

Competition Law Guidance Note (Ninth Issue) - Practical tips for dealing with pecuniary penalties in the context of competition law enforcement in Hong Kong

Introduction

The governance professional will know that the Competition Commission (**HKCC**) is actively enforcing the Competition Ordinance and has brought several cases to the Competition Tribunal (**Tribunal**). The Tribunal's jurisprudence is maturing, shedding light on how its range of statutory powers will be applied in practice to sanction parties that contravene the competition rules. These include pecuniary penalties, director disqualification and an array of other remedial orders. Only in limited circumstances might criminal liability attach (e.g., failure to provide documents or information requested by the HKCC, providing false information to the HKCC, or obstructing an investigation by the HKCC).

This guidance note focuses on pecuniary penalties and, in particular, how the courts assess and set fines, highlighting the need for the governance professional

to understand that competition law compliance should be taken seriously as set out under earlier Institute guidance.

Framework for determining fines

The HKCC may ask the Tribunal to impose a penalty on an undertaking that has contravened a competition rule. The HKCC will typically recommend the amount of the penalty, but ultimately it is the Tribunal that has the final say.

According to the Competition Ordinance, the fine is capped at 10% of the turnover of the undertaking concerned for each year in which the contravention occurred, up to a maximum of three years. If the infringement lasted longer than three years, the penalty cap may be calculated based on the three years with the highest turnover.

Gratitude is expressed to Natalie Yeung, Partner, Slaughter and May as author of this guidance note. The members of the Institute's Competition Law Interest Group are David Simmonds FCG HKFCG (Chairman), Adelaide Luke, Alastair Mordaunt, Brian Kennelly QC, Mike Thomas and Natalie Yeung. Mohan Datwani FCG HKFCG(PE), Institute Deputy Chief Executive also serves as Secretary to the Institute's Interest Groups. If you have any comments and/or suggestions relating to the Institute's thought leadership, please contact: mohan.datwani@hkcgi.org.hk.

The Tribunal imposed its first pecuniary penalties in the case of *Competition Commission v W Hing Construction Company & Others (1st Decorators Cartel case)* in April 2020. Fines totalling nearly HK\$4 million were imposed on ten firms that participated in market sharing and price fixing arrangements in the first instance, which were increased to nearly HK\$5 million on the HKCC's appeal. In that case, the Tribunal laid down a four-step framework for assessing and setting fines, which was adopted in subsequent fining decisions and forms the basis for the [HKCC's Policy on Recommended Pecuniary Penalties](#).

Step 1: Setting the base amount

The "Base Amount" is calculated by multiplying (i) the value of sales, (ii) the gravity percentage and (iii) the duration multiplier.

- The **value of sales** refers to the undertaking's revenue directly or indirectly related to the contravention in the relevant geographic area within Hong Kong in the financial year in question. This is to be distinguished from the undertaking's turnover (which is relevant to the statutory cap), as it only focuses on revenues from the affected commerce.
- The **gravity percentage** is a percentage that reflects the seriousness of the contravention. For serious anti-competitive conduct, the range of 15% to 30% is applicable.
- The **duration multiplier** refers to the number of years the contravention lasted.

Step 2: Making upward or downward adjustments

The Base Amount can be adjusted in light of aggravating or mitigating factors. The Competition Ordinance sets out some non-exhaustive factors that must be considered by the court. These are largely fact-sensitive, which include the nature and extent of the contravention, the circumstances in which it took place, the loss or damage caused by the conduct

and whether the person has previous records of competition law contravention. By way of example, the Tribunal could increase the Base Amount by 50% at this step for specific deterrence if the HKCC considers that otherwise the penalty would not be significant enough.

Step 3: Applying the statutory cap

The adjusted Base Amount would be capped at 10% of the turnover of the undertaking concerned (i.e. the total group turnover and not just the revenue related to the contravention) in Hong Kong for each year of the contravention, up to a maximum of three years.

Step 4: Considering further reductions

In the 1st Decorators Cartel case, the Tribunal considered two grounds for further reductions in fines: cooperation and inability to pay.

