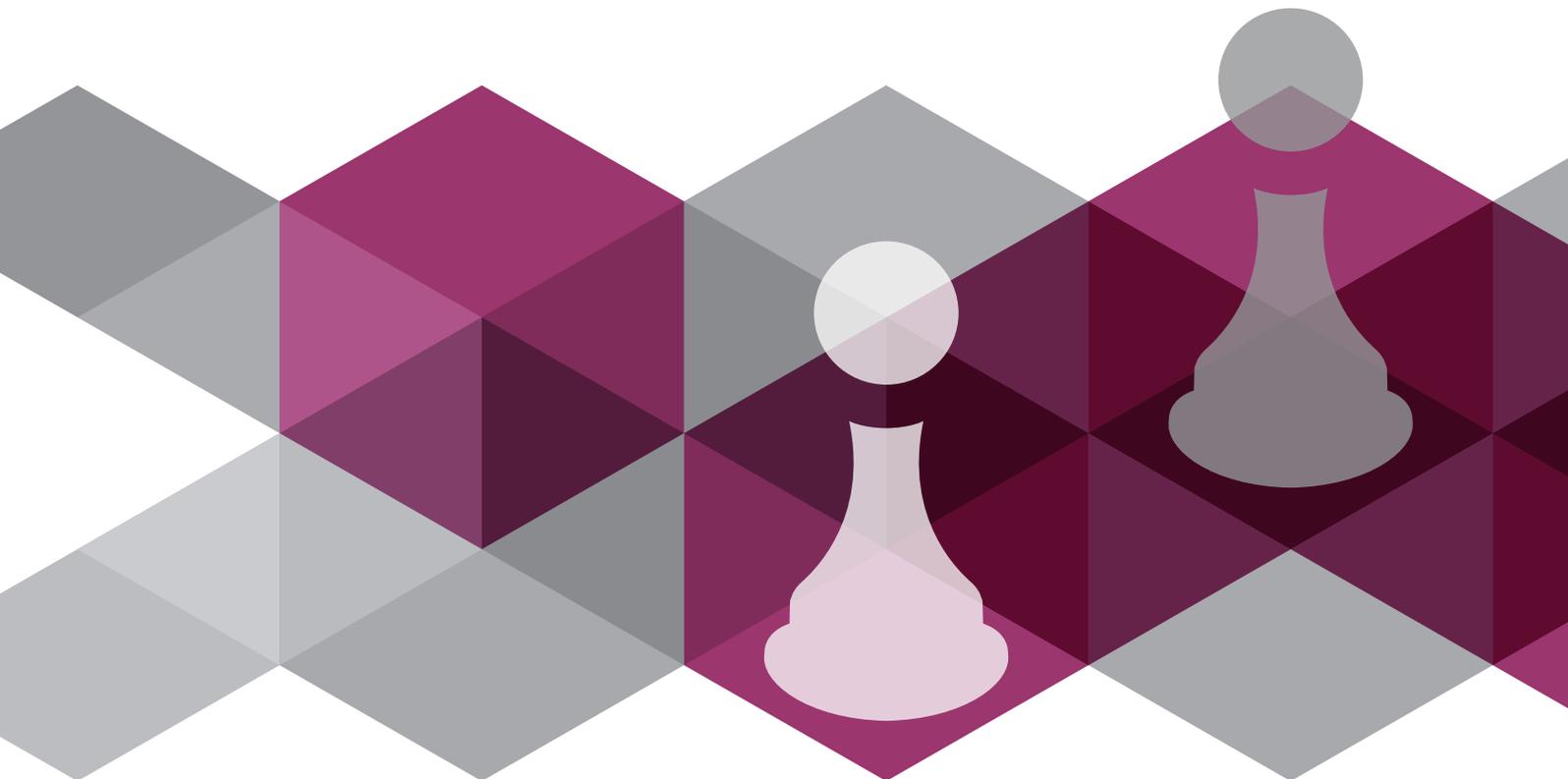


# Leniency Policy

for Undertakings Engaged  
in Cartel Conduct



# Leniency Policy for Undertakings Engaged in Cartel Conduct

*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 difficult to detect. An effective leniency policy will increase the risk of cartels being detected and therefore the risk and cost of participating in a cartel. This in turn deters the formation of cartels that would otherwise prevent, restrict or distort competition in the Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**").*

*In view of these considerations and subject to the terms and conditions of this policy, the Competition Commission (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 in the bringing of proceedings against other parties to the cartel.*

*Section 80 of the Competition Ordinance, Cap 619 (the "**Ordinance**") provides that 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.*

