

# Cartel Regulation 2020

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# Cartel Regulation

## 2020

**Contributing editor****Neil Campbell**

McMillan LLP

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Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Cartel Regulation*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.



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# Hong Kong

Natalie Yeung

Slaughter and May

## LEGISLATION AND INSTITUTIONS

### Relevant legislation

#### 1 | What is the relevant legislation?

Section 6 of the Competition Ordinance 2012 (Cap 619 of the Laws of Hong Kong) (the Ordinance) prohibits cartel conduct in Hong Kong. The substantive provisions came into effect on 14 December 2015.

The Competition Commission (the Commission) and the Communications Authority (CA) issued six guidelines under the Ordinance on 27 July 2015 (the Guidelines). The Guidelines provide guidance on how the Commission and the CA intend to interpret and apply the provisions of the Ordinance. In addition, the Commission published three policy documents on enforcement, leniency and cooperation and settlement. The Commission also published guidance notes on specific issues, including the turnover-based exclusions in the Ordinance, the fees payable for making an application to the Commission, the investigation powers of the Commission and legal professional privilege, and model non-collusion clauses and non-collusive tendering certificate.

### Relevant institutions

#### 2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Ordinance established two bodies for enforcement roles:

- the Competition Commission, whose role is to investigate and prosecute suspected offenders; and
- the Competition Tribunal (the Tribunal), comprising judges of the Hong Kong Court of First Instance (CFI).

The Commission has a full range of powers to investigate suspected cartels, including powers to require production of documents and information, to require individuals to attend interviews before the Commission and, if armed with a court warrant, to enter and search premises.

The Commission currently consists of 15 members. The appointments took effect on 1 May 2018 for a period of two years. The chairperson of the Commission, Ms Anna Wu, was reappointed for another two years from 1 May 2018.

The current executive team of the Commission has been in place since a number of changes took place during 2016 and 2017. First, Mr Brent Snyder was appointed as Chief Executive Officer in summer 2017. Prior to this appointment, Mr Snyder was the Deputy Assistant Attorney General of the US Department of Justice (Head of criminal enforcement function). Second, Mr Jindrich Kloub was appointed as Executive Director (Operations) of the Commission in October 2017. Mr Kloub was previously an official at the Directorate-General for Competition of the European Commission from 2006 until 2017. Third, Mr Steven Parker

was appointed as Executive Director (Legal Services) of the Commission in July 2017. Before his appointment to the Commission, Mr Parker was the Chief Litigation Counsel of the Hong Kong Monetary Authority. Fourth, Mr Rasul Butt was appointed as Senior Executive Director in July 2016. Mr Butt was previously the General Manager (Corporate Planning) at the Urban Renewal Authority in Hong Kong.

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the competition rules and private actions in respect of such infringements.

Mr Justice Godfrey Lam and Madam Justice Queeny Au-Yeung were reappointed for three-year terms as the president and deputy president respectively of the Tribunal with effect from 1 August 2019. Every judge of the CFI is also, by virtue of his or her appointment as such, a member of the Tribunal.

While the Commission is the principal competition authority responsible for enforcing the Ordinance, the CA has concurrent jurisdiction with the Commission in respect of undertakings licensed in the telecommunications and broadcasting sectors.

### Changes

#### 3 | Have there been any recent changes, or proposals for change, to the regime?

There are currently no proposed changes to the regime, but a review of the Ordinance is being carried out by the government, particularly in relation to the carve-out for statutory bodies that is currently available.

### Substantive law

#### 4 | What is the substantive law on cartels in the jurisdiction?

Section 6 of the Ordinance states that an undertaking must not:

- make or give effect to an agreement;
- engage in a concerted practice; or
- as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong (the First Conduct Rule).

Section 2 of the Ordinance defines serious anticompetitive conduct as any conduct that consists of price fixing, market sharing, output restriction and bid rigging. Such conduct shall be subject to stricter enforcement action (for example, the de minimis exclusion in paragraph 5 of Schedule 1 to the Ordinance is not available for serious anticompetitive conduct).

## APPLICATION OF THE LAW AND JURISDICTIONAL REACH

### Industry-specific provisions

- 5 | Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

At present, there are no industry-specific infringements under the Ordinance in respect of antitrust conduct. On 8 August 2017, the Commission issued a Block Exemption Order in respect of vessel sharing agreements (a type of agreement between operators of liner shipping services on certain operational arrangements, such as slot sharing) in the liner shipping industry, excluding such agreements from the application of the First Conduct Rule by virtue of the efficiencies brought about by them. The exemption is subject to certain conditions and will continue in force until 8 August 2022.

There is no specific defence or exemption for government-sanctioned activity or regulated conduct, as such. However, there are two exclusions in paragraphs 2 and 3 of Schedule 1 to the Ordinance that may be relevant in this context, namely that the conduct rules do not apply if:

- the relevant conduct is required by a 'legal requirement', which is defined as a requirement imposed by or under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong (paragraph 2 of Schedule 1 to the Ordinance); or
- the undertaking has been entrusted by the government with the operation of services of a general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it (which is modelled on article 106(2) of the Treaty on the Functioning of the European Union).

The Guidelines indicate that these exclusions will be narrowly construed by the Commission.

