



**International  
Competition  
Network**

# **ANTI-CARTEL ENFORCEMENT TEMPLATE**

**CARTELS WORKING GROUP  
Subgroup 2: Enforcement Techniques**

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# ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

## IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning (hardcore) cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

## 1. Information on the law relating to cartels

### A. Law(s) covering cartels: [availability (homepage address) and indication of the languages in which these materials are available]

The primary source of competition law in Hong Kong is the Competition Ordinance (Cap 619) (the 'Ordinance'). Insofar as cartels are concerned, the relevant substantive provision of the Ordinance is Section 6, which states:

*"(1) An undertaking must not—*

*(a) make or give effect to an agreement;*

*(b) engage in a concerted practice; or*

*(c) 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.*

*(2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).*

*(3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "**first conduct rule**".*

In addition to the provisions of section 6 for the undertaking(s) which participate in a contravention of the First Conduct Rule, the Ordinance also provides for the possibility of enforcement action to be taken against persons "involved in the contravention" of a competition rule, which includes the first conduct rule. Section 91 states:

*"A reference in this Part to a person being involved in a contravention of a competition rule means a person who—*

	<p>(a) <i>attempts to contravene the rule;</i></p> <p>(b) <i>aids, abets, counsels or procures any other person to contravene the rule;</i></p> <p>(c) <i>induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule;</i></p> <p>(d) <i>is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or</i></p> <p>(e) <i>conspires with any other person to contravene the rule.”</i></p> <p>See <a href="https://www.elegislation.gov.hk/hk/cap619">https://www.elegislation.gov.hk/hk/cap619</a>.</p> <p>Available in Chinese and English.</p>
<p><b>B. Implementing regulation(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p>	<p>A number of regulations have been adopted under the Ordinance. In particular, in so far as potentially relevant to the Hong Kong Competition Commission’s (“<b>Competition Commission</b>”) enforcement activity:</p> <ul style="list-style-type: none"> <li>• Statutory bodies are excluded from the application of certain provisions of the Ordinance, including the First Conduct Rule. However, six statutory bodies are subject to those provisions of the Ordinance by virtue of the <a href="#">Competition (Application of Provisions) Regulation (Cap 619A)</a>.</li> <li>• Seven entities related to Hong Kong Exchanges and Clearing Limited are specifically excluded from the application of the First and Second Conduct Rules by virtue of the <a href="#">Competition (Disapplication of Provisions) Regulation (Cap 619B)</a>.</li> <li>• The <a href="#">Competition (Turnover) Regulation (Cap 619C)</a> specifies the method for determining the turnover of an undertaking for the purpose of the Ordinance.</li> </ul> <p>Available in Chinese and English.</p>
<p><b>C. Interpretative guideline(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p>	<p>The Ordinance is complemented by the following set of guidelines:</p> <ul style="list-style-type: none"> <li>• <a href="#">Guideline on the First Conduct Rule</a></li> <li>• <a href="#">Guideline on the Second Conduct Rule</a></li> <li>• <a href="#">Guideline on the Merger Rule</a></li> <li>• <a href="#">Guideline on Complaints</a></li> <li>• <a href="#">Guideline on Investigations</a></li> <li>• <a href="#">Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders</a></li> </ul> <p>The Guidelines have been published by the <b>Competition Commission</b> and the Communications Authority (“<b>CA</b>”), with which the <b>Competition Commission</b> shares concurrent jurisdiction under the Ordinance in the telecommunications and broadcasting sectors.</p> <p>The Guidelines provide guidance on how the <b>Competition Commission</b> and the <b>CA</b> intend to interpret and give effect to</p>

	<p>the provisions of the Ordinance.</p> <p>In addition to the six guidelines, the <b>Competition Commission</b> has published certain guidance notes on specific issues. These include the following:</p> <ul style="list-style-type: none"> <li>• <a href="#">Investigation Powers of the Competition Commission and Legal Professional Privilege</a>;</li> <li>• <a href="#">Model Non-Collusion Clauses and Non-Collusive Tendering Certificate</a></li> </ul> <p>Each of the above documents are available in Chinese and English on the <b>Competition Commission</b>'s website.</p>
<p><b>D. Other relevant materials (if any): [availability (homepage address) and indication of the languages in which these materials are available]</b></p>	<p>To address key aspects of its enforcement approach, the <b>Competition Commission</b> has adopted the following policy documents:</p> <ul style="list-style-type: none"> <li>• <a href="#">Enforcement Policy</a>;</li> <li>• <a href="#">Leniency Policy for Undertakings Engaged in Cartel Conduct</a>.</li> </ul> <p>The <b>Competition Commission</b> has also produced a number of videos to educate about competition law issues including several on market-sharing, bid-rigging, price fixing and information exchange. These are available on <a href="#">the Competition Commission's website</a>.</p> <p>The <b>Competition Commission</b> also issues advisory bulletins on areas of particular interest. For an example, it recently published an advisory bulletin on <a href="#">Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment</a>.</p> <p>The <b>Competition Commission</b> produces a number of brochures and other user-friendly publications designed to further educate about competition law, including specific publications relating to cartel behaviour. These can be found <a href="#">here</a>.</p> <p>Available in Chinese and English.</p>

## 2. Scope and nature of prohibition on cartels

<p><b>A. Does your law or case law define the term “cartel”? [Please quote.]</b></p> <p><b>If not, please indicate the term you use instead. [Please quote.]</b></p>	<p>The term “cartel” is not defined in Hong Kong legislation or case law.</p> <p>However, the <b>Competition Commission</b>'s leniency policy, which applies only to cartel conduct in contravention of the First Conduct Rule, describes cartel conduct as:</p> <p><i>“(a) agreements (as defined in section 2(1) of the Ordinance); and</i></p> <p><i>(b) concerted practices,</i></p> <p><i>among undertakings that are, or otherwise would be if not for the cartel conduct, in competition with each other, that seek to</i></p>
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	<p>do one or any combination of the following activities, which have as their object preventing, restricting or distorting competition in Hong Kong:</p> <ol style="list-style-type: none"> <li>i. fix prices;</li> <li>ii. share markets;</li> <li>iii. restrict output; or</li> <li>iv. rig bids.”</li> </ol>
<p><b>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas<sup>1</sup>) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</b></p>	<p>Serious Anti-competitive Conduct is a defined term in the Ordinance. Section 2(1) of the Ordinance defines Serious Anti-competitive Conduct to mean:</p> <p><i>“any conduct that consists of any of the following or any combination of the following –</i></p> <ol style="list-style-type: none"> <li><i>(a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;</i></li> <li><i>(b) allocating sales, territories, customers or markets for the production or supply of goods or services;</i></li> <li><i>(c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;</i></li> <li><i>(d) bid-rigging.”</i></li> </ol> <p>In line with this definition, the <b>Competition Commission</b> takes the view that cartel arrangements between competitors (horizontal arrangements) that seek to fix prices, share markets, restrict output or rig bids are forms of Serious Anti-competitive Conduct.</p> <p>Where conduct amounts to Serious Anti-competitive Conduct, the consequences are that:</p> <ul style="list-style-type: none"> <li>• Unlike other First Conduct Rule conduct, the <b>Competition Commission</b> is not required to first issue a warning notice before it can initiate enforcement proceedings before the Competition Tribunal (“<b>Tribunal</b>”);</li> <li>• The turnover-based exclusion in the Ordinance for ‘agreements of lesser significance’ does not apply.</li> </ul> <p>Other types of agreements can be found to contravene the First Conduct Rule but not fall within the definition of Serious Anti-Competitive Conduct. For example, vertical arrangements are, as a general matter, unlikely to be considered Serious Anti-competitive Conduct although the definition of Serious Anti-competitive Conduct does not preclude the possibility (there is no reference in the definition to “competitors”).</p> <p>Whether conduct is considered Serious Anti-competitive Conduct is not part of the determination of whether the conduct contravenes the First Conduct Rule because it has the object or effect of harming competition. The issue of whether the</p>

