

OF 2019 – 2 - Consultation
Proposed Anti-Competitive Practices Penalties
Rules



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A. Introduction

1. The Utility Regulation and Competition Office (the ‘**Office**’) is the independent regulator for the electricity, information and communications technology (‘**ICT**’), water, wastewater and fuels sectors in the Cayman Islands. The Office also regulates the use of electromagnetic spectrum and manages the .ky Internet domain.
2. Different decisions by the Office will affect persons and organisations throughout the country in different ways. It is therefore important that the Office makes regulatory decisions with the appropriate input from persons with sufficient interest or who are likely to be affected by the outcome of such decisions. Consultation is an essential aspect of regulatory accountability and transparency and provides the formal mechanism for these persons to express their views in this manner. The requirement for the Office to consult is mandated in its enabling legislation.
3. Under its enabling and foundational legislation, the Office has several principal functions. One of these principal functions is to protect the short- and long-term interests of consumers in relation to utility services. The Office may do so by making administrative determinations, decisions, orders and regulations.
4. The purpose of this consultation paper is to seek the views of operators, the general public, and other interested parties regarding the draft Utility Regulation and Competition (Anti-Competitive Practices) Penalties Rules (‘**the draft Rules**’) in relation to all sectors regulated by the Office (Annex 1).

B. Legal Framework

5. The Office is guided by its statutory remit in developing the draft Rules, notably the provisions which follow.
6. **Section 6(1)(b)** of the Utility Regulation and Competition Office Law 2016 (as revised) (‘**URC Law**’) outlines that one of the principal functions of the Office, in the markets and sectors for which it has responsibility, is “*to promote appropriate and fair competition...*”.
7. **Section 6(2)** of the URC Law states that the Office in performing its functions and exercising its powers under this or any other Law, the Office may “*adopt remedies to deter anti-competitive conduct by sectoral providers in any relevant market.*”

8. The URC Law provides that agreements by or between sectoral providers or between one or more sectoral providers and any other person, decisions by sectoral providers or concerted practices which prevent, restrict or distort competition are prohibited under **section 66**, unless the agreements are exempted under the Law. **Section 70** prohibits any conduct on the part of one or more sectoral providers which amounts to the abuse of a dominant position in a market or sector for which the Office has responsibility.
9. Under **Section 82(1)** of the URC Law, the Office “*may prepare and publish rules providing the appropriate amount of any penalty*” with the approval of Cabinet.
10. **Section 7(1)** of the URC Law requires the Office, before issuing an administrative determination which in the reasonable opinion of the Office is of public significance, “... *to allow persons with sufficient interest or who are likely to be affected a reasonable opportunity to comment on the draft administrative determination.*”

C. History of Previous Consultations

The Office previously conducted a consultation from 23 March 2018 to 11 May 2018 on a draft of proposed Anti-competitive Practices Rules. The Office received submitted comments from five licensees, and took these responses into consideration. The Office held the position that it would re-draft the rules in order to expand on the calculation methodology that the Office will utilise when determining amounts of penalties to be imposed. In addition, the Office also outlined how it will enter into leniency agreements with parties guilty of participating in concerted practices.

D. Objectives of the Draft Anti-Competitive Practices Rules

11. The Office considers that it is in the interests of the public to promote appropriate and fair competition as required by the URC Law. As one of its functions, the Office is mandated to deter anti-competitive conduct by sectoral providers in any relevant market. Therefore, the Office under its power under **section 82(1)** has prepared draft Rules in relation to anti-competitive practices.
12. The draft Rules are attached to this consultation document, and are summarised in the paragraphs below. The Office strongly encourages respondents to read the draft Rules prior to submitting comments, or to

- answering the consultation questions in the next section, as this summary is not intended to be exhaustive.
13. The attached draft Rules address the amount of penalties that may be imposed upon any licensee who, intentionally or negligently, infringes **sections 66 or 70**, as well as the Office's power to impose periodic penalties.
 14. The main objectives of the draft Rules are to outline the process the Office will follow in relation to the calculation and imposition of penalties as a result of a person infringing **sections 66 and 70** of the URC Law.
 15. The draft Rules consist of twelve (12) rules and details the six-step process that will be utilised when calculating penalties. The Office will, as a first step when calculating a penalty, have regard to the seriousness of the infringement and the relevant turnover of the guilty party in order to determine the appropriate starting point (i.e. the starting amount of the relevant turnover, up to the maximum penalty in accordance with the URC Law). After determination of the starting point has been made, adjustments will be made in relation to duration of the infringement, and aggravating or mitigating factors, as well as for the purposes of specified deterrence and proportionality as the second, third and fourth steps respectively. The Office, as the fifth and sixth steps of the calculation methodology, will then make further adjustments if the maximum penalty exceeds total turnover and if a reduction needs to be applied as a result of a leniency agreement.
 16. The Office, when calculating a penalty, will have regard to its Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power, as well as its forthcoming Guidelines on the Abuse of a Dominant Position where applicable.