### Application of the law

- 6 | Does the law apply to individuals, corporations and other entities?

The law applies to both individuals and corporations. The First Conduct Rule applies to 'undertakings'. An undertaking is defined under section 2 of the Ordinance as 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity', and includes a natural person engaged in economic activity.

Individuals may also be liable for infringements of the First Conduct Rule. In particular, Part 6 of the Ordinance envisages that a 'person' (the definition of which appears to cover natural persons) who was 'involved' in the contravention of the First Conduct Rule (eg, by being knowingly concerned in or party to the contravention, or by aiding, abetting, counselling or procuring any other person to contravene the rule) may also be subject to a pecuniary penalty or other order imposed by the Tribunal. The Tribunal may also make a disqualification order against an individual, which prohibits that person for a period not exceeding five years from: being a director of a company; being a liquidator or provisional liquidator of a company; being a receiver or manager of a company's property; or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company.

On 6 September 2018, the Commission brought its first case against individuals allegedly involved in a contravention of the Ordinance. The case was brought against three decoration contractor companies and two individuals. The Commission alleged that the respondents engaged in cartel conduct, whereby they allocated customers and coordinated

pricing in relation to the provision of renovation services at a public housing estate in Hong Kong. In addition to seeking pecuniary penalties against all the respondents (including the individuals), the Commission is also seeking a director disqualification order against one of the individuals allegedly involved in the conduct.

On 3 July 2019, the Commission brought a second case against individuals. This case was brought against six decoration contractor companies and three individuals. Similar to the first case, the Commission alleges that the respondents engaged in cartel conduct, whereby they allocated customers and coordinated pricing in relation to the provision of renovation services at a public housing estate in Hong Kong. The Commission is again seeking a director disqualification order against one of the individuals but no pecuniary penalty or declaration of contravention. This suggests that the director was not personally involved but the Commission is alleging he is unfit to be concerned in the management of the company on the ground that he had actual knowledge or reasonable grounds to suspect that the company was breaching the First Conduct Rule and took no steps to prevent it. In addition, the Commission is seeking pecuniary penalties against all six decoration contractors as well as two of the three individuals.

### Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Section 8 of the Ordinance states that the First Conduct Rule applies if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if:

- the agreement or decision is made or given effect to outside Hong Kong;
- the concerted practice is engaged in outside Hong Kong;
- any party to the agreement or concerted practice is outside Hong Kong; or
- any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

### Export cartels

- 8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no specific exemption or defence in the Ordinance for conduct that only affects customers or other parties outside the jurisdiction. However, the First Conduct Rule applies only if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong.

## INVESTIGATIONS

### Steps in an investigation

- 9 | What are the typical steps in an investigation?

Section 39 of the Ordinance states that the Commission may commence a cartel investigation of its own volition;

- where it has received a complaint;
- where the court or the Tribunal has referred any conduct to it; or
- where the government has referred any conduct to it.

Section 40 of the Ordinance requires the Commission to issue guidelines on the procedures it will follow both in deciding whether to conduct an investigation and in conducting the investigation itself. The Commission's Guideline on Investigations as published on 27 July 2015 refers to a two-phase investigation process composed of:

- an initial assessment phase during which the Commission (relying solely on public information or information provided on a voluntary basis) considers whether it is reasonable to conduct an investigation and whether there is sufficient evidence for it to establish a reasonable cause to suspect that a contravention of the competition rules has occurred; and
- if the Commission has reasonable cause to suspect a contravention of the competition rules, an investigation phase during which the Commission may use its compulsory document and information-gathering powers.

### Investigative powers of the authorities

#### 10 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under Divisions II and III of Part 3 of the Ordinance, the Commission is granted a full range of investigative powers, including powers to require production of documents and information that it reasonably believes to be relevant to the investigation, to require individuals to attend interviews before the Commission and, if armed with a court warrant granted by a judge of the CFI, to enter and search premises (ie, conduct a dawn raid) and use reasonable force for gaining entry, to take possession of documents or computers found on the premises that are reasonably believed to contain relevant information for establishing a contravention of a competition rule. As mentioned above, the Commission issued a guideline on 27 July 2015 on the procedures it will follow when conducting an investigation.

In conducting its investigations, the Commission has continued to use its compulsory evidence-gathering powers under the Ordinance to request documents and information from companies and enter and search premises. In general, the Commission reports that businesses under investigation have shown a high degree of compliance with the Commission's evidence-gathering requests. Since the Ordinance came into effect in December 2015, the Commission has carried out a number of dawn raids across different investigations.

## INTERNATIONAL COOPERATION

### Inter-agency cooperation

#### 11 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Ordinance does not contain express provisions on cooperation with regulatory authorities in other jurisdictions. However, the Commission has shown willingness to cooperate with other authorities – both within Hong Kong and in other jurisdictions – by signing memoranda of understanding as well as engaging in informal dialogue and sharing experiences on cases. As required by section 161 of the Ordinance, the Commission and the CA signed a memorandum of understanding on how the two bodies will cooperate and pursue enforcement actions, which envisages that they will, where necessary, exchange information (including confidential information) with a view to adopting a harmonised approach under the Ordinance.

