

# Cooperation and Settlement Policy

for Undertakings Engaged  
in Cartel Conduct



April 2019

# Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct

*Under its Leniency Policy for Undertakings Engaged in Cartel Conduct (“**Leniency Policy**”), the Competition Commission (“**Commission**”) may make a leniency agreement with an undertaking that it will not bring or continue proceedings in the Competition Tribunal (“**Tribunal**”) for a pecuniary penalty in exchange for the undertaking’s cooperation in an investigation or in proceedings under the Competition Ordinance (Cap. 619) (“**Ordinance**”).*

*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 and Settlement Policy for Undertakings Engaged in Cartel Conduct (“**Policy**”) in exchange for benefits as set out in this Policy. Cooperation with the Commission’s investigation 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.*

*This Policy is an important tool in enhancing the Commission’s ability to conduct effective and efficient investigations into cartel conduct, which will in turn deter the occurrence of cartel conduct in Hong Kong. In view of these considerations, the Commission considers that it is in the public interest for the Commission to apply this Policy.*

*This Policy should be read alongside the Leniency Policy.*

*This Policy does not cover cooperation arrangements with undertakings engaged in non-cartel conduct that contravenes either the First Conduct Rule or Second Conduct Rule in the Ordinance. The Commission will exercise its enforcement discretion and consider cooperation arrangements in respect of such conduct on a case-by-case basis, applying this Policy, where and to the extent appropriate.*

*This Policy also does not cover cooperation arrangements with any persons who are not an undertaking.*



# 1. Introduction and overview

1.1 An undertaking may seek to cooperate with the Commission with a view to reaching a settled outcome to an investigation by way of orders made by consent as provided by Rule 39 of Competition Tribunal Rules (Cap. 619D) ("**Consent Order**") in accordance with this Policy if:

- (a) it is engaged in cartel conduct<sup>1</sup>; and
- (b) leniency in relation to the cartel conduct is not available.


## Key elements of the Policy

1.2 This Policy consists of the following key features:

- (a) First, this Policy applies only to cartel conduct. 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 cooperation provided by undertakings.
- (c) Third, if the undertaking meets all the conditions for cooperation under this Policy, the Commission will enter into a cooperation agreement with the undertaking ("**Cooperation Agreement**") and jointly apply with the undertaking for a Consent Order on the basis of a joint statement of agreed facts which will reflect the facts as set out in a summary of facts agreed by the undertaking and the Commission ("**Agreed Factual Summary**") (see paragraph 2.7 below).

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<sup>1</sup> Irrespective of whether its conduct may be qualified as a contravention of the First Conduct Rule or involvement in a contravention of the First Conduct Rule under Section 91 of the Ordinance.

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- (d) Fourth, in the Cooperation Agreement the Commission will agree to apply a cooperation discount of up to 50% on the pecuniary penalty that would otherwise be recommended to the Tribunal.
  - (e) Fifth, in the Cooperation Agreement the Commission may also agree not to take any proceedings against any current and former employees, officers, partners and agents of the undertaking provided that they fully and truthfully cooperate with the Commission.
  - (f) Sixth, a party to a Cooperation Agreement is required to continuously fulfill its requirements including co-operating with the Commission throughout the investigation and in any proceedings the Commission initiates before the Tribunal in relation to the reported conduct<sup>2</sup>. At an appropriate stage (usually at the end of the proceedings), the Commission will issue a letter confirming that all conditions under the agreement have been fulfilled.

## 2. Cooperation procedure

### **Stage 1: Indication of willingness to cooperate**

- 2.1 An undertaking subject to investigation may indicate its willingness to cooperate with the Commission under this Policy by making contact with the case manager concerned, either orally or in writing. Until confirming to an undertaking that it will accept cooperation under this Policy, the Commission retains full discretion to determine whether it will engage in cooperation with an undertaking under this Policy in that investigation.
- 2.2 In its discretion, the Commission may also approach undertakings subject to investigation to propose cooperation under this Policy.
- 2.3 The below paragraphs set out the procedure applicable to cooperation with the Commission during on-going investigations. In other cases, such as where proceedings have already been filed before the Tribunal, undertakings are welcome to indicate their willingness to cooperate with the Commission under this Policy, and the Commission may apply the procedure where and to the extent appropriate.

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<sup>2</sup> This shall include any subsequent appeal proceedings and remittals.