E. Consultation Questions

17. Based on the above, the Office invites all interested parties to submit their comments, with supporting evidence, on the following questions:

Question 1: What are your views on the proposed six-step calculation methodology outlined in the draft Anti-Competitive Practices Penalties Rules?

Question 2: What are your views on the proposed starting point (expressed as a percentage) in the calculation methodology outlined in the draft Anti-competitive Practice Penalties Rules?

Question 3: What are your views on the Office’s requirements regarding leniency agreements with parties guilty of participating in concerted practices.

Question 4: Please provide your views on any other matters you consider relevant to this Consultation.

F. How to Respond to This Consultation

18. This consultation is conducted in accordance with the Consultation Procedure Guidelines determined by the Office and found on the Office’s website.¹
19. The Office considers that because the draft Rules are published as part of this consultation, this consultation will be conducted as a single-phase consultation over a period of thirty (30) days. If, upon review of the responses to the consultation, it becomes clear that a second phase of consultation is required, a further notice will be issued accordingly. As noted above, **section 7(1)** of the URC Law states that prior to issuing an administrative determination of public significance, the Office shall “*issue the proposed determination in the form of a draft administrative determination.*” The Office considers the attached draft Rules to be a “*draft administrative determination*” for the purposes of **section 7(1)**.
20. All submissions on this consultation should be made in writing, and must be received by the Office by **5 p.m. on 15 March 2019** at the latest.
21. The Office will post any comments received within the stated deadline on its website by **5 p.m. on 29 March 2019**.
22. Submissions may be filed as follows:

By e-mail to:
consultations@ofreg.ky

Or by post to:
Utility Regulation and Competition Office
P.O. Box 2502
Grand Cayman KY1- 1104
CAYMAN ISLANDS

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<http://www.ofreg.ky/upimages/commonfiles/1507893545OF20171DeterminationandConsultationProcedureGuidelines.pdf>

Or by courier to:
Utility Regulation and Competition Office
3rd Floor, Alissta Towers
85 North Sound Rd.
Grand Cayman
CAYMAN ISLANDS

23. The Office expects to issue a Determination on the matters addressed by this Consultation by the end of the second quarter of 2019.

G. Next Steps

24. After the Office issues the Determination, the Office will approach Cabinet under section 82(1) of the URC Law for their approval prior to publication.
25. Upon publication of these new Anti-Competitive Practices Rules pursuant to section 82(1) of the URC Law, the previous information and Communications Technology Authority (Penalties for Anti-Competitive Practices) Rules will be repealed.

OF 2019 – 2 - Consultation
Proposed Anti-competitive Practices
Penalties Rules
ANNEX 1



CAYMAN ISLANDS



Supplement No.[...] published with Gazette No [...] dated [...].

**THE UTILITY REGULATION AND COMPETITION LAW (2018
REVISION)**

**THE UTILITY REGULATION AND COMPETITION (ANTI-
COMPETITIVE PRACTICES) PENALTIES RULES, 2019**

ARRANGEMENT OF RULES

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2. Definitions.
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4. Steps for determining the level of penalty.
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6. Adjustment for Duration.
7. Adjustment of a penalty amount (Aggravating and Mitigating Factors).
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9. Periodic penalty.
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11. Application of reduction for leniency and settlement.
12. Leniency Agreements.

CAYMAN ISLANDS

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THE UTILITY REGULATION AND COMPETITION LAW (2018 REVISION)

THE UTILITY REGULATION AND COMPETITION (ANTI-COMPETITIVE PRACTICES) PENALTIES RULES, 2019

The Utility Regulation and Competition Office, in exercise of the powers conferred by section 82(1) of the Utility Regulation and Competition Law (2018 Revision) makes the following rules-

1. These rules may be cited as the Utility Regulation and Competition (Anti-Competitive Practices) Penalties Rules, 2019.