The Commission has a secondment programme with certain overseas agencies, including the UK CMA. On 2 December 2016, the Commission signed a memorandum of understanding with the Competition Bureau of Canada with the purpose of enhancing cooperation, coordination and information sharing between the two agencies. In the spirit of such cooperation, Andrea McAuley from the Competition Bureau of Canada joined the Commission in February 2017 for a six-month secondment as part of an exchange programme under the memorandum of understanding.

### Interplay between jurisdictions

#### 12 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The Commission has indicated that it will look to other jurisdictions for precedents, especially in the early days of enforcement. For example, in the *Nutanix* judgment, the Tribunal relied heavily on EU case law on the definition of 'concerted practice', which is not defined in the Ordinance. Although the courts of Hong Kong have indicated that decisions of the courts of other jurisdictions cannot be transplanted to Hong Kong without a careful examination of the social and legal context in which they were made, overseas jurisprudence will continue to have a significant influence on the Tribunal's decisions, particularly in relation to concepts borrowed from EU jurisprudence.

Furthermore, given the proximity of Hong Kong to China, we would expect the Ordinance to apply to Chinese companies in a significant way. There has been some high-level dialogue and communication between the Commission and the Chinese competition authorities since the Ordinance came into effect.

## CARTEL PROCEEDINGS

### Decisions

#### 13 | How is a cartel proceeding adjudicated or determined?

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the First Conduct Rule and private actions in respect of such infringements. It is therefore the Tribunal that determines whether an infringement of the Ordinance has occurred.

Section 92 of the Ordinance allows the Commission to initiate enforcement action, if it considers it appropriate to do so, and apply to the Tribunal for a pecuniary penalty to be imposed on any person that it has reasonable cause to believe has infringed the First Conduct Rule or been involved in such an infringement.

### Burden of proof

#### 14 | Which party has the burden of proof? What is the level of proof required?

The burden of proof is on the Commission. Where proceedings are brought by the Commission seeking orders for pecuniary penalties, the Tribunal has held that this involves the determination of a criminal charge within the meaning of article 11 of the Hong Kong Bill of Rights, meaning that the applicable standard of proof required of the Commission is a criminal one – that is, beyond reasonable doubt.

### Circumstantial evidence

#### 15 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The First Conduct Rule applies to concerted practices, which the Commission has defined in its Guideline on the First Conduct Rule as 'a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition'. The Guideline further provides that the Commission is likely to conclude that there exists a concerted practice with the object of harming competition (and thus an infringement of the First Conduct Rule) where competitively sensitive information, such as an undertaking's planned prices or planned pricing strategy, is exchanged between competitors in circumstances where:

- the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market; and
- the recipient does act or intends to act on the information.

Without a legitimate business reason for an information exchange of this kind, the Commission is likely to infer from the information exchange that the party providing the relevant information had the requisite expectation or intention to influence a competitor's conduct in the market. Similarly, in the absence of a legitimate business reason for taking receipt of the information exchanged or other evidence showing that the recipient did not act or intend to act on the information when determining its conduct in the market, the Commission is likely to infer that the recipient undertaking acted on or intended to act on the information exchanged.

In January 2016, the Hong Kong High Court handed down a judgment quashing a 2013 decision of the CA, which was made under the competition provisions in the Broadcasting Ordinance (see *Television Broadcasts Limited v Communications Authority and The Chief Executive in Council*, HCAL 176/2013). In upholding the CA's competition law analysis, Mr Justice Godfrey Lam (also the president of the Tribunal) clarified a number of legal principles, which are also relevant to future cases decided under the Ordinance. This included the principle that, in evaluating the evidence, the CA is entitled to draw 'sufficiently compelling' inferences from the relevant circumstantial evidence considered in its entirety.

In May 2018, the Hong Kong High Court handed down a judgment ordering an alleged antitrust contravention from an ongoing legal action to be transferred to the Tribunal (see *Taching Petroleum Company, Limited v Meyer Aluminium Limited*, HCA 1929/2017). Taching argued that Meyer had not provided any evidence of direct collusion, but relied only on circumstantial evidence. In the judgment, Madam Justice Queeny Au-Yeung accepted that parallel conduct cannot by itself be equated with concerted practice, but it may, depending on the circumstances, be evidence of such practice. The case is now being considered by the Tribunal.

## Appeal process

### 16 | What is the appeal process?

Certain decisions made by the Commission may be reviewable by the Tribunal (section 84 of the Ordinance). This includes decisions or rescission of decisions by the Commission as to whether certain conduct is exempt from application of the First Conduct Rule (eg, block exemption order or an individual exemption decision), as well as decisions varying or releasing commitments relating to any competition rule. A person specified in section 85 of the Ordinance may apply to the Tribunal for leave to review a reviewable determination. Section 85 provides that an application for review may be made:

- in the case of a decision relating to the variation of a commitment or the release of a person from a commitment, by the person who made the commitment; or
- in the case of a decision relating to the termination of a leniency agreement, by a party to the agreement.

A person who does not fall into one of these categories may also apply to the Tribunal for a review of a reviewable determination if the Tribunal is satisfied that the person has a sufficient interest in the reviewable determination.

Appeals can be made as of right to the Court of Appeal against any decisions, determinations or orders by the Tribunal, including a decision as to the amount of any compensatory sanction or pecuniary penalty (section 154 of the Ordinance).