<sup>1</sup> In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

	<p>conduct is considered Serious Anti-competitive Conduct only arises after the <b>Competition Commission</b> forms the view that the conduct contravenes the First Conduct Rule.</p>
<p><b>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the ban on hardcore cartels.]</b></p>	<p>As mentioned, hardcore cartels are prohibited by virtue of the First Conduct Rule and also amount to Serious Anti-competitive Conduct as defined in the Ordinance.</p> <p>The Ordinance provides for a number of exclusions and exemptions from the First Conduct Rule (which are general in their application and not specific to cartels).</p> <p><b>General exclusions</b></p> <p>Schedule 1 to the Ordinance provides for the following general exclusions in respect of the First Conduct Rule:</p> <ul style="list-style-type: none"> <li>(a) agreements enhancing overall economic efficiency;</li> <li>(b) compliance with legal requirements;</li> <li>(c) services of general economic interest;</li> <li>(d) mergers; and</li> <li>(e) agreements of lesser significance.</li> </ul> <p>The exclusions listed for agreements enhancing overall economic efficiency, compliance with legal requirements and services of general economic interest could all, at least in theory, be raised as defences to cartel conduct.</p> <p>Further detail on these general exclusions can be found in the Annex to the <b>Competition Commission's</b> Guideline on the First Conduct Rule.</p> <p><b>Public Policy and International Obligations Exemptions</b></p> <p>Sections 31 and 32 of the Ordinance provide for exemptions on public policy grounds ("Public Policy Exemption") and to avoid a conflict with international obligations that directly or indirectly relate to Hong Kong ("International Obligations Exemption").</p> <p>Unlike the Schedule 1 exclusions which are listed in the Ordinance, these two exemptions require that the Chief Executive in Council make an order specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules.</p> <p>These exemptions are, however, unlikely to be applicable in the case of cartel conduct.</p> <p><b>Statutory Bodies, Specified Persons and Activities</b></p> <p>As mentioned above, under section 3 of the Ordinance, statutory bodies are excluded from the competition rules (including the First Conduct Rule) unless they are specifically brought within the scope of those rules by a regulation made by the Chief Executive in Council under section 5.</p> <p>The section 3 exclusion does not, however, extend to legal entities owned or controlled by a statutory body unless those entities are also statutory bodies. The section 3 exclusion does not extend to undertakings that might enter into anti-competitive arrangements with an excluded statutory body. These undertakings remain subject to the Ordinance.</p> <p>Section 4 of the Ordinance provides that the competition rules</p>

	(including the First Conduct Rule) do not apply to persons specified in a regulation made by the Chief Executive in Council under section 5 of the Ordinance or to persons engaged in activities specified in such a regulation. The regulations which have been made by the Chief Executive under section 5 of the Ordinance are provided above.
<b>D. Is participation in a hardcore cartel illegal <i>per se</i><sup>2</sup>? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</b>	<p>The Ordinance does not designate cartel conduct as illegal <i>per se</i> or create a criminal cartel offence.</p> <p>As a general matter, the First Conduct Rule prohibits conduct that has the “object or effect” of preventing, restricting or distorting competition.</p> <p>The <b>Competition Commission</b> considers that arrangements will have the object of harming competition where the arrangements can be regarded, by their very nature, to be so harmful to the proper functioning of normal competition in the market that there is no need to examine their effects. In the <b>Competition Commission’s</b> view, cartel behaviour should be considered to have the “object” of harming competition, such that there is no need to establish whether it has the effect of harming competition. This view is summarised in its <a href="#">Guideline on the First Conduct Rule</a>.</p> <p>However, to date, this approach has not yet been subject to any case law. While the <b>Competition Commission</b> has initiated proceedings in respect of alleged cartel conduct before the Tribunal, as at the time of writing, the Tribunal has not issued a decision on liability.</p>
<b>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</b>	<p>The <b>Competition Commission</b> and/or the <b>CA</b> conduct cartel investigations and enforcement actions are brought before the Competition Tribunal.</p> <p>The Competition Tribunal is a superior court of record, composed of judges of the Court of First Instance. The Competition Tribunal has the same jurisdiction, powers and duties of the Court of First Instance in respect of the practice and procedure of the Court in the exercise of its civil jurisdiction.</p> <p>There is no criminal cartel offence in Hong Kong.</p>

### 3. Investigating institution(s)

<b>A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]</b>	The <b>Competition Commission</b> is responsible for investigating cartels. Pursuant to section 130 of the Ordinance, its functions include investigating “ <i>conduct that may contravene the competition rules of the Ordinance and enforce the provisions of the Ordinance</i> ”.
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<sup>2</sup> For the purposes of this template the notion of ‘per se’ covers both ‘per se’ and ‘by object’, as these terms are synonyms used in different jurisdictions.

	<p>Under the Ordinance, as mentioned, the <b>CA</b> is conferred jurisdiction concurrent with the <b>Competition Commission</b> to enforce the Ordinance in respect of the conduct of certain undertakings operating in the telecommunications and broadcasting sectors, including in relation to cartels.</p>
<p><b>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</b></p>	<p>The <b>Competition Commission</b>,  19/F, South Island Place  8 Wong Chuk Hang Road, Wong Chuk Hang, HONG KONG  Tel: +852 3462 2118  Fax: +852 2522 4997  Email: <a href="mailto:enquiry@compcomm.hk">enquiry@compcomm.hk</a></p> <p>The <b>CA</b>  29/F, Wu Chung House  213 Queen's Road East, Wanchai, Hong Kong  Tel: +852 2961 6333  Fax: +852 2803 5110  Email: <a href="mailto:webmaster@ofca.gov.hk">webmaster@ofca.gov.hk</a></p>
<p><b>C. Information point for potential complainants:</b></p>	<p>The websites of both the <b>Competition Commission</b> and the <b>CA</b> provide information for those who wish to make a complaint regarding suspected anti-competitive conduct. The following webpages provide information about how to make a complaint:</p> <p><a href="#">Commission's 'Make a Complaint' page</a></p> <p><a href="#">CA's 'Lodge a Competition Complaint' page</a></p> <p>See also the <a href="#">Guideline on Complaints</a> which has been jointly issued by the <b>Competition Commission</b> and the <b>CA</b>.</p> <p>Available in Chinese and English.</p>
<p><b>D. Contact point where complaints can be lodged:</b></p>	<p>The <b>Competition Commission</b>  19/F, South Island Place  8 Wong Chuk Hang Road, Wong Chuk Hang, HONG KONG  Online complaint form:  <a href="https://www.compcomm.hk/en/applications/make_a_complaint/complaint.html">https://www.compcomm.hk/en/applications/make_a_complaint/complaint.html</a>  Tel: +852 3462 2118  Email: <a href="mailto:complaints@compcomm.hk">complaints@compcomm.hk</a></p> <p>The <b>CA</b>  Market and Competition Branch  Office of the Communications Authority  29/F, Wu Chung House,  213 Queen's Road East, Wanchai, Hong Kong.  Fax: 2123 2187  Email: <a href="mailto:webmaster@ofca.gov.hk">webmaster@ofca.gov.hk</a></p>
<p><b>E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.</b></p>	<p>Only the <b>Competition Commission</b> and the <b>CA</b> may investigate cartel conduct under the Competition Ordinance.</p>

#### 4. Decision-making institution(s)<sup>3</sup> [to be filled in only if this is different from the investigating agency]

