



**International
Competition
Network**

ANTI-CARTEL ENFORCEMENT TEMPLATE

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

**Hong Kong Competition Commission
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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 https://www.elegislation.gov.hk/hk/cap619.</p> <p>Available in Chinese and English.</p>
<p>B. Implementing regulation(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</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 (“Competition Commission”) enforcement activity:</p> <ul style="list-style-type: none"> • 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 Competition (Application of Provisions) Regulation (Cap 619A). • Seven entities related to Hong Kong Exchanges and Clearing Limited are specifically excluded from the application of the competition rules (including the First Conduct Rule) by virtue of the Competition (Disapplication of Provisions) Regulation (Cap 619B). • The Competition (Turnover) Regulation (Cap 619C) specifies the method for determining the turnover of an undertaking for the purpose of the Ordinance. <p>Available in Chinese and English.</p>
<p>C. Interpretative guideline(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>The Ordinance is complemented by the following set of guidelines:</p> <ul style="list-style-type: none"> • Guideline on the First Conduct Rule • Guideline on the Second Conduct Rule • Guideline on the Merger Rule • Guideline on Complaints • Guideline on Investigations • Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders <p>The Guidelines have been published by the Competition Commission and the Communications Authority (“CA”), with which the Competition Commission shares concurrent jurisdiction under the Ordinance in the telecommunications and broadcasting sectors.</p> <p>The Guidelines provide guidance on how the Competition Commission and the CA intend to interpret and give effect to the provisions of the Ordinance.</p>

	<p>Each of the above documents are available in Chinese and English on the Competition Commission's website.</p>
<p>D. Other relevant materials (if any): [availability (homepage address) and indication of the languages in which these materials are available]</p>	<p>To address key aspects of its enforcement approach, the Competition Commission has adopted the following policy documents:</p> <ul style="list-style-type: none"> • Enforcement Policy; • Leniency Policies (for Undertakings and Individuals); • Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct • Policy on Recommended Pecuniary Penalties • Policy on Section 60 Commitments <p>The Competition Commission has also produced Hong Kong's first docudrama series on competition law cases titled "COMPETE: Cartel Hunters" and 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 the Competition Commission's website.</p> <p>The Competition Commission also issues Advisory Bulletins on areas of particular interest. For an example, it has published Advisory Bulletins on:</p> <ul style="list-style-type: none"> • Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment; • Competition concerns regarding certain admission criteria and procedures of trade, sporting, professional and industry associations / bodies; • Competition concerns regarding joint negotiations in the labour sector <p>In addition, the Competition Commission has published certain guidance notes on specific issues. These include the following:</p> <ul style="list-style-type: none"> • Investigation Powers of the Competition Commission and Legal Professional Privilege; • Model Non-Collusion Clauses and Non-Collusive Tendering Certificate <p>The Competition Commission 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 here.</p> <p>Available in Chinese and English.</p>

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”? [Please quote.]</p> <p>If not, please indicate the term you use instead. [Please quote.]</p>	<p>The term “cartel” is not defined in Hong Kong legislation or case law.</p> <p>However, the Competition Commission’s leniency policy, which applies only to cartel conduct in contravention of the First Conduct Rule, describes cartel conduct as:</p> <p><i>“agreements and/or concerted practices between two or more undertakings which consist of:</i></p> <ul style="list-style-type: none"> <i>(i) fixing, maintaining, increasing or controlling the price for the supply of goods or services;</i> <i>(ii) allocating sales, territories, customers or markets for the production or supply of goods or services;</i> <i>(iii) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;</i> <i>or</i> <i>(iv) bid-rigging.”</i>
<p>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 quotas¹) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</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> <ul style="list-style-type: none"> <i>(a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;</i> <i>(b) allocating sales, territories, customers or markets for the production or supply of goods or services;</i> <i>(c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;</i> <i>(d) bid-rigging.”</i> <p>In line with this definition, the Competition Commission 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"> • Unlike other First Conduct Rule conduct, the Competition Commission is not required to first issue a warning notice before it can initiate enforcement proceedings before the Competition Tribunal (“Tribunal”); • The turnover-based exclusion in the Ordinance for ‘agreements of lesser significance’ does not apply. <p>Other types of agreements can be found to contravene the First Conduct Rule but not fall within the definition of Serious</p>

¹ 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>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 conduct is considered Serious Anti-competitive Conduct only arises after the Competition Commission forms the view that the conduct contravenes the First Conduct Rule.</p>
<p>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.]</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>General exclusions</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"> (a) agreements enhancing overall economic efficiency; (b) compliance with legal requirements; (c) services of general economic interest; (d) mergers; and (e) agreements of lesser significance. <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 Competition Commission’s Guideline on the First Conduct Rule.</p> <p>Public Policy and International Obligations Exemptions</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 First and Second Conduct Rules.</p> <p>These exemptions are, however, unlikely to be applicable in the case of cartel conduct.</p> <p>Statutory Bodies, Specified Persons and Activities</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</p>