*This document sets out the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (this "**Policy**"). This Policy updates and, as of the date of publication on 16 April 2020, supersedes the previous version of the policy issued in November 2015. Any leniency applications already made under the previous version of the policy shall be handled under that version of the policy.*

*This Policy does not address leniency sought by persons who are not undertakings. This is addressed in the Commission's Leniency Policy for Individuals Involved in Cartel Conduct (the "**Leniency Policy for Individuals**"). Where, however, an undertaking enters into a leniency agreement under this Policy, the leniency can extend to current and former officers, employees, partners and agents of the undertaking subject to conditions specified in this Policy.*

*In addition to the Commission's Leniency Policy for Individuals, this Policy should be read alongside the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (the "**Cooperation and Settlement Policy**").*

*This Policy does not preclude the Commission from entering into a leniency agreement in circumstances other than those provided for in it.*

# 1. Introduction and overview

- 1.1 This Policy is designed to provide a strong, transparent, and predictable 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 commit not to commence any proceedings (including proceedings for a pecuniary penalty) in relation to the reported conduct against the cartel member who has in place a leniency agreement with the Commission.
- 1.2 Leniency may be available regardless of whether the Commission has opened an investigation including any exercise of its investigative powers under Part 3 of the Ordinance, at the time leniency is requested. Leniency is, however, only available under this Policy for the first cartel member who meets all the requirements for receiving leniency and enters into a leniency agreement. Cartel members who do not benefit from leniency under this Policy are encouraged to cooperate with the Commission's investigation within the framework provided for in the Cooperation and Settlement Policy.

## Key elements of the Policy

- 1.3 This Policy consists of the following key elements:
  - (a) First, this Policy applies only to engagement or involvement in *cartel conduct*, which gives rise respectively to a contravention of the First Conduct Rule or involvement in a contravention of the First Conduct Rule within the meaning of section 91 of the Ordinance. For the purposes of this Policy, cartel conduct refers to agreements and/or concerted practices between two or more undertakings which consist of (i) fixing, maintaining, increasing or controlling the price for the supply of goods or services, (ii) allocating sales, territories, customers or markets for the production or supply of goods or services, (iii) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services, or (iv) bid-rigging.
  - (b) Second, this Policy only relates to an application for leniency by undertakings.<sup>1</sup>

---

<sup>1</sup> Individuals (who are not undertakings) who wish to seek leniency should consider the Commission's Leniency Policy for Individuals.



- (c) Third, leniency is not available under this Policy to undertakings that are the ringleader of the cartel conduct<sup>2</sup> or that have coerced other parties to participate in the cartel conduct.
- (d) Fourth, leniency is available only for the first cartel member that either:
  - (i) discloses its participation in a cartel of which the Commission has not yet opened an initial assessment or investigation ("**Type 1 Leniency**"); or
  - (ii) is able, in the Commission's view, to provide substantial assistance to the Commission's investigation and subsequent enforcement action of a cartel the Commission is already assessing or investigating ("**Type 2 Leniency**");and goes on to meet all the conditions for leniency.<sup>3</sup>
- (e) Fifth, if the undertaking meets all the conditions for leniency, the Commission will enter into a leniency agreement with the undertaking and agree not to take any proceedings against it in relation to the reported conduct.
- (f) Sixth, leniency will extend to the current (and possibly former) employees, officers,<sup>4</sup> and partners of a successful leniency applicant provided that they fully and truthfully cooperate with the Commission (subject to the conditions set out in paragraph 2.16 below).<sup>5</sup>
- (g) Seventh, a party to a leniency agreement is required to continuously fulfill its requirements under the leniency agreement, including cooperating with the Commission throughout the investigation and in any proceedings the Commission initiates before the Tribunal in relation to the reported conduct.<sup>6</sup> At an appropriate stage (usually at the end of the proceedings), the Commission will issue a letter to them confirming that all conditions under the agreement have been fulfilled.

---

<sup>2</sup> Undertakings are disqualified from obtaining leniency on this ground only if they were clearly the single ringleader of the cartel conduct. Wherever possible, the Commission will construe or interpret the ringleader ground of this Policy in favour of accepting a leniency applicant in order to maximise incentives and opportunities for companies to come forward and report their cartel conduct.

<sup>3</sup> Absent exceptional circumstances, the Commission would not enter into a leniency agreement with more than one cartel member per cartel.

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

<sup>5</sup> Leniency will extend to current and former agents on the same basis as it does to former employees, officers and partners.

<sup>6</sup> This shall include any subsequent appeal proceedings and remittals.

