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More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

- Contribution from Hong Kong, China -

1. Introduction

1. Hong Kong's competition law regime has been in full force for almost three years. It is a prosecutorial system with the Competition Commission (the "**Commission**") responsible for investigating contraventions of the Competition Ordinance (the "**Ordinance**"). The Ordinance provides, inter alia, two conduct rules¹. The first conduct rule is modelled on Article 101 of the TFEU (i.e. is focused on anti-competitive agreements and concerted practices). The second conduct rule is modelled on Article 102 of the TFEU (i.e., is focused on abuse of substantial market power). While the substantive provisions of the Ordinance are derived from EU law, other provisions of the Ordinance are clearly referable to laws in a variety of other jurisdictions. Hong Kong does not provide criminal sanctions, such as incarceration, on individuals for contravention of the conduct rules but civil pecuniary penalties can be imposed.

2. Subject to the consideration discussed in 3(a) below, where the Commission, following such investigation as it considers appropriate, has reasonable cause to believe that a person has contravened or been involved in the contravention of the first or second conduct rule it may bring an action for a pecuniary penalty (and potentially other orders) before the specialist Competition Tribunal (the "**Tribunal**").²

3. Not all investigations will result in the Commission bringing proceedings in the Tribunal³.

- Warning Notice: The Commission can only bring a first conduct rule contravention directly to the Tribunal where it involves "*serious anti-competitive conduct*".⁴ Where the Commission has a reasonable cause to believe that there has been a contravention but that the conduct does not fall into the category of serious anti-competitive conduct, the Commission must issue a warning notice to the parties before bringing proceedings before the Tribunal. The warning notice will give parties a period to cease the contravening conduct and it is only if the contravening

¹ There is a third rule that relates to mergers although this is only applicable to those with telecommunication carrier licenses.

² The Tribunal is a superior court of record and has a status equivalent to the Court of First Instance of Hong Kong. Judges of the Court of First Instance are also, by virtue of the Ordinance, judges of the Tribunal.

³ The Commission may also decide that no further action is warranted.

⁴ This is defined in section 2 of the Ordinance. In general terms it covers price fixing, market allocation, output restrictions and bid rigging. The classification of certain conduct as being serious anti-competitive conduct does not apply in relation to the second conduct rule.

conduct persists after that notice period has expired may the Commission bring proceeding in the Tribunal.⁵

- Infringement Notice Where the contravention is either a first conduct rule contravention that involves serious anti-competitive conduct or is a second conduct rule contravention, the Commission may issue an infringement notice in lieu of bringing proceedings before the Tribunal. An infringement notice will specifies certain requirements which, if the recipient of the notice complies with those requirements, the Commission will not bring proceedings before the Tribunal.⁶
- Commitments At any stage of an investigation the Commission may accept commitments by a party to take or refrain from taking any action the Commission considers appropriate.⁷ The Commission may seek specific performance of any commitment given to it before the Tribunal if it considers that the undertakings as set out in the commitment are not being complied with.⁸

4. Hong Kong's legal system is rooted in the Common Law and the issues of privilege, rights of defense, court procedures etc. will be familiar to those from other Common Law jurisdictions.

5. Over the past three years, the Commission has received approximately 3,500 complaints. At any one time the Commission will have several "initial investigations" open and a smaller number of "Part 3 Investigations". There are currently three enforcement actions before the Tribunal. It is expected that judgment for the first enforcement action will be handed down shortly.

6. The distinction between an *initial investigation* and a *Part 3 Investigation* is that a Part 3 Investigation requires the Commission to have **reasonable cause to suspect** that a contravention of a conduct rule has, is, or is about to, take place. It is only where the Commission is satisfied that such a threshold has been met that the Commission can use the investigatory powers provided in part 3 the Ordinance. An initial investigation relies on information either being accessible publicly or provided voluntarily.

7. Once the *reasonable cause to suspect* threshold has been met, the powers available to the Commission are, in brief:

- To require a person to produce specified documents or information relevant to the investigation i.e. compulsory requests for information (Section 41 of the Ordinance);
- To attend before the Commission and answer questions relevant to the investigation i.e. compulsory interviews (Section 42 of the Ordinance); and
- Subject to the issue of a warrant by a judge of the Court of First Instance, to enter and search a premise and take possession of or make copies any document that appears to be relevant to the investigation i.e. unannounced inspections (Section 48 of the Ordinance).

⁵ See section 82 of the Ordinance.

⁶ See section 67 of the Ordinance.

⁷ See section 60 of the Ordinance.

