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Alternatives to Leniency Programmes – Contribution from Hong Kong, China

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

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Alternatives to Leniency Programmes

- Contribution from Hong Kong, China -

1. Introduction

1. In this paper the Hong Kong Competition Commission (**HKCC**) provide a perspective from a relatively new competition authority. It starts by setting out why, when a new competition regime is introduced, the competition authority is unlikely to immediately be able to rely on leniency to detect many cases. This therefore required HKCC to adopt a strategy of cartel detection which did not rely on leniency, at least during the first few years of enforcement. In essence, during the initial phase of enforcement, the HKCC strategy consisted of helping businesses, trade associations, government officials and the public understand what to look out for which might indicate they had become a victim of cartel conduct and encourage them to make a complaint to the HKCC. That is we adopted a complaints-driven approach to detecting cartels. While "unsophisticated" in comparison to more data led approach – the HKCC's approach was reasonably successful. More recently we have brought cases based on use of data screens. The interaction between a complaints driven approach, data analysis and leniency are explored in more detail below.

2. This focus during our early years of enforcement on non-leniency approaches to detecting cartel should not be interpreted as the HKCC viewing leniency as not an essential means of cartel detection. Simply the fact that we believe in order for leniency to be effective it need to be accompanied by a genuine threat that cartel conduct will be uncovered without a leniency applicant.

2. Why the HKCC was not able to rely on leniency to detect cartel conduct during the first years of enforcement

3. The HKCC has in place a strong leniency policy which reflects international best practice. It provides complete immunity (including from local private actions) of the first person reporting a previously unknown cartel, it is predictable and has appropriate protections for confidentiality.[1] Despite this most of the cases HKCC has brought since competition law came into effect at the end of 2015 have **not** involved leniency applicants. We do not consider this to be a sign of weakness in the leniency policy, but rather a consequence that the willingness of cartel participants to seek leniency is not merely a product of the strength of a leniency policy. We consider other factors to play a more significant role.

a) First, it may not be clear how effective a new competition authority will be at detecting cartels. In addition, cartelists may either not take into account, or assume a very low possibility, that one of their members decide to seek leniency. If an authority is not yet demonstrated it is effective at detecting cartels, and perceived

[1] The HKCC's leniency policy for undertakings is available at www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Undertakings_E.pdf . For an academic review of the HKCC's leniency policy see Sandra Marco Colino's February 2021 paper Hong Kong's Revised Leniency Policy and Its Potential to Deter Cartels

to be unlikely to receive leniency applications, this will in turn reduce the driving force for cartel members to seek leniency.

b) Second, the key benefit of leniency is avoiding a penalty. During the early years of enforcement, it may be very difficult for cartel members to access their likely penalty or other punishment if they do not benefit from leniency. This issue is possibly heightened in a prosecutorial system where decisions on penalty are ultimately for the courts and therefore it is harder for the competition authority to publish, at the outset, a fining methodology.

c) Third, while a written policy might give clear assurances a company (and its lawyers) may feel hesitant about seeking leniency where they would be the first to do so.

4. Therefore, during the first several years of enforcing competition law the HKCC's approach was to (a) put in place the building blocks of a leniency policy that would *in time* become effective; but (b) assume until then cartels would have to be detected without relying on leniency.

5. This assumption has been consistent with experience. HKCC brought its first case based on a successful leniency applicant in 2020 (approximately four years after our competition law came into full effect).[2] Since then there has been a steady increase in the number of leniency applicants as people can easily see that very significant penalties are imposed on cartel members who did not seek leniency while the cartel member who did will be seen to have benefited hugely from doing so. These cases have acted as a catalyst for those involved in other cartels to seek leniency.

3. A cartel detection strategy when cartelist do not (yet) have a clear incentive to seek leniency

6. HKCC's strategy for detecting cartels at the time competition law came into force included the following elements:

a) Complaint driven

b) Invest in, and be creative with, public awareness initiatives

c) Take time to talk to businesses and trade associations

d) Educate lawyers, accountants and other intermediaries

e) Persuade and equip procurers to be bid-rigging detectors

f) Partner with other public bodies including those with law enforcement powers

g) Study certain sectors with a heightened possibility of cartel conduct

7. This strategy was not based on sophisticated tool or expertise but it proved reasonably effective at helping the HKCC detect cartel conduct. In terms of resource requirement, it was not only mobilized the internal resource but also the external to achieve such purposes. It also had a dual purpose of encouraging competition law compliance.

