

## Incentivising Cooperation: Hong Kong Competition Commission Publishes Cooperation and Settlement Policy

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On 29 April 2019, the Hong Kong Competition Commission (HKCC) published a Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (**Cooperation Policy**) as a supplement to its existing Leniency Policy for Undertakings Engaged in Cartel Conduct (**Leniency Policy**) and **Enforcement Policy**.

This Client Briefing outlines some of the key details of the new Policy and considers the implications for companies under investigation.

### Background

Since November 2015, the HKCC has had in place a Leniency Policy which provides that the HKCC may grant immunity to the first company that reports a cartel to the HKCC and cooperates with the ensuing investigation under the Competition Ordinance (**Ordinance**). The power to enter into leniency agreements is explicitly provided for in Section 80 of the Ordinance.

The Leniency Policy, however, provides that leniency is available only for the first cartel member who reports the cartel conduct to the HKCC and meets all the requirements for receiving leniency. The uncertainty surrounding what the position might be for applicants which are second or third in line, and the stringent requirements under the Leniency Policy to obtain immunity, may explain the apparently limited

number of leniency applications since the Ordinance came into full force in December 2015.

With the publication of the Cooperation Policy, companies which do not benefit from immunity under the Leniency Policy can now opt to cooperate with the HKCC's investigation in exchange for benefits set out in the Policy. It also introduces 'Leniency Plus' in Hong Kong.

This represents an important step in the HKCC's efforts to conduct effective and efficient investigations into cartel conduct, and gives companies under investigation greater clarity on the potential benefits of cooperating with an investigation.

### Key elements of the Policy

Some key elements of the Cooperation Policy are:

- It applies only to cartel conduct. The Policy does not cover cooperation arrangements with undertakings engaged in non-cartel conduct that contravenes either the First Conduct Rule or Second Conduct Rule in the Ordinance. The HKCC will exercise its enforcement discretion and consider cooperation arrangements in respect of such conduct on a case-by-case basis, applying the Policy, where and to the extent appropriate.
- The Policy relates only to cooperation provided by companies (undertakings). The HKCC has not published an equivalent cooperation policy for individuals.

- The ultimate goal of the Policy is for the HKCC and the cooperating undertaking to enter into a cooperation agreement (**Cooperation Agreement**) and jointly apply to the Tribunal for an order made by consent that the undertaking has contravened or been involved in the contravention of the First Conduct Rule.
- In the Cooperation Agreement, the HKCC may also agree not to commence any proceedings against any current and former employees, officers, partners and agents of the undertaking provided that they fully and truthfully cooperate with the HKCC.
- A party to a Cooperation Agreement is required to fulfil its requirements continuously, including co-operating with the HKCC throughout the investigation and in any proceedings the HKCC initiates before the Tribunal in relation to the reported conduct.

*Cooperation for a discount*

In return for cooperation provided by the undertaking, the HKCC will agree to apply a discount to the pecuniary penalty it would otherwise recommend to the Tribunal (**Cooperation Discount**). The Cooperation Policy sets out the levels of recommended discounts a cooperating undertaking can expect to receive:

**Table 1 - Recommended Cooperation Discounts**

	RECOMMENDED DISCOUNTS
Band 1	Between 35% and 50%
Band 2	Between 20% and 40%
Band 3	Up to 25%

The HKCC states that it will ordinarily indicate Band 1 to the first undertaking to express its interest to cooperate. Undertakings that come forward after the first undertaking will be identified as falling into Band 2 or 3 depending on their order. The HKCC may decide, on a case by case basis, to include more than one undertaking in each band, but the three bands are likely to

incentivise undertakings to come forward swiftly in order to benefit from the highest possible discount.

The HKCC will determine the actual Cooperation Discount within the applicable band, having regard to the timing, nature, value and extent of cooperation provided by the undertaking. The fact that there is some overlap in three bands is to differentiate cooperating undertakings in terms of the quality of their cooperation.

*Leniency Plus*

The Cooperation Policy provides for ‘Leniency Plus’, under which companies that cooperate with the HKCC in a cartel investigation and come forward first to disclose the existence of another completely separate cartel can receive an additional discount of up to 10% off the recommended pecuniary penalty for the first cartel. The level of discount will depend on a number of factors including the significance of the second cartel and the strength of relevant evidence provided.

**Implications of the Cooperation Policy**

The Cooperation Policy gives companies under investigation greater clarity on the benefits of cooperation. The HKCC had previously avoided providing guidance on recommended discounts (e.g. in its Leniency Policy) on the basis that this is ultimately a decision for the Tribunal. However, the fact that it has been willing to do so in the Cooperation Policy is a welcome step to encouraging closer cooperation with undertakings under investigation. To enhance predictability, the HKCC has said that it expects to indicate which band will apply at the time when the undertaking expresses an interest in cooperating.

‘Leniency Plus’ is a useful tool to offer greater incentives for companies to come forward, and brings Hong Kong in line with many other countries that have a ‘Leniency Plus’ regime. This is consistent with the HKCC’s objective of encouraging more leniency applications in Hong Kong.

For a company considering whether to cooperate with the HKCC under the terms of the Cooperation Policy, there remain a few areas of uncertainty to bear in mind.

- The Policy states that the HKCC “may” agree not to bring any proceedings against any current and former employees “as long as the relevant individual provides complete, truthful and continuous cooperation”. Although the language of the Policy suggests that this is the only criterion for the HKCC agreeing to not bring proceedings against employees, it is not clear whether there are any other circumstances in which the HKCC might not agree to this.
- The HKCC will “ordinarily” indicate Band 1 only to the first undertaking, and Bands 2 and 3 in the order in which they come forward. This creates some uncertainty over potential benefits for undertakings that may be the fourth or subsequent undertakings to cooperate. The HKCC notes in the Cooperation Policy that it may decide, on a case by case basis, to include more than one undertaking in each band, but this appears to remain entirely at the HKCC’s discretion.
- The discounts referred to in the Policy are only “recommended”. The HKCC cannot guarantee the reduction, as the final determination of any fine is made by the

Tribunal. There remains some risk therefore that the fine may end up being higher than what is proposed, by which time the cooperating company will have already made submissions to the Tribunal that it has contravened the First Conduct Rule. We understand, however, that the HKCC expects the Tribunal to take into account the HKCC’s recommendations.

### Conclusion

The Cooperation Policy is an important development to strengthen the incentives for companies to cooperate by creating a clear and predictable framework for cooperation beyond the existing leniency regime. Given the Cooperation Policy provides significantly greater clarity and certainty for companies under investigation, and there are clear benefits to companies in cooperating with the HKCC, we expect to see closer cooperation between such companies and the HKCC going forward.

The HKCC is currently carrying out a review of the Leniency Policy, and has been reported to be working on separate guidance relating to the calculation of pecuniary penalties which the HKCC recommends to the Tribunal.



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