Leniency Under the Hong Kong Competition Ordinance

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This contribution provides an overview of the "Leniency Policy for Undertakings Engaged in Cartel Conduct" (the "Leniency Policy") published by the Hong Kong Competition Commission ("Commission") on 19 November 2015.[2]

The Commission has made it clear that prosecuting cartels would be high up on its agenda for the enforcement of the Competition Ordinance (the "Ordinance"), which came into force on 14 December 2015.[3]

The experience in other jurisdictions shows that a transparent and well-functioning leniency program is a cornerstone for the effective prosecution of cartels. The Leniency Policy contains many attractive elements, notably full immunity from fines for the first to report and a pledge by the Commission to treat the information provided by a leniency applicant confidentially. However, it also contains elements that may prove a disincentive to self-report, such as a requirement to provide a written admission of wrongdoing, as well as aspects which may create uncertainty. These potential flaws are partly a consequence of the framework imposed by the Ordinance, and it will be necessary to observe how the Commission applies its Leniency Policy before rendering a verdict on its predictability, its benefits and, ultimately, its effectiveness.

1. Introduction: The Competition Ordinance In A Nutshell

The Ordinance was adopted in 2012. This set in motion a two-staged approach to establishing Hong Kong's first-ever, sector-neutral competition regime: first the necessary foundations were created under the institutional provisions, setting up the Competition Commission and a Competition Tribunal (the "Tribunal"); and second, the actual entry into force of the substantive provisions.

1.1. Substantive Provisions

The Ordinance creates three competition rules (the "Competition Rules"), comprised of two "Conduct Rules" and the "Merger Rule".[4] The Conduct Rules prohibit two broad types of conduct:

- The *"First Conduct Rule"* prohibits anti-competitive agreements, concerted practices and decisions of members of associations of undertakings (such as industry associations) having either the object or effect of preventing, restricting or harming competition in Hong Kong; and
- The *"Second Conduct Rule"* prohibits an abuse of a substantial degree of market power having its object or effect of preventing, restricting or harming competition in Hong Kong.

Under the First Conduct Rule, an agreement or concerted practice will be viewed as harming competition by *object,* where it can be regarded by its very nature to be so harmful to the proper functioning of normal competition in the market, such that there is no need to examine the effects.[5] The Ordinance also creates a subcategory of "Serious Anti-Competitive Conduct"

under the First Conduct Rule for horizontal arrangements seeking to fix prices, share markets, restrict output or rig bids.[6] The Commission classifies such conduct as "cartel conduct" with the object of preventing, restricting or distorting competition in Hong Kong.[7]

1.2. Enforcement Mechanism

The Commission cannot directly impose sanctions for contravention of the Competition Rules. It must rather apply to the Tribunal to have sanctions imposed.

If the Commission concludes that a contravention of the First Conduct Rule occurred but the conduct does not amount to "Serious Anti-Competitive Conduct", the Commission is first obliged to issue a "Warning Notice" to the undertaking concerned and provide it with a specified period within which to comply with the notice.[8] For other types of conduct (Serious Anti-Competitive Conduct under the First Conduct Rule and all conduct under the Second Conduct Rule), the Commission is not obliged to issue such a warning and may instead issue an "Infringement Notice" before commencing proceedings before the Tribunal or directly commence proceedings before the Tribunal without issuing a Warning Notice or an Infringement Notice.

If the Commission issues an Infringement Notice, it will offer not to bring or continue proceedings before the Tribunal on the condition that the undertaking under investigation commits to comply within a specified period of time with the requirements set out in the notice. According to Section 67 of the Ordinance, these requirements may include refraining from any specified conduct and admitting to a contravention of the relevant Conduct Rule. Importantly, these requirements may not include a payment to the Government. Given this last condition, it is expected that the Commission will not use the Infringement Notice mechanism for cartel conduct. If the undertaking concerned fails to comply with the Infringement Notice, the Commission may commence proceedings before the Tribunal.

