

CPI's Asia Column Presents:

Cartel Leniency in Hong Kong

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This contribution provides an overview of the leniency framework for cartel conduct in Hong Kong. It discusses, in particular, the “Leniency Policy for Undertakings Engaged in Cartel Conduct” (the “Leniency Policy”)² and the “Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct” (the “Cooperation Policy”)³ published by the Hong Kong Competition Commission (“Commission”) on 19 November 2015 and on 29 April 2019, respectively.

The Commission has made it clear that prosecuting cartels would be high up on its agenda for the enforcement of the Competition Ordinance (the “Ordinance”), which came into force on 14 December 2015.⁴ So far, the Commission has brought three cases before the Competition Tribunal (“Tribunal”) and these are all cartel cases. Decisions have been issued in two cases and the third one is still pending.⁵ None of these cases involves a leniency application.

The experience in other jurisdictions shows that a transparent and well-functioning leniency program is a cornerstone for the effective prosecution of cartels. The Leniency Policy contains many attractive elements, notably full immunity from fines for the first to report and a pledge by the Commission to treat the information provided by a leniency applicant confidentially. Similarly, the Cooperation Policy offers applicants the opportunity to receive a cooperation discount of up to 50% on the pecuniary penalty that the Commission would otherwise recommend to the Tribunal. The Commission has hired senior officials from foreign jurisdictions, including the US Department of Justice and the European Commission. These officials are very experienced in cartel matters, which significantly bolsters the credibility of Hong Kong’s Leniency Policy.

However, both policies also contain elements that may prove a disincentive to self-report, such as a requirement to provide a written admission of wrongdoing, as well as aspects which may create uncertainty in the policies’ implementation. These potential flaws are mostly a consequence of the legal framework imposed by the Ordinance, and it will be necessary to continue to observe how the Commission applies both policies before rendering a verdict on their predictability, benefits and, ultimately, effectiveness.

1 Introduction: The Competition Ordinance In A Nutshell

The Ordinance was adopted in 2012. This set in motion a two-staged approach to establishing Hong Kong’s first-ever sector-neutral competition regime: first, the Ordinance created the necessary foundations of the enforcement framework by setting up the Competition Commission and a Competition Tribunal (the “Tribunal”); and second, on 14 December 2015, the substantive provisions of the Ordinance entered into force.

1.1 Substantive Provisions

The Ordinance creates three competition rules (the “Competition Rules”), comprised of two “Conduct Rules” and the “Merger Rule”.⁶ The Conduct Rules prohibit two broad types of conduct:

- The “*First Conduct Rule*” prohibits anti-competitive agreements, concerted practices and decisions of members of associations of undertakings (such as industry associations) having either the object or effect of preventing, restricting or harming competition in Hong Kong; and
- The “*Second Conduct Rule*” prohibits an abuse of a substantial degree of market power having the object or effect of preventing, restricting or harming competition in Hong Kong.

Under the First Conduct Rule, an agreement or concerted practice will be viewed as harming competition by *object* where it can be regarded by its very nature to be so harmful to the proper functioning of normal competition in the market, such that there is no need to examine the effects.⁷ The Ordinance also creates a subcategory of “Serious Anti-Competitive Conduct” under the First Conduct Rule for horizontal arrangements seeking to fix prices, share markets, restrict output or rig bids.⁸ The Commission classifies such conduct as “cartel conduct” with the object of preventing, restricting or distorting competition in Hong Kong.⁹

1.2 Enforcement Mechanism

The Commission cannot directly impose sanctions for contravention of the Competition Rules. It must rather apply to the Tribunal to have sanctions imposed.

If the Commission concludes that a contravention of the First Conduct Rule occurred but the conduct does not amount to “Serious Anti-Competitive Conduct”, the Commission is first obliged to issue a “Warning Notice” to the undertaking concerned and provide it with a specified period within which to comply with the notice.¹⁰ For other types of conduct (Serious Anti-Competitive Conduct under the First Conduct Rule and all conduct under the Second Conduct Rule), the Commission is not obliged to issue such a warning and may instead issue an “Infringement Notice” before commencing proceedings before the Tribunal or directly commence proceedings before the Tribunal without issuing a Warning Notice or an Infringement Notice.

If the Commission issues an Infringement Notice, it will offer not to bring or continue proceedings before the Tribunal on the condition that the undertaking under investigation commits to comply within a specified period of time with the requirements set out in the notice. According to Section 67 of the Ordinance, these requirements may include refraining from any specified conduct and admitting to a contravention of the relevant Conduct Rule. Importantly, these requirements may not include a payment to the Government. Given this last condition, it is expected that the Commission will not use the Infringement Notice mechanism for cartel conduct. If the undertaking concerned fails to comply with the Infringement Notice, the Commission may commence proceedings before the Tribunal.

1.3 Sanctions and Damages

The Tribunal has wide-ranging powers, including the authority to:¹¹

- issue an order that undertaking(s) have contravened the Conduct Rules;
- impose “pecuniary penalties” of up to 10% of an undertaking’s total (thus not limited to the revenues of the products or services affected by the conduct) gross revenues generated in Hong Kong for the duration of the contravention (capped at three years);¹²
- prohibit a person from making or giving effect to an agreement;
- issue an order to pay damages to any person who has suffered loss or damage as a result of the contravention;
- issue an order prohibiting a person from acquiring, disposing of or dealing with property; and
- issue an order disqualifying directors of an undertaking where they are considered unfit to manage.

