

競爭事務委員會
COMPETITION
COMMISSION

Webinar on Competition Ordinance

21 April 2022



Outline

1. Background and Overview
2. Key Elements of the Competition Ordinance and Red Flags of Anti-competitive Practices
3. The Commission's Enforcement Work
4. The Commission's Various Policies
5. Competition Law Case Studies
6. Q&A



1. Background and Overview



Background

- About 130 years ago, the US and Canada enacted antitrust laws to prohibit anti-competitive conducts.
- European countries also introduced competition law after WWII.
- Today, over 130 jurisdictions have enacted competition laws, including the Mainland, Japan, South Korea, India, Singapore, Malaysia and Indonesia.
- Hong Kong:
 - Sectoral competition regulation was introduced for the telecom and broadcasting industries in late 1990s
 - Competition Ordinance (Cross-sector):
 - Passed in June 2012
 - Full commencement since 14 December 2015



Two Cardinal Principles

“Protect competition and not competitors”



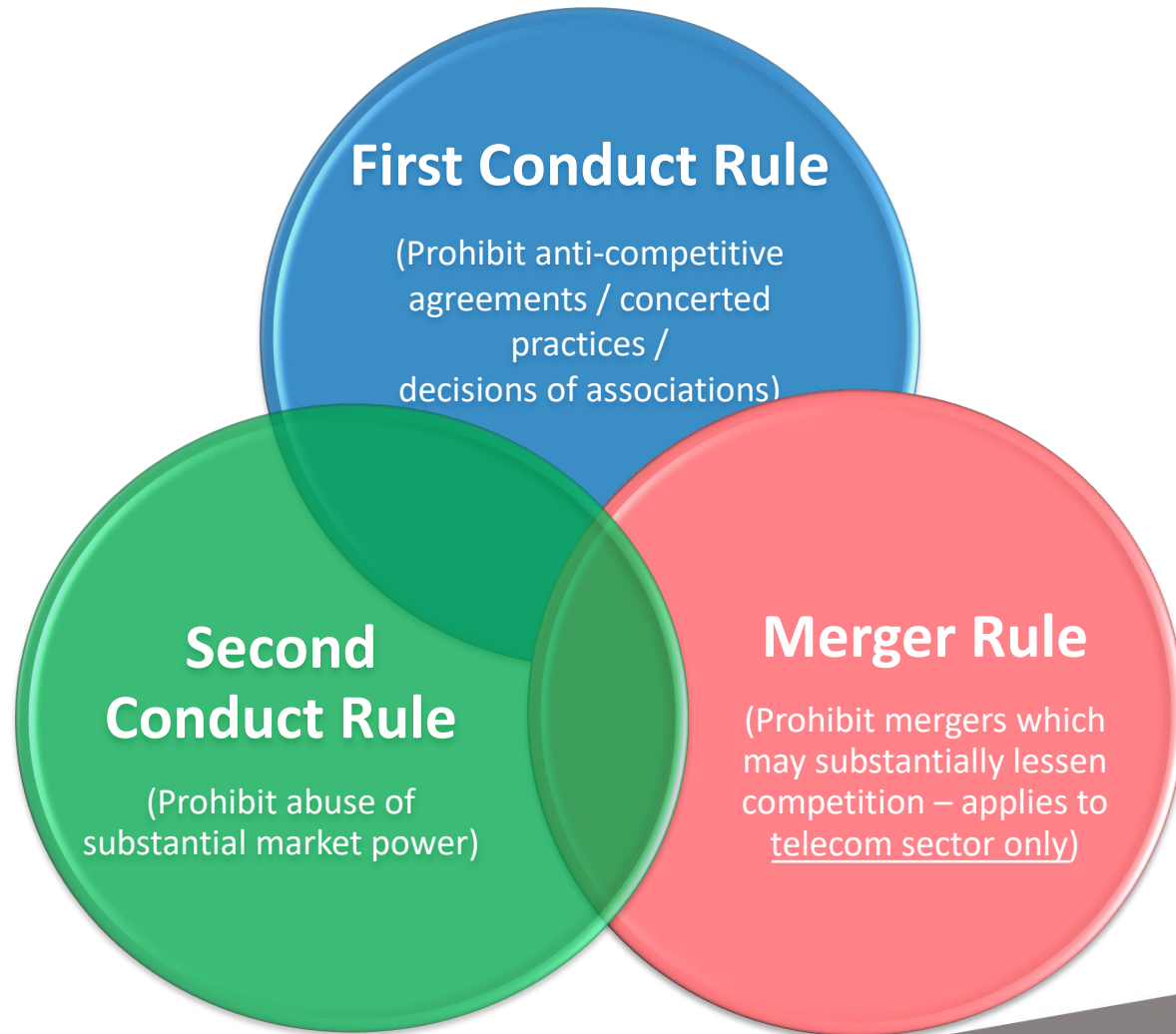
“Substance over form”