	<p>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 (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 in Council under section 5 of the Ordinance are provided above.</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>²? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</p>	<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” to harm competition in Hong Kong.</p> <p>The Competition Commission 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 Competition Commission’s 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 Guideline on the First Conduct Rule.</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>The Competition Commission and/or the CA conduct cartel investigations and enforcement actions are brought before the Tribunal.</p> <p>The Tribunal is a superior court of record, composed of judges of the Court of First Instance. The 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)

² 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>A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]</p>	<p>The Competition Commission 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>”.</p> <p>Under the Ordinance, as mentioned, the CA is conferred jurisdiction concurrent with the Competition Commission 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. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</p>	<p>The Competition Commission, 19/F, South Island Place 8 Wong Chuk Hang Road, Wong Chuk Hang, Hong Kong Tel: +852 3462 2118 Fax: +852 2522 4997 Email: enquiry@compcomm.hk</p> <p>The CA 29/F, Wu Chung House 213 Queen’s Road East, Wanchai, Hong Kong Tel: +852 2961 6333 Fax: +852 2803 5110 Email: webmaster@ofca.gov.hk</p>
<p>C. Information point for potential complainants:</p>	<p>The websites of both the Competition Commission and the CA 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>Commission's 'Make a Complaint' page</p> <p>CA's 'Lodge a Competition Complaint' page</p> <p>See also the Guideline on Complaints which has been jointly issued by the Competition Commission and the CA.</p> <p>Available in Chinese and English.</p>
<p>D. Contact point where complaints can be lodged:</p>	<p>The Competition Commission 19/F, South Island Place 8 Wong Chuk Hang Road, Wong Chuk Hang, Hong Kong Online complaint form: https://www.compcomm.hk/en/applications/make_a_complaint/complaint.html Tel: +852 3462 2118 Email: complaints@compcomm.hk</p> <p>The CA 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: webmaster@ofca.gov.hk</p>
<p>E. Are there other authorities which may assist the</p>	<p>Only the Competition Commission and the CA may investigate cartel conduct under the Competition Ordinance.</p>

investigating agency? If yes, please name the authorities and the type of assistance they provide.	
4. Decision-making institution(s)³ [to be filled in only if this is different from the investigating agency]	
A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]	<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 Tribunal has jurisdiction to hear and determine “<i>applications made by the Competition Commission or CA with regard to alleged contraventions, or alleged involvements in contraventions, of the competition rules</i>”.</p>
B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]	<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: enquiry@comptribunal.hk</p>
C. Contact point for questions and consultations:	<p>The Tribunal Registry contact details are provided in the answer to 4. B. above.</p>
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	<p>The investigating agencies (the Competition Commission and/or the CA) 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 Competition Commission and the CA 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>
E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?	<p>As mentioned, the Ordinance does not provide for a criminal cartel offence.</p>

³ 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>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</p>	<p>The Competition Commission may become aware of possible contraventions of the Ordinance from sources such as:</p> <ul style="list-style-type: none"> (a) a complaint or query made by the public; (b) the Competition Commission's own research and market intelligence gathering; (c) other Competition Commission processes and investigations, including its leniency regime; or (d) referrals by the Government, the courts or other statutory bodies or authorities of potentially anti-competitive conduct for investigation.
<p>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).]</p>	<p>The Competition Commission will accept complaints in any form, including those provided to the Competition Commission:</p> <ul style="list-style-type: none"> (a) directly; (b) anonymously; and (c) through an intermediary (such as a legal adviser). <p>A complaint or query may be made by telephone, e-mail, post, by completing an online form on the Competition Commission's website or in person at the Competition Commission's office (by appointment only). A complaint may be submitted on behalf of more than one person or party.</p>
<p>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?]</p>	<p>There are no legal requirements for lodging a complaint with the Competition Commission.</p>
<p>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.]</p>	<p>The Competition Commission 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 Competition Commission with a discretion as regards the investigation of complaints. In particular, the Competition Commission:</p> <ul style="list-style-type: none"> (a) is not required to investigate a complaint if it does not consider it reasonable to do so; and (b) may investigate a complaint even where the complainant no longer wishes to cooperate with the Competition Commission.

	<p>Without limiting what is considered reasonable under section 37(2), the Ordinance provides that the Competition Commission may, in particular, not investigate a complaint if it is:</p> <p>(a) trivial, frivolous or vexatious; or</p> <p>(b) misconceived or lacking in substance.</p> <p>When considering whether a complaint is misconceived or lacking in substance, the Competition Commission 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 Competition Commission will exercise its discretion having regard to the specific facts of the complaint.</p>
<p>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</p>	<p>The Competition Commission is not legally required to adopt such a decision.</p>
<p>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?</p>	<p>There is no time limit on the Competition Commission or the CA 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 Competition Commission to apply to the 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 Competition Commission became aware of the contravention, whichever is the later.”</i></p>

