



香港建築業物料聯會有限公司

HONG KONG CONSTRUCTION MATERIALS
ASSOCIATION LIMITED



HUGILL & IP
SOLICITORS

Webinar on Competition Law with Industry focus on Construction Materials and Related Sectors

Details:

Topic: Competition Law with Industry focus on
Construction Materials and Related Sectors

Date: 10 November 2020 (Tuesday)

Time: 3:00 pm – 4:30 pm (HKT)

Language: Cantonese (with supporting
presentation in English)

Fee: Free of Charge

Format: Webinar via Microsoft Teams



Profile of Hugill & Ip Solicitors

Independent law firm in Hong Kong providing bespoke legal services and exceptional client service to individuals, families, entrepreneurs and businesses, locally and internationally.

Its solicitors have achieved outstanding results in recent editions of the most reputable global and regional legal rankings.

They are able to meet clients' legal needs, whether they are related to dispute resolution, commercial litigation, commercial or corporate transactions, employment and immigration issues, wealth management or family disputes.



Ms. Jade Tang
Partner of Hugill & Ip Solicitors

Jade Tang advises companies about corporate and commercial issues (Joint Ventures, Mergers & Acquisitions, private equity funds), including the compliance and governance aspects of business. She also deals with employment and immigration matters related to companies doing business in Greater China and the Asia Pacific region.



Mr. Kenneth Lee
Andrew Liao S.C.'s Chambers

Kenneth Lee has a broad ranging civil practice, with a particular emphasis on competition law.

During the short history of competition law enforcement in Hong Kong (since 14 December 2015), he has acted in a number of competition law litigations (both public enforcement and private civil actions) before the Competition Tribunal. He also advises on matters involving investigation brought by the Competition Commission.

Kenneth is a member of the Competition Law Committee of the Hong Kong Bar Association. Kenneth is also an editor of KnowCompetition™, a Hong Kong competition law blog founded in 2020.

Kenneth sat as a Deputy District Judge in 2015 and 2016, and a Temporary Deputy Registrar of the High Court in 2020.



Mr. William Tse
Andrew Liao S.C.'s Chambers

William Tse has a predominantly intellectual property practice and a growing competition law practice. His experience in competition law includes acting in *Taching Petroleum Company Ltd v Meyer Aluminium Ltd* (CTA 1/2018); *Shell v Meyer Aluminium Ltd* (CTA 2/2018) and *Competition Commission v T.H. Lee Book Company Limited & Ors* (CTEA 2/2020) before the Competition Tribunal. William also advises on matters involving investigation brought by the Competition Commission.



What does the Construction Materials Industry need to know about Competition Law?



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Overview

1. Hong Kong Competition Law Enforcement Regime
2. Examples of Prohibited Conducts
3. Hypothetical scenarios

1. Hong Kong Competition Law Enforcement Regime

- **First Conduct Rule** – prohibits agreements, concerted practices or decisions of association of undertakings that has the object or effect of harming competition in Hong Kong.
- **Second Conduct Rule** – prohibits undertakings with substantial market power from abusing that power by engaging in conduct that has the object or effect of harming competition in Hong Kong.
- **Merger Rule** – only concerns telecommunication sector

1. Updates on Competition Enforcement Actions

Nutanix & Ors CTEA 1/2017

Background

- bid-rigging: submissions of ‘dummy bids’
- supply and installation of IT server system to YWCA

Status

- 4 out of 5 respondents found to have contravened first conduct rule
- Appeal pending (by some of the respondents and Commission)

1. Updates on Competition Enforcement Actions

W. Hing & Ors CTEA 2/2017

Background

- Market sharing (each allocated 4 floors of each buildings)
- price-fixing (agreed on prices on joint flyer circulated to tenants)
- Public rental housing estate renovation services

Status

- All respondents found to have contravened first conduct rule
- Respondents ordered to pay pecuniary penalty
- Appeal pending (by some of the respondents)

1. Updates on Competition Enforcement Actions

Kam Kwong & Ors CTEA 1/2018

Background

- Market sharing; price fixing
- Subsidized housing estate renovation services

Status

- 3 out of 5 respondents admitted liability
- Ongoing

1. Updates on Competition Enforcement Actions

Fungs E&M & Ors CTEA 1/2019

Background

- Market sharing, price fixing
- Public rental housing estate renovation services

Status

- All respondents admitted liability
- Disqualification of a Respondent (a director) for 22 months