- 
- (h) Eighth, in the event of the initiation of a follow-on action by victims of the cartel conduct against other undertakings found to have engaged or been involved in the conduct, the Commission may issue an infringement notice to a party to a Type 2 leniency agreement containing a requirement to admit a contravention, in order to permit the initiation of follow-on proceedings against that party under section 110(3)(e) of the Ordinance.<sup>7</sup> The Commission will not issue an infringement notice to parties to a Type 1 leniency agreement.



## 2. Applying for leniency under this Policy

### **Stage 1: Requesting a leniency marker**

- 2.1 The first step in obtaining leniency is to obtain a leniency “marker”. A leniency marker holds a leniency applicant’s place at the front of the queue for leniency for a period of time set by the Commission<sup>8</sup> to allow the leniency applicant to conduct an internal investigation and gather information necessary to perfect its leniency application. Since only one leniency marker is available per cartel, no other undertaking can pass the leniency applicant and obtain leniency while the leniency applicant holds the leniency marker.

### ***Checking the availability of a marker***

- 2.2 An undertaking, or its legal representative, may contact the Commission to ascertain if the leniency marker is available for particular cartel conduct. They can do so by using the leniency hotline<sup>9</sup> at +852 3996 8010 or by e-mail at [Leniency@compcomm.hk](mailto:Leniency@compcomm.hk).<sup>10</sup>

---

<sup>7</sup> Under section 68 of the Ordinance, the subject of an infringement notice is not required to make a commitment to comply with the requirements of the notice. Should a party to a Type 2 leniency agreement elect not to make the relevant commitment in an infringement notice issued by the Commission, the Commission reserves the right to treat the applicant as failing to comply with the leniency agreement and take appropriate action, including making an application to the Tribunal under section 94 of the Ordinance for an order that the applicant has contravened the Ordinance, in order to permit the initiation of follow-on proceedings against the applicant under section 110(3)(a) of the Ordinance.

<sup>8</sup> This will ordinarily be at least 30 calendar days.

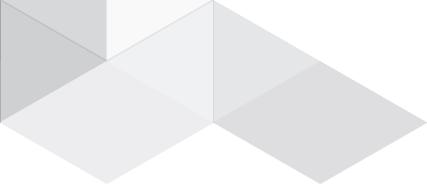
<sup>9</sup> The leniency hotline is only answered between 8am to 6pm Hong Kong time, Monday to Friday (excluding public holidays). Enquiries about cooperation may also be made using the leniency hotline and e-mail address.

<sup>10</sup> The Commission will handle the steps under this Policy from this Stage 1 (Requesting a Leniency Marker) to Stage 3 (Entering into a leniency agreement) through its Leniency Section staff supervised by the Executive Director (Operations). The Leniency Section staff assigned to a particular application will not be involved in any investigation by the Commission into the conduct forming the subject of that application and will not share any leniency information with the Commission’s investigative staff until after a leniency agreement is in place.



- 2.3 These initial enquiries may be made on an anonymous and/or hypothetical basis. To allow the Commission to ascertain whether a marker is available, information on the broad nature of the cartel conduct will need to be disclosed. This could include the affected industry, product(s) and/or service(s), the general nature of the conduct and the time period. While an admission of liability for cartel conduct is not required to obtain a marker, the applicant must report that it has uncovered information or evidence suggesting its participation in possible cartel conduct. The Commission may require more detail, if it is necessary, to determine the availability of a marker.
- 2.4 Before confirming the availability of a marker for particular conduct, the Commission will make a preliminary assessment as to whether the reported conduct is cartel conduct, whether a request for a marker has already been made in respect of that conduct and whether leniency is available.
- 2.5 Upon conducting the preliminary assessment, the Commission will approach the applicant and confirm whether a marker is available as soon as it is practicable to do so. Once it is confirmed that a marker is available, the undertaking will be asked to confirm whether it intends to apply for the marker and, if so, contact details will also need to be provided to identify itself. This may be done in writing or orally.
- 2.6 If the applicant is informed that a marker is not available, it will be because:
- (a) another undertaking has already obtained the marker for that cartel conduct;
  - (b) the conditions in section 1.3(c) and 1.3 (d) above are not met; or
  - (c) the Commission's preliminary assessment is that the conduct is not cartel conduct.

Where a marker is not available for the first of these reasons, an applicant may request that it is placed in a queue to request the marker should the marker become available at a later stage. The date and time of such a request will be recorded. Those who request to be in a marker queue are strongly encouraged to cooperate with the Commission and in doing so, may benefit under the Cooperation and Settlement Policy. Applicants will only be able to retain their place in the marker queue if they are cooperating with the Commission.



