

## **Fifty-third Meeting of the Business Facilitation Advisory Committee**

### ***Agenda Item 2 : Competition Ordinance and the Role of the Competition Commission in Assisting Businesses in Compliance and Promoting Market Competition***

#### **Purpose**

This paper provides Members of the Business Facilitation Advisory Committee (BFAC) with an overview of the key developments of Hong Kong's competition law regime and the activities of the Competition Commission (Commission) in recent years. It also highlights on the Commission's efforts to assist businesses in adopting appropriate internal controls and risk management systems to ensure their compliance with Competition Ordinance (Cap. 619) (the Ordinance), and provides an outlook of the Commission's work in 2024.

#### **Background**

2. The Commission is an independent statutory body established under the Ordinance which was enacted in June 2012 and brought into full effect in December 2015. The objective of the Ordinance is to prohibit conduct that prevents, restricts or distorts competition, and to prohibit mergers that substantially lessen competition in Hong Kong. The merger rule only applies where an undertaking that directly or indirectly holds a "carrier licence" within the meaning of the Telecommunications Ordinance (Cap. 106) is involved in a merger.

3. The Commission is tasked with the following statutory functions:

- to investigate conduct that may contravene the competition rules of the Ordinance and enforce the provisions of the Ordinance;
- to promote public understanding of the value of competition and how the Ordinance promotes competition;
- to promote the adoption by undertakings carrying on business in Hong Kong of appropriate internal controls and risk management systems and to ensure their compliance with the Ordinance;

- to advise the Government on competition matters in Hong Kong and outside Hong Kong;
- to conduct market studies into matters affecting competition in markets in Hong Kong; and
- to promote research into and the development of skills in relation to the legal, economic and policy aspects of competition law in Hong Kong.

### **Enforcements of the Ordinance to Curb Anti-Competition Conduct**

4. The primary function of the Commission is to investigate conduct that may contravene the competition rules and enforce the provisions of the Ordinance. The Commission may conduct an investigation under the Ordinance only if it has reasonable cause to suspect that there is a possible contravention of a competition rule under the Ordinance, whether of complaints received, of referrals from the Government and public bodies, or of the Commission's own volition (e.g. suspicions identified from public enquiries or on the Commission's own initiative otherwise). The Commission may also receive a leniency application from a party to the possible contravention.

5. Following an investigation, where the Commission has reasonable cause to believe that a contravention has taken place, it may commence proceedings in the Competition Tribunal (Tribunal) for pecuniary penalties or disqualification orders, or adopt suitable non-litigation remedies, depending on the nature and facts of each case.<sup>1</sup>

### **Cases brought before the Tribunal**

6. Over the past eight years since the full implementation of the Ordinance, there have been a total of 19 enforcement outcomes so far. Altogether 15 cases were brought to the Tribunal, including three filed over the past year. The Tribunal already ruled in the Commission's favour and handed down judgments on sanctions in six cases. The remaining nine cases are pending trial or judgment.

7. Over the last year, the Commission commenced new proceedings in the Tribunal in three cases, against a total of seven undertakings and nine individuals. In March 2023, the Commission commenced proceedings in

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<sup>1</sup> For conduct that is not identified as "serious anticompetitive conduct" as defined in the Ordinance, the Commission must issue a warning notice, which gives the recipient an opportunity to bring themselves into compliance, before taking any further action.

the Tribunal against four undertakings and three individuals in the information technology (IT) sector for alleged price fixing, market sharing, bid-rigging and/or sharing of competitively sensitive information regarding the provision of quotations for IT solutions in the applications for government subsidy under the Distance Business Programme. This is the first cartel case brought before the Tribunal involving the abuse of a government-sponsored COVID-19 subsidy programme.

8. In May 2023, the Commission commenced a set of proceedings concerning air-conditioning works against two undertakings and one individual. One undertaking has previously entered into a cooperation agreement with the Commission under the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct. Pursuant to the terms of the cooperation agreement, the undertaking admitted liability, has paid a total pecuniary penalty of HK\$150 million together with the Commission's investigation and legal costs, and adopted a comprehensive competition compliance programme. The Commission also sought the Tribunal to declare another undertaking's contravention of the First Conduct Rule and an individual's involvement in the contravention, as well as to impose penalties on them.

