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## HKCGI Competition Law Guidance Note (Thirteenth Issue) – 2023 in Review (Part 1)

### Competition Law – 2023 in Review (Part 1)

The governance professional should be aware of the high-level developments on competition law as part of related risk management. This is the purpose of this guidance note. In this connection, 2023 marked a year of major advancement for the Hong Kong Competition Commission (**Commission**). Now in its 8th year, the Commission has shown that it is able to initiate its own high-profile cases, move quickly in its investigations, and wrap up cases successfully. In this guidance note, we take a look at the highlights from the Commission's activities over the past year.

As set out under previous guidance notes, continuing the Commission's focus on matters affecting people's livelihood, abuse of public funding and digital markets,

the Commission's investigations primarily centred on cartel conduct in 2023, with all three of the new cases filed in the Competition Tribunal (**Tribunal**) relating to conventional anti-competitive conduct, including price fixing and bid-rigging.

### Case against Real Estate Agencies Cartel

In November 2023, the Commission issued proceedings against real estate agency Midland Realty International Limited and five individuals allegedly involved in an agreement to fix the minimum net commission for the sale of first-hand residential properties in Hong Kong at 2% with its competitors Centaline Property Agency Limited (**Centaline**) and its subsidiary, Ricacorp Properties Limited (**Ricacorp**). The Commission alleges that this effectively fixed or

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restricted the maximum level of rebate their frontline agents could offer to purchasers of such properties.

Notably absent from the Commission's proceedings, Centaline and Ricacorp had successfully applied for leniency under the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct, agreeing to cooperate fully with the Commission in exchange for immunity. The case highlights the Commission's dedication to tackling hardcore cartels that affect people's livelihood, particularly in sectors such as the property market, and the effectiveness of leniency as an enforcement tool. With the help of Centaline and Ricacorp, the Commission was able to issue the proceedings less than 12 months after the Commission announced it was looking into the matter (which was prompted by media reports), demonstrating its ability to act quickly and decisively on information it receives.

### Second set of proceedings in Air-Conditioning Works Cartel

To recap the happenings in 2023, the Commission filed a second set of legal proceedings in May 2023 in respect of suspected cartel conduct in the supply of air-conditioning works in Hong Kong against ATAL Building Services Engineering Limited (**ATAL**), Johnson Controls Hong Kong Limited and its parent companies, and an individual. These proceedings are a sequel to the Commission's proceedings in June 2022 against ATAL and another air-conditioning works contractor for similar conduct. ATAL agreed to admit liability for both sets of proceedings and pay a total penalty of **HK\$150 million**.

Apart from the fact that this is the Commission's biggest penalty being sought to date, this case raised an interesting question as to whether the Tribunal can impose a pecuniary penalty against one party (i.e. the settling party) pending trial against the other parties to the same proceedings, or if the Tribunal should only determine the appropriate penalty after it has adjudged the liability of all parties. Deviating from the Tribunal's previous approach in Kam Kwong (*Decoration Contractors Cartel*), the Tribunal's President, Harris J,

determined that the appropriate procedure is for the Tribunal to determine liability first and adjourn the determination of the penalty until after trial or after all respondents have settled.

The Commission is now appealing this point to the Court of Appeal. The outcome of this appeal will undoubtedly have an important bearing on the future of the Commission's enforcement activities.

### Bid-rigging in Government subsidy scheme

In March 2023, the Commission took the first cartel case relating to a Government subsidy scheme to court, in line with its expressed enforcement priority to target any potential exploitation of public funding. The Commission commenced proceedings against four undertakings and three individuals alleged to have engaged in practices including cover bidding when providing quotations for IT solutions in applications for Government subsidy under the Distance Business Programme (D-Biz).

The case was referred to the Commission by the Hong Kong Productivity Council (**HKPC**), which suspected its procurement process to have been tainted by anti-competitive conduct. With the assistance of the HKPC and the Innovation and Technology Commission (which launched the D-Biz funding scheme), the Commission obtained and reviewed 14,000 applications to identify suspicious bidding patterns and features which it alleged evidenced bid-rigging. The case highlights the importance of the screening work (enhanced by artificial intelligence) in building the Commission's case and the significance of cooperation between the Commission and other governmental agencies.

### Settlement of the Mail Inserters Cartel

While the Tribunal did not hear any trials in 2023, the Tribunal was able to resolve the Mail Inserters case filed in November 2021. In this case, the Commission alleged that three companies had engaged in price fixing, market sharing and bid-rigging in the sale of Neopost-branded mail inserters in Hong Kong. The

Tribunal ordered the payment of fines in the range of HK\$808,000-3,372,000 (approx. £80,800-337,200), after allowing a cooperation discount of 25-28%.

This marks the first case in which all the subjects of the Commission's investigation cooperated with the Commission during the investigation stage, agreeing to fully settle under the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct.

As of the end of 2023, the Commission has a total of 15 cases filed with the Competition Tribunal. Five of these cases have been resolved, resulting in fines and, in some cases, additional sanctions, such as an order.

Notwithstanding a relatively quiet year for the Tribunal in 2023, activity in the Tribunal is expected to increase in the coming year with a number of highly anticipated trials on the horizon including the *Textbooks Cartel* case, against three companies in an alleged price fixing, market sharing and/or bid-rigging in relation to the sale of school textbooks which is scheduled to be heard before Harris J in April 2024. How the Tribunal will decide these cases will undoubtedly generate useful precedents for practitioners and businesses alike, definitely a space to watch in the coming year.