### ***Applying for a marker***

2.7 Upon being informed that a marker is available, an applicant can confirm its acceptance of the marker either orally or in writing. If the applicant elects to accept the marker, the applicant will need to provide the following details to the best of its knowledge at that time:

- (a) the applicant's identity;
- (b) the identities of other undertakings participating in the cartel conduct;
- (c) the identities of the key individuals involved at each of the undertakings (including the applicant);
- (d) the time period of the cartel conduct;
- (e) the geographic scope of the cartel conduct;
- (f) a general description of the cartel conduct, including any information or evidence uncovered by the applicant and why they consider this may amount to cartel conduct; and
- (g) in the context of cartels covering multiple jurisdictions, which other agencies have or will be approached by the applicant.

2.8 The Commission will confirm that a marker has been granted and determine the timeframe in which the applicant has to perfect it. This may be done orally or in writing at the applicant's request.

### **Stage 2: Perfecting a marker**

2.9 An applicant which is granted a marker is required to perfect the marker through a proffer process within the period set by the Commission.<sup>11</sup>

2.10 The applicant will make the proffer on a "without prejudice" basis, either orally or in writing. Any communications with the Commission on the proffer or any related matters may also be made orally or in writing. For the avoidance of doubt, a marker cannot be perfected on hypothetical terms.

---

<sup>11</sup> This will ordinarily be at least 30 calendar days.



- 2.11 To perfect a marker, the applicant will be required to provide a detailed description of the cartel conduct and its functioning, including information about its duration and participants, the products or services affected by it, the names of persons involved in the conduct including those involved on the applicant's behalf, and to describe the evidence it can provide in respect of the cartel. During the proffer stage, the Commission may also ask the applicant to provide access to evidence in support of the proffer available to it (e.g. documentary evidence relating to the cartel) and/or to make available witnesses to be interviewed by the Commission.
- 2.12 Where an applicant considers that it requires more time to perfect its marker, it may apply for an extension which will be considered on a case-by-case basis.
- 2.13 Where the applicant and the Commission do not proceed to enter into a leniency agreement, information provided by the applicant when applying for a marker and at the proffer stage will be returned to the applicant and will not be used as evidence in the Commission's investigation or any subsequent proceedings. 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.

### **Stage 3: Entering into a leniency agreement**

- 2.14 Based on the proffer and any additional information provided by the applicant, the Commission will determine whether to make an offer to enter into a leniency agreement.
- 2.15 The leniency agreement will contain a description of the cartel conduct and will ordinarily 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 participate in the cartel conduct or acted as the clear single ringleader of the cartel conduct;
  - (c) it has, unless instructed by the Commission otherwise, taken prompt and effective action to terminate its participation in the cartel conduct;<sup>12</sup>

---

<sup>12</sup> The Commission may instruct the undertaking's continued participation in the cartel conduct 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 into the same or related conduct that are carried out by competition authorities in other jurisdictions.

- 
- (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;
  - (e) it will provide continuing full and truthful cooperation, at its own cost, to the Commission including in enforcement proceedings against other undertakings that engaged in the cartel conduct or against other persons involved in the cartel conduct;
  - (f) it is prepared to continue with, or adopt and implement, at its own cost, a corporate compliance programme to the reasonable satisfaction of the Commission; and
  - (g) for Type 2 Leniency applicants only, the Commission may issue an infringement notice to the applicant, in the event of follow-on action against other undertakings found to have contravened the First Conduct Rule or been involved in a contravention of the First Conduct Rule as a result of the cartel conduct, which will contain a requirement to admit a contravention, in order to permit the initiation of follow-on proceedings against the applicant under section 110(3)(e) of the Ordinance.

#### **Stage 4: Ongoing compliance with the terms of the leniency agreement**

2.16 Where the Commission has in place a leniency agreement with an undertaking in respect of particular cartel conduct, the Commission agrees not to commence any proceedings in the Tribunal against the undertaking in respect of that conduct. This agreement extends to any current officer or employee of the undertaking as long as the relevant individual provides complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing enforcement proceedings before the Tribunal or other courts in relation to that conduct. Where the undertaking is a partnership, leniency will extend to any partner in the partnership on the same conditions. At the Commission's discretion, leniency will also extend under the same conditions to any:

- (a) current and former agents; and



- (b) former:
  - i. officers;
  - ii. employees; and
  - iii. partners;

of the undertaking who are specifically identified in the leniency agreement. The leniency agreement may identify such individuals by category rather than naming them.

