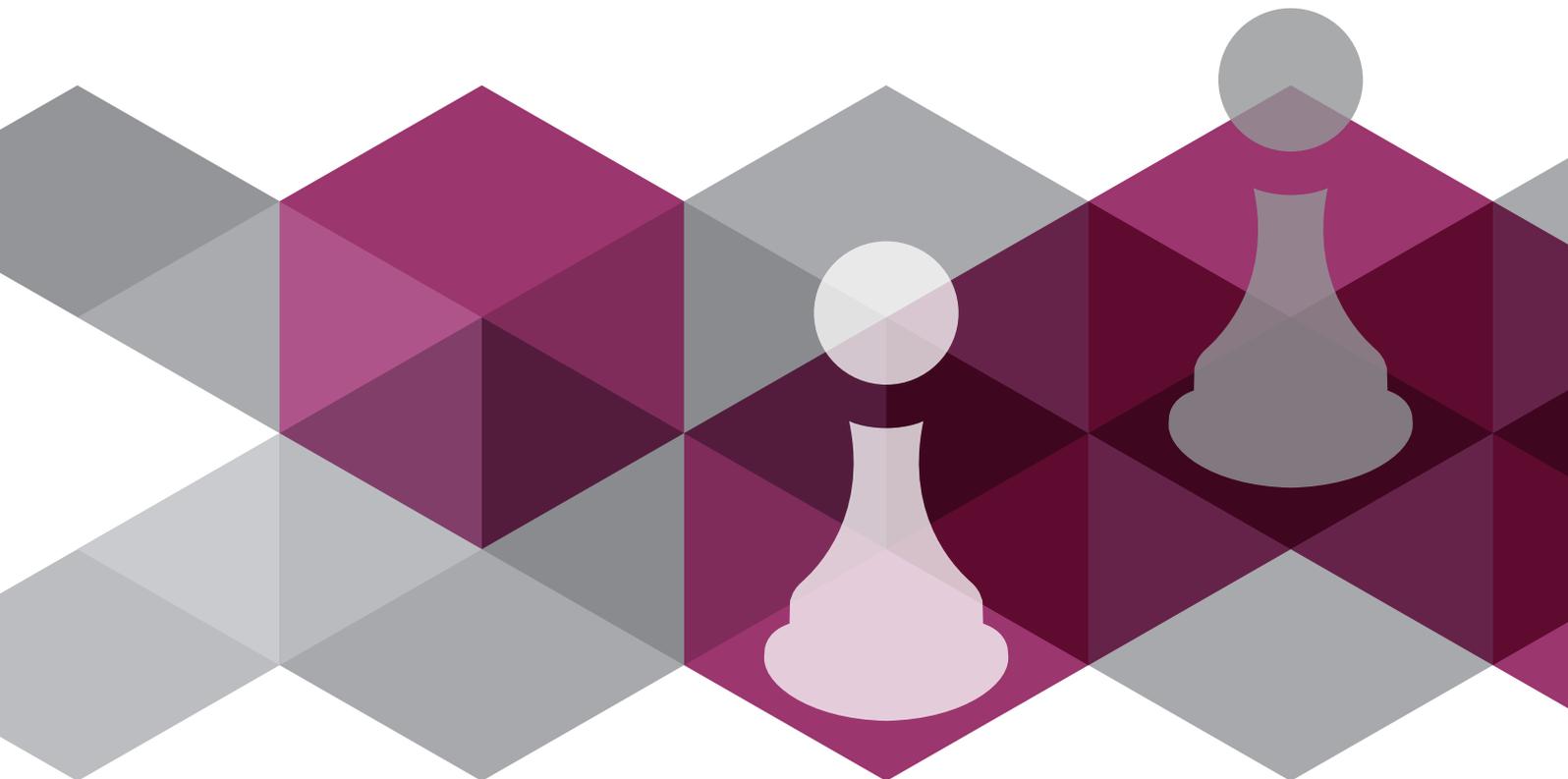


# Leniency Policy

for Undertakings Engaged  
in Cartel Conduct





# Leniency Policy for Undertakings Engaged in Cartel Conduct



*Section 80 of the Competition Ordinance (the “**Ordinance**”) provides that the Competition Commission (the “**Commission**”) may make a leniency agreement with a person that it will not bring or continue proceedings in the Competition Tribunal (the “**Tribunal**”) for a pecuniary penalty in exchange for the person’s cooperation in an investigation or in proceedings under the Ordinance.*

*Pursuant to section 80 of the Ordinance, this document sets out the Commission’s Leniency Policy for Undertakings Engaged in Cartel Conduct.*

*The Leniency Policy for Undertakings Engaged in Cartel Conduct 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 policy.*

