



...with Mr. Samuel Chan

In this month's edition of CPI Talks... we have the pleasure of speaking to Mr. Samuel Chan, Chairman of the Hong Kong Competition Commission (the "Commission").

Thank you, Mr. Chan, for taking this time to talk to CPI.

1. As the new leader of the Commission, would you please outline the enforcement achievements of the Commission in 2020? In particular, during the COVID-19 pandemic, what has been the Commission's experience of applying the Competition Ordinance?

Despite the pandemic, the year 2020 has seen important enforcement milestones with many "firsts" in Hong Kong's competition law regime. In just five years since the full implementation of the Competition Ordinance (the "Ordinance"), the Commission has brought seven cases before the Competition Tribunal (the "Tribunal"). Three of them, including the city's first ever abuse of substantial market power case, were filed in 2020. The Tribunal has to date ruled in the Commission's favour in five cases.

First, the Commission filed a case in January alleging that an IT company and a co-bidder exchanged competitively sensitive information about their intended quotations in a bidding exercise organised by the Ocean Park Corporation. The case was ruled in favour of the Commission with the judgment on pecuniary penalties handed down in November. It is the first case in which the Commission and the respondents reached agreement to resolve both the liability and relief portions of the proceedings by consent. It also represents the first proceedings in Hong Kong's competition regime resulting from a successful leniency application. The Commission also made use of an infringement notice as a remedy for the first time, to resolve the matter with one of the companies which also participated in the cartel conduct.

Second, in March 2020, the Commission filed another cartel case in the Tribunal against some leading textbook retailers in the city, claiming that the companies have engaged in price fixing, market sharing and/or bid rigging in relation to the sale of textbooks to primary and secondary school students in Hong Kong. It is the first time the Commission seeks to hold a parent company liable for the anti-competitive conduct of its subsidiaries, over which it exercised decisive influence.

Another notable achievement of the Commission during the year is the filing of Hong Kong's first abuse of substantial market power case in the Tribunal. The case was brought in December against a medical gas supplier which is said to have used its near-monopoly position in the supply of medical gases and engaged in a series of exclusionary acts against the only other potential service provider in the downstream medical gas pipeline system ("MGPS") maintenance market. In the Commission's view, this conduct harmed competition in the MGPS market, which in turn affected public hospitals that are providing close to 90 percent of hospital services to patients in Hong Kong.

Under the city's competition regime, the Commission may accept a commitment to take any action or refrain from taking any action from parties under investigation, where the Commission considers it appropriate to address its competition concerns. If the Commission accepts commitments, it may agree to terminate its investigation and not bring proceedings in the Tribunal regarding the matters covered by the commitments. If a person fails to comply with the commitment, the Commission may seek to enforce it in the Tribunal.

During 2020, the Commission accepted commitments in two cases.

First, the Commission concluded a case involving online platforms in May 2020 by accepting commitments offered by three large online travel agents, resulting in a complete removal of parity clauses in contracts between these online travel agents and accommodation providers in Hong Kong. The acceptance of the commitments seeks to ensure effective competition across different online travel agent platforms and it is expected that consumers, accommodation providers, potential new market entrants and the Hong Kong tourism industry as a whole will all benefit from it.

In addition, the Commission dealt with a case concerning the Hong Kong Seaport Alliance. The Hong Kong Seaport Alliance is a contractual joint venture between the city's four major terminal operators (out of five) to jointly operate and manage their 23 berths across eight terminals at Kwai Tsing port in Hong Kong. During the year, the Commission concluded its investigation into it by accepting a set of commitments from the parties to the Alliance, which addressed the Commission's competition concerns in an effective and timely manner. Major items in the commitments include capping handling charges and maintaining service levels for Gateway cargo, as well as an explicit reference to the plans and mechanisms the parties adopted to ensure customers receive a fair share of the efficiencies anticipated by the Alliance. A rigorous monitoring regime with an independent monitoring trustee is in place to ensure compliance.

The investigation into the case involved complex issues of market definition, competitive effects, efficiencies and remedy design, and its successful conclusion is a testament to the Commission's capacity to handle highly complex competition matters.

Further, in strengthening the Commission's overall capability and effectiveness in handling competition issues, the Commission signed a Memorandum of Understanding with the Hong Kong Securities and Futures Commission and the Philippine Competition Commission in April and December respectively, to enhance cooperation and the sharing of information.

Finally, specifically with regard to COVID-19, the Commission took prompt actions during the year both locally and internationally. At an early stage of the pandemic in March, the Commission issued a statement to address possible questions and concerns from businesses and consumers, stating that it would take a pragmatic approach in its enforcement and advisory functions for temporary measures among businesses which are genuinely necessitated by the pandemic and in the interests of Hong Kong consumers and society. The Commission also opened up an informal and expeditious channel for businesses proposing such measures, or their industry bodies, to contact the Commission.

