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HONG KONG COMPETITION TRIBUNAL PROVIDES GUIDANCE ON CARTEL FINES

To Our Clients and Friends:

The Hong Kong Competition Tribunal (“Tribunal”) has issued its first decision on cartel fines in *Competition Commission v W. Hing Construction Company Limited and Others* (“*Competition Commission v W. Hing*”).^[1] This decision is important because it sets out the methodology that the Tribunal will follow when imposing fines on undertakings in breach of the prohibition on cartel conduct.

The Tribunal has, by and large, followed the approach recommended by the Hong Kong Competition Commission (“Commission”). However, the facts of the case did not require the Tribunal to fully address all of the relevant factors for the calculation of a fine in the cartel context. Also, it is unclear how the framework adopted by the Tribunal would apply in case of fines on individuals. Further guidance from the Commission would therefore be welcome.

In addition, the facts did not require the Tribunal to assess a Commission recommendation on fine reductions under the Commission’s Cooperation and Settlement Policy. However, the Tribunal recognized the strong public interest in facilitating the kind of cooperation envisaged in the Commission’s leniency programme and it is therefore likely that the Tribunal will follow the Commission’s recommended reductions for cooperation.

1. Background

The Hong Kong Competition Ordinance (“Ordinance”) prohibits cartel conduct under its “First Conduct Rule.” The Commission can commence proceedings for violations of the First Conduct Rule before the Tribunal, which can impose pecuniary penalties of up to 10% of an undertaking’s total gross revenues generated in Hong Kong for the duration of the contravention (capped at three years). The Commission has recently brought major changes to its leniency programme (see <https://www.gibsondunn.com/hong-kong-competition-commission-brings-major-changes-to-leniency-program/>).

The Commission has initiated proceedings before the Tribunal for several cartel cases. The *Competition Commission v W. Hing* case concerned market sharing practices among decoration contractors in relation to a housing estate. The Tribunal decided on 17 May 2019 that the practices amounted to an infringement of the First Conduct Rule. In a subsequent decision on 29 April 2020, the Tribunal issued its decision on the amount of the fines to be imposed on the cartel participants.

2. Methodology for Fine Calculation

The Tribunal has adopted a methodology that is similar to the approaches taken by the UK and the EU. In particular, the Tribunal set out a four-step approach in calculating the fine: (1) determining the base amount; (2) making adjustments for aggravating, mitigating and other factors; (3) applying the statutory cap; and (4) applying any fine reductions based on cooperation or an inability to pay.

2.1 Step One: Determining the Base Amount

The base amount reflects the nature and extent of the conduct constituting the contravention, which is one of the mandatory considerations that the Tribunal must take into account in determining the amount of fine. The starting point is the “value of sales,” namely the undertaking’s sales directly or indirectly related to the contravention in the relevant geographic area within Hong Kong in the financial year in question. This is a different concept from the turnover of the undertaking, as the value of sales refers not to the revenues from all of the undertaking’s activities, but only from the affected commerce. In this case, the value of sales was calculated based on each defendant’s work orders and invoices issued for renovation works on the housing estate in question.

The next step is to identify the “gravity percentage,” which reflects the gravity and blameworthiness of the conduct. The Tribunal agreed with the Commission’s suggestion that the range of 15% to 30% would be appropriate for serious anti-competitive conduct and applied a percentage of 24%.

Finally, the amount is multiplied by the number of years of the undertaking’s participation in the contravention to reflect the temporal extent of the conduct in question. The Tribunal applied a multiplier of 1 although the cartel only lasted for 5 months.

2.2 Step Two: Making Adjustments for Aggravating, Mitigating and Other Factors

As provided by the Ordinance, the Tribunal must also take into account (1) aggravating circumstances; (2) mitigating circumstances; and (3) whether the person in question has previously been found to have contravened the Ordinance.

