



Competition Law Guidance Note

The Hong Kong Competition Commission's first action against "facilitators" of a cartel – the tourist attraction tickets case

The governance professional will know that where two competitors come together to form a 'cartel' to prevent, restrict or distort competition in Hong Kong, this will violate the first conduct rule¹. In most cases, the cartel will operate between competitors at the same level of the supply chain. But less obvious is how other parties may be held as 'facilitators' of the cartel, and in some cases, unwittingly caught under the Hong Kong Competition Ordinance (**Ordinance**). This guidance note is intended to raise awareness of this practical governance issue for the governance professional.

Introduction to the case

The case involves two competing travel service providers, Gray Line Tours of Hong Kong Limited (**Gray Line**) and Tink Labs Limited (**Tink Labs**), which are

accused of fixing and controlling the prices of tourist attractions and transportation tickets sold at certain hotels' counter desks by Gray Line with those sold through 'handy' electronic smartphones at hotel rooms by Tink Labs.

The prices of the tickets available at Tink Lab's handy devices were often cheaper than the tickets available via the Gray Line's counter desk at the same hotel. Gray Line raised this as a complaint to the relevant hotels and another party (**ITL**, a company that subleased a tour desk at one of the hotels to Gray Line), and in some cases asked these hotels and ITL to instruct Tink Labs to stop selling tickets entirely.

Following investigations, the Hong Kong Competition Commission (**Commission**) concluded that it had reasonable cause to believe that six hotels and

1 Section 6 of the Competition Ordinance (Cap. 619)

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ITL had played an active role in helping the two competitors Gray Line and Tink Labs to communicate and, ultimately to align their ticket pricing. In some cases, the relevant hotel also monitored Tink Labs' compliance with the arrangement.

The Commission's actions

On 17 February 2021, the Commission announced that it was taking action against seven entities, namely six hotel groups and ITL. The Commission believed that these seven entities *facilitated* the main cartel arrangement between Gray Line and Tink Labs. The cases against these seven entities were eventually resolved through the issuance of infringement notices².

Facilitation of cartel conduct

The case against the seven entities represents the first example of enforcement action taken by the Commission against facilitators of cartel conduct. It serves as an important reminder to the governance professional that even if a party is not directly involved in supplying the goods or services that are the subject of a cartel arrangement, it can still be held liable for facilitating it. This could include, for example, an upstream supplier being used as a channel for the exchange of competitively sensitive information between distributors (for more on this topic, please see the sixth issue in our Competition Law Guidance Note series: Risk of Information Exchange).

While this is the first Hong Kong case, this type of facilitation conduct is well established under the competition laws of a number of jurisdictions, including the EU. For example, in *AC-Treuhand v European Commission* (2015), it was held that AC-Treuhand, a consultancy firm, was liable for participating in two cartels in the tin stabiliser sector and the epoxidised soybean oil and esters sector. While AC-Treuhand

was not itself active in these cartelised markets, it was involved in organising and supporting several meetings between competitors, including acting as moderator and had been responsible for collecting and conveying data to the market participants.

In relation to the case, while the seven entities were not directly involved in the selling of the tickets, that is, they operated within different markets, each was viewed as having participated in the infringement of the Ordinance. These arrangements are sometimes referred to as "hub-and-spoke" cartels. In this case, each hotel acted as a 'hub' to facilitate communication between the competitors 'spokes', Gray Line and Tink Lab, leading to an anti-competitive outcome, that is, the cartel conduct.

Citing both *AC-Treuhand* and another leading EU case involving facilitation (relating to a Yen Interest Rate Derivative cartel), the Commission took the view that the hotels had acted as a 'facilitator' by having 'actively contributed to the implementation of the cartel'. Whilst the Commission has not elaborated on the standard applicable to establishing facilitation under the infringement notices, the EU cases cited by the Commission establish and apply a two-step test:

1. Did the facilitator intend to contribute to the common objectives pursued by the downstream competitors (in the present case, Gray Line and Tink Labs)? and
2. Was the facilitator aware of the conduct of the downstream competitors, or could it reasonably have foreseen it?

Considering these questions provides clarity on how infringements of this type can arise and may help the governance professional avoid involvement in similar contraventions.