In respect of appeals against an interlocutory decision, determination or order by the Tribunal, leave of the Court of Appeal or the Tribunal will be required, unless any rules of the Tribunal specify that an appeal lies as of right against such decisions or orders (section 155 of the Ordinance).

Section 158 of the Ordinance envisages that the chief judge may make Tribunal rules to regulate and prescribe the practice and procedure (and any incidental matters) to be followed by the Tribunal. These rules were brought into full effect on 14 December 2015.

## SANCTIONS

### Criminal sanctions

#### 17 | What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions in Hong Kong in respect of cartel infringements.

However, providing false or misleading information or obstruction of the Commission's investigations, such as failure to comply with a Commission requirement or destruction of evidence, may expose individuals or businesses to criminal sanctions under the Ordinance (sections 51–55 of the Ordinance).

Criminal offences may also be committed by a person who causes their employee to suffer certain conduct or damage (eg, discriminates against the employee or terminates the employment contract) because the employee had assisted the Commission in its investigation or proceedings (section 173 of the Ordinance).

### Civil and administrative sanctions

#### 18 | What civil or administrative sanctions are there for cartel activity?

The Ordinance gives the Tribunal the power to apply a full range of civil remedies for an infringement of the First Conduct Rule, including (among others):

- a declaration that a person has contravened a competition rule;
- financial penalties of up to 10 per cent of Hong Kong turnover of the relevant undertaking for a maximum of three years of infringement (at present, it is unclear whether this extends to group turnover);
- disgorgement orders (ie, to pay back the illegal profits made from the infringement);
- injunctions; and
- disqualification orders against directors.

A full list of orders that may be made by the Tribunal is set out in Schedule 3 to the Ordinance.

### Guidelines for sanction levels

#### 19 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

There are no formal sentencing guidelines yet. The Commission is reported to be considering issuing a document relating to the calculation of pecuniary penalties which the Commission will recommend to the Tribunal.

Section 93(2) of the Ordinance sets out certain factors to which the Tribunal must have regard in determining the amount of the pecuniary penalty. These are:

- the nature and extent of the conduct that constitutes the contravention;
- the loss or damage, if any, caused by the conduct;



- the circumstance in which the conduct took place; and
- whether the person has previously been found by the Tribunal to have contravened the Ordinance.

The first hearing of the Tribunal on subject of pecuniary penalties is scheduled for 14 January 2020 in relation to *Competition Commission v. W. Hing Construction Company Limited and Others* (CTEA/2017).

### Compliance programmes

#### 20 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The Commission's Enforcement Policy indicates that the Commission will take into consideration compliance efforts of persons under investigation where those persons can demonstrate that they have made a genuine effort to comply with the Ordinance. However, that is only one of the many factors that the Commission will take into account, other factors being the Commission's remedial goals, the severity of the conduct, cooperation and settlement, and efficacy in general.

### Director disqualification

#### 21 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

In two cartel cases before the Tribunal, the Commission is seeking director disqualification orders against individuals. Such an order, made by the Tribunal under section 101 of the Ordinance, would disqualify a person from being a director of a company or from otherwise being concerned in the affairs of a company (among other things) for up to five years.

### Debarment

#### 22 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

There is no such reference in the Ordinance.

### Parallel proceedings

#### 23 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Notwithstanding the finding of the Tribunal that pecuniary penalties sought by the Commission amount to a criminal charge against alleged cartelists, there are no other criminal sanctions in Hong Kong for cartel activity.

## PRIVATE RIGHTS OF ACTION

### Private damage claims

#### 24 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Follow-on private actions for damages are provided for by the Ordinance. A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right

of action under the Ordinance (subject to appeal periods during which such follow-on actions may not be brought). It remains to be seen how the Tribunal will deal with pass on and double recovery issues.

Private enforcement actions may be brought before the Tribunal based on:

- a determination by the Tribunal, the CFI or the higher courts that a conduct rule has been infringed; or
- an admission of an infringement in a commitment offered to the Commission (sections 110 and 111 of the Ordinance).

At present, stand-alone private enforcement actions are not permitted. This does not prevent a party from arguing in a private legal action that a conduct rule has been infringed (eg, as a defence), as long as the alleged infringement is not the basis for a cause of action (see, for example, the *Taching Petroleum Company, Limited v Meyer Aluminium Limited* case, HCA 1929/2017, referred to in question 15).

### Class actions

#### 25 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

At present, there is no class action procedure for competition claims or more generally in Hong Kong.

On 28 May 2012, the Law Reform Commission published a report proposing that a mechanism for class actions should be adopted in Hong Kong, with a view to expanding access to judicial relief. The report recommends that class actions be introduced on an incremental basis and initially be permitted only in relation to consumer cases, though the expectation is that class actions will eventually apply to all claims. The Hong Kong Department of Justice has since set up a cross-sector working group chaired by the Solicitor General in order to consider the proposals of the Law Reform Commission. As at 17 April 2019, the working group had held 25 meetings and its sub-committee had held 30 meetings to study the proposals in detail.