<p><b>A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]</b></p>	<p>In Hong Kong, the Tribunal is the body with responsibility for making decisions as to whether a contravention of the competition rules has occurred.</p> <p>Specifically, and among other matters, the Competition Tribunal has jurisdiction to hear and determine “<i>applications made by the <b>Competition Commission</b> or <b>CA</b> with regard to alleged contraventions, or alleged involvements in contraventions, of the competition rules</i>”.</p>
<p><b>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</b></p>	<p>The contact details of the Tribunal Registry are as follows:  Room LG343, LG3, High Court Building,  38 Queensway,  Hong Kong  Tel: +852 2825 0426  Fax: +852 2487 5509  Email: <a href="mailto:enquiry@comptribunal.hk">enquiry@comptribunal.hk</a></p>
<p><b>C. Contact point for questions and consultations:</b></p>	<p>The Competition Tribunal Registry contact details are provided in the answer to 4. B. above.</p>
<p><b>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</b></p>	<p>The investigating agencies (the <b>Competition Commission</b> and/or the <b>CA</b>) conduct investigations into anti-competitive behaviour. Following the completion of the investigation, the investigating agencies may, pursuant to section 92 of the Ordinance, “<i>apply to the Tribunal for a pecuniary penalty to be imposed on any person it has reasonable cause to believe—</i></p> <p><i>(a) has contravened a competition rule; or</i></p> <p><i>(b) has been involved in a contravention of a competition rule.</i>”</p> <p>The investigating agencies then litigate the case before the Tribunal.</p> <p>The <b>Competition Commission</b> and the <b>CA</b> may also apply to the Tribunal for other orders to be made, including but not limited to those specified in Schedule 3 to the Ordinance, and director disqualification orders (see further at 12.A. below).</p>
<p><b>E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?</b></p>	<p>As mentioned, the Ordinance does not provide for a criminal cartel offence.</p>

<sup>3</sup> Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

## 5. Handling complaints and initiation of proceedings

<p><b>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</b></p>	<p>The <b>Competition Commission</b> may become aware of possible contraventions of the Ordinance from sources such as:</p> <ul style="list-style-type: none"> <li>(a) a complaint or query made by the public;</li> <li>(b) the <b>Competition Commission</b>'s own research and market intelligence gathering;</li> <li>(c) other <b>Competition Commission</b> processes and investigations, including its leniency regime; or</li> <li>(d) referrals by the Government, the courts or other statutory bodies or authorities of potentially anti-competitive conduct for investigation.</li> </ul>
<p><b>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)? [If there is a requirement to complete a specific form, please, indicate its location (website address).]</b></p>	<p>The <b>Competition Commission</b> will accept complaints in any form, including those provided to the <b>Competition Commission</b>:</p> <ul style="list-style-type: none"> <li>(a) directly;</li> <li>(b) anonymously; and</li> <li>(c) through an intermediary (such as a legal adviser).</li> </ul> <p>A complaint or query may be made by telephone, e-mail, post, by completing an online <a href="#">form</a> on the <b>Competition Commission</b>'s website or in person at the <b>Competition Commission</b>'s office (by appointment only). A complaint may be submitted on behalf of more than one person or party.</p>
<p><b>C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]</b></p>	<p>There are no legal requirements for lodging a complaint with the <b>Competition Commission</b>.</p>
<p><b>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect? [Please elaborate.]</b></p>	<p>The <b>Competition Commission</b> will consider any complaint it receives regarding anti-competitive behaviour. However, it will not pursue all such complaints.</p> <p>Section 37(2) of the Ordinance provides the <b>Competition Commission</b> with a discretion as regards the investigation of complaints. In particular, the <b>Competition Commission</b>:</p> <ul style="list-style-type: none"> <li>(a) is not required to investigate a complaint if it does not consider it reasonable to do so; and</li> <li>(b) may investigate a complaint even where the Complainant no longer wishes to cooperate with the <b>Competition Commission</b>.</li> </ul> <p>Without limiting what is considered reasonable under section 37(2), the Ordinance provides that the <b>Competition Commission</b> may, in particular, not investigate a complaint if it is:</p> <ul style="list-style-type: none"> <li>(a) trivial, frivolous or vexatious; or</li> </ul>

	<p>(b) misconceived or lacking in substance.</p> <p>When considering whether a complaint is misconceived or lacking in substance, the <b>Competition Commission</b> will have regard to factors including:</p> <p>(a) the subject matter of the complaint and the scope of the Ordinance;</p> <p>(b) any applicable exclusions and exemptions under the Ordinance; and</p> <p>(c) the likely veracity of the complaint, including any supporting information provided with it.</p> <p>In every case the <b>Competition Commission</b> will exercise its discretion having regard to the specific facts of the complaint.</p>
<p><b>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</b></p>	<p>The <b>Competition Commission</b> is not legally required to adopt such a decision.</p>
<p><b>F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?</b></p>	<p>There is no time limit on the <b>Competition Commission</b> or the <b>CA</b> by which a decision must be taken on whether to investigate a complaint or not.</p> <p>There is, however, a legislative time limit for the <b>Competition Commission</b> to apply to the Competition Tribunal for a pecuniary penalty in respect of anti-competitive conduct. Section 92(2)(b) of the Ordinance states that an application for a pecuniary penalty “<i>may not be made ... in the case of an application with respect to a contravention of a conduct rule, more than 5 years after the day on which the contravention ceased or the <b>Competition Commission</b> became aware of the contravention, whichever is the later.</i>”</p>

## 6. Leniency policy<sup>4</sup>

<p><b>A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]</b></p>	<p>The <b>Competition Commission</b> has published its <a href="#">Leniency Policy for Undertakings Engaged in Cartel Conduct</a> (“<b>Leniency Policy</b>”). It is available on the <b>Competition Commission’s</b> website in Chinese and English.</p>
<p><b>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on</b></p>	<p><b>Full Leniency</b></p> <p>The Ordinance contains a specific provision relating to the grant of leniency.</p>

<sup>4</sup> For the purposes of this template the notion of ‘leniency’ covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like ‘leniency’ ‘amnesty’ and ‘immunity’ are considered as synonyms.

<p>the case?</p>	<p>Section 80 of the Ordinance permits the <b>Competition Commission</b> to agree not to seek any pecuniary penalty for any alleged contravention of a competition rule against a person in return for that person's cooperation in an investigation or proceedings under the Ordinance. The <b>Competition Commission</b> and the person will conclude a leniency agreement to this effect. <b>Competition Commission</b></p> <p>The <b>Competition Commission's Leniency Policy</b> provides clarity on how it intends to apply this statutory provision in so far as <i>undertakings</i> engaged in <i>cartel conduct</i> are concerned. The <b>Leniency Policy</b> does not preclude the possibility of circumstances in which the <b>Competition Commission</b> would enter into a leniency agreement with (i) undertakings engaged in non-cartel behaviour; or (ii) individuals engaged in cartel conduct.</p> <p><b>Partial Leniency</b></p> <p>Section 80 of the Ordinance only deals with leniency whereby the <b>Competition Commission</b> agrees not to see <i>any</i> pecuniary penalty against a person.</p> <p>Under the <b>Competition Commission's Leniency Policy</b>, 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 <b>Competition Commission</b> in its investigation and proceedings before the Tribunal.</p> <p>The <b>Competition Commission</b> will rely on its enforcement discretion regarding undertakings which cooperate with the <b>Competition Commission</b> in connection with an investigation of alleged contraventions of the First Conduct Rule. In particular, to the extent permitted by law, the <b>Competition Commission</b> may consider 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 the Tribunal in relation to contraventions of competition rules).</p> <p>If the <b>Competition Commission</b> is seeking a pecuniary penalty or other order in relation to cartel conduct, the <b>Competition Commission</b> may in such circumstances consider making joint submissions to the Tribunal with the cooperating undertaking 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.</p>
<p>C. Who is eligible for full leniency [only for the first one to come forward or for more participants in the cartel]?</p>	<p>Under the <b>Leniency Policy</b>, leniency is only available for the first undertaking that reports the cartel conduct to the <b>Competition Commission</b> and meets all the requirements for leniency. Details regarding the scope of any benefits available for subsequent applicants are dealt with at 6. G. below.</p>
<p>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the</p>	<p>Under the <b>Leniency Policy</b>, leniency may be available even if the <b>Competition Commission</b> has already begun an investigation or has exercised its investigative powers under Part 3 of the Ordinance.</p> <p>Absent exceptional circumstances, leniency will not be</p>

