


Cooperation and Settlement Policy

for Undertakings Engaged
in Cartel Conduct



April 2019

Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct

*Under its Leniency Policy for Undertakings Engaged in Cartel Conduct (“**Leniency Policy**”), the Competition Commission (“**Commission**”) may make a leniency agreement with an undertaking that it will not bring or continue proceedings in the Competition Tribunal (“**Tribunal**”) for a pecuniary penalty in exchange for the undertaking’s cooperation in an investigation or in proceedings under the Competition Ordinance (Cap. 619) (“**Ordinance**”).*

*Undertakings which do not benefit from leniency under the Leniency Policy can opt to cooperate with the Commission’s investigation within the framework of this Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (“**Policy**”) in exchange for benefits as set out in this Policy. Cooperation with the Commission’s investigation will ultimately lead to the Commission and the undertaking jointly applying 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.*

This Policy is an important tool in enhancing the Commission’s ability to conduct effective and efficient investigations into cartel conduct, which will in turn deter the occurrence of cartel conduct in Hong Kong. In view of these considerations, the Commission considers that it is in the public interest for the Commission to apply this Policy.

This Policy should be read alongside the Leniency Policy.

This 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 Commission will exercise its enforcement discretion and consider cooperation arrangements in respect of such conduct on a case-by-case basis, applying this Policy, where and to the extent appropriate.

This Policy also does not cover cooperation arrangements with any persons who are not an undertaking.



1. Introduction and overview

1.1 An undertaking may seek to cooperate with the Commission with a view to reaching a settled outcome to an investigation by way of orders made by consent as provided by Rule 39 of Competition Tribunal Rules (Cap. 619D) ("**Consent Order**") in accordance with this Policy if:


- (a) it is engaged in cartel conduct¹; and
- (b) leniency in relation to the cartel conduct is not available.

Key elements of the Policy

1.2 This Policy consists of the following key features:

- (a) First, this Policy applies only to cartel conduct. For the purposes of this Policy cartel conduct refers to agreements and/or concerted practices between two or more undertakings which consist of (i) fixing, maintaining, increasing or controlling the price for the supply of goods or services, (ii) allocating sales, territories, customers or markets for the production or supply of goods or services, (iii) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services, or (iv) bid-rigging.
- (b) Second, this Policy only relates to cooperation provided by undertakings.
- (c) Third, if the undertaking meets all the conditions for cooperation under this Policy, the Commission will enter into a cooperation agreement with the undertaking ("**Cooperation Agreement**") and jointly apply with the undertaking for a Consent Order on the basis of a joint statement of agreed facts which will reflect the facts as set out in a summary of facts agreed by the undertaking and the Commission ("**Agreed Factual Summary**") (see paragraph 2.7 below).

¹ Irrespective of whether its conduct may be qualified as a contravention of the First Conduct Rule or involvement in a contravention of the First Conduct Rule under Section 91 of the Ordinance.

- 
- (d) Fourth, in the Cooperation Agreement the Commission will agree to apply a cooperation discount of up to 50% on the pecuniary penalty that would otherwise be recommended to the Tribunal.
 - (e) Fifth, in the Cooperation Agreement the Commission may also agree not to take any proceedings against any current and former employees, officers, partners and agents of the undertaking provided that they fully and truthfully cooperate with the Commission.
 - (f) Sixth, a party to a Cooperation Agreement is required to continuously fulfill its requirements including co-operating with the Commission throughout the investigation and in any proceedings the Commission initiates before the Tribunal in relation to the reported conduct². At an appropriate stage (usually at the end of the proceedings), the Commission will issue a letter confirming that all conditions under the agreement have been fulfilled.

2. Cooperation procedure

Stage 1: Indication of willingness to cooperate

- 2.1 An undertaking subject to investigation may indicate its willingness to cooperate with the Commission under this Policy by making contact with the case manager concerned, either orally or in writing. Until confirming to an undertaking that it will accept cooperation under this Policy, the Commission retains full discretion to determine whether it will engage in cooperation with an undertaking under this Policy in that investigation.
- 2.2 In its discretion, the Commission may also approach undertakings subject to investigation to propose cooperation under this Policy.
- 2.3 The below paragraphs set out the procedure applicable to cooperation with the Commission during on-going investigations. In other cases, such as where proceedings have already been filed before the Tribunal, undertakings are welcome to indicate their willingness to cooperate with the Commission under this Policy, and the Commission may apply the procedure where and to the extent appropriate.