6. Leniency policy⁴

<p>A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]</p>	<p>The Competition Commission has published its Leniency Policy for Undertakings Engaged in Cartel Conduct (“Leniency Policy for Undertakings”). It is available on the Competition Commission’s website in Chinese and English.</p>
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⁴ 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 Competition Commission has also published its Leniency Policy for Individuals Involved in Cartel Conduct ("Leniency Policy for Individuals") which sets out similar information to the Leniency Policy for Undertakings and is directed towards individuals who wish to stop their involvement in cartel conduct and to report the conduct to the Commission Commission.</p>
<p>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</p>	<p>Full Leniency</p> <p>The Ordinance contains a specific provision relating to the granting of leniency.</p> <p>Section 80 of the Ordinance permits the Competition Commission 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 in proceedings under the Ordinance. The Competition Commission and the person will conclude a leniency agreement to this effect.</p> <p>The Competition Commission's Leniency Policy for Undertakings provides clarity on how it intends to apply this statutory provision in so far as <i>undertakings</i> engaged in cartel conduct are concerned.</p> <p>The Competition Commission's Leniency Policy for Individuals provides clarity on how it intends to apply this statutory provision in so far as <i>individuals</i> engaged in cartel conduct are concerned.</p> <p>Partial Leniency / Cooperation and Settlement</p> <p>Section 80 of the Ordinance only deals with leniency whereby the Competition Commission agrees not to seek <i>any</i> pecuniary penalty against a person.</p> <p>Undertakings which do not benefit from leniency under the Leniency Policy for Undertakings can opt to cooperate with the Competition Commission's investigation within the framework of its Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct ("Cooperation Policy"). The Cooperation Policy sets out information relating to:</p> <ul style="list-style-type: none"> • an overview and scope of the policy, including how to settle cases and apply for cooperation; • the benefits of cooperation, including cooperation discounts on the pecuniary penalty the Competition Commission would otherwise recommend to the Tribunal; • the availability of an additional "Leniency Plus" discount; • termination of the cooperation agreement; and • protection for confidentiality.
<p>C. Who is eligible for full leniency [only for the first</p>	<p>Under the Leniency Policy for Undertakings, Type 1 leniency is only available for the first cartel member that</p>

<p>one to come forward or for more participants in the cartel]?</p>	<p>discloses its participation in a cartel of which the Competition Commission has not yet opened an initial assessment or investigation, and meets all the requirements for leniency.</p> <p>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 cartel to initiate an investigation?</p> <p>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?</p>	<p>Under the Leniency Policy for Undertakings, Type 1 leniency is available to the first cartel member that discloses its participation in a cartel of which the Competition Commission has not yet opened an initial assessment or investigation.</p> <p>Type 2 leniency is available to the first cartel member that is able, in the Competition Commission's view, to provide substantial assistance to the Competition Commission's investigation and subsequent enforcement action of a cartel it is already assessing or investigating.</p> <p>Both types of leniency require the leniency applicant to go on and meet all the other conditions for leniency.</p> <p>The Type 1 and Type 2 distinction is also made in the Leniency Policy for Individuals.</p>
<p>E. Who can be a beneficiary of the leniency program (individual / businesses)?</p>	<p>Leniency is available for undertakings and individuals engaged in cartel conduct. Please refer to the Leniency Policy for Undertakings and Leniency Policy for Individuals respectively.</p>
<p>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.]</p>	<p>The key elements of the Leniency Policy for Undertakings 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 Leniency Policy for Undertakings (individuals should refer to the Leniency Policy for Individuals);</p> <p>(c) leniency is not available to undertakings that are the single ringleaders of the cartel conduct or that have coerced other parties to participate in the cartel conduct;</p> <p>(d) leniency is available only for the first cartel member that:</p> <ul style="list-style-type: none"> (i) discloses its participation in a cartel of which the Competition Commission has not yet opened an initial assessment or investigation (Type 1 leniency); or (ii) is able, in the Competition Commission's view, to provide substantial assistance to its investigation and subsequent enforcement action of a cartel it is already assessing or investigating (Type 2 leniency) <p>and meets all the requirements for leniency;</p> <p>(e) if the undertaking meets the conditions for leniency, the Competition Commission will enter into an agreement with the undertaking not to take any proceedings against it in relation to the reported conduct;</p>

	<p>(f) leniency will extend to the current (and possibly former) employees, officers, and partners of a successful leniency applicant provided that they fully and truthfully cooperate with the Competition Commission;</p> <p>(g) a party to the leniency agreement is required to continuously fulfil its requirements under such leniency agreement, including cooperating with the Commission throughout the investigation and in any proceedings the Competition Commission initiates before the Tribunal in relation to the reported conduct. At an appropriate stage (usually at the end of the proceedings), the Competition Commission will issue a letter to them confirming that all conditions under the agreement have been fulfilled.</p> <p>(h) 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 Competition 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. The Commission will not issue an infringement notice to parties to a Type 1 leniency agreement.</p> <p>When applying for leniency, the applicant will be required to:</p> <p>(a) agree to a non-disclosure agreement with the Competition Commission 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>(b) perfect its marker through a proffer process within the period set out by the Competition Commission;</p> <p>(c) 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;</p> <p>(d) provide access to some of the evidence (both documents and/or by making available witnesses to be interviewed by the Competition Commission); and</p> <p>(g) provide full and truthful cooperation.</p>
<p>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?]</p>	<p>For Type 2 leniency, please see 6F. above.</p> <p>Undertakings engaged in cartels which do not benefit from the Leniency Policy for Undertakings may choose to admit their wrongdoings and cooperate with the Competition Commission in its investigations and resulting proceedings under the Cooperation Policy.</p> <p>In return the Competition Commission will offer a discount of up to 50% off the pecuniary penalty it would otherwise recommend to the Tribunal. The Competition Commission may also agree not to bring proceedings against individuals involved, such as employees or directors of the cooperating</p>