2. Key Elements of the Competition Ordinance (CO) and Red Flags of Anti-competitive Practices



Competition Rules under the CO (Cap.619)



The First Conduct Rule (FCR)



- Prohibits an **undertaking** from making or giving effect to an **agreement** if the agreement has the **object or effect** of harming competition in Hong Kong; also applies to **concerted practices**; and **decisions** of associations
- Prohibits all kinds of anti-competitive agreements, involving at least 2 undertakings



The First Conduct Rule (FCR)



- Applicable to:
 - “**Horizontal**” agreements (arrangements between competitors in a market)
 - “**Vertical**” agreements (arrangements between businesses at different levels of a supply chain)



The First Conduct Rule (FCR)



- Arrangements that have the “**object**” of harming competition:
 - “**Cartel**”: **price fixing, market sharing, bid-rigging and output restriction**
 - Regarded as **serious anti-competitive conducts** under the Ordinance



First Conduct Rule – *Price Fixing*

- Competitors agreeing to **fix, increase, lower, maintain or control the price** for the purchase or sale of goods or services
- May involve competitors agreeing upon **a specified price, a price range or a formula to calculate prices**
- “Price” includes any element of price including **discounts, rebates, promotions, credit terms etc.**
- **Regardless of the form of the agreement:** verbal, written, electronic, etc.
- Competitors should independently determine the prices of their goods or services

“Let's fix our profit margin at 10% to ensure market stability.”



“Compete with Integrity” video: Price Fixing



Red Flags of Price Fixing

- Quotes are much higher than expected
- Prices from different suppliers change in the same amount or percentage at the same time, with no relation to the underlying costs
- A new supplier's price is much lower than the usual suppliers
- Prices from different suppliers stay identical for long periods of time, especially when they were previously differentiated
- Discounts are eliminated, especially in a market where discounts were previously available



First Conduct Rule – *Market Sharing*

- Competitors collude to divide up markets by agreeing:
 - Not to sell to each others' **customers**
 - Not to compete in each other's **agreed territories/ geographical areas**
 - Not to compete in the **production or sale of certain products or services**
 - Not to **enter or expand into a market where another party to the agreement is already active**

"If you don't compete with me in Kennedy Town, I won't compete with you in Sai Ying Pun."



“Compete with Integrity” video: [Market Sharing](#)



Red Flags of Market Sharing

- Competitors suddenly stop selling in a territory
- Competitors suddenly stop selling to a customer
- Competitor refers customers to other competitors
- Salesperson or prospective bidder says that a particular customer or contract “belongs” to a certain competitor



First Conduct Rule – *Bid-rigging*

- When two or more bidders secretly agree that they will not compete with one another for particular projects
- Bid-rigging can take a number of forms, for examples:
 - **Bid suppression**
 - **Cover bidding**
 - **Bid rotation**
 - Others: agree on **minimum bidding prices**, or agree that **the winning bidder will reimburse other bidders' bid costs**
- Competitors should make their tender decisions independently

"I'll bid high on this tender if you let me win the next tender."



Educational video: Cartel



Red Flags of Bid-rigging

- Suspicious signs in documents submitted
 - Bids containing identical wordings, particularly if the wordings are unusual
 - Bids containing the same handwriting or typeface or using identical forms or stationery
- Suspicious bidding/ winning patterns and behaviours
 - Regular bidders fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders
 - Bids that are suddenly withdrawn
- Suspicious pricing
 - Sudden and identical increase in prices by most bidders while there have been no substantial increase in costs
 - Bids with identical pricing either on a lump sum basis or line item basis (especially when continued over a period of time)
- Other red flags
 - Indications that the bidders have communicated with each other
 - Suspicious statements indicating that bidders may have reached an agreement



