

Clearer fines and cleaner immunity: Hong Kong's first antitrust penalty and revised leniency policy

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Until recently, understanding antitrust risk in Hong Kong was difficult due to uncertainties in the local antitrust regime, particularly on fines and leniency. These issues have been clarified in the past month with (1) the first Tribunal decision on cartel pecuniary penalties and (2) a revised set of leniency policies for cartels. We take a look at how these new developments impact decisions on managing competition compliance and antitrust investigations in Hong Kong.

The first cartel fines in Hong Kong

On 29 April, the Competition Tribunal (**Tribunal**) imposed its first pecuniary penalties (the judgment is available [here](#)), and in doing so, laid out the framework for determining fines in future antitrust cases.

Fines totalling nearly HK\$4 million (approx. US\$516,000) were imposed on ten firms that participated in the Decorators Cartel (see [our client briefing](#) on the Tribunal's ruling). The fines were calculated using a four-step framework inspired by the EU and UK approaches to setting fines, as summarised in the Table below. The individual fines ranged from HK\$132,000 (approx. US\$17,000) to HK\$740,000 (approx. US\$95,000).

In addition, all ten firms were ordered each to pay, in equal shares, the legal costs of the Competition Commission (**HKCC**). A reduction of 20% was granted to account for the novelty in the law, as this was one of the first cases in the Tribunal. Although the amount of HKCC's costs was not specified in the Tribunal's judgment, the portion that each firm would bear could may well be as much as (or more than) the fine imposed.

The key significance of the Tribunal's decision is that **antitrust fines in Hong Kong can now be assessed with a reasonable level of predictability**. This in turn allows businesses to carry out a more accurate cost-benefit analysis in deciding whether to self-report cartel conduct or cooperate with the HKCC. Other key takeaways from the Tribunal's decision include:

- **Don't forget the HKCC's costs when assessing options!** Losing parties are required to pay the HKCC's litigation costs. The HKCC will spare no expense in hiring top barristers for enforcement proceedings. Investigation costs of the HKCC may also be claimed against losing parties. Such costs should be weighed into the assessment of whether to oppose or settle the HKCC's concerns.
- **Take compliance programmes and corrective measures seriously.** Fines may be reduced if businesses can demonstrate a corporate commitment to genuine competition compliance. For instance, this can be in the form of educational programmes or taking disciplinary or corrective measures in response to a known contravention.

- **Manage expectations about the prospects of success in litigation.** The decorator firms that attempted to justify their cartel arrangements on economic efficiencies were criticised by the Tribunal and ordered to pay extra costs of the HKCC for rebutting such arguments. Businesses should therefore be realistic in assessing their chances of a successful defence before the Tribunal.

Table: The Tribunal’s framework for setting antitrust fines

<p>Step 1: Setting the Base Amount</p>	<p>The base amount is calculated by multiplying the value of sales, the gravity percentage and the duration multiplier.</p> <ul style="list-style-type: none"> • Value of sales: This refers to revenue directly or indirectly related to the contravention, i.e. revenue from other arms of the group’s business are not counted. Specifically, only revenue from the relevant geographic area within Hong Kong is counted, i.e. sales from other geographic areas can be excluded. • Gravity percentage: This refers to a percentage of the value of sales that reflects the seriousness and blameworthiness of the contravention. In line with international practice, a range of 15% to 30% will be applicable to cartel conduct. • Duration multiplier: This refers to the number of years the contravention lasted. For conduct lasting less than a year, the Tribunal left open the question whether a multiplier less than 1 would be applicable. A multiplier of 1 was applicable for the Decorators Cartel, as the value of sales considered in that case was already limited to the duration of the contravention.
<p>Step 2: Making upward or downward adjustments</p>	<p>The Base Amount can be increased due to aggravating factors, or decreased due to mitigating factors.</p> <ul style="list-style-type: none"> • Aggravating factors: Examples include acting as ringleader or instigator of the contravention, coercive or retaliatory measures involved, continuation or concealment of the contravention, egregious nature of the conduct, widespread industry practice, continuation of serious anti-competitive conduct despite being aware of the antitrust investigation, obstruction to the investigation. • Mitigating factors: Examples include genuine uncertainty as to the lawfulness of the conduct, limited participation in the contravention and steps taken to ensure genuine competition law compliance. <p>Specific deterrence, proportionality and prior contraventions of the parties were identified as other factors that could also be relevant considerations at this stage.</p>
<p>Step 3: Applying the statutory cap</p>	<p>The adjusted Base Amount would be capped at 10% of the <u>total group turnover</u> in Hong Kong (not the revenue related to the contravention) for each year of the contravention, up to a maximum of three years.</p>
<p>Step 4: Considering further reductions</p>	<p>A reduction may be given to parties who cooperated with the HKCC during the investigation and/or Tribunal proceedings. For cartel conduct, the HKCC will recommend reductions depending on the order in which the cartel member comes forward to the HKCC, in accordance with its Cartel Cooperation Policy.</p> <p>Exceptionally, a reduction may also be given to account for a party’s financial inability to pay the penalty. Such claims, however, would have to be specific and substantiated.</p>

A reinvigorated cartel leniency regime

Shortly before the Tribunal’s judgment on the “cost of contravention”, the HKCC reinforced the benefits of cooperation on 16 April by introducing (1) a revised *Cartel Leniency Policy for Undertakings (Revised Policy)*, and (2) a new *Cartel Leniency Policy for Individuals (Individual Policy)*.

