction in relation to merger control to all sectors of the economy will bring Hong Kong's enforcement capabilities in line with that of other jurisdictions.

There are also a few other changes to the Competition Ordinance that have been suggested by observers.

First, the Commission's case against Linde will reveal to what extent the Tribunal's decision in *Nutanix* effectively limits the Commission's enforcement activities to clear-cut cartel cases. If so, the Commission may need to seek a legislative change to be able to fully prosecute the Competition Ordinance.

44 *Ibid.*

45 See n 38.

46 See <https://www.lexology.com/library/detail.aspx?g=cd2f6211-a4b3-456a-a572-f27afe58f3bc>, last accessed 29 April 22.

47 See www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1164885&siteid=202&rdir=1, last accessed 10 April 2022.

48 See www.scmp.com/news/hong-kong/hong-kong-economy/article/2182425/tightening-hong-kongs-competition-laws-cover, last accessed 10 April 2022.

Second, some observers argue that the fines (combined with the high burden of proof) are too low to incentivise competitors to comply with the law or to avail themselves of the world-class leniency regime that the Commission has put in place. The Commission could seek an increase in such fines.

Third, the introduction of private litigation would assist the Commission in fostering a competition compliance culture. This is undoubtedly on the Commission's wish-list as well.

Should these changes be implemented, we are likely to see an increased level of enforcement in Hong Kong.

Author biographies

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