*The Leniency Policy for Undertakings Engaged in Cartel Conduct does not apply to leniency agreements between the Commission and persons who are not undertakings. The Commission will consider case by case whether it is appropriate to exercise its enforcement discretion towards such persons. Where, however, an undertaking enters into a leniency agreement under this policy, the leniency ordinarily extends to any current officer or employee of the undertaking where the relevant individuals provide complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing proceedings. The leniency will also extend under the same conditions to any former officer or employee and any current or former agents of the undertaking specifically named in the leniency agreement.*



## 1. Introduction

- 1.1 Leniency is a key investigative tool used by competition authorities around the world to combat cartels. Cartels differ from other types of anti-competitive conduct. First, they are universally condemned as economically harmful. Second, cartels are usually organised and implemented in secret, making them more difficult to detect.
- 1.2 In view of these considerations and subject to the terms and conditions of this policy, the Commission considers that it is in the public interest that leniency should be accorded to an undertaking which is willing to terminate its participation in cartel conduct, report that conduct to the Commission and cooperate, at that undertaking's own cost, in the bringing of proceedings against other parties to the cartel.
- 1.3 The Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct is designed to provide a strong and transparent incentive for a cartel member to stop its cartel conduct and to report the cartel to the Commission. In exchange for a cartel member's cooperation, the Commission will undertake not to commence proceedings for a pecuniary penalty against the cartel member who enters into a leniency agreement with the Commission. In addition, the Commission will agree not to bring any other proceedings before the Tribunal or other courts other than proceedings for an order under section 94 of the Ordinance declaring that the cartel member has contravened the First Conduct Rule. The Commission will extend that leniency to current officers and employees of the cartel member and specifically named former officers or employees and current and former agents of the cartel member who cooperate with the Commission.
- 1.4 Since this policy provides that 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 a strong incentive for a cartel member to be the first undertaking to apply for leniency.
- 1.5 As a result, the Leniency Policy for Undertakings Engaged in Cartel Conduct is intended to increase the risk of detection and discourage the continuation of cartel conduct. By increasing the risk and cost of participating in a cartel, the policy deters the formation of cartels that would otherwise prevent, restrict or distort competition in Hong Kong.

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- 1.6 The Leniency Policy for Undertakings Engaged in Cartel Conduct enables the Commission to obtain evidence more efficiently and effectively thereby leading to a prompt resolution of the Commission's investigation of the conduct.
  - 1.7 The Leniency Policy for Undertakings Engaged in Cartel Conduct does not preclude the possibility of a follow-on action under section 110 of the Ordinance against cartel members, including a party to a leniency agreement, by persons who can prove they have suffered loss or damage as a result of the cartel.

## 2. Overview and scope of the policy

### Key elements of the policy

- 2.1 The policy consists of the following key elements:
  - (a) First, leniency is available only in respect of cartel conduct contravening the First Conduct Rule, as further described in paragraphs 2.3 to 2.5 below.
  - (b) Second, only an *undertaking*<sup>1</sup> may apply for leniency under the policy.
  - (c) Third, leniency is available only for the *first*<sup>2</sup> undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency.
  - (d) Fourth, as indicated at paragraph 1.3 above, 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.
  - (e) Fifth, 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.<sup>3</sup>

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<sup>1</sup> The term "undertaking" is defined in section 2 of the Ordinance and refers to any entity (including a natural person), regardless of its legal status or the way in which it is financed, which is engaged in an economic activity. Examples of undertakings include individual companies, groups of companies, partnerships, individuals operating as sole traders or subcontractors, co-operatives, societies, business chambers, trade associations and non-profit organisations. Further guidance on what the Commission considers to constitute an undertaking is provided in the Commission's *Guideline on the First Conduct Rule*.

<sup>2</sup> Absent exceptional circumstances, the Commission would not enter into a leniency agreement with more than one cartel member in a given case.

<sup>3</sup> The Commission will not require the leniency applicant to comply with this condition in circumstances where the Commission decides not to commence proceedings against any other persons who engaged in the cartel conduct.



2.2 Where the Commission enters into a leniency agreement with an undertaking, leniency will ordinarily extend to any current officer<sup>4</sup> or employee of the undertaking provided the relevant individuals provide complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing proceedings. Leniency will also extend under the same conditions to any agent, former officer or former employee of the undertaking specifically named in the leniency agreement. Where the undertaking is a partnership, leniency will ordinarily extend to any partner in the partnership and any employee of the partnership where the relevant individuals provide complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing proceedings. Leniency will also extend under the same conditions to any agent, former partner, or former employee of the partnership specifically named in the leniency agreement.

### **What is Cartel Conduct under the policy?**

2.3 The Leniency Policy for Undertakings Engaged in Cartel Conduct applies only to cartel conduct in contravention of the First Conduct Rule.