### **Stage 5: Follow-on Litigation**

2.17 In the event that follow-on litigation is initiated under section 110 of the Ordinance in relation to the cartel conduct covered by the leniency agreement by victims of the conduct, the Commission may issue an infringement notice to a party to a Type 2 leniency agreement containing a requirement to admit a contravention, in order to permit the initiation of follow-on proceedings against that party under section 110(3)(e) of the Ordinance. As such, the infringement notice will generally describe the scope of the cartel conduct in or affecting Hong Kong and include a requirement to admit to a contravention of the First Conduct Rule due to the undertaking's participation in that cartel conduct in or affecting Hong Kong. The Commission will not issue such a notice unless and until victims have initiated follow-on action against other undertakings found to have contravened the First Conduct Rule by participation in the cartel conduct covered by the leniency agreement.

### **Stage 6: Issuance of a final letter**

2.18 At an appropriate stage, the Commission will issue a final letter to the undertaking to confirm that all conditions under the leniency agreement have been fulfilled. This will usually be at the end of any proceedings by the Commission before the Tribunal or other courts against other participants in the cartel conduct, or after the issuance of an infringement notice under Stage 5.

### 3. Terminating the leniency agreement

- 3.1 The termination of a leniency agreement entered into under section 80 of the Ordinance is governed by the provisions of section 81 of the Ordinance. Under this Policy, the Commission will generally only consider terminating a leniency agreement with a party to a leniency agreement under section 81(1)(b) of the Ordinance if it has reasonable grounds to suspect that that party has at any time knowingly provided false or materially incomplete information to the Commission or has otherwise failed to comply with the terms of the leniency agreement.
- 3.2 Where the Commission is of the view that it may be appropriate to terminate a leniency agreement under section 81(1) of the Ordinance, it will, at first instance, inform only the party to the agreement of its concerns and the party to the leniency agreement will be given an opportunity to address the Commission's concern within a reasonable period of time.<sup>13</sup> If the Commission's concerns remain unaddressed, the Commission will only then proceed with the termination 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 in relation to the cartel conduct subject to the agreement 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 participants in the cartel conduct.

---

<sup>13</sup> As this procedure is intended to address any preliminary concern of the Commission and is in addition to the statutory procedure of consultation as set out in section 81(2)-(5) of the Ordinance, the usual time period which the Commission will give the other party to respond to this initial inquiry will be a relatively short one.



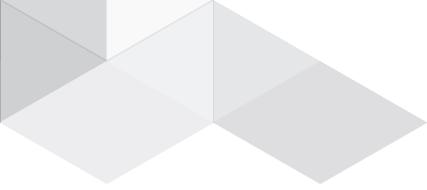
### **Officers, employees and agents**

- 3.5 Where a leniency agreement with an undertaking is terminated, the Commission may exercise its enforcement discretion not to commence proceedings in the Tribunal against current and former officers, employees, partners and agents of the undertaking who previously benefited from the protection of the leniency agreement, in return for the on-going cooperation of those persons with the Commission.
- 3.6 The Commission may revoke leniency protection extended to current and former officers, employees, partners and agents of the undertaking and/or any other individuals specifically named in the leniency agreement if the relevant individual does not fully and truthfully cooperate with the Commission. The Commission will notify the undertaking and the relevant individual if it has decided to no longer extend leniency to that individual.

## **4. Confidentiality and non-disclosure**

### **Confidentiality of leniency applications**

- 4.1 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 if the disclosure of the information is required by law. Where a leniency applicant is contemplating whether to disclose any information relating to its application for leniency on the grounds that such disclosure is required by law, the leniency applicant must notify the Commission forthwith.



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

4.2 The documents and information comprising a leniency application include:

- (a) 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**").

4.3 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information<sup>14</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.

4.4 The Commission reserves the right to use and disclose Leniency Material with appropriate confidentiality protections in its investigations and any proceedings it has brought under the Ordinance.<sup>15</sup> However, it is the Commission's policy not to release Leniency Material (whether or not it is confidential information under section 123 of the Ordinance) in connection with other proceedings, such as private civil or criminal proceedings in Hong Kong or in other jurisdictions. Accordingly, where such proceedings are concerned, the Commission will firmly resist, on public interest immunity and other applicable grounds, requests for Leniency Material, including the fact that leniency has been sought or is being sought, where such requests are made, unless:

- (a) it is compelled to make a disclosure by an order of the Tribunal or any other Hong Kong court, by law or any requirement made by or under a law;

---

<sup>14</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.