⁸ See section 63 of the Ordinance.

8. The Commission has used each of these powers over the past three years. Section 1 below addresses the Commission's experience in using its search warrant powers. Section 2 addresses the Commission's experience of the limits and effectiveness of section 41 powers e.g. requests for information (RFIs). Section 3 addresses issues that have arisen in relation to the Commission's use of section 42 powers i.e. compulsory interviews.

2. Section 1: Unannounced Inspections

2.1. Warrant to enter and search premises

9. Pursuant to Section 48 of the Competition Ordinance, a judge of the Court of First Instance may issue a warrant authorizing a person specified in the warrant and any other persons who may be necessary to assist in the execution of the warrant, to enter and search any premises if the judge is satisfied that there are reasonable grounds to suspect that there are, or are likely to be, on the premises, documents that may be relevant to an investigation by the Commission.

10. In order to apply for a warrant, the Commission must have reasonable cause to suspect a contravention of a competition rule. It must also be conducting an investigation and have reasonable grounds to suspect that there are, or are likely to be, documents that may be relevant to an investigation on a premises. The premises specified in the warrant need not relate to the party under investigation. For example, the premises may belong to the investigated party's supplier, a customer or other witness.

11. It is expected that the types of situations where the Commission may seek a warrant would include, without limitation:

- Matters which involve secretive conduct;
- Instances where it considers that documents or information relevant to the investigation may be destroyed or interfered with, should the Commission seek them through other means;
- Circumstances where the Commission has been unsuccessful in obtaining specific documents or information; or
- Instances where the Commission suspects non-compliance with an earlier request for such documents and information and wishes to identify further documents and information relevant to the investigation.

12. The Ordinance does not require the Commission to have first used one of its other investigation powers before applying for a warrant.

2.2. Powers conferred by warrant

13. Pursuant to section 50 of the Ordinance, a person that is specified in the warrant (usually the Commission's officers and any other persons that are assisting the Commission in its investigation) may, in the execution of the warrant, exercise certain powers. These include but are not limited to:

- Make use of such equipment as is reasonable in the circumstances;
- Search for, makes copies of or take extracts from relevant documents;

- Take possession of any documents that appear to be relevant documents if (i) such action appears to be necessary for preserving the documents or preventing interference with them, or if (ii) it is not reasonably practicable to take copies of the documents on the premises, or any such other steps that appear necessary for preserving relevant documents or preventing interference with them;
- Take possession of any computer or other thing on the premises that the person executing the warrant has reasonable grounds to believe will afford evidence of a contravention of a competition rule under the Ordinance. Alternatively, Commission officers may instead make copies;
- Require any information which is stored in electronic form and is accessible from the premises and which the person executing the warrant considers relates to any matter relevant to the investigation, to be produced in a form (i) in which it is visible and legible or from which it can readily be produced in a visible and legible form; and (ii) in which it can be taken away.

2.3. Preparing for and conducting dawn raids

14. As set out above, the specified persons will typically comprise of Commission officers and other persons authorised in the warrant including, where appropriate, IT forensic experts.

15. IT experts should be included in each search team where the Commission considers that the search team should be assisted by IT support. This includes assisting with accessing all electronic documentation, computers, mobile devices, including personal devices if used for business purposes, and digital storage media (e.g. external hard drives, CDs/DVDs, USB thumb drives, memory cards etc.), ensuring that these are searched properly and liaising with the target's own IT representatives. Searching and preserving digital evidence (including its underlying metadata⁹) as well as presenting that evidence to court can be essential to building a strong case.

16. Commission officers conducting a search will typically seek to conclude the search in one day. Where the search is not completed in one day, the Commission officers are empowered by the warrant to carry on the search the following working day. In such circumstances the Commission will seal appropriate parts of the premises. This will be done in a proportionate manner so as to minimise the impact of the sealing on the affairs of the persons on the search premises.

17. The preferred approach for gathering electronic evidence is to sift and review the electronic material onsite. This can be achieved through the use of an onsite review platform or through searching directly on the desktop/laptop of the key custodians, the server or even the Cloud, followed by the forensic acquisition of the relevant electronic data. Section 50 (1)(j) of the Ordinance¹⁰ also empowers Commission officials to take away equipment which can store electronic data such as laptops, hard drives and mobiles. As stated in paragraph 13, the search team may require any information stored in electronic

⁹ The metadata includes, but is not limited to, the properties showing the dates that the document was created and last modified.

¹⁰ See section 50 (1)(j) of the Ordinance.

form which is *accessible* from the premises. This includes servers that are accessible from the searched premises.