1. Updates on Competition Enforcement Actions

Quantr & Or CTEA 1/2020

Background

- Price fixing and exchange of competitively sensitive information
- Ocean Park workflow automation project

Status

- All respondents admitted liability
- A respondent ordered to pay pecuniary penalty
- Further proceedings stayed upon compliance with Tribunal's order

1. Updates on Competition Enforcement Actions

T.H. Lee & Ors CTEA 2/2020

Background

- Price fixing, marketing sharing and/or bid-rigging
- Supply of textbooks to primary and secondary schools in Hong Kong

Status

- Early stage, ongoing

2. Examples of prohibited conducts

First Conduct Rule:-

1. Price-fixing (合謀定價)
2. Exchange of information (交換資料)

Second Conduct Rule:-

3. Predatory pricing (掠奪性定價)
4. Margin Squeeze (利潤擠壓)

2.1 Price-Fixing 合謀定價

Definition: the direct or indirect of fixing of price

Meaning of price:

-Not only final price

-Includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of products: s.2 Competition Ordinance

Example 1: *Steel Abrasives*

25 May 2016

| No. of cartelists | Industry | Geographical areas of cartel | Conduct | Cartel period | Total fines imposed |
|-------------------|-----------------|------------------------------|---|--|---------------------|
| 5 | Steel Abrasives | EEA- wide | <ol style="list-style-type: none">1. Coordinate the introduction of a uniform calculation model for a common scrap surcharge;2. Introduce energy surcharge;3. Coordinate behaviour with respect to individual customers | 2003-2010 (varies depending on the parties) | €36.9million |

Example 2: *Re Bathroom Fittings and Fixtures Cartel*

23 June 2010

| No. of cartelists | Industry | Geographic areas of cartel | Conduct | Cartel period | Total fines imposed |
|-------------------|--|--|--|---------------|---------------------|
| 17 | Bathroom fittings and fixtures manufacturers | Germany, Austria, Italy, France, Belgium and the Netherlands | <ol style="list-style-type: none"> 1. Coordination of annual price increases; 2. Coordination of price increases on occasion of specific events (such as increase of raw material prices, road toll, introduction of the euro); 3. Fixing of minimum prices and rebates; and 4. exchange of commercially sensitive information | 1992 to 2004 | €622 million |

2.2 Information Exchange 交換資料: what can and cannot be exchanged

| | Problematic | Unlikely to be problematic |
|--|---|---|
| Types of information exchanged | Sensitive data e.g. prices, costs, turnover, sales, etc | e.g. Industry best practices; forecast of future demand |
| Individualised or aggregated and age of data | current and individualised data | Historical, aggregated and anonymised data |
| Frequency of exchange | High frequency likely to facilitate a collusive outcome | N/A |
| Public or non-public information | Private and confidential information | Publicly available information |

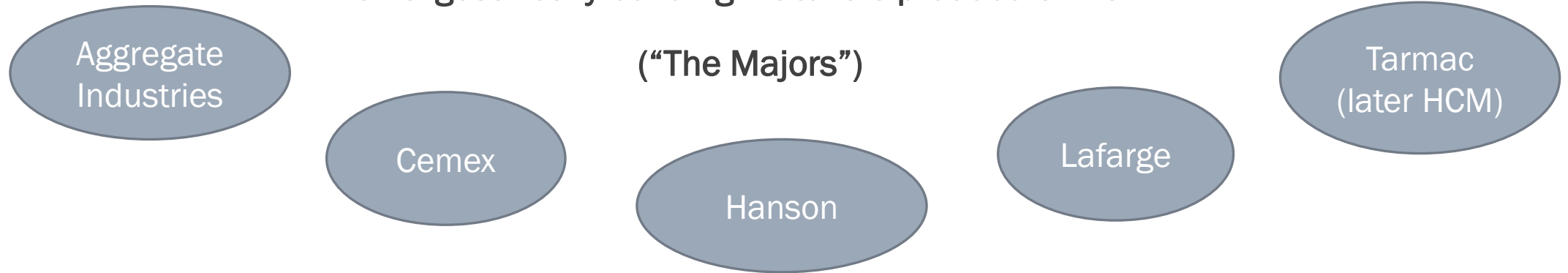
Example 1: *Wirtschaftsvereinigung Stahl* (26 November 1997)

| Undertakings | Information exchange in form of questionnaires | Characteristics of the data |
|---|---|---|
| German steel industry trade association and 16 of its members | <ol style="list-style-type: none">1. data on deliveries by each producer of product in each of EU Member States2. deliveries of steel on national market by product according to qualities and by consumer industry3. deliveries of certain qualities of steel by product in each of the Member State | <ol style="list-style-type: none">1. Individual2. Recent (1 mth old)3. Not available to third parties |