Non-Collusion Clauses

- Published by the Commission for procurers' reference and adaptation
- Including non-collusion clauses in tender documents: to alert tenderers of the prohibitions against, and consequences of cartel conducts
- Including non-collusion clauses in formal contracts: to provide contractual protections to procurers in the event that the tender process has been subject to collusion
- Procurers may consider adding other requirements, e.g. tenderers have to provide information regarding their shareholding structure and/or ultimate controlling entities as requested. This would help procurers better understand the identity of the tenderers



Model Non-Collusion Clauses and
Non-Collusive Tendering Certificate



Chinese:

<http://bit.ly/CCNonCollusionChn>

English:

<http://bit.ly/CCNonCollusionEng>



Non-Collusive Tendering Certificate

- For tenderers to sign as part of their tender submission to declare that the bid is developed independently
- For tenderers to commit to disclosing sub-contracting arrangements relating to the tenders
- Where the bid is submitted jointly by two or more parties (e.g. multiple persons or companies acting in a joint venture), all such parties should sign the certificate



Other anti-competitive conduct under FCR

Information Exchange

- Not all information exchange is anti-competitive
- But the exchange of commercially sensitive information among competitors (whether directly or through a third party) such as information about their **future prices, pricing strategies, discounts, or costs** may have the same effect as price fixing
- Exchange of historical, aggregated and anonymised data, as well as publicly available information is less likely to give rise to competition concerns



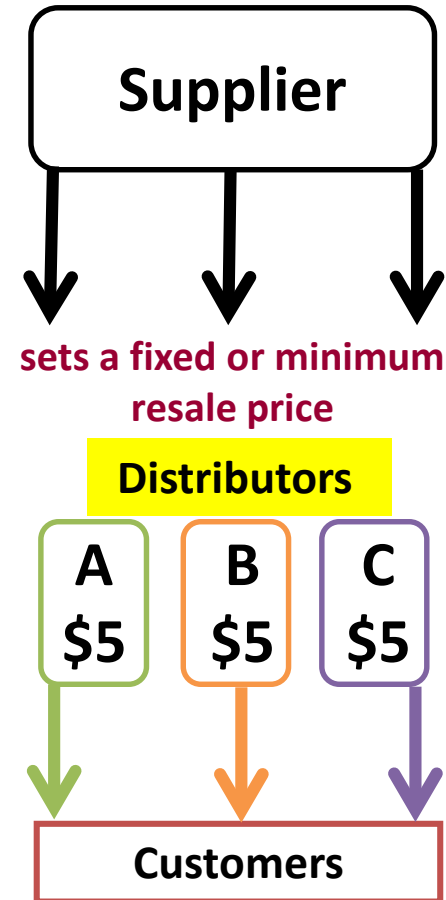
“Compete with Integrity” video: Information Exchange



Other anti-competitive conduct under FCR

Resale Price Maintenance (RPM)

- RPM occurs when the supplier of a product establishes **a fixed or minimum resale price** to be observed by the distributors
- RPM is likely a contravention of the First Conduct Rule of the Ordinance unless there is a sound economic efficiency justification



The Second Conduct Rule (SCR)



- Prohibits undertakings with **substantial market power** in a **market** from **abusing** that power by engaging in conduct which has the **object or effect** of harming competition in Hong Kong
- Relevant *market*:
 - Two dimensions:
Product and **Geographic**
 - Substitutability from the perspective of buyer



The Second Conduct Rule (SCR)



Substantial market power:

- Factors to consider in determining whether an undertaking has substantial market power in a market:
 - Market share of the undertaking
 - Countervailing buyer power
 - Barrier to entry/expansion



The Second Conduct Rule (SCR)



- *Examples of anti-competitive conduct under SCR:*

(1) Predatory pricing

- Charging below its own cost, making a loss for a sufficient duration to force one or more undertakings out of the market and/or to otherwise “discipline” competitors

(2) Refusals to deal

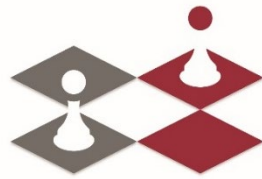
- Refusing to supply an input to another undertaking, or is willing to supply that input only on objectively unreasonable terms



3. The Commission's Enforcement Work



A Prosecutorial Model



競爭事務委員會
COMPETITION
COMMISSION

Investigation

- Receives complaints
- Investigates cases. Range of enforcement powers – e.g. onsite inspections, requests for documents and interviews
- Can resolve cases by coming to agreement with parties under investigation or applying to Tribunal

