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GREETINGS FROM THE EDITOR-IN-CHIEF

We are pleased to present this new issue of the International Antitrust Bulletin, 2017 Vol. 2. The issue features articles on recent developments in competition law in the Czech Republic, Hong Kong, India, Mexico and the Netherlands, along with articles on pharmaceutical patent infringement settlements under EU competition law and Latin America merger control practices. As always, the Bulletin also includes *What In The World Did I Miss?* updates on global developments from our expert regional reporters. We welcome your comments and suggestions and invite you proposals for future articles.

Thomas J. Collin
Editor-in-Chief

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Hong Kong Competition Commission's First Legal Action: An Economic Perspective

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Hong Kong passed its first comprehensive competition law (“Competition Ordinance”) in June 2012, and the law came into full effect in December 2015.¹ On March 23, 2017, the Hong Kong Competition Commission (“HKCC”) took its first legal action and filed a complaint against five firms in the information technology (“IT”) industry with the Competition Tribunal.²

The complaint alleges that Nutanix Hong Kong Limited (“Nutanix”), BT Hong Kong Limited (“BT”), SiS International Limited (“SiS”), Innovix Distribution Limited (“Innovix”), and Tech-21 Systems Limited (“Tech-21”) participated in a bid-rigging scheme in connection with a tender conducted by the Young Women’s Christian Association (“YWCA”) in July 2016 for the supply and installation of a “hyper-converged” IT server system based on Nutanix technology, in violation of the First Conduct Rule under the Competition Ordinance.³ According to the Complaint, Nutanix is a supplier of IT hardware and software solutions, including hyper-converged server systems based on a Nutanix software platform.⁴ BT, SiS, Innovix, and Tech-21 are distributors of Nutanix products who sell directly to final customers such as YWCA.

Following a summary of the Complaint’s allegations, this article highlights two particular issues that are noteworthy from an economic perspective. First, the alleged bid-rigging scheme involved a series of “vertical” arrangements between Nutanix and each of the four distributors. Notably, there is no allegation of communication or horizontal agreement among the four distributors. Second, the Complaint has not alleged that the respective arrangements between Nutanix and the four distributors have resulted in competitive harm to YWCA, the ultimate customer.⁵ As such, in accordance with its published guidelines, the HKCC has apparently taken a *per se* approach to conduct involving allegations of bid rigging.⁶

The Complained of Conduct

In June 2016, YWCA invited 12 companies to tender for the supply and installation of a Nutanix hyper-converged server system (“the First Tender”). BT was the only firm that submitted a bid. YWCA’s procurement policies required a minimum of five tenders; thus, in July 2016, YWCA conducted a second tender and invited nine companies to participate (“the Second Tender”).

Nutanix has in place a “deal registration system” under which it offers a reseller a discounted price for being the first to

register a business opportunity with Nutanix. BT registered YWCA as a potential customer with Nutanix, and was entitled to the discount if it supplied a Nutanix server system to YWCA. The Complaint alleges that Nutanix agreed to help BT win the YWCA tender by obtaining four “dummy” bids from certain “friends” of a Nutanix representative. In return, BT provided Nutanix completed tender documents that BT was going to submit to YWCA, including information on BT’s bid price. BT also met with Nutanix to discuss the tender documents, and prepared template tender documents for Nutanix’s “friends” to fill out.

Nutanix then reached out to SiS, Innovix and Tech-21 separately, informing them that there were insufficient bidders for YWCA’s First Tender, and asked each of them to help by submitting a bid in the Second Tender.⁷ Based on the documents provided by BT, Nutanix prepared all the tender documents that would eventually be submitted by SiS, Innovix and Tech-21, including filling in the bid prices in the documents. Nutanix also helped SiS, Innovix and Tech-21 complete and submit their respective tenders to YWCA. Nutanix then informed BT when SiS, Innovix and Tech-21 delivered their respective submissions to YWCA.

According to the Complaint, YWCA received four bids on July 18, 2016, the day of the tender submission deadline, from BT, SiS, Innovix and Tech-21. BT submitted the lowest bid for the core (mandatory) project items, and was the only firm that tendered bids for both the core and optional project items. SiS, Innovix and Tech-21 each tendered a bid for the core project items only. Their tenders were incomplete, each missing information for some of the same required fields.⁸ Further, many responses and typographical errors found in the four submissions were identical, and common edits were made to the original bid forms in all four bids. Three days after the tender deadline, the HKCC received a complaint regarding the YWCA tender; it opened an investigation on July 29, 2016.

“Hub and Spoke” Bid-Rigging Arrangements

The alleged bid-rigging scheme involved separate “vertical” arrangements between Nutanix and, respectively, BT, SiS, Innovix and Tech-21. Specifically, the Complaint has not alleged that any of the four distributors has communicated with another distributor regarding the YWCA tender; nor has it alleged any explicit or implicit (horizontal) agreement or arrangement among the four distributors. Indeed, according to the Complaint, SiS, Innovix and Tech-21 were not aware of each other’s

arrangement with Nutanix; nor did they have any knowledge that BT was to be the designated winner.

However, SiS, Innovix and Tech-21 admitted that but for Nutanix's request, they would not have participated in the YWCA tender. The Complaint alleges that SiS, Innovix and Tech-21 understood their bids were not genuine, and they did not expect to win the tender. Thus, the evidence suggests that the bids submitted by BT, SiS, Innovix and Tech-21 were not the results of independent decision from each firm. The Complaint alleges that the bid-rigging scheme was facilitated by the series of "hub-and-spoke" arrangements that Nutanix made with each distributor. Despite the absence of direct evidence of any horizontal agreement among the four competing distributors, the HKCC concluded that the vertical arrangements facilitated by Nutanix were anti-competitive, and thus violated the First Conduct Rule under the Competition Ordinance.