Citation

2. In these rules-

Definitions

“Affiliate” in relation to a Sectoral Provider, means any holding company of the Sectoral Provider, any subsidiary of the Sectoral Provider or any subsidiary of any holding company of the Sectoral Provider;

“association of enterprises” means any association created for the purpose of representing the interests of its members in relation to commercial matters;

“Concerted practice” is conduct on the part of two or more parties which, although not found in an express agreement is a direct or indirect organised course of dealing, understanding, coordination, or contact. Examples include:

- price fixing (including resale price maintenance);
- bid rigging (collusive tendering);
- the establishment of output restrictions or quotas; or
- market sharing or market dividing.

“financial year” means the Sectoral Provider’s, enterprise’s or association of enterprises’ financial year relevant to an anti-competitive investigation or determination and it may, in the Office’s discretion, be the current, previous or deemed financial year;

“Law” means the Utility Regulation and Competition Law (as amended);

“Office” means the Utility Regulation and Competition Office, established by section 4 of the Law;

“section” means a section of the Law;

“Sectoral Provider” means a person, whether or not an authorisation holder, who provides goods or services in a sectoral utility;

“turnover” means the total amount of money or money’s worth earned by a Sectoral Provider from all sources arising out of or in connection with the Sectoral Provider’s business in or from the Cayman Islands in the Sectoral Provider’s financial year (money or money’s worth earned from transactions with Affiliates are to be included as if those transactions are made at open market value on an arm’s length basis); and

“enterprise” means a body corporate or partnership, an unincorporated association, or any person carrying on a trade or business, with or without a view to profit.

Penalty for infringement

3. (1) The Office may impose upon any Sectoral Provider, enterprise or associations of enterprises, who intentionally or negligently, infringes section 66 or 70 of the Law, a penalty in accordance with section 80 of the Law.

(2) In fixing the amount of the penalty, the Office shall consider factors as set out below.

Six Steps for determining the level of penalty.

4. (1) A financial penalty imposed by the Office under section 80 of the Law will be calculated using a six-step procedure:

- (i) Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the Sectoral Provider, enterprise or association of enterprise.
- (ii) Adjustment for duration.
- (iii) Adjustment for aggravating or mitigating factors.
- (iv) Adjustment for specific deterrence and proportionality.
- (v) Adjustment for the maximum penalty.
- (vi) Adjustment for leniency.

(2) In determining the starting point having regard to the seriousness of the infringement and the relevant turnover of the Sectoral Provider, enterprise or association of enterprises, at the first stage, the Office will consider the likelihood that the type of infringement at issue will, by its nature, restrict or distort competition. The Office will then consider the extent and/or likelihood of harm to competition in the specific relevant circumstances of the individual case. Lastly, the Office, will consider the relevant turnover of the Sectoral Provider, the enterprise or the association of enterprises (the “relevant party”) of the financial year relevant to an anti-competitive investigation or determination.

(3) The Office, in making its assessment, will have reference to the following principles:

- (a) The Office will normally use a starting point between 15% to 20% of the relevant turnover, up to the maximum penalty in accordance with section 80(7), for the most serious types of infringement, that is, those which the Office deems are the most likely by their very nature to harm competition. In relation to infringements of the section 66 prohibition, this includes concerted practices such as price fixing and market sharing as well as other types of infringements which are likely to cause significant harm to competition. In relation to infringements of the section 70 prohibition, conduct such as exclusive dealing will likely have a particularly serious exclusionary effect.
- (b) In relation to infringements of the section 66 prohibition or section 70 prohibition, a starting point between 10% to 15% up to the maximum penalty in accordance with section 80(7), is more likely to be appropriate for certain less serious object infringements, for infringements by effect and for conduct which is less likely to be inherently harmful.

(4) The above principles do not prevent the Office from applying a lower starting point.

(5) At the **second stage** in determining the starting point, the Office will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific factors applicable to the case that might be relevant to the extent and likelihood of harm to competition. These specific factors may include, for example:

- (a) the nature of the product including the nature and extent of demand for that product;
- (b) the structure of the market, including the market share of the relevant party or parties involved in the infringement, market concentration and barriers to entry;
- (c) the market coverage of the infringement;
- (d) the actual or potential effect of the infringement on competitors and third parties; and

- (e) the actual or potential harm caused to consumers whether directly or indirectly.

(6) Lastly, the Office will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In the case of infringements involving more than one relevant party, the assessment outlined above will be consistent for each party and the Office expects to adopt the same percentage starting point for each party to the infringement.

