

How dear is an antitrust breach in Hong Kong – flat decorators slammed with HK\$4 million fines in first penalties judgment

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On 29 April 2020, the Competition Tribunal ("**Tribunal**") handed down its first judgment on financial penalties in a competition case in Hong Kong. The Tribunal had earlier found that the respondents, ten flat decorators, had contravened the First Conduct Rule (i.e. on anti-competitive agreements) in the Competition Ordinance ("**Ordinance**") by engaging in market sharing and price fixing. The Tribunal fined the respondents a total of around HK\$4 million.

This case is significant because it sets a precedent on the proper approach for the determination of financial penalties under the Ordinance, and clarifies the role of the Hong Kong Competition Commission ("**HKCC**") in this exercise.

Role of the Hong Kong Competition Commission

Hong Kong follows a prosecutorial model of enforcement whereby the HKCC investigates and prosecutes cases and the Tribunal determines whether there has been a contravention of the conduct rules in the Ordinance, and imposes penalties and other sanctions.

The Tribunal had already handed down a judgment on the substance of the case a year ago, finding all 10 respondents to have contravened the Ordinance by engaging in: (1) a market sharing arrangement (involving the allocation of designated floors in buildings of a new public housing estate in Hong Kong amongst themselves); and (2) a price fixing arrangement (involving the production of a joint promotional flyer to tenants with packaged prices for renovation works) (see our alert [here](#)).

In that judgment, the Tribunal held that the requirement to show the contravention was subject to a criminal standard, requiring proof beyond reasonable doubt. Against the backdrop of that finding, a question arose in this procedure – focusing on the penalties to be imposed – as to whether the HKCC played the same role as a prosecutor in criminal sentencing and whether the HKCC should be allowed to make submissions on the range of penalties.

The Tribunal ruled that the HKCC was not precluded from making submissions and recommendations in relation to the financial penalties. The Tribunal disagreed that the action was to be treated as a trial for a criminal offence in every respect, and noted that the proceedings had so far been conducted in a manner broadly similar to civil proceedings. If the HKCC was not able to make submissions and recommendations on the penalties, this would undermine the programme designed to incentivise cooperation by potential infringers with the HKCC.

Determination of financial penalties

The Tribunal decided to adopt a "structured and methodological" approach to the determination of the financial penalty as this approach provided a transparent and predictable process and best served the purpose of deterrence from anti-competitive conduct. Under this approach, the Tribunal laid down four main steps:

Step 1 Determining the Base Amount

The "Base Amount" is calculated as follows: Value of Sales x Gravity Percentage x Duration Multiplier.

The **Value of Sales** is the value of sales directly or indirectly related to the contravention in the relevant geographic area within Hong Kong in the financial year in which the contravention occurred. The Value of Sales is intended to provide a sense of the scale of the contravention. The Tribunal noted that the concept of Value of Sales does not refer to revenues from all activities but only from the affected commerce.

The **Gravity Percentage** reflects the gravity and blameworthiness of the conduct. The Tribunal considered the range of 15% to 30% to be the appropriate percentage for serious anti-competitive conduct (which was the conduct involved in this case). In this case, the Tribunal applied a Gravity Percentage of 24%. According to the Tribunal, the mandatory consideration under the Ordinance as to the likely loss or damage caused by the conduct was implicit in the determination of the Gravity Percentage and there was no need for a detailed quantitative analysis in every case.

The **Duration Multiplier** is the number of years of participation in the contravention. This provides an incentive to stop a contravention as soon as possible.

Step 2 Making adjustments for aggravating, mitigating, and other factors

This step involves increasing or decreasing the Base Amount to take into account the surrounding circumstances. This includes consideration of any aggravating and mitigating factors. The Tribunal stated that this stage also encompassed consideration of whether the undertaking had a previous contravention.

