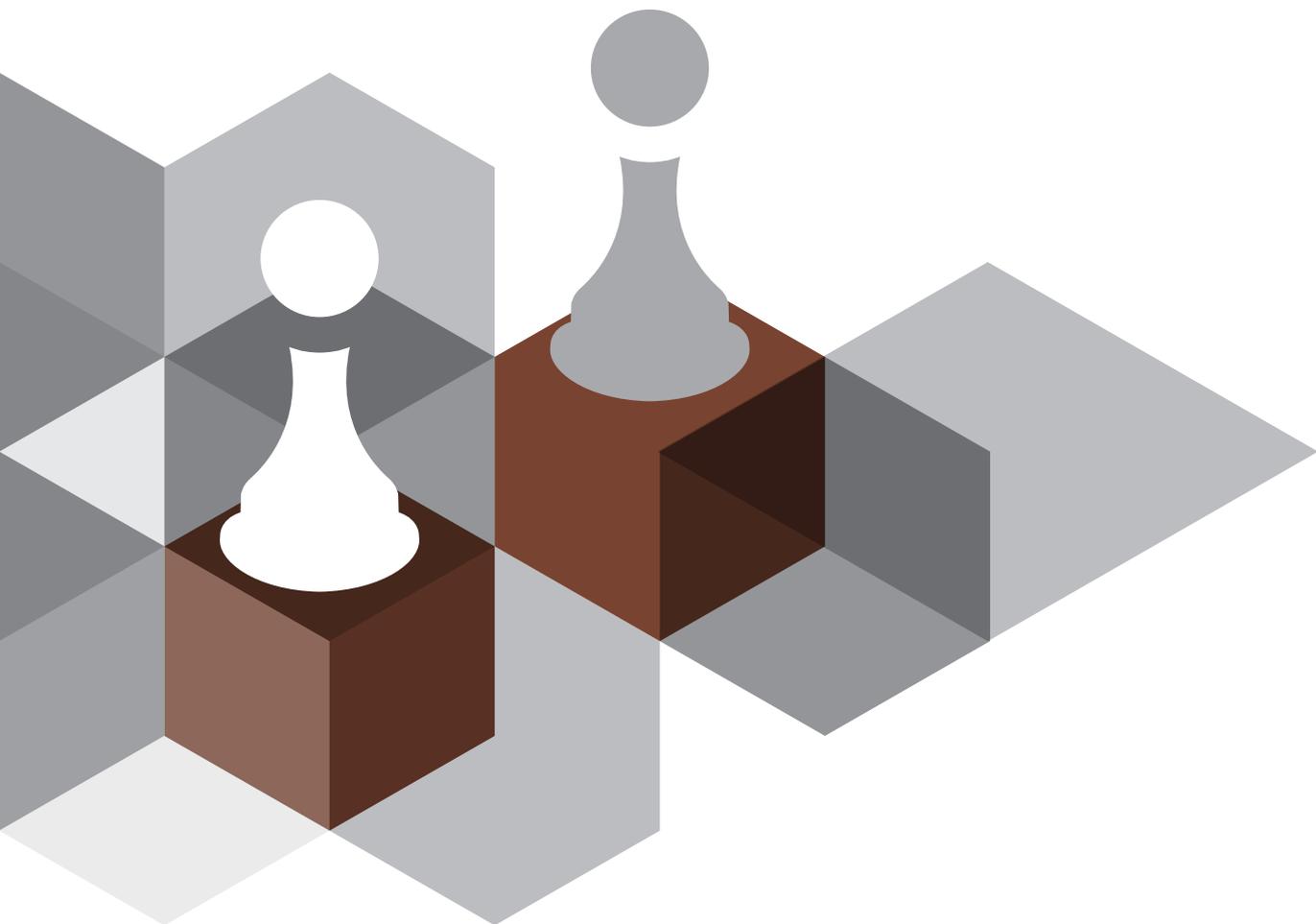


Policy on Recommended Pecuniary Penalties



Policy on Recommended Pecuniary Penalties

1 Introduction and overview

- 1.1 Pursuant to section 92 of the Competition Ordinance, Cap 619 (“**Ordinance**”), the Competition Commission (“**Commission**”) may apply to the Competition Tribunal (“**Tribunal**”) for a pecuniary penalty to be imposed on any person¹ it has reasonable cause to believe has contravened a competition rule or has been involved in a contravention of a competition rule.
- 1.2 The Tribunal may, in accordance with section 93 of the Ordinance, order a person to pay to the Government a pecuniary penalty of any amount it considers appropriate if the Tribunal is satisfied that a person has contravened or been involved in a contravention of a competition rule. Section 93(2) of the Ordinance provides that, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters:
 - (a) the nature and extent of the conduct that constitutes the contravention;
 - (b) the loss or damage, if any, caused by the conduct;
 - (c) the circumstances in which the conduct took place; and
 - (d) whether the person has previously been found by the Tribunal to have contravened the Ordinance.

