# Conglomerates beware: Parent company implicated for subsidiary's role in booksellers cartel

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The Hong Kong Competition Commission (**HKCC**) recently brought its second cartel case this year. The case is lodged against four parties, namely two book retailers, the parent company of one of the book retailers, and the General Manager of the other book retailer, for alleged price fixing, market sharing and/or bid-rigging. Corporate groups should take note of this case, as it is the first case before the Tribunal where a parent company could become liable for the acts of its subsidiary.

## Facts of the case

The HKCC took out its sixth enforcement action on 20 March 2020 against **Commercial Press, T.H. Lee** and **Sino United** (the ultimate owner of Commercial Press). Mr. Hui Chiu Ming, the General Manager of T.H. Lee and Chairman of the trade association **Educational Booksellers' Association** (**EBA**), is also named as one of the respondents due to his significant involvement in the alleged cartel.

The case concerns an agreement or concerted practice dating back to 2011, when EBA members allegedly agreed not to "poach" one another's customers. The EBA consisted of many prominent school textbook retailers in Hong Kong (including Commercial Press, T.H. Lee and other subsidiaries of Sino United). The EBA members are alleged to have reached an understanding to end an industry price war, and to maintain the members' respective existing clients, by agreeing not to submit more attractive bids to tenders organised by schools that were not their existing clients and specifying price levels for losing bids. The EBA Chairman allegedly played a key role in these arrangements.

Although the Competition Ordinance (**Ordinance**) was not in full effect until December 2015, the HKCC alleges that the respondents nonetheless engaged in anti-competitive conduct after 2015 by continuing to give effect to the pre-existing arrangements. According to the HKCC, in 2016, the EBA Chairman contacted the Vice President of Sino United to complain about Sino United's subsidiaries winning tenders for schools that were T.H. Lee's clients. Commercial Press and T.H. Lee later gave effect to pre-existing arrangements by submitting bids at the specified prices for losing bids. This extended to tenders conducted by 80 schools and sponsoring bodies between 2016 and 2019.

The HKCC claims that the respondents have contravened the First Conduct Rule by price fixing, market sharing and/or bid-rigging. Pecuniary penalties and adverse costs orders (for investigation and litigation costs) are being sought against all parties, including the EBA Chairman, who also faces a claim for a disqualification order.

## Key takeaways

***Parental liability, even if the parent has no knowledge of the subsidiary's conduct***

One of the respondents, Sino United, does not appear to have been directly involved in the alleged conduct, but the allegations against it are primarily based on the simple fact that it is the ultimate owner of Commercial Press. Notwithstanding factual specificities at play in this case (e.g. the Vice President of Sino United, who is also a director of Commercial Press, allegedly directed Commercial Press employees to give effect to the cartel arrangement), the HKCC relies heavily on EU rules on parental liability that are not recognised under Hong Kong rules of attribution.

If the EU rules of parental liability are endorsed by the Competition Tribunal in full, parent companies (including multinational conglomerates and investment firms) could be exposed to antitrust liability incurred by any company they have "decisive influence" over. According to the HKCC, whether the parent exercises such decisive influence over the subsidiary should be inferred from the facts of the case, but the key principle is whether the parent can direct the conduct of its subsidiary to such an extent that they should be regarded as the same undertaking. The HKCC has suggested that the Competition Tribunal can look to various factors for this assessment, including the parent's shareholding in the subsidiary, instructions given by the parent to the subsidiary or the two entities having shared directors.

Corporate groups should take note of how this principle is applied by the Tribunal, particularly given its potential significance for conglomerates whose various operating businesses in Hong Kong may be tightly controlled by the ultimate parent company or group (whether or not it is incorporated in Hong Kong).

***Increased fines and greater participant liability in a cartel***

The Booksellers case will also be the first time the HKCC introduces the European concept of a "single and continuous infringement" to the Competition Tribunal. We expect the Competition Tribunal will be open to the HKCC's arguments, as the application of substantive European competition law principles has already been generally recognised in previous Hong Kong cases (see our briefing **here**).

The implication of this concept is that conduct that could otherwise be considered as separate instances of contraventions, potentially involving different parties, would be grouped together as a single contravention over the entire period of the existence of the overall cartel. This would allow the HKCC to attribute liability to a particular cartel member without having to identify and prove the existence of each distinct contravention that the cartel member was actually involved in.

Importantly, this concept in EU case law has developed to allow the finding of (greater) liability even when a business had no knowledge of contact between other cartel participants, or had limited participation in the cartel. Wholesale import of this concept into Hong Kong law could mean that businesses are exposed to greater liability in cases with multiple cartel members spanning a long period of time.

***Other trade association members are not part of the HKCC's proceedings***

The HKCC alleges that the pre-existing arrangements were made and reaffirmed in EBA meetings, where other book retailers (in addition to the two respondent book retailers) were present and formally part of the relevant arrangements.

It is curious why they are not subject to the same proceedings, especially as the HKCC is putting forward the concept of a single and continuous infringement. It could be due to lack of sufficient evidence or because these other book retailers did not in fact give effect to the pre-existing arrangements. This will be an interesting aspect of the case to look out for as it progresses in the Tribunal.

## Conclusion

Despite being a local cartel, multinational conglomerates and investment firms with "decisive influence" over Hong Kong companies should be alert to the development of this case, as it could have a major impact on the antitrust risk exposure of the wider global corporate group. For local businesses and in-house counsel, the Booksellers cartel will be a case to look out for in the near future given the fundamental importance of the legal principles involved.

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