² This shall include any subsequent appeal proceedings and remittals.



Stage 2: Cooperation in the investigation

- 2.4 An undertaking cooperating with the Commission is required to provide documents and information through a proffer process. All documents, information, communications and representations provided in this stage are considered to be made on a “without prejudice basis”.³ Any communications with the Commission may be made orally or in writing.
- 2.5 During this stage, the undertaking will be required to provide 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 including those involved on the undertaking’s behalf and information about the undertaking itself. The undertaking will be also required to provide access to evidence (e.g. documentary evidence relating to the cartel) and to make its employees, officers, partners and agents available to be interviewed by the Commission.⁴ The Commission may ask the undertaking to provide any other information relevant to the investigation, including information relevant to the Commission’s assessment of a recommended pecuniary penalty.
- 2.6 At an appropriate time, and generally not before the provision of documents and information set out in paragraph 2.5 above, the Commission will provide the undertaking with a draft Agreed Factual Summary as established by the investigation to date and a draft Cooperation Agreement. At the same time, the Commission will offer the undertaking limited disclosure of a selection of key documents underpinning the draft Agreed Factual Summary. Upon the undertaking’s request and if it deems justified, the Commission may disclose additional documents.

³ But see paragraph 2.10 and footnote 6.


⁴ Generally, in the context of cooperation the Commission will record voluntary interviews with cooperating individuals by way of a summary of the interview the accuracy of which will be confirmed by the relevant individual (“**Cooperating Individual Statement**”).



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

- 2.7 Where the Commission and the undertaking reach an understanding in principle on the draft Agreed Factual Summary and the draft Cooperation Agreement, the Commission will indicate to the undertaking the maximum recommended pecuniary penalty it would be willing to recommend to the Tribunal, which will include a discount for the cooperation provided. It will also indicate whether it intends to apply for any other orders under section 94 of the Ordinance. The undertaking will be asked to formally confirm within 10 working days whether it wishes to continue cooperation by signing the Cooperation Agreement including the Agreed Factual Summary. The Commission will consider reasonable requests, supported by evidence, for an extension of this period on the basis that the 10 working day period is insufficient to obtain formal confirmation.
- 2.8 The Cooperation Agreement will contain the Agreed Factual Summary and will ordinarily 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 conduct⁵;
 - (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 continuing 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;

⁵ The Commission may instruct the undertaking's continued participation in the cartel conduct e.g. with a view to avoiding 'tipping-off' other cartel participants to the fact of the Commission's investigation, or to assist in investigations by competition authorities in other jurisdictions.

- 
- (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, including that:
 - i. the undertaking will make joint submissions with the Commission to the Tribunal in support of a finding that the undertaking contravened the First Conduct Rule or was involved in a contravention of the First Conduct Rule, as appropriate, on the basis of the Agreed Factual Summary;
 - ii. the undertaking will pay the Government a pecuniary penalty pursuant to section 93 of the Ordinance in a sum to be assessed by the Tribunal on the basis of a joint recommendation by the undertaking with the Commission at a level not exceeding the maximum indicated under paragraph 2.7 above; and
 - iii. the undertaking will bear the Commission's costs of any proceedings against the undertaking, the application under Rule 39 of the Competition Tribunal Rules and the hearing (if any) to be taxed if not agreed.

2.9 The Commission reserves the right to discontinue cooperation with an undertaking at any stage before the Cooperation Agreement has been signed, if it has reasonable grounds to suspect that the undertaking has failed to comply with any of the requirements as set out in paragraphs 2.4 to 2.6 and 6.1.



2.10 Where the undertaking and the Commission do not proceed to enter into a Cooperation Agreement, documents and information provided by the undertaking and records of any interviews with the undertaking's cooperating employees, officers, partners or agents will not be used directly⁶ as evidence in the Commission's investigation or any subsequent proceedings and the Commission will endeavour to ensure that the same protection from disclosure is afforded to these documents in the same way as communications with unsuccessful leniency applicants. The Commission, however, reserves the right to obtain that same information by using its powers under the Ordinance and to make indirect use of documents and information provided in the context of cooperation.⁷

Stage 4: Ongoing compliance with the terms of the Cooperation Agreement and the issuance of a final letter

2.11 The undertaking is required to ensure continued compliance with the terms of the Cooperation Agreement.

2.12 At an appropriate time (usually at the end of any proceedings by the Commission before the Tribunal or other courts against the party to the Cooperation Agreement and other participants in the cartel conduct⁸), the Commission will issue a final letter to the undertaking to confirm that all conditions under the Cooperation Agreement have been fulfilled.