## Stage 2: Cooperation in the investigation

- 2.4 An undertaking cooperating with the Commission is required to provide documents and information through a proffer process. All documents, information, communications and representations provided in this stage are considered to be made on a “without prejudice basis”.<sup>3</sup> Any communications with the Commission may be made orally or in writing.
- 2.5 During this stage, the undertaking 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 undertaking’s behalf and information about the undertaking itself. The undertaking will be also required to provide access to evidence (e.g. documentary evidence relating to the cartel) and to make its employees, officers, partners and agents available to be interviewed by the Commission.<sup>4</sup> The Commission may ask the undertaking to provide any other information relevant to the investigation, including information relevant to the Commission’s assessment of a recommended pecuniary penalty.
- 2.6 At an appropriate time, and generally not before the provision of documents and information set out in paragraph 2.5 above, the Commission will provide the undertaking with a draft Agreed Factual Summary as established by the investigation to date and a draft Cooperation Agreement. At the same time, the Commission will offer the undertaking limited disclosure of a selection of key documents underpinning the draft Agreed Factual Summary. Upon the undertaking’s request and if it deems justified, the Commission may disclose additional documents.

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<sup>3</sup> But see paragraph 2.10 and footnote 6.

<sup>4</sup> Generally, in the context of cooperation the Commission will record voluntary interviews with cooperating individuals by way of a summary of the interview the accuracy of which will be confirmed by the relevant individual (“**Cooperating Individual Statement**”).




### **Stage 3: Entering into a Cooperation Agreement with an Agreed Factual Summary**

- 2.7 Where the Commission and the undertaking reach an understanding in principle on the draft Agreed Factual Summary and the draft Cooperation Agreement, the Commission will indicate to the undertaking the maximum recommended pecuniary penalty it would be willing to recommend to the Tribunal, which will include a discount for the cooperation provided. It will also indicate whether it intends to apply for any other orders under section 94 of the Ordinance. The undertaking will be asked to formally confirm within 10 working days whether it wishes to continue cooperation by signing the Cooperation Agreement including the Agreed Factual Summary. The Commission will consider reasonable requests, supported by evidence, for an extension of this period on the basis that the 10 working day period is insufficient to obtain formal confirmation.
- 2.8 The Cooperation Agreement will contain the Agreed Factual Summary and will ordinarily require the undertaking to confirm that:
- (a) it has provided and will continue to provide full and truthful disclosure to the Commission;
  - (b) it has, unless requested by the Commission otherwise, taken prompt and effective action to terminate its participation in the cartel conduct<sup>5</sup>;
  - (c) it will keep confidential all aspects of the Cooperation Agreement and the cooperation process unless the Commission's prior consent has been given or the disclosure of information is required by law;
  - (d) 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;

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<sup>5</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 by competition authorities in other jurisdictions.

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- (e) 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
  - (f) it will make a joint application with the Commission for a Consent Order under terms set out in the Cooperation Agreement, including that:
    - i. the undertaking will make joint submissions with the Commission to the Tribunal in support of a finding that the undertaking contravened the First Conduct Rule or was involved in a contravention of the First Conduct Rule, as appropriate, on the basis of the Agreed Factual Summary;
    - ii. the undertaking will pay the Government a pecuniary penalty pursuant to section 93 of the Ordinance in a sum to be assessed by the Tribunal on the basis of a joint recommendation by the undertaking with the Commission at a level not exceeding the maximum indicated under paragraph 2.7 above; and
    - iii. the undertaking will bear the Commission's costs of any proceedings against the undertaking, the application under Rule 39 of the Competition Tribunal Rules and the hearing (if any) to be taxed if not agreed.

2.9 The Commission reserves the right to discontinue cooperation with an undertaking at any stage before the Cooperation Agreement has been signed, if it has reasonable grounds to suspect that the undertaking has failed to comply with any of the requirements as set out in paragraphs 2.4 to 2.6 and 6.1.



