

# New developments in Hong Kong's first case under the Competition Ordinance

## **Kluwer Competition Law Blog**

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Adrian Emch (Hogan Lovells, China)

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Important new developments are reported in the first case under Hong Kong's cross-sector antitrust statute, the Competition Ordinance ("**Ordinance**"), in effect since December 2015. The hearing for the case is scheduled in June/July 2018.

Under the Ordinance, enforcement action may only be undertaken by the Competition Commission ("**HKCC**"), and by the Communications Authority in the broadcasting and telecommunications sector.

HKCC is responsible for investigating allegations of breaches of the Ordinance and may issue notices or settle cases. In order to impose a fine or other punishment for such breaches, HKCC is required to prove its case before the Competition Tribunal ("**Tribunal**"), a separate specialized court.

### **Bid-rigging in the IT industry**

HKCC brought its first lawsuit in March 2017, against Nutanix, a supplier of IT hardware and software solutions, and BT, SiS, Innovix and Tech-21, four distributors of Nutanix products ("**Respondents**").

HKCC's claim is that the Respondents breached the Ordinance by engaging in "bid-rigging" in a single tender conducted by the Hong Kong Young Women's Christian Association ("**YWCA**") in July 2016 for the supply and installation of an IT server

system. In the first round of tenders, YWCA only received one bid from BT, which did not satisfy YWCA's procurement policy requirements. HKCC alleges that Nutanix agreed to help BT to win the YWCA tender by obtaining four "dummy" bids.

The Tribunal has handed down a number of interlocutory decisions in this case:

- In March and June 2017, the Tribunal issued two decisions, granting confidential treatment of information, and covering case management issues.
- In October 2017, the Tribunal handed down an important clarification concerning the applicability of privilege against self-incrimination. It held that statements made to HKCC by employees of the company could not be treated as privileged in relation to self-incrimination of the company. The Respondents argued that statements made to HKCC by their employees pursuant to a "section 42 notice," compelling the employees to answer questions in connection with an investigation, should not be disclosed in the proceedings on the grounds of privilege against self-incrimination. However, the Tribunal decided that privilege against self-incrimination could not be claimed by the companies, as the employees had given the statements in their personal capacity and not as representatives of the companies.
- In March 2018, the Tribunal published a ruling forcing HKCC to disclose more documents to one of the Respondents, SiS. The Tribunal rejected HKCC's attempt to assert privilege wholesale over vast quantities of documents and undertook a rigorous analysis of the issues surrounding in relation to the other categories of documents sought, ordering and limiting disclosure on a case by case basis. Significantly, the Tribunal ruled to protect the regulator's communications with the other Respondents in relation to its leniency policy, on the grounds of informer privilege and without prejudice privilege, providing reassurance to those considering self-reporting and making use of the leniency policy.

Most recently, it was reported in April 2018 that the Tribunal ruled to allow HKCC to extract oral evidence from an individual without a formal statement, despite counter-arguments from SiS.

## **Busy years**

HKCC has had a busy first few years as a new regulatory body. The authority filed its second case in the Tribunal in August 2017, for an alleged market sharing and price fixing agreement for renovation services at a public housing estate in Hong Kong. Proceedings have been filed against ten construction and engineering companies.

In addition to initiating its first two enforcement cases in the Tribunal, HKCC has engaged in a substantial public outreach and education program, issuing guidelines and advice to a variety of sectors and conducting market studies.

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