2.4 For the purposes of the policy, cartel conduct refers to:

- (a) agreements (as defined in section 2(1) of the Ordinance); and
- (b) concerted practices,  
among undertakings that are, or otherwise would be if not for the cartel conduct, in competition with each other, that seek to do one or any combination of the following activities, which have as their object preventing, restricting or distorting competition in Hong Kong:
  - i. fix prices;
  - ii. share markets;
  - iii. restrict output; or
  - iv. rig bids.<sup>5</sup>

2.5 Where other anti-competitive practices that may contravene the First Conduct Rule are used to give effect to the cartel conduct, those other practices would ordinarily benefit from this policy.

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<sup>4</sup> "Officer" has the meaning under section 79 of the Ordinance (which includes directors and managers of the undertaking).

<sup>5</sup> These forms of conduct are discussed in paragraphs 6.10 to 6.15, 6.17 to 6.19, 6.21 to 6.24 and 6.26 to 6.29 of the Commission's *Guideline on the First Conduct Rule*.



## **How to apply for leniency under the policy**

### ***Step 1: Applying for a marker***

- 2.6 Since, under this policy, the Commission provides leniency only to the first successful applicant, 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.
- 2.7 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. A marker will not, however, be granted on the basis of anonymous enquiries.
- 2.8 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 product(s) and/or service(s) involved), the main participants in the cartel conduct and the caller's contact details.
- 2.9 If these conditions are satisfied, a marker which identifies the time and date of the call will be given to applicant.
- 2.10 The Commission may issue one or more markers with respect to a specific cartel. In this context, all markers are ranked in descending order of the time and date of the call where the information set out in paragraph 2.8 above was provided to the Commission enabling it to grant a marker. As a result, a marker queue is created for each reported cartel. The undertaking concerned may choose to receive confirmation of the marker orally or in writing.
- 2.11 A request for a marker may only be made by using the Leniency Hotline at +852 3996 8010. The Leniency Hotline is only answered between 8am to 6pm Hong Kong time, Monday to Friday (excluding public holidays).



## ***Step 2: Invitation to apply for leniency***

- 2.12 On the basis of the information provided when applying for a marker, the Commission will make a preliminary determination whether the reported conduct is cartel conduct and whether leniency is available. Leniency may be available even if the Commission has already begun an investigation or has exercised its investigative powers under Part 3 of the Ordinance.
- 2.13 Absent exceptional circumstances, leniency will not be available under this policy if the Commission has decided to issue an infringement notice under section 67 of the Ordinance or to make an application to the Tribunal in respect of the cartel conduct reported by the undertaking.
- 2.14 If the Commission determines that there is cartel conduct and leniency is available, it will notify the undertaking with the highest ranking marker that it may make an application for leniency. The undertaking will be informed of the date and time by which an application must be submitted to the Commission.
- 2.15 Before the applicant submits its application, it will be asked to agree to a non-disclosure agreement with the Commission which provides that the applicant will keep confidential:
- (a) the fact that it is submitting an application for leniency; and
  - (b) the information provided or that will be provided.
- Applicants will agree not to disclose anything covered by the non-disclosure agreement except as required by law or otherwise agreed by the Commission.
- 2.16 The non-disclosure agreement shall not restrict applicants from disclosing information to competition authorities in other jurisdictions or for the purposes of obtaining legal advice.<sup>6</sup> At the discretion of the applicant, the non-disclosure agreement may be executed and kept at the Commission's offices.
- 2.17 Undertakings who are not invited to apply for leniency will be informed that they are not currently eligible to apply for leniency under this policy. Such undertakings may, however, consider cooperating with the Commission as detailed further in Part 4 of this Policy.

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<sup>6</sup> Applicants will be expected to ensure that their external legal advisors do not disclose the relevant information to any third parties.



### ***Step 3: Making the leniency application through a proffer***

- 2.18 The undertaking invited to apply for leniency is asked to provide a detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and the evidence the leniency applicant can provide in respect of the cartel conduct. This is commonly referred to as a “**proffer**”. The proffer may be made in hypothetical terms and through a legal representative on a ‘without prejudice’ basis. The proffer should include an explanation of how the cartel conduct affects or relates to competition in Hong Kong to establish a jurisdictional nexus and provide an estimate of the value/volume of sales affected by the cartel in Hong Kong.
- 2.19 The Commission will invite the undertaking to submit an application by completing its proffer within a specified period, ordinarily within 30 calendar days. Should the undertaking fail to complete its proffer within this timeframe, or any extension to it as might be agreed by the Commission<sup>7</sup>, 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.
- 2.20 After considering the proffer, the Commission may ask the applicant to provide access to some evidence in support of the proffer such as documentary evidence (including pre-existing documents relating to the cartel) and/or by making available witnesses to be interviewed by the Commission. Information of this kind provided to the Commission during the proffer stage will not be used as evidence in proceedings for a finding of a contravention of the First Conduct Rule against the applicant or any other person.<sup>8</sup>
- 2.21 Based on the proffer and any additional information requested and provided by the applicant, the Commission will determine whether to make an offer to enter into a leniency agreement. Such an offer will be made where the Commission concludes that the applicant has demonstrated its capacity to provide full and truthful cooperation and the requirements of this policy are fully satisfied.

