

Individuals under the Competition Ordinance

Lingnan Competition Policy Forum

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A warm welcome to Hong Kong...

Our Competition Commission is pushing this one, very bad, idea

But let's hear no more talk of prison from you, Mr Snyder. If that's your line, then go back home.

'If the commission fishes for big fish all we will get is huge legal bills and multiyear delays in negligible outcomes as our regulators are stalled by obstructionist corporate lawyers. Is it really worth it?'

Natural persons



Persons problem

- > CO cross refers to Cap 1 - person includes a natural person
- > CO then uses “person” inconsistently throughout, e.g.
 - > “*Person not obliged to make a commitment*” in an Infringement Notice (s.68 CO) BUT
 - > Infringement Notices are only for a contravention of the FCR i.e. undertakings
- > Result of **(inconsistent) fusing**
 - > substantive sections (EU/UK)
 - > procedural sections (Aus/Nz)

Rights and Protections



Key protections for natural persons

- > **Privilege Against Self incrimination**
 - > (Ex)employees subject to s41 notices and s42 interviews
 - > Tribunal has confirmed these are natural persons and not the undertaking under investigation
 - > Right of self-incrimination applies only to the employee as a natural person
- > **Employees are protected from their employers if they assist the Commission**
 - > terminate or threaten to terminate the employment of that employee;
 - > discriminate in any way against that employee;
 - > intimidate or harass that employee; or
 - > cause that employee any injury, loss or damage.

Sanctions

Sanctions against natural persons under the CO

- > **Director Disqualification Orders** (and criminal sanction for breach of a DDO)
- > Criminal Offences (including imprisonment) in relation to Commission's investigations
 - > **Failure to comply with s41, s42 or request during a dawn raid**
 - > **Destroying documents or providing misleading information**
 - > **Obstructing a dawn raid**
- > **Obstruction of 'specified persons'** in their functions under the CO
- > **Provision of false information** "in any representation" to the Commission
- > **Tribunal prohibition order** from leaving Hong Kong (and contravening a prohibition order)
- > **Commission staff** and specified persons **breaching confidentiality**



Can individuals be subject to a pecuniary penalty?

HKCC now appears to assume this is a possibility

- > CO is not internally consistent – reliance for this is placed on select provisions e.g. leniency
- > **Undertakings are subject to the 10% cap – are natural persons?**
 - > HKCC has stated (in passing) in the Tribunal that natural persons are likely to be subject to the same cap i.e. 10% of the relevant undertaking's turnover
 - > Can that be correct? Proportionality, principle of individual responsibility
- > If there is no cap on natural persons:
 - > Is it **compatible with HKBOR/Basic Law?**
 - > Unlimited fine points further to the **criminal nature of proceedings**
 - > Full circle – **is a pecuniary penalty even possible against natural persons** – why are individuals being treated differently than undertakings?



Should individuals be subject to a pecuniary penalty?

- > **Dubious legislative intent – Government made no mention of this and LegCo debates lack discussion**
 - > *“The objective of the Bill is to prohibit and deter ‘undertakings’ in all sectors from adopting abusive or other anti-competitive conduct which has the object or effect of preventing”*
 - > HKCC was curiously discrete on the issue of pecuniary penalties against individuals natural persons during legislative scrutiny of the Guidelines or prior to full enactment of the CO
- > **CO’s drafting was an incomplete copy paste – can that be a basis for potentially significant penalties?**
 - > *“Person”* is used in Australia/New Zealand – and includes a *“Corporation”*
 - > But in Australia and New Zealand, there are different caps for a pecuniary penalty for corporations and persons who are not corporations
- > **Policy questions**
 - > Deterrence? – is jail time the solution – amendments to the CO would be needed
 - > Too soon? – Commission has yet to use range of existing tools (IN, WN, Commitments...)

Watch this space...

- > Enforcement outcomes to date
 - > Trade Associations
 - > Press Release regarding 1 trade association
 - > 2 cases pending before the Tribunal against 15 alleged undertakings.
- > Government review of the CO expected to begin in 2018
 - > Time to clarify the law on individual sanctions?
 - > HKCC's use of existing enforcement tools – where are the WN, IN and Commitments?
 - > Remove the bar to private actions?
 - > Imprisonment is unlikely issue