There is no concrete time frame for public consultation or implementation. The working group has been compiling a draft consultation document that proposes to cover a number of specific issues, including a close scrutiny of what will be meant by 'consumer' and 'consumer cases', the inclusion and exclusion of potential litigants from a class action, procedural features of such a class action regime, and the determination and distribution of class action awards.

## COOPERATING PARTIES

### Immunity

#### 26 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Part IV of the Ordinance allows the Commission to make an agreement, on terms it considers appropriate, that it will not bring or continue proceedings for a pecuniary penalty in exchange for a person's cooperation in an investigation or in proceedings. While a leniency agreement is in force, the Commission must not bring or continue proceedings for a pecuniary penalty in breach of that leniency agreement, notwithstanding certain circumstances in which the Commission may terminate a leniency agreement.

Under the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (the 'Leniency Policy'), published pursuant to section 80 of the Ordinance, the key elements of the programme are as follows:

- leniency is available only in respect of cartel conduct contravening the First Conduct Rule;

- only an undertaking (the definition of which is described in question 6) may apply for leniency under the policy;
- leniency is available only for the first undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency;
- if the undertaking meets the conditions for leniency, the Commission will enter into an agreement with the undertaking not to take proceedings against it for a pecuniary penalty in exchange for cooperation in the investigation of the cartel conduct;
- leniency ordinarily extends to any current officer or employee of the undertaking cooperating with the Commission, as well any former officer or employee and any current or former agents of the undertaking specifically named in the leniency agreement; and
- the undertaking receiving leniency will, to the satisfaction of the Commission, agree to and sign a statement of agreed facts admitting to its participation in the cartel on the basis of which the Tribunal may be asked jointly by the Commission and the applicant under rule 39 of the Competition Tribunal Rules (Cap 619D) (CTR) to make an order under section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in the cartel.

Under the Commission's Leniency Policy, leniency is available only for the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency. There is therefore a strong incentive for a cartel member to be the first undertaking to apply for leniency and the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

### Subsequent cooperating parties

- 27** | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Leniency Policy applies only to the first undertaking reporting the cartel. However, it explicitly states that this does not preclude the Commission from entering into a leniency agreement with an undertaking with respect to an alleged contravention of a conduct rule which is not covered by the Leniency Policy. As such, the Commission may exercise its discretion with subsequent cooperating parties. In particular, the Leniency Policy states that the Commission 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. When seeking a pecuniary penalty or other order in relation to cartel conduct, the Commission may consider making joint submissions to the Tribunal with the cooperating undertaking.

In April 2019, the Commission introduced the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (the Cooperation and Settlement Policy) in relation to cartel conduct. The policy provides that an undertaking engaged in cartel conduct may seek to cooperate with the Commission with a view to reaching a settled outcome to an investigation by way of consent order if leniency is not available. The undertaking should indicate its willingness to cooperate before the commencement of any Tribunal proceedings against it (although Commission may still consider offers to cooperate after this point). The Commission will enter into a cooperation agreement with the undertaking and jointly apply with the undertaking to the Tribunal for a consent order on the basis of a joint statement of agreed factual summary. In return for such cooperation, the Commission will agree

to apply a cooperation discount of up to 50 per cent on the pecuniary penalty. Unlike the Leniency Policy, more than one undertaking can benefit from the Cooperation and Settlement Policy. The Commission will identify an applicable band of cooperation discount based on the order in which the undertakings express their interest to cooperate, as well as the nature, value and extent of cooperation provided.

### Going in second

- 28** | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

In the Cooperation and Settlement Policy, the Commission also introduced the 'Leniency Plus' system. Under this system, an undertaking cooperating with the Commission in relation to its participation in one cartel ('First Cartel') may have engaged in one or more completely separate cartels ('Second Cartel'). The Commission will apply an additional discount of up to 10 per cent of the recommended pecuniary penalty for an undertaking involved in the First Cartel, provided that:

- the undertaking has entered into a leniency agreement with the Commission;
- the Second Cartel is completely separate from the First Cartel; and
- the undertaking fully and truthfully cooperates with the Commission in respect of both cartels.

### Approaching the authorities

- 29** | Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Neither the Ordinance, nor the Leniency Policy, envisages a specific deadline for applying for immunity. However, the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

A potential applicant for leniency, or their legal representative, may contact the Commission to ascertain if a marker is available for particular cartel conduct. Such enquiries may be made on an anonymous basis, although a marker will not be granted on the basis of anonymous enquiries. To obtain a marker and thereby preserve the undertaking's place in the queue, a caller must provide sufficient information to identify the conduct for which leniency is sought in order to enable the Commission to assess the applicant's place in the queue in relation to that specific cartel. This includes, at a minimum, providing the Commission with the identity of the undertaking applying for the marker, information on the nature of the cartel (such as the products and services involved), the main participants in the cartel conduct and the caller's contact details. The Commission is willing to grant the marker on the basis of an oral discussion.

Similarly, there are no specific deadlines for applications under the Cooperation and Settlement Policy. The policy is intended to encourage cooperation before the Commission commences proceedings before the Tribunal, but the Commission may still consider offers to cooperate after this point. The level of cooperation discount granted to the cooperating undertakings will be determined based on the order in which the undertakings express their interest to cooperate, as well as the nature, value and extent of cooperation provided.