8. Each of these elements is discussed, briefly, below.

2 https://www.compcomm.hk/en/media/press/files/20200122_ENG_PR_Competition_Commission_takes_IT_cartel_conduct_case_to_Competition_Tribunal.pdf

3.1. Complaint driven

9. Before Competition Law came into force, the HKCC issued a Guideline on Complaints.[3] In the first 5 year of enforcement of competition law the HKCC received approximately 4500 complaints. Most of these were received by phone (40.9%) and a smaller number by e-mail or online form (25.4% and 22.7% respectively).[4] Each complaint is assessed on its own merits and given a recommendation as to appropriate further action for the Executives to determine whether to escalate the case to a full investigation. In addition to individual assessment, all complaints are categorized and tagged so that patterns across numerous complaints can be detected.

10. Of the HKCC's first 14 cases 12 cases were initiated following complaints. Most complaints were received from members of the public but a disproportionate number of those which were subsequently turned into full investigations were initiated by businesses.

11. One issue with encouraging and prioritising complaints is that a significant percentage of complaints will be misdirected or incoherent. Another issue was that where complaints did raise a possible competition concern, they often lacked sufficient evidence to meet the HKCC's threshold to launch a formal investigation. However, even where complaints did not lead to an investigation, let alone effective enforcement action, they could be used to give a general indication of where the public and business community had competition concerns.

3.2. Invest in, and be creative with, public awareness initiatives

12. A competition authority, particularly a new one, cannot expect members of the public or business community to make relevant complaints if they are not aware of what competition law is and what to do if they believe it has been broken.

13. The HKCC invested in multifaceted public awareness campaigns both to allow a complaints driven approach to cartel detection as well as encourage compliance. Since 2016 the HKCC public awareness initiatives have included:

- A television docudrama series
- Micro-movies and television announcements
- Outdoor and online advertising
- Social media promotions
- Roving exhibitions

14. The awareness campaigns primarily focused on cartel conduct (price fixing, market sharing, bid rigging) represented by the HKCC's corporate mascots "cheating cats".

15. The publicity efforts have been effective in raising community awareness of suspected anti-competitive conduct, resulting in a substantial increase in the volume of complaints and enquiries characterised by an escalating level of depth and sophistication. For instance, there was a notable 25% increase in the number of complaints received on market sharing during the two months following the campaign launch, compared to the two

3 www.compcomm.hk/en/legislation_guidance/guidance/complaints/files/Guideline_Complaints_Eng.pdf

4 The remaining 11% are "other" i.e. fax, walk-in or through a referral.

months prior. The surge in complaints brought suspected cartel conduct to the attention of the HKCC and two more market sharing cases were filed subsequently.

3.3. Take time to talk to businesses and trade associations

16. Alongside public facing awareness initiatives, the HKCC actively participates in an average of 54 seminars and meetings each year, reaching out to over 5,300 representatives of businesses, industry associations and members of the public annually since the full implementation of the Competition Ordinance. We have also hosted a number of more detailed roundtable discussion on particular themes (e.g. procurement, HR etc.).

17. Our first case involving bid-rigging – arose from the audience member of one such seminar realizing that their organisation had recently received suspicious tenders.

18. We also initiated a specific trade association campaign which had the dual purpose of (a) ensuring that trade associations did not adopt measures which conflicted with competition law; and (b) encouraging trade associations to disseminate key information about competition law, and its application, to their members.

19. In addition to seminars the HKCC also published a detailed guideline on the application of competition law to anti-competitive agreements[5] as well as much shorter summaries of the key points.[6]

3.4. Educate lawyers, accountants and other intermediaries

20. The HKCC runs more detailed training for lawyers, accountants and other intermediaries delivered by its staff as well as its NGAs on the application of competition law. The course is 12 hours of live teaching. This goes into greater detail than the seminars for businesses. This is again intended to increase compliance but also includes sessions on detection of anti-competitive conduct and what to do if you, or the business you advise, may be a victim of cartel conduct.

3.5. Persuade and equip procurers to be bid-rigging detectors

21. The HKCC has worked to build relationship with the public sector procurement community as well as representatives of private sector procurers. This is in part to encourage them to adopt pro-competitive measures (for example use of non-collusion clauses, and removing unnecessary thresholds) but also to help them identify red-flags in procurements.

22. For example, we have brought together Government officials responsible for procurement in an extended briefing session to understand their concerns, train them and build a relationship of trust. As a direct result of this work we have received several enquiries and complaints which have led to further investigatory steps.

