

CARTEL FINES IN HONG KONG

SOME OBSERVATIONS ON THE LATEST PENALTIES

The Hong Kong Competition Tribunal (Tribunal) concluded 2020 with its highest pecuniary penalties to date in the IT Bid-rigging case and started 2021 with another set of fines (including on individuals) in the 3rd Decorators Cartel case. With these, there are now four sets of Hong Kong cartel fines precedents to refer to when assessing options for responding to an ongoing or potential cartel investigation. In this briefing, we take a look at how these precedents can inform businesses considering whether to defend a cartel investigation or not.

The fines in the IT Bid-rigging case and the 3rd Decorators Cartel case

The sanctions decision in the IT Bid-rigging case has been long coming since the Tribunal's landmark decision in April 2019 - in that substantive decision, the Tribunal found 4 of the 5 respondents liable for rigging a tender issued by a local charity (see [our briefing](#) for details). Following that decision, 3 of the 4 relevant parties settled with the Competition Commission (HKCC) on the question of pecuniary penalties, while the remaining party stopped participating and ceased to be legally represented in the Tribunal proceedings. The sanctions decision handed down in December 2020 ([\[2020\] HKCT 11](#)) concludes the case with the highest pecuniary penalties imposed by the Tribunal to date.

The pecuniary penalties in the 3rd Decorators Cartel case in January 2021 ([\[2021\] HKCT 1](#) (in Chinese only)) also resulted from a settlement between the parties and the HKCC, through a settlement process now coined by the Tribunal as the "Kam Kwong procedure" (see [our briefing](#)). The fines from this case are similar to those in the 1st Decorators Cartel case, which is reflective of the similar fact pattern and the small size of the decorators involved. The fines in the 3rd Decorators Cartel case are notable as the first imposed directly on individuals, for their involvement in the cartel in question.

An overview of these recent decisions, as compared to those earlier in 2020, is as follows:

Case Name (date of decision)	Highest pecuniary penalty	Lowest pecuniary penalty	Remarks
The 1 st Decorators Cartel case (Apr 2020) (see our briefing)	HK\$ 740,000 (approx. £69,800)	HK\$ 132,000 (approx. £12,400)	Contested - the only case so far where the parties contested both liability and the pecuniary penalties recommended by HKCC
The Quantr case (Nov 2020) (see our briefing)	N/A	HK\$ 37,702.26 (approx. £3,600)	Settled - settlement reached shortly after enforcement proceedings commenced
The IT Bid-rigging case (Dec 2020)	HK\$ 2,730,000 (approx. £257,500)	HK\$ 187,740 (approx. £17,700)	Settled - settlement on quantum reached only after trial and respondents (except one) lost on the question of liability
The 3 rd Decorators Cartel case (Jan 2021)	HK\$ 600,000 (approx. £56,600)	HK\$ 200,000 (approx. £18,900)	Settled - settlement reached a little over a year after enforcement proceedings commenced

What these decisions tell us

Broadly speaking, the “early settlement means lower fines” principle holds true. This is most apparent in the low fines in the Quantr case, where Quantr quickly settled after enforcement proceedings started (see [our briefing](#)). The highest fines in the 3rd Decorators Cartel settlement are also lower than those in the disputed 1st Decorators Cartel case.

That said, the more determinative factor on quantum is (unsurprisingly) the “Value of Sales” taken for purposes of calculating pecuniary penalties. In the Tribunal’s four-step approach towards pecuniary penalties calculation (see [our briefing](#)), this refers to the value of the respondent’s sales directly or indirectly related to the contravention within Hong Kong. This is illustrated by the HK\$ 2.4 million (approx. £226,300) fine imposed against Nutanix, the supplier of the subject product in the IT Bid-rigging case (the fine could have been higher if pecuniary penalties were not settled in that case). In contrast, the relatively lower fines in the 1st and 3rd Decorators Cartel cases are reflective of the decorators’ relatively modest revenues.

A notable aspect of the IT Bid-rigging case is that one of the cartel members (BT) did not have any revenue related to the relevant product but was still subject to significant fines. In these circumstances, the Tribunal allowed the HKCC to take a “lump-sum approach” for purposes of calculating cartel fines. This meant the HKCC was entitled to take into account the recommended fines for other respondents, BT’s role and culpability relative to the other respondents, and “other circumstances of the case”. BT received the largest fine of all the cartellists in this case (HK\$ 2.7 million) (approx. £254,600).

Other noteworthy observations on the Tribunal’s pecuniary penalty decisions include:

