

A sign of things to come: Hong Kong competition enforcement developments and trends

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4 June 2021

The Competition Ordinance, Cap. 619 (the **Ordinance**) came into full force in December 2015, and prohibits three types of conduct, including anti-competitive conduct covered by the first conduct rule, abuse of substantial market power covered by the second conduct rule and mergers in the telecommunications sector covered by the merger rule (collectively, the **Competition Rules**). In the last five years, the Competition Commission (the **Commission**) has employed various tools in promoting competition, providing clarity to businesses, and taking action for breaches of the Competition Rules. There have been four enforcement decisions on the first conduct rule of precedential value, with further enforcement actions, including one on the second conduct rule pending. Further investigations and enforcement actions will also be forthcoming - the Commission has as at the end of January 2021 received over 4,700 complaints and enquiries relating to a wide variety of sectors, with around 30% of the complaints and enquiries being about alleged cartel conduct covered by the first conduct rule¹, and over 17% being about the second conduct rule.²

In this publication, we present an overview of the Commission's recent enforcement activities, highlight key developments pertaining to the Commission's enforcement approach and practical tips for businesses in the future.

Competition Enforcement "Firsts"

2020 has been a significant year for the competition regime in Hong Kong, with many "firsts" resulting from the Commission's enforcement activities:

- ▶ The Competition Tribunal (the **Tribunal**) handed down its first decision on pecuniary penalties.
- ▶ The Tribunal handed down its first disqualification order against a director who had reasonable grounds to suspect that his company was taking part in anti-competitive conduct and did not take any steps to prevent it.
- ▶ The Tribunal approved for the first time an application for an order by consent made by the Commission and some of the respondents.
- ▶ The Commission accepted the first ever successful leniency application.

Notably, all these "firsts" relate to enforcement actions relating to the first conduct rule, and provide important precedents for dealing with anti-competition investigations and enforcement actions, and guidelines for navigating the Competition Rules.

¹ https://www.compcomm.hk/en/media/press/files/EN_QA_Infringement_Notices_Tourist_Attraction_Tickets.pdf

² https://www.compcomm.hk/en/media/press/files/EN_SCR_QA_final.pdf

We set out below a summary of these four decisions, highlighting the significance of each decision and key takeaways.

***Competition Commission v W Hing Construction Company & others* [2020] HKCT 1**

Ten contractors contravened the first conduct rule by participating in a market sharing and price fixing arrangement while providing decoration work to individual tenants in a public housing estate. The contractors agreed to allocate floors in the estate among themselves and to only approach and accept work from tenants according to the agreed allocation. They also agreed to jointly produce flyers with pre-agreed prices for standardized decoration packages.

The Tribunal confirmed that the primary sanction for enforcement cases before the Tribunal is pecuniary penalty, and the Tribunal also has power to make a wide range of other orders specified in Schedule 3(1) to the Ordinance, as well as disqualification orders under Division 5. In this case, the Tribunal imposed a total fine of HK\$3.97 million. In assessing pecuniary penalties on the contractors, the Tribunal adopted a 4-step approach, which involved (a) determining the base amount; (b) adjusting the base amount for aggravating, mitigating and other factors; (c) applying the statutory cap of 10% of the turnover of the undertaking involved in which the contravention occurred; and (d) applying cooperation reductions and consideration of plea of inability to pay.³

Insofar as costs is concerned, the Tribunal held that competition law proceedings fall within the civil scheme of proceedings and therefore the civil approach of allowing costs of the proceedings to follow the event should be applied, albeit where pecuniary penalties are sought the infringement has to be proved beyond reasonable doubt.

The Tribunal's approach in deciding this case provides useful guidance for assessing and determining the amount of pecuniary penalty and costs for future cases brought by the Commission.

***Competition Commission v Kam Kwong Engineering Company Ltd and others* [2020] HKCT 3**

Three companies were involved in making and giving effect to a market sharing agreement in relation to provision of renovation services at a housing estate, in contravention of the first conduct rule. They entered into an arrangement to allocate potential customers, exchanged information and coordinated the content and price of the standard decoration packages on offer.⁴ Two individuals employed by these companies were allegedly involved in the three companies' contraventions.