<p><b>cartel to initiate an investigation?</b></p> <p><b>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</b></p>	<p>available under this policy if the <b>Competition Commission</b> 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.</p>
<p><b>E. Who can be a beneficiary of the leniency program (individual / businesses)?</b></p>	<p>Leniency is available for undertakings engaged in cartel conduct. The <b>Leniency Policy</b> states also that:</p> <p>“The <b>Competition Commission</b> 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 <b>Competition Commission</b>.”</p>
<p><b>F. What are the conditions of availability of full leniency: [e.g. provide decisive evidence, maintain cooperation throughout, not to be the ringleader, cease the infringement, restitution, etc.]</b></p>	<p>The key elements of the <b>Leniency Policy</b> are as follows:</p> <p>(a) leniency is available only in respect of cartel conduct contravening the First Conduct Rule;</p> <p>(b) only an undertaking may apply for leniency under the <b>Leniency Policy</b> (noting that the policy does not preclude an individual applying for leniency outside of scope of the policy);</p> <p>(c) leniency is available only for the first undertaking that reports the cartel conduct to the <b>Competition Commission</b> and meets all the requirements for leniency;</p> <p>(d) if the undertaking meets the conditions for leniency, the <b>Competition Commission</b> 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;</p> <p>(e) the undertaking receiving leniency will, to the satisfaction of the <b>Competition Commission</b>, 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 <b>Competition Commission</b> and the applicant 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.</p> <p>Also, the applicant will be required to:</p> <p>(a) submit its application before a date and time set out by the <b>Competition Commission</b>;</p> <p>(b) agree to a non-disclosure agreement with the <b>Competition Commission</b> which provides that the applicant will keep confidential:</p> <p>(i) the fact that it is submitting an application for leniency; and</p> <p>(ii) the information provided or that will be provided.</p> <p>(c) 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;</p>

	<p>(d) explain how the cartel conduct affects or relates to competition in Hong Kong;</p> <p>(e) provide an estimate of the value/volume of sales affected by the cartel in Hong Kong;</p> <p>(f) provide access to some of the evidence (both documents and/or by making available witnesses to be interviewed by the <b>Competition Commission</b>; and</p> <p>(g) provide full and truthful cooperation.</p>
<p><b>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment): [e.g.: valuable, potential, decisive evidence by witnesses or on basis of written documents, etc.? Must the information be sufficient to lead to an initiation of investigations?]</b></p>	<p>As stated at 6.B. above, the <b>Competition Commission</b> has discretion to make a joint submission to the Tribunal with a cooperating undertaking 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.</p> <p>Under the <b>Leniency Policy</b>, the <b>Competition Commission</b> 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:</p> <p>(a) approached the <b>Competition Commission</b> in a timely manner seeking to cooperate;</p> <p>(b) provided significant evidence regarding the cartel conduct;</p> <p>(c) provided full and truthful disclosure, and cooperated fully and expeditiously on a continuing basis throughout the <b>Competition Commission's</b> investigation and any related court proceedings;</p> <p>(d) coerced any other person to participate in the cartel; and</p> <p>(e) acted in good faith in dealings with the <b>Competition Commission</b>.</p> <p>However, while the <b>Competition Commission</b> 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 discretion under section 94 of the Ordinance as regards the appropriateness of other orders which might be made.</p>
<p><b>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]</b></p>	<p>According to the <b>Leniency Policy</b>, the leniency agreement agreed to be between the <b>Competition Commission</b> and the leniency applicant will require the applicant to confirm that:</p> <p>(a) it has provided and will continue to provide full and truthful disclosure to the <b>Competition Commission</b>;</p> <p>(b) it has not coerced other parties to engage in the cartel conduct;</p> <p>(c) it has, absent a consent from the <b>Competition Commission</b> taken prompt and effective action to terminate its involvement in the cartel;</p> <p>(d) it will keep confidential all aspects of the leniency application and the leniency process unless the <b>Competition</b></p>

	<p><b>Commission's</b> prior consent has been given or the disclosure of information is required by law;</p> <p>(e) it will provide continuing cooperation, at its own cost, to the <b>Competition Commission</b> including in proceedings against other undertakings that engaged in the cartel conduct or against other persons involved in the cartel conduct;</p> <p>(f) it will, to the satisfaction of the <b>Competition Commission</b>, 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 <b>Competition Commission</b> 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</p> <p>(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 <b>Competition Commission</b>.</p>
<p><b>I. Are there formal requirements to make a leniency application? [e.g. must applications take a particular form or include particular information/data, must they be in writing or can they be made orally, etc.]</b></p>	<p>The only way to apply for leniency under the <b>Leniency Policy</b> is to call the Leniency Hotline at +852 3996 8010. The Leniency Hotline is answered between 8am to 6pm Hong Kong time, Monday to Friday (excluding public holidays).</p> <p>A potential applicant for leniency, or their legal representative, may contact the <b>Competition Commission</b> 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.</p> <p>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 <b>Competition Commission</b> to assess the applicant's place in the queue in relation to that specific cartel. This includes, at a minimum, providing the <b>Competition Commission</b> 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.</p> <p>If these conditions are satisfied, a marker which identifies the time and date of the call will be given to the applicant.</p>
<p><b>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency ("PGL") and further steps leading to a final leniency agreement / decision)?]</b></p>	<p>There are a number of steps involved in a leniency application under the <b>Leniency Policy</b>. These are:</p> <ul style="list-style-type: none"> <li>(i) Applying for a marker (as described at 6.I. above);</li> <li>(ii) Invitation from the <b>Competition Commission</b> to apply for leniency;</li> <li>(iii) Making the leniency application through a proffer;</li> <li>(iv) Offer from the <b>Competition Commission</b> to enter into a leniency agreement; and</li> <li>(v) Conclusion of the leniency agreement.</li> </ul>
<p><b>K. At which time during the application process is the</b></p>	<p>The leniency applicant is given this certainty at the stage where it is invited to enter into a leniency agreement. This happens</p>

<p><b>applicant given certainty with respect to its eligibility for leniency, and how is this done?</b></p>	<p>when the applicant has provided:</p> <p>(a) 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;</p> <p>(b) an explanation as to how the cartel conduct affects or relates to competition in Hong Kong;</p> <p>(c) an estimate of the value/volume of sales affected by the cartel in Hong Kong; and</p> <p>(d) access to some of the evidence (both documents and/or by making available witnesses to be interviewed by the <b>Competition Commission</b>).</p>
<p><b>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</b></p>	<p>As stated at 6.B. above, section 80 of the Ordinance provides for the <b>Competition Commission</b> to enter into a leniency agreement with a person in exchange for their cooperation in an investigation or proceedings under the Ordinance. Leniency is granted in accordance with the terms of the <b>Competition Commission's Leniency Policy</b>. The decision whether to enter into a leniency agreement ultimately rests with the <b>Competition Commission</b>. A template leniency agreement is annexed to the Leniency Policy.</p>
<p><b>M. Do you have a marker system? If yes, please describe it.</b></p>	<p>The <b>Competition Commission</b> uses a marker system to establish a queue in order of the date and time the <b>Competition Commission</b> is contacted with respect to the cartel conduct for which leniency is sought.</p> <p>A description of how an undertaking can apply for a marker is detailed at 6. I. above.</p> <p>The <b>Competition Commission</b> 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 required information was provided to the <b>Competition Commission</b> 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.</p>
<p><b>N. Does the system provide for any extra credit<sup>5</sup> for disclosing additional violations? [e.g. a hardcore cartel in another market]</b></p>	<p>The <b>Leniency Policy</b> does not specifically address this issue.</p>
<p><b>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</b></p>	<p>Section 125 of the Ordinance imposes a general obligation on the <b>Competition Commission</b> to preserve the confidentiality of any confidential information provided to the <b>Competition Commission</b>.</p>

<sup>5</sup> Also known as: “leniency plus”, “amnesty plus” or “immunity plus”. This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