Exclusions and Exemptions

- Handles applications for decision on exclusion/exemptions
- Issues block exemption orders – of own volition or following application



Investigation Powers: *S.41 and S.42 Notices*

- **S.41 CO** – Request for documents and/or information
 - Reasonable cause to suspect that a person has or may have possession or control of relevant documents/information or may otherwise be able to assist the Commission in its investigation
 - Use S.41 Notices which relate to any matter it reasonably believes to be relevant to an investigation from any person, e.g. subject under investigation, their competitors, suppliers, customers and any other parties

- **S.42 CO** – Request for attendance before the Commission to answer questions
 - At a specified time and place

- **Both S.41 and S.42 Notices:**
 - Can be used at any stage of the Investigation Phase
 - May be issued to same party/person more than once
 - Non-compliance to S.41 and S.42 Notice is a contravention of S.52 CO



Investigation Powers: *S.48 Warrant*

- **S.48 CO – Enter and search** premises under warrant
 - Issued by a judge of the Court of First Instance
 - Will exercise S.48 power in below circumstances (not exhaustive):
 - a) Secretive conduct
 - b) Documents/information may be destroyed or interfered should the Commission seek them through other means
 - c) Commission has been unsuccessful in obtaining specific or categories of documents/information OR suspects non-compliance

- During the search, Commission officers will:
 - search, copy and/or confiscate relevant documents and equipment that are relevant to the investigation;
 - seek explanations from individuals present at the premises about any documents which may appear to be relevant



Sanctions on non-compliance with the Commission's Investigation Powers

- S.52 CO provides that failure to comply without reasonable excuse with any requirement (or prohibition) imposed under the Commission's Investigation Powers is a **criminal offence punishable by fines of up to HK\$200,000 and imprisonment for 1 year.**
- Under section 54 of the Competition Ordinance, obstruction of the Commission's search is a **criminal offence and the maximum penalty is a fine of HK\$1,000,000 and imprisonment for 2 years.** Whoever instructs or assists anyone to obstruct the Commission's work is also subject to the same liability.



Enforcement Tools & Remedies



Remedial goals:

- Swift end to illegal conduct
- Undo any harm caused
- Encourage effective compliance
- Deterrence
- Consistency
- Proportionality



Competition Tribunal



Adjudication by the Competition Tribunal

- Determines contraventions of the Ordinance
- Power to impose penalties (fines, director disqualifications) and other orders
- Hears review of “reviewable determinations”
- Tribunal Rules govern procedures



Pecuniary Penalty

- After investigation, the Commission may apply to the Tribunal for a **pecuniary penalty** to be imposed on any person it has reasonable cause to believe has contravened a competition rule; or has been involved in a contravention of a competition rule
 - *“Has contravened a competition rule”*: Primary contraveners
 - *“Has been involved in a contravention of a competition rule”*: Secondary liability (S.91 CO)
- Statutory maximum in relation to **conduct that constitutes a single contravention**:
 - 10% of the turnover of the undertaking concerned in Hong Kong for each year in which the contravention occurred; or
 - If the contravention occurred in more than 3 years, 10% of the turnover of the undertaking concerned for the 3 years in which the contravention occurred that saw the highest, second highest and third highest turnover



Other Orders

- If the Tribunal is satisfied that a person (includes undertakings and individuals) **has contravened, or has been involved in a contravention** of a competition rule, it may make any order it considers appropriate against that person, including:
 - Declaration of contravention - relevant for follow-on proceedings
 - Director disqualification
 - Compensation
 - Restitution
 - Injunctions etc.

