

# HONG KONG COMPETITION TRIBUNAL ORDERS PENALTIES IN THE GOVERNMENT SUBSIDIES CARTEL CASE

On 7 June 2024, the Hong Kong Competition Tribunal (“Tribunal”) found eight undertakings and individuals liable for cartel conduct relating to quotations provided to the Innovation and Technology Commission of the Hong Kong Government (“ITC”) in response to a tender for government-subsidised IT solutions under the Distance Business Programme (“D-Biz”) borne out of the COVID-19 epidemic. This was followed by the Tribunal’s judgment handed down on 30 July 2024.

Six of the respondents settled with the Commission, and judgment was entered against the remaining two respondents in their absence and without trial, due to their failure to file a response in reply to the Commission’s pleaded case. This is the fourth case to date that has been settled under the *Kam Kwong* procedure,<sup>1</sup> and reiterates the advantages of early settlement with the Commission.

In this briefing, we summarise the background facts of this case and orders made by the Tribunal, and highlight some of our key observations coming out of the Tribunal’s judgment.

## Factual background

The Commission’s investigation was prompted by complaints from the Hong Kong Productivity Council (“HKPC”) in June 2020 after the HKPC suspected that the D-Biz funding scheme, a procurement process it was overseeing, may have been tainted by anti-competitive conduct.

The D-Biz funding scheme was launched by the ITC under the Hong Kong Government’s Anti-epidemic Fund, which was established to support and encourage local enterprises to adopt IT solutions which would help navigate business challenges faced during the COVID-19 epidemic. For certain funding applications under the scheme, an applicant was required to: (a) obtain quotations from at least two IT service providers, and (b) select the IT service provider with the lowest quotation unless otherwise justified (“Two-Quotation Requirement”).

The Commission alleged (and the Tribunal accepted) that Multisoft Limited (“Multisoft (R1)”), Yat Ying Hong (“Yat Ying (R6)”), BP Enterprise Company Limited and Noble Nursing Home Company Limited (together “BP/Noble (R3 and 4)”),<sup>2</sup> KWEK Studio Limited (“KWEK (R5)”) and various individuals engaged in cover bidding to help applicants of the scheme satisfy the Two-Quotation Requirement and to ensure that BP/Noble (R3 and 4) would win. Similarly, the Tribunal accepted that BP/Noble (R3 and 4) and Yat Ying (R6) had also provided cover bids to one another in another batch of D-Biz applications for the same purpose.

During the investigation, the Commission analysed extensive bidding data provided by the HKPC, exercised its compulsory powers to obtain documents and information from each of the undertakings and conducted a search at Multisoft (R1)’s offices. Altogether, the Commission identified 189 (out of around 14,000) D-Biz applications whereby the four undertakings had “bid” against each other receiving approved government funding of around HKD 13 million.

<sup>1</sup> The *Kam Kwong* procedure facilitates the disposal of proceedings by consent, allowing parties to agree on terms without undergoing a full trial.

<sup>2</sup> BP Enterprise Company Limited and Noble Nursing Home Company Limited are owned and controlled by the same person and were considered to be a single undertaking.

## The Tribunal's orders

Based on the respective admissions of Multisoft (R1), BP/Noble (R3 and 4), KWEK (R5) and Tang Wai Chun (“**Tang (R8)**”), the Tribunal held that the parties were liable to pay pecuniary penalties under the Competition Ordinance (Cap. 619) (“**Ordinance**”). The Tribunal also ordered pecuniary penalties to be paid by Yat Ying (R6) and Fan Sing Chi (“**Fan (R7)**”) in their absence, under Rule 76 of the Competition Tribunal Rules (Cap. 619D) (“**CTR**”), because they had failed to file any response to the proceedings.

In determining the appropriate sum for the undertakings, the Tribunal adopted the four-step approach in *Competition Commission v W. Hing Construction* [2020] 2 HKLRD 1229 (“**W Hing**”). For the individuals (i.e. Fan (R7) and Tang (R8)), the Tribunal adopted a lump sum approach based on the nature and extent of the conduct, the loss and damage caused, the circumstances in which the conduct took place and the existence of prior contraventions (which are mandatory considerations under section 93(2) of the Ordinance). Each were ordered to pay the following sums:

Table 1

Respondent	Pecuniary Penalty (HKD)	Pecuniary Penalty (approx. USD)
Multisoft (R1)	1,190,000	154,700
BP/Noble (R3 and 4)	90,000 ( <i>jointly and severally</i> )	11,700 ( <i>jointly and severally</i> )
Yat Ying (R6)	242,000 ( <i>as an undertaking</i> )	31,460 ( <i>as an undertaking</i> )
Fan (R7)	160,000	20,800
Tang (R8)	32,000	4,160
<b>Total</b>	<b>1,714,000</b>	<b>222,820</b>

The Tribunal did not order penalties against KWEK (R5)<sup>3</sup> but only against Tang (R8), a shareholder and director of KWEK (R5), who was found to have personally received money in exchange for the cover bids. The Tribunal also made an order disqualifying Tang (R8) from being a director and being concerned or taking part in the promotion, formation or management of a company for two years.

