



OFF AND RUNNING: THE HONG KONG COMPETITION COMMISSION COMMENCES FULL OPERATIONS



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I. INTRODUCTION

The Competition Commission ("Commission") in Hong Kong began enforcing Hong Kong's first economy wide competition law on December 14, 2015. This followed a long period of preparation following the passing of the Competition Ordinance ("Ordinance") in June 2012 and the Commission's establishment in May 2013.

Although less than a year has passed since full operations commenced, the Competition Commission has already conducted a number of publicity campaigns, published a report of research into a market of great public interest, issued a draft block exemption order and has some substantial enforcement activity underway. This article outlines some of the Commission's activities over the past nine months.

II. COMMENCEMENT OF THE COMPETITION ORDINANCE

On December 14, 2015 the substantive provisions of the Ordinance came into full effect. For the first time Hong Kong businesses were subject to a generally applicable competition law (previously there had only been a competition regime for the telecommunications sector).

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Immediately prior to the coming into effect of the Ordinance, the Commission undertook a wide-ranging outreach and publicity campaign. This included launching a revamped website (www.compcomm.hk); conducting a series of seminars entitled "Getting Ready for Full Implementation of the Competition Ordinance" and two additional seminars specifically aimed at trade associations and the broadcast of a thirty second TV advertisement entitled the "Competition Ordinance is now in Full Effect." Buses and trams in Hong Kong carried images heralding the implementation of the new law and posters were displayed in businesses and MTR stations.

In addition to events and publicity organized by the Commission there were many workshops, seminars and conferences organized by trade associations, chambers of commerce and law firms. Commission staff attended many of these events and outlined what steps businesses should be taking to ensure compliance with the law.

It was clear to us that as December 14, 2015 approached there was increasing awareness of the Ordinance and interest in what it meant for businesses across Hong Kong.

However even we were surprised by the extent of the interest on the day. The Commission received over 200 complaints and inquiries in the first two days of operation. Our press conference was heavily attended and the new law was covered extensively in newspapers and on prime time TV. Additionally the media reported on price wars that broke out in various consumer retail goods such as sneakers and mobile phones on the same day as the law commenced, suggesting that this was due to the removal of long standing resale price arrangements.

Although the numbers of complaints and inquiries leveled off during the Christmas and New Year period, there has continued to be a steady flow of issues brought to the Commission's attention. In addition to being reactive to matters brought to it, the Commission has conducted a number of proactive initiatives in sectors of the economy particularly at risk of anti-competitive conduct such as trade associations, and targeting conduct likely to be prevalent in Hong Kong such as bid-rigging.

III. TRADE ASSOCIATIONS PROJECT

On July 21, 2015, shortly following the Hong Kong Government announcement that the Ordinance would fully commence on December 14, 2015, the Commission issued a press release stating its proposed approach to handling competition matters in the intervening period. This included the statement that:

As the date of full commencement approaches, the Commission will, in appropriate cases, contact businesses and other relevant parties directly if the Commission considers that their conduct or practice may be considered anti-competitive and, therefore, likely to contravene the Ordinance after full commencement.

One area where the Commission expected this would be necessary was in relation to trade and professional associations in Hong Kong. Associations have a significant role in Hong



Kong's economy, with their members representing the vast majority of Hong Kong's businesses. Operating in a domestic environment without competition laws, a number of associations (including associations with global companies as members) had traditionally published fee scales and/or imposed other restrictions on price competition among their members. The Commission initiated a project in 2015 to educate trade and professional associations with a view to encouraging compliance with the Ordinance.

The project commenced with the publication of "The Competition Ordinance and Trade Associations" brochure in June 2015, which was sent to over 500 associations. This was followed by a series of seminars and direct engagement with different associations. While undertaking these advocacy and education efforts, the Commission reviewed the published practices of over 350 associations and identified over 20 associations who publicly restricted price competition and whose members were therefore at high risk of contravening the Ordinance.

The Commission wrote to a number of these high risk associations in November 2015 to ensure that they were aware of its concerns. The Commission was encouraged by the subsequent shift in business practices across a range of industries including various professional services, transport, real estate and insurance. As of September 1, 2016, the Commission is aware of 17 associations who have removed fee scales or other price restrictions from their terms of membership. These associations represent important sectors in Hong Kong and it is significant that they have taken steps to change long standing codes and policies.

However, in some cases, practices have not changed. Six months after full commencement on March 14, 2015, the Commission released an interim report on this project warning that enforcement action may follow for associations or their members who have not taken steps to comply with the Ordinance.