2.10 Where the undertaking and the Commission do not proceed to enter into a Cooperation Agreement, documents and information provided by the undertaking and records of any interviews with the undertaking's cooperating employees, officers, partners or agents will not be used directly<sup>6</sup> as evidence in the Commission's investigation or any subsequent proceedings and the Commission will endeavour to ensure that the same protection from disclosure is afforded to these documents in the same way as communications with unsuccessful leniency applicants. The Commission, however, reserves the right to obtain that same information by using its powers under the Ordinance and to make indirect use of documents and information provided in the context of cooperation.<sup>7</sup>

#### **Stage 4: Ongoing compliance with the terms of the Cooperation Agreement and the issuance of a final letter**

2.11 The undertaking is required to ensure continued compliance with the terms of the Cooperation Agreement.

2.12 At an appropriate time (usually at the end of any proceedings by the Commission before the Tribunal or other courts against the party to the Cooperation Agreement and other participants in the cartel conduct<sup>8</sup>), the Commission will issue a final letter to the undertaking to confirm that all conditions under the Cooperation Agreement have been fulfilled.

### **3. Cooperation Benefits**

3.1 In return for cooperation provided by the undertaking, the Commission will agree to apply a discount to the pecuniary penalty it would otherwise recommend to the Tribunal ("**Cooperation Discount**").

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<sup>6</sup> The Commission does, however, reserve the right to make direct use of a Cooperating Individual Statement in the context of any proceedings following an action filed by the Commission if the individual statement maker gives evidence inconsistent with the Cooperating Individual Statement. In such situation, the Commission reserves the right to use the Cooperating Individual Statement for the purpose of calling the relevant individual's credibility into question.

<sup>7</sup> For the avoidance of doubt, 'indirect use' covers derivative use in the context of an investigation, e.g. to develop facts through further investigation on the basis of knowledge gained by the Commission from documents and information provided as part of cooperation.

<sup>8</sup> This shall include any subsequent appeal proceedings and remittals.



3.2 The Commission may also agree not to bring any proceedings against any current and former officers, employees, partners and agents 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 in relation to that conduct.

3.3 Where an undertaking indicates its willingness to cooperate with the Commission (as set out at paragraphs 2.1 to 2.3 above) before the commencement of any Tribunal proceedings against it, the Commission will identify an applicable band of a Cooperation Discount based on the order in which undertakings express their interest to cooperate:

	<b>Recommended discounts</b>
Band 1	Between 35% and 50%
Band 2	Between 20% and 40%
Band 3	Up to 25%

3.4 The Commission will ordinarily indicate Band 1 to the first undertaking to express its interest to cooperate<sup>9</sup>. Undertakings that come forward after the first undertaking will be identified as falling into Band 2 or 3 depending on the order in which they come forward. The Commission may decide, on a case by case basis, to include more than one undertaking in to each band.

3.5 The Commission will determine the actual Cooperation Discount within the applicable band, having regard to the timing, nature, value and extent of cooperation provided by the undertaking. Such determination will be communicated to the undertaking at stage 3 (paragraph 2.7 above) with the draft Cooperation Agreement and the draft Agreed Factual Summary.

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<sup>9</sup> Until confirming to an undertaking that it will accept cooperation under this Policy, the Commission retains full discretion to determine whether it will engage in cooperation with an undertaking under this Policy in that investigation or the band in which it will accept cooperation.



- 3.6 If an undertaking is the first to provide the Commission with information or evidence that allows the Commission to prove additional facts extending the duration or gravity of the contravention, the Commission will not take into account such additional facts when calculating the undertaking's recommended pecuniary penalty.
- 3.7 Where an undertaking begins to cooperate with the Commission only after the commencement of any enforcement proceedings against it, the Commission may recommend a Cooperation Discount of up to 20%.

## 4. Leniency Plus

- 4.1 An undertaking cooperating with the Commission under this 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**").
- 4.2 The Commission will apply an additional discount of up to 10% of the recommended pecuniary penalty for an undertaking involved in the First Cartel, provided that:
  - (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,("Leniency Plus Discount").
- 4.3 The Commission will take into account the following factors when determining the level of Leniency Plus Discount:
  - (a) the strength of evidence provided by the undertaking in respect of the Second Cartel;

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- (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.

4.4 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.

## **5. Terminating the Cooperation Agreement and revoking protection for officers, employees, partners and agents**

- 5.1 The Commission will generally only consider terminating a Cooperation Agreement with an undertaking if it has reasonable grounds to suspect that the undertaking has at any time knowingly or recklessly provided false or materially incomplete information to the Commission or has otherwise failed to comply with the terms of the Cooperation Agreement.
- 5.2 Where the Commission is of the view that it may be appropriate to terminate a Cooperation Agreement, it will, in the first instance, inform only the party to the Agreement of its concerns and the party to the Cooperation Agreement will be given an opportunity to address the Commission's concerns within a reasonable period of time.
- 5.3 If the Commission's concerns remain unaddressed, the Commission will only then proceed with the termination of the Cooperation Agreement which will be carried out in the same process as that provided for in sections 81(2) to (5) of the Ordinance.
- 5.4 Information provided by an undertaking to the Commission pursuant to a Cooperation Agreement which has been terminated may be retained by the Commission and used directly as evidence against that undertaking and other participants in the cartel conduct.