1.3. Sanctions and Damages

The Tribunal has wide-ranging powers including the authority to:[9]

- issue an order that undertaking(s) have contravened the Conduct Rules;
- impose "pecuniary penalties" of up to 10% of an undertakings total gross revenues generated in Hong Kong for the duration of the contravention (capped at three years);[10]
- prohibit a person from making or giving effect to an agreement;
- issue an order to pay damages to any person who has suffered loss or damage as a result of the contravention;
- issue an order prohibiting a person from acquiring, disposing of or dealing with property; and
- issue an order disqualifying directors of an undertaking where they are considered unfit to manage.

A private party cannot bring a stand-alone action before the Tribunal. The Tribunal must first have ruled on the legality of the alleged contravention and only then can a claimant bring a follow-on action, if it can show that it suffered loss or damage as a result of any act which has been ruled by the Tribunal to amount to a contravention of the Competition Rules.[11]

2. The Leniency Policy

The Ordinance laid the foundations for the creation of the Leniency Policy. Section 80 of the Ordinance grants the Commission the ability to enter into a "leniency agreement" where the Commission agrees not to initiate a proceeding seeking a "pecuniary penalty" before the Tribunal in exchange for the applicant's timely cooperation in an investigation:

"(1) The Commission may, in exchange for a person's cooperation in an investigation or in proceedings under this Ordinance, make an agreement (a "leniency agreement") with the person, on any term it considers appropriate that it will not bring or continue proceedings under Part 6 for a pecuniary penalty in respect of an alleged contravention of a conduct rule against:

> *a) if the person is a natural person, that person or any employee or agent of that person;*
> *b) if the person is a corporation, that corporation or any officer, employee or agent of the corporation;*
> *c) if the person is a partner in a partnership that partnership or any partner in the partnership, or any employee or agent of the partnership; or*
> *d) if the person is an undertaking other than one referred to in paragraph (a), (b) or (c), that undertaking or any officer, employee or agent of the undertaking, in so far as the contravention consists of the conduct specified in the agreement.*

(2) The Commission must not, while a leniency agreement is in force, bring or continue proceedings under Part 6 for a pecuniary penalty in breach of that leniency agreement"

On 23 September 2015, the Commission published its Draft Leniency Policy on its website for public consultation.[12] In response, twenty organisations, including domestic and overseas companies, industry associations, bar associations, law societies and law firms submitted comments which were published on the Commission's website.[13] Following this public consultation period, the Commission issued its finalised Leniency Policy on 19 November 2015.[14]

According to the Leniency Policy, the Commission considers leniency to be *"a key investigative tool used by competition authorities around the word to combat cartels"*. The Commission recognises that cartel conduct is different from other types of anti-competitive conduct, because cartels are *"universally condemned as economically harmful"* and are "*usually organised and implemented in secret, making them more difficult to detect"*.[15] For this reason, the Leniency Policy only applies to cartel conduct and its provisions intend to provide

"strong and transparent incentives for a cartel member to stop its cartel conduct and to report the cartel".[16]

Under the Leniency Policy, full immunity from pecuniary sanctions is available for the first cartel member to report the conduct to the Commission. The benefits of leniency extend to the company as well as any current officers, employees and agents of the leniency applicant who cooperate with the Commission's investigation. Former officers, employees and agents may also receive leniency protection at the discretion of the Commission. As described below, the Leniency Policy provides limited guidance on the benefits available for undertakings that provide cooperation but do not qualify for leniency.[17] The Leniency Policy also includes information on the application process; confidentiality obligations; the process for terminating leniency agreements; and a template for leniency agreements.

2.1. Who Can Benefit From The Leniency Policy?

A) Only undertakings

Leniency applications may only be made by undertakings. Undertakings are defined as "*any entity (including natural persons), regardless of its legal status or the way in which it is financed, which is engaged in an economic activity*".[18] This means that an employee or director who may, of their own accord, wish to "blow the whistle on a company" will not be able to benefit from the Leniency Policy. This may have significant implications given that the Ordinance does not exclude the possibility of imposing pecuniary penalties on employees or directors of an undertaking. By contrast, in the US, an Individual Leniency Policy is available for individuals who wish to come forward of their own accord.