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<sup>7</sup> The Commission will consider requests to extend the deadline for completing the proffer. In considering such requests, the Commission will have particular regard to evidence of efforts already made by the applicant to comply with the deadline and whether providing an extension will impede the Commission’s investigation.

<sup>8</sup> See paragraph 2.23 of this policy. Once the applicant enters into a leniency agreement with the Commission, it will, however, be required to make all non-privileged information and evidence in respect of the cartel conduct available to the Commission. Such information and evidence provided under a leniency agreement may be used in investigations and proceedings. See paragraph 2.26 of this policy.

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- 2.22 A proffer may be made orally or in writing. Any communications with the Commission about the proffer or any related matters may be made orally or in writing.
- 2.23 The Commission will maintain its own records of the marker process and any information submitted in a proffer or about any related matters.
- 2.24 Information provided by a party at the proffer stage will be returned to the party concerned where a leniency agreement is not entered into. The Commission, however, reserves its ability to subsequently request that same information pursuant to section 41 of the Ordinance or to otherwise use its powers under the Ordinance to obtain the information.

***Step 4: Offer to enter into a leniency agreement***

- 2.25 If the applicant meets the conditions for leniency under this policy, the applicant will be asked to sign a leniency agreement in the form of the annexed **“Template for a Leniency Agreement with an Undertaking Engaged in Cartel Conduct”** with any necessary amendments or specific terms as might be appropriate to the applicant.
- 2.26 The leniency agreement submitted to the applicant will require the applicant to confirm that:
- (a) it has provided and will continue to provide full and truthful disclosure to the Commission;
  - (b) it has not coerced other parties to engage in the cartel conduct;
  - (c) it has, absent a consent from the Commission taken prompt and effective action to terminate its involvement in the cartel<sup>9</sup>;
  - (d) it will keep confidential all aspects of the leniency application and the leniency process unless the Commission’s prior consent has been given or the disclosure of information is required by law<sup>10</sup>;
  - (e) it will provide continuing cooperation, at its own cost, to the Commission including in proceedings against other undertakings that engaged in the cartel conduct or against other persons involved in the cartel conduct;

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<sup>9</sup> The Commission may consent to the undertaking’s continued participation in the cartel e.g. with a view to avoiding ‘tipping-off’ other cartel participants to the fact of the Commission’s investigation, or to assist in investigations by competition authorities in other jurisdictions.

<sup>10</sup> As noted in paragraph 2.15 of this policy, this does not restrict applicants from obtaining legal advice.

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- (f) it 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 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; and
  - (g) it is prepared to continue with, or adopt and implement, at its own cost, an effective corporate compliance programme to the satisfaction of the Commission.

### ***Step 5: Leniency agreement***

- 2.27 Once an undertaking has entered into a leniency agreement with the Commission it is required to provide the Commission with all non-privileged information and evidence in respect of the cartel conduct without delay. Witnesses will also be interviewed by the Commission and can be called upon to provide evidence before the Tribunal in due course.
- 2.28 Where the Commission enters into a leniency agreement with an undertaking under section 80 of the Ordinance, the Commission is not permitted to commence proceedings in the Tribunal for a pecuniary penalty against the undertaking that has contravened the First Conduct Rule (including any other persons covered by the agreement). The Commission will also commit in the leniency agreement not to commence any other proceedings against the undertaking other than proceedings for an order under section 94 of the Ordinance declaring that the cartel member has contravened the First Conduct Rule.<sup>11</sup>
- 2.29 The Leniency Agreement must be executed by an officer of the undertaking. Execution of the Agreement by an external legal advisor on behalf of the undertaking will not be accepted.
- 2.30 If the undertaking fails to abide by the terms of the leniency agreement, the Commission may terminate the agreement pursuant to section 81 of the Ordinance and the terms of the leniency agreement.

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<sup>11</sup> The Commission will extend leniency to current officers and employees of the parties to the leniency agreement and specifically named former officers or employees and current and former agents of the parties to the leniency agreement who cooperate with the Commission. This will include the Commission agreeing not to seek disqualification orders under section 101 of the Ordinance.