<sup>15</sup> In a previous enforcement action before the Tribunal, the Tribunal confirmed that the Commission could resist the disclosure of certain Leniency Material in relation to an unsuccessful leniency application on public interest immunity and without prejudice privilege grounds (see *Competition Commission v Nutanix Hong Kong Limited and others* [2018] HKCT 1). The Leniency Material in question comprised without prejudice correspondence and records of without prejudice communication between the Commission and an unsuccessful leniency applicant in that case (though not any documents pre-existing the leniency application). The Tribunal recognised "*a strong public interest in encouraging eligible parties to apply for leniency and in facilitating free and frank communication during the process*" and, on the facts of the case in question, this public interest in non-disclosure outweighed any contrary interest in disclosure.



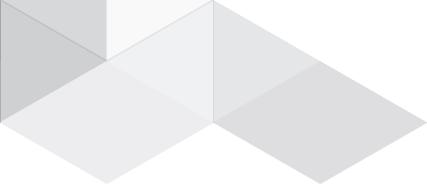
- (b) it has the consent of the leniency applicant to disclose the material; or
- (c) the relevant information or document is already in the public domain.

4.5 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 possible.

4.6 Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations.

## **5. No Further Action**

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



## Annex A

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

*This template contains the standard terms to be used in leniency agreements under section 80 of the Ordinance between undertakings engaged or involved 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.*

\* \* \* \* \*

**CONFIDENTIAL**

#### **LENIENCY AGREEMENT**

This leniency agreement ("**Agreement**") is made under the laws of the Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**") 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 party applying for leniency]** (the "**Leniency Party**").

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



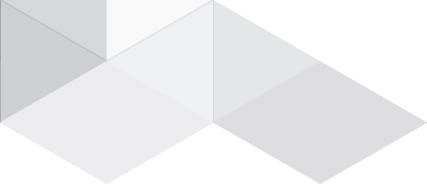
## RECITALS

- (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**] during the period [**relevant period**] (the "**Cartel**").
- (2) The Leniency Party has applied for leniency under the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct issued on 16 April 2020 (the "**Leniency Policy**") in relation to the Cartel.
- (3) The Commission considers the Leniency Party as of the date of the agreement meets the conditions to obtain Type [**1/2**] Leniency as provided for in the Leniency Policy.

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) "**Additional Individuals**" means individuals who are agents or former officers, directors, employees and/or partners of the Leniency Party, and are identified in Annex 1 to this Agreement as may be amended pursuant to clauses 5.1 or 5.2. Such individuals may be identified either by name or by virtue of falling within a category of individuals provided therein.
  - (b) "Confidential Leniency Information" means any information relating to the Leniency Application and provided pursuant to this Agreement, including without limitation, this Agreement, 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 the Leniency Party or the Protected Individuals for the purposes of making the Leniency Application or under this Agreement; and

- 
- ii. any information obtained by the Leniency Party or the Protected Individuals as a result of making the Leniency Application or under this Agreement.
  - (c) “**Court**” means the Competition Tribunal, and other courts of Hong Kong.
  - (d) “**Excluded Individuals**” means individuals who are current officers, directors, employees or partners of the Leniency Party, and are identified in Annex 2 to this Agreement as may be amended pursuant to clauses 5.1 or 5.2.
  - (e) “**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 the Commission has exercised its powers in sections 41, 42 and 48 of the Ordinance.
  - (f) “**IT Systems**” includes but is not limited to, servers, personal computers, desktop and laptop computers, mobile telephones, smartphones, tablets, digital media, electronic messaging services, electronic data storage services, and other similar networking or personal devices capable of processing and storing data.
  - (g) “**Leniency Application**” means the application for leniency under the Leniency Policy made by the Leniency Party prior to the execution of this Agreement in relation to the Cartel.
  - (h) “**Parties**” means the Commission and the Leniency Party.
  - (i) “**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.



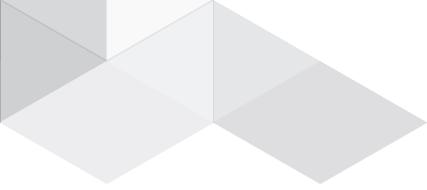
- (j) **“Protected Individuals”** means:
  - i. any current officers, directors, employees or partners of the Leniency Party who are not Excluded Individuals; and
  - ii. the Additional Individuals.
  
- (k) **“Type 2 Leniency”** is as defined in paragraph 1.3(d)(ii) of the Leniency Policy.

## 2. Leniency

- 2.1 In return for the Leniency Party having satisfied and continuing to satisfy each of the conditions set out in this Agreement, the Commission agrees not to bring Proceedings against any of the following:
- (a) the Leniency Party; and
  - (b) the Protected Individuals.