- **For individuals representing a principal in the subject business, the principal’s relevant revenue can be used to calculate the fine against the individual.** This was the case for the 7th Respondent in the 3rd Decorators Cartel case, who participated in the cartel as a sub-contractor of the 1st Respondent. For the 8th Respondent in the same case, the relevant revenues of the 5th and 6th Respondents were calculated cumulatively, as he was the sub-contractor for both of those respondents. The 7th and 8th Respondents received HK\$ 600,000 (approx. £56,600) and HK\$ 200,000 (approx. £18,900) respectively in fines.
- **Lack of actual harm may not be a mitigating factor for the adjustment of fines.** When imposing fines on the smallest respondent in the IT Bid-rigging case (Tech-21), the Tribunal did not consider whether the bid-rigging exercise had caused the tenderer to pay more for the product tendered. Only a 20% discount was applied to account for the fact that the tenderer did not ultimately award the contract based on the tainted tender.
- **Lack of profit from the cartel conduct is no mitigation factor either.** In the 3rd Decorators Cartel case, this was disregarded as irrelevant to the consideration of adjustment of fines, as the Tribunal considered liability to be founded on the agreement itself. The same applies to the fact that some cartel members charged fees below the price fixed by the cartel.
- **No one-third discount for a “guilty plea” (unlike criminal sentencing).** The Tribunal takes a strong stance towards distinguishing Tribunal proceedings from criminal proceedings generally, and thus the Tribunal does not consider it bound by the usual rules and practices in criminal procedure. As such, the convention of a one-third discount in criminal sentencing has been expressly rejected by the Tribunal, in favour of the discounts specified in the HKCC’s leniency and cooperation policies (see [our briefing](#)).
- **A 40% uplift for the ringleader of the cartel.** The HKCC considered Nutanix as a “leader or instigator” of the cartel in the IT Bid-rigging case and applied a significant (40%) uplift on its fine. This provides some insight on the type of behaviour that the HKCC considers sufficiently egregious to justify such an uplift; in this case, the Nutanix manager formulated the arrangement in question and procured “dummy bids” from the other respondents.
- **A 50% uplift can be applied for specific deterrence.** In the IT Bid-rigging case, the HKCC applied a substantial (50%) uplift on the fine against Innovix, as the HKCC considered the resultant figure from the second step of the pecuniary penalties calculation to be too low to deter Innovix from engaging in further anti-competitive practices.

- **Cooperation reductions can be quite limited.** In line with other competition law regimes, the Tribunal applies a percentage reduction to account for the respondent's cooperation rendered with the HKCC, before or after proceedings commenced. The extent of such reduction in practice is, however, unclear. Only the 3rd Decorators Cartel case specified a cooperation reduction of 5-10%. For the respondent subject to the highest fines in that case (i.e. the 8th Respondent mentioned above), this meant a reduction merely in the region of HK\$ 75,000 (£7,000).

Interestingly, cartel fines in Hong Kong can be paid in instalments. This was the case for some of the decorators in the 3rd Decorators Cartel case. While this lends some sympathy to the inability of the decorators to pay the fine in full, this is also a reflection of the fact that the respondents were individuals or small businesses with limited financial resources. In other words, larger corporations should not necessarily expect similar treatment in future cartel cases.

Don't forget about costs!

The Tribunal's pecuniary penalties are (literally) only half the story when considering the potential price tag for cartel behaviour in Hong Kong. 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.

In line with the distinction from criminal proceedings mentioned above, the Tribunal's costs rules depart from those in criminal proceedings (where defendants are rarely ordered to pay for the prosecution's costs). Instead, the Tribunal opted to follow the costs rules in Hong Kong civil procedure, i.e. the losing side has to pay the winner's costs. Parties settling enforcement proceedings via the Kam Kwong procedure are typically required to pay for the HKCC's costs incurred in the settling process.

In the IT Bid-rigging case, the losing parties had to pay over 50% of the HKCC's HK\$ 18.8 million (approx. £1.8 million) in total legal costs. Parties that settled with the HKCC on pecuniary penalties (Nutanix, BT and Innovix) each agreed to pay HK\$ 2.9 million (approx. £273,500) as their respective portions of the HKCC's costs of the proceedings; the remaining respondent (Tech-21) was ordered to pay for the remaining portion, with the option to agree costs at HK\$ 962,560 (approx. £90,800). These costs orders were higher than the fines imposed on each respondent.

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. The respondents in the 1st Decorators Cartel were (rightly or wrongly) reprimanded by the Tribunal for raising a defence on grounds of potential economic efficiency, and were consequently ordered to bear the HKCC's costs specifically relating to that defence.

Despite the fact that competition law is still relatively new in Hong Kong with many legal points to be tested, the precedents show the Tribunal will not spare a party from paying costs on grounds of novelty of the law.

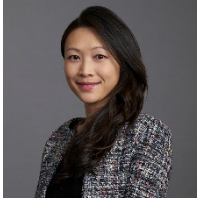
Investigation costs can also be claimed by the HKCC. With the exception of the IT Bid-rigging case, the HKCC has routinely included investigation costs as part of the relief sought in enforcement proceedings. This is understood to cover primarily translation costs incurred in the investigation phase, and not staff and overhead costs of the HKCC. No order for investigation costs have been granted in favour of the HKCC yet, although an estimate of HK\$ 670,000 (approx. £63,200) was mentioned in the 1st Decorators Cartel case.

Conclusion

For parties under investigation by the HKCC, the assessment of whether to fight or settle the investigation is a complex one - it requires careful consideration of all the facts and circumstances of the case. While the above observations may be helpful in determining which strategy to adopt, and highlight the clear benefits of settlement, it is important to bear in mind that settlement is not necessarily the right option in all cases.

The pecuniary penalty decisions discussed above all relate to cartel proceedings. However, these observations can also inform investigations/litigation outside the realm of cartels. Notably, the HKCC lodged its first abuse of substantial market power case in late December 2020 - it would be interesting to see how that case develops and, if the Tribunal rules in favour of the HKCC, whether (and to what extent) the above observations also apply.

CONTACTS



NATALIE YEUNG
PARTNER
T: +86 10 5965 0601 / +852 2901 7275
E: natalie.yeung@slaughterandmay.com



ALEXANDER LEE
SENIOR ASSOCIATE
T: +852 2901 7202
E: alexander-pc.lee@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2021.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com