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“It takes two to collude” – Competition Tribunal rejects first private competition action

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The Competition Tribunal has delivered its judgment in the first private competition action in Hong Kong SAR.

By rejecting the claims of an alleged cartel in the supply of diesel, this judgment cements the importance of claims based on clear factual evidence and avoids private parties making logical leaps through implausible inferences.

It also delivers a clear message that parallel pricing, on its own, is a sign of normal competitive behaviour.

In a strongly worded judgment (see here), the Tribunal rejected allegations that Shell Hong Kong and Taching Petroleum had engaged in a 6-year price fixing arrangement in the supply of diesel. This case stems from a contractual claim by Taching and Shell against Meyer for outstanding debts of unpaid bills of industrial diesel sold to Meyer. Meyer’s defence to the debt claim was to allege that Taching and Shell colluded to fix prices, and raised illegality as a defence to avoid the unpaid bills. The High Court transferred this aspect of the claim to the Competition Tribunal in May 2018, with the 10 day trial taking place earlier this year.

Private competition law actions

Under Hong Kong’s competition law regime, private parties cannot initiate a standalone action alleging a contravention of the Competition Ordinance. The HKCC therefore plays the vital gatekeeper role in investigating and choosing to prosecute actions to address competition concerns.

Private actions permissible under the Competition Ordinance are limited to “follow-on actions” to claim damages where (i) the Tribunal has determined that there was a contravention of the competition rules; or (ii) a person has admitted to a contravention of Competition Ordinance in a commitment accepted by the HKCC.

Notwithstanding the above, private parties can raise a plea of illegality (on the basis of any contravention of the Competition Ordinance) as a defence in civil proceedings. Meyer’s case marks the first (and rather novel) case where civil actions are transformed into competition law proceedings as a result of the illegality defence.

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“Parallel conduct, in itself, cannot constitute proof of concerted practice because it can be the “very essence” of competition”

Tribunal Judgment, paragraph 59

Factual evidence of coordination required to prove collusion

Meyer's allegations against Shell and Taching centred around alleged identical price adjustments by the diesel suppliers in their respective List Prices. This resulted in identical prices charged to Meyer in 118 instances between 2011 and 2017. Meyer's suspicions arose from the non-public nature of the price adjustments, and the similar timing of these adjustments by Shell and Taching.

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Alleged instances of coordinated price adjustments

However, Meyer was not able to provide any convincing factual evidence to support their claims. In particular, there was no evidence indicating any reciprocal contacts or communications between Taching and Shell during the relevant period.

Citing its earlier decision on this case, the Tribunal's position was that parallel pricing in itself is not illegal. If there is no evidence of explicit coordination between competitors, parallel conduct is not proof of competitor coordination unless that collusion constituted **the only plausible explanation.** Therefore, the question that was repeatedly stressed by the Tribunal was – what was the relevant factual evidence?

Alternative plausible explanations?

In this regard, the Tribunal considered that Meyer's claim appeared to be a fishing expedition to establish collusion between the parties. In the absence of any factual evidence, Meyer failed to convince the Tribunal that the only plausible explanation of Shell and Taching's pricing adjustments was a cartel arrangement. This is not surprising, particularly where Shell and Taching successfully demonstrated to the Tribunal various "plausible explanations" as alternative reasons for the similarity of price adjustments.

Among others, Shell described its detailed internal process relating to its price adjustments, which demonstrated to the Tribunal that it made independent pricing decisions and had not coordinated with its competitors. Further, Taching and Shell also argued that the similar adjustments and timing of the adjustments were a result of pressure exerted by their common customer Meyer, which requested them to adjust their prices by disclosing the prices offered by Shell to Taching (and *vice versa*).

Taching and Shell also do not operate at the same level of supply chain. The Tribunal agreed that it was not plausible to argue that Shell, as one of the global oil majors, would have the initiative to fix prices with Taching (which is a local Hong Kong distributor of a much smaller scale). Taching consistently pleaded that its price adjustments were made by referring to the list price provided by its upstream supplier (another global oil major).

While Meyer had attempted to bring in other oil majors as respondents in the case, the Tribunal had rejected such requests in an earlier judgment.