Example 2: UK CMA's Final Report on "Aggregates, cement and ready-mix concrete market investigation"

14 January 2014

5 Largest heavy building materials producers in GB



Vertically integrated: cement and aggregates produced by the Majors are used for their own downstream operations

2.3 Predatory Pricing 掠奪性定價

Definition: when an undertaking with a substantial degree of market power deliberately incurring losses in the short-run by lowering its prices to a level that other suppliers cannot compete and are therefore forced to leave the market. Once the competitors are excluded, the undertaking can then increase their prices to monopoly levels.

Rule 1: prices below average variable cost is *prima facie* abusive subject to legitimate commercial objectives e.g.: (a) genuine promotion offer of limited duration; (b) minimize losses regarding deteriorating products

Rule 2: prices below average total costs but above average variable costs ok unless evidence of predatory strategy

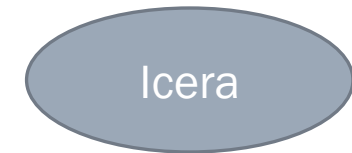
Case AT.39711- Qualcomm

18 July 2019

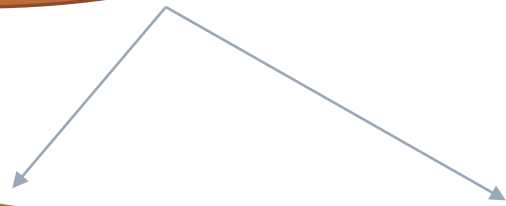
60% market share worldwide for UMTS chipsets