A private party cannot bring a stand-alone action before the Tribunal. The Tribunal must first have ruled on the legality of the alleged contravention and only then can a claimant bring a follow-on action, if it can show that it suffered loss or damages as a result of any act which has been ruled by the Tribunal to amount to a contravention of the Competition Rules.¹³

2 The Leniency Policy

The Ordinance laid the foundations for the creation of the Leniency Policy. Section 80 of the Ordinance grants the Commission the ability to enter into a “leniency agreement” whereby the Commission agrees not to initiate a proceeding seeking a “pecuniary penalty” before the Tribunal in exchange for the applicant’s timely cooperation in an investigation:

“(1) The Commission may, in exchange for a person’s cooperation in an investigation or in proceedings under this Ordinance, make an agreement (a “leniency agreement”) with the person, on any term it considers appropriate that it will not bring or continue proceedings under Part 6 for a pecuniary penalty in respect of an alleged contravention of a conduct rule against:

- a) if the person is a natural person, that person or any employee or agent of that person;*
- b) if the person is a corporation, that corporation or any officer, employee or agent of the corporation;*
- c) if the person is a partner in a partnership that partnership or any partner in the partnership, or any employee or agent of the partnership; or*
- d) if the person is an undertaking other than one referred to in paragraph (a), (b) or (c), that undertaking or any officer, employee or agent of the undertaking, in so far as the contravention consists of the conduct specified in the agreement.*

(2) The Commission must not, while a leniency agreement is in force, bring or continue proceedings under Part 6 for a pecuniary penalty in breach of that leniency agreement.”

On 23 September 2015, the Commission published its Draft Leniency Policy on its website for public consultation.¹⁴ In response, twenty organisations, including domestic and overseas companies, industry associations, bar associations, law societies and law firms submitted comments which were published on the Commission’s website.¹⁵ Following this public consultation period, the Commission issued its finalised Leniency Policy on 19 November 2015.¹⁶

According to the Leniency Policy, the Commission considers leniency to be “a key investigative tool used by competition authorities around the world to combat cartels”. The Commission recognises that cartel conduct is different from other types of anti-competitive conduct, because cartels are “universally condemned as economically harmful” and are “usually organised and implemented in secret, making them more difficult to detect”.¹⁷ For this reason, the Leniency Policy applies only to cartel conduct, and its provisions intend to provide “strong and transparent incentives for a cartel member to stop its cartel conduct and to report the cartel”.¹⁸

Under the Leniency Policy, full immunity from pecuniary sanctions is available for the first cartel member to report the conduct to the Commission. The benefits of leniency extend to the company as well as any current officers, employees and agents of the leniency applicant who cooperate with the Commission’s investigation. Former officers, employees and agents may also receive leniency protection at the discretion of the Commission. As described below, the Leniency Policy provides limited guidance on the benefits available for undertakings that provide cooperation but do not qualify for leniency, a weakness which the Commission has attempted to remedy with its recently-

published Cooperation Policy.¹⁹ The Leniency Policy also includes information on the application process, confidentiality obligations, the process for terminating leniency agreements, and a template for leniency agreements.

2.1 Who Can Benefit from the Leniency Policy?

A) Only available to undertakings

Leniency applications may only be made by undertakings. Undertakings are defined as “any entity (including natural persons), regardless of its legal status or the way in which it is financed, which is engaged in an economic activity”.²⁰ This means that an employee or director who may, of their own accord, wish to “blow the whistle on a company” will not be able to benefit from the Leniency Policy. This may have significant implications given that the Ordinance does not exclude the possibility of imposing pecuniary penalties on employees or directors of an undertaking. By contrast, in the United States, an Individual Leniency Policy is available for individuals who wish to come forward of their own accord.

While only undertakings can contravene the Competition Rules, under Part 6 of the Ordinance,²¹ sanctions can be imposed by the Tribunal on a “person involved in a contravention” which may include a person who “[...] aids, abets, counsels or procures any other person to contravene the rule”.²² This may include employees, directors or even facilitators. In fact, the Commission’s leadership has announced its intention to prosecute individuals,²³ and one of the cartel cases currently pending before the Tribunal includes two individuals.²⁴

The impossibility for directors or employees to seek leniency under the Leniency Policy beyond the undertaking for whom they work(ed) is a potential disincentive for them to blow the whistle on an undertaking, unless they come forward with their employer.

B) Only available to “first-ins”

As already noted, the benefits of the Leniency Policy are limited to the first undertaking to self-report and fulfil the requirements for leniency.²⁵ For undertakings that do not hold the first-in marker, but cooperate fully with the Commission, the Leniency Policy provides that the Commission will “exercise its enforcement discretion” and “will consider a lower level of enforcement action, including recommending to the Tribunal a reduced pecuniary penalty or the making of an appropriate order under Schedule 3 to the Ordinance.”²⁶ Prior to the Commission’s April 2019 publication of its Cooperation Policy, however, second-ins had little guidance regarding the requirements and benefits of cooperating with a Commission investigation. The benefits available to second-ins under the Cooperation Policy are discussed in detail in Section 3 below.

It is noteworthy that the Commission has not excluded the possibility of entering into a leniency agreement with more than one cartel member, although according to the Leniency Policy this will only apply in exceptional circumstances,²⁷ which are not further defined.

2.2 Timing of an Application

Timing is of the essence when making a leniency application. The more advanced the Commission’s investigation, the less likely it is that a leniency applicant will be successful in obtaining leniency. This is because, absent exceptional circumstances, the Commission will not entertain leniency applications if it has already decided to issue an Infringement Notice pursuant to Section 67 or to

make an application to the Tribunal under Part 6 of the Ordinance in respect of the conduct reported by the undertaking.²⁸

Excluding a leniency application after the Commission refers the matter to the Tribunal limits the scope of leniency beyond what may have been intended by the Hong Kong Legislative Council in Section 80 of the Ordinance. Under that provision, the Commission may enter into leniency agreements not only in exchange for not bringing an action before the Tribunal but also for not *continuing* proceedings for pecuniary penalty before the Tribunal under Part 6 of the Ordinance. This would imply that the Commission may enter into leniency agreements even after the proceedings have commenced before the Tribunal. Although the Leniency Policy does not exclude the possibility of accepting leniency applications after an Infringement Notice has been issued or once proceedings have commenced before the Tribunal, it will do so only in “exceptional circumstances”, which are not further defined.