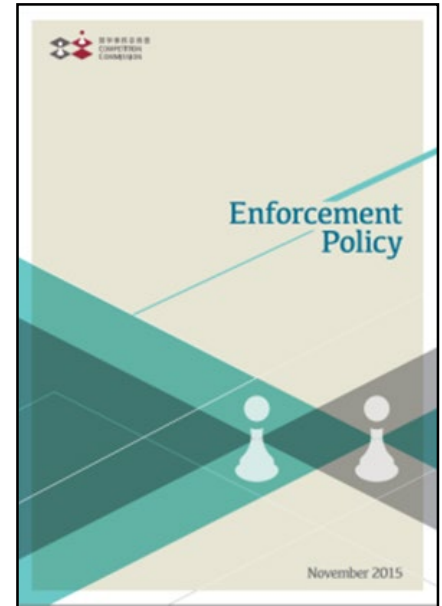


4. The Commission's Various Policies



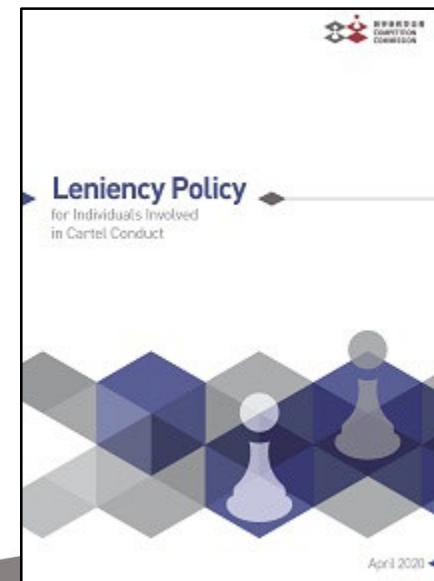
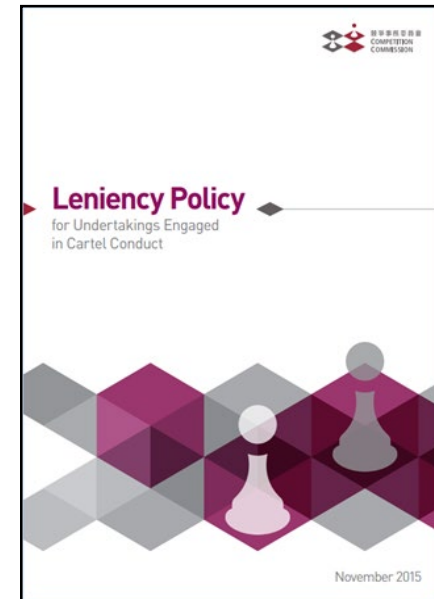
Enforcement Policy

- Commission will target anti-competitive conduct that is clearly harmful
- Priority given to following types of conduct:
 - cartel conduct (price fixing, market sharing, output restriction and bid-rigging)
 - other agreements contravening First Conduct Rule causing significant harm to competition in HK and
 - abuses of substantial market power involving exclusionary behaviour by incumbents
- In addition to taking action against undertakings, the Commission may also prioritise taking action against:
 - associations of undertakings; and/or
 - officers (as defined in the CO), including directors and managers of undertakings



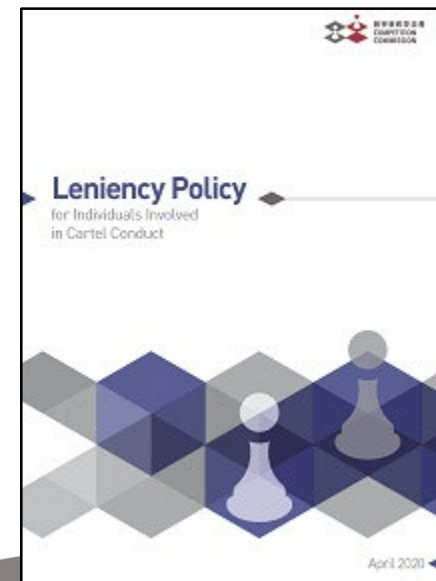
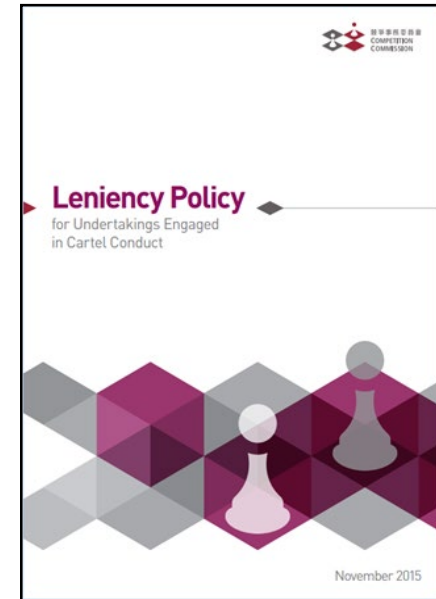
Cartel Leniency Policies

