

# A YEAR OF NEW FRONTIERS

## THE 6<sup>TH</sup> YEAR OF ANTITRUST ENFORCEMENT IN HONG KONG

Despite the continued challenges posed by the COVID-19 pandemic, the past year has been a year of progress and robust competition enforcement in Hong Kong. We saw developments across the board, including the first abuse of substantial market power case, a full spectrum of public enforcement outcomes, and the conclusion of the city's first (and only) standalone private action. In this Briefing, we take a look at the top 10 events in the 6<sup>th</sup> year of antitrust enforcement in Hong Kong, and share what we see on the horizon in 2022.

### The year in review: pushing boundaries across all fronts

The Hong Kong Competition Commission (**Commission**) had a busy year pushing out new cases and driving enforcement actions through litigious and non-litigious means. There have also been other significant developments, notably in the Court of Appeal and the standalone proceedings before the Competition Tribunal (**Tribunal**). Here is a list of the key antitrust developments over the past year:

#### 1. First abuse of substantial market power case and first enforcement proceedings against a foreign parent

The Commission started its 6<sup>th</sup> year of antitrust enforcement with its first Second Conduct Rule case in December 2020. The case concerns a medical gas supplier that allegedly engaged in a series of exclusionary acts against the only other potential service provider in the downstream medical gas pipeline systems maintenance market for public hospitals. The Commission is also pursuing the general manager of the relevant business division of the medical gas supplier for his active involvement in the acts concerned (see our [January Newsletter](#)).

The case already saw some interlocutory skirmishes in the Tribunal during the year (the Commission's attempt to seek discovery from the respondents was rejected in October). However, there may still be some time before we see a trial date. Nonetheless, we will be watching out for this case in coming years, as we expect it to become the landmark authority for future Second Conduct Rule cases, as well as extending the highly-contested issue of parental liability beyond Hong Kong, i.e. liability of an overseas parent for anti-competitive acts carried out by a Hong Kong entity.

#### 2. First enforcement against facilitators of a cartel

In February 2021, the Commission issued Infringement Notices to six hotel groups and a tour counter operator for facilitating an alleged price-fixing cartel between two competing travel services providers (see our [February Newsletter](#)). This Tourist Attraction Tickets case was notable because this was the first case in Hong Kong involving the concept of "facilitation" of a cartel - by accepting the Infringement Notices, all recipients of the Infringement Notices admitted to have facilitated the cartel and the exchange of pricing information between the travel services providers.

As the case against these facilitators were resolved upon the acceptance of Infringement Notices, the case did not come before the Tribunal, and no pecuniary penalties were levied. However, as not all parties accepted the Infringement Notice, the Commission's case against other parties in this case remains ongoing, which could yet bring the facilitator concept to be tested before the Tribunal.

#### 3. Confirming the criminal standard of proof in antitrust enforcement proceedings

In July, the Court of Appeal rejected the Commission's cross appeal in the 1<sup>st</sup> Decorators Cartel case regarding the standard of proof in competition proceedings for a pecuniary penalty. In reaffirming the Tribunal's decision on the criminal standard of proof issue in the Nutanix case (see our [May 2019 briefing](#)), the appellate court reasoned that it would be better to test the Commission's argument in an actual case where the application of the criminal standard

would have a real impact and where the issue has been dealt with in the Tribunal's evidential assessment, before the point is considered on appeal (see our [July Newsletter](#)).

The Commission has taken up the Court of Appeal's suggestion and is putting forward its case on both civil and criminal standards of proof in the Cleaners' Cartel case mentioned below.

#### 4. First full cartel settlement before enforcement proceedings

In November, the Commission lodged its 8<sup>th</sup> enforcement case before the Tribunal. While this is yet another cartel case - specifically a cartel concerning inserters (machines for inserting letters into envelopes for mass mailing) - this was the first cartel case in which all cartel members cooperated with the Commission and agreed to fully settle the case before the commencement of Tribunal proceedings. Parties are expected to resolve the case via the Kam Kwong procedure (see our [August 2020 briefing](#)), having already agreed recommended pecuniary penalties with the Commission (but with the Tribunal's decision on penalties to follow).

This case builds on the increasing trend of respondents resolving the Commission's investigations expeditiously and economically via settlements. It also shows the benefits of quicker enforcement outcomes through settlements. That said, investigated parties should be reminded that every case is different, and it would be advisable to seek timely advice from competition law specialists that can help determine the best strategy in specific circumstances.

#### 5. Flagging concerns on trade associations and professional bodies

In July, the Commission published an Advisory Bulletin warning that trade associations and professional bodies should not use their admission criteria and/or admission procedures to arbitrarily exclude competition in the market. Specifically, it elaborates on the Commission's requirements in the Guideline on the First Conduct Rule requiring such rules to be (a) transparent, (b) proportionate, (c) non-discriminatory, (d) based on objective standards, and (e) subject to appeal in the event of a refusal to admit a party to membership.

The Advisory Bulletin provides welcomed guidance and details on the Commission's expectations on how trade associations should comply with each requirement (see our [August Briefing](#)). Interestingly, the Commission followed-up the Advisory Bulletin with a rare public statement in September, indicating that it is "looking into" concerns raised by the media regarding the decision of the Volleyball Association of Hong Kong, China to exclude the "full membership" status of certain sports clubs and associations. The outcome of that inquiry remains to be seen.