IV. REPORT OF STUDY ON THE BUILDING MAINTENANCE MARKET

On May 24, 2016, the Commission published a report summarizing the results of its study into aspects of the Building Maintenance market. The market for building maintenance services is of substantial relevance to many people in Hong Kong. Before the launch of the Commission's study, the public had regularly expressed concerns about the functioning of competition in this market.

At the outset of the study, the Commission received anecdotal and other market evidence suggesting that bid-manipulation may have been common in Hong Kong in the recent past. In order to study this issue more closely and look for possible signs of bid-manipulation, the Commission applied screening techniques to tender data from actual renovation projects.

Screening techniques are well-known in competition enforcement. They were proposed in the academic literature by economists as a tool to facilitate cartel detection and have been applied by competition authorities around the world to real markets. Many screens



look for patterns of behavior that appear inconsistent with competition and are therefore more likely to reflect collusion. In screening the available tender data, the Commission followed that approach and developed a number of suitable screens.

The Commission's analyses revealed certain patterns that appeared unlikely to emerge under functioning competition and that were consistent with some of the bid-manipulation practices widely suspected by many observers.

The Commission pointed out that the results are no proof that such practices were actually present in the market. The Commission also highlighted that the Ordinance had not been in effect (and hence would not have applied) at the time the tenders underlying the analyses took place. However, the Commission concluded that if it were to encounter similar patterns today it would likely be concerned about potential breaches of the First Conduct Rule (Prohibition of anti-competitive agreements, concerted practices and decisions) and would likely investigate certain tenders more closely.

V. BID-RIGGING CAMPAIGN

Bid-rigging has been a subject of grave public concern in Hong Kong and combating this type of cartel action is a major enforcement priority for the Commission. As mentioned above, the Commission undertook an early study of bid-rigging issues in the local residential building renovation and maintenance market, but it recognized that bid-rigging can occur in any market where tender processes are used.

With an aim to raise public awareness as well as to educate on ways to detect and prevent bid-rigging, the Commission launched a multi-pronged "Fighting Bid-rigging Cartels" Campaign ("Campaign") in May 2016 as its first major advocacy initiative since the commencement of the Ordinance.

The Campaign kick-started with a TV announcement and two brochures outlining common types of bid-rigging and tips for procurement officers to safeguard the tender process. A series of educational videos and radio programs were produced and broadcast to facilitate easy understanding of these messages. The Campaign was also supported by extensive online and outdoor advertising to enhance public awareness. These materials are available on the [Commission's website](http://www.compcomm.hk) at www.compcomm.hk.

To further educate and reach out to the community, a Roving Exhibition was staged at four key locations in Hong Kong in May and June 2016. In August, publicity posters were sent to the owners' corporations of over 15,000 residential and commercial properties in Hong Kong. Seminars on fighting bid-rigging targeting different audiences including procurement practitioners, property management companies and property owners were held between June and September.

On the enforcement front, the Commission has received complaints on suspected bid-rigging and is assessing each of them carefully. It is also working closely with other law enforcement agencies and public bodies to ensure a coordinated and effective approach to tackling bid-rigging in all sectors of the Hong Kong economy.



VI. APPLICATIONS FOR A BLOCK EXEMPTION ORDER BY LINER SHIPPING COMPANIES

The Ordinance contains a provision allowing an undertaking or an association of undertakings to ask the Commission to make a block exemption order in respect of a category of agreements. The only grounds on which the Commission may make a block exemption order is that the category of agreements meet the so called “efficiency exclusion” which is provided in Section 1 of Schedule 1 of the Ordinance.

Undertakings and associations of undertakings do not have to obtain a block exemption order to benefit from the efficiency exclusion. They can choose to self-assess whether they fall within the terms of the exclusion. It may be for this reason that the Commission has so far received only one application for a block exemption order (and no applications under a similar process where a decision may be provided in respect of a single agreement).

On December 17, 2015, just days after the full commencement of the Ordinance, the Commission received an application from the Hong Kong Liner Shipping Association (“HKLSA”) for a block exemption order in respect of liner shipping agreements. The HKLSA sought a block exemption in respect of both Vessel Sharing Agreements (“VSAs”) (also referred to as consortia and alliances) and Voluntary Discussion Agreements (“VDAs”).

As part of its consideration of the application, in January 2016 the Commission commenced preliminary consultation with over 30 interested parties including customers, trade associations and chambers of commerce, container terminal operators, non-HKLSA shipping lines and government bureaux.