To ensure that subsidy programmes implemented by the Government to help businesses weather the economic effects of the pandemic are not subject to anti-competitive conduct, the Commission issued guidance in May and August to remind all parties involved, including participating suppliers and businesses receiving the subsidy, of the importance of complying with the Ordinance and being vigilant against potential anti-competitive practices that may undermine procurement processes. We have also been working closely with public bodies which are tasked to administrate these subsidy programmes to take competition concerns into consideration.

Internationally, the Commission hosted two webinars, bringing together competition enforcers and academics around the globe to discuss a wide range of enforcement and policy issues arising from the pandemic.

2. Could you please give us more details concerning cartel investigations in Hong Kong?

As with all competition authorities, it is important for the Commission to make efficient use of its resources in order to be as effective and far-reaching as possible when fulfilling our enforcement mission.

Guided by the principle that the goal of competition law is to bring the benefits of competition to consumers, the Commission prioritises investigations and enforcement actions that result in the greatest overall benefit to competition and consumers in Hong Kong. To this end, disrupting hard core cartels has been one of our top priorities, particularly where such conduct is not an isolated incident but reflects ingrained industry practice. This approach is supported by the complaints and queries we have been receiving from consumers and businesses in the city, which predominantly feature concerns about cartel conduct.

The Commission has to date brought six cartel cases before the Tribunal, covering the most egregious types of anti-competitive conduct including bid-rigging, price fixing and market sharing. The defendants include subsidiaries of multinational companies which rigged bids invited by a non-governmental organisation, contractors who have been entrusted with renovation work for low-income families at public housing estates and leading textbook retailers in Hong Kong. The Commission has been consistently pursuing the liability of individuals involved in cartel

conduct with seven individuals named as respondents in five of these cases. By focusing on individuals through whose acts businesses engage in cartel conduct, the Commission seeks to create additional deterrence.

Apart from the two cartel cases filed in 2020 (as mentioned above), the Commission has brought four cartel cases to the Tribunal between 2017 and 2019.

In March 2017, the Commission took its first enforcement action against bid-rigging in the IT sector, resulting in the conviction of four IT companies in May 2019. This case was notable not just for being the Commission's first case before the Tribunal but also for including a form of vertical bid-rigging. The upstream supplier of the software surreptitiously arranged for the submission of dummy bids to ensure that the hardware provider they favoured would be awarded the contract. In December 2020, the Tribunal ordered each of the four companies to pay a pecuniary penalty as well as the Commission's cost of proceedings.

In August 2017, the Commission brought its second case to the Tribunal, against 10 construction companies for market sharing and price fixing in relation to the provision of renovation services for a public rental housing estate. This case required the Commission to present expert economic evidence to counter arguments that the Ordinance's economic efficiency exclusion applied to what appeared to be clear cartel conduct.¹ In May 2019, all 10 companies were found to have contravened the Ordinance. The pecuniary penalty imposed on seven of the companies reached the statutory cap of penalties allowable under the Ordinance² and all of the companies were also ordered to pay the Commission's litigation costs.

The Commission subsequently filed two more similar cases in 2018 and 2019. All 14 respondents, including both companies and individuals, in these two cases were found to have contravened or been involved in the contravention of the Ordinance. Judgment on sanctions in the latter case was handed down in January 2021³, involving the first fine on an individual and the first written decision issuing a director disqualification order under the city's competition regime.

Another area that is worthy of mention is the enhancement of the Commission's guidance and policies. Over the last couple of years, the Commission has significantly improved the incentives for companies and individuals to self-report cartel conduct and cooperate with its investigations. To encourage cartel members to come forward, we published a Cooperation and Settlement Policy in 2019 and enhanced the leniency framework in April 2020, expanding its coverage to individuals, such as employees of a company.

The Commission also published a policy on recommended pecuniary penalties for anti-competitive conduct in June 2020, providing transparency on the methodology the Commission will use in making fine recommendations to the Tribunal against undertakings.

These three policies have formed a comprehensive framework for businesses engaged in cartels to assess the benefits of coming forward and cooperating with the Commission, thus strengthening enforcement and enhancing deterrence.

3. Compared to the other jurisdictions, what are the major challenges that the Commission has to face?

Given the relatively young age of our competition regime, it is important for the Commission to establish judicial precedents and create sufficient deterrent effect to help shape the society's anti-competition culture and promote compliance. The Commission is on the right track building a solid pipeline of cases, setting precedents with favourable judgments by the Tribunal, and devising strategies for effective enforcement and litigation. Going forward the Commission will continue its effort in this regard.

The Commission's success in carrying out its missions rests on its staff, which makes developing and retaining talents a key priority and challenge. We will endeavour to ensure that the Commission is a constantly developing organisation and that our staff will benefit from the high quality training and learning opportunities that we provide them.

¹ This is set out in Schedule 1 Section 1 of the Ordinance and is similar to Article 101(3) of the Treaty on the Functioning of the EU.