18. The Commission will usually try to minimise the amount of material seized in hardcopy during a search. Instead, electronic copies of documents should be taken using specialist imaging equipment. This approach will lower the administrative burden of scanning large amounts of hardcopy material post-search, as well as avoiding the need to take, securely store and process original hardcopy material.

19. A number of steps are also taken prior to the operation in order to search and review electronic data in the most efficient manner. The Case Team starts by identifying information of relevance, such as key targets (to focus on key individuals), products or services, making it easier to secure the evidence on site as well as determine the amount of resources likely needed. As mentioned above, the Commission is also investing in specialized IT staff, hardware and software in order to conduct searches in the digital age in the most efficient manner.

2.4. Legal professional privilege and confidentiality

20. The company may wish for it (or its legal advisers) to be present during the onsite sift, review and seizure process.

21. Section 58(1) of the Ordinance provides that the Commission's investigative powers do not affect any claims, rights or entitlements that would, but for such powers, arise on the ground of legal professional privilege ("LPP"). In accordance with section 58(1) of the Ordinance but subject to section 58(2), persons are not required to provide information to the Commission where that information is protected by a valid claim to LPP.

22. Same as for hardcopy searches, if, during the course of a search, a person considers that any electronic document or information is legally privileged, the person should bring the potential existence of LPP to the attention of a Commission officer conducting the search. The officer may request that the person claiming LPP to provide the Commission officer with material of such a nature as to demonstrate to his/her satisfaction that the electronic document or information, or parts of it, for which LPP is claimed, fulfil the conditions for it being subject to LPP.

23. If there is a dispute during a search between a Commission officer and a person on the search premises as to whether any electronic document or information is subject to LPP, the digital storage device containing the disputed document or information will be placed in a bag or container and dealt with in accordance with the Commission's Guidance Note on '*Investigation Powers of the Competition Commission and Legal Professional Privilege*'.¹¹

24. In accordance with established case law in Hong Kong, the Commission does not accept blanket LPP claims. Where a party (or its lawyers) attempts to assert a blanket LPP claim, it is the Commission's practice to ask for the party to provide a limited waiver to the Commission for the purpose of allowing the Commission and the party concerned to conduct a "side by side" review of the documents concerned. This will enable issues of relevance and whether or not a particular document is actually legally privileged to be

¹¹ Available on the Commission's website at https://www.compcomm.hk/en/legislation_guidance/guidance/other/other_guidance.html.

reviewed and determined simultaneously in so reducing the time and costs which may otherwise be required to deal with a blanket LPP claim.

25. Section 46 of the Ordinance provides that a person is not excused from providing any information or document to the Commission under its investigative powers where an obligation of confidence is owed to any other person. Where it is possible to do so, after the search on the premises, any part or parts of any document or information copied or taken possession of that may be considered to be confidential may be drawn to the attention of the Commission officers conducting the search. A written explanation as to why such electronic document or information (or parts thereof) should be treated as confidential should also be provided.

26. Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to or obtained by the Commission.

3. Section 2: Requests for Information (RFIs) – Limits and Effectiveness

27. Where a formal Part 3 Investigation has been opened (i.e the reasonable cause to suspect threshold has been met) the Commission has powers under section 41 of the Ordinance to require the provision of information including documents.

28. Section 41 of the Ordinance applies to any person who has or may have possession or control of documents or information or may otherwise be able to assist in relation to a matter that constitutes or may constitute a contravention of the Ordinance. The Commission is therefore able to send compulsory RFIs to third parties. The Ordinance provides that a person (which would include third parties) is not excused from providing information or documents to the Commission on ground of confidentiality owed to other persons. To reinforce this, when a party is required to provide the Commission information or documents in respect of which they have an obligation of confidence they are not liable for a breach of that obligation in providing the information to the Commission¹². Notwithstanding this, protections for legal privilege will still apply and the Commission's use of a compulsory RFI is a judicially reviewable decision.

29. While the Commission uses compulsory RFIs frequently and generally find them effective there are a number of limitations and areas where the Commission hopes to improve their effectiveness.

3.1. Self-incrimination and use of answers received following compulsory RFIs

30. Under Section 45(1) of the Ordinance, a person is not excused from (a) giving any explanation or further particulars about a document; or (b) from answering any questions in response to the Commission's section 41 and 42 requests, on the grounds that such answer might expose the person to proceedings for pecuniary and financial penalties¹³

¹² See section 46 of the Ordinance.