On September 14, 2016, the Commission published notice of a proposed Block Exemption Order for VSAs together with a statement of reasons outlining the Commission’s preliminary views. In accordance with the procedure provided for in the Ordinance, the Commission must now carry out a public consultation about the proposed block exemption order, which will be open until December 14, 2016. The Commission indicated that it did not propose to issue a block exemption for VDAs.

In coming to its preliminary view, the Commission was mindful that it is tasked with reviewing the application solely by reference to the specific economic efficiencies generated by the liner shipping agreements covered by the application and the impact of those agreements on customers in Hong Kong. However, the Commission found it informative to consider the approach taken by other jurisdictions as background. It found that the scope, form and basis of the relevant exemptions varied widely from jurisdiction to jurisdiction.

VII. ONGOING OUTREACH AND ADVOCACY

The Commission has an ongoing role to inform the Hong Kong public and businesses about the benefits of competition to the Hong Kong economy and the need for them to be aware of



and to comply with the Ordinance. The Commission has been actively engaging its stakeholders through meetings and seminars, educational materials and special projects. Advocacy will remain a major focus of the Commission's work going forward.

One of the Commission's functions is to advise the Government on competition matters. This can be done through direct engagement with government departments and public bodies on issues of public concern that relate to competition, the making of submissions in response to public consultations on government policies or laws, and the formulation of criteria that can be incorporated into the policy making process. Our advice on the supply of liquefied petroleum gas to the public housing sector, affecting the lives of over 150,000 people, was released in September 2016.

VIII. EARLY ENFORCEMENT ACTIVITIES

In November 2015, the Commission released its Enforcement Policy. The Enforcement Policy supplements the Ordinance and the six Guidelines the Commission has issued to provide guidance on how the Commission intends to exercise its enforcement function in investigating possible contraventions of the First Conduct Rule and the Second Conduct Rule (collectively, the "Conduct Rules") through:

- adhering to six core principles in conducting investigations (professional, confidential, engaged, timely, proportionate and transparent);
- prioritizing the use of the Commission's operational resources to investigate conduct that may contravene the Conduct Rules in an efficient and timely manner; and
- identifying an enforcement response that is suitable and proportionate where the Commission considers a contravention of the Ordinance has occurred.

The three areas of compliance focus for the Commission identified in the Enforcement Policy are:

- cartel conduct;
- other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong; and
- abuses of substantial market power involving exclusionary behavior by incumbents.

The Commission also released, following domestic and international consultation, a Leniency Policy for Undertakings Engaged in Cartel Conduct.

In the six months after commencement, the Commission received 1,250 complaints and queries about potentially anti-competitive conduct. The Commission also received intelligence from other regulators, whistleblowers and leniency applicants. These various sources have led to a number of investigations into potential contraventions of the Ordinance in areas of the Commission's compliance focus, including alleged cartel conduct. The Commission has also made use of its Investigative Powers under Part 3 of the Ordinance in conducting investigations.



In keeping with its proportionate approach to addressing anti-competitive conduct, the Commission also resolved one early case involving newspaper hawkers. A group of these sole traders, who operate small stands in markets and in the streets in Hong Kong, agreed to fix prices of a certain brand of cigarettes. The agreement was public and lasted for a few days, ceasing immediately following the Commission meeting with the hawkers. Given the circumstances, the Commission was content to resolve the case by issuing a warning to the hawkers. In keeping with the Commission's policy on such resolutions, the outcome of the case was also made public.

IX. LOOKING FORWARD

One of the most commonly asked questions of the Commission is what will be its first enforcement case. Undoubtedly, this question will continue to be asked until that case commences. Under Hong Kong's prosecutorial model, the Commission has to bring evidence proving a contravention before the Competition Tribunal in order for a pecuniary penalty to be imposed, so it may be expected that it will take some time before such a case brought. The Commission's other remedial options such as commitments or infringement notices may be employed earlier.

In addition to a keen focus on our enforcement outcomes, we are experiencing increasing awareness by legislators, the government and the public of the importance of competition policy as well as competition law, and the Commission expects to be drawn into a number of debates on important policy issues. Like many other competition authorities, there are demands on the Commission to look at a range of sectors of the economy and commence other market studies in addition to its current study on auto fuel.

Although still in its infancy, the Competition Commission has made a good start. There are many challenges ahead, but it seems that businesses and the public have accepted that we have an important role to play in Hong Kong's future.