9. In November 2023, the Commission brought a price-fixing case to the Tribunal against an undertaking and five individuals in the real estate agent sector for fixing the minimum net commission rate for the sale of firsthand residential properties in Hong Kong at 2%, which effectively restricts the maximum level of rebate their frontline agents could offer to the purchasers of such properties.

### Non-litigation Remedies

10. The Commission is also able to use non-litigation means to address competition concerns, for example through the acceptance of binding commitments.<sup>2</sup> Doing so can provide a proportionate and expedient solution to competition concerns and bring about changes that benefit the wider community.

11. Since December 2015, the Commission has adopted non-litigation remedies in five cases. In October 2022, the Commission accepted commitments offered by seven car distributors, resulting in the complete removal of car warranty restrictions previously imposed on car owners of

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<sup>2</sup> This can be done in accordance with section 60 of the Ordinance or following the issuance of an infringement notices under section 67 of the Ordinance.

17 passenger car brands. The commitments were accepted following a consultation conducted in August 2022.

12. In June and November 2023, the Commission conducted two consultations on the proposed commitments offered by two leading online food delivery platforms in Hong Kong. The commitments were proposed in response to the Commission's earlier investigation, which had found that certain requirements imposed by the two platforms on their partnering restaurants may hinder entry and expansion by new and/or smaller platforms and/or soften competition in the market, potentially in contravention of the First Conduct Rule of the Ordinance. To address the Commission's concerns, the two platforms had each offered commitments to amend or remove the relevant provisions to allow restaurants greater freedom in partnering with new and/or smaller platforms and in pricing menu items on their own channels and other platforms. In December 2023, the Commission announced the acceptance of commitments offered by the two platforms under section 60 of the Ordinance.

### Collaboration with other Law Enforcement Agencies

13. In recent years, the Commission stepped up collaborations with other law enforcement agencies. In this connection, in November 2022, the Commission participated in an inter-departmental anti-crime joint operation at the Aberdeen Wholesale Fish Market (Fish Market) coordinated by the Hong Kong Police Force, during which the Commission surveyed practitioners from over 30 wholesalers on allegations concerning possible anti-competitive conduct in the Fish Market. Subsequently, the Commission escalated the case to the investigation phase, and conducted searches in a number of premises at the Fish Market as well as two offices of the companies involved for suspected anti-competitive conduct including price fixing, output limitation and group boycott amongst the wholesalers in December 2022 and June 2023.

## **Initiatives to Promote Understanding of Ordinance and Facilitate Compliance**

### Business Sector Engagement

14. The Commission continued its efforts to increase public awareness of the Ordinance and to promote compliance through various types of outreach and engagement events. Whilst some of these events provided a general overview of the Ordinance for members of the public, others are bespoke events for specific target audiences, such as statutory organisations, professional bodies

and particular trades including property management, tourism, housing, legal, sports, chambers of commerce, charity etc.

15. Over the last three years, the Commission conducted 22 webinars for both businesses and members of the public, in particular small and medium enterprises and trade associations. Among them, one was conducted specifically for trade, sporting, professional and industry associations, while another targeted practitioners in the hotel and travel industry. There was enthusiastic response to these webinars, with a total of about 9 932 participants showing great interest in the topics and raising questions on various issues.

16. In November 2021, the Commission co-organised its first Autumn Academy on Competition Law and Policy with the Faculty of Law of the Chinese University of Hong Kong. Delivered by distinguished legal scholars, senior staff members from the Commission and veteran competition lawyers in private practice, the three-day online event covered key elements and practical applications of the Ordinance, compliance matters as well as the recent development of the Mainland's Anti-Monopoly Law. The event received overwhelming response from over 600 lawyers, compliance practitioners and business representatives.

