

MORE SETTLEMENTS TO COME? THE FIRST DIRECTORS DISQUALIFICATION DECISION AND THE QUICKEST CARTEL SETTLEMENT IN HONG KONG

Hong Kong saw a wave of settlements in cartel enforcement recently - the latest being a director disqualification decision and a decision imposing fines on Quantr, an IT company. The former sets the precedent as the first director disqualification order; whereas the latter is significant as the quickest conclusion of a cartel case, and holds the record as the lowest pecuniary penalty (less than HK\$40,000) imposed in the history of antitrust enforcement in Hong Kong.

The First Director Disqualification Order

The Competition Tribunal (**Tribunal**) issued its first director disqualification decision in the fourth cartel case, which concerns market sharing and price fixing in the provision of renovation services in a public housing estate (see our client briefing on the fourth cartel case [here](#)).

The order was granted pursuant to a joint application filed in August by the Hong Kong Competition Commission (**HKCC**), the director, and the director's company (Luen Hop). The Tribunal disqualified the director for 22 months, from the date of the order on 30 October 2020, until 30 August 2022. Other respondents in this case were found liable for cartel behaviour earlier on 14 October, and are pending a decision on corresponding sanctions.

This first director disqualification decision is significant for several reasons:

- **We can now estimate the duration of disqualification.** The Tribunal broadly laid out three “brackets” for determining the duration of disqualification orders under the Competition Ordinance.

Top bracket	4-5 years for particularly serious cases (5 years being the statutory maximum) (e.g. person knowingly contravened the competition rule, substantial participation in the contravention, recidivism, incitement of others to participate in the contravention)
Middle bracket	2-3 years for cases that, though serious, do not merit the top bracket
Minimum bracket	2 years or less for cases that are less serious

- **Previous related contraventions will be considered when assessing severity.** Apart from the fourth cartel case, Luen Hop was also found guilty of cartel behaviour in the second cartel case in May 2019 (see our briefings [here](#) and [here](#)). The director held his directorship in Luen Hop during material times for both cases.

The director admitted he was not directly involved in the fourth cartel. However, by the time of the events in the fourth cartel case, Luen Hop's representative had already been interviewed by the HKCC in the second cartel case concerning cartel conduct that had essentially the same modus operandi as the fourth cartel case. As such, the Tribunal found the director to have had reasonable grounds to suspect illegality in Luen Hop's conduct in the fourth cartel case, but the director did not take action to stop or rectify the contravention.

In these circumstances, the Tribunal considered the case against the director in question to be of “lower-medium” severity. On the HKCC's application, the Tribunal took 2 years as a starting point, and reduced the disqualification period by 2 months (i.e. for a total disqualification period of 22 months), in consideration of mitigating circumstances.

- **Mitigating circumstances may not count for much.** The director's old age (74 years old), limited literacy and lack of understanding of competition law were not considered as mitigating factors. The only mitigating circumstances taken into account by the Tribunal were: (1) the early admission of liability; and (2) the delay caused by the coronavirus and another respondent's objection to the consent procedure earlier this year (i.e. the disqualification order could have started and ended earlier). However, such factors merely reduced the disqualification duration by 2 months.

The key takeaway is that, not only must directors refrain from engaging in anti-competitive conduct personally, directors must also be vigilant about company employees or representatives being involved in anti-competitive conduct, especially when the HKCC invites one of them for an interview.

The Quantr Settlement

On 3 November, the HKCC concluded its case against an IT company (Quantr) and its sole director, for exchanging competitively sensitive information with a co-bidder (Nintex) in connection with a tender for an IT project by Ocean Park, a local amusement park.

The case was itself notable when it was first lodged in January 2020, as the HKCC's first proceedings resulting from a successful leniency application, and the first use of an Infringement Notice as a remedy (see our client briefing [here](#)). With the conclusion of the case, it now holds even more records:

- **This is now the quickest conclusion of a cartel case in Hong Kong at the Tribunal stage**, i.e. within 10 months. The case against the director in the fourth cartel case (discussed above) took 15 months to conclude, but sanctions against the other respondents in the fourth cartel are still pending. The first cartel case lodged in March 2017 is still pending a sanctions hearing in December 2020.
- **This has the lowest fine to date**, as a pecuniary penalty of only HK\$37,702.26 (approximately £3,700) was imposed. In comparison, the lowest fine in the second cartel case was HK\$132,000 (approximately £13,000) after applying the statutory cap (10% of group annual turnover in Hong Kong); whereas the highest fine in the same case was HK\$740,000 (approximately £72,000).
- **This is also the first court endorsed settlement requiring the implementation of a competition compliance program, in lieu of other remedies**, e.g. a pecuniary penalty against the director personally and a director disqualification order. The terms of the program are relatively light, and mirror the terms in the commitment that Nintex accepted pursuant to the Infringement Notice in January. However, in hindsight, Quantr may have been better off accepting the Infringement Notice to avoid the fine and legal costs in the enforcement proceedings.

While the relatively light enforcement outcome may raise questions about deterrence in the Hong Kong antitrust regime, one should not take these aspects at face value. A closer examination suggests that a similar outcome may not be easily replicated in other cases:

- **The low pecuniary penalty was the result of a unique factual context.** The value of sales directly related to the contravention was exceptionally low (less than HK\$150,000 (approximately £14,500)). Also, the contravention involved conduct that merely spanned a few months. This may have allowed the Tribunal to treat the sharing of competitively sensitive information as relatively less severe, despite the HKCC's characterisation of the case as "serious anti-competitive conduct" in its original pleadings. More importantly, unlike disputed sanctions in the second cartel case, the low pecuniary penalty in this case was mainly the result of Quantr's cooperation with the HKCC and admission of facts shortly after proceedings commenced.
- **Quick settlement was the result of exceptional procedural circumstances.** As the facts of the case were already set out by the leniency applicant and agreed by Nintex, and Quantr did not appear to seek to dispute these facts, thereby allowing a settlement decision to be made shortly after commencement of the proceedings. Also, as the only parties in the enforcement proceedings, settlement proceedings would have been relatively straightforward once Quantr and its sole director decided to settle (e.g. unlike the fourth cartel case where settlement proceedings were delayed due to a challenge raised by one of the parties).

- **The remedies were specially tailored to Quantr.** Apart from the pecuniary penalty, the Tribunal's order also included a requirement for Quantr and the director to jointly pay the HKCC's legal costs, and a requirement for Quantr to implement a relatively light competition compliance policy. Non-compliance of the latter would allow the HKCC to resume proceedings against Quantr and the director, which may include further pecuniary penalties and a director disqualification order. The relatively light competition compliance policy requirement may be explained by the fact that Quantr is understood to have a limited number of employees (if any), and the sole director is also the sole shareholder of Quantr.

In view of the above, the timeframe and remedies in the Quantr settlement should be viewed as the exception, rather than the norm. One can indeed expect the HKCC to cite the above as reasons for taking a more aggressive approach in other cases. That said, this Quantr settlement amply demonstrates the benefits of early settlement after commencement of enforcement proceedings, if not before (although it is not clear why Quantr did not accept the Infringement Notice which could have avoided the fine and legal costs).

Conclusion

The first director disqualification decision and the Quantr settlement came in the wave of settlements in Tribunal proceedings following the wake of the first Tribunal decisions on cartel liability in May 2019 and on pecuniary penalties in April 2020. The two decisions are important additions to the library of precedents of enforcement outcomes under the Hong Kong antitrust regime. As more local precedents allow parties to better weigh the cost of fighting the HKCC in the Tribunal against settling cases with the HKCC, this trend of settling cases is expected to continue.

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