#### 6. No collusion found in the first standalone action

The first privately litigated antitrust case in Hong Kong concluded shortly after trial over the summer (see our [October Newsletter](#)). The Tribunal found that the buyer of industrial diesel, Meyer Aluminium, had "*failed to show even a prima facie case of agreement or concertation*" between two petrol suppliers. Meyer's sole illegality defence in the civil claim for non-payment of goods accordingly fell apart. A High Court judgment was entered into on the same day, and Meyer was ordered to pay the petrol suppliers for diesel delivered in 2017, with interest and costs.

While the lack of standalone private actions is a well-known "feature" of the local competition law regime, the case is a demonstration of how a standalone action can be brought before the Tribunal through the clever use of litigation procedures available in the statute. However, the case also shows that, even if the statutory mechanism can be successfully invoked, the party invoking the procedure may ultimately find it difficult to substantiate its claim.

#### 7. New Commission Policy on Commitments

The Commission bolstered its enforcement toolkit with a new [Policy on Section 60 Commitments](#) in November. The Policy clarifies how investigated parties or the Commission may initiate the process of offering Commitments to resolve the Commission's concerns in an investigation, what factors the Commission would consider when deciding whether to accept Commitments offered, and the particulars of the Commitments process and content. Matters following the acceptance of Commitments are also outlined in the Policy, including failure to comply with a Commitment, and the variation, substitution and release of a Commitment.

The Policy reflects the Commission's recent enforcement experience involving Commitments (e.g. Commitments from certain online travel agencies to remove wide parity clauses in their contracts with hotels), and is a welcomed addition to the Commission's suite of enforcement policy documents.

#### **8. First referral to the Police for criminal obstruction of search in the Cleaners' Cartel case**

In conjunction with the Commission's 6<sup>th</sup> enforcement anniversary in December 2021, the Commission lodged proceedings against two cleaning companies and three directors for alleged cartel conduct in the procurement of cleaning services for public housing estates. In particular, the Commission is strategically pleading its case on both civil and criminal standards of proof, thereby allowing the Commission to revisit the applicable standard of proof on appeal if required.

The Commission also highlighted its referral to the Police regarding an allegation that, during the course of the Commission's execution of a search warrant at one of the cleaning companies' offices, someone tried to delete some documents and shortcuts linking the computers of one company to the servers of another company. While the Commission is known to have carried out a number of dawn raids over the past 6 years of enforcement, this is the first instance of obstruction encountered during a raid.

The outcome of the case for obstruction for search in this Cleaners' Cartel case will be an interesting one, particularly if it results in a successful prosecution - the maximum penalty for the offence is a fine of HK\$1,000,000 (approx. US\$130,000) and imprisonment for 2 years. In any event, the referral sends a clear message that the Commission takes the criminal provisions of the Competition Ordinance seriously.

#### **9. New leadership in the Commission and a new President of the Tribunal**

The Commission saw some changes in senior management in 2021. Mr. Rasul Butt, who joined the Commission in 2015 as Executive Director (Corporate Services & Public Affairs) and was promoted to Senior Executive Director in 2016, was appointed the new CEO of the Commission in May 2021. His appointment has brought about a seamless leadership transition within the Commission. Meanwhile, the departure of Executive Director (Legal Services), Mr. Steven Parker, has left the role open since October; Mr. Billy Woo, a long-time civil servant, was appointed Executive Director (Policy & Advocacy) in December.

The Tribunal also saw some changes in judicial appointments. The first President of the Tribunal since 2013, Mr. Justice Godfrey Lam, was appointed a Justice of Appeal of the Court of Appeal of Hong Kong in June. Mr. Justice Jonathan Harris took up the mantle as the new President of the Tribunal in August, with an appointment of three years.

#### **10. Commission announcement on future enforcement focus areas**

Upon celebrating its 6<sup>th</sup> anniversary of antitrust enforcement, the Commission **announced** that its enforcement focus would prioritise the following areas: (a) anti-competitive conduct that affects people's livelihood, (b) cartels that take advantage of public funding, and (c) cases and market studies involving digital markets (including online retail). In its press conference, the Commission Chairperson, Mr Samuel Chan, also noted that the Commission has been making investigative inquiries into the automotive fuel market, the nature of which is different from its market study of the auto-fuel market in 2017.

In the past, the Commission has been criticised of taking on cases that do not relate to the common Hong Kong consumer, and focusing enforcement on small local businesses instead of tackling big businesses such as Big Tech and Big Oil. The Commission's latest comments suggests that it may be steering its enforcement focus away from this perception in the near future.

#### **What's to come in 2022**

With its achievements in 2021, the Commission has proven itself to be a respectable and maturing antitrust enforcer. Looking ahead, we expect the Commission to bring enforcement outcomes consistent with its 2022 enforcement priorities outlined above - the Commission is likely to already have a line of cases in the pipeline at the time of its announcement. It will be interesting to see how many of these cases will be contested or settled, as the Commission will likely be continuing its current practice of balancing enforcement via litigious and non-litigious means.

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