2.3 What Conduct Can Be Reported under the Leniency Policy?

The scope of Section 80 of the Ordinance appears to be much broader than the Leniency Policy. Section 80 enables the Commission to enter into leniency agreements with undertakings in respect of “an alleged contravention of a conduct rule”. The term “Conduct Rule” refers to both the First Conduct Rule (anticompetitive agreements) and the Second Conduct Rule (abuses of substantial market power).²⁹

Yet, the Commission’s Leniency Policy is much narrower in scope, applying only to cartel conduct which has the object of preventing, restricting or distorting competition, i.e., agreements and/or concerted practices between competing undertakings to fix prices, share markets, restrict output or rig bids.³⁰ The benefit of the Leniency Policy appears therefore not to be available for conduct concerning, for example, resale price maintenance or exchanges of information that may be capable of anticompetitive effects, unless these practices are used to give effect to a cartel.³¹

2.4 Procedural Aspects of the Leniency Policy

The Leniency Policy sets out the key procedural conditions and requirements for entering into a leniency agreement with the Commission. These can be summarized as follows:

Applying for a marker.³²

Since full leniency can only be granted to the first applicant to satisfy the eligibility requirements, the Commission has put in a place a “marker system” to establish a queue in the order of when a company comes forward and seeks leniency. Marker systems are used in most jurisdictions with leniency programs, including the EU and the United States. The use of markers is designed to incentivise an applicant to come forward when it first learns of possible wrongdoing. The evidentiary threshold for obtaining a marker is relatively low, with no requirement that the applicant admit to wrongdoing before the marker is granted. Instead, an applicant reports its suspicion of possible wrongdoing to the authority and is granted time to investigate the conduct more thoroughly. The marker ensures that no other party can leap ahead of the applicant while the applicant conducts its internal investigation and seeks to perfect its leniency application.

Potential applicants (or their legal representatives) can contact the Commission on a designated Leniency Hotline on a no-names basis to ascertain whether a marker is available for cartel conduct in a particular industry or market. However, in order to obtain an actual marker, the applicant will

have to disclose sufficient information, including its identity and contact details, the nature of the cartel and the product(s) or service(s) potentially involved, and the main participants. If these conditions are satisfied, the applicant will be granted a marker securing its place at the front of the queue while it continues to investigate the conduct.

Invitation to apply for leniency.³³

Following a marker request, the Commission will determine whether the conduct constitutes cartel conduct and whether leniency is available. Leniency is only available to the first to report, only applies to cartels, and, except in exceptional cases, is only available if the Commission has not yet commenced proceedings before the Tribunal or sent an Infringement Notice.

Where leniency is available, the holder of the highest-ranking marker will be invited to submit a leniency application within a particular deadline. Other undertakings that have obtained a lower-ranking marker will be informed that they are not eligible for full immunity from pecuniary sanctions but may still benefit from a reduction in sanctions if they fully cooperate.³⁴

The proffer.³⁵

As noted above, after receiving its marker, an applicant will be given additional time to investigate before being required to provide the Commission with a detailed description of its conduct. The proffer should include an explanation of how the conduct affects competition in Hong Kong and an estimation of the volume of affected sales in Hong Kong. Following the proffer, the Commission will consider the information provided and decide whether to enter into a leniency agreement.

The proffer of information can be made orally on a “without prejudice” or hypothetical basis in order to protect the applicant from having the information provided in the proffer subsequently used against it. The Commission may request access to some evidence and/or witnesses. However, information provided during the proffer stage may not be used as evidence against the undertaking or any other person in any subsequent proceedings before the Tribunal, and any information will be returned to the applicant if a leniency agreement is not reached.³⁶

The leniency agreement.³⁷

The Commission has published a template leniency agreement as Annex A to its Leniency Policy. The most notable conditions include representations and warranties from the applicant to the following effect:

- it (including current or former officers, employees or agents) did not coerce the other cartel participants;
- it took prompt and effective action to terminate its participation in the cartel, except where authorized by the Commission to avoid tipping off other parties;
- it will maintain continuous and complete cooperation with the Commission;
- it will agree to sign a statement of facts admitting its participation in the cartel; and
- it will implement an effective corporate compliance programme.

Note that the leniency agreement must be executed by an officer of the undertaking and cannot be made through external legal counsel. Once the leniency agreement has been entered into, the

applicant will have to provide the Commission with the non-privileged documents supporting its proffer as well as access to its employee witnesses without delay.

The Statement of Facts.

As explained above, as part of the leniency agreement, the applicant will be required to sign a statement of agreed facts (“Statement of Facts”) admitting to its participation in the cartel. This written statement will be used for the purpose of a joint statement by the Commission and the leniency applicant to the Tribunal requesting an order under Section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in cartel conduct.

The Statement of Facts requirement attracted a high degree of criticism during the consultation process, particularly from stakeholders outside Hong Kong, and rightly so. A signed Statement of Facts amounts to an admission of wrongdoing which could carry severe consequences in follow-on private damage litigation in Hong Kong, as well as in the United States and potentially elsewhere depending on the scope of the conduct. For example, private plaintiffs in US civil litigation may be expected to argue that a written Statement of Facts is subject to discovery and is admissible against the leniency applicant (although not against other cartel members).

In order to avoid creating a disincentive to self-reporting, most jurisdictions with leniency programs have moved away from requiring written admissions of wrongdoing and have instead adopted a paperless process for leniency applications. In the consultation process, the Commission was urged to adopt a paperless process similar to that of the European Commission. Following the consultation period, the Commission added language to the Leniency Policy announcing its intentions to protect leniency materials from disclosure, but it did not amend the requirement that applicants sign a written Statement of Facts. The changes offered by the Commission do not resolve the concerns surrounding a written admission of wrongdoing. If a written Statement of Facts exists, a private plaintiff may be able to obtain it in civil discovery directly from the leniency applicant, even if it is unsuccessful in obtaining it from the Commission. The written Statement of Facts requirement will remain a disincentive for self-reporting for applicants at risk of private damages exposure.