- 5. (1) The relevant turnover is the turnover of the relevant party in the relevant market affected by the infringement in the relevant party's last business year. In this context, the relevant party's last business year is the financial year preceding the date when the infringement ended or otherwise deemed by the Office. Determination of relevant turnover.

(2) The Office will generally base relevant turnover on figures from a relevant party's audited accounts, but retains the right to require the accounts presented in any manner.

- 6. The starting point may be increased or, in particular circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement. Where the total duration of an infringement is less than one year, the Office shall treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of an infringement is more than one year. Step 2 Adjustment for Duration.

- 7. (1) The amount of the financial penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors. The Office will consider whether any adjustments are appropriate in all cases for each relevant party based on the specific circumstances of the infringement. A list of non-exhaustive factors is provided in the following sub rules. Step 3 Adjustment of a Penalty Amount.

(2) Aggravating factors include:
 - (a) Persistent and repeated unreasonable behaviour that delays the Office's enforcement action;

- (b) role of the relevant party as a leader in, or an instigator of, the infringement;
 - (c) involvement of directors or senior management;
 - (d) retaliatory or other coercive measures taken against other Sectoral Providers, enterprises or associations of enterprises aimed at ensuring the continuation of the infringement;
 - (e) continuing the infringement after the start of the investigation;
 - (f) repeated infringements by the same Sectoral Provider, enterprises or association of enterprises or other parties in the same group;
 - (g) infringements which are committed intentionally rather than negligently;
 - (h) retaliatory measures taken, or commercial reprisal sought by the Sectoral Provider against a leniency applicant; and
 - (i) failure to comply with the Law following receipt of a warning or advisory letter in respect of the same or similar conduct.
- (3) Mitigating factors include:
- (a) role of the relevant party, for example, where the relevant party is acting under severe duress or pressure;
 - (b) genuine uncertainty on the part of the relevant party as to whether the agreement or conduct constituted an infringement;
 - (c) adequate steps having been taken with a view to ensuring compliance with the section 66 and 70 prohibitions;
 - (d) termination of the infringement as soon as the Office intervenes; and
 - (e) cooperation which enables the enforcement process to be concluded more effectively and/or quickly.
8. (1) In contemplating whether any adjustments should be made at this step for specific deterrence or proportionality, the Office will ruminant suitable indicators of the Sectoral Provider's or enterprise's size and financial position at the time the penalty was imposed. The Office may analyse indicators – including, where available, total turnover, profitability, net assets and dividends, liquidity and industry margins, and any other relevant circumstances. The Office will generally consider indicators of size and financial position from the time of the infringement. Adjustment for specific deterrence and proportionality.
- (2) The amount of the penalty calculated after the completion of steps 1 to 3 may be increased to ensure that the penalty to be imposed on the

relevant party will deter it from breaching the Law in the future. Such an increase will generally be limited to situations in which a Sectoral Provider, an enterprise or an association of enterprises has a significant proportion of its turnover outside the relevant market or where the Office has evidence that the infringing party has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3. Where relevant, the Office's estimate would account for any gain which might accrue to the relevant party in other markets as well as the "relevant" market under consideration. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing party.

(3) In addition, there might be unique cases where the relevant party's relevant turnover is very low or zero with the result that the figure at the end of step 3 would be very low or zero. In such cases, the Office would expect to make more significant adjustments, both for general and specific deterrence, at this step. Such an approach may also be appropriate where the relevant turnover did not accurately reflect the scale of the relevant party's involvement in the infringement or the likely harm to competition.

(4) In considering the appropriate level of uplift for specific deterrence, the Office will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the relevant party's size and financial position and the nature of the infringement.

(5) At this step, the Office will assess whether, in its view, the overall penalty proposed is appropriate in the round. Where necessary, the penalty reached at the end of steps 1 to 3 may be decreased to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the Office will have regard to the relevant party's size and financial position, the nature of the infringement, the role of the relevant party in the infringement and the impact of the relevant party's infringing activity on competition.

Periodic penalty. 9. (1) Where the Sectoral Provider, enterprise or associations of enterprises, after the imposition of a penalty under rule 3, continues to carry out the actions to which the penalty relates, the relevant party is liable for every day or part thereof on which the action continues to a periodic penalty of not less than five thousand dollars (\$5,000) and not more than

twenty-five thousand dollars (\$25,000) per day and such penalty shall be imposed by the Office.