	<p>undertakings, if they fully cooperate with the Competition Commission.</p> <p>The order and timing of cooperation determines the amount of benefits (reduction in recommended pecuniary penalty) available:</p> <ul style="list-style-type: none"> • The Competition Commission will identify an applicable band of a cooperation discount based on the order in which undertakings express their interest to cooperate. • The Competition Commission will determine the <u>actual cooperation discount within the applicable band</u>, having regard to the timing, nature, value and extent of cooperation provided. • <u>If undertakings only cooperate after commencement of Tribunal proceedings, the Competition Commission may recommend a cooperation discount of up to 20%.</u>
<p>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.]</p>	<p>According to the Leniency Policy, the leniency agreement agreed to be between the Competition Commission 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 Competition Commission;</p> <p>(b) it has not coerced other parties to engage in the cartel conduct or acted as the clear ringleader of the cartel conduct;</p> <p>(c) it has, unless instructed by the Competition Commission otherwise, taken prompt and effective action to terminate its participation in the cartel conduct;</p> <p>(d) it will keep confidential all aspects of the leniency application and the leniency process unless the Competition Commission's prior consent has been given or the disclosure of information is required by law;</p> <p>(e) it will provide continuing full and truthful cooperation, at its own cost, to the Competition Commission including in enforcement proceedings against other undertakings that engaged in the cartel conduct or against other persons involved in the cartel conduct;</p> <p>(g) it is prepared to continue with, or adopt and implement, at its own cost, an effective corporate compliance programme to the reasonable satisfaction of the Competition Commission; and</p> <p>(h) (for Type 2 leniency only): that the Competition Commission may issue an infringement notice to the applicant requiring admission of liability in the event of follow-on actions.</p>
<p>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.]</p>	<p>Under the Leniency Policies, an undertaking/individual or their legal representative may contact the Competition Commission to ascertain if leniency marker is available for particular cartel conduct by calling the Leniency Hotline at +852 3996 8010 or by email at Leniency@compcomm.hk. The Leniency Hotline is answered between 8am to 6pm Hong Kong time, Monday to Friday (excluding public holidays).</p>
<p>J. Are there distinct procedural steps within the leniency</p>	<p>There are a number of steps involved in a leniency application under the Leniency Policy for Undertakings. These are:</p>

<p>program? [e.g.: provisional guarantee of leniency ("PGL") and further steps leading to a final leniency agreement / decision?]</p>	<ul style="list-style-type: none"> (i) Requesting a marker (as described at 6.M. below); (ii) Perfecting a marker through a proffer process; (iii) Entering into a leniency agreement; (iv) Ongoing compliance with the terms of the leniency agreement (v) Follow-on Litigation (if any, only relevant to Type 2 leniency) (vi) Issuance of a final letter
<p>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</p>	<p>The leniency applicant is given this certainty at the stage where it is invited to enter into a leniency agreement.</p>
<p>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?</p>	<p>As stated at 6.B. above, section 80 of the Ordinance provides for the Competition Commission 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 Competition Commission's Leniency Policies (for Undertakings and Individuals). The decision whether to enter into a leniency agreement ultimately rests with the Competition Commission. A template leniency agreement is annexed to the Leniency Policy for Undertakings and Individuals.</p>
<p>M. Do you have a marker system? If yes, please describe it.</p>	<p>The Competition Commission uses a marker system to establish a queue in order of the date and time the Competition Commission is contacted with respect to the cartel conduct for which leniency is sought.</p> <p>A potential applicant for leniency, or their legal representative, may contact the Competition Commission to ascertain if a marker is available for particular cartel conduct. Such enquiries may be made on an anonymous and/or hypothetical basis. A marker will not, however, be granted on the basis of anonymous enquiries.</p> <p>To allow the Competition 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.</p> <p>Before confirming the availability of a marker for particular conduct, the Competition 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.</p>

	<p>The Competition 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 applicant 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.</p> <p>Where a marker is not available because another undertaking has already obtained the marker for that cartel conduct, an applicant may request that it is placed in a queue 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 under the Cooperation Policy. Applicants will only be able to retain their place in the marker queue if they are cooperating with the Competition Commission.</p> <p>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:</p> <ul style="list-style-type: none"> (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. <p>The Competition 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.</p>
<p>N. Does the system provide for any extra credit⁵ for disclosing additional violations? [e.g. a hardcore cartel in another market]</p>	<p>The Leniency Policy does not specifically address this issue. However, the Cooperation Policy provides for "leniency plus":</p> <p>An undertaking cooperating with the Competition Commission under the Cooperation Policy in relation to its participation in one cartel ("First Cartel") may find that it also has engaged in one or more completely separate cartels ("Second Cartel").</p>