The Ordinance explicitly does not limit other matters to which the Tribunal may have regard.

¹ “Person” is defined under section 2(1) of the Ordinance, and includes an undertaking and an individual who is not an undertaking.

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- 1.3 Section 93(3) of the Ordinance provides that the pecuniary penalty for conduct which constitutes a single contravention may not exceed 10% of the turnover of the undertaking obtained in the Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**") for each year of contravention, up to a maximum of three years.²
- 1.4 Where the Commission has applied to the Tribunal for a pecuniary penalty to be imposed on any person, the Commission will generally recommend to the Tribunal an amount it considers to be an appropriate pecuniary penalty at an appropriate stage ("**Recommended Pecuniary Penalty**"). By issuing this Policy on Recommended Pecuniary Penalties ("**Policy**"), the Commission seeks to ensure consistency and provide transparency as to the principles it will follow when formulating a Recommended Pecuniary Penalty for undertakings and associations of undertakings.
- 1.5 This Policy applies to conduct which may constitute:
- (a) a contravention of the First Conduct Rule in section 6 of the Ordinance or the Second Conduct Rule in section 21 of the Ordinance (each, a "**Conduct Rule**"); or
 - (b) involvement in a contravention of a Conduct Rule under section 91 of the Ordinance by undertakings and associations of undertakings. This Policy does not address involvement in a contravention of a Conduct Rule by individuals who are not undertakings.³
- 1.6 The Commission will generally apply the methodology set out in this Policy when determining a Recommended Pecuniary Penalty. However, the particularities of a given case may justify the Commission departing from the general methodology set out in this Policy.

² Turnover is to be calculated with reference to the Competition (Turnover) Regulation (Cap 619C). A year means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

³ This Policy also does not apply to contraventions of the merger rule or involvement in a contravention of the merger rule.



- 1.7 It is ultimately for the Tribunal to determine the penalty amount that is appropriate. This Policy does not bind the Tribunal. The Commission will take account of any relevant decision of the Tribunal when calculating a Recommended Pecuniary Penalty. The Commission will make necessary amendments to the Policy in order to reflect decisions of the Tribunal and the appellate courts. The Commission may also, in its discretion, revisit and amend this Policy from time to time.
- 1.8 When formulating a Recommended Pecuniary Penalty, the Commission will apply the framework provided in section 93, in particular having regard to each of the matters provided for in section 93(2) (see paragraph 1.2 above). Consistent with this framework, the Commission considers that the Recommended Pecuniary Penalty should reflect the severity of the conduct and deter:
 - (a) those persons who have been found to have contravened or been involved in a contravention of a Conduct Rule from engaging in further anti-competitive practices ("**specific deterrence**"); and
 - (b) any other persons from engaging in similar anti-competitive practices ("**general deterrence**").
- 1.9 The Commission also considers that, in formulating its Recommended Pecuniary Penalty, due credit should be given to those persons who cooperate with the Commission.



2 Formulating the Recommended Pecuniary Penalty for Undertakings and Associations of Undertakings

2.1 In this section, the Commission sets out how it calculates the Recommended Pecuniary Penalty for undertakings and associations of undertakings.

Undertakings

Step One: Determining the Base Amount

2.2 As a first step in the formulation of the Recommended Pecuniary Penalty, the Commission will determine a “**Base Amount**”. This is intended to reflect in broad terms the nature and extent of the conduct which constitutes the contravention, which is one of the mandatory considerations in section 93(2) of the Ordinance. To determine the Base Amount, the Commission will consider:

- (a) the value of sales directly and/or indirectly related to the contravention;
- (b) the gravity of the conduct; and
- (c) the duration of the contravening conduct.

Value of Sales

2.3 The Commission will refer as a starting point to the value of the undertaking’s sales directly and/or indirectly related to the contravention in the relevant geographic area within Hong Kong (“**Value of Sales**”). The Value of Sales will normally be based on the last full financial year of the undertaking’s participation in the contravention. The Value of Sales will be calculated using the relevant gross revenues without deduction for taxes directly related to the revenues.⁴

⁴ This approach to calculating Value of Sales therefore differs from that used in Step Three which is calculated in accordance with the Competition (Turnover) Regulation (Cap 619C).