The Revised Policy retains the basic mechanics of the previous leniency policy, i.e. the first successful applicant earns immunity from prosecution by the HKCC, thereby entirely avoiding the risk of pecuniary penalties and adverse costs orders. New features in the Revised Policy are:

- **New distinction between Type 1 and Type 2 applicants.** This distinction has been introduced to incentivise applicants to approach the HKCC as early as possible. A leniency applicant that is first to report a cartel before and after the HKCC opens an initial assessment or investigation is referred to as a “Type 1” and “Type 2” applicant respectively.
- **Extra protection from follow-on actions for Type 1 applicants.** Previously, all leniency applicants were required to admit to a contravention of the First Conduct Rule. The removal of this requirement for Type 1 applicants shields them from potential follow-on actions.
- **Delayed admission of guilt for Type 2 applicants.** While Type 2 applicants are not required to admit to a contravention upfront, they will be required to do so if follow-on actions are lodged by “victims” of the cartel. Such admission will be required in an infringement notice issued by the HKCC after a follow-on action is initiated.
- **Cartel ringleaders or coercers need not apply.** Previously, only those which coerced others to join the cartel were barred from leniency. The Revised Policy now also disqualifies those which were “clearly the single ringleader” of the cartel. Such disqualified applicants may nevertheless consider applying for cooperation pursuant to the HKCC’s *Cartel Cooperation Policy*.

The Individual Policy makes it clear that leniency is also available to individuals who first report a cartel to the HKCC, but s/he must do so before any undertaking. The Individual Policy largely follows the same mechanics and features of the Revised Policy (e.g. the first to apply gains immunity from enforcement proceedings; ringleaders and coercers cannot apply). Individual and corporate applicants compete in the same queue for leniency, but the evidential requirements for individuals are no less than those required for corporate applicants.

Together, the Revised Policy and the Individual Policy give businesses **bigger incentives to apply for leniency at an early stage:**

- **No exposure to follow-on actions in Hong Kong.** Type 1 applicants no longer need to admit to a contravention, which ostensibly relieves them from exposure to follow-on liability in Hong Kong. This change was deliberately made to remove a significant disincentive in the previous leniency policy. This could also be a boon for international cartelists considering leniency in multiple jurisdictions.
- **More pressure to be first to apply.** Greater incentives to qualify as a Type 1 applicant mean that there is more competition to be the first report the cartel. A business discovering its own participation in a cartel will have to compete not only with other cartelists, but also with its own employees and employees of other cartel members to qualify for leniency. Although a company may still apply after an individual’s application, that window of opportunity would quickly expire as the individual perfects his/her leniency application.

The availability of individual leniency should also be a reminder for businesses to **implement an internal whistleblowing policy** to complement competition compliance measures. Doing so could help minimise the risk of disgruntled employees (past or present) going straight to the HKCC without the company's prior knowledge. Explaining to employees that the company's leniency application also benefits employees would avoid nervous employees exposing the company without its knowledge by attempting to secure personal immunity via individual leniency.

What these developments mean for businesses

Businesses can no longer take a “wait and see” approach to antitrust enforcement in Hong Kong - the Tribunal's decision on fines and costs have now set the standard for general deterrence, not only for cartels, but potentially other antitrust violations as well.

Cartel leniency is now more attractive, especially as the HKCC increasingly pursues companies and individuals for involvement in cartel conduct. The benefits of leniency are now clarified, as there is now a framework to estimate future antitrust fines and costs orders (that can be avoided by leniency). The “cost” of leniency in terms of follow-on liability is also now removed for early reporting of cartels previously unknown to the HKCC.

While it took some time for the HKCC's previous leniency policy to bear fruit (see [our client briefing](#) on the Quantr case earlier this year), the Revised Policy and the Individual Policy is expected to result in more cartels being reported to the HKCC and more cartel enforcement in Hong Kong. Before dismissing or delaying the leniency option, businesses now have to seriously consider the risks of and consequences for losing the “leniency race” to other cartelists and individuals. In addition to the possible fines, the requirement to pay the HKCC's costs (and their own legal costs) is a significant factor to take into account in these strategic considerations.

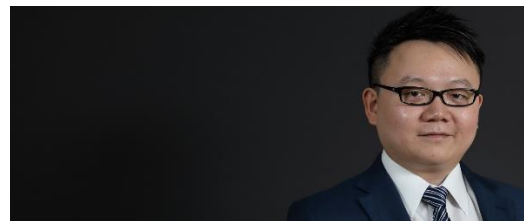


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