⁵ 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>The Competition Commission will apply an additional discount of up to 10% of the recommended pecuniary penalty for an undertaking involved in the First Cartel (“Leniency Plus Discount”), provided that:</p> <ul style="list-style-type: none"> (a) the undertaking has entered into a leniency agreement with the Commission in respect of the Second Cartel; (b) the Second Cartel is completely separate from the First Cartel; (c) the undertaking fully and truthfully cooperates with the Commission in respect of both cartels. <p>The Competition Commission will take into account the following factors when determining the level of Leniency Plus Discount:</p> <ul style="list-style-type: none"> (a) the strength of evidence provided by the undertaking in respect of the Second Cartel; (b) the significance of the Second Cartel (including the value of sales, number and size of undertakings involved and geographic scope); and (c) the likelihood that the Second Cartel would have been uncovered without the undertaking’s cooperation. <p>An undertaking which wishes to apply for leniency in respect of a Second Cartel should discuss this with the case manager for the First Cartel.</p>
<p>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</p>	<p>Section 125 of the Ordinance imposes a general obligation on the Competition Commission to preserve the confidentiality of any confidential information provided to the Competition Commission.</p> <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 Competition Commission.</p> <p>Section 126 of the Ordinance lists the exceptions to this obligation where the Competition Commission may disclose confidential information with lawful authority.</p> <p>As stated in the Leniency Policy, the Competition Commission will use its best endeavours to appropriately protect:</p> <ul style="list-style-type: none"> (a) information provided to the Competition Commission by a leniency applicant for the purpose of making a leniency application and/or pursuant to a leniency agreement; and (b) the Competition Commission’s records of the leniency application process, including the leniency agreement (“Leniency Material”).
<p>P. Is there a possibility of appealing an agency’s decision rejecting a leniency application?</p>	<p>Decisions reached by the Competition Commission 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</p>

	<p>Competition Commission relating to the termination of a leniency agreement, it does not include a decision by the Competition Commission to reject a leniency application.</p>
<p>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</p>	<p>A request for a marker may be made by using the Leniency Hotline at +852 3996 8010 or by e-mail at Leniency@compcomm.hk. The Leniency Hotline is answered between 8am to 6pm Hong Kong time, Monday to Friday (excluding public holidays).</p>
<p>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?</p>	<p>Section 81 of the Ordinance sets out the circumstances in which a leniency agreement can be terminated. It states that the Competition Commission may terminate a leniency agreement in the following circumstances:</p> <ul style="list-style-type: none"> (a) the other party to the agreement agrees to the termination; (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; (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 (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>The Competition Commission’s Leniency Policy for Undertakings and Leniency Policy for Individuals provide further clarification as to the procedure which the Competition Commission 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 Competition Commission 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 Competition Commission’s Leniency Policy for Undertakings and Leniency Policy for Individuals do not specifically address this scenario.</p> <p>However, the Cooperation Policy provides that the Competition Commission may, in its discretion, also approach undertakings subject to investigation to propose cooperation under the Cooperation Policy.</p>
<p>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate.</p>	<p>The Competition Commission 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 Leniency Material.</p>

	<p>In addition, it is stated in the Leniency Policy for Undertakings that:</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 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.”</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 Competition Commission 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>
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7. Settlement

<p>A. Does your competition regime allow settlement?</p> <p>If yes, please indicate its public availability (link to the relevant rules, guidelines, etc.).</p>	<p>The Competition Commission’s Enforcement Policy envisages the possibility of settlement in a number of scenarios. The Enforcement Policy is available in English and Chinese on the Competition Commission’s website.</p>
<p>B. Which types of restrictive agreements are eligible for settlement [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</p>	<p>For cartel conduct, undertakings which do not benefit from leniency under the Leniency Policy can opt to cooperate with the Commission’s investigation within the framework of this Cooperation Policy in exchange for benefits as set out therein. Cooperation will ultimately lead to the Commission and the undertaking jointly applying to the Tribunal for an order made by consent that the undertaking has contravened or been involved in the contravention of the First Conduct Rule.</p> <p>For non-cartel conduct, the Competition Commission may also consider resolving its competition concerns by way of Commitments.</p>
<p>C. What is the reward of the settlement for the parties?</p>	<p>The reward of settlement will vary depending on the form of settlement in question.</p> <p>For undertakings cooperating and settling under the Cooperation Policy, the Competition Commission will agree to make submissions for a reduced penalty and/or other appropriate orders by the Tribunal.</p> <ul style="list-style-type: none"> • The Competition Commission will identify an applicable band of a cooperation discount based on the order in which undertakings express their interest to cooperate:

	<table border="1" data-bbox="691 150 1390 356"> <thead> <tr> <th data-bbox="691 150 890 203"></th> <th data-bbox="890 150 1390 203">Recommended Discounts</th> </tr> </thead> <tbody> <tr> <td data-bbox="691 203 890 257">Band 1</td> <td data-bbox="890 203 1390 257">Between 35% and 50%</td> </tr> <tr> <td data-bbox="691 257 890 311">Band 2</td> <td data-bbox="890 257 1390 311">Between 20% and 40%</td> </tr> <tr> <td data-bbox="691 311 890 356">Band 3</td> <td data-bbox="890 311 1390 356">Up to 25%</td> </tr> </tbody> </table> <ul data-bbox="643 371 1394 633" style="list-style-type: none"> • The Competition Commission will determine the actual cooperation discount within the applicable band, having regard to the timing, nature, value and extent of cooperation provided. • For undertakings that cooperate and settle after commencement of Tribunal proceedings, the Competition Commission may recommend a cooperation discount of up to 20%. 		Recommended Discounts	Band 1	Between 35% and 50%	Band 2	Between 20% and 40%	Band 3	Up to 25%
	Recommended Discounts								
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<p>D. May a reduction for settling be cumulated with a leniency reward?</p>	<p>As mentioned above, where the Competition Commission enters into a leniency agreement with a party under the Leniency Policy, 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>E. List the criteria (if there is any) determining the cases which are suitable for settlement.</p>	<p>As set out in the Guideline on Investigations, the Competition Commission 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 Competition Commission 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> <ol style="list-style-type: none"> 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 Competition Commission is seeking a pecuniary penalty; ii. reflects the culpability of the respective parties bearing in mind the extent of their cooperation with the Competition Commission (see below); and iii. sets an appropriate standard for future similar cases (if there are no existing precedents). <p>When applying these remedial goals, the Competition Commission will endeavour to identify enforcement responses, including those with settled outcomes that are</p>								

	proportionate to the context of the conduct and the harm caused or likely to occur.
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.].	Settlement approaches may be made by an undertaking, individual or by the Competition Commission . The Competition Commission will rely on its general enforcement discretion to consider offers of settlement.
F. Describe the procedural efficiencies of your settlement system [e.g. shorter decision, etc.].	Settlement can lead to a more expeditious and cost effective resolution to a particular case, to the benefit of both the Competition Commission and the parties concerned, in particular by avoiding the need for contested proceedings before the Tribunal.
G. Does a settlement necessitate that the parties acknowledge their liability for the violation?	<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>Under the Cooperation Policy, undertakings engaged in cartel conduct that settle would be required to acknowledge their liability as it will be required to make a joint application with the Competition Commission to the Tribunal for a Consent order including the finding of a contravention of the First Conduct Rule.</p> <p>Under the Policy on Section 60 Commitments, a Commitment may or may not contain an admission from the person that they have contravened a conduct rule. However, the Competition Commission is very unlikely to accept a Commitment with respect to cartel conduct involving competitors.</p>
H. Is there a possibility for settled parties to appeal a settlement decision at court?	<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	
A. Does your competition regime allow the possibility of commitment?	Under section 60 of the Ordinance, at any stage the Competition Commission may accept from parties under investigation a commitment to take any action or refrain from

<p>If yes, please indicate its public availability [link to the relevant rules, guidelines, etc.].</p>	<p>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 Competition Commission accepts a commitment, it is required to cease any investigation or proceedings before the Tribunal which relate to matters addressed by the commitment (or must not commence such investigation or proceedings if they have not yet begun).</p> <p>Schedule 2 to the Ordinance sets out the procedural requirements for acceptance and variation of commitments.</p> <p>The Competition Commission's approach to commitments is set out in its Policy on Section 60 Commitments.</p>
<p>B. Which types of restrictive agreements are eligible for commitment [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</p> <p>Are there commitments which are excluded from the commitment possibility?</p>	<p>Under section 60 of the Ordinance, commitments may, in theory, be accepted by the Competition Commission to address its concerns about any possible contravention of a competition rule.</p> <p>Nevertheless, in exercising this discretion, the Competition Commission will consider whether a commitment is an appropriate enforcement outcome in the matter generally and whether a specific proposed commitment is appropriate to address the Competition Commission's competition concerns, having regard to relevant factors including, but not limited to the seriousness of the conduct. As such, the Competition Commission is very unlikely to accept a commitment with respect to cartel conduct involving competitors.</p>
<p>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</p>	<p>The Policy on Section 60 Commitments sets out the relevant factors the Competition Commission would have regard to when considering whether a commitment is an appropriate enforcement outcome in the matter generally and whether a specific proposed commitment is appropriate to address the Competition Commission's competition concerns, These are (non-exhaustive list):</p> <ul style="list-style-type: none"> a) Seriousness of the conduct b) Ability to address competition concerns c) Effective implementation and monitoring d) Severity factors e) Remedial goals f) Good faith g) Timing considerations
<p>D. Describe, which types of commitments are available under your competition law.[e.g.: behavioural / structural]</p>	<p>The Ordinance does not expressly stipulate what types of commitments are available.</p>

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.]