While only undertakings can contravene the Competition Rules, under Part 6 of the Ordinance,[19] sanctions can be imposed by the Tribunal on a "*person involved in a contravention*" which may include a person who *"[…] aids, abets, counsels or procure any other person to contravene the rule*".[20] This may include employees, directors or even facilitators.

The impossibility for directors or employees to seek leniency under the Leniency Policy beyond the undertaking for whom they work(ed) is a potential disincentive for them to blow the whistle on an undertaking, unless they come forward with their employer.

B) Cooperation benefits for "second-ins"

As already noted, the benefit of the Leniency Policy is limited to the first undertaking to self-report and fulfil the requirements for leniency.[21] For undertakings that do not hold the first-in marker, but cooperate fully with the Commission, the Leniency Policy provides that the Commission will "*exercise its enforcement discretion*" and "*will consider a lower level of enforcement action, including recommending to the Tribunal a reduced pecuniary penalty or the making of an appropriate order under Schedule 3 to the Ordinance*".[22] However, in the

absence of further guidance by the authority or any legal precedent, significant uncertainties remain for companies who are considering whether to cooperate with a Commission investigation. First, no guarantees exist as to whether and to what extent the Commission will, in return for their cooperation, make favourable recommendations to the Tribunal; and second, since there are no guarantees that the Tribunal will (and if so, to what extent) take into account such recommendations. Therefore, for a company that does not hold the first-in marker status, the benefits for cooperating remain very unclear.

It is noteworthy that the Commission has not excluded the possibility of entering into a leniency agreement with more than one cartel member, although according to the Leniency Policy this will only apply in exceptional circumstances,[23] which are not further defined.

2.2. Timing of an Application

Timing will be of the essence when making a leniency application. The more advanced the Commission's investigation, the less likely it is that a leniency applicant will be successful in obtaining leniency. This is because, absent exceptional circumstances, the Commission will not entertain leniency applications if it has already decided to issue an Infringement Notice pursuant to Section 67 or to make an application to the Tribunal under Part 6 of the Ordinance in respect of the conduct reported by the undertaking.[24]

Excluding a leniency application after the Commission refers the matter to the Tribunal limits the scope of leniency beyond what may have been intended by the Hong Kong legislator in Section 80 of the Ordinance. Under that provision, the Commission may enter into leniency agreements not only in exchange for not bringing an action before the Tribunal but also for not *continuing* proceedings for pecuniary penalty before the Tribunal under Part 6 of the Ordinance. This would imply that the Commission may enter into leniency agreements even after the proceedings have commenced before the Tribunal. Although the Leniency Policy does not exclude the possibility to accept leniency applications after an Infringement Notice has been issued or once proceedings have commenced before the Tribunal, it will only do so in "exceptional circumstances", which are not further defined. It will therefore be necessary to wait and see how the Commission decides to apply these provisions in practice.

2.3. What Conduct Can Be Reported Under The Leniency Policy?

The scope of Section 80 of the Ordinance appears to be much broader than the Leniency Policy. Section 80 enables the Commission to enter into leniency agreements with undertakings in respect of "*an alleged contravention of a conduct rule*". The term "Conduct Rule" refers to both the First Conduct Rule (anticompetitive agreements) and the Second Conduct Rule (abuses of substantial market power).[25]

Yet, the Commission's Leniency Policy is much narrower in scope, only applying to cartel conduct which has the object of preventing, restricting or distorting competition, i.e., agreements and/or concerted practices between competing undertakings to fix prices, share

markets, restrict output or rig bids.[26] The benefit of the Leniency Policy appears therefore not to be available for conduct concerning, for example, resale price maintenance or exchanges of information that may be capable of anticompetitive effects, unless these practices are used to give effect to a cartel.[27] At this stage, it is unclear how the Commission intends to apply Section 80 to leniency applications for conduct other than cartels.