23. We discuss below use of data to detect bid-rigging, but this should not over shadow the potential for recipients of tenders to raise suspicious without the application of more

[5] www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf

[6] Combat Price Fixing Cartels. https://www.compcomm.hk/en/media/reports_publications/files/Price_Fixing_Brochure_ENG.pdf

sophisticated tools. It is, however, necessary to provide training and encourage people to come forward with such suspicions.

3.6. Partner with other public bodies including those with law enforcement powers

24. In addition to working with procurers on bid-rigging. The Commission has worked closely with other public bodies including those with law enforcement powers or a specific regulatory remit, in order to develop potential cases. This includes financial regulators as well as police. By way of example, earlier this year the HKCC conducted a joint operation with the Hong Kong Police Force in relation to suspicious activities at the Aberdeen Wholesale Fish Market codenamed "White Whale". This targeted suspicious conduct related to, market sharing, output limitation and a possible group boycott among wholesalers in the fish market. The involvement of the police is indicative that market participants may have been engaged in conduct that falls outside of competition law but is nevertheless unlawful.

25. The reason to prioritise this form of engagement is because cartel conducts may sometimes be accompanied with other criminal offences, like bribery, financial misconduct, forgery, intimidation, gang affiliation etc. By enhancing other law enforcement authority's awareness of competition law this provides an additional channel to generate new cases.

3.7. Study certain sectors with a heightened possibility of cartel conduct

26. Where complaints and other forms of intelligence indicated a sector which appeared to have a heightened risk of cartel conduct the HKCC conducted a more detailed study. This was sometime published. An example of this is the May 2016 Report on study into aspects of the market for residential building renovation and maintenance[7]. This had a dual purpose of encouraging anyone engaged in cartel conduct in the sector to appreciate an increased likelihood of being detected and therefore seek leniency but also helped us build a case for an investigation and subsequent enforcement.

4. More recent use of data to detect cartel conduct

27. The HKCC recognizes that data screening is an increasingly important tool for the detection of bid-rigging. The key limiting factor to the use of data screening techniques to detect bid-rigging is not a lack of technical expertise. It is difficulty getting access to the necessary data. The HKCC has therefore been building on its ongoing outreach to those working in public sector procurement to encourage them to share not simply suspicious procurement data but all their procurement data.

28. Recently the HKCC worked with a statutory body tasked to promote Hong Kong enterprises' productivity – to build sufficient trust for that body to share data they had gathered on a Covid measure. Specifically a funding scheme launched by the Hong Kong Government to support local enterprises to adopt various IT solutions[8] (such as for online order taking and delivery, self-service system, digital payment, online/ cloud-based financial management system) to continue with their business during the epidemic. This

[7] www.compcomm.hk/en/media/reports_publications/files/Report_on_market_study.pdf

[8] In total, 12 IT solution categories (details: https://bee.hkpc.org/funding-schemes/dbiz/?tab=eligibility)

funding scheme involves a large sum of public monies of HKD 1.9 billion (~ USD 250 million).

29. The focus of the exercise was not on procurement of the statutory body's own goods and services – but on procurement of IT services by the recipients of funding it distributed. The statutory body provided a set of data that stores all application details. The dataset contains information of more than 13,000 applications with quotations submitted by more than 5,000 Service Providers.

30. Using this data the HKCC applied several different screens to identify the most suspicious bidding patterns. This work was undertaking by the HKCC's Economic Team (consisting of three members). This produced approximately 100 bidding processes with interrelated parties the HKCC's investigators could narrow in on – which revealed clear signs of bid-rigging. This was sufficient for the investigators to get a search warrant which revealed further incriminating evidence.

31. The HKCC hopes to strengthen its capability with respect to the use of data to detect bid-rigging. But its primary focus is building trust with public bodies not simply so that they provide us with data but also to allow us to equip their staff to detect bid-rigging themselves.

5. Conclusion

32. The HKCC's enforcement experience encompasses a period in which leniency was not a primary driver for the detection of cartels. During the initial phase of implementation, the HKCC had to look to other sources for cases. More recently the Commission has seen an upswing in leniency cases and hopes that to continue. This upswing is based on cartelists appreciating both that they risk detection alongside a heavy penalty and that use of the HKCC's leniency policy provides an attractive alternative. Even as we receive increasing numbers of leniency applications we expect to also rely on our traditional approach to detecting cartels as well develop more data heavy approaches. All of this is mutually reinforcing.