The commitment process can be initiated by either the undertaking under investigation or the **Competition Commission** at any time.

Schedule 2 to the Ordinance sets out the process that the **Competition Commission** must adopt before accepting a commitment or variation of an existing commitment. In particular, the **Competition Commission** must:

- (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
- (b) consider any representations made (and not withdrawn) in response to the notice.

The notice to be provided to parties must state, among other things,

- the intended object and effect of the commitment or variation;
- whether the commitment or variation constitutes an admission of contravention of a competition rule;
- the situation that the commitment or variation is seeking to deal with;
- any other facts that the **Competition Commission** considers to be relevant to the acceptance or variation of the commitment;

If the **Competition Commission** exercises its discretion to accept a commitment or a variation to a commitment, the **Competition Commission** must publish the commitment or variation. Typically, this will be published on the **Competition Commission's** website.

If, after giving notice, the **Competition Commission** decides not to accept the commitment or variation concerned, the **Competition Commission** must give notice that it has so decided.

The Ordinance provides the **Competition Commission** with withdraw, vary or enforce commitments and also sets out the way in which undertaking will be released from the commitments.

The [Policy on Section 60 Commitments](#) sets out the Commission's practice and procedure in respect of commitments relating to contraventions of the competition rules (including the First Conduct Rule). It sets out information relating to:

- the appropriateness of a Section 60 Commitment as an enforcement outcome;
- the content of a Section 60 Commitment;
- the Section 60 Commitment process;
- matters following acceptance of a Section 60 Commitment; and
- confidentiality.

The Policy also contains a template which may be used by parties seeking to make Section 60 Commitments.

<p>I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation?</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 Competition Commission must set out whether the acceptance of a commitment constitutes an admission of such a contravention.</p>
<p>J. Describe how your authority monitors the parties' compliance to the commitments.</p>	<p>In some cases, parties are required to submit annual compliance statements to the Competition Commission. In the Hong Kong Seaport Alliance case, compliance with the commitments are monitored throughout by an independent monitoring trustee on behalf of the Commission.</p>
<p>K. Is there a possibility for parties to appeal a commitment decision at court?</p>	<p>Decisions reached by the Competition Commission 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 Competition Commission 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 Competition Commission to accept the commitments.</p>

9. Investigative powers of the enforcing institution(s)⁶

<p>A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁷, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.</p>	<p>Where the Competition Commission conducts an investigation under Part 3 of the Ordinance, it may exercise the following compulsory information-gathering powers:</p> <p>Written requests for documents and information</p> <p>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.</p> <p>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.</p>
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⁶ "Enforcing institutions" may mean either the investigating or the decision-making institution or both.

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

	<p>Request for attendance before the Commission to answer questions</p> <p>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:</p> <p>(a) current or former employees, competitors, customers, distributors or suppliers of the parties under investigation;</p> <p>(b) representatives of relevant trade associations; or</p> <p>(c) complainants.</p> <p>Enter and search premises under warrant</p> <p>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”).</p> <p>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.</p> <p>The premises specified in the section 48 warrant need not 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 Competition Commission when conducting a search under a warrant. It authorises the Commission to, among other matters:</p> <ul style="list-style-type: none"> • use reasonable force to gain entry and/or access evidence on the premises; • remove any obstructions to the execution of the warrant (including individuals who are obstructing the execution of the warrant); and • 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 Competition Commission officers believe will, on examination, afford evidence of a contravention.
<p>B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does</p>	<p>According to section 48 of the Ordinance, the Competition Commission may seek a warrant with regard to any 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>this require authorisation by a court?</p>	<p>When executing search warrants, as issued by a judge of the Court of First Instance, the Competition Commission 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 Competition Commission officers believe will, on examination, afford evidence of a contravention.</p>
<p>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)?</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"> • 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; • 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 • 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.
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>To date, there have not been any judicial decisions relating to challenges to use of the Competition Commission's investigative powers as authorised by the courts.</p>

10. Procedural rights of businesses / individuals

<p>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</p>	<p>Right to see the case against them</p> <p>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.</p> <p>Discovery</p> <p>During the litigation process, respondents may also apply for discovery of the Competition Commission's case file.</p> <p>Legal Professional Privilege (‘LPP’)</p>
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<p>indicate the relevant legal provisions.</p>	<p>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.</p> <p>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.</p> <p>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 seize or copy those non-privileged parts.</p> <p>Self-incrimination</p> <p>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 person to proceedings in which the Competition Commission seeks a pecuniary or financial penalty or criminal proceedings.</p> <p>No statement made under compulsion by a person to the Competition Commission 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. 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.</p>	<p>Section 125 of the Ordinance imposes a general obligation on the Competition Commission to preserve the confidentiality of any confidential information provided to or obtained by the Competition Commission. This general obligation applies regardless of whether the Competition Commission 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 Competition Commission 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"> i. the private affairs of a natural person; ii. the commercial activities of any person that are of a confidential nature; or