	<p>Confidential information is defined in Section 123 of the Ordinance and includes the identity of any person (individual or corporate) who has given information to the <b>Competition Commission</b>.</p> <p>Section 126 of the Ordinance lists the exceptions to this obligation where the <b>Competition Commission</b> may disclose confidential information with lawful authority.</p> <p>As stated in the <b>Leniency Policy</b>, the <b>Competition Commission</b> will use its best endeavours to appropriately protect:</p> <p>(a) any confidential information provided to the <b>Competition Commission</b> by a leniency applicant for the purpose of making a leniency application and/or pursuant to a leniency agreement; and</p> <p>(b) the <b>Competition Commission's</b> records of the leniency application process, including the leniency agreement ("<b>Leniency Material</b>").</p>
<p><b>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</b></p>	<p>Decisions reached by the <b>Competition Commission</b> may generally be subject to judicial review where parties can satisfy the criteria for making a judicial review application.</p> <p>Section 84 of the Ordinance also provides for applications to the Tribunal "for a review of a reviewable determination". Section 83 lists what constitutes a reviewable determination. While, as set out in 6. R. below, this includes a decision <b>Competition Commission</b> relating to the termination of a leniency agreement, it does not include a decision by the <b>Competition Commission</b> to reject a leniency application.</p>
<p><b>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</b></p>	<p>A request for a marker may only be made by using the Leniency Hotline at +852 3996 8010. The Leniency Hotline is answered between 8am to 6pm Hong Kong time, Monday to Friday (excluding public holidays).</p>
<p><b>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</b></p>	<p>Section 81 of the Ordinance sets out the circumstances in which a leniency agreement can be terminated. It states that the <b>Competition Commission</b> may terminate a leniency agreement in the following circumstances:</p> <p>(a) the other party to the agreement agrees to the termination;</p> <p>(b) it 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;</p> <p>(c) the other party to the agreement, or if the agreement was made by a person as an officer, employee or agent of an undertaking, that undertaking has been convicted of an offence under Part 3 of the Ordinance; or</p> <p>(d) it is satisfied that the other party to the agreement, or if the agreement was made by a person as an officer, employee or agent of an undertaking, that undertaking has failed to comply with the terms of the agreement.</p> <p>The <b>Competition Commission's Leniency Policy</b> provides</p>

	<p>further clarification as to the procedure which the <b>Competition Commission</b> will follow, including giving of notice, where it is of the view that it may terminate a leniency agreement.</p> <p>As mentioned above, the Ordinance provides that applications may be made to the Tribunal <i>“for a review of a reviewable determination”</i>. Section 83 lists what constitutes a reviewable decision, which includes <i>“a decision relating to the termination of a leniency agreement, made by the <b>Competition Commission</b> under section 81”</i>.</p>
<p>S. Does your policy allow for “affirmative leniency”, that is the possibility of the agency approaching potential leniency applicants?</p>	<p>The <b>Competition Commission’s Leniency Policy</b> does not specifically address this scenario.</p>
<p>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate.</p>	<p>The <b>Competition Commission</b> is bound by the confidentiality provisions in the Ordinance and will endeavour to protect Leniency Material from disclosure, as set out in 6. O. above. As set out in 6. H. above, there is also an obligation on the applicant not to disclose <b>Leniency Material</b>.</p> <p>In addition, the template leniency agreement (annexed to the leniency policy) states:</p> <p><i>“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.”</i></p> <p>In the context of a recent enforcement action before the Tribunal, the Tribunal confirmed that, on the facts of the case in question, the <b>Competition Commission</b> was entitled to resist the disclosure of certain Leniency Material in relation to an unsuccessful leniency application on public interest immunity and without prejudice privilege grounds.</p>

## 7. Settlement

<p>A. Does your competition regime allow settlement? If yes, please indicate its public availability (link to the relevant rules, guidelines, etc.).</p>	<p>The <b>Competition Commission’s</b> Enforcement Policy envisages the possibility of settlement in a number of scenarios. The Enforcement Policy is available in English and Chinese on the <b>Competition Commission’s</b> website.</p> <p>As stated in the Policy, the <b>Competition Commission</b> will rely on its general enforcement discretion to consider offers of settlement. Approaches to the <b>Competition Commission</b> to discuss settlement may be made on a “without prejudice” basis.</p> <p>Settlement may take various forms, such as:</p>
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	<p>(a) the <b>Competition Commission</b> agreeing not to take action against individuals who wish to provide assistance to the <b>Competition Commission</b> in their personal capacity in return for their cooperation;</p> <p>(b) the person entering a commitment with the <b>Competition Commission</b> not to engage in anti-competitive conduct again, and/or to offer appropriate redress to parties affected by the conduct (see 8. below); or</p> <p>(c) the person agreeing to resolve Tribunal proceedings on a consent basis through a statement of agreed facts and by seeking specific orders.</p> <p>If the <b>Competition Commission</b> decides to apply for a penalty or other order before the Tribunal, settlement may, to the extent permitted by law, involve the <b>Competition Commission</b> agreeing to make submissions for a reduced penalty and/or other appropriate orders by the Tribunal having regard to the timing, nature, value and extent of cooperation provided. Where cooperation relates to cartel conduct, the <b>Competition Commission</b> will exercise this discretion mindful of the <b>Competition Commission’s Leniency Policy</b>.</p>
<p><b>B. Which types of restrictive agreements are eligible for settlement [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</b></p>	<p>The settlement arrangements specified in the Enforcement Policy are available for any contravention of the competition rules in the Ordinance. This would include all forms of cartels, other anti-competitive agreements and abuses of market power.</p>
<p><b>C. What is the reward of the settlement for the parties?</b></p>	<p>The reward of settlement will vary depending on the form of settlement in question.</p> <p>For example, in the case of an individual who wishes to provide assistance to the <b>Competition Commission</b> in their personal capacity, the <b>Competition Commission</b> may agree not to take action against that individual.</p> <p>For persons agreeing to resolve Tribunal proceedings on a consent basis, the <b>Competition Commission</b> may agree to make submissions for a reduced penalty and/or other appropriate orders by the Tribunal.</p>
<p><b>D. May a reduction for settling be cumulated with a leniency reward?</b></p>	<p>As mentioned above, where the <b>Competition Commission</b> enters into a leniency agreement with a party under the <b>Leniency Policy</b>, it will not seek any pecuniary penalty against the party. The question of combining a reduction for settling with a leniency award therefore does not arise.</p>
<p><b>E. List the criteria (if there is any) determining the cases which are suitable for settlement.</b></p>	<p>As set out in the Guideline on Investigations, the <b>Competition Commission</b> has a range of enforcement responses at its disposal, depending on the conduct in question, to seek to resolve a matter it considers may contravene the Ordinance. This includes those responses which lead to a settled outcome.</p> <p>Regardless of which option is used, the <b>Competition Commission</b> will generally favour remedies which would achieve certain remedial goals. These are set out in the Enforcement Policy as follows:</p> <p>(a) the remedy will stop the unlawful conduct speedily;</p>

	<p>(b) the remedy will undo the harm caused by the contravening conduct, such as by affording damages to affected parties in cases where this can be efficiently achieved;</p> <p>(c) the remedy will impose sufficient economic sanction to encourage compliance with the Ordinance, both by the persons involved in the contravention and other participants in the market;</p> <p>(d) the remedy:</p> <ul style="list-style-type: none"> <li>i. is consistent with previous remedies that have been applied in matters involving similar conduct, particularly taking into account the factors listed in section 93 of the Ordinance if the <b>Competition Commission</b> is seeking a pecuniary penalty;</li> <li>ii. reflects the culpability of the respective parties bearing in mind the extent of their cooperation with the <b>Competition Commission</b> (see below); and</li> <li>iii. sets an appropriate standard for future similar cases (if there are no existing precedents).</li> </ul> <p>When applying these remedial goals, the <b>Competition Commission</b> will endeavour to identify enforcement responses, including those with settled outcomes that are proportionate to the context of the conduct and the harm caused or likely to occur.</p>
<p><b>F. Describe briefly the system [who can initiate settlement – your authority or the parties, whether your authority is obliged to settle if the parties initiate, in which stage of the investigation settlement may be initiated, etc.].</b></p>	<p>Settlement approaches may be made by an undertaking, individual or by the <b>Competition Commission</b>. The <b>Competition Commission</b> will rely on its general enforcement discretion to consider offers of settlement.</p>
<p><b>F. Describe the procedural efficiencies of your settlement system [e.g. shorter decision, etc.].</b></p>	<p>Settlement can lead to a more expeditious and cost effective resolution to a particular case, to the benefit of both the <b>Competition Commission</b> and the parties concerned, in particular by avoiding the need for contested proceedings before the Competition Tribunal.</p>
<p><b>G. Does a settlement necessitate that the parties acknowledge their liability for the violation?</b></p>	<p>As stated above, settlement may take a number of different forms. The inclusion of an acknowledgement of liability will vary depending on the form of settlement.</p>
<p><b>H. Is there a possibility for settled parties to appeal a settlement decision at court?</b></p>	<p>As set out in section 15.A. below, section 154 of the Ordinance states that an appeal may be lodged against:</p> <p><i>“... any decision (including a decision as to the amount of any compensatory sanction or pecuniary penalty), determination or order of the Tribunal made under this Ordinance.”</i></p> <p>As set out in 7.A. above, settlement can take a number of forms. To the extent that settlement occurs in the context of leniency or commitments, the possibility of appeal is further explained at 6.P, 6. R and 8.K.</p>