Benefits of the leniency agreement.³⁸

A leniency agreement obligates the Commission not to seek pecuniary penalties against the applicant. It also prevents the Commission from seeking any other order from the Tribunal, with the exception of a Section 94 order declaring that the applicant has violated the First Conduct Rule. Thus, the Commission may not apply to the Tribunal to request, for example, that a director be disqualified. However, the Tribunal can impose non-pecuniary sanctions of its own motion. The Tribunal could therefore decide to impose non-pecuniary penalties (for example, a disqualification order) on the leniency applicant, even if this is not requested by the Commission. This could be the case when the Tribunal is hearing the case for imposing an order that the applicant has violated the First Conduct Rule, or when the leniency applicant is subject to a follow-on damage claim by one of the cartel’s victims. The Tribunal is, however, likely to be mindful not to undermine the Leniency Policy by imposing non-pecuniary penalties of its own motion upon the leniency applicant.

When the leniency applicant is a company, the benefits will extend to the company as well as any current officers, employees and agents of the leniency applicant who cooperate with the Commission’s investigation. Former officers, employees and agents may also receive leniency protection if, at the Commission’s discretion, they are specifically named in the leniency agreement.³⁹

Termination of the leniency agreement.⁴⁰

Under Section 81 of the Ordinance, the Commission may terminate a leniency agreement where it has “reasonable grounds” to suspect that the applicant provided incomplete, false or materially misleading information or has otherwise failed to comply with the terms of the agreement. Before voiding a leniency agreement, the Commission will inform the applicant orally of its intention to terminate the agreement and will give the applicant seven days to remedy the situation.

During the consultation process, commentators encouraged the Commission to include further guidance on what would constitute “reasonable grounds” to revoke a leniency agreement, including when information would be viewed as “incomplete”. The Commission was encouraged to distinguish between situations where a company failed to disclose all the information in its possession versus when a company uses its best efforts to cooperate fully but the information available to it is incomplete.⁴¹ This is because a company may not have access to all of the facts or witnesses, some of whom may be former employees or may otherwise be unwilling to cooperate. The Commission did not address this question in the final version of the Leniency Policy. However, if the Commission were to withhold or revoke leniency from applicants on the basis that the information was not complete without demonstrating that the applicant failed to provide information in its custody, possession or control, then the application process would become far less predictable and the leniency program would suffer.

Where it decides to terminate a leniency agreement, the Commission reserves the right to retain the evidence obtained under the leniency agreement and commence proceedings against the undertaking and/or any persons covered by the leniency agreement before the Tribunal. Some third parties were critical of this heavy-handed approach during the consultation process. However, it is consistent with the practices followed by other leading authorities. If the Commission terminates a leniency agreement, it is within the Commission’s discretion whether to consider offering first-in leniency benefits to the next undertaking in the leniency marker queue.

Confidentiality.

An applicant is required to agree in writing neither to disclose the fact that it is submitting an application nor to disclose the information it provides to the Commission (the “Non-disclosure Agreement”), unless required by law or with the Commission’s consent. This may presumably cover disclosures required, for example, under applicable securities or stock exchange regulations. The confidentiality requirement is ongoing throughout the investigation as well as during subsequent court proceedings (presumably this only covers proceedings to which the applicant is not part). If a leniency applicant breaches the Non-disclosure Agreement, it will cease to be eligible for leniency.

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Following the consultation of its Draft Leniency Policy, the Commission amended the procedure to allow an applicant to execute and keep the Non-disclosure Agreement at the Commission’s offices.⁴³ This revision was designed to partially address concerns raised during the consultation period that the execution of the Non-disclosure Agreement would create a written record that could prove harmful to the applicant in the event of follow-on private damage actions.

In addition to the applicant’s non-disclosure commitments, the Leniency Policy also describes the Commission’s own confidentiality obligations. Sections 123 to 125 of the Ordinance impose a general obligation on the Commission to preserve the confidentiality of information, including information relating to the private affairs or the identity of individuals or information which has been identified and justified as confidential.⁴⁴ Following the consultation period, the Commission inserted additional confidentiality assurances in its Leniency Policy by pledging to use its “best endeavours to appropriately protect the Commission’s records of the leniency application process,

including the leniency agreement". The Commission also made clear in the Leniency Policy that it is not the Commission's policy to "release leniency material" and the Commission shall "firmly resist, on public interest or other applicable grounds", requests for such material where such requests were made in connection with private civil proceedings in Hong Kong and other jurisdictions. The Commission will nonetheless make a disclosure where it is compelled to do so by a court or by the law.⁴⁵

Cooperation in Cross-Border Cartel Investigations.⁴⁶

The Leniency Policy includes indications of how the Commission intends to investigate cartels across multiple jurisdictions. Undertakings cooperating with the Commission will be expected to identify the other jurisdictions where they have sought leniency and share information on the status of their applications in those jurisdictions. Generally speaking, it is common practice for a leniency applicant to voluntarily waive a competition authority's commitment not to share the identity of, or the information provided by, an applicant with any third party by allowing an authority to share information with another authority with the grant of a waiver. This is typically done when the applicant is assured of leniency in both jurisdictions. However, the grant of a waiver to allow competition authorities to share information is treated as strictly voluntary by the world's major competition authorities. Unfortunately, the Commission's Leniency Policy suggests that waivers may be compulsory in Hong Kong. According to the Leniency Policy, in appropriate cases, applicants may be *required* to authorise the Commission to exchange confidential information with authorities in other jurisdictions where leniency/ immunity has been sought.

3 The Cooperation Policy

Whereas the Leniency Policy offers first reporters of cartel conduct the opportunity to receive full immunity from pecuniary penalty and to avoid Section 93 proceedings entirely, the Cooperation Policy establishes a framework by which cooperating cartel members that are not the first to report may receive a *discount* on the penalty that the Commission would otherwise recommend to the Tribunal in Section 93 proceedings. Although the Cooperation Policy is intended to incentivise second-ins to cooperate with Commission investigations, certain aspects of the policy nonetheless create uncertainty as to how the policy will actually be implemented. First, the policy gives the Commission broad discretion to determine the discount offered to the cooperating undertaking. The policy lays out several "bands" of discounts on the recommended pecuniary penalty, with higher to lower discounts offered to undertakings based on the order in which they express their interest in cooperating.⁴⁷ However, the Commission determines on a case-by-case basis to which band it will assign each undertaking.⁴⁸ The Commission also has discretion to determine the discount amount actually offered to the undertaking within each band.⁴⁹

In addition to the uncertainty created by the broad discretion in the percentage discount offered to cooperating undertakings, the Cooperation Policy (or any other Commission guidance document) does not indicate the base amount or starting point from which the Commission will calculate the discount on pecuniary penalty. Without guidance as to the amount of the original pecuniary penalty before any discount, companies considering cooperating with investigations will have difficulty assessing the expected benefits of doing so. Even if companies were able to assess the base pecuniary penalty that would be recommended should they refuse to cooperate, the Commission's agreed-upon pecuniary discount under the policy is only a *recommendation* to the Tribunal in Section 93 proceedings. It is therefore conceivable that a company could agree to cooperate in exchange for a discounted pecuniary penalty, and the Tribunal could nonetheless disregard the Commission's suggestion.