#### Advisory Bulletins and Notes

17. The Commission issues advisory bulletins on specific competition matters from time to time to encourage and assist businesses to be ready, willing and able to comply with the Ordinance.

18. In July 2021, the Commission published an advisory bulletin which applies to all trade, sporting, professional and industry associations or bodies and their members in Hong Kong for the purpose of advising them on the potential risks under the Ordinance concerning membership admission criteria and procedures of such associations. The Commission indicated that the admission rules of associations should be transparent, proportionate, non-discriminatory, based on objective standards, and subject to appeal in the event of a refusal to grant membership to a party. If rules for admission do not meet these requirements, they may be viewed as having the object or effect of harming competition.

19. In August 2022, the Commission published an advisory bulletin with practical scenario-based examples to provide guidance on how the Ordinance applies to the conduct of employers in the context of their joint negotiations with employee bodies on employment matters.

20. In addition, to strengthen protection for procurers against attempts to undermine competition during procurement exercises, the Commission published a revised set of model “Non-collusion Clauses” (Model NCC) in January 2023 for procurers to incorporate in their invitation to bid documents and contracts. The newly added clauses require bidders to identify their beneficial owners which, in turn, will provide procurers with greater clarity as to the competitiveness of the procurement process.

### Enforcement Policies

21. The Commission has published various enforcement policy documents over the years to address key aspects of its enforcement approach, and has made revisions to some of the documents based on its experience accumulated since the Ordinance came into full effect.

22. In November 2021, the Commission published a policy on commitments under section 60 of the Ordinance setting out the Commission’s practice and procedure in respect of such commitments. Under section 60 of the Ordinance, the Commission may accept a commitment from a party to take any action, or refrain from taking any action, that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule. If the Commission accepts a commitment, it will not commence or continue any investigation or proceedings before the Tribunal regarding the matters addressed by the commitment.

23. In September 2022, the Commission revised the Leniency Policy for Individuals Involved in Cartel Conduct to offer clearer guidance and enhanced incentives for individuals to cease their involvement in cartel conduct and report to the Commission, which will further strengthen the Commission’s cartel detection and enforcement efforts.

### Public Advocacy and Education

24. Two publicity campaigns were launched in recent years. In September 2022, the Commission launched Hong Kong’s first docudrama series on competition law cases entitled COMPETE: Cartel Hunters. Showcasing the first batch of competition cases handled by the Commission, the five-episode series co-produced with Radio Television Hong Kong (RTHK) was aired on RTHK 31 from September to October 2022. A city-wide publicity campaign via outdoor, radio, online and social media platforms was launched in tandem until early November of the same year.

25. In June 2023, the Commission rolled out a campaign to enhance public awareness and understanding of resale price maintenance as well as to encourage compliance through a series of advocacy initiatives. The campaign featured television and radio announcements, online videos, outdoor advertisements, webinars, a brochure and promotion on social media.

### **Policy Advice to Government and Public Bodies**

26. Another important statutory function of the Commission is to advise the Government on competition matters. Over the years, the Commission has provided advice to various government bureaux, departments and public bodies on over 180 public policies and measures. Some of the key examples include the Taxi Fleet Management Regime, the Water Efficiency Labelling Scheme, tender exercise for car park operations, employers' joint negotiations with employee bodies on employment matters, and procurement policy related to the treatment of unreasonably low bids.

27. The Commission has continued to assist the Government in incorporating competition principles in the policy-making and implementation process. It has also raised public procurers' awareness against bid-rigging, and enhanced frontline staff's capability to detect and report potential anti-competitive conduct to the Commission. In August 2022, the Commission collaborated with the Civil Service Bureau (CSB) to provide competition law training to Senior Executive Officers and other officers who are responsible for tender design and implementation. With the training well received by over 70 officers, the CSB proposed to conduct it on a regular basis as part of its procurement training programme.

28. To further increase the awareness of government departments in the prevention and detection of anti-competitive conduct (such as bid-rigging) in public procurement process, the Commission has invited more than 80 senior procurement officials from 40 departments to a briefing session in June 2023, at which the Commission elaborated, among other things, on the use of the revised Model NCC and discussed the Commission's effort in assisting public procurers in cartel detection through data screening.