The Commission and three of the five respondents reached a settlement and made a joint application to the Tribunal in accordance with Rule 39 of the Competition Tribunal Rules to dispose of the proceedings against those respondents. The Tribunal held that the *Carecraft* procedure, whereby the Tribunal is confined to the facts set out in a statement of agreed facts, should be adopted when determining consensual applications, and found that there had been a contravention of the Competition Rules based on the agreed facts and had to decide on the appropriate sanctions to be ordered.

The decision determining the liability of the other respondents as well as appropriate sanctions for them is still pending as of the date of this publication.

This case shows that the Commission is prepared to resolve investigations and enforcement actions expeditiously against respondents who are willing to admit liability, and companies are encouraged to actively communicate with the Commission throughout the investigation process and consider admission of liability at an early stage in return for leniency.

³ *Competition Commission v W Hing Construction Company & others* [2020] HKCT 1

⁴ *Competition Commission v Kam Kwong Engineering Company Ltd and others* [2020] HKCT 3

***Competition Commission v Fungs E&M Engineering Company Limited and others* [2020] HKCT 9**

This case also involves anti-competitive price fixing and customer allocation conduct in relation to renovation work at a housing estate. Utilizing the *Carecraft* procedure approved for use in competition law proceedings in the case of *Kam Kwong Engineering Company*, the Tribunal imposed pecuniary penalties of more than HK\$200,000 on each of the contractors and individuals involved, applying the four-step approach adopted in *W Hing Construction Company*.

A director of one of the contractors was also disqualified for 22 months, reduced by 2 months because on his early admission of liability, for failing to take steps to prevent the anti-competitive conduct even though he had reasonable grounds to suspect that his company was taking part in such conduct. While the director did not know of or participate in the contravention, the Commission had already commenced investigating the company at the time when the alleged conduct took place.⁵ The Tribunal found him to be unfit for the management of the company.

Directors and senior management of companies should take heed of this case as it illustrates the importance of staying vigilant and taking pro-active steps to ensure that their companies do not engage in anti-competitive conduct.

***Competition Commission v Quantr Limited & Cheung Man Kit* [2020] HKCT 10**

The Commission issued its first infringement notices to Quantr Limited and Nintex Proprietary Limited for exchanging future price sensitive information in a bidding exercise and acting on this information, in breach of the first conduct rule. Proceedings were brought against Quantr Limited and its director who was involved in the contravention, and following agreement with the Commission, the proceedings were disposed of using the *Carecraft* procedure. They were ordered to pay a pecuniary penalty and costs of the proceedings. Following the approach in *W Hing Construction Company*, the Tribunal considered that the proposed penalty of HK\$37,702.26 against Quantr Limited was appropriate. Owing to the special circumstance of the case where the director was the sole director and shareholder of Quantr Limited, the Tribunal agreed to stay its proceedings against him for a pecuniary penalty.⁶

The cartel conduct in question was brought to the Commission's attention by a co-bidder, who successfully applied for leniency for the first time,⁷ and Nintex, which made commitments to comply with the requirements imposed by the Commission, was not prosecuted.

This case illustrates the Commission's commitment to granting immunity to businesses that voluntarily report cartel conduct, and cooperate in the bringing of proceedings against other parties to the cartel and leniency to businesses that cooperate with its investigations.

Enforcement of the second conduct rule has begun

In December 2020, the Commission filed its first case in the Tribunal involving contravention of the second conduct rule against a substantial medical gases supply company for abusing its substantial degree of market power in Hong Kong. It is alleged that the company ceased or limited supply of medical gases to the only other potential medical gas pipeline system maintenance service provider for public hospitals between 2015 and 2018 by various exclusionary acts such as unjustifiably denying supply and imposing unreasonable trading terms.⁸ The case is still pending, but this marks a milestone for Hong Kong's competition regime and demonstrates the Commission's ongoing commitment to take enforcement action against all types of anti-competition conduct that harm competition in Hong Kong.

⁵ *Competition Commission v Fungs E&M Engineering Company Limited and others* [2020] HKCT 9

⁶ *Competition Commission v Quantr Limited & Cheung Man Kit* [2020] HKCT 10

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https://www.compcomm.hk/en/media/press/files/20200122_ENG_QA_Competition_Commission_takes_IT_cartel_conduct_case_to_Competition_Tribunal.pdf

⁸ https://www.compcomm.hk/en/media/press/files/EN_PR_SCR_Final.pdf

Enforcement trends

As can be seen from the above, the Commission has initiated enforcement action against companies across different sectors, ranging from information technology (IT), construction, publishing and medical.