Cooperation agreements are not explicitly addressed under the Ordinance. The Ordinance provides that the Commission may enter into leniency agreements with cooperating undertakings to not commence or continue proceedings seeking a pecuniary penalty before the Tribunal.⁵⁰ The Ordinance does not, however, explicitly authorize the Commission to enter into agreements to bring Section 93 proceedings for a *reduced pecuniary penalty* in exchange for an undertaking's cooperation. The Commission's Cooperation Policy therefore appears to be a creative means of instituting a "second-in" cooperation framework not contemplated by, nor in contravention of, the Ordinance. It remains unclear to what extent the Tribunal will, given the legislative ambiguity, take into account the recommendations of the Commission pursuant to cooperation agreements under the new policy. Without case law indicating that the Tribunal will take into account the Commission's recommendations for reduced pecuniary penalties, the willingness of second-in undertakings to enter into such agreements, and therefore the effectiveness of the policy, remains uncertain.

3.1 Who Can Benefit from the Cooperation Policy?

Like the Leniency Policy, cooperation applications may only be made by undertakings.⁵¹ Unlike the Leniency Policy, though, which provides that the benefits of the agreement will extend to the company's current employees, officers and agents, the Cooperation Policy gives the Commission the *discretion* to determine whether to extend benefits of any agreement to such individuals.⁵² As a practical matter, this uncertainty may decrease the likelihood that current employees will cooperate with corporate internal investigations if an employee has no guarantee that the company's cooperation will not benefit the employees and, in fact, may be used to incriminate and penalize the individual.

3.2 Timing of an Application

An undertaking may reach out during an ongoing investigation to express its willingness to cooperate; however, the Commission also has discretion to enter into a cooperation agreement with an undertaking "where and to the extent appropriate" even after proceedings have already been filed before the Tribunal.⁵³ The policy also permits the Commission to reach out to undertakings subject to investigation to propose cooperation.⁵⁴ The extent to which the Commission will be willing to enter into cooperation agreements with undertakings after it has already filed proceedings with the Tribunal remains to be seen.

3.3 What Conduct Can Be Reported under the Cooperation Policy?

Like the Leniency Policy, the Cooperation Policy applies only to cartel conduct and is intended to deter the occurrence of cartel conduct in Hong Kong.⁵⁵

3.4 Procedural Aspects of the Cooperation Policy

The Cooperation Policy sets out the general conditions and stages for entering into a cooperation agreement with the Commission. These can be summarised as follows:

Stage 1: Indication of Willingness to Cooperate.⁵⁶

An undertaking subject to a Commission investigation may reach out to the investigation's case manager, either orally or in writing, to indicate that it is willing to cooperate. The Commission is under no obligation to engage in cooperation with an undertaking merely because the undertaking has expressed willingness to cooperate, and retains "full discretion" to determine whether to enter into a cooperation agreement with an undertaking.⁵⁷ As discussed above, the Commission may also reach out to an investigation's subject in order to seek its cooperation.

Stage 2: Cooperation in the Investigation.⁵⁸

After indicating its willingness to cooperate, an undertaking is required to provide documents and information to the Commission through a proffer process similar to that under the Leniency Policy. The proffer should include a "detailed description of the cartel conduct and its functioning, including information about its duration and participants, the products or services affected by it, the names of persons involved in the conduct, and information about the undertaking itself."⁵⁹ The proffer may be made orally or in writing, and all documents and information provided during the proffer are considered to be made on a "without prejudice basis".⁶⁰ Following the proffer, the undertaking is required to provide the Commission with access to documentary evidence as well as make its employees available to be interviewed by the Commission.⁶¹

Stage 3: Entering into a Cooperation Agreement with an Agreed Factual Summary.⁶²

After the undertaking has produced to the Commission documentary evidence relevant to the cartel conduct, the Commission will provide the undertaking with a draft Agreed Factual Summary and draft cooperation agreement.⁶³ The Commission will then inform the undertaking of the "maximum recommended pecuniary penalty" it is willing to recommend to the Tribunal.⁶⁴ This amount will incorporate a discount for the undertaking's cooperation. The undertaking will then be given 10 working days to formally confirm whether it wishes to continue with the cooperation by signing the cooperation agreement.⁶⁵ The Commission may discontinue the cooperation at any stage before the cooperation agreement has been signed if it reasonably suspects that the undertaking has failed to comply with the requirements of the proffer process, to provide the Commission with access to evidence or to keep the cooperation confidential.⁶⁶

The cooperation agreement will incorporate the Agreed Factual Summary, and will require the undertaking to confirm that:

"(a) it has provided and will continue to provide full and truthful disclosure to the Commission;

(b) it has, unless requested by the Commission otherwise, taken prompt and effective action to terminate its participation in the cartel conduct;

(c) it will keep confidential all aspects of the Cooperation Agreement and the cooperation process unless the Commission's prior consent has been given or the disclosure of information is required by law;

(d) it will provide full and truthful cooperation, at its own cost, to the Commission, including in enforcement proceedings against other undertakings that engaged in the cartel conduct or against other persons involved in the cartel conduct;

(e) it is prepared to continue with, or adopt and implement, at its own cost, a corporate compliance programme to the reasonable satisfaction of the Commission; and

(f) it will make a joint application with the Commission for a Consent Order under terms set out in the Cooperation Agreement . . .”⁶⁷