## 8. Commitment

<p><b>A. Does your competition regime allow the possibility of commitment?</b></p> <p><b>If yes, please indicate its public availability [link to the relevant rules, guidelines, etc.].</b></p>	<p>Under section 60 of the Ordinance, at any stage the <b>Competition Commission</b> may accept from parties under investigation a commitment to take any action or refrain from taking any action. It may do so where it considers the commitment appropriate to address its concerns about a possible contravention of a competition rule. Commitments may not include making a payment to the Government.</p> <p>If the <b>Competition Commission</b> accepts a commitment, it may agree not to commence or continue an investigation, or bring or continue proceedings in the Tribunal, in relation to any alleged contravention of a competition rule in so far as that investigation or those proceedings relate to matters that are addressed by the commitment.</p> <p>Schedule 2 to the Ordinance sets out the procedural requirements for acceptance and variation of commitments.</p> <p>The <b>Competition Commission's</b> approach to commitments is set out in its <a href="#">Guideline on Investigations</a>.</p>
<p><b>B. Which types of restrictive agreements are eligible for commitment [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</b></p> <p><b>Are there commitments which are excluded from the commitment possibility?</b></p>	<p>Under section 60 of the Ordinance, commitments may, in theory, be accepted by the <b>Competition Commission</b> to address its concerns about any possible contravention of a competition rule. This would include all forms of anti-competitive agreements and abuses of market power.</p>
<p><b>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</b></p>	<p>There are no particular criteria for determining which cases are suitable for commitments in the Ordinance (beyond the requirements in section 60 described above).</p> <p>As a general matter and as stated in the Enforcement Policy, the <b>Competition Commission</b> will endeavour to identify enforcement responses in a particular case that are proportionate to the context of the conduct and the harm caused or likely to occur.</p>
<p><b>D. Describe, which types of commitments are available under your competition law.[e.g.: behavioural / structural]</b></p>	<p>The Ordinance does not expressly stipulate what types of commitments are available.</p>
<p><b>E. Describe briefly the system [who can initiate commitment – your authority or the parties, in which stage of the investigation commitment may be initiated, etc.]</b></p>	<p>The commitment process can be initiated by either the undertaking under investigation or the <b>Competition Commission</b> at any time.</p> <p>Schedule 2 to the Ordinance sets out the process that the <b>Competition Commission</b> must adopt before accepting a commitment or variation of an existing commitment. In particular, the <b>Competition Commission</b> must:</p> <p>(a) give notice of the proposed commitment or variation in any manner it considers appropriate for bringing it to the attention of those it considers likely to be affected by it; and</p>

	<p>(b) consider any representations made (and not withdrawn) in response to the notice.</p> <p>The notice to be provided to parties must state, among other things,</p> <ul style="list-style-type: none"> <li>• the intended object and effect of the commitment or variation;</li> <li>• whether the commitment or variation constitutes an admission of contravention of a competition rule;</li> <li>• the situation that the commitment or variation is seeking to deal with;</li> <li>• any other facts that the <b>Competition Commission</b> considers to be relevant to the acceptance or variation of the commitment;</li> </ul> <p>If the <b>Competition Commission</b> exercises its discretion to accept a commitment or a variation to a commitment, the <b>Competition Commission</b> must publish the commitment or variation. Typically, this will be published on the <b>Competition Commission's</b> website.</p> <p>If, after giving notice, the <b>Competition Commission</b> decides not to accept the commitment or variation concerned, the <b>Competition Commission</b> must give notice that it has so decided.</p> <p>The Ordinance provides the <b>Competition Commission</b> with withdraw, vary or enforce commitments and also sets out the way in which undertaking will be released from the commitments.</p>
<p><b>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</b></p>	<p>The Ordinance does not specify that commitments necessarily require an admission of a contravention of a competition rule by an undertaking. However, as described in 8.E. above, the <b>Competition Commission</b> must set out whether the acceptance of a commitment constitutes an admission of such a contravention.</p>
<p><b>J. Describe how your authority monitors the parties' compliance to the commitments.</b></p>	<p>To date the <b>Competition Commission</b> has not entered into commitments with any undertaking.</p>
<p><b>K. Is there a possibility for parties to appeal a commitment decision at court?</b></p>	<p>Decisions reached by the <b>Competition Commission</b> may generally be subject to judicial review in circumstances where the claimant can satisfy the criteria for doing so.</p> <p>As stated above, Section 84 of the Ordinance also provides for applications to be made to the Tribunal "for a review of a reviewable determination". Section 83 lists what constitutes a reviewable determination. This list includes decisions made by the <b>Competition Commission</b> to vary or terminate commitments. It also includes a decision to release a person from a commitment. However, it does not include any decision by the <b>Competition Commission</b> to accept the commitments.</p>

## 9. Investigative powers of the enforcing institution(s)<sup>6</sup>

A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids<sup>7</sup>, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.

Where the **Competition Commission** conducts an investigation under Part 3 of the Ordinance, it may exercise the following compulsory information-gathering powers:

### Written requests for documents and information

Under section 41 of the Ordinance, the **Competition Commission** may issue written notices ("section 41 notices") to a person, requiring the provision of documents or specified information which relate to any matter it reasonably believes to be relevant to an investigation. Section 41 notices may be issued to persons such as the person under investigation, their competitors, supplier and customers or any other parties.

The **Competition Commission** may exercise this power where it has reasonable cause to suspect that the person has or may have possession or control of relevant documents or information or may otherwise be able to assist the **Competition Commission** in its investigation.

### Request for attendance before the Commission to answer questions

Under section 42(1) of the Ordinance, the **Competition Commission** may require any person to appear before it, at a specified time and place, to answer questions relating to any matter the **Competition Commission** reasonably believes to be relevant to an investigation ("section 42 notices"). By way of example, persons with relevant evidence may include, without limitation:

- (a) current or former employees, competitors, customers, distributors or suppliers of the parties under investigation;
- (b) representatives of relevant trade associations; or
- (c) complainants.

### Enter and search premises under warrant

Under section 48 of the Ordinance, the **Competition Commission** may apply to a judge of the Court of First Instance for permission to enter and search any premises to obtain documents, information and other items relevant to its investigation ("section 48 warrant").

A section 48 warrant may be issued where a judge of the Court of First Instance is satisfied, on the basis of an application made on oath by an authorised officer of the **Competition Commission**, that there are reasonable grounds to suspect that there are or are likely to be, on the premises in question, documents that may be relevant to an investigation by the **Competition Commission**.

The premises specified in the section 48 warrant need not

<sup>6</sup> "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

<sup>7</sup> "Searches/raids" means all types of search, raid or inspection measures.