### 3. Terminating the leniency agreement

- 3.1 The termination of a leniency agreement entered into under section 80 is governed by the provisions of section 81 of the Ordinance. Under section 81 of the Ordinance, the Commission may terminate a leniency agreement where, inter alia, the Commission has reasonable grounds to suspect that the information on which it based its decision to make the agreement was incomplete, false or misleading in a material particular or where the Commission is satisfied that the other party to the leniency agreement has failed to comply with the terms of the leniency agreement.
- 3.2 Where the Commission is of the view that it may terminate a leniency agreement, it will orally inform the party to the agreement of its concerns and give a period of 7 calendar days for the party to take the necessary steps to remedy the situation. If the Commission's concerns remain after that period, the Commission will proceed (in writing) with the process set out at sections 81(2) to 81(5) of the Ordinance.
- 3.3 Where a leniency agreement is terminated, the Commission may at its discretion commence proceedings against the undertaking and/or any persons previously covered by the leniency agreement, including without limitation, proceedings in the Tribunal seeking a pecuniary penalty.
- 3.4 Information provided by an undertaking to the Commission pursuant to a leniency agreement which has been terminated may be retained by the Commission and used as evidence against that undertaking and other persons involved in the cartel.
- 3.5 Where a leniency agreement is terminated, the Commission will consider offering the next qualifying highest marker holder the option of making a leniency application to enter a leniency agreement.
- 3.6 Where a leniency agreement with an undertaking is terminated, the Commission may exercise its enforcement discretion not to commence proceedings in the Tribunal against officers, employees and agents of the undertaking whom previously benefited from the protection of the leniency agreement in return for the on-going cooperation of those persons with the Commission.



## 4. Undertakings which do not qualify for leniency

- 4.1 Undertakings holding a marker but who are not currently eligible for leniency under this policy will be informed of that status. Undertakings which do not qualify for leniency, but which have engaged in cartel conduct, may wish nonetheless to cooperate, at their own cost, with the Commission in its investigation and proceedings before the Tribunal.
- 4.2 The Commission will rely on its enforcement discretion regarding undertakings which cooperate with the Commission in connection with an investigation of alleged contraventions of the First Conduct Rule. The exercise of the Commission's enforcement discretion towards undertakings which have engaged in or been involved in cartel conduct but which do not qualify for leniency may take various forms. In particular, to the extent permitted by law, 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 (*Orders that may be made by Tribunal in relation to contraventions of competition rules*).
- 4.3 If the Commission is seeking a pecuniary penalty or other order in relation to cartel conduct, the Commission may in such circumstances consider making joint submissions to the Tribunal with the cooperating undertaking under rule 39 (*Orders made by consent in proceedings under Part 3, 4, 5 or 6*) of the Competition Tribunal Rules on the pecuniary penalty that might be imposed and/or on the terms of a particular order that the Tribunal might make having regard to the timing, nature, extent and value of any cooperation provided.
- 4.4 The Commission will consider, a range of factors in assessing the extent and value of the cooperation provided by an undertaking who has engaged in cartel conduct, including whether the undertaking:
- (a) approached the Commission in a timely manner seeking to cooperate;
  - (b) provided significant evidence regarding the cartel conduct;

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- (c) provided full and truthful disclosure, and cooperated fully and expeditiously on a continuing basis throughout the Commission's investigation and any related court proceedings;
  - (d) coerced any other person to participate in the cartel; and
  - (e) acted in good faith in dealings with the Commission.

4.5 However, while the Commission retains the discretion whether to seek a pecuniary penalty, it is a matter for the Tribunal and other courts to decide ultimately whether a pecuniary penalty is appropriate in the circumstances and, if so, the level of the penalty that should be imposed. Similarly, the Tribunal has a discretion under section 94 of the Ordinance as regards the appropriateness of other orders which might be made.

## 5. Confidentiality and non-disclosure

### Confidentiality of leniency applications

- 5.1 To support the Commission's ability to conduct effective investigations, the leniency applicant is required to keep confidential the fact of the investigation, its application for leniency (including any non-public information received by the applicant from the Commission in that context) and the terms of any leniency agreement entered into with the Commission, unless the Commission's prior consent has been given or the disclosure of the information is required by law.
- 5.2 The confidentiality and non-disclosure commitment is on-going throughout an investigation and in any subsequent Tribunal or other court proceedings.
- 5.3 As noted above, an applicant for leniency is required to enter into a non-disclosure agreement with the Commission.
- 5.4 If a leniency applicant breaches its confidentiality and non-disclosure commitments, the applicant will cease to be eligible for leniency under this policy.



## Release of information provided by leniency applicants to the Commission

5.5 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information<sup>12</sup> provided to the Commission. Section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority. Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's *Guideline on Investigations*.

5.6 The Commission will use its best endeavours to appropriately protect:

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

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

5.7 Subject to paragraph 3.4 above on the use of information by the Commission in Tribunal and other court proceedings and the requirements of Part 8 of the Ordinance to the extent applicable, it is the Commission's 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, for example, in connection with private civil proceedings in Hong Kong or in other jurisdictions unless:

- (a) it is compelled to make a disclosure by an order of the Tribunal or any other court, by law or any requirement made by or under a law;
- (b) it has the consent of the leniency applicant to disclose the material;
- (c) the relevant information or document is already in the public domain; or
- (d) the Commission, after entering a leniency agreement, has terminated the leniency agreement under section 81 of the Ordinance.

