

FIRST COMPETITION CASE IN HONG KONG INVOLVING ALLEGED OBSTRUCTION OF INVESTIGATION

On 14 December 2021 the Hong Kong Competition Commission (**Commission**) **commenced proceedings** against Hong Kong Commercial Cleaning Services Limited (**HKC**) and Man Shun Hong Kong & Kln Cleaning Company Limited (**MS**) in the Competition Tribunal. Consistent with the Commission's continued focus on personal liability, three directors of the companies are also named as respondents in these proceedings. This is the first time the Commission referred a case to the Police for criminal investigation of the obstruction of its investigation powers. In this briefing, we provide an overview of this case, and discuss its implications on competition law enforcement in Hong Kong.

Overview of the Commission's allegation

The Commission alleges that two companies engaged in price-fixing in 17 tenders submitted to the Hong Kong Housing Authority (**HA**) for the procurement of cleaning services for public housing estates between May 2016 and August 2018. According to the Commission's findings, the companies shared common offices and IT access, and exchanged competitively sensitive information in various tenders when the companies were bidding for the same HA cleaning service contract, including the quoted prices and information on salary and production costs which formed part of the companies' tenders. The Commission alleges that such conduct is in contravention of the First Conduct Rule of the Competition Ordinance (**CO**).

The first obstruction of investigation case claimed by the Commission

In particular, the Commission also alleged that, during a search at HKC's office conducted by the Commission, some individuals tried to delete electronic evidence potentially relevant to the case (such as commercial documents and shortcuts linking the computers of one company to the servers of another company). For the first time, the Commission referred this alleged obstruction of its search to the Police for criminal investigation. This sends a strong message that the Commission will not tolerate any violation of the criminal provisions of the CO.

As the first precedent on this subject matter, the case will provide helpful guidance on the development of the case law on obstruction of investigation. The maximum penalty for the criminal offence is a fine of HK\$1,000,000 (approximately US\$130,000) and imprisonment for 2 years.

Standard of proof in proceedings for a pecuniary penalty being tested

Another notable learning is that the Commission is strategically pleading its case on both civil and criminal standards of proof, thereby allowing the Commission to revisit the applicable standard of proof on appeal if required.

In a previous case (*Competition Commission v W. Hing Construction Co Ltd & Ors*), the Court of Appeal rejected the Commission's cross appeal and reaffirmed that the standard of proof in competition proceedings for a pecuniary penalty should be the criminal standard of beyond reasonable doubt. However, the appellate court also acknowledged that it would be better for the Commission's argument (that the civil standard should be applied) to be tested in an actual case where the application of the criminal standard of proof would have a real impact and where the Tribunal has dealt with the issue in its evidential assessment, before the point is considered by an appellate court (see our [previous newsletter](#)).

The Commission now appears to be adopting the Court of Appeal's suggestion by putting forward its case on both civil and criminal standards of proof. Specifically, the Commission submits that it is more likely than not (on a civil standard of proof) that the two companies have engaged in price-fixing through exchanging competitively sensitive information, based on a mix of circumstantial evidence (e.g. the fact that the companies' proposals contained identical or similar pricing and mistakes, and were signed on the same day) and documentary evidence (e.g. emails containing the breakdown of the values of various HA contracts of both companies). In any event, even if the criminal standard of proof is applicable, the Commission submits that there is an irresistible inference from the evidence available that the parties must have engaged in price-fixing during the relevant period.

Implications for businesses

This case again confirms the Commission's enforcement focus and priority against cartels, especially those that aim to take advantage of government funding and/or have a wide impact on people's livelihood, which the Commission described as "*particularly egregious*".

On the remedies front, the Commission is seeking remedies against the companies as well as the three directors involved, including director disqualification orders and pecuniary penalties (on all respondents, including individuals). While this is consistent with the Commission's recent focus on personal liability, it is notable that in this case, the Commission is only enforcing against the three directors but not the other individuals who also appeared relevant to the case (such as the office purchasing clerk and the Head of Human Resources who allegedly worked for both companies). As the case develops, it may offer useful insights into the basis on which the Commission determines which individuals are considered 'relevant' and should be pursued on an individual basis.

Recently, there has been a wave of settlements as more businesses prefer the time- and cost-effective enforcement outcomes through cooperation. This case, however, is an exception. Contrary to the recent trend, the parties did not cooperate with the Commission. This illustrates that it remains a complex assessment requiring consideration of all relevant facts and circumstances of the case to determine the most appropriate strategy to adopt, and cooperation may not always be the best approach.

We will continue to keep an eye on the developments of the case, in particular whether the obstruction of search would result in a successful prosecution. Businesses should take note that the Commission takes the criminal provisions of the CO seriously.

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