The first enforcement action under the Ordinance was brought against IT equipment suppliers, distributors and resellers for bid-rigging⁹, and in January 2020 the Commission filed the *Quantr* case involving IT cartel conduct with the Tribunal. The Commission has also taken enforcement action against companies in the construction sector, evident in the cases of *W Hing Construction Company*, *Kam Kwong Engineering Company* and *Fungs E&M Engineering Company* mentioned above, and the sanctions imposed were not only limited to companies but also individuals involved in their management.

In early 2020, the Commission conducted an investigation in relation to suspected anti-competitive conduct by online travel agents relating to certain terms of the agreements with Hong Kong accommodation providers.¹⁰ In February 2021, infringement notices were issued against six hotel groups and a tour counter operator for facilitating a price-fixing cartel.¹¹ **This was the first time the Commission pursued facilitators of cartel conduct, sending a warning to third parties facilitating anti-competitive conduct that they (and not only the cartelists) will also be held accountable and liable for breaching the Competition Rules.**¹²

The Commission has also commenced proceedings in the Tribunal against three companies in the publishing sector, alleging that they have contravened the first conduct rule by engaging in cartel conduct in the sale of textbooks to primary and secondary school students in Hong Kong.¹³ These arrangements were made prior to the implementation of the Ordinance, but continued after the Ordinance came into effect in December 2015. **This case shows that the Commission will investigate and take action in relation to any agreements that breach the Competition Rules, as long as they continued after the Ordinance came into force.**

As mentioned above, the Commission has commenced enforcement action under the second conduct rule in relation to anti-competitive conduct in the medical sector. It remains to be seen whether the Commission will further look out for businesses in the medical sector which may have contravened other Competition Rules.

Below is a table setting out the known investigations and enforcement actions to date:

Sector	Year when cases concluded	Number of cases before the Tribunal	Contravention
IT	2020 ¹⁴	2	First conduct rule
Construction	2020 ¹⁵	3	First conduct rule
Publishing	Pending	1	First conduct rule
Medical	Pending	1	Second conduct rule
Tourism and travel	Pending ¹⁶	2	First conduct rule

It will be apparent from the enforcement actions and investigations taken to date that they are multi-sectorial, with a number of cases in each sector. This is understandable as issues in one sector suggest that there are circumstances in that sector that may be encouraging and/or rewarding anti-competitive conduct, and heightened risks in those sectors. Business should be vigilant and proactively monitor activity in their sector and the Commission's

⁹ *Competition Commission v Company N and others* [2020] HKCT 11

¹⁰ https://www.compcomm.hk/en/enforcement/consultations/past_consultations/files/OTA_Notice_ENG.pdf

¹¹ https://www.compcomm.hk/en/media/press/files/EN_PR_Infringement_Notices_Tourist_Attraction_Tickets.pdf

¹² https://www.compcomm.hk/en/media/newsletter/files/Competition_Matters_Mar2021.pdf

¹³

https://www.compcomm.hk/en/media/press/files/20200320_Competition_Commission_takes_Textbook_cartel_case_to_Competition_Tribunal_EN.pdf

¹⁴ In the first case enforced against IT sector, the suppliers, distributors and resellers have been held liable for contravening the first conduct rule in an earlier judgment in May 2019.

¹⁵ In the case of *W Hing Construction*, the respondents have been held liable for contravening the first conduct rule in an earlier judgment in May 2019.

¹⁶ Commitments by online travel agents have been accepted by the Commission and the investigation has been terminated. On the other hand, as against the hotel groups and tour counter operator, although they have made commitments required by the infringement notices in February 2021, the investigation against other parties in the case is pending.

enforcement news, and take appropriate action to investigate, identify and remediate any anti-competitive conduct in their business practices.

Further, both corporates and individuals have been investigated and prosecuted for breaches of the Competition Rules, and the individuals investigated and sanctioned so far are not limited to those who have breached the rules (whether directly or through aiding or inducing others to do so), but also individuals in management of businesses that have breached the Competition Rules and have not taken sufficient steps to prevent the anti-competitive behavior. It is therefore important for businesses and their senior management to be well-aware of the types of conduct that may fall foul of the Competition Rules.