## Cooperation

**30** What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

If a leniency applicant with the marker is invited by the Commission to apply for leniency, it will be asked to provide a detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and evidence in respect of the cartel conduct (a 'proffer'). The Commission will invite the undertaking to submit its application by completing its proffer within a specified period, ordinarily within 30 calendar days. A proffer may be made orally or in writing. Should the undertaking fail to complete its proffer within this time frame, or any extension to it as might be agreed by the Commission, the undertaking's marker will automatically lapse. In that circumstance the next undertaking in the marker queue will be invited by the Commission to make an application for leniency.

Undertakings in the marker queue who are not invited to apply for leniency will be informed that they are not currently eligible to apply for leniency under the Leniency Policy. Such undertakings may, however, consider cooperating with the Commission as mentioned in question 27.

The requirements for the Leniency Policy and Cooperation and Settlement Policy are similar in that they both apply only to cartel conduct and may be applied for only by an undertaking. On the other hand, while leniency is only available for the first undertaking that reports the cartel conduct to the Commission, there is no such limit under the Cooperation and Settlement Policy.

## Confidentiality

**31** What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission and section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority, such as where the disclosure is: in accordance with an order of the Tribunal or any other court or in accordance with a law; or in connection with judicial proceedings arising under the Ordinance. Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations. This states, among other things, that in deciding whether to disclose confidential information, the Commission will consider and have regard to the extent to which the disclosure is necessary for the purpose sought to be achieved and where the Commission may be required to produce confidential information in accordance with a court order, law or legal requirement, the Commission will endeavour to notify and consult the person who provided the confidential information prior to making such a disclosure.

Specifically, in the context of a leniency application and as set out in the Leniency Policy, the Commission will use its best endeavours to protect as appropriate:

- any confidential information provided to the Commission by a leniency applicant for the purpose of making a leniency application or pursuant to a leniency agreement; and
- the Commission's records of the leniency application process, including the leniency agreement (collectively, leniency material).

It is the Commission's stated policy not to release leniency material (whether or not it is confidential information under section 123 of the Ordinance) and to firmly resist, on public interest or other applicable grounds, requests for leniency material, including the fact that leniency has been sought or is being sought, where such requests are made. In March 2018, the Tribunal handed down a judgment in the *Nutanix* case in relation to document disclosure in the case of an unsuccessful leniency applicant, ruling that leniency documents in these circumstances are covered by informer privilege and without prejudice privilege and need not be disclosed. In the case of successful leniency applications, on which the Tribunal did not need to rule as no leniency was granted in this case, the Commission's position was that there is a need to withhold from disclosure without prejudice communications pursuant to which the application is made, such as the application statement or proffer. The Commission raised no objection to the production of any pre-existing documents that were provided during the course of the leniency process.

## Settlements

**32** Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Commission has the discretion to accept a party's commitment to take, or refrain from taking, any action that the Commission considers appropriate to address its concerns about a possible infringement of the First Conduct Rule (pursuant to section 60 of the Ordinance). If the Commission accepts the commitment, it may not commence or continue an investigation or bring proceedings in the Tribunal, in relation to any alleged contravention, if such an investigation or proceedings relate to matters addressed by the commitment. Any admission contained in the commitment can form the basis of a follow-on action (see question 24). The Commission's Guideline on Investigations states that the Commission may accept commitments under section 60 of the Ordinance at any stage.

Further, in relation to cartel activity, the Commission has the discretion to issue an 'infringement notice' instead of bringing proceedings in the Tribunal, provided the undertaking makes a commitment to comply with the requirements of the notice. These requirements may include:

- refraining from specified conduct, or to take any specified action that the Commission considers appropriate; and
- admitting to an infringement of the conduct rule.

The original intention was to allow the Commission to impose a financial penalty with the infringement notice; however, this was subsequently removed from the Ordinance as a result of feedback from small and medium enterprises that this could potentially be an unreasonable burden on them.

Even where parties wish to resolve the Commission's concerns, there may be cases where the Commission considers these can only be addressed satisfactorily by an order made by the Tribunal. Subject to the Tribunal's determination, a consent order may provide for a declaration that a person has contravened a competition rule, the imposition of a pecuniary penalty, a director disqualification order or any other order that may be made by the Tribunal under the Ordinance.

## Corporate defendant and employees

### 33 | When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Section 80 of the Ordinance provides that leniency can be granted to an individual (as well as to corporations or partnerships) in return for that individual's cooperation with the Commission's investigation or proceedings under the Ordinance.

In particular, leniency granted to a corporate defendant will also cover any director, manager, company secretary (or governing body of the undertaking), employee or agent.

According to the Commission's Cooperation and Settlement Policy which caters for undertakings engaged in cartel conduct that do not benefit from leniency, in return for cooperation, the Commission may 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.

## Dealing with the enforcement agency

### 34 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

In relation to an immunity applicant, the template Leniency Agreement (set out in the Commission's Leniency Policy) sets out certain conditions with which the leniency applicant must comply. These include an obligation to maintain continuous and complete cooperation with the Commission throughout the investigation and any ensuing proceedings, and to ensure full and truthful disclosure to the Commission. The Commission is likely to ask for compliance with similar conditions in relation to subsequent cooperating parties. Failure to comply with the conditions imposed by the Commission could jeopardise immunity, in the case of immunity applicants, and the benefits of cooperation (eg reduced recommended fines, immunity for individuals), in the case of subsequent cooperating parties. The Commission encourages parties who are subject to an investigation to engage with the Commission early and often to ensure a productive dialogue is established and maintained.