A reduction may be given to parties who cooperated with the HKCC during the investigation and/or Tribunal proceedings. For cartel conduct, the HKCC will recommend reductions depending on the order in which the cartel member comes forward to the HKCC.

On the other hand, inability to pay may be much more difficult to make out in practice, as the Tribunal has recognized this as an "exceptional measure" requiring the respondent in question "to produce clear and comprehensive evidence of its financial position".

Observations on fines levied by the Tribunal

As at the time of this publication, the Tribunal has concluded six cartel cases and pecuniary penalties have been imposed in four of them. In another ongoing cartel and facilitation case, pecuniary penalties have also been levied on the settling respondents. These decisions provide valuable precedent for undertakings that are assessing options for responding to an ongoing or potential investigation. An overview of these decisions is set out below.

Case	Penalty range imposed on each party (HK\$)	Remarks
The 1st Decorators Cartel case	132,000 – 1,135,000	Contested both liability and pecuniary penalties, fines revised after appeal.
Competition Commission v Quantr Limited and Cheung Man Kit	37,702.26	Settled shortly after enforcement proceedings were commenced.
Competition Commission v. Nutanix Hong Kong Limited & Others (IT Bid-rigging case)	187,740 - 2,730,000	Settled on quantum after trial.
Competition Commission v. Fungs E & M Engineering Company Limited & Others (3rd Decorators Cartel case)	200,000 – 855,000	Settled over a year after enforcement proceedings commenced, fines revised after appeal.
Competition Commission v. Gray Line Tours of Hong Kong Limited (Tourist Attraction Tickets cartel case)	\$4,177,000 and \$1,600,000	Pecuniary penalties imposed on two settling respondents. The case remains ongoing against the non-settling parties.

As the first step of the framework for calculating pecuniary penalties, the “value of sales” is the most determinative factor. This is illustrated by the HK\$2.4 million fine imposed against Nutanix, the supplier of the subject product in the IT Bid-rigging case. In contrast, the relatively lower fines in the 1st and 3rd Decorators Cartel cases are reflective of the decorators’ relatively modest revenues.

It should be noted that even if an undertaking does not have any revenue related to the relevant product and therefore there is no relevant “value of sales”, a “lump-sum approach” may be taken instead. This was the approach taken for determining the fines for one of the respondents in the IT Bid-rigging case that had no revenue associated with the product in question.

Apart from the value of sales, there are other factors that may result in the upward or downward adjustment of fines. Some noteworthy observations on the Tribunal’s pecuniary penalty decisions include:

- Lack of actual harm, or lack of profit from the cartel conduct may not be mitigating factors to reduce fines.
- Subcontracting is not a mitigating factor either. The Court of Appeal in the 1st Decorators Cartel case ruled that the Tribunal erred in giving a reduction of fines to principal contractors who lent their Housing Authority licences to sub-contractors and had no direct participation in cartels in question. This was because pecuniary penalties will be assessed in respect of the entire economic unit responsible for the contravention in question, and not the individual entity’s role within the economic unit.
- A significant uplift in fines can be applied at step 2 on the ringleader of the cartel. In the IT Bid-rigging case, the HKCC applied a 40% uplift on the fines imposed on the leader or instigator of the cartel.
- A significant uplift in fines can also be applied to give a specific deterrence effect if the Base Amount is considered insufficient to achieve this. In the IT Bid-rigging case, the HKCC applied a 50% uplift on a supplier who provided a dummy bid, as it considered that the resultant figure from the pecuniary penalties calculation to be too low to deter the contravening party from engaging in further anti-competitive practices.

- No automatic one-third discount for a “guilty plea” (unlike criminal sentencing).
- The extent of reductions for cooperation varies. In the 3rd Decorators Cartel case, cooperation reductions of 5% and 10% were given whereas, in the Tourist Attraction Tickets cartel case, higher discounts of 20% and 25% were given to the two settling respondents respectively.