Cooperation with regulatory authorities or jurisdictions

Apart from investigations and enforcement actions, the Commission has also been increasing its collaboration with other regulatory authorities within and outside Hong Kong.

As early as July 2015, the Commission cooperated with the Communications Authority in formulating the Guidelines to the Competition Rules, as well as in the enforcement of the Merger Rule which proscribes mergers involving businesses in the telecommunication and broadcasting industry in accordance with a Memorandum of Understanding (MoU).¹⁷

In April 2020, the Commission signed another MoU with the Securities and Futures Commission, under which the two authorities have agreed to notify and consult each other on issues that may have significant implications or issues for the other authority, share information regarding businesses in the securities and futures industry, and engage in other technical cooperation such as staff training and exploring collaboration opportunities.¹⁸

Further, in December 2020, the Commission signed a MoU with the Philippine Competition Commission, which allows discussions on competition issues of mutual interest and technical cooperation such as collaboration on research.¹⁹ This is a breakthrough for the Hong Kong competition regime as it gradually expands its network of collaboration with competition authorities in foreign jurisdictions.

We anticipate more such cross-sectoral and cross-border collaboration in the near future, which will likely result in even more intelligence on anti-competitive conduct, and more investigations and enforcement actions.

Practical takeaways for businesses

Businesses and their officers and senior management should be in no doubt that anti-competitive conduct will be investigated and enforced against. While the Commission issued a statement recognizing the need for additional cooperation between businesses in certain industries on a temporary basis due to the COVID-19 pandemic and provided guidance on four potentially relevant arrangements that would unlikely give rise to competition concerns,²⁰ it also emphasized that it would not tolerate any conduct seeking to take advantage of the public health crisis and would remain watchful to protect consumers from anti-competitive conduct.

As such, businesses should be mindful of the Competition Rules when conducting their business, stay vigilant and take proactive steps to ensure compliance.

¹⁷ https://www.coms-auth.hk/filemanager/en/content_923/mou.pdf

¹⁸ https://www.compcomm.hk/en/media/press/files/ENG_CC_SFC_MOU.pdf

¹⁹ https://www.compcomm.hk/en/media/press/files/HKCC_PCC_MOU_signed.pdf

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https://www.compcomm.hk/en/media/press/files/20200327_PR_CC_issues_statement_on_application_of_CO_during_COVID19_outbreak_EN.pdf

We set out below some practical steps that businesses can take to ensure compliance:

- ▶ **Update and/or revise internal policies and procedures** endorsed by the board and senior management to include provisions proscribing anti-competitive conduct and guidelines for ensuring compliance with the Competition Rules, and raise awareness of management and staff regarding the types of behavior that should be avoided. Provide training on a regular basis.
- ▶ **Review business practices**, ensure management and staff have a proper understanding of the Competition Rules and identify high-risk issues in the business, including a lack of awareness of the competition regime by management or staff, particularly if they have a common practice of collaborating and/or sharing information or plans with competitors.
- ▶ **Review contracts** to identify any “red flag” provisions that should be assessed against the Competition Rules, such as standard terms that would affect prices.
- ▶ **Carry out internal compliance audit** to identify potential competition law risks, and monitor compliance with internal guidelines which are updated and amended from time to time to correspond with the most up-to-date Competition Rules.
- ▶ **Keep paper trail of high-risk decisions and contracts after review.** In the event that the Commission investigates, voluntary provision of these records may be helpful in demonstrating a culture focused on compliance and also constitute cooperation which is relevant to the outcome of any investigations and/or enforcement actions.
- ▶ **Take action if breach is identified.** Investigate and remediate breaches, including taking appropriate disciplinary action against perpetrators, revise policies and procedures as necessary, and provide training to management and staff of issues identified.
- ▶ **Report anti-competitive conduct to the Commission.** Timely reporting provides an opportunity to obtain the benefit of immunity under the Commission’s leniency policies in relation to cartel conduct. Alternatively, if an infringement notice has already been issued, making commitments to address the Commission’s concerns can be another way to benefit from immunity from subsequent proceedings.

The views reflected in this article are the views of the authors and do not necessarily reflect the views of the global EY organization or its member firms.

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EYG no.: 004779-21Gbl / APAC no.: 03012495

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