Notably, the joint application will include a joint submission in support of a finding that the undertaking contravened the First Conduct Rule.⁶⁸ The undertaking will also agree in the joint application to pay the Government a pecuniary penalty pursuant to Section 93 of the Ordinance. The amount the undertaking agrees to pay will not exceed the maximum penalty the Commission indicated to the undertaking it would recommend to the Tribunal;⁶⁹ however, note that the Tribunal may nonetheless impose a penalty in excess of that amount.⁷⁰ Finally, the undertaking will agree in the joint application to pay the Commission’s costs of proceedings against the undertaking.⁷¹

It is important to note that, because the Tribunal ultimately decides the amount of the pecuniary penalty, the Cooperation Policy effectively requires a cooperating undertaking to make a written admission of wrongdoing with no guarantee that the cooperation agreement will result in a reduced pecuniary penalty. As discussed above, the Ordinance does not require the Tribunal to follow or take into account recommendations by the Commission that a discounted pecuniary penalty be imposed. According to Section 93 of the Ordinance, the Tribunal may order the undertaking to pay a pecuniary penalty “of any amount it considers appropriate.”⁷² Section 93 does require the Tribunal to take into account several factors when determining the amount of the pecuniary penalty, including the nature of the conduct and the circumstances in which the conduct took place; however, the Ordinance does not require the Tribunal to take into account an undertaking’s cooperation with an investigation.⁷³ It remains unclear, then, to what extent the Tribunal will discount the pecuniary penalty imposed on an undertaking on the basis of the Commission’s recommendation.

Stage 4: Ongoing Compliance.⁷⁴

A cooperating undertaking must maintain ongoing compliance with the terms of the cooperation agreement.⁷⁵ At the end of proceedings before the Tribunal and other courts against the undertaking, the Commission will usually issue a final letter to the undertaking confirming that it has fulfilled the conditions of the cooperation agreement.⁷⁶

3.5 Benefits of the Cooperation Agreement.⁷⁷

As discussed above, a cooperation agreement obligates the Commission to seek discounted pecuniary penalties against the applicant. It does not prevent the Commission from seeking any other orders from the Tribunal, although the Commission must inform the undertaking whether it intends to apply for any other orders under Section 94 of the Ordinance.⁷⁸ The Tribunal may also

decide to impose non-pecuniary penalties on the undertaking, even if such penalties are not requested by the Commission.⁷⁹

In addition to agreeing to apply a discount to the undertaking's recommended pecuniary penalty, the Commission may also agree not to initiate any proceedings against current or former officers, employees and agents of the applicant who cooperate with the Commission's investigation.⁸⁰ Unlike the Leniency Policy, which provides that the Commission *will* extend the leniency agreement's benefits to an undertaking's current officers and employees, the Cooperation Policy gives the Commission discretion over whether it will agree not to bring any proceedings against current or former officers, employees, partners and agents of a cooperating undertaking.⁸¹

Cooperation Discount "Bands."

When an undertaking expresses willingness to cooperate with an investigation before the Commission has initiated Tribunal proceedings against it, the Commission will assign the undertaking to a Cooperation Discount "band" based on the order in which it came forward to cooperate.⁸² Undertakings assigned to Band 1 will receive a discount of between 35% and 50% of the recommended penalty; those assigned to Band 2 will receive a discount of between 20% and 40%; and those assigned to Band 3 will receive a discount of up to 25%.⁸³

The Commission will "ordinarily" assign the first second-in to Band 1. Later cooperators will be assigned to Band 2 or 3, depending on the order in which they came forward.⁸⁴ Note, however, that the Cooperation Policy gives the Commission full discretion to determine the band to which each undertaking will be assigned.⁸⁵ The Commission may also include more than one undertaking in each band.⁸⁶ Within each applicable band, the Commission has the discretion to determine the actual discount, taking into consideration factors such as the timing and value of the undertaking's cooperation.⁸⁷ Finally, the Commission may recommend a discount of up to 20% if an undertaking cooperates with the Commission only after enforcement proceedings against it have commenced.⁸⁸

No additional penalty for reporting new information.⁸⁹

The Cooperation Policy insulates undertakings from being penalized for providing the Commission with *new incriminating information or evidence*. If an undertaking provides the Commission with new evidence "that allows the Commission to prove facts extending the duration or gravity of the cartel conduct," the Commission will not take those facts into account when assessing the undertaking's pecuniary penalty.⁹⁰ This provision allows a second-in undertaking ineligible for full immunity under the Leniency Policy to effectively receive immunity against pecuniary penalty for any information that it is the first to report. This provision of the Cooperation Policy is designed to incentivise undertakings to come forward and cooperate with an investigation as early as possible, in the hopes of being the first to provide specific information relating to the full scope of the cartel conduct and thereby avoid pecuniary penalty for certain conduct that may not yet have been reported. Note, however, that this benefit is tempered by the fact that the Tribunal ultimately decides whether to follow the Commission's recommendations on the pecuniary penalty.

Leniency Plus.⁹¹

The Cooperation Policy also offers cooperating undertakings the opportunity to receive an additional discount on recommended pecuniary penalty in instances in which the undertaking finds that it has been involved in multiple, separate cartels.⁹² If a cooperating undertaking finds that, in addition to the first cartel, it has engaged in a completely separate cartel and enters into a leniency agreement with the Commission for its role in the second cartel, the Commission will apply an additional discount of up to 10% on the undertaking's recommended pecuniary penalty for its role in the first cartel.⁹³ The Commission will consider several factors in determining the amount of the additional

discount, including the significance of the second cartel and the likelihood that the cartel would have been uncovered without the undertaking's cooperation.⁹⁴

Termination of the Cooperation Agreement.⁹⁵

The Cooperation Policy provides that the Commission will generally only consider terminating a cooperation agreement if it has reasonable grounds to suspect that the undertaking “*knowingly or recklessly* provided false or materially incomplete information,” or otherwise failed to comply with the terms of the agreement.⁹⁶ This is a higher standard than that for termination of an agreement under the Leniency Policy, which provides that the Commission can terminate an agreement for the provision of false, incomplete or misleading information, even if the undertaking did not knowingly or recklessly provide or fail to provide such information.⁹⁷