Fines on individuals

Similarly, fines may be imposed on an individual who has contravened a competition rule. The HKCC has sought pecuniary penalties against individuals in a number of cases. For example, in the 3rd Decorators Cartel case, the 7th and 8th respondents were individual subcontractors who were fined HK\$600,000 and HK\$200,000 respectively, representing the principal contractor’s Base Amount multiplied by the percentage which was agreed between the principal contractor and the subcontractor for splitting the profit from the renovation work in question.

Other pecuniary orders

The Tribunal has powers to impose other orders of a pecuniary nature with respect to a contravention of the competition rules, namely:

- An order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention;
- An order requiring any person to pay to the Government or to any other person an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention.

Key tips when dealing with sanctions in the context of competition law enforcement

Tip 1: Don’t forget the HKCC’s costs when assessing options

Legal costs are often neglected when deciding whether it is worth fighting the HKCC’s investigation. This includes not only the legal costs in defence, but also the HKCC’s legal costs in case the Tribunal rules in the HKCC’s favour or in case of settlement. Under the Competition Ordinance, the HKCC may also be awarded investigation costs.

These costs can be substantial and should not be neglected. In the IT Bid-rigging case, the losing parties had to pay over 50% of the HKCC’s HK\$18.8 million legal costs. The individual costs orders imposed on some respondents (i.e. HK\$2.9 million) were even higher than the fines they had to pay. Respondents raising disputes with the HKCC risk bearing an even higher proportion of the costs, as costs can be apportioned on the basis of disputed issues.

Tip 2: Know the benefits of settlement

A respondent may choose to settle with the HKCC during an investigation or in subsequent enforcement proceedings. This usually means that disruptions to the business can be minimised and a lengthy and expensive trial can be avoided, with the benefit of fine reductions or even commitments in lieu of fines.

The ongoing Tourist Attraction Tickets cartel case is illustrative of this point, in which two travel services providers, multiple hotel groups and a tour counter operator were investigated by the HKCC. In February 2021, the Commission resolved its case against six of the hotel groups and the tour counter operator through Infringement Notices, in which these parties admitted their role in facilitating the cartel in exchange for a settlement with commitments but without a fine. In January 2022, the Commission commenced enforcement proceedings against the travel services providers and the remaining hotel groups that did not accept an Infringement Notice. During the proceedings, the travel services providers settled with the HKCC and were ordered by the Tribunal to pay pecuniary penalties subject to a 25% and 20% discount respectively, due to their cooperation in the matter. The Tribunal case remains ongoing in respect of the

remaining non-settling hotel groups.

This case demonstrates the benefits of cooperation at an early stage of the HKCC investigation – pecuniary sanctions can be avoided if an undertaking accepts an Infringement Notice, whereas fines may be reduced if settlement is reached after enforcement proceedings have been commenced in the Tribunal. It also shows the benefits of quicker enforcement outcomes through settlements. That said, investigated parties should be reminded that every case is different, and it is advisable to seek timely advice from competition law specialists who can help determine the best strategy in specific circumstances.

Tip 3: Take compliance programmes and corrective measures seriously.

Fines may also be reduced if businesses can demonstrate a corporate commitment to genuine competition compliance. For instance, this can be in the form of educational programmes or taking disciplinary or corrective measures in response to a known contravention.

To minimise competition law risk, businesses should

also consider extending compliance efforts to subsidiaries as well as unaffiliated business, particularly those they have some degree of control or influence over (e.g. suppliers, distributors and agents). As mentioned, in the Decorator Cartel cases, even though the principal contractors did not have any direct involvement in the cartel conduct committed by their sub-contractors, this did not prevent the Tribunal from holding the principal contractors fully accountable for competition law infringement.

Conclusion

For parties under investigation by the HKCC, the assessment of whether to defend the allegations or settle with the HKCC is a complex one - it requires careful consideration of all the facts and circumstances of the case. While the above observations provide an overview of the various pecuniary sanctions that may be imposed for contravening competition rules, it is important to bear in mind that each case is different and there is no rule of thumb that universally applies to all cases. When faced with an HKCC investigation, businesses should seek legal advice promptly in order to determine the best strategy in light of the unique circumstances of the case.