- To provide a strong, transparent, and predictable incentive for an undertaking who is engaged or involved in cartel conduct to stop their conduct and report the conduct to the Commission
- Key elements of Leniency Policy for Undertakings:
 - Only in respect of **cartel conduct** (First Conduct Rule)
 - **Type 1** and **Type 2** Leniency
 - Leniency extends to **current officers / employees** of the cartel member
 - **Excludes ringleader/coercer**
 - The successful applicant will sign a **leniency agreement** with the Commission and fulfil the conditions and obligations therein
- Leniency Policy for individuals introduced in April 2020



Benefits of Leniency Policies

- The Commission **will not** commence proceedings in the Tribunal against the **first** undertaking or individual who self-reports the cartel conduct to the Commission and meets all other requirements for receiving leniency
- This includes **not** seeking a pecuniary penalty or for an order declaring that the successful leniency applicant has contravened the Ordinance
- Employees and officers of an undertaking that obtains leniency will also be protected from proceedings if they cooperate with the Commission's investigation



How to Apply for Leniency

- Call the Leniency Hotline at **+852 3996 8010** or
- E-mail to: Leniency@compcomm.hk
- The Leniency Hotline is answered between **8am to 6pm** Hong Kong time, **Mon to Fri** (excluding public holidays)



Cooperation and Settlement Policy

- **Undertakings** engaged in **cartels** which **do not benefit from the Leniency Policy**
- May choose to admit their wrongdoings and cooperate with the Commission in its investigations and resulting proceedings
- In return the Commission will offer a discount of **up to 50% off** the pecuniary penalty it would otherwise recommend to the Competition Tribunal
- Entering into a **Cooperation Agreement**
- Jointly apply to for a Consent Order on the basis of a joint statement of agreed facts



Benefits of Cooperation

- **Benefits to the undertakings:**
 - **Recommendation for a reduction in pecuniary penalty**
 - ❖ RPP reduction: **Band 1:** 35-50%, **Band 2:** 20-40%, **Band 3:** up to 25%
 - **Protection for employees, officers, partners and agents**
 - **Other collateral benefits: e.g. reduced reputational harm, saving litigation costs**
- Benefits are **conditional on full and continuous cooperation** in the investigation and subsequent litigation by the undertaking and its employees
- The **order** and **timing** of cooperation determines the amount of benefits (reduction in RPP) available



5. Competition Law Case Studies



Cases in the Competition Tribunal

IT bid-rigging (CTEA1/2017)

- March 2017: The Commission commenced proceedings in the Tribunal, alleging that 5 IT companies engaged in **bid-rigging** in relation to a tender issued by the Hong Kong Young Women's Christian Association for the supply and installation of a new IT system
- Judgement:** The Tribunal ruled that 4 of the companies contravened the First Conduct Rule of the Competition Ordinance and they had to pay a total pecuniary penalty of over HK\$7.16 million and over HK\$8.6 million of the Commission's legal costs



Source: *The Standard*



Cases in the Competition Tribunal

On Tat Estate cartel case (CTEA2/2017)

King Tai Court cartel case (CTEA1/2018)

On Tai Estate cartel case (CTEA1/2019)

- In 2017-2019, the Commission brought 3 cases to the Tribunal for suspected **market sharing and price fixing** of renovation services in public housing estates
- A total of 19 decoration contractors and 5 individuals were involved in the 3 cases
- **Judgement:** The Tribunal ruled that all the Respondents contravened or were involved in the contravention of the First Conduct Rule of the Competition Ordinance. Judgements on sanctions had been handed down in 2 of the cases:
 - The Tribunal ordered 16 decoration contractors and 2 individuals to pay a total pecuniary penalty of over HK\$7.23 million and the Commission's legal costs
 - The Tribunal issued the first director disqualification order to an individual, prohibiting him from serving as a director for 22 months



Cases in the Competition Tribunal

IT cartel case (CTEA1/2020)

- January 2020: The Commission commenced proceedings in the Tribunal, alleging an IT company and its director (Respondents) for their participation in **cartel conduct** in relation to a bidding exercise organised by the Ocean Park Corporation in 2017 for the procurement of IT services
- The IT company **exchanged competitively sensitive information** with a co-bidder regarding their intended quotations in the bidding exercise, in an effort to coordinate which company was going to win, amounting to **price fixing**
- The Commission also issued an infringement notice to another IT company participated in the same cartel
- This case also represents the first set of proceedings resulting from a successful leniency application