Before voiding a cooperation agreement, the Commission must inform the undertaking of its concerns and give the applicant a reasonable period of time to address them.⁹⁸ If a cooperation agreement is terminated, the Commission may retain information provided by the undertaking pursuant to the agreement and use the information as evidence against the undertaking and other cartel members.⁹⁹ The Commission may also revoke protections under a cooperation agreement for current or former officers, employees, partners and agents of the undertaking if it determines that the individuals have failed to fully cooperate with the Commission.¹⁰⁰

Confidentiality.¹⁰¹

Unless the Commission gives prior consent, an undertaking must keep confidential the Commission's investigation, the cooperation agreement, and the terms of the cooperation agreement. If an undertaking is considering disclosing information related to the cooperation as required by the law, the undertaking must give the Commission advance notice of the disclosure. The undertaking may, however, disclose information related to the cooperation without advance notification to the Commission when it is prevented by law from doing so.¹⁰²

Similar to the Leniency Policy, the Cooperation Policy also describes the Commission's own confidentiality obligations. The Cooperation Policy provides that the Commission will “firmly resist” any requests for cooperation material “in connection with non-Commission-initiated criminal and civil proceedings in Hong Kong or . . . other jurisdictions”.¹⁰³ The Commission will nonetheless make a disclosure when compelled to do so by a court or by the law, if the undertaking consents to the disclosure, or if the information is in the public domain.¹⁰⁴

In a notable departure from the Leniency Policy, the Cooperation Policy does not discuss the Commission's cooperation with cross-border cartel investigations. It is unclear whether the Commission will use information gathered in the context of cooperation agreements to participate in multi-jurisdictional cartel investigations. Further guidance on the Commission's participation in multi-jurisdictional investigations is necessary to permit companies involved in cross-border cartel conduct to assess the risks associated with entering into cooperation agreements with the Commission.

4 Conclusion

Leniency programs have proven to be an important investigative tool for competition authorities around the world. However, to be effective, leniency programs must be transparent and mindful to avoid disincentives to participate.

While the Commission has tried to make the program attractive by offering full immunity to first-ins and promising confidentiality to all cooperating undertakings (and hiring very experienced officials), certain aspects of the application of the programs remain uncertain and create disincentives to self-reporting. Notably, the obligation to sign a Statement of Facts, the risk that the Tribunal may impose non-pecuniary sanctions on its own accord, and the possibility that the Commission may share its information with another jurisdiction over its objection through a compulsory waiver create potential disincentives to self-reporting. The broad discretion the Commission has in setting the terms of cooperation agreements and the uncertainty surrounding whether the Tribunal will accept the recommendations of the Commission when imposing pecuniary penalties on second-in undertakings may discourage late reporters from taking advantage of the Cooperation Policy. It is true that these potential flaws are in part due to the particular design of the leniency provisions in the Ordinance.

It will therefore be very important that the Commission and the Tribunal develop a track record for the fair and transparent implementation of the leniency provisions of the Ordinance. In particular, the Tribunal should set precedents confirming that it will not impose non-pecuniary penalties on leniency applicants, and that it will follow the recommendations of the Commission when imposing pecuniary penalties on cooperating undertakings not eligible for full immunity under the leniency policy.

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- ¹ Sébastien J. Evrard is an antitrust and competition partner in the Hong Kong office of Gibson Dunn & Crutcher; Virginia Newman is an associate in the same office. Scott D. Hammond is a co-chair of Gibson Dunn’s antitrust and competition practice group.
- ² http://www.compcomm.hk/en/media/press/files/Leniency_Policy_Eng.pdf.
- ³ https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Cooperation_Policy_Eng.pdf.
- ⁴ See Keynote Speech by Miss Anna Wu, Chairperson Competition Commission, March 2015, available at: http://www.compcomm.hk/en/media/speeches/files/Fighting_Cartels_20150327.pdf; see also the Commission’s “Enforcement Policy” in which it confirmed that cartel conduct will be afforded investigative priority in the “initial years”, available at: http://www.compcomm.hk/en/media/press/files/Enforcement_Policy_Eng.pdf.
- ⁵ Competition Commission v. Nutanix Hong Kong Ltd (and others), [2019] HKCT 2; Competition Commission v. W. Hing Construction Co. Ltd. (and others), [2019] HKCT 3.
- ⁶ Sections 6, 21 and Schedule 7 of the Ordinance, respectively.
- ⁷ See para. 3.3 of the Guideline on the First Conduct Rule.
- ⁸ Section 2 of the Ordinance.
- ⁹ See Leniency Policy at para. 2.4.
- ¹⁰ See Section 82(1) of Ordinance and paragraphs 7.14 and 7.15 of the Guideline on Investigations.
- ¹¹ See Part 6 of the Ordinance.
- ¹² If the conduct took place for longer than three years, the years in which the highest revenues were reported will be taken into account.
- ¹³ See Section 110 of the Ordinance. This rule will not prevent private parties from raising defenses based on the Competition Rules in any litigation before the Court of First Instance. In that case, there is a possibility to transfer the case (or parts of it) to the Tribunal (see Sections 113 and 114 of the Ordinance).
- ¹⁴ http://www.compcomm.hk/en/media/speeches/files/Fighting_Cartels_20150327.pdf.
- ¹⁵ http://www.compcomm.hk/en/enforcement/consultations/past_consultations/draft_leniency_policy.html.
- ¹⁶ http://www.compcomm.hk/en/legislation_guidance/policy_doc/leniency_policy.html.
- ¹⁷ Leniency Policy at para.s 1.1 – 1.3.
- ¹⁸ *Ibid.*
- ¹⁹ *Ibid.*, at para. 1.4.
- ²⁰ See footnote 1 of the Leniency Policy.
- ²¹ See Section 6 prohibiting anticompetitive agreement: “An undertaking must not [...]” and Section 7 prohibiting abuses of substantial market power: “An undertaking that has a substantial degree of market power in a market must not [...]”.
- ²² Section 92 of the Ordinance states that “if the Tribunal is satisfied [...] that a person has contravened, or has been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate”.
- ²³ See Competition Commission Press Release, “Competition Commission takes renovation cartel case to Competition Tribunal,” 6 September 2018, available at: https://www.compcomm.hk/en/media/press/files/Competition_Commission_takes_renovation_cartel_case_to_Competition_Tribunal_EnglishPR.pdf.
- ²⁴ See Competition Commission v. Kam Kwong Engineering Co. Ltd., et al., available at: https://www.compcomm.hk/en/enforcement/enforcement/competition_tribunal.html.
- ²⁵ See para. 1.4 of the Leniency Policy.
- ²⁶ *Ibid.*, at para.s 4.1 – 4.3
- ²⁷ *Ibid.*, at footnote 2.
- ²⁸ *Ibid.*, at para. 2.13.
- ²⁹ See the definition in Section 2(1) of the Ordinance.
- ³⁰ See para. 2.4 of the Leniency Policy.
- ³¹ *Ibid.*, at para. 2.5.
- ³² *Ibid.*, at para.s 2.6 – 2.11.

