

EMBRACING PROACTIVE ENFORCEMENT: HONG KONG COMPETITION ENFORCEMENT GAINS PACE

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 briefing, we take a look at the highlights from the Commission’s activities over the past year.

Taking the initiative in antitrust enforcement

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, such as price fixing and bid-rigging.

1. Case against *Real Estate Agencies Cartel*

In November, 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 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.

2. Second set of proceedings in *Air-Conditioning Works Cartel*

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*) (see our client briefing [here](#)), 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.

3. Bid-rigging in Government subsidy scheme

In March, 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 in building the Commission's case and the significance of cooperation between the Commission and other governmental agencies.

4. 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 HKD 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 to adopt a compliance programme or director disqualification. The remaining 10 cases are still ongoing.

Enforcement highlights outside the Tribunal

Apart from lodging enforcement proceedings, the Commission engaged in a number of enforcement related activities, as it continued to increase the number of investigations in the pipeline and resolve cases using an array of enforcement tools. Of note in 2023:

1. Public consultation on commitments proposed by Deliveroo and foodpanda

The Commission conducted two public consultations on its proposal to accept commitments from the city's two major online food delivery platforms, Deliveroo and foodpanda, to address its concerns that certain requirements imposed by Deliveroo and foodpanda on partnering restaurants could potentially harm competition, in contravention of the First Conduct Rule. The Commission accepted the commitments proposed by the food delivery platforms on 29 December 2023. Under the commitments, Deliveroo and foodpanda each agreed to amend or remove provisions that: (1) restricted restaurants from partnering with new and/or smaller competing platforms, (2) penalised restaurants for switching to other competing platforms, and (3) restricted restaurants from pricing menu items at a lower price on their own channels or competing platforms. It also required foodpanda to remove a tying provision requiring restaurants acquiring foodpanda's order to deliver services to also acquire order to pick up services.

This case represents the Commission's second public case relating to digital markets after the Commission's investigation into Online Travel Agents (Booking.com, Expedia and Trip.com), which similarly resulted in commitments in 2020. This illustrates the Commission's capacity to take on cases in the digital sector and readiness to resolve investigations through means other than enforcement proceedings where appropriate.

2. Increased on-site search activities

In 2023, the Commission conducted two sets of on-site investigative activities, which were closely related to matters affecting people's livelihood. First, in June, the Commission conducted a second joint operation, together with the Police and the Immigration Department, in the Aberdeen Wholesale Fish Market, following its previous joint operation with the Police in December 2022 targeting alleged market sharing, output limitation and group boycott among wholesalers in the fish market. Second, in August, the Commission conducted a "surprise visit" to the New Territories (Shatin) Forensic Medicine Centre over suspicions that market sharing conduct may have been taking place among funeral service practitioners based on intelligence it had gathered.

The Commission's physical search activities this year highlight the increasingly important role of on-site investigation to the Commission's enforcement efforts. The fish market case also demonstrates the Commission's willingness to work closely with other law enforcement agencies to combat suspected illegal activities involving an anti-competitive element.

3. Joint Business Agreement between two major airlines

The Commission announced that it had closed its investigation into a proposed joint business agreement involving revenue and costs sharing between Cathay Pacific Airways and Malaysia Airlines Berhad, following the parties' decision not to proceed with the agreement. The investigation was prompted by the parties' reported application to the Malaysia Aviation Commission for an individual exemption in May 2022.

Notwithstanding the close of the investigation, the Commission issued a press release outlining the outcome of its preliminary assessment which indicated concerns regarding the potential impact of the proposed agreement on prices and service quality for flights between Hong Kong and Malaysia. This is a sign that the Commission will continue to keep a close eye on the air transport space especially given the public concerns over the increased cost of travel which has yet to normalise to pre-pandemic levels.

4. City-wide campaign to raise awareness on resale price maintenance

After bringing its first RPM case in September 2022, in June 2023, the Commission published a new brochure on Resale Price Maintenance ("RPM") as part of a city-wide education campaign to raise awareness on RPM. The brochure sets out a tough stance on RPM by emphasising its potential harm to competition, and the need for parties to strictly prove all four conditions of the statutory exclusion for economic efficiencies if they wish to benefit from the exclusion (see our client briefing [here](#)).

The aim of the campaign is to bring about more public awareness on RPM which in turn, may result in more RPM complaints leading to more investigations. Businesses should exercise caution and carefully consider any potential competition implications before adopting vertical price restraints or strategies.

5. Model clauses for non-collusion

At the beginning of 2023, the Commission issued a revised set of model "Non-collusion Clauses", which was designed to be incorporated in invitation to bid documents and contracts to help reduce procurers' exposure to anti-competitive conduct by bidders. As a result of the Commission's investigative work, which revealed instances of apparently competitive bids actually being prepared by bidders with common ownership links, the Commission introduced a new model clause requiring bidders to identify their beneficial owners, with a view to providing procurers with greater clarity as to the competitiveness of the procurement process.

The Commission published a set of model non-collusion clauses over six years ago in 2017. This most recent update illustrates the Commission's proactive educational efforts by applying the insights gained from its enforcement activities to educate the public on adopting and maintaining good practices to avoid anti-competitive conduct. Non-collusion clauses are expected to become more popular in both public and private sectors following the Commission's publication.

6. Closer cooperation in the Greater Bay Area

In July, the Commission signed a memorandum of understanding (“MoU”) with the Guangdong Administration for Market Regulation to strengthen their cooperation in the advancement of competition policy and law in the Greater Bay Area (“GBA”). Under the MoU, the two authorities will hold regular meetings to discuss key developments regarding competition policy, legislation and enforcement in their respective jurisdictions, and collaborate in activities to raise awareness of competition policy and law among businesses, government agencies and the general public.

The MoU is likely to foster closer ties between the two agencies, promote public awareness of competition law issues and harmonise competition policy in the GBA. The Commission also plans to organise a large-scale international forum at the end of 2024 to allow exchange of experience among enforcers, which will include competition practitioners and experts from mainland China.

What’s to come in 2024

The Commission’s activity over the past year shows that it is becoming more proactive and, in some cases, moving much more quickly with its enforcement actions than it has in the past. Most recently, the Chairman of the Commission, Samuel Chan, publicly raised concerns against delays with the scheduling of Tribunal hearings, noting that a protracted period could impact the progress of the Commission’s law enforcement work as well as leave companies and individuals involved in a state of uncertainty. 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.

CONTACT



NATALIE YEUNG
PARTNER
T: +852 2901 7275
E: natalie.yeung@slaughterandmay.com



ALEXANDER LEE
COUNSEL
T: +852 2901 7202
E: alexander-pc.lee@slaughterandmay.com



MICHELE HO
ASSOCIATE
T: +852 2901 7370
E: michele.ho@slaughterandmay.com



YVONNE NGAI
LEGAL ASSISTANT
T: +852 2901 7324
E: yvonne.ngai@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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