¹³ Unlike pecuniary penalties (which are imposed on parties that contravene the first and second conduct rule and the merger rule or is involved in a contravention of the first and second conduct rule), sections 168 and 169 of the Ordinance also provides for the imposition of "financial penalties" on any person that unlawfully attempts to indemnify another person from the paying of any

under the Ordinance, or any other criminal proceedings¹⁴). Section 45(1) therefore, in effect, expressly abrogates the privilege against self-incrimination for those persons who are compelled to answer any questions posed to them by the Commission under its section 41 and 42 powers.

31. Balancing the express abrogation of the privilege against self-incrimination in section 45(1) of the Ordinance, section 45(2) of the Ordinance provides that no statement made by a person in (a) giving any explanation or further particulars above a document; or (b) answering any questions pursuant to a section 41 or 42 request, is admissible against that person in relation to proceedings for pecuniary and financial penalties under the Ordinance, or any other criminal proceedings (save, again, for the three types of criminal offenses as is specifically provided for in section 45(3)(b) of the Ordinance).

32. In this regard, section 45 renders the *whole* of the statement inadmissible against its maker (and not just those portions of the statement that may be regarded as being incriminating upon judicial determination).

33. The result is that while section 45 enhances the ability of the Commission to demand comprehensive responses to its compulsory RFIs, the Commission may not be able to then rely on those responses when bringing pecuniary penalty proceedings before the Tribunal against the maker of the relevant statement.

34. The Commission has considered addressing this issue in a number of ways. For example:

- Use of voluntary request for information - where information is provided voluntarily to the Commission there is no restriction on its use in subsequent enforcement proceedings. This is most relevant where the information or explanation sought is factual and in no ways incriminatory. The obvious downside is that parties are under no obligation to respond to a voluntary request. The Ordinance also does not specifically provide for voluntary RFIs and does not itself impose specific sanctions for provision of false or misleading information as is the case with compulsory RFIs¹⁵.
- Rely on requests for documents – many of the Commission’s compulsory RFIs will be seeking existing documents and therefore the issue of admissibility before the Tribunal does not apply. Where the Commission requires information that is not typically set out by companies in pre-existing documents it may be possible for it to be recreated from those documents which the company has provided. This process may not always be possible and could impose a significant burden on the Commission.

pecuniary penalty or costs that might be incurred by him/her in defending certain specified actions under section 168(1)(b) of the Ordinance.

¹⁴ This is save for the three types of criminal offenses as is specifically provided for in section 45(3)(b) of the Ordinance. These are the offence of (1) providing false or misleading documents or information to the Commission during the course of the Commission’s investigation; (2) perjury as specifically provided for under the Crimes Ordinance of Hong Kong; and (3) perjury generally.

¹⁵ Although other offenses may apply.

35. The Commission does not adopt a single approach but rather considers what combination of approaches works best in any one case.

3.2. Sanctions

36. Although there are no criminal sanctions for a contravention of the conduct rules themselves the Ordinance creates several criminal offences in respect of how parties respond to the use of the Commission's investigatory powers.

- Failure to comply with a compulsory RFI is an offence with a maximum penalty of HK\$200,000¹⁶ and 1 year imprisonment;
- Intentionally or recklessly destroying or falsifying documents required to be produced in a compulsory RFI is an offence with a maximum penalty of HK\$1,000,000¹⁷ and 2 years imprisonment;
- Knowingly or recklessly providing documents or information that is false or misleading in a material particular with a maximum penalty of HK\$1,000,000¹⁸ and 2 years imprisonment.

37. The Commission believes that such sanctions are sufficiently severe to act as a deterrent for non-compliance. However the fact that it is a criminal sanction which would be prosecuted by Hong Kong Department of Justice rather than the Commission makes it harder for the Commission to impose any sanction.

3.3. Limitations to the use of information collected in the context of a previous separate investigation

38. The Commission's position expressed in its Investigation Guideline is that information obtained by the Commission in one matter may be used by the Commission in another matter. For this reason the Commission resists conditions being applied by the supplier of documents to the use that can be made of them. This has not raised any significant issues for the Commission.

3.4. Provision of excessively large volumes of data in response to an RFI

39. Care is taken in drafting RFIs, whether or not they are compulsory, to ensure the scope of the information requested is clearly defined and to avoid the risk of being provided with an unmanageably large volume of data. To date this has been successful.

