

Competition Law Guidance Note (Eleventh Issue) - Guidance Note on significant competition law cases and need for competition law compliance (Part 2)

In the earlier guidance note, we introduced the Hong Kong competition law regime and the First and Second Conduct Rule, reminding governance professionals of the need to comply with competition law. We also highlighted some of the recent competition law cases brought by the Competition Commission (**Commission**) in a broad range of areas such as air-conditioning services, consumer products (flavour enhancers), food delivery platforms and car repair/maintenance services and the Commission's expressed intention to bring cases that were more relatable to the common Hong Kong consumer. In this guidance note, which aims to enhance the knowledge of governance professionals in competition law compliance, we will continue with highlighting other significant competition law developments which is likely to have an impact on the trajectory of competition law in 2023.

1. Continuing the case against the *Tourist Attraction Tickets Cartel*

In January 2022, the Commission commenced new enforcement proceedings in the Competition Tribunal (**Tribunal**) against a travel services provider and four other parties for their involvement in the Tourist Attraction Tickets case. This case was notable because it was the first case in Hong Kong involving the concept of "facilitation" of a cartel, in which a number of other parties have already admitted to facilitating the cartel and the exchange of pricing information between two competing travel service providers.¹

In July 2022, three parties – two companies and an individual - settled the proceedings with the Commission, resulting in the Tribunal ordering

¹ See also Slaughter and May's Competition & Regulatory Newsletter (10-23 February 2021), <https://my.slaughterandmay.com/insights/newsletters/competition-regulatory-newsletter-10-23-february-2021>

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pecuniary penalties for HK\$4.2 million (approx. US\$537,000) and HK\$1.6 million (approx. US\$206,000), together with a director disqualification order against the managing director of the travel services provider. Enforcement proceedings against the two remaining parties are ongoing and are not expected to be heard until 2024.

This case is a prime example of the Commission adopting a genuinely hybrid approach in the use of its enforcement tools, namely: (1) issuing infringement notices to the seven early cooperating parties, (2) a settled outcome in the Tribunal proceedings (including an agreed recommended pecuniary penalty) for three parties that cooperated later in the process, and (3) the full set of remedies (including a pecuniary penalty) before the Tribunal for the two remaining non-cooperating parties. This demonstrates that even when the Commission is willing to "settle" a case early (by issuing an infringement notice), it will generally be confident enough in the case's merits to be willing to take it all the way through the Tribunal process.

2. Successful appeal against pecuniary penalty discounts

Following the Commission's appeal against the Tribunal's penalty decision in the 1st and 3rd Decorators Cartel cases, the Court of Appeal confirmed in June 2022 that undertakings that had no direct participation in the cartel but had subcontracted their works should not be given a lower pecuniary penalty. In particular, as the contractors had loaned their licences to the subcontractors in breach of the licensing terms of the Housing Authority, the appellate court held that it was against public interest to recognise such unlawful conduct as a mitigating factor for pecuniary penalties.

While it is not surprising for the Court of Appeal to rule that sub-contracting is not a defence or mitigating factor in competition law, the principles enunciated in its judgment may have broader applications to other

day-to-day business relationships (e.g., distributors, agents, subsidiaries). In particular, businesses looking to minimise competition law risk may have to extend their compliance efforts to external business partners.²

3. Joint search operations with other law enforcement agencies

An interesting development in 2022 was the emergence of the Commission's new practice of conducting search operations jointly with other Hong Kong public bodies.

In January 2022, the Commission and the Organised Crime and Triad Bureau of the Hong Kong Police Force conducted a joint search at the premises of two companies suspected to have engaged in anti-competitive conduct in the tender exercise for a building maintenance project for a building in Tuen Mun. In November 2022, the Commission conducted another joint operation with multiple government bodies – this time at the Aberdeen Wholesale Fish Market. The joint raid was conducted after the Commission received a complaint alleging that wholesalers at the fish market had engaged in price-fixing in the sale of fisheries products. A further raid was conducted at the same fish market by the Commission, assisted by the Police, in December 2022.