### **Competition Law Developments in Greater Bay Area (GBA)**

29. In August 2022, the Mainland revamped its Anti-monopoly Law (AML). Shortly after the legislative amendments, the Commission organised a webinar as part of our advocacy efforts for businesses and the public sector in Hong Kong to learn about the latest development of AML. Delivered by

two senior officials from the State Administration for Market Regulation (SAMR) and a distinguished legal scholar from Shanghai Jiao Tong University, the webinar was attended by over 350 lawyers, business representatives, academics, university students and those from the public sector.

30. In March 2023, the Commission received a delegation led by the Guangdong Administration for Market Regulation (Guangdong AMR) senior officials. It was a fruitful meeting where both parties introduced their respective competition enforcement and advocacy work, as well as explored possible areas of collaboration within the GBA framework that could include compliance training for corporations, exchange of experience and knowledge, creative approach to advocacy and so on. Executives from several market regulators at the city and district levels also joined the Guangdong delegation in the visit.

31. In July 2023, the Commission signed a Memorandum of Understanding (MoU) with the Guangdong AMR to strengthen cooperation between the two authorities. In accordance with the principle of “One Country, Two Systems” and the Outline Development Plan for the Guangdong-Hong Kong-Macau Greater Bay Area, the Commission and the Guangdong AMR considered it appropriate to establish an effective framework for communication and cooperation on competition policy and law, with the aim of promoting a level-playing field for all businesses, and enhancing market vibrancy and social welfare as a whole. The initiative is supported by the SAMR. Under the terms of the MoU, the Commission and the Guangdong AMR will hold regular meetings to share and discuss key developments regarding competition policy, legislation and enforcement in each other’s jurisdiction, as well as collaborate in activities related to competition advocacy to increase awareness of competition policy and law among businesses, government agencies and the general public in the GBA. The MoU also provides a platform for the Commission and the Guangdong AMR to engage in technical cooperation to enhance capacity building, including staff training.

32. In December 2023, the Commission hosted a meeting with the officials from the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone Authority, and shared its best practices in government advocacy and policy advisory work with them. In the spirit of the MoU, in January 2024 the Commission and the Guangdong AMR jointly published the Competition Compliance Manual for Businesses in Guangdong and Hong Kong (the Manual) that aims to help enterprises operating in the GBA to better understand, compare and thus comply with the competition laws of Hong Kong and the Mainland. The Manual highlights the key features of the two competition law



regimes, and provides guidance to companies on how to enhance their internal risk assessment and compliance capacities.

33. With closer economic integration of Hong Kong in the GBA, the Commission will continue to strengthen collaborations with its Mainland counterparts to bolster the implementation of competition law and policy in the GBA, in line with fast-growing development opportunities for businesses in the area.

### **Outlook for the Commission's Work in 2024**

34. Enforcement of the Ordinance will remain a key focus of the Commission with priority given to investigations and enforcement actions that would result in the greatest overall benefit to competition and consumers in Hong Kong. The Commission will continue to focus on three particular areas, including anti-competitive conduct concerning livelihood issues, cartels that aim to take advantage of government or public funding, and conducts affecting digital markets.

35. With the removal of social distancing and travel restrictions, the Commission is strengthening its in-person exchanges and collaborations with competition agencies from the Mainland and overseas. Towards this end, the Commission is planning to pay a visit to the SAMR and the Competition Policy and Big Data Centre in Beijing. The Commission is also preparing for a high-level international conference in Hong Kong which will gather leading competition enforcers, judges, scholars and business leaders to discuss and share views on topical issues in the field of competition policy and enforcement.

36. The return to normalcy will also allow the Commission to make full use of both physical and online events to engage with its stakeholders and members of the public. Promotions on social media platforms will also continue as part of the Commission's outreach to a wider audience.

### **Advice Sought**

37. Members of the BFAC are invited to note the content of the paper.