4. Section 3: Due Process in relation to Evidence Gathering

4.1. Investigative powers – section 42 interviews

40. As discussed in previous paragraphs, the Commission may exercise certain compulsory investigative powers in the course of its investigations. Under section 42, the

¹⁶ This is currently approximately US\$25,500

¹⁷ This is currently approximately US\$127,600

¹⁸ This is currently approximately US\$127,600

Commission may also, via a section 42 notice, request any individual or entity to answer questions in a compulsory interview. Section 42 interview is one of the primary investigative tools used by the Commission for evidence gathering. An individual may be subject to criminal sanction for failing to attend to a section 42 interview without reasonable excuse. It is also a criminal offence for an individual to provide false or misleading information during a section 42 interview¹⁹. A section 42 interview will generally be audio recorded and the recordings may be used as evidence in future proceedings.

41. Section 45(1) of the Ordinance is also applicable to compulsory interviews conducted under section 42 of the Ordinance and, as such, no person is excused from answering any questions posed to it on the grounds that it might expose him/her to proceedings for pecuniary and financial penalties under the Ordinance, or any other criminal proceedings (save for the three types of criminal offenses as is specifically provided for in section 45(3)(b) of the Ordinance). Like the protection that is afforded to a recipient of a section 41 notice (which is set out from paragraph 30 above), the statutory protection with regards to the use of the statement as set out in section 45(2) of the Ordinance is also applicable to a person giving a compulsory statement in a section 42 interview.

42. The nature and extent of the following two points has recently been considered by the Competition Tribunal in *Competition Commission v Nutanix Hong Kong Ltd (No. 2) [2017] 5 HKLRD 712.*:

- Section 45 of the Ordinance protects those individuals that are answering questions posed to them under section 42 of the Ordinance; and
- An employer may or may not benefit from the statutory protections as set out in section 45(2) of the Ordinance where its employee is the person giving the answer to the Commission under compulsion.

43. In *Nutanix*, the Commission alleges that the five respondents in the case had engaged in bid-rigging in response to an invitation to tender for the supply and installation of IT server systems. During the Commission's investigation, employees from two of the respondents, Nutanix Hong Kong Ltd ("Nutanix HK") and BT Hong Kong Ltd ("BT HK"), were required to provide statements to the Commission pursuant to Section 42 interviews. During enforcement proceedings before the Tribunal, Nutanix HK and BT HK sought to strike out any references to these employees' statements in the Commission's case against them on the grounds that, as the employer of these relevant individuals, they too can benefit from the protection from self-incrimination contained in section 45(2) of the Ordinance.

44. It was the argument of both of the respondents in that case that as the Commission was seeking to attribute the act of the individual employee as being the act of their employers for the purpose of establishing bid-rigging, the answers given by those individuals under section 42 of the Ordinance must also be regarded as the answers of their employers. Accordingly, the protection afforded under section 45(2) must apply equally to the employer undertaking as well as the employee itself as otherwise the employer's privilege against self-incrimination would be abrogated "through the back door" since the Commission can always choose to compel the employees to give section 42 statements to the Commission instead of the employer.

¹⁹ Refer to section 55 of the Ordinance.

45. Agreeing with the submissions of the Commission, the Competition Tribunal held, *inter alia*, that:

- The legislative intent of section 45 of the Ordinance is to only limit the beneficiary of the “direct use prohibition” in section 45(2) of the Ordinance to the “subject of the compulsion” (i.e. the person required by the section 42 notice to attend and answer questions); and
- Accordingly, employers of the person that are subject to a section 42 notice to attend and answer questions under compulsion may not benefit from the “direct use prohibition” under section 45(2) of the Ordinance where such persons are being compelled to answer questions in their personal capacity.

46. This may be distinguished from situations where a corporate entity is, in its own right, compelled to attend interview with the Commission pursuant to section 42 of the Ordinance and where a proper officer of the corporate entity is being asked questions and expected to answer for and on behalf of the corporate entity (although this very point has yet to be tested before the Tribunal).

47. While noting that the Tribunal only has the equivalent status as the Court of First Instance, the judgment in *Nutanix* has provided useful and persuasive guidance as to how a limited abrogation of an individual’s privilege against self-incrimination in the context of the Commission’s compulsory investigative powers may interact with principles of Hong Kong’s competition law (which, as set out at paragraph 1 above, contains many similarities with the EU regime).

48. The practical takeaway herein may go to the importance of the capacity in which an individual has received a Section 42 notice, affirming the Commission’s general practice of issuing section 42 notices to individual employees in their personal capacity when conducting compulsory interviews (as opposed to issuing the notice to the undertakings themselves requiring them to attend the compulsory interview through its proper officer).