² This is based on 10 percent of the business's turnover in Hong Kong for each year of the contravention up to a maximum of three years. The Commission has, however, initiated an appeal based on the Tribunal's acceptance of certain respondent's arguments that the role of sub-contractors in the conduct should act as a mitigating factor.

³ In 2020, the Tribunal entered judgement on liability against the respondents in the two cases. All of the respondents admitted liability in these cases.

In regard to enforcement, it is well-known that cartels are generally secretive in nature and notoriously hard to detect. As the Ordinance has now been in force for a period of time and the Commission is bringing more cases to the Tribunal, cartelists might become more cautious when engaging in collusive practices which will make investigation and evidence gathering even harder. To improve detection and strengthen enforcement, as mentioned above, the Commission has enhanced its leniency and cooperation programme and published guidance on how it approaches the calculation of recommended pecuniary penalties. Importantly, it has also focused on enhancing its ability to detect anti-competitive conduct on its own initiative. We expect that all of these measures would increase incentives to self-report in exchange for leniency or reduction of penalties, drawing more businesses engaged in cartel to come forward and cooperate with the Commission.

On the other hand, it is also very important to manage public expectations about how quickly the Commission can bring cases to the Tribunal and what powers the Commission has to achieve under the law. Bringing seven cases to the Tribunal in five years is no mean feat and not all investigations will move so quickly, especially those presenting more complex issues of competition analysis.

4. What is the Commission's enforcement plan for the digital economy?

In line with the Commission's enforcement policy, our focus remains on anti-competitive conduct that has the strongest impact to competition and consumers in Hong Kong and is supported by the necessary evidence, whether in the digital economy or not. The fact that a sizeable portion of commerce in Hong Kong is going digital means that we anticipate there will be more and more cases involving digital markets. But the Commission does not prioritize any particular type of commerce over another. We prioritize enforcement that brings about compliance with the law.

We are aware that digital markets have features that impact the types of anti-competitive conduct that can arise as well as how such conduct is investigated. Towards this end, the Commission has invested in training and systems which enhance our capability in this respect. The Commission will keep abreast of the global development, and continue to monitor the situation in Hong Kong with a view to promoting competition for the long-term benefit of the community.

As regards cases concerning e-commerce so far, as mentioned, the Commission accepted commitments offered by major online travel agents ("OTAs") in May 2020 removing parity clauses which require accommodation providers to always give the OTAs the same or better terms as those they offer in all other sales channels, as regards room prices, room conditions and/or room availability.

5. What is the future development plan of the Commission?

Going forward, the Commission will keep up its momentum in its enforcement, policy and advocacy work.

Enforcement of the Ordinance will remain a key focus of the Commission's work. While most of our current cases involve cartel conduct under the First Conduct Rule, we have started and will continue to broaden our enforcement and litigation in other areas of the law. It is expected that a number of promising investigations will result in various enforcement outcomes in the coming year.

The Commission is also looking to further enhance enforcement effectiveness and efficiencies, by strengthening deterrence on one hand and encouraging cooperation on the other. To strengthen deterrence, in addition to companies, we will continue to pursue the liability of individuals and parent companies where appropriate. It is also expected that the enhancement of our leniency policy coupled with focus on initiating investigations ex officio (without relying on a complaint or leniency application) will attract more cartel members to come forward, further strengthening our detection of and enforcement against cartel conduct.

Internally, to cope with the growing number and complexity of enforcement and legal actions, we will continue to strengthen our professional staff and raise our level of competition law expertise. This includes leveraging overseas experience as well as providing targeted training and learning opportunities for our staff members.

On the policy front, the Commission will keep on using various non-enforcement approaches to address market restrictions arising from, or which may arise from, existing and new public policies, as well as to encourage the integration of competition principles into the public policy-making process. To this end, the Commission has completed a comparative study of competition impact assessment regimes by engaging renowned academics from Hong Kong, Mainland China and Australia. The study has brought valuable insights and lessons for Hong Kong.

As regards advocacy and engagement, the Commission will carry on its momentum to actively engage the public and businesses through continuous outreach and educational initiatives across different sectors of the community. These include seminars and meetings, thematic advocacy campaigns and youth education programmes. Despite the challenges brought by the pandemic, the Commission has not stopped reaching out to the local community through webinars and online engagement events. Riding on our success in international advocacy contests organised by the International Competition Network, the Commission will expand our outreach and strengthen the use of social media through different channels.

The Commission will remain actively engaged with our Mainland and overseas counterparts to share knowledge, experience and best practices. The Commission is now working with the Guangdong Administration for Market Regulation to jointly publish a brochure on the key principles of the competition laws in Mainland China, Hong Kong and Macau. This initiative aims to promote better understanding of and compliance with respective competition laws among businesses operating in the Greater Bay Area, in particular the small and medium enterprises. The Commission is excited about this collaboration and looks forward to sharing with the international community on how competition law compliance may be promoted among different jurisdictions with close economic ties.



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