Cases in the Competition Tribunal

IT cartel case (CTEA1/2020) (continued)

- **Judgement:**
 - The Tribunal ruled that the 2 Respondents contravened the First Conduct Rule or were involved in the contravention
 - The IT company had to pay a pecuniary penalty of HK\$37,702 and both Respondents had to pay the Commission's legal costs
 - The Respondents were required to conduct a competition compliance programme for all of its staff



Cases in the Competition Tribunal

Textbook cartel case (CTEA2/2020)

- March 2020: The Commission brought a case to the Tribunal, alleging that 3 textbook suppliers and 1 individual engaged in **price fixing, market sharing, and/or bid-rigging** in relation to the sale of textbooks to students attending primary and secondary schools in Hong Kong



Source: SCMP



Cases in the Competition Tribunal

Hong Kong's first case on abuse of substantial market power (CTEA3/2020)

- December 2020: The Commission brought a case to the Tribunal, alleging that 2 companies (as parts of a single undertaking) and 1 individual engaged in **abuse of substantial market power** in the medical gases supply market in Hong Kong to the detriment of competition in the downstream medical gas pipeline system maintenance market

Gas supplier faces competition law trial

Jane Cheung

The Competition Commission has filed the city's first case on abuse of substantial market power against a medical gas supplier, accusing it of distorting competition and affecting public hospitals' consumer interests.

The watchdog has filed the case with the Competition Tribunal against Linde HKO and Linde GmbH for abusing Linde's "substantial degree of market power" in Hong Kong's medical gas supply market between October 2015 and January 2018, hindering competition in the downstream medical gas pipeline system maintenance market.

It is also pursuing Linde HKO's general manager Tse Chun-wah, who was "actively involved in formulating and executing" the exclusionary acts, for contravening the Competition Ordinance.

The commission alleged Linde limited or even ceased supply of medical gases to MGI (Far East), the only other potential pipeline maintenance service provider for public hospitals.

Describing Linde as having a "de facto monopoly posi-



Samuel Chan said the case affected hospitals serving 90 percent of patients in the city.



tion" in the medical gas supply market, the watchdog said it engaged in exclusionary acts ranging from unjustified denial of supply of gases essential for maintenance services to unreasonable trading terms so MGI could not compete for pipeline maintenance contracts.

It is also seeking orders to declare Linde and Tse to have contravened the Second Conduct Rule of the ordinance, which prohibits businesses from abusing its market power to prevent, restrict or distort competition in Hong Kong.

Abusive conduct includes refusals to deal, margin squeezing, predatory pricing, tying and bundling, and any behavior that can ultimately limit choices available to consumers.

The commission is also asking the tribunal to impose fines on Linde and Tse and disqualify Tse as a director for up to five years.

The commission's chairman Samuel Chan Ka-yan said: "The egregious nature of the conduct seriously affected public hospitals which provide close to 90 percent of hospital services to all Hong Kong patients."

Contravention of the ordinance could result in a fine of up to 10 percent of the company's annual turnover for a maximum period of three years.

The tribunal can also issue orders requiring compensation for victims.

As of last month, the commission had received over 4,600 complaints and inquiries, with 55 percent related to the First Conduct Rule, which prohibits anti-competitive agreements, and over 17 percent about concerns under the Second Conduct Rule.

Source: *The Standard*



Cases in the Competition Tribunal

Inserter cartel case (CTEA1/2021)

- November 2021: The Commission commenced proceedings in the Tribunal against 3 undertakings for their participation in cartel conduct regarding the sale of inserters in Hong Kong
- It is the Commission's case that the three undertakings (including a supplier and 2 resellers) made or gave effect to an agreement not to compete in the sale of inserters of the Neopost brand in Hong Kong, while the two resellers engaged in a concerted practice by **exchanging competitively sensitive information with each other**
- The Commission has reasonable cause to believe that such conduct amounts to serious anti-competitive conduct in the form of **price-fixing, market-sharing, and bid-rigging**, in contravention of the First Conduct Rule of the Competition Ordinance
- The Commission agreed to **enter into cooperation agreements** with the Subject Undertakings which resulted in the submission of joint applications to the Tribunal seeking orders to allow the proceedings to be disposed of by consent, including:
 - Declarations that the Subject Undertakings have contravened the First Conduct Rule;
 - Orders to impose pecuniary penalties on the Subject Undertakings; and
 - Orders for the recovery of the Commission's costs of investigation and proceedings.