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<sup>12</sup> Confidential information is defined in section 123 of the Ordinance and includes the identity of any person who has given information to the Commission.

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- 5.8 If a third party makes an application in whatever form seeking to compel the Commission to disclose Leniency Material, the Commission will advise the leniency applicant of that application as soon as practicable. Pursuant to the terms of the non-disclosure agreement with the Commission the leniency applicant will likewise be required to advise the Commission as soon as practicable should a third party make an application seeking to compel the leniency applicant to disclose Leniency Material or should such disclosure otherwise be required by law.

## **6. Cooperation in cross-border cartel investigations**

- 6.1 Where a cartel operates in multiple jurisdictions, authorities in these jurisdictions may cooperate with each other when conducting their respective cartel investigations.
- 6.2 Undertakings who are cooperating with the Commission, either as a party to a leniency agreement or otherwise, will be expected to provide the Commission with details of the other jurisdictions where they have sought immunity/leniency and an indication of the on-going status of their application in those jurisdictions.
- 6.3 In appropriate cases, in relation to those jurisdictions identified in paragraph 6.2 above, and where permitted by law, the Commission may require a leniency applicant to authorise the Commission to exchange confidential information with authorities in another jurisdiction.

## **7. No Further Action taken in respect of a cartel investigation**

- 7.1 If the Commission decides not to pursue further a matter which is the subject of a marker or leniency application, it will advise the leniency applicant of this outcome.



## Annex A

# Template for a Leniency Agreement with an Undertaking Engaged in Cartel Conduct

*This template contains the standard terms to be used in leniency agreements under section 80 of the Ordinance between undertakings engaged in cartel conduct and the Competition Commission.*

*The template may be amended to reflect the specific circumstances of the matter in question. The template may also be updated from time to time.*

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**CONFIDENTIAL**

### LENIENCY AGREEMENT

This Leniency Agreement ("**Agreement**") is made on the [Date] day of [Month] [Year]  
BETWEEN:

A. **Competition Commission** (the "**Commission**"), an independent statutory body established under the Competition Ordinance (Cap. 619) (the "**Ordinance**");

and

B. **[Party]**, a **[description of the Leniency Applicant]**

*[There may be a number of parties to the agreement with the Commission where the Leniency Applicant consists of more than one related legal entities]*



## RECITALS

- (1) This Agreement is made in connection with **[description of cartel]** conduct in the **[description of industry]** in **[geographical area of cartel, e.g., Hong Kong SAR]** during the period **[relevant period]** (the “**Cartel**”).
- (2) The Commission considers the Cartel contravenes the First Conduct Rule (section 6(1) of the Ordinance), in respect of which **[Party]** has applied for leniency under the Commission’s Leniency Policy for Undertakings Engaged in Cartel Conduct (a copy of which is attached to this Agreement).

NOW IT IS AGREED as follows:

### 1 Interpretation

- 1.1 For the purposes of this Agreement, the terms used have the same meaning as in the Ordinance and in addition:
  - (a) “**Court**” means the Competition Tribunal, and other courts of the Hong Kong SAR;
  - (b) “**Confidential Leniency Information**” means any information relating to the Leniency Application and provided pursuant to this Agreement, including, without limitation, the fact that Leniency has been sought or is being sought or has been granted pursuant to the terms of this Agreement and, for avoidance of doubt, includes any confidential information:
    - i. provided to the Commission by **[Party]** or the other persons within the scope of this Agreement for the purposes of making the Leniency Application or under this Agreement; and
    - ii. any information obtained by **[Party]** or the other persons within the scope of this Agreement through cooperating with the Commission as a result of making the Leniency Application or under this Agreement;



- (c) **“Leniency Application”** means the application for leniency pursuant to section 80 of the Ordinance made by **[Party]** under the Commission’s Leniency Policy for Undertakings Engaged in Cartel Conduct which preceded the execution of this Agreement;
- (d) **“Investigation”** means the Commission’s initial assessment and investigation into the Cartel or any related conduct, including any investigation regarding persons involved in the Cartel, whether or not as a result of the exercise of the Commission’s powers in sections 41, 42 and 48 of the Ordinance;
- (e) **“Parties”** means the Commission and **[Party]**; and
- (f) **“Proceedings”** means any Court proceedings relating to the Cartel, excluding proceedings in respect of the criminal offences provided for in sections 52, 53, 54, 55, 172, 173 and 174 of the Ordinance and follow on actions under section 110 of the Ordinance.