## 3. Representation and warranties of the Leniency Party

- 3.1 The Leniency Party expressly represents and warrants the following, and acknowledges that the Commission has relied on these representations and warranties in entering into this Agreement:
- (a) it has not disclosed to any third party (including the Additional Individuals) the Confidential Leniency Information (including the fact that it has applied for leniency) unless:
    - i. the disclosure was made to its legal advisor for the purposes of obtaining or receiving advice on the Leniency Application or the terms of this Agreement;
    - ii. the Commission provided its express written consent to the disclosure; or

- 
- iii. the disclosure was required by law and the conditions provided for in clause 4.3 are met;
  - (b) except as otherwise expressly authorised by the Commission, as of **[Date of the application for leniency]** it has refrained from further participation in the Cartel and shall continue to do so;
  - (c) it has not taken steps to coerce any other undertaking to participate in the Cartel;
  - (d) it did not act as the clear, single ringleader of the Cartel;
  - (e) the information provided to the Commission prior to entering into this Agreement as part of the Leniency Application was and remains complete and is not false nor misleading in any material particular; and
  - (f) any opinion provided to the Commission with respect to the Cartel was and remains honestly held.

#### **4. Leniency conditions for the Leniency Party**

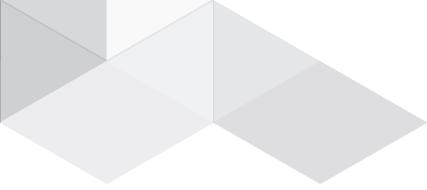
4.1 As a condition of this Agreement, at its own cost, the Leniency Party:

- (a) will maintain continuing full and truthful cooperation with the Commission throughout the Investigation and any ensuing Proceedings. Save as otherwise agreed with the Commission, the Leniency Party shall:
  - i. make Protected Individuals available at the Commission's request to provide any information reasonably requested and otherwise secure their cooperation; and
  - ii. use best endeavours to make current or former officers, directors, employees or partners of the Leniency Applicant, who are not Protected Individuals, available at the Commission's request to provide any information reasonably requested and otherwise secure their cooperation;



and, in respect of all such individuals, the Leniency Party shall use its best endeavours to ensure their cooperation is complete and truthful. 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;

- (b) will make full and truthful disclosure to the Commission throughout the Investigation and any ensuing Proceedings relating to the Cartel, including but not limited to:
  - 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;
  - 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 the Leniency 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 are not removed, destroyed, tampered with or modified, and that relevant data accessible on or through the relevant IT Systems are not removed, destroyed, tampered with or modified prior to, during or following any analysis by the Commission;
  - iv. not knowingly or negligently misrepresenting or concealing 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 ensure that it and the Protected Individuals keep confidential the Confidential Leniency Information unless:
    - i. the Leniency 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 and the conditions provided in clause 4.3 are met;
  - (d) will, where the Commission has requested that the Leniency Party to continue to participate in the Cartel, act as directed by the Commission in relation to the Cartel including terminating its participation when directed to do so; and
  - (e) will agree to continue with, or adopt and implement, at its own costs, a corporate compliance programme to the satisfaction of the Commission.

4.2 In addition to the conditions provided in clause 4.1, a Leniency Party that obtains Type 2 Leniency shall, in the event that the Commission issues an infringement notice in accordance with paragraph 2.17 of the Leniency Policy, make a commitment to comply with the requirements of the notice, which will be to admit to a contravention of the First Conduct Rule, within the compliance period specified in the notice.

4.3 Where the Leniency Party considers that the release of Confidential Leniency Information is required by law, it shall:

- (a) promptly notify the Commission of the content and form of the proposed disclosure, and why the Leniency 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.

## **5. Amending the composition of Protected Individuals**

5.1 The Commission may, at its discretion, amend:

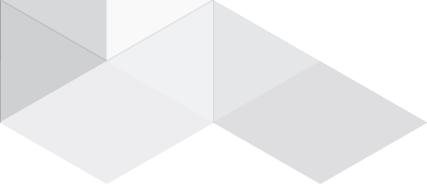
- (a) Annex 1 by adding individuals or categories of individuals, so that they fall within the definition of Additional Individuals; and
- (b) Annex 2 by removing individuals, so that they will no longer fall within the definition of Excluded Individuals.

5.2 The Commission may, subject to fulfilling the requirements provided for in clause 5.3, amend:

- (a) Annex 1 by removing individuals, so that they will no longer fall within the definition of Additional Individuals; and
- (b) Annex 2 by adding individuals, so that they fall within the definition of Excluded Individuals.