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

- 5.5 Where a Cooperation Agreement with an undertaking is terminated, the Commission may exercise its enforcement discretion not to commence enforcement proceedings against current and former officers, employees, partners and agents of the undertaking whom previously benefited from the protection of the Cooperation Agreement in return for the on-going cooperation of those persons with the Commission.
- 5.6 The Commission may revoke protection from proceedings by the Commission for current and former officers, employees, partners and agents of the undertaking and/or any other individuals specifically named in the Cooperation 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 intends to revoke protection for that individual.

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

### **Confidentiality of cooperation**

- 6.1 To support the Commission's ability to conduct effective investigations, the cooperating undertaking is required to keep confidential the fact of the investigation, the Cooperation Agreement (including any non-public information received by the undertaking from the Commission in that context and any discussions prior to entering into a Cooperation Agreement) and the terms of any Cooperation 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 an undertaking is contemplating whether to disclose any information relating to the cooperation on the grounds that such disclosure is required by law, the undertaking must notify the Commission in advance of such disclosure, unless prevented by law from doing so.



## Release of information provided by an undertaking to the Commission

6.2 The documents and information relating to cooperation include:

- (a) Information provided to the Commission by an undertaking for the purpose of entering into a Cooperation Agreement and/or pursuant to a Cooperation Agreement; and
  - (b) The Commission's records of the cooperation process, including the Agreed Factual Summary and Cooperation Agreement,
- (collectively, "**Cooperation Material**").

6.3 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information<sup>10</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.

6.4 While the Commission reserves the right to use and disclose Cooperation Material with appropriate confidentiality protections in its investigations and any proceedings before the Tribunal or other courts under terms set out in this Policy, it is the Commission's general policy not to release Cooperation Material (whether or not it is confidential information under section 123 of the Ordinance) in connection with non-Commission-initiated criminal and civil 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 Cooperation Material, including the fact that cooperation 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;

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<sup>10</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.



- (b) It has the consent of the party to the Cooperation Agreement to disclose the material; or
- (c) The relevant information or document is already in the public domain.

- 6.5 If a third party makes an application in whatever form seeking to compel the Commission to disclose Cooperation Material, the Commission will advise the party to the Cooperation Agreement of that application as soon as possible.
- 6.6 Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations.

## **7. No Further Action**

- 7.1 If the Commission decides not to pursue further a matter which is the subject of a Cooperation Agreement, it will advise the party to the Cooperation Agreement of this outcome.



## Annex A

# Template Cooperation Agreement with an Undertaking Engaged or involved in Cartel Conduct

*This template contains the standard terms to be used in cooperation agreements concluded under the Competition Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct.*

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

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**CONFIDENTIAL**

### COOPERATION AGREEMENT

This Cooperation 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 cooperation]** (the "**Cooperating Party**")

*[There may be a number of parties to the agreement with the Commission where the Cooperating 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 Cooperating Party has applied to cooperate with the Commission under the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct issued on 29 April 2019 (the "**Cooperation Policy**") in relation to the Cartel.
- (3) The Commission considers the Cooperating Party as of the date of this agreement meets the conditions to enter into a cooperation agreement as provided for in the Cooperation 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 Cooperating 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) "**Agreed Factual Summary**" means the summary of facts agreed by the Cooperating Party and the Commission set out in Annex 3.
  - (c) "**Cooperation Agreement Process**" means the process from the point at which the Cooperating Party indicated its willingness to cooperate with the Commission under the Cooperation Policy until the date of this Agreement.




