

A carrot and a stick? A new display of the Hong Kong antitrust enforcement arsenal

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Hong Kong competition law enforcement had a promising start in 2020 - a pecuniary penalties hearing, a successful leniency application, an Infringement Notice, and new enforcement proceedings that brings information sharing cartels under the spotlight. Together, these showcase the variety of tools the Hong Kong Competition Commission (HKCC) has for antitrust enforcement in the city.

The First Pecuniary Penalties Hearing

The first of these developments was the pecuniary penalties three-day hearing concluded in the Competition Tribunal (**Tribunal**) on 16 January 2020. This was a follow-up to the Decorators' cartel case, in which ten decorator firms were found to have fixed prices and shared customers in a new public housing estate (see our previous [client briefing](#)).

The hearing focused on two issues: (1) the determination of pecuniary penalties to be imposed for a contravention of the Competition Ordinance; and (2) the payment of the HKCC's costs following the Tribunal's finding of a contravention of the Competition Ordinance.

How should pecuniary penalties be determined in Hong Kong?

The HKCC advocated for adopting a methodological framework in arriving at a pecuniary penalty. The HKCC's approach, which is modelled along the lines of the European

Commission's 2006 Guidelines on the method of setting fines, starts by determining the base penalty, followed by adjustments for specific aggravating and mitigating factors.

The respondents criticised the HKCC's approach as "mathematical" and generally advocated for an Australian approach towards imposing pecuniary penalties. Instead of starting with a base penalty, the Australian approach looks at a range of matters in setting the appropriate pecuniary penalty, such as the size of the relevant company, the deliberateness of the contravention and whether the contravention arose out of the conduct of senior management or at some lower level. Although this arguably allows less certainty for companies under investigation, the respondents pointed to the Australian authorities' rejection of a mathematical approach to sentencing on the basis that this risks attributing weight to some factors while overlooking others.

Do respondents have to pay the HKCC's costs for defending an enforcement action?

The HKCC asked for costs in the Tribunal proceedings, as well as the costs incurred during their investigation stage, on grounds that the Hong Kong regime allows them to do so and the civil costs rules (the successful party's costs being paid by the losing party) should be followed. The HKCC also asked for costs on an indemnity basis against respondents that raised an economic efficiency defence for their market sharing conduct, arguing that it was wasteful and unreasonable to do so.

The decorators argued that it would be unfair to impose a costs order on them, highlighting that the prosecution's costs are not paid by defendants even upon a conviction of a criminal offence. Moreover, it was neither unreasonable nor improper for the economic efficiency defence to be raised, as it was the first time the defence was raised before a Hong Kong court. Furthermore, the respondents questioned the justifiability of investigation fees incurred by the HKCC.

How harsh will antitrust penalties be?

The Tribunal reserved its judgment after the hearing. Judgment is expected in the first half of 2020. The decision will determine the legal (and financial) consequences for contravening the Competition Ordinance. Naturally, this will have an important impact on future competition law enforcement in Hong Kong, as it will set the standard of general deterrence of the regime.

The Leniency Application, Infringement Notice and New Enforcement Proceedings

On 22 January 2020, the HKCC issued its first [enforcement action](#) following a successful leniency application.

The case concerns an IT company, Quantr, allegedly exchanging competitively sensitive information with an unnamed co-bidder (the leniency applicant) in a tender conducted by an amusement park in Hong Kong. The exchanges were made in an effort to coordinate the winner of the tender and was allegedly instigated by the upstream Australian software supplier, Nintex.

Alternative enforcement tools in lieu of Tribunal proceedings

While the new case marks the first successful proceedings brought as a direct result of the HKCC's leniency policy (published in 2015), more importantly, the HKCC also published its first [Infringement Notice](#), as well as the first

[commitments](#) accepted by an Infringement Notice recipient, on the same day.

An Infringement Notice is a summary enforcement mechanism whereby the HKCC offers not to bring enforcement proceedings against the recipient on condition that the recipient makes a commitment to comply with the requirements of the notice.

The HKCC offered to resolve the issue by way of an Infringement Notice to the software supplier and Quantr respectively. Only Nintex accepted this offer. It admitted to a contravention of the First Conduct Rule and offered a commitment to adopt an enhanced competition compliance programme, details of which are contained in a separate confidential letter between the HKCC and Nintex.

In contrast, Quantr refused to accept the HKCC's offer of an Infringement Notice. As a consequence, the HKCC brought enforcement proceedings against it. Pecuniary penalties and a director disqualification order are now being sought against the IT company and its founding director.

A 'hybrid' enforcement approach

The Quantr case is a full display of the HKCC's investigative powers: the immunity offered to the leniency applicant, the lenient treatment offered to the cooperating Infringement Notice recipient, and the full enforcement proceedings brought on to the non-cooperating party, as well as the individual as a person "involved in a contravention" of the Competition Ordinance.

The combination of both 'soft' and 'hard' approaches in the Quantr case will likely stand as the precedent of a line of future cases where the HKCC utilises multiple tools in its arsenal to reach an enforcement outcome.

Conclusion

The HKCC's new 'hybrid' approach of combining an Infringement Notice with Tribunal proceedings is a welcomed one. The *Quantr* case removes any doubt about the threat of enforcement proceedings if an Infringement Notice is not accepted. Recipients of Infringement Notices will now have to consider seriously the benefits of accepting the offer of resolving the case by cooperation and commitments. All of these weigh in favour of encouraging investigated parties to

cooperate and settle the HKCC's concerns, rather than litigating it through the courts.

This direction of travel will be reinforced by the Tribunal's pecuniary penalties decision in the *Decorators* case, as the extent of potential pecuniary penalties and risk of paying the HKCC's litigation and investigation costs would become another push factor in favouring settlement over litigation. These developments could in turn lead to quicker enforcement results and possibly enable the HKCC to pursue more cases in a wider range of sectors in the city.



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