The Hong Kong Competition Ordinance (Competition Ordinance) went into full implementation on December 14, 2015. Since then, the Hong Kong Competition Commission (Commission) has initiated initial assessment of 111 cases. Among them, only 10 cases have moved into in-depth investigation. In this article, we highlight the first case publicized by the Commission regarding a price-cartel in May and a second case early this year concerning the abuse of dominance in the telecommunications sector. Although the second case falls under the jurisdiction of the sector-specific Broadcasting Ordinance, the underlying issue is, nevertheless, competition law. The decision made by the Court of First Instance set an important precedent in the early history of Hong Kong competition law.

CASE 1: HONG KONG NEWSPAPER HAWKER ASSOCIATION

On May 31, 2016, the Commission made an announcement welcoming the withdrawal by the Hong Kong Newspaper Hawker Association (Newspaper Hawker Association) of a letter sent to its members recommending newspaper hawkers to increase the retail price of certain branded cigarette products as well as a related notice on the Newspaper Hawker Association’s social media platform.

The Commission investigated the said letter and notice by consulting with the Newspaper Hawker Association and specific members, and it was apparent to the Commission that a number of newspaper hawkers were following the price recommended by the Newspaper Hawker Association. The Commission considered that if an association fixes or recommends prices at which its competing members should sell products, the association and its members are likely to be engaging in serious anticompetitive conduct and contravening the Competition Ordinance. The Commission then met with a representative of the Newspaper Hawker Association, following which the Newspaper Hawker Association sent a letter to its members stating that the earlier letter and notice were withdrawn, and reminded its members that they should individually determine the price they charge for the products they sell. Since the Newspaper Hawker Association responded swiftly to rectify its anti-competitive conduct, the Commission proposed not to take any further action in this case.

Under the Competition Ordinance, the First Conduct Rule – in current case the prohibition of price-fixing – applies to both individual companies as well as trade associations. Letters and notices sent within an association or to members of a group could be in violation of the Competition Ordinance, if the object or effect of such letters or notices could be to prevent, restrict, or distort competition in Hong Kong. Companies are advised to consult their competition lawyers when drafting such letters or notices to ensure compliance with the Competition Ordinance.

CASE 2: ABUSE OF DOMINANCE IN COMMUNICATION AUTHORITY V. TELEVISION BROADCASTS LIMITED
On January 29, 2016, the Court of First Instance (Court) handed down a decision quashing the 2013 decision of the Communications Authority (Authority) that Television Broadcasts Limited (TVB) had violated certain anti-competition provisions under the Broadcasting Ordinance (BO) on procedural grounds, while upholding the Authority's analysis of the anti-competitive effect of the conducts of TVB.

The case concerned certain contractual provisions and policies which TVB imposed upon its artistes and singers, which included clauses providing for exclusive appearances on TVB and prohibiting artistes and singers from appearing on other Hong Kong television broadcasters, the “no original voice” policy under which artistes and singers could not use their original voice when appearing for other broadcasters, and the “no Cantonese” policy which forbids artistes and singers from speaking in Cantonese when appearing for other broadcasters. The Authority found these practices to have the purpose and effect of harming competition in the television program service market, violating the competition provisions under the BO.

However, while the Court agreed with the Authority's analysis that the provisions imposed by TVB upon its artistes and singers were anti-competitive, it quashed the Authority’s decision because (1) the hearing procedures of the Authority amounted to infringement of Article 10 of the Hong Kong Bill of Rights, which provides for "the right of hearing by a competent, independent and impartial tribunal established by law," and (2) the remedial measures adopted by the Authority against TVB were disproportionate. In its judgment, the Court gave detailed guidelines regarding the determination of market power of a firm, and decided that it suffices for the Authority to demonstrate that the practices in question have a potential, likely anti-competitive effect, as opposed to an actual effect, for the purpose of proving that they have the effect of harming competition in the relevant market.

With the full commencement of the Competition Ordinance, the competition provisions under the BO were replaced by the Competition Ordinance. Businesses with a substantial degree of market power are prohibited from abusing that power to harm competition. This is defined as the “Second Conduct Rule” under the Competition Ordinance. Apart from the guidance in respect to the procedural constitutionality, the Court’s recent decision serves as an important judicial precedent of Hong Kong in the application of the Second Conduct Rule of the Competition Ordinance, particularly in the determination of the relevant market, market power and the harm to competition in the relevant market.

View PDF

RELATED PROFESSIONALS

Jingwen Zhu
Registered Foreign Lawyer
Hong Kong
+852 2292 2032

© 2019 Winston & Strawn LLP