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- (d) “**Cooperation Discount Percentage**” means [percentage discount]% [and includes a Leniency Plus Discount which, pursuant to the application of clause 2.2, may be removed from the Cooperation Discount Percentage].
- (e) “**Confidential Cooperation Information**” means any information relating to the Cooperation Agreement Process or provided pursuant to this Agreement (or both), including, without limitation this Agreement, the fact that the Cooperating Party has sought to enter into this Agreement and, for avoidance of doubt, includes:
- i. any confidential information provided to the Commission by the Cooperating Party or the Protected Individuals (as defined in subsection (n) *infra*) for the purposes of entering into this Agreement;
  - ii. the Agreed Factual Summary prior to its filing in the Competition Tribunal; and
  - iii. any confidential information obtained by the Cooperating Party or the Protected Individuals as a result of the Cooperation Agreement Process or under this Agreement.
- (f) “**Court**” means the Competition Tribunal, and other courts of Hong Kong.
- (g) “**Excluded Individuals**” means individuals who are current officers, directors, employees or partners of the Cooperating Party, and are identified in Annex 2 to this Agreement as may be amended pursuant to clauses 5.1 or 5.2.
- (h) “**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.



- (i) **"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.
- (j) **"Joint Application"** means a joint application to the Competition Tribunal, pursuant to Rule 39 of the Competition Tribunal Rules (Cap. 619D), for the making of an order by consent on the agreed terms set out in clause 4.1(f)(ii) and Annex 4.
- (k) [**"Leniency Plus Discount"** means a discount of **[percentage discount]**% applied pursuant to paragraph 4.2 of the Cooperation Policy.]
- (l) **"Parties"** means the Commission and the Cooperating Party.
- (m) **"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.
- (n) **"Protected Individuals"** means:
  - i. any current officers, directors, employees or partners of the Cooperating Party who are not Excluded Individuals; and
  - ii. the Additional Individuals.

## 2. Obligations of the Commission

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

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- (b) in any Proceedings involving an application under section 92 of the Ordinance for the imposition of a pecuniary penalty on the Cooperating Party,
    - i. to recommend to the Competition Tribunal that the amount of the pecuniary penalty be reduced by the Cooperation Discount Percentage; and
    - ii. not to recommend a pecuniary penalty which, after application of the Cooperation Discount Percentage, exceeds the maximum recommended amount indicated in Annex 4.

2.2 Notwithstanding clause 2.1(b), where

- (a) a Leniency Plus Discount has been applied; and
- (b) the leniency agreement in respect of the “Second Cartel”, as defined in the Cooperation Policy, has been terminated, the Cooperation Discount Percentage shall be reduced by an amount equal to the Leniency Plus Discount.

### **3. Representation and warranties of the Cooperating Party**

3.1 The Cooperating 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 Cooperation Information unless:
  - i. the disclosure was made to its legal advisor for the purposes of obtaining or receiving advice on the Cooperation Agreement Process 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 4.2 are met;
- (b) except as otherwise expressly authorised by the Commission, as of **[Date of the application for cooperation]** it has refrained from further participation in the Cartel and shall continue to do so;
- (c) the information provided to the Commission prior to entering into this Agreement as part of the Cooperation Agreement Process was and remains complete and is not false nor misleading in any material particular. This includes, but is not limited to, the content of the Agreed Factual Summary; and
- (d) that any opinion provided to the Commission with respect to the Cartel was and remains honestly held.

#### **4. Obligations of the Cooperating Party**

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

- (a) will continue to maintain full and truthful cooperation with the Commission throughout the Investigation and any ensuing Proceedings. Save as otherwise agreed with the Commission, the Cooperating Party shall continue to:
  - 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 Cooperating Party, 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 Cooperating Party shall continue to 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 continue to 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. where it has not already done so, 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 Cooperating 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 continue to ensure that it and the Protected Individuals keep confidential the Confidential Cooperation Information unless:
  - i. the Cooperating Party has the Commission's express written consent to release the Confidential Cooperation Information; or
  - ii. the release of the Confidential Cooperation Information is required by law and the conditions provided in clause 4.2 are met;
- (d) will, where the Commission has requested that the Cooperating 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;
- (e) will agree to continue with, or adopt and implement, at its own costs, a corporate compliance programme to the satisfaction of the Commission; and
- (f) will:
  - i. to the satisfaction of the Commission, agree to and sign a statement of agreed facts in a form that is in accordance with paragraph 72 of the Competition Tribunal Practice Direction No. 1, based on the Agreed Factual Summary;
  - ii. together with the Commission make a Joint Application, the agreed terms of which shall comprise:
    - a. a declaration under section 94 of the Ordinance, in conjunction with section 1(a) of Schedule 3 to the Ordinance, that the Cooperating Party has contravened the First Conduct Rule or been involved in a contravention of the First Conduct Rule by engaging in the Cartel;

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- b. the imposition under section 93 of the Ordinance of a pecuniary penalty on the Cooperating Party, in a sum to be assessed by the Competition Tribunal on the basis of a joint recommendation by the undertaking with the Commission which shall reflect the terms agreed by the Commission in clause 2.1(b) above; and
  - c. any further terms provided in Annex 4;
  - iii. to pay the Commission's costs of the Proceedings including the Joint Application, to be taxed if not agreed; and
  - iv. take any other step reasonably requested by the Commission in respect of the Joint Application.