5.3 For the purposes of clause 5.2 the requirements are:

- (a) The Commission has reasonable grounds to suspect that the individual to be removed or added, as the case may be, has:
  - i. failed to provide complete and truthful cooperation, including but not limited to providing any information reasonably requested by the Commission;

- 
- ii. failed to make themselves available to the Commission, including but not limited to attending any Commission interview or providing evidence in Court;
  - iii. knowingly or negligently misrepresented or concealed any material facts to the Commission including before this Agreement was entered into; and/or
  - iv. obstructed or attempted to obstruct the Investigation or Proceedings.
- (b) The Commission has given notice in writing to the individual and the Leniency Party stating:
- i. its intention to amend Annex 1 or Annex 2 so that the individual will no longer fall within the definition of Protected Individual and therefore lose the benefit of the protection provided for in clause 2.1 of this Agreement;
  - ii. the reasons for making such amendment; and
  - iii. that both the Leniency Party and the relevant individual have a specified period, which will be not less than 30 days beginning after the day on which notice is given, during which representation may be made to the Commission as to why such amendment should not be made.
- (c) The Commission has considered any representations made to it pursuant to clause 5.3 (b)(iii) and continues to consider that the requirement in clause 5.3 (a) is met.

## **6. Termination**

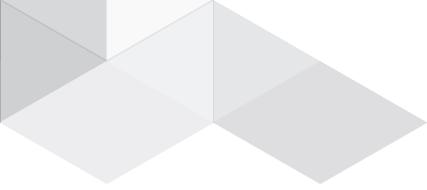
- 6.1 The Commission may terminate this Agreement at any time if one or more of the conditions for termination of a leniency agreement as set out in section 81(1) of the Ordinance are met, including where the Leniency Party has not complied with the terms of this Agreement.



- 6.2 The Parties acknowledge the procedure for terminating this Agreement is set out in section 81 of the Ordinance.
- 6.3 If this Agreement is terminated, the Commission may at its discretion commence Proceedings against the Leniency Party and/or the Protected Individuals including, without limitation, proceedings seeking a pecuniary penalty under section 93 of the Ordinance.

## **7. Use of information and documents**

- 7.1 The Commission may use any information or documents provided by the Leniency Party under this Agreement for the purpose of any investigation and proceedings under the Ordinance, but shall not do so in respect of any investigation or proceedings under the Ordinance against the Leniency Party unless this Agreement is terminated.
- 7.2 All Confidential Leniency Information provided to the Commission by the Leniency Party or the Protected Individuals, 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.
- 7.3 The Commission may, in appropriate cases, and where permitted by law, request the Leniency Party to authorise the Commission to exchange confidential information with authorities with competition law enforcement functions in other jurisdictions.
- 7.4 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 the Leniency Party prompt notice and shall, in any event, use its best endeavours to resist disclosure unless the Leniency 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.



## 8. Continuing obligations

8.1 The obligations in this Agreement are on-going and continue until:

- (a) the Commission issues a final letter to the Leniency Party in accordance with paragraph 2.18 of the Leniency Policy; or
- (b) this Agreement is terminated.

## 9. Communications

9.1 Any written notice or communication pursuant to this Agreement shall be delivered by registered mail or by e-mail as follows:

**If to the Commission, to:**

For the attention of [•]  
Competition Commission  
19/F, South Island Place,  
8 Wong Chuk Hang Road,  
Wong Chuk Hang, HONG KONG

E-mail: [Leniency@compcomm.hk]

**If to the Leniency Party to:**

**[Address]**

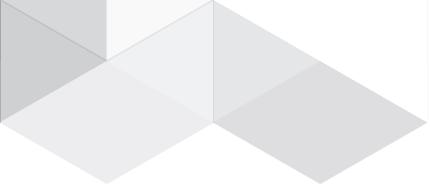
For the attention of: [•]  
Email: [•]

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



## 10. Miscellaneous

- 10.1 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.
- 10.2 Entire Agreement: This Agreement is the entire agreement between the Commission and the Leniency Party and supersedes all prior representations, writings, negotiations or understandings, whether oral or written, between the Commission and the Leniency Party relating the Cartel.
- 10.3 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.
- 10.4 Applicable Law: This Agreement is governed by, and shall be construed in accordance with, the laws of Hong Kong. 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.
- 10.5 Execution in Counterparts: This Agreement may be executed in counterparts.



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

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

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

Date:

Name:

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

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

Date:

Name:

Position:

Annex 1 - Additional Individuals

Annex 2 - Excluded Individuals



19/F, South Island Place,  
8 Wong Chuk Hang Road,  
Wong Chuk Hang, HONG KONG