

The first cartel settlement in Hong Kong - practical implications for businesses (Part 1)

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Hong Kong recently saw its first court-endorsed cartel settlement. This has important implications on the strategy for handling competition investigations and litigation in Hong Kong. In this two-part series, we take a look at the approach towards ‘hybrid’ cases (involving settling and non-settling parties), pros and cons of settling antitrust cases in Hong Kong, as well as important considerations for parties who decide not to settle.

The first cartel settlement in Hong Kong

The settlement came out of the 2nd decorators’ cartel case before the Competition Tribunal (the **Tribunal**). The Hong Kong Competition Commission (the **HKCC**) brought the case in September 2018, alleging three decorator firms to have fixed prices and allocated customers in a public housing project, and two individuals from two of those companies to have been involved in such cartel agreement (for details of the case, see our briefing [here](#)).

After almost a year since the commencement of proceedings, in August 2019, two companies and an individual (the **1st Settling Parties**) decided to cooperate with the HKCC to settle the case against them. As a result of the joint application, in June 2020, the Tribunal granted orders declaring the 1st Settling Parties to have contravened the First Conduct Rule. The Tribunal reserved its decision on corresponding sanctions to a hearing later heard in August 2020.

Shortly after the June Tribunal hearing for the 1st Settling Parties’ settlement application, the remaining company and its representative (the **2nd Settling Parties**) also decided to admit liability in August 2020. The corresponding hearing for the 2nd Settling Parties is expected in September 2020.

Clarity on the consent procedure

This case is significant in setting the first precedent in a number of categories: (i) it is the first settlement of enforcement proceedings in Hong Kong; (ii) the first to demonstrate how parties can agree to admit liability but dispute the quantum of applicable sanctions; (iii) the first “hybrid” settlement where some parties settle but not the others; and (iv) the first director disqualification order granted by the Tribunal.

Notably, the Tribunal endorsed a settlement process commonly used in the context of settling directors’ disqualification proceedings under the Companies Ordinance and the Securities and Futures Ordinance, known as the “*Carecraft* procedure”. In competition cases, this multi-step process involves:

- (1) The settling party and the HKCC make a joint application to the Tribunal in which the settling party admits to a contravention of a competition rule, on the basis of a “Statement of Agreed Facts”. The

HKCC's recommended sanctions may also be included in the joint application as part of the agreement with the settling party.

- (2) The Tribunal then considers the joint application and decides whether the settling party's liability is established on the facts, as well as the appropriate sanctions. Such decisions remain solely with the Tribunal notwithstanding the agreement between the settling party and the HKCC.

The Tribunal's endorsement of a tried and tested means of settlement, which is the premise of the HKCC's [Cooperation and Settlement Policy](#) published in April 2019 (the **Policy**), is much welcomed. Parties wishing to avoid lengthy legal battles with the HKCC now have a clear roadmap to settle cases in the Tribunal. It also paves the way for the HKCC to propose negotiated sanctions with cooperating parties, whether before or after commencement of enforcement proceedings in the Tribunal.

This case started out as a "hybrid" case involving settling and non-settling parties. The Tribunal made an order declaring the relevant conduct as a contravention vis-à-vis the 1st Settling Parties, notwithstanding the fact that the 2nd Settling Parties' trial concerning the same conduct had not yet been heard. If the trial went ahead, it would have been interesting to see how the 2nd Settling Parties would seek to convince the Tribunal that the same conduct did not amount to a contravention. As such, the fact that the 2nd Settling Parties also chose to settle their case with the HKCC is a missed opportunity to answer some of these legal and procedural questions.

Practical implications for businesses

The consent procedure is a means to resolve antitrust investigations expeditiously and economically. Parties can expect a number of benefits when the consent procedure is deployed:

- **Early conclusion of antitrust investigation/proceedings.** Enforcement proceedings against the settling party comes to an end once the consent procedure is concluded before the Tribunal. This means that disruptions to company staff can be minimised, and business can return to normal for the company.
- **Savings on legal costs.** A consent procedure truncates the legal proceedings before the Tribunal, thus allowing parties to avoid a lengthy and expensive trial. Parties cooperating with the HKCC during the investigation stage can also expect savings for legal costs in dealing with the HKCC's investigation, in addition to litigation costs and greater fine reductions.
- **Greater certainty on reduced sanctions.** Parties cooperating with the HKCC can expect reduced pecuniary penalties in line with the Policy. A "Cooperation Discount" of up to 50% can be recommended by the HKCC, depending on the timing, nature, value and extent of cooperation provided (see our client briefing [here](#)). For parties that settle after commencement of enforcement proceedings, a Cooperation Discount of up to 20% will be applicable. In the 2nd decorators' cartel case, the HKCC recommended a 10% Cooperation Discount for the 1st Settling Parties.

Parties looking to settle should also be aware of the limits of these advantages. For instance:

- **The case may go on after the consent proceedings.** If other alleged cartel members refuse to settle and the HKCC's case against them proceeds to trial (as was the case before the 2nd Settling Parties settled), employees of the settling party may be summoned to appear at trial as witnesses.
- **The company remains exposed to follow-on claims.** The Tribunal's order declaring the relevant conduct as a contravention in itself can form the basis of a follow-on claim under the Competition Ordinance. Therefore, the company may also have to deal with follow-on claims after the conclusion of the consent proceedings. Multinational corporations may also be exposed to civil claims overseas, as the Statement of Agreed Facts is published with the Tribunal's judgment.

- **Settlement still comes at a cost.** As a condition of settlement, settling parties will likely be required to pay the HKCC's legal costs for preparing the joint application and the supporting Statement of Agreed Facts. This will be in addition to the settling parties' own legal costs of the investigation and Tribunal proceedings, as was the case for the 1st Settling Parties.
- **The HKCC can still argue for higher pecuniary penalties.** At the sanctions hearing, the HKCC argued for a higher base amount for pecuniary penalties against the 1st Settling Parties in order to achieve "the necessary deterrent effect" (for a discussion on how pecuniary penalties are calculated, see our briefing [here](#)). Businesses looking to settle may face similar arguments in consent proceedings.
- **Uncertainty on future developments of the case.** Notwithstanding the Tribunal's finding of a contravention against a settling party, other alleged cartel members may ultimately win their case at trial or on appeal (e.g. on procedural grounds) or face lower pecuniary penalties. The party who settled early may face higher fines as a result.

Conclusion

The consent procedure provides legal certainty and clear incentive for parties to settle as early as possible. As the Tribunal and the HKCC gain more experience with settlement decisions, we could see quicker enforcement outcomes through settlements, with Tribunal deciding on liability and sanctions at the same time. This will likely become the HKCC's procedure of choice to resolve cartel cases, as has been the case with analogous settlement procedures in other jurisdictions, notably in the EU and the US.

In Part 2 of this briefing, we will look at the Tribunal's decision on the question of sanctions following the consent procedure in the 2nd decorators' cartel case - stay tuned!



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