### Key observations from this case

We take a look below at some interesting points to note from the Tribunal's reasons for judgment:

#### 1. First use of Rule 76 of the CTR

This is the first time that the Tribunal has granted an application under Rule 76 of the CTR. Rule 76 of the CTR provides that “*If the respondent fails to file a response within the time specified in rule 75, the applicant may apply to the Tribunal for an order granting the relief sought in the application against the respondent.*” Practically, this operates as a default judgment in general civil proceedings.

In this case, the Tribunal was satisfied that it could grant the relief sought by the Commission against Yat Ying (R6) and Fan (R7) in their absence, and without a substantive trial, since they were both given ample opportunities to contest the proceedings but failed to do so.

The Tribunal's use of Rule 76 demonstrates its pragmatic approach and willingness to make orders without the need for a full hearing where the respondents fail to file any response in the proceedings.

<sup>3</sup> The Tribunal did, however, make an order that KWEK (R5) pay the Commission's investigation costs and litigations costs reasonably incurred for and incidental to the proceedings - further discussed below.

## 2. Reduced penalties for early cooperation and settlement under *Kam Kwong* proceedings

This case highlights the significant advantages of settling with the Commission at the earliest opportunity.

As shown in Table 2, BP/Noble (R3 and 4), settled with the Commission before the proceedings, and received a 25% cooperation discount on the proposed pecuniary penalty. Multisoft (R1) and Tang (R8) received a lower discount of 18% and 20% respectively. Unsurprisingly, Yat Ying (R6) and Fan (R7), who failed to respond at all, received no discount on their pecuniary penalty.

This case also highlights the importance of settling early before the Commission has advanced its investigation. The *Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct* (“**Cooperation Policy**”) states that the Commission will ordinarily indicate a Band 1 discount (between 35% and 50%) for the first undertaking to express an interest to cooperate.<sup>4</sup> In this case, however, despite being the first undertaking to express an interest to cooperate, the Commission did not recommend a Band 1 discount to BP/Noble (R3 and 4) because they had only provided their indication to cooperate three weeks after the investigation was made known to the parties, when the Commission had already conducted a search and obtained valuable evidence by other means against those involved.

Table 2

Recommended discounts under the Cooperation Policy		Respondent(s) falling into this category	Basis for cooperation discount
Band 1	Between 35% and 50%	None	N/A
Band 2	Between 20% and 40%	BP/Noble (R3 and 4) - 25%	<ul style="list-style-type: none"> <li>• First undertaking to indicate willingness to cooperate</li> <li>• Three weeks after the investigation turned overt when the Commission had already obtained valuable evidence by other means</li> <li>• BP/Noble (R3 and 4) both admitted liability</li> <li>• Less hands-on involvement in the contravention</li> </ul>
Band 3	Up to 25%	Multisoft (R1) - 18%	<ul style="list-style-type: none"> <li>• Indicate willingness to cooperate and admitted liability</li> </ul>

Further, it is interesting to see that the Tribunal agreed with the Commission’s recommendation to extend a 20% cooperation discount to Tang (R8), a shareholder and director of KWEK, even though individuals are not explicitly eligible under the Cooperation Policy for a cooperation discount which only applies to undertakings engaged in cartel conduct. The Tribunal’s approach in this case shows that both the Commission and the Tribunal are likely to consider relevant the cooperation afforded by an individual under the “lump sum” approach.

## 3. Penalty uplifts recognised by the Tribunal

The Tribunal’s decision sheds additional light on the aggravating factors which may lead the Tribunal to increase the pecuniary penalty to be paid. Previously, in *Competition Commission v Nutanix Hong Kong Limited and Others* [2020] HKCT11 (“*Nutanix*”), the Tribunal took into consideration Nutanix’s role as the leader or instigator of the contravention and applied an uplift of 40% to the base amount of the pecuniary penalty, to reflect the severity of Nutanix’s conduct in formulating the bid-rigging scheme, and taking part to coordinate dummy bids from the other respondents.