Growing company;
Main competitor of Qualcomm



Key customers



Case AT.39711- Qualcomm

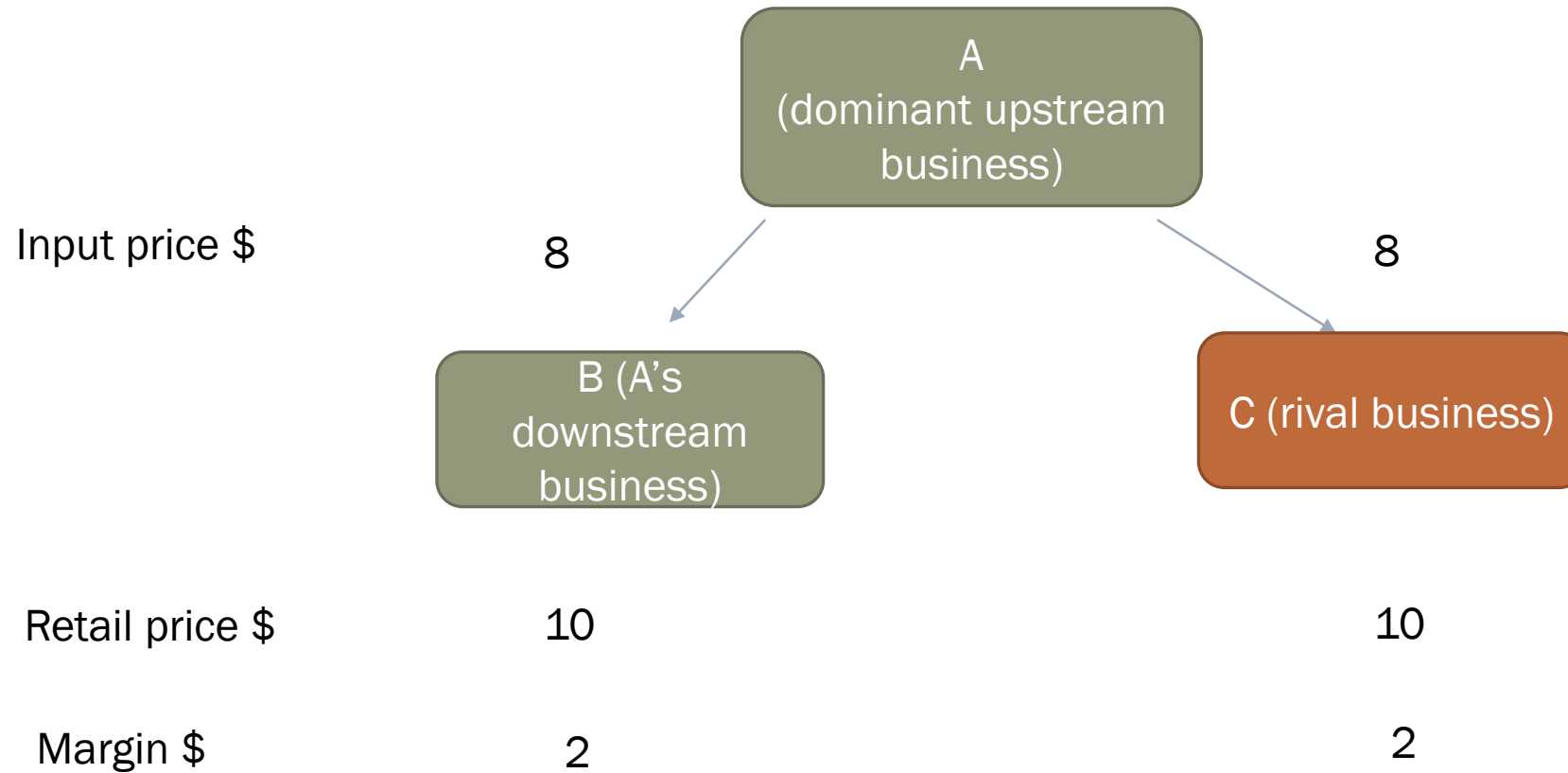
18 July 2019

EU Commission found that:-

- Qualcomm sold certain amounts of these chipsets below ATC and for some sold below AVC.
- Qualcomm internal evidence demonstrates exclusionary intent vis-à-vis Icera.
- no valid objective justification or efficiency defence for its conduct.
- concluded Qualcomm engaged in predatory pricing

EU Commission fined Qualcomm €242 million

2.4 Margin Squeeze 利潤擠壓



Comp/38.784- *Wanadoo Espana v Telefonica* 4 July 2007

Telefónica SA

Rival firm

Wanadoo
Espana

Daughter
company

Telefónica de
España SAU

Comp/38.784- *Wanaddo Espana v Telefonica* 4 July 2007

EU Commission held that the margin squeeze:

1. affected Telefónica's competitors' ability to enter the relevant market and exert a competitive constraint on Telefónica;
2. imposed unsustainable losses on equally efficient competitors: they were either ultimately forced to exit or in any event constrained in their ability to invest and to grow;
3. led to the high level of Spanish retail prices (among (if not) the highest amongst EU-15).

EU Commission fined Telefonica €151,875,000

3. Hypothetical scenarios

Scenario 1:

如果營運商A及或其關聯公司B擁有上游市場相當規模的資源，A除自行在下游市場銷售產品，A及B同時為下游其他競爭者供應產品的關鍵原材料。

若A把原材料對外售價定於一較高水平或定於遠高A及B的內部售價，從而提升自己產品成本競爭力，有否違反競爭條例？

3. Hypothetical scenarios

Scenario 2

如果營運商A及或其關聯公司B擁有上游市場相當規模的資源，A除自行在下游市場銷售產品，A及B同時為下游其他競爭者供應產品的關鍵原材料。

若A根據A及B向其他競爭者銷售原材料的價格，調整自己產品售價至市場最低價，有否違反競爭條例？

3. Hypothetical scenarios

Scenario 3:

若政府或半官方組織推行一些計劃/政策/標準時，一些營運商會因他們現有設施及擁有資源而受惠於該政策。相反，另一些營運商會因缺乏資源及或因政府其他法例 / 政策限制增加設施，而導致競爭力減低。同樣地該政策亦同時提高了行業的入場門檻。上述情況有否違反競爭條例？

3. Hypothetical scenarios

Scenario 4:

若營運商A以低過市場平均價格承接大量供貨項目，導致競爭者接不到訂單 / 做唔到生意，而營運商A再以低價甚至高於訂單價外判給競爭者，上述情況有否違反競爭條例？競爭者可否共同設定行業判上判的最低售價？

3. Hypothetical scenarios

Scenario 5

營運商可否以低於變動成本(材料及運費成本)承接訂單?

Thank You!

The full content of the webinar and the slides are also available online



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