These joint operations continue a trend of closer cooperation between the Commission and other government agencies in Hong Kong (it first referred a suspected case of obstruction of its search of premises to the Police for investigation in 2021). The collaboration between the Commission and other law enforcers is expected to continue in 2023. This is considered part of the Commission's strategy to enhance its effectiveness as a law enforcement agency.

4. Renewal of the Block Exemption Order for Vessel Sharing Agreements

In July 2022, the Commission decided to renew the

² See also Slaughter and May's Briefing (25 June 2022), <https://my.slaughterandmay.com/insights/briefings/sub-contractor-discount-for-cartel-fines-overturned-in-hong-kong>

Block Exemption Order for Vessel Sharing Agreements between liner shipping companies for a further four years, following a public consultation conducted in August 2021. The renewed Block Exemption Order is in line with the substantive terms of the Commission's original Block Exemption Order issued in 2017. In essence, the Block Exemption Order exempts certain operational arrangements between shipping lines from the prohibition against anti-competitive agreements.

The decision to renew the Block Exemption Order on substantively the same terms is a welcomed one for the industry, as it keeps Hong Kong in line with similar exemptions available in major maritime jurisdictions, including Australia, Canada, China, the European Union, Israel, Japan, Malaysia, New Zealand, Singapore, South Korea and the United States.

5. Advisory Bulletin on sharing employment information in joint employer/employee negotiations

In August 2022, the Commission published an Advisory Bulletin on joint negotiations between groups of employers and employees, recognising that in certain circumstances, joint negotiations may have a positive impact, leading to improved compensation and conditions for employees. Provided that certain conditions are satisfied, the Commission noted that it had no intention to pursue a case against employers participating in these joint negotiations.

Businesses (and human resource professionals) should note that the conditions only apply in a very narrow set of circumstances. Information relating to what an employer intends to offer prospective employees (e.g., pay, leave, training, working hours and other benefits) could be categorised as competitively sensitive information. Sharing this type of information is rarely advisable.³

6. Aligning Cartel Leniency Policies for individuals and undertakings

In September 2022, the Commission revised its *Cartel Leniency Policy for Individuals*, first introduced in 2020⁴. The revised policy creates a new queue for individuals that report their involvement in cartel conduct (previously, individuals and companies competed in the same queue for leniency). In line with the *Cartel Leniency Policy for Undertakings*, the revised *Cartel Leniency Policy for Individuals* retains the distinction between cartels reported before the Commission opens an initial assessment or investigation (Type 1) and cartels reported after the Commission commences such assessment or investigation (Type 2).

The Commission expects the revised Cartel Leniency Policy for Individuals would help obtain evidence and secure the cooperation of individuals who may want to be shielded from enforcement proceedings. These incentives will be important going forward as the Commission continues its strategy of pursuing companies and individuals for involvement in cartel conduct.

What's to come in 2023

2022 has been a busy year for the Commission. We have seen the Commission bring various enforcement actions and outcomes in line with its enforcement strategy announced in 2021, which is favourable for developing competition law in Hong Kong. The Commission has also demonstrated growing experience and confidence in deciding how to best deliver enforcement outcomes efficiently via contested and non-contested means. In line with historical trends, we expect the Commission to maintain course in 2023, with more cases to be brought before the Tribunal. The developing practice of joint investigation operations

³ See also Slaughter and May's Briefing (15 September 2022), <https://my.slaughterandmay.com/insights/briefings/sharing-employment-information-when-is-it-permissible-under-the-competition-ordinance>

⁴ See also Slaughter and May's Briefing (22 May 2022), <https://my.slaughterandmay.com/insights/briefings/sharing-employment-information-when-is-it-permissible-under-the-competition-ordinance>

with other government agencies and soliciting public comments and views to aid its fact-finding process are also areas to watch out for.

As the Commission enters its 8th year of enforcement, the Commission is rapidly maturing into a respectable

competition law agency, and we can expect to see the Commission increase the pace and complexity of its enforcement actions. Governance professionals should ensure their internal competition law compliance programmes are practical and up-to-date, or seek help from competition law specialists, if appropriate.