For a cooperating undertaking engaged in cartel conduct, the Commission has set out a four-stage cooperation procedure, involving the undertaking first indicating its willingness to cooperate, then proceeding to fully cooperate with the Commission by providing documents and information and agreeing the factual summary. The Commission will enter into a Cooperation Agreement with the undertaking, and will eventually issue a final letter confirming the conditions of the Cooperation Agreement have been fulfilled. Such a letter will be issued conditional upon the undertaking having ensured continued compliance up to an appropriate time.

## DEFENDING A CASE

### Disclosure

### 35 | What information or evidence is disclosed to a defendant by the enforcement authorities?

According to the Commission's Guideline on Investigations, prior to commencing proceedings in the Tribunal, in circumstances where a Warning Notice has not already been issued, the Commission will usually contact relevant parties to advise them of its concerns and to provide the parties with an opportunity to address those concerns.

If proceedings are commenced in the Tribunal, the Commission must make its case in a notice of application, which is published by the registrar of the Tribunal and states, among other things: the nature of the application; the determination to which the application relates; the particulars of the relief sought; and the grounds for the application. The Commission will issue a press release as soon as practicable after commencing proceedings. For example: the first case was brought before the Tribunal on 23 March 2017, with a Commission press release issued on the same day; the second case was brought before the Tribunal on 14 August 2017, with a Commission press release issued on the same day; the third case was brought before the Tribunal on 6 September 2018, with a Commission press release being issued on the same day; and the fourth case was brought before the Tribunal on 3 July 2019, with a Commission press release issued on the same day.

In terms of further discovery, the Competition Tribunal Rules (at rule 24) provide that a party may apply to the Tribunal for an order for discovery and production of a document relating to the proceedings from a person for inspection. The application may be determined by the Tribunal with or without a hearing. The Tribunal may make or refuse to make an order for discovery and production of a document having regard to all the circumstances of the case, including: the need to secure the furtherance of the purposes of the Ordinance as a whole; whether the information contained in the document sought to be discovered or produced is confidential; the balance between the interests of the parties and other persons; and the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the proceedings.

In March 2018, the Tribunal handed down a judgment in the *Nutanix* case in relation to document disclosure. One respondent in the case, SiS International Limited, had asked the Tribunal to order the Commission to disclose certain documents claimed by the Commission to be protected under privilege or public interest immunity. The documents over which the Commission claimed privilege or public interest immunity included:

- without prejudice correspondence and records of without prejudice communication between the Commission and respondents in relation to the Commission's Leniency Policy. These contained correspondence and records of communications with leniency applicants;
- affirmations (together with exhibits), and drafts thereof, for the purpose of applying for search warrants;
- the complainant's original complaint form submitted to the Commission;
- correspondence, reports, and other documents passing between the Commission and its solicitors for the purpose of the case;
- all without prejudice correspondence and records of without prejudice communications between the Commission and any respondent where an agreement had not been reached; and
- all confidential internal reports, minutes and correspondence relating to the Commission's investigation and the proceedings.

The Commission opposed disclosure on various grounds including public interest immunity, without prejudice privilege, and lack of relevance. The Tribunal ruled partly in favour of SiS and held, among other things, that:

- leniency documents are covered by informer privilege and without prejudice privilege;
- the original complaint form would ordinarily be protected by informer privilege, but was not in this case because the identity of the complainant was known to the parties; and
- internal documents relating to the Commission's investigation need to be judged by context. It is likely that two narrower types of documents (ie, reports to and minutes of the Commission concerning the results of the investigation and the enforcement steps to be

taken, and certain internal communications and notes relating to the execution of the search warrants showing the methods, procedures and tactics of the Commission) could in principle be covered by public interest immunity, but immunity would have to be justified in each case.

The Commission was ordered to produce a list of relevant documents, along with its claims for public interest immunity or privilege in respect of those documents.

### Representing employees

**36 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?**

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority.

### Multiple corporate defendants

**37 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

### Payment of penalties and legal costs

**38 | May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Section 168 of the Ordinance prohibits a corporation from indemnifying its officers, employees or agents against liability for paying:

- a pecuniary penalty imposed under the Ordinance; or
- costs incurred in defending an action in which the person is convicted of contempt, convicted of an offence under the Ordinance or ordered to pay a pecuniary penalty.

However, according to section 170, section 168 does not prohibit a corporation from providing funds to an officer, employee or agent to meet expenditure incurred or to be incurred in defending proceedings for a pecuniary penalty if it is done on the following terms:

- the funds are to be repaid in the event of the person being ordered by the Tribunal to pay the pecuniary penalty; and
- they are to be repaid no later than the date when the decision of the Tribunal becomes final (this means either the decision is not appealed against or when the appeal is finally disposed of).

### Taxes

**39 | Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Not yet applicable in the absence of any fines (and the Ordinance is silent on this issue).

### International double jeopardy

**40 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

Not yet applicable.

