Hong Kong Competition Tribunal Issues its First Two Infringement Decisions

Introduction

On 17 May 2019, the Hong Kong Competition Tribunal (“Tribunal”) issued its first two infringement decisions under the Hong Kong Competition Ordinance (the “Ordinance”). The first case involved five IT companies that were alleged to have engaged in bid-rigging (“IT Bid Rigging Case”) and the second case involved ten renovation contractors that were alleged to have entered into price-fixing and market sharing agreements (“Renovation Contractors Case”). For both cases, the issue of penalties will be determined at a further hearing. This Update provides a summary of the Tribunal’s decisions of the two cases.

By way of background, Hong Kong’s competition regime is at a relatively nascent stage, with the Ordinance only coming into force in December 2015. As with other competition regimes across the world, it contains three prohibitions relating to anti-competitive agreements (“First Conduct Rule”), abuse of market power (“Second Conduct Rule”) and anti-competitive mergers and acquisitions (“Merger Rule”). The First Conduct Rule and the Second Conduct Rule both apply to all market sectors in Hong Kong, whereas the Merger Rule currently only applies to mergers in the telecommunications sector. The Hong Kong Competition Commission (“HKCC”) has the responsibility of enforcing the Ordinance through commencing enforcement proceedings before the Competition Tribunal.

With these decisions being issued, Hong Kong is now on the map as a serious competition enforcer. It is one additional country in Asia that has, and enforces, competition laws. Businesses that operate across borders must therefore remain cognisant of competition laws, and particularly be alert to Asia as a whole.

IT Tender Case

On 23 March 2017, the HKCC brought its first case before the Tribunal, alleging that five IT companies engaged in bid-rigging in relation to a call for tenders for the supply and installation of an IT server system by the Hong Kong Young Women’s Christian Association (“YWCA”). The five IT companies involved were Nutanix Hong Kong Limited (“Nutanix”), BT Hong Kong Limited (“BT”), SIS International (“SIS”), Innovix Distribution Limited (“Innovix”) and Tech-21 Systems Limited (“Tech-21”). As the YWCA’s procurement policy required a minimum of five bids for the tender, BT agreed with Nutanix to obtain non-genuine “dummy bids” from Nutanix’s channel partners to meet the minimum requirement. Nutanix then separately procured dummy bids from SIS, Innovix and Tech-21. The HKCC contended that these agreements contravened the First Conduct Rule as the parties made or gave effect to anti—competitive agreements.
The Tribunal dismissed the claim against SiS as its employee’s conduct was not attributable to the company, given that he was not acting in the course of his employment and was not part of SiS, and found the other four IT companies to have infringed the First Conduct Rule, as the agreements in this case had the object of preventing, restricting or distorting competition in Hong Kong.

Renovation Contractors Case

On 14 August 2017, the HKCC commenced its second set of enforcement proceedings in the Tribunal against ten decorating contractors approved by the Hong Kong Housing Authority (“HKHA”) in relation to decoration works undertaken for residential tenants in three buildings. The HKCC contended that the parties contravened the First Conduct Rule as between June and November 2016, they entered into a market sharing agreement by allocating designated floors in each of the three buildings to carry out decoration works, as well as a price-fixing agreement by jointly producing a promotional flyer distributed to tenants, which had set out certain package prices used or offered by the parties.

Apart from denying the existence of the two agreements, eight parties argued that even if the agreements were found to have existed, they should not be held liable for infringing the First Conduct Rule. They submitted that the alleged agreements would given rise to economic efficiencies, and hence, were excluded from the purview of the First Conduct Rule pursuant to Paragraph 1 of Schedule 1 to the Ordinance ("Efficiency Defence"). While the other two parties did not deny the existence of the alleged agreements, they submitted that the acts were carried out by their sub-contractors, who were entirely independent undertakings. As such, they should not be held liable for the acts of their sub-contractors ("Sub-contractor Defence").

The Tribunal ultimately rejected both defences put forth by the parties and found that all ten parties were liable for contravening the First Conduct Rule as the two agreements both had the object of preventing, restricting or distorting competition in Hong Kong.

Following the practice in the EU, the Tribunal held that the Efficiency Defence failed as the parties failed to show, on a balance of probabilities, that the agreements fulfilled the four cumulative criteria, namely (a) the agreement generated efficiencies; (b) consumers were able to enjoy a fair share of the resulting benefit; (c) the agreement does not impose restrictions that were indispensable to the attainment of the efficiencies; and (d) the agreement does not give rise to the possibility of eliminating competition.

As for the Sub-contractor Defence, the Tribunal disagreed with the parties and found that each of them and their respective sub-contractors amounted to a single economic unit. Although the sub-contractors bore the risks and profits on the decoration business, the two parties together assumed the external risks and retained all the legal and economic obligations in relation to the works undertaken by sub-contractors, as they were the ones who were dealing with tenants and the HKHA and that the sub-contractors were providing the decoration services in their names.
Key Takeaways

Given the infancy of the Hong Kong competition law regime and the lack of local jurisprudence, these two decisions provide guidance on how the Tribunal will apply the Ordinance.