4.2 Where the Cooperating Party considers that the release of Confidential Cooperation Information is required by law, it shall:

- (a) promptly notify the Commission of the content and form of the proposed disclosure, and why the Cooperating 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 the Agreement was entered into; or
  - iv. obstructed or attempted to obstruct the Investigation or Proceedings.



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- (b) The Commission has given notice in writing to the individual and the Cooperating 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 from the protection provided for in clause 2.1 of this Agreement;
    - ii. the reasons for making such amendment; and
    - iii. that both the Cooperating 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 following grounds for termination are present:
  - (a) The Cooperating Party agrees to the termination;
  - (b) The Commission has reasonable grounds to suspect that the information on which it based its decision to make the agreement, including without limitation any information contained in the Agreed Factual Summary, was incomplete, false or misleading in a material particular;
  - (c) The Cooperating Party or any Protected Individual has been convicted of an offence under Part 3 of the Ordinance; and/or



(d) The Commission is satisfied that the Cooperating Party or a Protected Individual has failed to comply with the terms of the agreement,

(the “**Grounds for Termination**”).

6.2 Where the Commission suspects that one or more of the Grounds for Termination are present the Commission will:

(a) inform the Contracting Party that it suspects a Ground for Termination to have been met and the basis for its suspicion;

(b) provide a reasonable period of time for the Contracting Party to address its concern; and

(c) confirm after the expiry of such period of time whether its concerns have been addressed.


6.3 When the Commission’s concerns remain unaddressed pursuant to the process in clause 6.2, the Commission may terminate this Agreement by giving notice in writing to the other party to the agreement and to any other person who appears to the Commission to be likely to benefit from the agreement, stating:

(a) the date of the termination; and

(b) the reasons for the termination.

6.4 A notice under clause 6.3 must specify the period within which representations may be made to the Commission about the proposed termination.

6.5 The period specified for the purposes of clause 6.4 must be a period of at least 30 days beginning after the day on which the notice is given.

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- 6.6 Before terminating this Agreement, the Commission must consider any representations about the proposed termination that are made to it.
- 6.7 If this Agreement is terminated, the Commission may at its discretion:
- (a) commence Proceedings against the Protected Individuals including, without limitation, proceedings seeking a pecuniary penalty under section 93 of the Ordinance; and
  - (b) not apply the Cooperation Discount Percentage to any pecuniary penalty it recommends to the Competition Tribunal in Proceedings commenced against the Cooperating Party. For the avoidance of doubt, the Commission is in no way bound by the indication of the pecuniary penalty it would recommend or the basis on which any pecuniary penalty recommendations will be made.

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

- 7.1 The Commission may use any information or documents provided by the Cooperating Party under this Agreement for the purpose of any investigation and proceedings under the Ordinance, including Proceedings against the Cooperating Party and Protected Individuals.
- 7.2 All Confidential Cooperation Information provided to the Commission by the Cooperating Party or the Protected Individuals, may, notwithstanding the termination of the Agreement under clause 6 of the Agreement, 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 Cooperating 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 Cooperation Information or the Commission's records developed during the Cooperation Agreement Process or the entering into of this Agreement, the Commission will, to the extent reasonably possible, give the Cooperating Party prompt notice and shall, in any event, use its best endeavours to resist disclosure unless Cooperating 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 Cooperating Party in accordance with paragraph 2.12 of the Cooperation 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: [•@compcomm.hk]



**If to the Cooperating Party to:**

**[Address]**

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 Cooperating Party and supersedes all prior representations, writings, negotiations or understandings, whether oral or written, between the Commission and the Cooperating Party relating to 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 Cooperating Party**]

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

Date:

Name:

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

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

Date:

Name:

Position:

Annex 1 – Additional Individuals

Annex 2 – Excluded Individuals

Annex 3 – Agreed Factual Summary

Annex 4 – Further Terms



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