### Getting the fine down

**41 | What is the optimal way in which to get the fine down?**

The Commission may be willing to take into account steps taken by the undertaking to conduct a detailed internal audit throughout its businesses and to cooperate with the Commission in its investigation. The Commission's Enforcement Policy notes that it will take into consideration (in assessing the appropriate enforcement response) the compliance efforts of persons under investigation where they can demonstrate they have made a genuine effort to comply with the Ordinance. However, the Ordinance and the Guidelines are silent on whether the existence of a compliance programme affects the level of the fine. As part of its review of the Leniency Policy, the Commission may consider whether to credit compliance programmes in determining the level of recommended fine.

As soon as the undertaking becomes aware of possible participation in cartel activity, it should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to fully assess its exposure, not only in the Hong Kong but in all jurisdictions in which the cartel is operating.

## UPDATE AND TRENDS

### Recent cases

**42 | What were the key cases, judgments and other developments of the past year?**

On 17 May 2019, two judgments were handed down by the Tribunal in relation to Hong Kong's first two competition cases involving bid rigging, market sharing and price fixing.

#### **Competition Commission v Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited (trading as Innovix Distribution) and Tech-21 Systems Limited (CTEA1/2017)**

The case was brought against five information technology companies over alleged bid rigging in a tender process. The Tribunal found four of the companies (namely Nutanix, BT, Innovix and Tech-21) liable for contravening the First Conduct Rule by engaging in bid rigging concerning a tender. Nutanix and BT were found to have made an agreement to procure the submission of four 'dummy bids', and it was found that Nutanix entered into separate bilateral and trilateral agreements with the other respondents to help BT win the bid. Each of the agreements falls within the definition of 'bid rigging' and constituted 'serious anticompetitive conduct' for which no warning notice needed to be issued pursuant to the Ordinance.

On the other hand, the application against one of the companies (namely SiS) was dismissed. The Tribunal found that the SiS employee's conduct was not attributable to SiS because he was a junior employee whose general duties did not include submission of tenders or even provision of any binding quotation, and he had no authority to bind SiS in relation to any commercial commitment. Furthermore, SiS's business



did not include sales to end users; it only sold to resellers. It was not within the job description of anyone in SiS to be tendering in that market – lawfully or otherwise. The Commission also failed to show that the relevant SiS employee’s superiors were aware of his arrangements with the representative of Nutanix.

Separately, the Tribunal found that the applicable standard of proof required of the Commission is the criminal standard of proof beyond reasonable doubt as the proceedings, seeking orders for pecuniary penalties, involved the determination of a criminal charge within the meaning of article 11 of the Hong Kong Bill of Rights.

A decision on the penalties that will be applied in this case is still pending.

#### **Competition Commission v W Hing Construction Company Limited and Others (CTEA2/2017)**

The case was brought against 10 construction and engineering companies for engaging in market-sharing and price-fixing conduct regarding decoration works on a public housing estate. The Tribunal found all 10 companies liable for contravening the First Conduct Rule by engaging in market sharing and price fixing in relation to the provision of renovation services at a public rental housing estate in Hong Kong. The respondents were found to have engaged in market allocation and price fixing in relation to the supply of services which constituted ‘serious anticompetitive conduct’ under the Ordinance. The respondents failed to demonstrate that any of the limbs of the efficiencies exclusion (contained in section 1 of Schedule 1 to the Ordinance) were satisfied.

Two of the respondents also failed to convince the Tribunal that they were not liable on the ground that the sub-contractors who carried out the works were separate undertakings. The Tribunal concluded that each relevant respondent and their respective sub-contractor formed a single economic unit, and therefore constituted a single undertaking.

Separately, the Tribunal followed the *Nutanix* case in holding the standard of proof to be beyond reasonable doubt.

A decision on the penalties that will be applied in this case is still pending.

#### **Regime reviews and modifications**

43 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

There are no proposed changes to the regime, but a review of the Ordinance is being carried out by the government, particularly in relation to the carve-out for statutory bodies that is currently available.

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# Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Hong Kong	
Is the regime criminal, civil or administrative?	The regime in Hong Kong is a civil one. However, where proceedings are brought by the Commission seeking orders for pecuniary penalties, the applicable standard of proof required of the Commission is a criminal one – that is, proof beyond reasonable doubt – as this involves the determination of a criminal charge within the meaning of article 11 of the Hong Kong Bill of Rights.
What is the maximum sanction?	The maximum financial penalty that the Tribunal can grant for an infringement of the First Conduct Rule is up to 10 per cent of Hong Kong turnover of the relevant undertaking for each year of the infringement, up to a maximum of three years.
Are there immunity or leniency programmes?	Yes, the Commission's Leniency Policy provides immunity for the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency. In April 2019, the Commission also introduced the Cooperation and Settlement Policy to offer cooperation discounts for undertakings that are willing to cooperate but cannot benefit from the Leniency Policy.
Does the regime extend to conduct outside the jurisdiction?	Yes, the regime applies so long as the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if the agreement is made or given effect to, or the conduct otherwise takes place, outside Hong Kong.
Remarks	Following the first two judgments by the Tribunal this year, there can be no doubt that the Hong Kong competition regime is now fully active, and that any anticompetitive conduct occurring within Hong Kong will be subject to proper investigation and enforcement.

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