- 2.4 To assess the relevant Value of Sales, the Commission will usually require any relevant information and documents to be provided either voluntarily or in response to a notice issued under section 41 of the Ordinance. In certain circumstances, the Commission may consider it appropriate and relevant to formulate the Value of Sales based on any other sources. For example, the Commission may refer to other sources where the documents and information provided by an undertaking appear to be incomplete, not reliable and/or misleading.
- 2.5 The Commission may, in certain circumstances, use a different approach to determine the relevant Value of Sales. For example, the Commission may use a different financial year where the Value of Sales in the last financial year fails to reflect the actual scale of an undertaking's activities. Similarly, the Commission may take a different approach to calculating an undertaking's Value of Sales in circumstances where that undertaking's Value of Sales would otherwise be zero or very low.

The gravity of the conduct

- 2.6 The Commission will assess the gravity of the conduct constituting the contravention on a case-by-case basis. In doing so, the Commission will identify a percentage figure ("**Gravity Percentage**") to reflect the seriousness of the conduct in question. The Gravity Percentage provides a broad scale to reflect the gravity and blameworthiness of the conduct. Examples of factors which may be considered by the Commission when setting the Gravity Percentage include but are not limited to the following:
- (a) the type of conduct, including whether it is Serious Anti-competitive Conduct;⁵
 - (b) the combined market shares of the undertakings involved;

⁵ Serious Anti-competitive Conduct is defined in section 2(1) of the Ordinance.

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- (c) whether the penalty is to be imposed on an undertaking that contravened a Conduct Rule⁶ or an undertaking that was involved in a contravention of a Conduct Rule.⁷ For cases concerning an undertaking involved in a contravention of a Conduct Rule, the Commission may take account of the degree of that undertaking's involvement; and
 - (d) the impact on competitors, consumers and third parties, whether directly or indirectly.

2.7 The Commission will normally consider all relevant circumstances without specifying what weight (if any) is given to any one factor. The Commission will exercise its discretion when considering the appropriate Gravity Percentage in relation to any particular contravention.

2.8 The Commission will usually set a Gravity Percentage for Serious Anti-competitive Conduct in the range of 15% to 30%.

Duration

2.9 To reflect the temporal extent of the conduct in question, the Commission will have regard to the number of years of the undertaking's participation in the contravention ("**Duration Multiplier**").⁸ Where the total duration of an undertaking's participation in a contravention is more than one year, the Duration Multiplier will be the total number of years of participation with partial years counted as a fraction of one with rounding up to the nearest month.⁹ Where the total duration of an undertaking's participation in a contravention is less than a year, a Duration Multiplier of one will normally be used.¹⁰

Calculation of the Base Amount

2.10 To determine the Base Amount, the Value of Sales will be multiplied by the Gravity Percentage, which will in turn be multiplied by the Duration Multiplier.

⁶ See paragraph 1.5 (a) above.

⁷ See paragraph 1.5 (b) above.

⁸ This may be more than three years, notwithstanding section 93(3)(b) of the Ordinance, since section 93(3)(b) applies only to the calculation of the statutory maximum (see Step Three below).

⁹ For example, participation in a contravention between 1 March 2018 and 20 August 2020 would result in a Duration Multiplier of 2.5.

¹⁰ In appropriate cases, the Commission may apply a Duration Multiplier of less than one to conduct that lasted less than one year.



Step Two: Making adjustments for aggravating, mitigating and other factors

- 2.11 The Commission will consider under this Step factors which may lead to an increase or decrease of the Base Amount.
- 2.12 This will include aggravating and mitigating circumstances, noting that the circumstances in which the contravention took place is one of the mandatory considerations in section 93(2) of the Ordinance.¹¹ A non-exhaustive list of aggravating and mitigating factors for these purposes is set out in paragraphs 2.14 and 2.15 below.
- 2.13 As part of this Step, the Commission will also take into account the loss or damage, if any, caused by the conduct, whether the person in question has previously been found to have contravened the Ordinance and whether there is a need to adjust the penalty for specific deterrence. It will also check that the penalty recommended is just and proportionate in the circumstances.

Aggravating circumstances

- 2.14 Aggravating circumstances may include but are not limited to the following:
- (a) where an undertaking acts as a leader in, or an instigator of, the contravention;
 - (b) where an undertaking takes coercive and/or retaliatory measures against other persons to ensure the implementation, continuation, and/or concealment of the contravention;
 - (c) where directors and senior management are involved in the contravention;
 - (d) where an undertaking's conduct is of a particularly egregious nature;
 - (e) where the anti-competitive conduct is reflective of widespread industry practice such that there is a need for additional general deterrence;

¹¹ See section 93(2)(c) of the Ordinance.