The Tribunal did not discuss the aggravating circumstances in detail as they were not relevant in the present case. Some of the aggravating circumstances suggested by the Commission include where the undertaking acted as a leader in the contravention, or where the anti-competitive practice is reflective of widespread industry practice such that there is a need for general deterrence.

On the other hand, the Commission suggested that mitigating circumstances may include where there was a genuine uncertainty as to the lawfulness of the conduct in question, where an undertaking had limited participation in the contravention, or where an undertaking has taken steps to ensure genuine compliance with the Ordinance, although there is no indication in the judgment as to whether this is a reference to pre-investigation/contravention steps or post-investigation remedial measures, or both.

Where there is a previous contravention, the Tribunal indicated that an increase in the amount of penalty would be imposed, having regard to the number of previous contraventions, the time lag between the previous and current contraventions, whether any of the individuals involved in the previous

contravention are connected with the current contravention and the nature of the previous contravention. However, these factors were not relevant in the *Competition Commission v W. Hing* case.

The Tribunal added that proportionality is relevant throughout the process of assessment, in particular to give “an overall sense check” to ensure that the amount would be a just and proportionate penalty for the contravention by the undertaking in the circumstances.

2.3 Step Three: Applying the Statutory Cap

Section 93(3) of the Ordinance imposes a ceiling which a penalty may not exceed, namely 10% of the undertaking’s turnover for each year in which the contravention occurred, or where the contravention occurred in more than three years, 10% of the turnover of the undertaking for the three years in which the contravention occurred that saw the highest, second highest and third highest turnover.

The Tribunal rejected the argument that the statutory cap should be viewed as the “maximum sentence” to be reserved for a case that is the worst case of its kind that can be realistically envisaged. In finding that the statutory cap is more akin to a jurisdictional limit than provisions stipulating the maximum amount of fine, the Tribunal explained that the limit is applied only towards the end of the process of assessment so as to ensure that the maximum is not exceeded, and not treated as part of the general considerations in arriving at the amount of the penalty in the first place.

2.4 Step Four: Applying Cooperation Reduction and Considering Plea of Inability to Pay

Step Four involves the application of fine reductions to reflect cooperation with the Commission and, in exceptional cases, the undertaking’s inability to pay the penalty.

Under the Commission’s Leniency Policy, the first undertaking to report its participation in a cartel will obtain full immunity from possible fines. Other cartel participants can still obtain a reduction of the possible fine under the Commission’s Cooperation and Settlement Policy. In exchange for their cooperation, the Commission will agree to apply a discount to the pecuniary penalty that it would recommend to the Tribunal. Where an undertaking indicates its willingness to cooperate with the Commission before the commencement of any Tribunal proceedings against it, it may receive a discount of up to 50% depending on the order in which undertakings express their interest to cooperate. In particular, the Commission may recommend a discount between 35% and 50% in favour of the first undertaking after the immunity applicant to express its interest to cooperate (see <https://www.gibsondunn.com/cartel-leniency-in-hong-kong/>).

While the Tribunal did not fully consider the weight to be placed on the Commission’s recommendation of a reduction of penalty as none of the defendants in the case claimed a cooperation reduction, the Tribunal indicated that it would give due consideration to any such recommendations if raised by the Commission. In particular, the Tribunal acknowledged that there is strong public interest in facilitating the kind of cooperation and settlement envisaged in the Commission’s leniency and cooperation policies. Such arrangements enable the Commission to carry out its investigations more efficiently, conserve resources and give early redress to any harmful conduct.

Finally, the Tribunal held that the cooperation reduction should be dealt with after applying the statutory cap to ensure that there would still be a real benefit for someone to offer cooperation even if the pecuniary penalty would already be limited by the statutory cap.

With regard to an undertaking's inability to pay, the Tribunal stated that a reduction of penalty on account of inability to pay should be an exceptional measure, having regard to the effect on the undertaking's viability and supported by clear and compelling evidence.

[1] Competition Commission v W. Hing Construction Company Limited and Others [2020] HKCT 1. A copy of the judgment is available at:
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=127610&currpage=T.



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