	<p>relate to the party under investigation. For example, the premises may belong to the investigated party's supplier or customer.</p> <p>Section 50 of the Ordinance sets out the powers available to the <b>Competition Commission</b> when conducting a search under a warrant. It authorises the Commission to, among other matters:</p> <ul style="list-style-type: none"> <li>• use reasonable force to gain entry and/or access evidence on the premises;</li> <li>• remove any obstructions to the execution of the warrant (including individuals who are obstructing the execution of the warrant); and</li> <li>• take such action and steps as necessary for the preservation of any relevant documents or the prevention of any interference with them (including the alteration or removal of such documents from the premises), such as by taking possession of any computer or other thing found on the premises that <b>Competition Commission</b> officers believe will, on examination, afford evidence of a contravention.</li> </ul>
<p><b>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?</b></p>	<p>According to section 48 of the Ordinance, the <b>Competition Commission</b> may seek a warrant with regard to <b>any</b> premises where there are reasonable grounds to suspect that there are or are likely to be, on the premises, documents that may be relevant to its investigation.</p> <p>When executing search warrants, as issued by a judge of the Court of First Instance, the <b>Competition Commission</b> can exercise any of the powers set out in section 50 of the Ordinance. As set out above, this would include taking possession of any computer or other thing found on the premises that <b>Competition Commission</b> officers believe will, on examination, afford evidence of a contravention.</p>
<p><b>C. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</b></p>	<p>The powers conferred by the warrant are circumscribed by section 50 of the Ordinance.</p> <p>In terms of the evidence that may be gathered during a search, section 50 permits a person executing the warrant:</p> <ul style="list-style-type: none"> <li>• to require any person on the premises to produce any document that appears to be a relevant document, in the possession or under the control of that person;</li> <li>• to make copies of or take extracts from any document that appears to be a relevant document found on the premises or produced to a person executing the warrant; and</li> <li>• to take possession of any computer or other thing found on the premises that the person executing the warrant has reasonable grounds for believing will, on examination, afford evidence of a contravention of a competition rule.</li> </ul>
<p><b>D. Have there been significant legal challenges to your use</b></p>	<p>To date, there have not been any judicial decisions relating to challenges to use of the <b>Competition Commission's</b></p>

<p>of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>investigative powers as authorised by the courts.</p>
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## 10. Procedural rights of businesses / individuals

**A. Key rights of defence in cartel cases: [e.g.: right of access to documents in the possession of the enforcing authority, right to a written statement of the case against the defendant, right to respond to that case in writing, right to respond orally, right to confront companies or individuals that make allegations against the defendant, right to legal representation before the enforcing authorities, right not to self-incriminate, etc.] Please indicate the relevant legal provisions.**

### **Right to see the case against them**

As set out in the response to 4.A above, contravention of a conduct rule, including cartel conduct, is decided upon by the Tribunal. In proceedings before the Tribunal, the persons alleged to have contravened or have been involved in the contravention of a conduct rule (the 'respondents') would be provided with a copy of the application which would set out the case against them.

### **Discovery**

During the litigation process, respondents may also apply for discovery of the **Competition Commission's** case file.

### **Legal Professional Privilege ('LPP')**

Undertakings and individuals can be legally represented during the investigation and litigation phases. The **Competition Commission** has published a guide [Guideline on Investigation Powers of the Competition Commission and Legal Professional Privilege](#).

Persons (undertakings or individuals) cannot be required to provide documents and information to the **Competition Commission** under sections 41 or 42 of the Ordinance where the documents and information is protected by a valid claim to LPP.

Where the **Competition Commission** enters and searches premises under a Section 48 Warrant, disputes may arise as to whether documents or information which **Competition Commission** staff might wish to seize or copy contain information subject to LPP. Essentially, the **Competition Commission** cannot seize, or take copies of, documents which are subject to LPP. Where only part of a document is subject to LPP and it is possible to readily separate the privileged and non-privileged part of the document, then the **Competition Commission** will those non-privileged parts.

### **Self-incrimination**

Section 45 of the Ordinance provides that a person is not excused from giving any explanation or further particulars about a document, or from answering any question from the **Competition Commission**, on the grounds that to do so might expose the individual to proceedings in which the **Competition Commission** seeks a pecuniary or financial penalty or criminal proceedings.

	<p>No statement made under compulsion by a person to the <b>Competition Commission</b> in giving any explanation or further particulars about a document, or in answering any question pursuant to Part 3, Division 2 of the Ordinance is admissible against that individual in such penalty (pecuniary or financial) or criminal proceedings unless, in the proceedings, evidence relating to the statement is adduced, or a question relating to it is asked, by that person or on that person's behalf.</p>
<p><b>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation? Please indicate the relevant legal provisions.</b></p>	<p>Section 125 of the Ordinance imposes a general obligation on the <b>Competition Commission</b> to preserve the confidentiality of any confidential information provided to or obtained by the <b>Competition Commission</b>. This general obligation applies regardless of whether the <b>Competition Commission</b> has compelled the production of the confidential information. The following categories of information are defined as confidential under section 123 of the Ordinance:</p> <p>(a) information that has been provided to or obtained by the <b>Competition Commission</b> in the course of, or in connection with, the performance of its functions under the Ordinance, that relates to:</p> <ul style="list-style-type: none"> <li>i. the private affairs of a natural person;</li> <li>ii. the commercial activities of any person that are of a confidential nature; or</li> <li>iii. the identity of any person who has given information to the <b>Competition Commission</b>;</li> </ul> <p>(b) information that has been given to the <b>Competition Commission</b> on terms or in circumstances that require it to be held in confidence; or</p> <p>(c) information given to the <b>Competition Commission</b> that has been identified as confidential information in accordance with section 123(2) of the Ordinance.</p> <p>Section 126(1) of the Ordinance permits the disclosure of confidential information by the <b>Competition Commission</b> in certain circumstances, including disclosures made by the <b>Competition Commission</b> in the performance of any of its functions, or in carrying into effect or doing anything authorised by the Ordinance. Section 126(1) disclosures are therefore not limited to where the Ordinance expressly requires the <b>Competition Commission</b> to publish information and, subject to the provisions of the Ordinance, the <b>Competition Commission</b> may in certain circumstances disclose confidential information without the consent of relevant parties.</p>

## 11. Limitation periods and deadlines

<p><b>A. What is the limitation period (if any) from the date of the termination of the</b></p>	<p>In respect of contraventions of a competition rule, the <b>Competition Commission</b> may apply to the Tribunal for, among other things, (i) an order for a pecuniary penalty</p>
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<p><b>infringement by which the investigation / proceedings must begin or a decision on the merits of the case must be made?</b></p>	<p>(section 92 of the Ordinance); or (ii) other orders (section 94 of the Ordinance).</p> <p>Sections 92(2) and 94(2) both state:</p> <p><i>“An application for an order ... may not be made—</i></p> <p><i>...</i></p> <p><i>(b) in the case of an application with respect to a contravention of a conduct rule, more than 5 years after the day on which the contravention ceased or the <b>Competition Commission</b> became aware of the contravention, whichever is the later.”</i></p>
<p><b>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits?</b></p>	<p>The Ordinance does not set down any statutory time limits for the completion of an investigation. However, as stated in 11.A. above, an application for an order in case involving a contravention of a conduct rule needs to be made within 5 years of the later date of the termination of the contravention or the <b>Competition Commission</b> becoming aware of it.</p>
<p><b>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions? (see also 15A)</b></p>	<p>The Ordinance does not provide any deadlines for challenges regarding the commencement or completion of an investigation.</p> <p>As set out in 15.A. below, section 154 of the Ordinance sets out the rights of appeal against any decision of the Tribunal including decision as to the amount of any compensatory sanction of pecuniary penalty. Such an appeal would need to be brought within 14 days of the making of the decision.</p>