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- ³³ *Ibid*, at para.s 2.12 – 2.17.
- ³⁴ See *infra* section 3 (discussing the Cooperation Policy).
- ³⁵ See para.s 2.18 – 2.24 of the Leniency Policy.
- ³⁶ Leniency Policy at para. 2.20. Note, however, that the Commission may seek to obtain access to the information proffered by an applicant by using its general investigation powers under the Ordinance.
- ³⁷ *Ibid*, at para.s 2.25 – 2.26 and 2.29.
- ³⁸ *Ibid*, at para.s 2.27 – 2.30.
- ³⁹ *Ibid*, at para. 2.2.
- ⁴⁰ *Ibid*, at para.s 3.1 – 3.6.
- ⁴¹ http://www.compcomm.hk/en/enforcement/consultations/past_consultations/submission_leniency.html
- ⁴² *Ibid*, at para.s 5.1- 5.4 and 2.15.
- ⁴³ *Ibid*, at para. 2.16.
- ⁴⁴ Section 126 lists the exceptions where the Commission may disclose the information with lawful authority.
- ⁴⁵ Leniency Policy at para.s 5.7-5.9.
- ⁴⁶ *Ibid*, at paragraphs 6.1 – 6.3.
- ⁴⁷ Cooperation Policy at para. 3.4.
- ⁴⁸ *Ibid*.
- ⁴⁹ *Ibid*, at para. 3.5.
- ⁵⁰ See Section 80 of the Ordinance.
- ⁵¹ Cooperation Policy at para. 1.2(b).
- ⁵² *Ibid*, at para. 1.2(e).
- ⁵³ *Ibid*, at para. 2.3.
- ⁵⁴ *Ibid*, at para. 2.2.
- ⁵⁵ *Ibid*, at para. 1.2(a).
- ⁵⁶ *Ibid*, at para. 2.
- ⁵⁷ *Ibid*, at para. 2.1.
- ⁵⁸ *Ibid*, at para.s 2.4 – 2.6.
- ⁵⁹ *Ibid*, at para. 2.5.
- ⁶⁰ *Ibid*, at para. 2.4.
- ⁶¹ *Ibid*, at para. 2.5.
- ⁶² *Ibid*, at para.s 2.7 – 2.10.
- ⁶³ *Ibid*, at para. 2.6.
- ⁶⁴ *Ibid*, at para. 2.7.
- ⁶⁵ *Ibid*, at para. 2.7.
- ⁶⁶ *Ibid*, at para. 2.9.
- ⁶⁷ *Ibid*, at para.s 2.7(a) – (f).
- ⁶⁸ *Ibid*, at para. 2.7(f)(i).
- ⁶⁹ *Ibid*, at para. 2.7(f)(ii).
- ⁷⁰ Section 93(1) of the Ordinance.
- ⁷¹ Cooperation Policy at para. 2.8(f)(iii). At this stage, there is no guidance on the amount such costs could represent.
- ⁷² Section 93(1) of the Ordinance.
- ⁷³ Section 93(2) of the Ordinance.
- ⁷⁴ Cooperation Policy at para.s 2.11 – 2.12.
- ⁷⁵ *Ibid*, at para. 2.11.
- ⁷⁶ *Ibid*, at para. 2.12.
- ⁷⁷ *Ibid*, at para.s 3.1 – 3.7.
- ⁷⁸ *Ibid*, at para. 2.7.

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- ⁷⁹ Section 94(1) of the Ordinance.
- ⁸⁰ See Cooperation Policy at para. 3.2.
- ⁸¹ *Ibid.*
- ⁸² *Ibid.*, at para. 3.3.
- ⁸³ *Ibid.*
- ⁸⁴ *Ibid.*, at para. 3.4.
- ⁸⁵ *Ibid.*, at footnote 9.
- ⁸⁶ *Ibid.*
- ⁸⁷ *Ibid.*, at para. 3.5.
- ⁸⁸ *Ibid.*, at para. 3.7.
- ⁸⁹ *Ibid.*, at para. 3.6.
- ⁹⁰ *Ibid.*
- ⁹¹ *Ibid.*, at para.s 4.1 – 4.4.
- ⁹² *Ibid.*, at para. 4.1.
- ⁹³ *Ibid.*, at para.s 4.2(a) – (c).
- ⁹⁴ *Ibid.*, at para.s 4.3(a) – (c).
- ⁹⁵ *Ibid.*, at para.s 5.1 – 5.4.
- ⁹⁶ *Ibid.*, at para. 5.1.
- ⁹⁷ See Leniency Policy at para. 3.1.
- ⁹⁸ Cooperation Policy at para. 5.2.
- ⁹⁹ *Ibid.*, at para. 5.4.
- ¹⁰⁰ *Ibid.*, at para. 5.6.
- ¹⁰¹ *Ibid.*, at para.s 5.1 – 5.4.
- ¹⁰² *Ibid.*, at para. 6.1.
- ¹⁰³ Cooperation Policy at para. 6.4.
- ¹⁰⁴ *Ibid.*, at para.s 6.4(a) – (c).