

Insights

HONG KONG SEES THE FIRST DISQUALIFICATION ORDER UNDER ITS COMPETITION ORDINANCE

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SUMMARY

Under the *Competition Ordinance*, the Hong Kong Competition Tribunal (“**Tribunal**”) may, on application by the Competition Commission (“**Commission**”), impose a disqualification order prohibiting a person from being a director, liquidator or provisional liquidator of a company, a receiver or manager of a company’s property, or taking part in the promotion, formation or management of a company.

The disqualification order may be for a maximum period of 5 years (*ss 101-103*). This is one of many orders, remedies and penalties the Tribunal is empowered to make in respect of competition law contraventions in Hong Kong.

In *Competition Commission v Fungs E&M Engineering Company Limited & others* [2020] HKCT 9, the Tribunal issued its first disqualification order since the new statutory competition regime came into effect. The Tribunal also discussed the principles, guidelines and factors for determining the length of disqualification orders.

CASE HISTORY

Fungs E&M is the third case concerning the cartel conduct of renovation contractors. The six renovation companies and their three representatives admitted to participating in an agreement to divide and allocate potential customers among themselves, to coordinate the contents and prices of standard decoration packages offered to homeowners, and jointly to produce flyers for such decoration packages.

On 14 October 2020, utilising the *Carecraft* procedure established in *Competition Commission v Kam Kwong Engineering Company Ltd & others* [2020] HKCT 3, the Tribunal held that the six renovation companies had contravened the First Conduct Rule. Under the *Carecraft* procedure, where respondents have admitted their liability for competition law contravention, the parties are

required to submit a statement of agreed facts. The agreed facts form the basis for the Tribunal to determine whether there has been a contravention of a competition rule, whether an order should be made, and if so, on what terms. Details of the *Carecraft* procedure are covered in our case note for *Kam Kwong*, which is available at this [link](#).

The Tribunal's judgment on 14 October 2020 was the second finding against Luen Hop Decoration Engineering Company Limited (the "**Company**"), the 5th Respondent in this case, for competition law contraventions. Previously on 17 May 2019, the Tribunal made a finding against the Company in respect of its cartel conduct concerning another housing estate, On Tat Estate (our case note for that case is available at this [link](#)).

According to the agreed facts, the 9th Respondent was a director of the Company. After the Company had been approved in June 2017 by the Hong Kong Housing Authority to carry out decoration works in a new subsidised housing estate, On Tai Estate, the 9th Respondent handed the project over to the 8th Respondent to manage. In August 2017, the Commission commenced investigations against the Company for its cartel conduct in the On Tat Estate project. Notwithstanding the Commission's investigations, the 9th Respondent did not take any steps to prevent or correct the Company's anti-competitive conduct, including in particular on the On Tai Estate project that was the subject of the present case.

Although the 9th Respondent did not know or directly participate in the Company's cartel conduct, the Tribunal found the 9th Respondent had reasonable grounds to suspect that the Company's conduct constituted a competition law contravention, but that he took no steps to prevent or correct it. The Tribunal held further that in its view the 9th Respondent was unfit to be concerned in the management of a company (*s103*).

PERIOD OF DISQUALIFICATION

Citing authorities concerning similar provisions under the *Securities and Futures Ordinance* and the now-repealed *Securities (Insider Dealing) Ordinance*, the Tribunal discussed the principles, guidelines and factors for determining the length of the disqualification period.

In essence, the objectives in making disqualification orders are (i) to protect the public against future anti-competitive conduct, and (ii) to provide general deterrence to businesses from contravening competition rules.

In determining the appropriate starting point for the disqualification period, the Tribunal adopted the broad-brush approach in *Securities and Futures Commission v Tong Shek Lun & others* [2020] HKCFI 435 and divided cases into three brackets in accordance with the gravity of the contravention:

1. Top bracket of 4 to 5 years for particularly serious cases.

2. Minimum bracket of less than 2 years for relatively less serious cases.
3. Middle bracket of 2 to 3 years for cases of which the severity is between the minimum bracket and the top bracket.

The Tribunal also will take other factors into account in determining the period of disqualification. For guidance, the Tribunal provided an indicative, non-exhaustive list of examples:

- a. Number of shareholders and members of the public impacted by the contravention, and the severity of such impact.
- b. Involvement in other competition law contraventions (*s103(1)(b)*).
- c. Extent and nature of involvement in the contravention.
- d. Any personal gain from the contravention.
- e. Attempts to prevent or correct the contravention.
- f. Admitting liability.
- g. Cooperating or assisting in the Commission's investigations.

Based on the agreed facts, the Tribunal found that the 9th Respondent's case was within the lower end of the middle bracket, and that the two-year period proposed by the Commission was an appropriate starting point. A two-month reduction was applied to reflect the 9th Respondent's early admission of liability, and delays caused by the 1st Respondent's objection to the application of the *Carecraft* procedure and by court closures due to COVID-19.

BCLP PERSPECTIVE

In Hong Kong, the Commission enjoys wide powers to seek disqualification not only of directors but also senior management of a company if their conduct makes them unfit to participate in the management of a company.

As illustrated by *Fungs E&M*, directors and senior management may face disqualification even if they did not actively participate in the competition law contravention. The Competition Ordinance expressly provides that a person may be liable if he should have known that the company's conduct constituted a contravention, or if he fails to act despite having reasonable grounds to suspect the same (*s103(b) and (c)*).

The cases show that, starting from 2018, in each and every case brought before the Tribunal, the Commission has sought disqualification orders, albeit against only one individual in each case. It therefore appears that the Commission is prepared to exercise such statutory power to deter businesses from contravening competition rules.

Accordingly, this case is a timely and important reminder to businesses in Hong Kong regularly to review their procedures and practices and actively monitor their conduct to ensure full compliance with competition law.

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