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## HKCGI Competition Law Guidance Note (Fourteenth Issue) – 2023 in Review (Part 2)

### Competition Law – 2023 in Review (Part 2)

As part of review of competition law developments, we have considered the enforcement proceedings at the Competition Tribunal (**Tribunal**). In this guidance note, to continue to we discuss enforcement highlights outside the Tribunal. The Competition Commission (**Commission**) engaged in a number of enforcement related activities, as it continued to increase the number of investigations in the pipeline and resolve cases using an array of enforcement tools. The following discussion relates to 2023 noteworthy developments.

#### Public consultation on commitments proposed by Deliveroo and foodpanda

The Commission conducted two public consultations

on its proposal to accept commitments from the city's two major online food delivery platforms, Deliveroo and foodpanda, to address its concerns that certain requirements imposed by Deliveroo and foodpanda on partnering restaurants could potentially harm competition, in contravention of the First Conduct Rule. The Commission accepted the commitments proposed by the food delivery platforms on 29 December 2023. Under the commitments, Deliveroo and foodpanda each agreed to amend or remove provisions that: (1) restricted restaurants from partnering with new and/or smaller competing platforms, (2) penalised restaurants for switching to other competing platforms, and (3) restricted restaurants from pricing menu items at a lower price on their own channels or competing platforms. It also required foodpanda to remove a tying provision requiring restaurants acquiring foodpanda's order

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to deliver services to also acquire order to pick up services.

This case represents the Commission's second public case relating to digital markets after the Commission's investigation into Online Travel Agents (Booking.com, Expedia and Trip.com), which similarly resulted in commitments in 2020. This illustrates the Commission's capacity to take on cases in the digital sector and readiness to resolve investigations through means other than enforcement proceedings where appropriate.

### Increased on-site search activities

In 2023, the Commission conducted two sets of on-site investigative activities, which were closely related to matters affecting people's livelihood. First, in June, the Commission conducted a second joint operation, together with the Police and the Immigration Department, in the Aberdeen Wholesale Fish Market, following its previous joint operation with the Police in December 2022 targeting alleged market sharing, output limitation and group boycott among wholesalers in the fish market. Second, in August, the Commission conducted a "surprise visit" to the New Territories (Shatin) Forensic Medicine Centre over suspicions that market sharing conduct may have been taking place among funeral service practitioners based on intelligence it had gathered.

The Commission's physical search activities this year highlight the increasingly important role of on-site investigation to the Commission's enforcement efforts. The fish market case also demonstrates the Commission's willingness to work closely with other law enforcement agencies to combat suspected illegal activities involving an anti-competitive element.

### Joint Business Agreement between two major airlines

The Commission announced that it had closed its

investigation into a proposed joint business agreement involving revenue and costs sharing between Cathay Pacific Airways and Malaysia Airlines Berhad, following the parties' decision not to proceed with the agreement. The investigation was prompted by the parties' reported application to the Malaysia Aviation Commission for an individual exemption in May 2022.

Notwithstanding the close of the investigation, the Commission issued a press release outlining the outcome of its preliminary assessment which indicated concerns regarding the potential impact of the proposed agreement on prices and service quality for flights between Hong Kong and Malaysia. This is a sign that the Commission will continue to keep a close eye on the air transport space especially given the public concerns over the increased cost of travel which has yet to normalise to pre-pandemic levels.

### City-wide campaign to raise awareness on resale price maintenance

After bringing its first RPM case in September 2022, in June 2023, the Commission published a new brochure on Resale Price Maintenance ("RPM")<sup>1</sup> as part of a city-wide education campaign to raise awareness on RPM. The brochure sets out a tough stance on RPM by emphasising its potential harm to competition, and the need for parties to strictly prove all four conditions of the statutory exclusion for economic efficiencies if they wish to benefit from the exclusion.<sup>2</sup>

The aim of the campaign is to bring about more public awareness on RPM which in turn, may result in more RPM complaints leading to more investigations. Businesses should exercise caution and carefully consider any potential competition implications before adopting vertical price restraints or strategies.

### Model clauses for non-collusion

At the beginning of 2023, the Commission issued a revised set of model "Non-collusion Clauses", which

1 [https://www.compcomm.hk/en/media/reports\\_publications/files/RPM\\_brochure\\_eng.pdf](https://www.compcomm.hk/en/media/reports_publications/files/RPM_brochure_eng.pdf)

2 <https://my.slaughterandmay.com/insights/briefings/are-minimum-resale-prices-allowed-a-fresh-look-at-vertical-price-restraints-in-hong-kong>

was designed to be incorporated in invitation to bid documents and contracts to help reduce procurers' exposure to anti-competitive conduct by bidders. As a result of the Commission's investigative work, which revealed instances of apparently competitive bids actually being prepared by bidders with common ownership links, the Commission introduced a new model clause requiring bidders to identify their beneficial owners, with a view to providing procurers with greater clarity as to the competitiveness of the procurement process.

The Commission published a set of model non-collusion clauses over six years ago in 2017. This most recent update illustrates the Commission's proactive educational efforts by applying the insights gained from its enforcement activities to educate the public on adopting and maintaining good practices to avoid anti-competitive conduct. Non-collusion clauses are expected to become more popular in both public and private sectors following the Commission's publication.

### Closer cooperation in the Greater Bay Area

In July, the Commission signed a memorandum of understanding ("MoU") with the Guangdong Administration for Market Regulation to strengthen their cooperation in the advancement of competition policy and law in the Greater Bay Area ("GBA").

Under the MoU, the two authorities will hold regular meetings to discuss key developments regarding competition policy, legislation and enforcement in their respective jurisdictions, and collaborate in activities to raise awareness of competition policy and law among businesses, government agencies and the general public.

The MoU is likely to foster closer ties between the two agencies, promote public awareness of competition law issues and harmonise competition policy in the GBA. The Commission also plans to organise a large-scale international forum at the end of 2024 to allow exchange of experience among enforcers, which will include competition practitioners and experts from mainland China.

### What's to come in 2024

The Commission's activity over the past year shows that it is becoming more proactive and, in some cases, moving much more quickly with its enforcement actions than it has in the past. Most recently, the Chairman of the Commission, Samuel Chan, publicly raised concerns against delays with the scheduling of Tribunal hearings, noting that a protracted period could impact the progress of the Commission's law enforcement work as well as leave companies and individuals involved in a state of uncertainty.