Object Restrictions

In both decisions, the Tribunal adopted the EU approach on the interpretation of the First Conduct Rule, recognising the bifurcation of anti-competitive agreements into object and effect. As noted by Justice Godfrey Lam, this was because the First Conduct Rule is almost identical to the corresponding competition provisions in the EU, UK and Singapore.

The Tribunal affirmed that the bid-rigging, price-fixing and market sharing agreements are regarded as agreements that restrict competition by object, and hence there was no need to consider the effects of the agreements. In its decision for the IT Tender Case, the Tribunal further recognised that there was no need to conduct a separate appreciability analysis for object restrictions, such that even if the undertakings involved held insignificant market shares, object restrictions would still amount to infringements of the First Conduct Rule. Moreover, the Tribunal noted that an agreement will still be held to have an anti-competitive object, even if it did not have the sole aim of restricting competition, but also pursued other legitimate objectives. These pronouncements were made with reference to, and follow, EU case law.

Attribution of Conduct

Another issue raised in the IT Tender Case was attribution of employees’ conduct to employers. The HKCC’s primary submission was that an undertaking is responsible for acts of its employees carried out during their employment which infringe the First Conduct Rule, if such acts were committed within the temporal currency of the employment.

However, after considering the practices adopted in various jurisdictions such as the EU, UK, Australia and the US, the Justice Lam rejected the HKCC’s argument and concluded that liability cannot be attributed solely because the wrongful acts were carried out during working hours. There must therefore be a requirement of sufficient connection between the employee’s acts and the undertaking.

On the facts of the case, the Tribunal found that the employee in question was a relatively junior employee who had “gone rogue” by acting on his own accord in an unauthorised manner outside his scope of responsibilities, and also concealed his acts from SiS. Hence, the Tribunal concluded that the employee was neither acting in the course of his employment nor part of SiS, even if the acts were carried out during working hours, and therefore liability could not be attributed to SiS.
Requisite Standard of Proof

An important issue which the Tribunal ruled on in the IT Tender Case was the standard of proof to be applied in competition proceedings - that is, whether it should be the criminal standard of proof (beyond reasonable doubt) or the civil standard of proof (on the balance of probabilities).

Notably, Justice Lam rejected the civil standard of proof, which was the approach in most jurisdictions (e.g., Australia, Canada, New Zealand, Singapore and the UK) and instead ruled that the applicable standard of proof required of the HKCC is the criminal standard of beyond reasonable doubt, which makes the burden of proof more difficult to discharge. The HKCC was seeking orders to impose pecuniary penalties on the relevant undertakings and that the proceedings “involve[d] the determination of a criminal charge within the meaning of Article 11 of the Bill of Rights”, and thus the standard of proof required was the criminal standard.

Conclusion

From the two infringement decisions issued, it is clear that the Tribunal considers overseas jurisprudence, in particular the EU’s, as highly relevant and persuasive. Nonetheless, it should be kept in mind that while the Ordinance draws heavily from the EU and UK competition legislations, as well as parts of the Australian competition law, it has its own unique features that may be the grounds for departure from the well-established approaches adopted in other jurisdictions.

Indeed, as seen from the IT Tender Case and the Renovation Contractors Case, the Tribunal clearly recognises the peculiarities of the Hong Kong competition regime and have demonstrated that it would not hesitate to deviate from overseas practices, especially given how Hong Kong’s social, political and economic landscape differs largely from its western counterparts’. In fact, this has already been illustrated in the IT Tender Case regarding the issue of the requisite standard of proof.

If you have any questions on the above, please feel free to contact the relevant lawyers below.
For more information on legal issues arising in Singapore or any of the specific countries, please feel free to contact the relevant lawyers.

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com
Our Regional Contacts

RAJAH & TANN | Singapore
Rajah & Tann Singapore LLP
T +65 6535 3600
F +65 6225 9630
sg.rajahtannasia.com

R & T SOK & HENG | Cambodia
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | China
Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | Indonesia
Assegaf Hamzah & Partners
Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | Lao PDR
Rajah & Tann (Laos) Sole Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | Malaysia
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN NK LEGAL | Myanmar
Rajah & Tann NK Legal Myanmar Company Limited
T +95 9 7304 0763 / +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

SAGATMAYTAN YAP PATACSI | Philippines
Gutierrez & Protacio (C&G Law)
T +632 894 0377 to 79 / +632 894 4931 to 32 / +632 552 1977
F +632 552 1978
www.cagatlaw.com

R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | Vietnam
Rajah & Tann LCT Lawyers
Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

Member firms are constituted and regulated in accordance with local legal requirements and where regulations require, are independently owned and managed. Services are provided independently by each Member firm pursuant to the applicable terms of engagement between the Member firm and the client.

© Rajah & Tann Singapore LLP | 6
Our Regional Presence

Rajah & Tann Singapore LLP is one of the largest full-service law firms in Singapore, providing high quality advice to an impressive list of clients. We place strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems. As the Singapore member firm of the Lex Mundi Network, we are able to offer access to excellent legal expertise in more than 100 countries.

Rajah & Tann Singapore LLP is part of Rajah & Tann Asia, a network of local law firms in Singapore, Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Vietnam. Our Asian network also includes regional desks focused on Japan and South Asia.

The contents of this Update are owned by Rajah & Tann Singapore LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann Singapore LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or e-mail Knowledge & Risk Management at eOASIS@rajahtann.com.