3. Cooperation Benefits

3.1 In return for cooperation provided by the undertaking, the Commission will agree to apply a discount to the pecuniary penalty it would otherwise recommend to the Tribunal ("**Cooperation Discount**").

⁶ The Commission does, however, reserve the right to make direct use of a Cooperating Individual Statement in the context of any proceedings following an action filed by the Commission if the individual statement maker gives evidence inconsistent with the Cooperating Individual Statement. In such situation, the Commission reserves the right to use the Cooperating Individual Statement for the purpose of calling the relevant individual's credibility into question.

⁷ For the avoidance of doubt, 'indirect use' covers derivative use in the context of an investigation, e.g. to develop facts through further investigation on the basis of knowledge gained by the Commission from documents and information provided as part of cooperation.

⁸ This shall include any subsequent appeal proceedings and remittals.

3.2 The Commission may also agree not to bring any proceedings against any current and former officers, employees, partners and agents of the undertaking as long as the relevant individual provides complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing enforcement proceedings in relation to that conduct.

3.3 Where an undertaking indicates its willingness to cooperate with the Commission (as set out at paragraphs 2.1 to 2.3 above) before the commencement of any Tribunal proceedings against it, the Commission will identify an applicable band of a Cooperation Discount based on the order in which undertakings express their interest to cooperate:

	Recommended discounts
Band 1	Between 35% and 50%
Band 2	Between 20% and 40%
Band 3	Up to 25%

3.4 The Commission will ordinarily indicate Band 1 to the first undertaking to express its interest to cooperate⁹. Undertakings that come forward after the first undertaking will be identified as falling into Band 2 or 3 depending on the order in which they come forward. The Commission may decide, on a case by case basis, to include more than one undertaking in to each band.

3.5 The Commission 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. Such determination will be communicated to the undertaking at stage 3 (paragraph 2.7 above) with the draft Cooperation Agreement and the draft Agreed Factual Summary.


⁹ Until confirming to an undertaking that it will accept cooperation under this Policy, the Commission retains full discretion to determine whether it will engage in cooperation with an undertaking under this Policy in that investigation or the band in which it will accept cooperation.



- 3.6 If an undertaking is the first to provide the Commission with information or evidence that allows the Commission to prove additional facts extending the duration or gravity of the contravention, the Commission will not take into account such additional facts when calculating the undertaking's recommended pecuniary penalty.
- 3.7 Where an undertaking begins to cooperate with the Commission only after the commencement of any enforcement proceedings against it, the Commission may recommend a Cooperation Discount of up to 20%.

4. Leniency Plus

- 4.1 An undertaking cooperating with the Commission under this Policy in relation to its participation in one cartel ("**First Cartel**") may find that it also has engaged in one or more completely separate cartels ("**Second Cartel**").
- 4.2 The Commission will apply an additional discount of up to 10% of the recommended pecuniary penalty for an undertaking involved in the First Cartel, provided that:
- (a) the undertaking has entered into a leniency agreement with the Commission in respect of the Second Cartel;
 - (b) the Second Cartel is completely separate from the First Cartel;
 - (c) the undertaking fully and truthfully cooperates with the Commission in respect of both cartels,
- ("Leniency Plus Discount").
- 4.3 The Commission will take into account the following factors when determining the level of Leniency Plus Discount:
- (a) the strength of evidence provided by the undertaking in respect of the Second Cartel;

- 
- (b) the significance of the Second Cartel (including the value of sales, number and size of undertakings involved and geographic scope); and
 - (c) the likelihood that the Second Cartel would have been uncovered without the undertaking's cooperation.

4.4 An undertaking which wishes to apply for leniency in respect of a Second Cartel should discuss this with the case manager for the First Cartel.