The standard of proof

There was no dispute that Meyer had the burden of proof. The question arose whether Meyer had to prove its allegations beyond reasonable doubt i.e., a criminal standard of proof. That higher standard of proof is required in enforcement actions where the HKCC is the prosecuting agency.

The Tribunal considered that private civil actions should be differentiated from enforcement proceedings initiated by the HKCC. It is therefore more appropriate to adopt the civil standard of proof (i.e., on the balance of probabilities) in such cases.

While the civil standard of proof is applied in this case, the Tribunal recognised the seriousness of cartel offences, and stressed that the application of the standard should be on the basis of strong and convincing evidence. Given that Meyer was solely relying on circumstantial evidence, the burden remained on Meyer to prove that the only plausible explanation of the parallel conduct was collusion.

The Tribunal expressed some measure of discontent with Meyer's pleadings that appeared to be searching for a conclusion without any factual basis. This included the attempt at trial to undermine the credibility of witness evidence from Shell and Taching by "*fishing through cross-examination*". The Tribunal concluded Meyer had failed to even meet a prima facie case of an illegal arrangement.

Expert evidence excluded

A series of economic expert reports were filed by the parties as supporting evidence. Meyer alleged that economic evidence would help fill the factual evidence gap – and would provide the analytical basis to establish that collusion was the only plausible reason behind the price adjustments.

Although the expense and complexity of economic evidence had been undertaken, at Trial, the Tribunal decided to exclude the expert evidence. The Tribunal's blunt assessment was that "**the expert evidence turned out to be wholly unnecessary**".

This was because the Tribunal was able to come to a fully informed decision without hearing the evidence at all. Particularly, it appeared that the expert report prepared by Meyer focused on an assessment relating to the upstream market and competition between oil majors. These were irrelevant given that Taching and Shell competed in a downstream market when supplying diesel to Meyer (and not in the upstream market). The Tribunal also stressed that the market structure (including the lack of transparency) is only background information and could not be used to build up a positive case of explicit (and illegal) coordination between market players.

The Tribunal's scepticism towards such use of expert evidence in cartel cases is unsurprising. The Tribunal had already curtailed the use of economic evidence by Meyer to a number of strictly defined issues in a separate ruling last year.

This serves as a good reminder that economic evidence alone is highly unlikely to be sufficient to prove cartel conduct, even in cases where market players show parallel pricing behaviour. A broader lesson can also be learnt that economic evidence cannot be used to fill the void of a factual case that simply doesn't exist.

"Parallel conduct could be innocent. This can happen when an undertaking adapts its pricing intelligently to its competitors"

Tribunal Judgment, paragraph 61

Key takeaways

This will have been an expensive exercise for Meyer in exploring the contours of the Competition Ordinance. As well as losing its defence to the underlying debt claim, it now faces legal fees and economic expert costs of itself, Shell and Taching.

The Meyer judgment sets an important milestone as the first private action in Hong Kong. The trial process was helpful in that it demonstrated that private parties may be able to deploy competition law arguments as defences in civil proceedings.

However, the case showed there is only a small window for private parties to succeed in establishing an illegality defence based on competition law arguments. The Tribunal rightly adopts a rigorous approach to evidence. Specifically, the Tribunal's guidance on the relevance and use of inferences and economics, points to significant hurdles to satisfy the evidentiary threshold. This is especially so if the alleged conduct relates to secretive cartel behaviour. Unlike the HKCC who has wide mandatory investigation powers, private parties would have limited means to obtain incriminating "smoking gun" factual evidence.

This may also finally seal the lid on the ongoing public discourse relating to alleged price fixing in the petrol sector in Hong Kong. The case lays out the framework that should be adopted going forward when assessing parallel pricing under the Competition Ordinance. Without evidence of explicit coordination, parallel pricing, on its own, is healthy competitive conduct, regardless of the market structure.

Competition law and the illegality defence

Even in established overseas competition law regimes, civil litigants' use of an illegality defence is very limited. Whilst the Tribunal was at pains to leave the door open to potential claims of this type in the future, the message is very clear – **evidence matters**!

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