

22 January 2020

For Immediate Release

Competition Commission takes IT cartel conduct case to Competition Tribunal

First infringement notice issued by Competition Commission

The Competition Commission (Commission) today commenced proceedings in the Competition Tribunal (Tribunal) against Quantr Ltd (Quantr) and its director Mr. CHEUNG Man Kit (張民傑) for their participation in cartel conduct in relation to a bidding exercise organised by the Ocean Park Corporation (Ocean Park) in 2017 for the procurement of IT services based on Nintex technology (Bidding Exercise).

The Commission alleges that Quantr and a co-bidder exchanged competitively sensitive information in relation to their intended quotations in the Bidding Exercise, in an effort to coordinate which company was going to win. The Commission has reasonable cause to believe that the exchange of future price information which occurred amounts to serious anti-competitive conduct in the form of price fixing, in contravention of the First Conduct Rule of the Competition Ordinance (Ordinance), and that Mr. Cheung is a person ‘involved’ in that contravention within the meaning of section 91 of the Ordinance.

The Commission is seeking remedies including:

- a declaration that Quantr has contravened the First Conduct Rule and Mr. Cheung is a person involved in the contravention;
- an order for pecuniary penalties to be imposed on Quantr and Mr. Cheung;
- an order that Quantr adopt certain compliance measures; and
- a director disqualification order against Mr. Cheung.

Infringement notice to Nintex Proprietary Limited

Pursuant to section 67(2) of the Ordinance, the Commission may, instead of bringing proceedings in the Tribunal against a person in the first instance, issue an infringement notice offering not to bring those proceedings on condition that the person makes a commitment to comply with the requirements of the notice.

The Commission attempted to resolve the matter by issuing an infringement notice to Quantr which specified certain requirements. Quantr did not agree to make a commitment to comply with those requirements, resulting in the current proceedings against it and its director.

Software supplier Nintex Proprietary Limited (Nintex) also participated in the cartel conduct, through the acts of a former employee, and likewise was given the opportunity to resolve the matter by acceptance of an infringement notice. Nintex, which has cooperated with the Commission throughout its investigation, accepted the infringement notice and has committed

to take steps to strengthen its competition compliance program. As a result, Nintex was not named as a respondent in the Commission's enforcement action. The commitment made by Nintex is published in the "Register of Commitments" on the Commission's website (www.compcomm.hk).

First proceedings following successful leniency application

The cartel was brought to the Commission's attention by Quantr's co-bidder, who made a leniency application under the Commission's *Leniency Policy for Undertakings Engaged in Cartel Conduct* (Leniency Policy). Pursuant to the Leniency Policy, the Commission entered into a leniency agreement with the co-bidder that it would not bring proceedings for a pecuniary penalty against it or its officers or employees in exchange for their cooperation. Neither the co-bidder nor any of its officers or employees are therefore named as respondents in the current proceedings.

Mr. Brent Snyder, CEO of the Commission, said, "These are the Commission's first enforcement proceedings resulting from a successful leniency application, which is an important enforcement milestone for the Commission.

This is also the first time the Commission makes use of an infringement notice as a remedy, which it considers to be appropriate and proportionate to the circumstances in this case. Consistent with the Commission's initial focus on encouraging compliance, the infringement notice will result in strengthened corporate compliance. For companies, like Quantr, that exercise their right not to accept such a remedy when offered by the Commission, the outcome is likely to be litigated proceedings before the Competition Tribunal.

As a result, this case sends home a message that all competing businesses, no matter whether they seek to undermine competition by reaching agreements or by sharing competitively sensitive information, in particular future price intentions, must be aware that the Commission will take appropriate action to pursue them. Competing businesses in all sectors should steer clear of such practices, while those already involved should approach the Commission for leniency or cooperation."

Notes to the Editor

The Commission

The Commission is an independent statutory body established under the Competition Ordinance (Cap. 619).

The Competition Ordinance

The objective of the Competition Ordinance (Ordinance) is to prohibit conduct that prevents, restricts or distorts competition and mergers that substantially lessen competition in Hong Kong. At the present time, the Merger Rule applies only to a merger involving an undertaking that directly or indirectly holds a carrier licence issued under the Telecommunications Ordinance (Cap. 106). The competition rules in the Ordinance came into force on 14 December 2015.

The First Conduct Rule

Under the First Conduct Rule in section 6(1) of the Ordinance, undertakings are prohibited from making or giving effect to an agreement, or engaging in a concerted practice, if the object or

effect of the agreement or concerted practice is to prevent, restrict or distort competition in Hong Kong. Cartel conduct, which includes price fixing, market sharing and bid-rigging, is generally regarded as a particularly harmful form of anti-competitive agreement or concerted practice.

Persons Involved in Contravention

Under section 91 of the Ordinance, a person involved in contravention of a competition rule is a person that: attempts to contravene the rule; aids, abets, counsels or procures any other person to contravene the rule; induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule; is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or conspires with any other person to contravene the rule.

Disqualification under the Ordinance

Section 101 of the Ordinance provides that the Tribunal may order that a person may not, without the leave of the Tribunal: (a) be, or continue to be, a director of a company; (b) be a liquidator or provisional liquidator of a company; (c) be a receiver or manager of a company's property; or (d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company; for a specified period of time. Under section 102 of the Ordinance, the Tribunal may only make the above order if the Tribunal has determined that a company of which the person is a director has contravened a competition rule and that the Tribunal considers that the person's conduct as a director makes the person unfit to be concerned in the management of a company.