In this case, an uplift was imposed based on the following factors:

<sup>4</sup> Cooperation Policy, paragraph 3.4

Aggravating Factor	Effect on penalty (+/-)	Applicable Respondent(s)
Participation of the director/ senior management in the contravention	+50%	Multisoft (R1)
Achieve deterrent effect to promote the effectiveness of the competition regime	+50%	Multisoft (R1)
Non-compliance with the non-collusion clauses (which all applicants were required to sign when submitting their quotations and applications for D-Biz)	+25%	Multisoft (R1), BP/ Noble (R3 and 4) and Yat Ying (R6)

#### 4. No penalty for the parent company of Multisoft (R1)

Although the Commission filed proceedings against MTT Group Holdings Limited (“MTT (R2)”) and MTT accepted liability for the contravention committed by its wholly owned subsidiary, Multisoft (R1), the Tribunal took a pragmatic approach and did not order a separate fine against MTT (R2). This is likely to have been because MTT (R2) was not involved or had no knowledge of the contravention that had taken place.

Instead, the Tribunal accepted the suggestion by the Commission and MTT (R2) that the Tribunal should enter judgment on liability and consequential orders in favour of the Commission against Multisoft (R1) alone, and to stay the portion of the proceedings against MTT (R2) upon, among other things, MTT guaranteeing the payment of Multisoft (R1)’s monetary liabilities.

#### 5. Sole proprietors - an undertaking or an individual?

In this case, the Commission pursued Au Yeung Kit-ye trading as Yat Ying (R6) under section 6 of the Ordinance (i.e. in her capacity as an undertaking), and in her personal capacity under section 91 of the Ordinance (i.e. as an individual involved in a contravention of a competition rule).

Despite having done so, for the purposes of determining the appropriate penalty, the Tribunal’s treated Yat Ying (R6) as an undertaking and did not impose a separate fine against her as an individual. An order was also made against Yat Ying (R6) requiring her to implement a compliance programme, even though Yat Ying (R6), a sole proprietorship, was a “small business” and did not appear to have been a sizeable company.

#### 6. Director disqualification order against Tang (R8)

As mentioned above, in addition to imposing a pecuniary penalty against Tang (R8) for his part in the contravention, the Tribunal further imposed a director disqualification order against him. It was not disputed that Tang (R8) agreed to provide cover bids, and personally accepted money from Fan (R7) for doing so. Based on this, the Tribunal found that Tang (R8) was unfit to be concerned in the management of a company, and ordered that he be prohibited from being a director of a company, or be concerned or take part in the promotion, formation, or management of a company (whether directly or indirectly) for a period of two years.

This is not the first occasion where the Tribunal has imposed a director disqualification order against a person involved in the contravention. For example, the Tribunal previously imposed disqualification orders in *Fungs E & M Engineering Company and Others* [2020] HKCT 9 (“*Fungs E&M*”), *Kam Kwong Engineering Company Limited and Others* [2022] HKCT 1 (“*Kam Kwong*”) and *Gray Line Tours of Hong Kong Limited and Others* [2023] HKCT 2. Such orders are becoming increasingly common, with the Commission pursuing disqualification orders in the majority of cases it has initiated to date.

#### 7. Investigation and litigation costs may be substantial

This case once again serves as a reminder that, apart from a fine, there are additional costs stemming from a finding of contravention that businesses may have to bear. In most cases, the Commission will seek an order from the Tribunal that the undertaking(s) liable for a contravention be required to pay the Commission’s investigation and litigation costs.

In the current case, the Commission sought:

- **Investigation costs** incurred by the Commission in equal shares. This amounted to each of the undertakings being liable to pay an additional HKD 155,000, being 25% each for the total investigation costs of HKD 621,730). This amount exceeds the pecuniary penalty ordered against BP/Noble (R3 and R4) and Tang (R8); and
- **Litigation costs** incurred by the Commission. A total sum of HKD 405,000 was agreed to be paid by KWEK (R5) and Tang (R8) on joint and several basis, and a sum to be assessed by the remaining respondents (except MTT (R2)). Again, this amount exceeds the pecuniary penalty ordered against Tang (R8).

As in any court proceedings, parties should be aware that the Tribunal has a wide discretion to make cost orders. In a lengthy and complex investigation, these cost orders could be hefty and may even be higher than the pecuniary penalties imposed.

### Conclusion

This judgment in this case establishes a useful precedent for the various ways the Tribunal may resolve a case, particularly against those who fail to respond to the Commission's case. It also illustrates the Tribunal's consistent application of the four-step approach outlined in *W Hing*, which has now been applied in a number of cases including *Nutanix*, *Fungs E&M*, *Kam Kwong* etc.

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