2.4. Procedural Aspects of the Leniency Policy

The Leniency Policy sets out the key procedural conditions and requirements for entering into a leniency agreement with the Commission. These can be summarized as follows:

Applying for a marker.[28] Since full leniency can only be granted to the first applicant to satisfy the eligibility requirements, the Commission has put in a place a "marker system" to establish a queue in the order of when a company comes forward and seeks leniency. Marker systems are used in most jurisdictions with leniency programs, including the EU and the United States. The use of markers is designed to incentivise an applicant to come forward when it first learns of possible wrongdoing. The evidentiary threshold for obtaining a marker is relatively low, with no requirement that the applicant admit to wrongdoing before the marker is granted. Instead, an applicant reports its suspicion of possible wrongdoing to the authority and is granted time to investigate more thoroughly the conduct. The marker ensures that no other party can leap ahead of the applicant while the applicant conducts its internal investigation and seeks to perfect its leniency application.

Potential applicants (or their legal representatives) can contact the Commission on a designated Leniency Hotline on a no-names basis to ascertain whether a marker is available for cartel conduct in a particular industry or market. However, in order to obtain an actual marker, the applicant will have to disclose sufficient information, including its identity and contact details, the nature of the cartel and the product(s) or service(s) potentially involved, and the main participants. If these conditions are satisfied, the applicant will be granted a marker securing its place at the front of the queue while it continues to investigate the conduct.

Invitation to apply for leniency.[29] Following a marker request, the Commission will determine whether the conduct constitutes cartel conduct and whether leniency is available. Leniency is only available to the first to report, only applies to cartels, and, except in exceptional cases, is only available if the Commission has not yet commenced proceedings before the Tribunal or sent an Infringement Notice.

Where leniency is available, the holder of the highest-ranking marker will be invited to submit a leniency application within a particular deadline. Other undertakings that have obtained a lower-ranking marker will be informed that they are not eligible for full immunity from pecuniary sanctions but may still benefit from a reduction in sanctions if they fully cooperate.

The proffer.[30] As noted above, after receiving its marker, an applicant will be given additional time to investigate before being required to provide the Commission with a detailed description of its conduct. The proffer should include an explanation of how the conduct affects competition in Hong Kong and an estimation of the volume of affected sales in Hong Kong. Following the proffer, the Commission will consider the information provided and decide whether to enter into a leniency agreement.

The proffer of information can be made orally on a "without prejudice" or hypothetical basis in order to protect the applicant from having the information provided in the proffer subsequently used against it. The Commission may request access to some evidence and/or witnesses. However, information provided during the proffer stage may not be used as evidence against the undertaking or any other person in any subsequent proceedings before the Tribunal and any information will be returned to the applicant if a leniency agreement is not reached.[31]

The leniency agreement.[32] The Commission has published a template leniency agreement as Annex A to its Leniency Policy. The most notable conditions include representations and warranties from the applicant to the following effect:

- it (including current or former officers, employees or agents) did not coerce the other cartel participants;
- it took prompt and effective action to terminate its participation in the cartel, except where authorized by the Commission to avoid tipping-off other parties;
- it will maintain continuous and complete cooperation with the Commission;
- it will agree to sign a statement of facts admitting its participation in the cartel; and
- it will implement an effective corporate compliance programme.

Note that the leniency agreement must be executed by an officer of the undertaking and cannot be made through external legal counsel. Once the leniency agreement has been entered into, the applicant will have to provide the Commission with the non-privileged documents supporting its proffer as well as access to its employee witnesses without delay.