## 2. Leniency

2.1 In return for **[Party]** having satisfied and continuing to satisfy each of the conditions set out in this Agreement, the Commission agrees not to bring Proceedings for a pecuniary penalty under section 93 of the Ordinance or any other Proceedings (other than Proceedings for an order under section 94 of the Ordinance as mentioned in clause 4.1(c) below declaring that **[Party]** has contravened the First Conduct Rule) against any of the following:

- (a) **[Party]** for any acts it has committed in contravention of the First Conduct Rule in connection with the Cartel;
- (b) current officers or employees of **[Party]** for their involvement in a contravention of the First Conduct Rule in connection with the Cartel;
- (c) the former officers or employees of **[Party]** listed in Schedule A to this Agreement for their involvement in a contravention of the First Conduct Rule in connection with the Cartel; or

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- (d) the current or former agents of **[Party]** listed in Schedule B to this Agreement for their involvement in a contravention of the First Conduct Rule in connection with the Cartel.

### **3. Representation and warranties of [Party]**

3.1 **[Party]** expressly represents and warrants, and acknowledges that the Commission has relied on these representations and warranties in entering into this Agreement, in particular that:

- (a) it has not, without the express written consent of the Commission, disclosed to any third party the Confidential Leniency Information (including the fact that it has applied for leniency); except to its legal advisor for the purposes of making or advising on the Leniency Application or the terms of this Agreement;
- (b) except as otherwise expressly authorised by the Commission, it has refrained from further participation in the Cartel from and including **[Date of the application for leniency]** and shall continue to do so;
- (c) neither it nor any of its current or former officers, employees or agents has taken steps to coerce any other undertaking to participate in the Cartel;
- (d) that the information provided to the Commission prior to entering into this Agreement as part of the Leniency Application was, and still is, neither false nor misleading in any material particular; and
- (e) that any opinion provided to the Commission with respect to the Cartel was, and still is, honestly held.



#### 4. Leniency conditions for [Party]

4.1 As a condition of this Agreement, at its own cost, **[Party]**:

- (a) will maintain continuous and complete cooperation with the Commission throughout the Investigation and any ensuing Proceedings. Save as otherwise agreed with the Commission, this includes but is not limited to:
  - i. facilitating, and, using its best endeavours to secure the complete and truthful cooperation of its current officers and employees including by making relevant persons available at the Commission's request to provide any information reasonably requested. For avoidance of doubt, this includes the giving of full and truthful information to the Commission during any Commission interviews and full and truthful evidence in Court if so required;
  - ii. using its best endeavours to facilitate, and secure the complete and truthful cooperation of its current and former agents, its former officers and employees (all to the extent involved in the Cartel) including by making, on a best endeavours basis, relevant persons available at the Commission's request to provide any information reasonably requested. For the avoidance of doubt, this includes the giving of full and truthful information to the Commission during any Commission interviews and full and truthful evidence in Court if so required.
- (b) will make full and truthful disclosure to the Commission throughout the Investigation and any ensuing Proceedings relating to the Cartel, including by:
  - i. providing the Commission promptly with all non-privileged information known or available to it or under its power, custody, or control in respect of the Cartel including all records, wherever located, relating to the Cartel as well as identifying other sources of evidence in any form;

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- ii. preserving all relevant non-privileged information and assisting the Commission to retrieve all such information. For avoidance of doubt, this includes making the IT systems and equipment under control of **[Party]** and/or accessible from its premises available for analysis by such means and in such a manner as determined by the Commission to be most appropriate for the purposes of its Investigation;
  - iii. ensuring that any potentially relevant IT systems or equipment (including, but not limited to, servers, personal computers, laptops, mobile telephones, blackberries, smartphones, tablets, digital media, and other similar networking or personal devices) are not removed, destroyed, tampered with or modified, and that relevant data are not removed, destroyed, tampered with or modified prior to, during or following any analysis by the Commission;
  - iv. not knowingly misrepresenting any material facts to the Commission; and
  - v. immediately notifying the Commission forthwith of any change in circumstances that may affect the accuracy of the information or any opinion already provided to the Commission;
- (c) 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 Competition Tribunal may be asked jointly by the Parties under rule 39 of the Competition Tribunal Rules (Cap. 619D) to make an order under section 94 of the Ordinance declaring that **[Party]** has contravened the First Conduct Rule by engaging in the Cartel; and
- (d) will ensure that the **[Party]**, its officers, employees, representatives [and, using its best endeavours, secure that the persons listed in Schedule A and Schedule B to this Agreement] will, keep confidential the Confidential Leniency Information unless:
- i. **[Party]** has the Commission's express written consent to release the Confidential Leniency Information; or