² In January 2022, the Commission instigated proceedings before the Competition Tribunal (**Tribunal**) against Gray Line, one of its directors, as well as some other hotel groups. According to the Commission's public statements, Gray Line, its director, and one hotel group had cooperated with the Commission. As such, the Commission sought to dispose of the proceedings against them through consent orders at the Tribunal, with an appropriate discount to the pecuniary penalties that would otherwise have been payable. However, two other hotel groups chose to put in substantial defences against the Commission's case, and the proceedings are ongoing. As the Tribunal proceedings are ongoing in relation to Gray Line and additional hotel groups, this guidance note will only focus on the infringement notices issued in February 2021 to the seven entities.

Scope of the undertaking

One of the important substantive questions considered by the Commission under the infringement notices is whether the scope of the relevant undertaking (for example, each hotel) should encompass the hotel owners and/or the hotel operators. This has a direct impact on the scope of the liability faced by parties involved in an infringement.

The main factors that the Commission considered as part of this analysis include:

1. An assessment of whether the operator is a "true" agent for competition law purposes, which in part turns on whether the "agent" bears any financial risks
2. the responsibility for employing the relevant employees that took part in the relevant conduct, and their reporting lines, and
3. whether the hotel outwardly presents itself as a single entity.

While these sorts of owner/operator arrangements are more prevalent in the hotel industry, companies operating in all sectors should be aware of how a competition authority might assess similar arrangements, including liability for actions of a joint venture company. It highlights the importance of compliance across the entire corporate group as liability for competition law infringements can be very broad.

The Commission's enforcement outcomes

Procedurally, the governance professional should note that, in this case, the Commission has deployed a mix of tools to arrive at different enforcement outcomes for different parties. For some, this involved issuing infringement notices in lieu of instigating Tribunal proceedings in return for commitments, and for others, the Commission has entered into cooperation agreements resulting in joint applications to the

Tribunal (described further below). For a third category of parties, the Commission has brought standard proceedings seeking remedies before the Tribunal.

This demonstrates both the range of enforcement outcomes that are available to the Commission, as well as the opportunities available to parties to avoid protracted legal proceedings before the Tribunal. Other than infringement notices, these could include:

- **Leniency:** under section 80 of the Ordinance, an undertaking or individual that has taken part in cartel conduct may report the cartel to the Commission and cooperate with the Commission in its investigation of the cartel, in return for which the Commission may enter into a leniency agreement with the cartel member and commit not to commence any proceedings against them in relation to the reported conduct. The Commission's leniency regime adopts a "winner takes all" approach, and leniency is available only for the first cartel member that makes a successful leniency application. Further details on the leniency process for undertakings and individuals can be found in the Commission's [Leniency Policy for Undertakings Engaged in Cartel Conduct](#) and [Leniency Policy for Individuals Involved in Cartel Conduct](#), respectively.
- **Cooperation and settlement:** where leniency is not available, an undertaking engaged in cartel conduct may nevertheless seek to cooperate with the Commission and enter into a cooperation agreement, to reach a settled outcome to an investigation by way of orders made by consent under Rule 39 of the Competition Tribunal Rules (Cap 619D). As part of the cooperation agreement, the Commission may agree to apply a cooperation discount of up to 50% on the pecuniary penalty that would otherwise be recommended to the Tribunal. Further details on the cooperation and settlement process can be found in the Commission's [Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct](#).

- **Section 60 Commitments:** under section 60 of the Ordinance, the Commission may accept a commitment from a person in order to address its concerns about a possible contravention of a competition rule under the Ordinance. Where the Commission accepts such a commitment, the Commission shall cease any investigation or proceedings before the Tribunal which relate to the matters addressed by the commitment. Further details on the Section 60 Commitments process can be found in the Commission's [Policy on Section 60 Commitments](#).

Conclusion

From the case, the governance professional should understand that the ambit of competition law is

extensive, and the Commission is aggressively seeking enforcement outcomes and applying international competition law norms to interpret the Competition Ordinance in Hong Kong. It is also clear that the Commission is developing a more sophisticated approach towards competition law enforcement, including making use of the variety of tools it has at its disposal. Now, more than ever, companies need to ensure that they are compliant with the competition law rules in Hong Kong. The governance professional should therefore recommend to their companies to be concerned with competition law as compliance risk, and facilitate the conduct of competition law audit, where necessary. In any event, the governance professional should facilitate the adoption of appropriate policy and procedures, and business practices, as well as training to reduce risks of competition law infringement.