5. Terminating the Cooperation Agreement and revoking protection for officers, employees, partners and agents

- 5.1 The Commission will generally only consider terminating a Cooperation Agreement with an undertaking if it has reasonable grounds to suspect that the undertaking has at any time knowingly or recklessly provided false or materially incomplete information to the Commission or has otherwise failed to comply with the terms of the Cooperation Agreement.
- 5.2 Where the Commission is of the view that it may be appropriate to terminate a Cooperation Agreement, it will, in the first instance, inform only the party to the Agreement of its concerns and the party to the Cooperation Agreement will be given an opportunity to address the Commission's concerns within a reasonable period of time.
- 5.3 If the Commission's concerns remain unaddressed, the Commission will only then proceed with the termination of the Cooperation Agreement which will be carried out in the same process as that provided for in sections 81(2) to (5) of the Ordinance.
- 5.4 Information provided by an undertaking to the Commission pursuant to a Cooperation Agreement which has been terminated may be retained by the Commission and used directly as evidence against that undertaking and other participants in the cartel conduct.



Officers, employees, partners and agents

- 5.5 Where a Cooperation Agreement with an undertaking is terminated, the Commission may exercise its enforcement discretion not to commence enforcement proceedings against current and former officers, employees, partners and agents of the undertaking whom previously benefited from the protection of the Cooperation Agreement in return for the on-going cooperation of those persons with the Commission.
- 5.6 The Commission may revoke protection from proceedings by the Commission for current and former officers, employees, partners and agents of the undertaking and/or any other individuals specifically named in the Cooperation Agreement if the relevant individual does not fully and truthfully cooperate with the Commission. The Commission will notify the undertaking and the relevant individual if it intends to revoke protection for that individual.

6. Confidentiality and non-disclosure

Confidentiality of cooperation

- 6.1 To support the Commission's ability to conduct effective investigations, the cooperating undertaking is required to keep confidential the fact of the investigation, the Cooperation Agreement (including any non-public information received by the undertaking from the Commission in that context and any discussions prior to entering into a Cooperation Agreement) and the terms of any Cooperation Agreement entered into with the Commission, unless the Commission's prior consent has been given or if the disclosure of the information is required by law. Where an undertaking is contemplating whether to disclose any information relating to the cooperation on the grounds that such disclosure is required by law, the undertaking must notify the Commission in advance of such disclosure, unless prevented by law from doing so.



Release of information provided by an undertaking to the Commission

6.2 The documents and information relating to cooperation include:

- (a) Information provided to the Commission by an undertaking for the purpose of entering into a Cooperation Agreement and/or pursuant to a Cooperation Agreement; and
- (b) The Commission's records of the cooperation process, including the Agreed Factual Summary and Cooperation Agreement,

(collectively, "**Cooperation Material**").

6.3 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information¹⁰ provided to the Commission. Section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority.

6.4 While the Commission reserves the right to use and disclose Cooperation Material with appropriate confidentiality protections in its investigations and any proceedings before the Tribunal or other courts under terms set out in this Policy, it is the Commission's general policy not to release Cooperation Material (whether or not it is confidential information under section 123 of the Ordinance) in connection with non-Commission-initiated criminal and civil proceedings in Hong Kong or in other jurisdictions. Accordingly, where such proceedings are concerned, the Commission will firmly resist, on public interest immunity and other applicable grounds, requests for Cooperation Material, including the fact that cooperation has been sought or is being sought, where such requests are made, unless:

- (a) It is compelled to make a disclosure by an order of the Tribunal or any other Hong Kong court, by law or any requirement made by or under a law;

¹⁰ Confidential information is defined in section 123 of the Ordinance and includes the identity of any person who has given information to the Commission.



(b) It has the consent of the party to the Cooperation Agreement to disclose the material; or

(c) The relevant information or document is already in the public domain.

6.5 If a third party makes an application in whatever form seeking to compel the Commission to disclose Cooperation Material, the Commission will advise the party to the Cooperation Agreement of that application as soon as possible.

6.6 Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations.

7. No Further Action

7.1 If the Commission decides not to pursue further a matter which is the subject of a Cooperation Agreement, it will advise the party to the Cooperation Agreement of this outcome.



Room 3601, 36/F, Wu Chung House
213 Queen's Road East
Wanchai, HONG KONG