- ii. the release of the Confidential Leniency Information is required by law.
  - (e) will, where the Commission has requested that **[Party]** continue to participate in the Cartel, act as directed by the Commission in relation to the Cartel; and
  - (f) will, agree to continue with, or adopt and implement, an effective corporate compliance programme to the satisfaction of the Commission.
- 4.2 Where **[Party]** considers that the release of Confidential Leniency Information is required by law pursuant to clause 4.1 (d) ii. above, it shall:
- (a) promptly notify the Commission of the content and form of the proposed disclosure, and why **[Party]** considers it is required by law to make the proposed disclosure; and
  - (b) use its best endeavours to provide the Commission with sufficient time to:
    - i. consider whether the proposed disclosure, including the content and form of the proposed disclosure, is in the Commission's view required by law; and
    - ii. comment on or challenge the proposed disclosure before a court or otherwise.
- 4.3 For the avoidance of doubt, nothing in clause 4.1 prevents **[Party]** from defending any subsequent follow-on action under the Ordinance on the basis that the person making the claim did not suffer loss or damage as a result of the Cartel.
- 4.4 The Commission will not require **[Party]** to comply with clause 4.1 (c) above in circumstances where the Commission decides not to commence Proceedings against any other members of the Cartel.



## 5. Termination

- 5.1 The Commission may terminate this Agreement at any time if one or more of the conditions for termination of a leniency agreement as set out in section 81(1) of the Ordinance are met, including where **[Party]** has not complied with the terms of this Agreement.
- 5.2 The Parties acknowledge the procedure for terminating this Agreement is set out in section 81 of the Ordinance.
- 5.3 If this Agreement is terminated, the Commission may at its discretion commence Proceedings against **[Party]** and/or any persons previously within the scope of this Agreement including, without limitation, proceedings seeking a pecuniary penalty under section 93 of the Ordinance.

## 6. Use of information and documents

- 6.1 The Commission may use any information or documents provided by **[Party]** under this Agreement, for the purpose of any investigation and proceedings under the Ordinance.
- 6.2 All Confidential Leniency Information provided to the Commission by **[Party]** or other persons within the scope of this Agreement, may, notwithstanding the termination of the Agreement under section 81 of the Ordinance, be used by the Commission to facilitate the performance of its functions insofar as is permitted by law.
- 6.3 Pursuant to paragraphs 6.1 to 6.3 of the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct, the Commission may, in appropriate cases, and where permitted by law, request **[Party]** to authorise the Commission to exchange confidential information with authorities in other jurisdictions.



6.4 If any third party seeks to compel disclosure by the Commission of Confidential Leniency Information or the Commission's records of the Leniency Application process or the entering into of this Agreement, the Commission, will to the extent reasonably possible, give **[Party]** prompt notice and shall, in any event, use its best endeavours to resist disclosure unless **[Party]** consents to such disclosure or the Commission is compelled to do so by an order of a Court, by law or any requirement made by or under a law.

## **7. Continuing obligations**

7.1 The obligations in this Agreement except clause 4.1 (d) are on-going and continue until:

- (a) the Commission advises **[Party]** that the Proceedings have been concluded;  
or
- (b) this Agreement is terminated.

7.2 The obligations in clause 4.1 (d) only cease when the Commission advises **[Party]** that the Proceedings have been concluded, or releases in writing **[Party]** from its obligations under this Agreement.

## **8. Communications**

8.1 Any written notice or communication pursuant to this Agreement shall be delivered by registered mail and by fax as follows:

### **If to the Commission, to:**

For the attention of ED (Operations)  
Competition Commission  
Room 3601, 36/F, Wu Chung House  
213 Queen's Road East  
Wan Chai, HONG KONG

Fax Number: +852 3996 8011



**If to [Party], to:**

**[Address]**

For the attention of: [•]

Fax Number: [•]

or to such other person or address as the Parties may agree.

## **9. Miscellaneous**

- 9.1 Authority and Capacity: The Parties represent and warrant to each other that the signatories to this Agreement have all the authority and capacity necessary to bind them to it.
- 9.2 Entire Agreement: This Agreement is the entire agreement between the Commission and **[Party]** and supersedes all prior representations, writings, negotiations or understandings, whether oral or written, between the Commission and **[Party]** relating the Cartel.
- 9.3 Non-Waiver: The failure of the Commission to enforce any provision of this Agreement at any time shall not act as a waiver of the Commission's right to enforce that provision in respect of the particular act or omission or any other act or omission.
- 9.4 Applicable Law: This Agreement is governed by, and shall be construed in accordance with, the laws of Hong Kong SAR. The Parties agree that the Court has jurisdiction to determine any proceedings arising out of or in connection with this Agreement and the matters to which it relates, including any Proceedings brought by the Commission.
- 9.5 Execution in Counterparts: This Agreement may be executed in counterparts.



**AGREED by the Parties through their authorised signatories:**

SIGNED for and on behalf of [**Party**]

*[To be adjusted depending on the specific formalities required for execution]*

Date:

Name:

Position: [Director/Duly Authorised Signatory (Officer of the Party)]

SIGNED for and on behalf of the **Competition Commission**

Date:

Name:

Position:



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