Cases in the Competition Tribunal

Cleansing service cartel case (CTEA2/2021)

- December 2021: The Commission commenced proceedings in the Tribunal against 2 companies and 3 individuals
- It is the Commission's case that the two companies **exchanged commercially sensitive information** in relation to 17 tenders submitted to the Hong Kong Housing Authority ("HA") for the procurement of cleansing services for public housing estates and other buildings under HA's management
- The Commission has reasonable cause to believe that such conduct amounts to **price fixing**, a serious anti-competitive conduct in contravention of the First Conduct Rule of the Competition Ordinance
- During the course of the Commission's execution of a search warrant at one of the companies' office, certain individuals had tried to delete relevant electronic evidence and the Commission has referred this obstruction of its investigation powers to the Police for **criminal investigation**



Cases in the Competition Tribunal

Travel services sector cartel case (CTEA1/2022)

- January 2022: The Commission commenced proceedings in the Tribunal against 4 undertakings and 1 individual
- It is the Commission's case that between 2016 and 2017, two competing travel services providers agreed to fix the prices at which tourist attractions and transportation tickets were sold at hotels belonging to nine hotel groups in Hong Kong. The hotel groups, as well as a tour counter operator in one of the hotels, acted as **facilitators** by passing on pricing information between these two competitors in circumstances where they had actively contributed to the implementation of the price-fixing agreement
- The Commission has reasonable cause to believe that the subject arrangement had the object of harming competition, in contravention of the First Conduct Rule of the Competition Ordinance
- February 2021: Enforcement actions against the 6 hotel groups and the tour counter operator were resolved with the Commission issuing and all of them accepting **Infringement Notices** for acting as facilitators in the subject arrangement. These parties had committed to take concrete measures to effectively enhance competition compliance within their respective businesses



Cases in the Competition Tribunal

Travel services sector cartel case (CTEA1/2022) (continued)

- During the investigation onward, 2 undertakings and 1 individual (Cooperating Respondents) agreed to cooperate with the Commission under the Commission's Cooperation Policy. By the Cooperating Respondents ceasing the relevant anti-competitive conduct and meeting the various requirements under the Cooperation Policy, the Commission agreed to enter into cooperation agreements with them which results in the submission of joint applications to the Tribunal seeking orders to allow the proceedings to be disposed of by consent, including:
 - A declaration that all Cooperating Respondents have contravened the First Conduct Rule or had been involved in the contravention;
 - Orders for pecuniary penalties to be imposed on the Cooperating Respondents;
 - Orders for the recovery of the Commission's costs of investigation and proceedings; and
 - Director disqualification order against an individual for a period of three years.



Cases in the Competition Tribunal

Travel services sector cartel case (CTEA1/2022) (continued)

- In relation to the 2 undertakings (Respondents) which did not cooperate with the Commission, the Commission is seeking remedies before the Tribunal, including:
 - A declaration that the Respondents have contravened the First Conduct Rule;
 - An order for pecuniary penalties to be imposed on the Respondents;
 - Orders for the recovery of the Commission's costs of investigation and proceedings; and
 - Orders requiring the Respondents to adopt an effective compliance program as the Tribunal.



Education and Advocacy



Publications

- Six guidelines providing guidance on Commission’s interpretation and enforcement of the Ordinance
- Enforcement Policy, Leniency Policies, Cooperation and Settlement Policy and Policy on Recommended Pecuniary Penalties
- Brochures introducing the Ordinance in an easy-to-understand approach

Educational videos

- Educational videos on “Fighting Bid-Rigging”, “Cartel” and “Combat Price-Fixing Cartels”
- Short videos and micro movie explaining the Ordinance and cartels

Seminars

- Regular seminars to promote public understanding of the Ordinance



Complain and Report

- Completing an Online Complaint Form available on the Commission's website:
www.compcomm.hk
- Email: complaints@compcomm.hk
- Reporting number: (852) 3462 2118
- Leniency hotline: (852) 3996 8010
- Post: Competition Commission
19/F, South Island Place,
8 Wong Chuk Hang Road,
Wong Chuk Hang, Hong Kong
- In person at the Commission's office (by appointment only)



Q&A



Thank You!