According to the HKCC's submissions, aggravating and mitigating factors may include the following:

Aggravating factors	Mitigating factors
Acting as leader or instigator of contravention	Genuine uncertainty as to lawfulness of conduct
Taking coercive or retaliatory measures against other persons to ensure implementation, continuation or concealment of contravention	Limited participation in contravention
Involvement of directors and senior management	Steps taken to ensure genuine compliance with the Ordinance that reflect a corporate commitment to competition compliance
Particularly egregious conduct	
Widespread industry practice	
Serious anti-competitive conduct continued despite awareness of the HKCC's investigation	
Obstruction of the HKCC's investigation	

Not all of the above factors were relevant to this case. The fact that some of the respondents were acting through a sub-contractor and therefore did not participate directly in the renovation project was considered a mitigating factor for those respondents.

Step 3 Applying the statutory cap

The Ordinance contains a cap of the financial penalty to be imposed: 10% of the undertaking's turnover obtained in Hong Kong for up to three years in which the contravention occurred (the three years with the highest turnover if the contravention lasted longer than three years). In the case at hand, the Tribunal noted that the statutory cap is calculated by reference to the overall turnover of an undertaking, not the value of sales affected by the contravention. The Tribunal remarked that "*the statutory cap functions as an ultimate backstop which, on a general level, takes into account the impact of the penalty on the finances of the undertaking.*"

Where the amount calculated from the steps above exceeds the statutory cap, that cap is imposed (subject to further adjustments in Step 4 below). Interestingly, in the case at hand, the financial penalty was capped at 10% for 7 out of 10 respondents as their turnover was made up exclusively by their Value of Sales (although the penalties would otherwise have been over 20%).

Step 4 Applying cooperation reduction and considering plea of inability to pay

The Tribunal confirmed that cooperation with the HKCC is an appropriate factor to be taken into account by the Tribunal in setting the fine, and that the HKCC may "recommend" to the Tribunal a reduction for cooperation. The Tribunal is not bound by any such recommendation, but may properly have regard to it bearing in mind the policy justifications (e.g. cooperation enables efficient investigations, saves public time and costs, gives early redress to any harmful conduct).

The HKCC would determine the reduction in accordance with the HKCC's *Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct*, which in particular, provides for a scale of recommended discounts (ranging from 20% to 50%) based on the order in which a party expresses its interest to cooperate. However, since none of the respondents in this case had any claim for reduction for cooperation, the Tribunal did not discuss the effect of, or the weight to be placed on, a recommendation by the HKCC for reduction of a penalty.

The Tribunal considered it appropriate to apply the cooperation reduction after applying the statutory cap to ensure that there is still a real benefit for a person to offer cooperation.

Otherwise, a cooperation reduction would provide no incentive where both the original and reduced amounts exceed the statutory cap, and are then limited by the cap.

Finally, the Tribunal considered that an inability to pay may exceptionally justify a reduction of the amount assessed. Clear and comprehensive evidence of a respondent's financial position is required, and audited financial statements may not necessarily be enough.

Costs

A majority of the respondents submitted that the criminal rule for ordering costs against a defendant should be applied in competition law proceedings and so they should only be required to pay the HKCC's costs if their conduct was unreasonable or improper. The Tribunal, however, ruled that the general rule for civil proceedings, that is, that costs follow the event should apply. The respondents were therefore ordered to pay a large part of the HKCC's costs of the proceedings. However, the Tribunal awarded costs for only two counsel although the HKCC had engaged three counsel. The Tribunal also did not award the HKCC its investigation costs (primarily translation costs estimated to be around HK\$670,000), as the HKCC did not provide materials to show the details of its claim.

Conclusion

Businesses now have more clarity and predictability on how the Tribunal will assess penalties, although the precise outcome will remain uncertain and vary from case to case. Another aspect worth considering in calculating the "cost" of a contravention is the HKCC's costs of investigation and proceedings (which are likely to be extensive). Although in this case the HKCC was not awarded its costs of the investigation, we can expect the HKCC to justify its investigation costs in more detail in future cases. Overall, the Tribunal's approach is consistent with the HKCC's policies to incentivise cooperation by potential infringers.

This case also confirms that the Tribunal continues to look at international antitrust practices, including benchmarking Hong Kong with other jurisdictions such as the European Union, the United Kingdom, and Singapore.

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