	<p>iii. the identity of any person who has given information to the Competition Commission;</p> <p>(b) information that has been given to the Competition Commission on terms or in circumstances that require it to be held in confidence; or</p> <p>(c) information given to the Competition Commission 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 Competition Commission in certain circumstances, including disclosures made by the Competition Commission 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 Competition Commission to publish information and, subject to the provisions of the Ordinance, the Competition Commission may in certain circumstances disclose confidential information without the consent of relevant parties.</p>
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11. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings must begin or a decision on the merits of the case must be made?</p>	<p>In respect of contraventions of a competition rule, the Competition Commission may apply to the Tribunal for, among other things, (i) an order for a pecuniary penalty (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 Competition Commission became aware of the contravention, whichever is the later.”</i></p>
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits?</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 Competition Commission becoming aware of it.</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision</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</p>

regarding sanctions? (see also 15A)

sanction of pecuniary penalty. Such an appeal would need to be brought within 14 days of the making of the decision.

12. Types of decisions

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.]

Where the **Competition Commission** has reasonable cause to believe that a person has contravened a Competition Rule, or been involved in such a contravention, the **Competition Commission** may initiate proceedings before the Tribunal seeking:

- (a) a pecuniary penalty (section 92) (see also 14. below);
- (b) other orders (section 94); and/or
- (c) a disqualification order.

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.

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:

- a) *a declaration that a person has contravened a competition rule;*
- b) *an order restraining or prohibiting a person from engaging in any conduct that constitutes the contravention or the person's involvement in the contravention;*
- c) *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;*
- d) *an order prohibiting a person from making or giving effect to an agreement;*
- e) *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;*
- f) *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;*
- g) *an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention;*

	<p><i>h) 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; or</i></p> <p>For a suspected contravention of the First Conduct Rule that does not involve Serious Anti-competitive Conduct, the Competition Commission must issue a warning notice before the Competition Commission can apply to the Tribunal. In all other cases prior to commencing proceedings in the Tribunal, the Competition Commission 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 Competition Commission will issue a press release as soon as practicable after commencing proceedings.</p>
<p>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).</p>	<p>See 12. A. above.</p>
<p>C. Can interim measures⁸ be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both⁹.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</p>	<p>The Competition Commission and the CA 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>

⁸ 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].

⁹ Only for agencies which answered “yes” to question 2.B. above

13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

<p>A. Grounds for the imposition of procedural sanctions / fines [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 Competition Commission's 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 Competition Commission (section 128(1) of the Ordinance).</p>
<p>B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):</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>C. On whom can procedural sanctions be imposed?</p>	<p>The sanctions can be imposed on any person. For the purposes of the Ordinance, persons can include individuals and undertakings.</p>
<p>D. Criteria for determining the sanction / fine:</p>	<p>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.</p>
<p>E. Are there maximum and / or minimum sanctions / fines?</p>	<p>Yes, these are set out in 13.A. above.</p>

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</p>	<p>Sanctions are imposed by the Tribunal on application by the Competition Commission or the CA.</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>There is no criminal offence for cartel conduct. However, in respect of individuals, apart from pecuniary penalty, sanctions include director disqualification.</p>
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<p>or the individual companies?]</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.</p> <p>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"> (a) the nature and extent of the conduct that constitutes the contravention; (b) the loss or damage, if any, caused by the conduct; (c) the circumstances in which the conduct took place; and (d) whether the person has previously been found by the Tribunal to have contravened the Ordinance. <p>The Ordinance explicitly does not limit other matters to which the Tribunal may have regard.</p> <p>Where the Competition Commission has applied to the Tribunal for a pecuniary penalty to be imposed on any person, the Competition Commission 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 obtained in Hong Kong for each year of contravention, up to a maximum of three years. There is no equivalent statutory cap for pecuniary penalties on individuals.</p> <p>There is no minimum fine.</p>
<p>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]</p>	<p>The Competition Commission has published its Policy on Recommended Pecuniary Penalties which sets out a 4-step approach to the formulation of recommended pecuniary penalties for undertakings and associations of undertakings:</p> <ul style="list-style-type: none"> Step 1 – Determining the base amount Step 2 – Making adjustments for aggravating, mitigating and other factors Step 3 – Applying the statutory cap Step 4 – Applying any cooperation reduction <p>It is ultimately for the Tribunal to determine the penalty amount that is appropriate. This Policy does not bind the Tribunal.</p> <p>The Competition Commission will generally apply the methodology set out in this Policy when determining a pecuniary penalty recommendation for undertakings and associations of undertakings but may depart from it according to the particularities of each case.</p>

<p>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?</p>	<p>Section 154(6) of the Ordinance states that, except in the case of an appeal against the imposition, or the amount, of a pecuniary penalty, 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>
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15. Possibilities of appeal

<p>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?</p>	<p>Yes. Section 154 of the Ordinance provides for appeals of 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. Before which court or agency should such a challenge be made? [if the answer to question 15/A is affirmative]</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>