No Evidence of Competitive Harm

According to the Complaint, the purpose of the arrangements described above was to facilitate the submission of "dummy" bids by SiS, Innovix and Tech-21 in order to make up for the minimum number of bids required by YWCA, and to ensure BT would be awarded the contract to supply a hyper-converged server based on Nutanix technology to YWCA. The Complaint did not allege that the arrangements between Nutanix and the four distributors resulted in higher prices paid by YWCA; nor did it allege that YWCA suffered any other competitive harm as a result. Instead, the Complaint alleges that the arrangements led to "conditions of competition which do not correspond to normal market conditions . . . [and are] by their nature harmful to competition."⁹

It is unclear from the Complaint what "normal market conditions" would have been in this particular matter but for the complained of conduct. As discussed above, but for the "hub-and-spoke" arrangements facilitated by Nutanix, SiS, Innovix and Tech-21 would not have participated in the YWCA tender, and BT would have been the only bidder as a result. The HKCC has not presented any evidence suggesting that BT's decision of whether to submit a bid, or its decision regarding the bid price for the server system, would have been affected by the alleged "dummy" bid arrangements facilitated by Nutanix.

Nevertheless, bid rigging is regarded as a form of "Serious Anti-Competitive Conduct" under the Competition Ordinance.¹⁰ The HKCC considers such conduct as having the object of harming competition, and conduct that has the object of harming competition by its nature is deemed to be harmful to competition.¹¹ Hence, the HKCC is not required to establish anti-competitive effects before bringing legal proceedings against the infringing parties in this case.

Conclusion

Since the Competition Ordinance became effective, the HKCC has consistently made it clear in its public statements that its enforcement priority would be hard core, "Serious Anti-Competitive Conduct", and in particular, bid rigging, which is prevalent in many sectors in Hong Kong.¹² As such, it should come with no surprise that the first legal action the HKCC brought before the Competition Tribunal involved bid rigging. By bringing the action against the five IT firms, the HKCC is apparently sending a strong signal to the business community that it will not hesitate to prosecute any form of bid rigging behavior, even though, as in this case, the conduct may seem benign as there is no evidence of competitive harm. Further, firms can be found to be in violation of the First Conduct Rule even if there is no evidence of a horizontal conspiracy among direct competitors.

Finally, it is worth noting that there will be a change in leadership at the HKCC in the upcoming months: the current Chief Executive Officer, Rose Webb, who has been with the HKCC since its inception in April 2014, will be leaving the agency this September. Ms. Webb will be succeeded by Brent Snyder, who most recently was the Deputy Assistant Attorney General of the criminal division of the United States Department of Justice ("USDOJ"). The appointment of Mr. Snyder, who has played a pivotal role in the USDOJ's investigations of cartels, may further signal the HKCC's strong commitment in fighting hard core anticompetitive behavior in Hong Kong.

¹ Competition Ordinance, No. 14, (2012), (H.K.), *available at* www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf. The Competition Ordinance provides for a judicial enforcement model through the establishment of the Competition Commission ("the HKCC") and the Competition Tribunal ("the Tribunal"). *Id.*, §§ 129 and 134. The HKCC is the enforcement agency, and the Tribunal is a judicial panel set up to hear and adjudicate on proceedings brought by the HKCC.

² Competition Commission and Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited, and Tech-21 Systems Limited, Competition Tribunal Enforcement Action No. 1 of 2017 (CTEA 1/2017) [hereafter the Complaint] (H.K.).

³ The First Conduct Rule prohibits undertakings from entering into an agreement or engaging in a concerted practice if the agreement or concerted practice has the object or effect of preventing, restricting, or distorting competition in Hong Kong. Competition Ordinance, § 6(1).

⁴ A hyper-converged system is an IT server system that integrates computing, storage, networking, virtualization and other technologies in a commodity hardware box supported by a single provider. A Nutanix hyper-converged system is one that is supported by a Nutanix software platform. Complaint, ¶ 24.

⁵ The Complaint alleges that the arrangements led to "conditions of competition which do not correspond to normal market conditions" and "were by their nature harmful to competition." Complaint, ¶ 77(2).

⁶ HONG KONG COMPETITION COMM'N, GUIDELINE: THE FIRST CONDUCT RULE (July 27, 2015), *available at* www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/

[Guideline_The_First_Conduct_Rule_Eng.pdf](#) [hereinafter FIRST CONDUCT RULE GUIDELINES].

⁷ Nutanix also requested the assistance of a fourth firm, ICON, to participate in the YWCA tender; ICON decided not to submit the bid documents prepared and provided by Nutanix.

⁸ Information on the bidder's business registration was also missing from the bid submitted by Tech-21.

⁹ Complaint, ¶ 77(2).

¹⁰ Competition Ordinance, § 2(1).

¹¹ FIRST CONDUCT RULE GUIDELINES, §§ 3.3 and 3.7.

¹² See, e.g., Rose Webb, Rasul Butt, Tim Lear & Dennis Beling, *Off and Running: The Hong Kong Competition Commission Commences Full Operations*, COMPETITION POL'Y INT'L (Oct. 2016), available at www.competitionpolicyinternational.com/wp-content/uploads/2016/10/CPI-Chronicle-Webb-Butt-Lear-Beling.pdf. Indeed, BT admitted that the submission of "dummy" bids was a common practice in the IT industry in Hong Kong. Complaint, ¶ 49.



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The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the author and do not reflect or represent the views of Charles River Associates or any of the organizations with which the author is affiliated.