The Statement of Facts. As explained above, as part of the leniency agreement, the applicant will be required to sign a statement of agreed facts ("Statement of Facts") admitting to its participation in the cartel. This written statement will be used for the purpose of a joint statement by the Commission and the leniency applicant to the Tribunal requesting an order under Section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in cartel conduct.[33]

The Statement of Facts requirement attracted a high degree of criticism during the consultation process, particularly from stakeholders outside Hong Kong, and rightly so. A signed Statement of Facts amounts to an admission of wrongdoing which could carry severe consequences in follow-on private damage litigation in Hong Kong, as well as in the United

States and potentially elsewhere depending on the scope of the conduct. For example, private plaintiffs in U.S. civil litigation may be expected to argue that a written Statement of Facts is subject to discovery and is admissible against the leniency applicant (although not against other cartel members).

In order to avoid creating a disincentive to self-reporting, most jurisdictions with leniency programs have moved away from requiring written admissions of wrongdoing and have instead adopted a paperless process for leniency applications. In the consultation process, the Commission was urged to adopt a paperless process similar to that of the European Commission. Following the consultation period, the Commission added language to the Leniency Policy announcing its intentions to protect leniency materials from disclosure, but it did not amend the requirement that applicants sign a written Statement of Facts. The changes offered by the Commission do not resolve the concerns surrounding a written admission of wrongdoing. If a written Statement of Facts exists, a private plaintiff may be able to obtain it in civil discovery directly from the leniency applicant, even if it is unsuccessful in obtaining it from the Commission. The written Statement of Facts requirement will remain a disincentive for self-reporting for applicants at risk of private damages exposure.

Benefits of the leniency agreement.[34] A leniency agreement obligates the Commission not to seek pecuniary penalties against the applicant. It also prevents the Commission from seeking any other order from the Tribunal, with the exception of a Section 94 order declaring that the applicant has violated the First Conduct Rule. Thus, the Commission may not apply to the Tribunal to request, for example, that a director be disqualified. However, the Tribunal can impose non-pecuniary sanctions of its own motion. The Tribunal could therefore decide to impose non-pecuniary penalties (for example a disqualification order) on the leniency applicant, even if this is not requested by the Commission. This could be the case when the Tribunal is hearing the case for imposing an order that the applicant has violated the First Conduct Rule, or when the leniency applicant is subject to a follow-on damage claim by one of the cartel's victims. The Tribunal is, however, likely to be mindful not to undermine the Leniency Policy by imposing non-pecuniary penalties of its own motion upon the leniency applicant.

When the Leniency applicant is a company, the benefits will extend to the company as well as any current officers, employees and agents of the leniency applicant who cooperate with the Commission's investigation. Former officers, employees and agents may also receive leniency protection if, at the Commission's discretion, they are specifically named in the leniency agreement.[35]

Termination of the leniency agreement.[36] Under Section 81 of the Ordinance, the Commission may terminate a leniency agreement where it has "reasonable grounds" to suspect that the applicant provided incomplete, false or materially misleading information or has otherwise failed to comply with the terms of the agreement. Before voiding a leniency agreement, the Commission will inform the applicant orally of its intention to terminate the agreement and will give the applicant seven days to remedy the situation.

During the consultation process, commentators encouraged the Commission to include further guidance on what would constitute "reasonable grounds" to revoke a leniency agreement, including when information would be viewed as "incomplete". The Commission was encouraged to distinguish between situations where a company failed to disclose all the information in its possession, versus when a company uses its best efforts to cooperate fully but the information available to it is incomplete.[37] This is because a company may not have access to all of the facts or witnesses, some of whom may be former employees or may otherwise be unwilling to cooperate. The Commission did not address this question in the final version of the Leniency Policy. However, if the Commission were to withhold or revoke leniency from applicants on the basis that the information was not complete without demonstrating that the applicant failed to provide information in its custody, possession or control, then the application process will become far less predictable and the leniency program will suffer.