(2) The penalty under sub rule 10(1) above shall be calculated from the date that the relevant party is notified of the decision and shall be imposed in order to compel the relevant party to bring to an end an infringement of section 66 or 70 in accordance with a decision of the Office.

(3) Where the relevant party has satisfied the obligation which the Office sought to enforce by imposing the periodic penalty, the Office may, notwithstanding sub rule 10(1) above, fix the total amount of the periodic payment at a lower figure than that which it could have imposed.

Step 5 Adjustment if maximum penalty

10. (1) The adjustment referred to in rule 9(1) will be made after all the relevant adjustments have been made in rules 7 and 8 above, and also before adjustments are made in respect of leniency or settlement.

(2) Where any infringement by an association of Sectoral Providers or enterprises related to the activities of its members, the penalty shall not exceed the total turnover of each member of the association of Sectoral Providers or enterprises active on the market affected by the infringement.

(3) The final amount of the penalty calculated according to the method set out above may not in any event exceed the maximum penalty in accordance with section 80(7). The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.

Step 6 Application of reduction for leniency.

11. (1) The Office will reduce a relevant party's penalty where he has a leniency agreement with the Office, entered into as a result of an application pursuant to rule 13 of these guidelines below, provided always that the Sectoral Providers meet the conditions of the leniency agreement.

(2) The Office will also apply a penalty reduction where a relevant party settles with the Office, which will involve, among other things, the relevant party admitting its participation in the infringement.

(3) Where the Office applies discounts at this step, these discounts will be applied consecutively.

(4) In exceptional circumstances, the Office may reduce a penalty where the relevant party is unable to pay the penalty proposed due to its financial position. The Office emphasises that such financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.

Leniency Agreements.

12. (1) The Office may grant lenient treatment to parties which inform it of concerted practices, and if the parties cooperate with it in the circumstances set out below.
 - (2) In order to encourage parties participating in concerted practices to come forward, the Office may grant total immunity from financial penalties for an infringement of the section 66 prohibition to a participant in concerted practices who is the first to come forward before the Office has commenced an investigation and satisfies the following conditions. The relevant party must:
 - (a) accept that he participated in concerted practices;
 - (b) provide the Office with all the information, documents and evidence available to it regarding the concerted practices;
 - (c) maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action (including criminal proceedings and defending civil or criminal appeals) by the Office arising as a result of the investigation;
 - (d) refrain from further participation in the concerted practices from the time of disclosure of the concerted practices to the Office (except as may be directed by the Office); and
 - (e) not have taken any steps to coerce another Sectoral Provider, enterprise or association of enterprises to take part in the concerted practices.
 - (3) Alternatively, the Office may offer total immunity or a reduction of up to 100% from financial penalties to a participant who is the first to come forward and who satisfies the following requirements:
 - (a) The Sectoral Provider, enterprise or association of enterprises seeking immunity or a reduction in the level of financial penalty under this rule is the first to provide the Office with evidence of concerted practices in a market before the Office has issued a statement of objections;
 - (b) Conditions (a) to (e) in sub rule 13(2) above are satisfied; and

- (c) the information, documents and evidence provided by the Sectoral Provider, enterprise or associations of enterprises, as a minimum, add significant value to the Office's investigation, that is they must constitute or contain information which genuinely advances the investigation.

- (4) Immunity or a reduction in the level of the financial penalty of up to 100% by the Office in these circumstances is discretionary. In order for the Office to exercise this discretion it must be satisfied that the enterprise should benefit from a reduction in the level of the financial penalty, taking into account the overall added value provided by the leniency applicant.

- (5) A relevant party which is not the first to come forward or does not satisfy the above requirements may benefit from a reduction of up to 50% in the amount of financial penalties imposed. The key criterion for determining the discount available will be the overall added value of the information, documents and evidence provided by the leniency applicant. The grant of a reduction by the Office in these circumstances is discretionary. In order for the Office to exercise this discretion it must be satisfied that the relevant party should benefit from a reduction. The Office will also take account the overall level of cooperation provided.

- (6) A relevant party who wishes to take advantage of the lenient treatment set out in this part of the guidelines, must contact the Office in writing and this step has to be taken by a person who has the power to represent the relevant party, if an entity, for that purpose.

Made by the Utility Regulation and Competition Office the [...] day of [...], 2019

[]

Chief Executive Officer of the Office.