## 12. Types of decisions

<p><b>A. List which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]</b></p>	<p>Where the <b>Competition Commission</b> has reasonable cause to believe that a person has contravened a Competition Rule, or been involved in such a contravention, the <b>Competition Commission</b> may initiate proceedings before the Tribunal seeking:</p> <p>(a) a pecuniary penalty (section 92)(see also 14. below);</p> <p>(b) other orders (section 94); and/or</p> <p>(c) a disqualification order.</p> <p>This includes initiating proceedings against persons involved in a contravention of a Competition Rule as defined in section 91 of the Ordinance. Persons in this context includes persons who aided and abetted, counselled or procured any other person to contravene a Competition Rule, induced or attempted to induce another person to contravene a Competition Rule, were in any way knowingly concerned in or party to a contravention or conspired with another to contravene a Competition Rule.</p> <p>Schedule 3 to the Ordinance, and sections 93, 96 and 101 of the Ordinance, set down the orders that may be made by the Tribunal in relation to contraventions of the Competition Rules. They include:</p> <p><i>a) a declaration that a person has contravened a</i></p>
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	<p><i>competition rule;</i></p> <p>b) <i>an order restraining or prohibiting a person from engaging in any conduct that constitutes the contravention or the person's involvement in the contravention;</i></p> <p>c) <i>an order requiring a person to dispose of such operations, assets or shares of any undertaking specified in the order, in the manner specified in the order;</i></p> <p>d) <i>an order prohibiting a person from making or giving effect to an agreement;</i></p> <p>e) <i>an order requiring the parties to an agreement (the making or giving effect to which constitutes the contravention of the competition rules) to modify or terminate that agreement;</i></p> <p>f) <i>an order declaring any agreement (the making or giving effect to which constitutes the contravention of the competition rules) to be void or voidable to the extent specified in the order;</i></p> <p>g) <i>an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention;</i></p> <p>h) <i>an order requiring any person to pay to the Government or to any other specified person, as the Tribunal considers appropriate, an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention;</i> or</p> <p>For a suspected contravention of the First Conduct Rule that does not involve Serious Anti-competitive Conduct, the <b>Competition Commission</b> must issue a Warning Notice before the <b>Competition Commission</b> can apply to the Tribunal. In all other cases prior to commencing proceedings in the Tribunal, the <b>Competition Commission</b> will usually contact parties:</p> <p>(a) to advise parties of its concerns; and/or</p> <p>(b) to provide parties with an opportunity to address those concerns.</p> <p>If proceedings are commenced in the Tribunal, the <b>Competition Commission</b> will issue a press release as soon as practicable after commencing proceedings.</p>
<p><b>B. List any other types of decisions on the merits of the case relevant particularly in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A).</b></p>	<p>See 12. A. above.</p>

<p><b>C. Can interim measures<sup>8</sup> be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both<sup>9</sup>.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</b></p>	<p>The <b>Competition Commission</b> and <b>CA</b> the <b>CA</b> can apply to the Tribunal for interim measures. Only the Tribunal is authorised to order such measures.</p> <p>Section 95 of the Ordinance deals with interim measures and provides for the Tribunal to make an interim order where it is satisfied that:</p> <p><i>“a person is engaged in or is proposing to engage in conduct that constitutes or would constitute a contravention of the competition rules”.</i></p> <p>An interim order may remain in force for a period of not more than 180 days (unless extended by the Tribunal).</p> <p>The Tribunal may make an interim order whether or not there is an imminent danger of damage or loss being incurred by any person if the order is not made.</p>
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### 13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

<p><b>A. Grounds for the imposition of procedural sanctions / fines</b> [e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.]:</p>	<p>Section 52 of the Ordinance provides that failure to comply without reasonable excuse with any requirement (or prohibition) imposed under the <b>Competition Commission’s</b> investigation powers is a criminal offence punishable by fines of up to HK\$200,000 and imprisonment for 1 year.</p> <p>The Ordinance also creates criminal offences punishable by fines of up to HK\$1 million and imprisonment for 2 years in respect of providing false or misleading information (section 55 of the Ordinance), destroying, falsifying or concealing documents (section 53 of the Ordinance), obstructing a search under a section 48 warrant (section 54 of the Ordinance), or disclosing confidential information received from the <b>Competition Commission</b> (section 128(1) of the Ordinance).</p>
<p><b>B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):</b></p>	<p>The offences relating to a breach of sections 52 to 55 and 128 of the Ordinance are criminal in nature. The penalties are set out in 13.A. above.</p>
<p><b>C. On whom can procedural sanctions be imposed?</b></p>	<p>The sanctions can be imposed on any person. For the purposes of the Ordinance, persons can include individuals and undertakings.</p>

<sup>8</sup> In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

<sup>9</sup> Only for agencies which answered “yes” to question 2.B. above

D. Criteria for determining the sanction / fine:	As set out in 13.A. above, the maximum sanctions available for procedural breaches are set out in the Ordinance. The level of sanction to be applied in an individual case would be determined by the courts in Hong Kong.
E. Are there maximum and / or minimum sanctions / fines?	Yes, these are set out in 13.A. above.

## 14. Sanctions on the merits of the case

<p>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</p> <p>On whom can sanctions be imposed? [E.g.: representatives of businesses, (imprisonment for individuals), businesses, in the case of associations of companies the associations or the individual companies?]</p>	<p>Sanctions are imposed by the Competition Tribunal on application by the Competition <b>Competition Commission</b> or the CA. There is no criminal offence for cartel conduct.</p> <p>Sanctions can be imposed on undertakings which have engaged in cartel conduct and ‘persons’ who have been involved in cartel conduct. For the purposes of the Ordinance, persons can include individuals and undertakings.</p>
<p>B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]</p>	<p>The Tribunal may, in accordance with section 93 of the Ordinance, order a person to pay to the Government a pecuniary penalty of any amount it considers appropriate if the Tribunal is satisfied that a person has contravened or been involved in a contravention of a competition rule. Section 93(2) of the Ordinance provides that, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters:</p> <ul style="list-style-type: none"> <li>(a) the nature and extent of the conduct that constitutes the contravention;</li> <li>(b) the loss or damage, if any, caused by the conduct;</li> <li>(c) the circumstances in which the conduct took place; and</li> <li>(d) whether the person has previously been found by the Tribunal to have contravened the Ordinance.</li> </ul> <p>The Ordinance explicitly does not limit other matters to which the Tribunal may have regard.</p> <p>Where the <b>Competition Commission</b> has applied to the Tribunal for a pecuniary penalty to be imposed on any person, the <b>Competition Commission</b> expects that it will generally recommend to the Tribunal an amount it considers to be an appropriate pecuniary penalty at an appropriate stage.</p>
<p>C. Are there maximum and / or minimum sanctions / fines?</p>	<p>Section 93(3) of the Ordinance provides that the pecuniary penalty for conduct which constitutes a single contravention may not exceed 10% of the turnover of the undertaking</p>

	<p>obtained in Hong Kong for each year of contravention, up to a maximum of three years.</p> <p>There is no minimum fine.</p>
<p><b>D. Guideline(s) on calculation of fines: [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p>	<p>At the time of writing, there is no published policy on the methodology for the calculation of a pecuniary penalty.</p>
<p><b>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</b></p>	<p>Section 154(6) of the Ordinance states that, <b>except in the case of an appeal against the imposition, or the amount, of a pecuniary penalty</b>, the making of an appeal under this section does not suspend the effect of the decision, determination or order to which the appeal relates.</p>

## 15. Possibilities of appeal

<p><b>A. Does your law provide for an appeal against a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</b></p>	<p>Yes. Section 154 of the Ordinance provides for appeals of Competition Tribunal decisions in the following terms:</p> <p><i>“(1) ... an appeal lies as of right to the Court of Appeal against any decision (including a decision as to the amount of any compensatory sanction or pecuniary penalty), determination or order of the Tribunal made under this Ordinance.</i></p> <p>...</p> <p><i>(5) The Court of Appeal has jurisdiction to hear and determine an appeal under subsection (1) and may—</i></p> <p><i>(a) confirm, set aside or vary the decision, determination or order of the Tribunal;</i></p> <p><i>(b) where the decision, determination or order of the Tribunal is set aside, substitute any other decision, determination or order it considers appropriate; or</i></p> <p><i>(c) remit the matter in question to the Tribunal for reconsideration in the light of the decision of the Court.”</i></p>
<p><b>B. Before which court or agency should such a challenge be made? [if the answer to question 15/A is affirmative]</b></p>	<p>As provided in Section 154 of the Ordinance, appeals concerning decisions of the Tribunal will be heard by the Court of Appeal.</p>