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- (f) where the conduct is Serious Anti-competitive Conduct and the undertaking has continued with the contravention despite being aware of the Commission's investigation;¹² and
 - (g) where an undertaking obstructs the Commission's investigation.

Mitigating circumstances

2.15 Mitigating circumstances may include but are not limited to the following:

- (a) where there was genuine uncertainty as to the lawfulness of the conduct in question;
- (b) where the undertaking's participation in the contravention is limited; and
- (c) where an undertaking has taken steps to ensure genuine compliance with the Ordinance through implementing a proportionate and on-going compliance programme that reflects a corporate commitment to competition compliance.¹³

Undertakings previously found by the Tribunal to have contravened the Ordinance

2.16 Where an undertaking was previously found by the Tribunal to have contravened the Ordinance, the Commission will apply uplift to the Base Amount. This reflects the mandatory consideration in section 93(2)(d) of the Ordinance. In determining the appropriate uplift, the Commission may have regard (without limitation) to the following matters:

- (a) whether there is more than one previous contravention;
- (b) the time lag between previous and current contraventions;

¹² This aggravating circumstance would not be present where the Commission requested the undertaking to continue its participation in cartel conduct e.g. with a view to avoiding "tipping-off" other cartel participants.

¹³ Compliance activities are only likely to be treated by the Commission as mitigating steps for the purpose of its Recommended Pecuniary Penalty where the undertaking demonstrates a clear and unambiguous commitment to competition law compliance throughout the organisation and that steps were taken, appropriate to the size of the business, to achieve this.

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- (c) whether any of the relevant individuals involved in the previous contraventions (e.g. directors and senior management) remain employed by the undertaking and are directly or indirectly connected with the current contravention; and
 - (d) the nature of the previous contravention(s) and in particular, whether the previous contravention was Serious Anti-competitive Conduct.

Loss or damage, if any, caused by the conduct

2.17 Where specific and concrete loss or damage is evident, and that loss or damage has not been fully reflected in the Base Amount, the Commission may increase the Base Amount as appropriate.¹⁴ This reflects the mandatory consideration in section 93(2)(b) of the Ordinance.

Specific deterrence

2.18 The Commission considers it necessary for pecuniary penalties to have a specific deterrent effect to promote the effectiveness of the competition regime. Accordingly, the Commission will consider whether the Base Amount is sufficient to achieve such effect or needs to be adjusted.

Proportionality

2.19 In addition to ensuring that the principle of proportionality is observed throughout the entire process of assessing the appropriate penalty, the Commission will especially, at the end of this Step, consider whether the penalty recommended at the end of this Step is, in the circumstances of the case, a just and proportionate penalty.

Step Three: Applying the statutory cap

2.20 The statutory maximum in respect of a pecuniary penalty for conduct that constitutes a single contravention is set at 10% of the total turnover of the undertaking in Hong Kong for each year in which the contravention occurred, up to a maximum of three years (section 93(3) of the Ordinance).¹⁵

¹⁴ This may be the case where the contravention is established on the basis of anti-competitive effects or where the overcharge resulting from the relevant conduct has been established. For the avoidance of doubt, where specific and concrete loss is not evident the Commission does not consider this to amount to a mitigating factor.

¹⁵ The Commission may in appropriate circumstances also apply a similar cap when formulating a Recommended Pecuniary Penalty for undertakings involved in a contravention of a competition rule under section 91 of the Ordinance.



2.21 Where the amount calculated after carrying out Steps One and Two above exceeds the relevant statutory maximum, the Commission will adopt the statutory maximum as the Recommended Pecuniary Penalty (subject to any final adjustments in Step Four below).

Step Four: Applying any cooperation reduction and considering inability to pay

Cooperation reduction

2.22 Where an undertaking cooperates with the Commission, a cooperation reduction will if applicable be applied as a final adjustment to the amount calculated after carrying out Steps One to Three above. In the case of cartel conduct, the cooperation reduction will be the sum of discounts determined in accordance with the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct.¹⁶

Inability to pay

2.23 In exceptional circumstances, the Commission may take into account an undertaking's inability to pay and reduce the Recommended Pecuniary Penalty. The burden will be on the undertaking to provide clear and compelling evidence of its financial position and that the Recommended Pecuniary Penalty would significantly undermine its viability.

Associations of undertakings

2.24 For an association of undertakings involved in a contravention relating to the activities of its members, the Commission will generally adopt the methodology set out with respect to undertakings, with such adaptations as appropriate. For the purposes of Step One, the Value of Sales for an association of undertakings will be assessed on a case-by-case basis, including with regard to the Value of Sales by its members.

¹⁶ This covers the Cooperation Discount and any Leniency Plus Discount as defined in that policy.



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