Where it decides to terminate a leniency agreement, the Commission reserves the right to retain the evidence obtained under the leniency agreement and commence proceedings against the undertaking and/or any persons covered by the leniency agreement before the Tribunal. Some third parties were critical of this heavy-handed approach during the consultation process. However, it is consistent with the practices followed by other leading authorities. If the Commission terminates a leniency agreement, it is within the Commission's discretion whether to consider offering leniency to the next undertaking in the leniency marker queue.

Confidentiality. An applicant is required to agree in writing neither to disclose the fact that it is submitting an application nor to disclose the information it provides to the Commission (the "Non-disclosure Agreement"), unless required by law or with the Commission's consent. This may presumably cover disclosure required, for example, under applicable securities or stock exchange regulations. The confidentiality requirement is on-going throughout the investigation as well as during subsequent court proceedings (presumably this only covers proceedings to which the applicant is not part). If a leniency applicant breaches the Non-disclosure Agreement, it will cease to be eligible for leniency.[38]

Following the consultation of its Draft Leniency Policy, the Commission amended the procedure to allow an applicant to execute and keep the Non-disclosure Agreement at the Commission's offices.[39] This revision is designed to partially address concerns raised during the consultation period that the execution of the Non-disclosure Agreement would create a written record that could prove harmful to the applicant in the event of follow-on private damage actions.

In addition to the applicant's non-disclosure commitments, the Leniency Policy also describes the Commission's own confidentiality obligations. Sections 123 to 125 of the Ordinance impose a general obligation on the Commission to preserve the confidentiality of information, including information relating to the private affairs or the identity of individuals or information

which has been identified and justified as confidential.[40] Following the consultation period, the Commission inserted additional confidentiality assurances in its Leniency Policy by pledging to use its "*best endeavours to appropriately protect the Commission's records of the leniency application process, including the leniency agreement".* The Commission also made clear in the Leniency Policy that it is not the Commission's policy to "*release leniency material"* and the Commission shall *"firmly resist, on public interest or other applicable grounds",* requests for such material where such requests were made in connection with private civil proceedings in Hong Kong and other jurisdictions. The Commission will nonetheless make a disclosure where it is compelled to do so by a court or by the law. [41]

Cooperation in Cross-Border Cartel Investigations.[42] The Leniency Policy includes indications of how the Commission intends to investigate cartels across multiple jurisdictions. Undertakings cooperating with the Commission will be expected to identify the other jurisdictions where they have sought leniency and share information on the status of their applications in those jurisdictions. Generally speaking, it is common practice for a leniency applicant to voluntarily waive a competition authority's commitment not to share the identity of, or the information provided by an applicant with any third party by allowing an authority to share information with another authority with the grant of a waiver. This is typically done when the applicant is assured of leniency in both jurisdictions. However, the grant of a waiver to allow competition authorities to share information is treated as strictly voluntary by the world's major competition authorities. Unfortunately, the Commission's Leniency Policy suggests that waivers may be compulsory in Hong Kong. According to the Leniency Policy, in appropriate cases, applicants may be *required* to authorise the Commission to exchange confidential information with authorities in other jurisdictions where leniency/immunity has been sought.

3. Conclusion

Leniency programs have proven to be an important investigative tool for competition authorities around the world. However, to be effective, leniency programs must be transparent and mindful to avoid disincentives to participate.

While the Commission has tried to make the program attractive by offering full immunity and promising confidentiality, certain aspects of the application of the program remain uncertain and create disincentives to self-reporting. Notably, the obligation to sign a statement of facts, the uncertain benefits available for the second or subsequent entities to report, the risk that the Tribunal may impose non-pecuniary sanctions on its own accord, and the possibility that the Commission may share its information with another jurisdiction over its objection through a compulsory waiver create potential disincentives to self-reporting. It is true that these potential flaws are in part due to the particular design of the leniency provisions in the Ordinance.

It will therefore be very important that the Commission develop a track record for the fair and transparent implementation of the leniency provisions of the Ordinance. The Tribunal will also play an important role in creating legal certainty. In particular, it should set precedents

confirming that it will not impose non-pecuniary penalties on leniency applicants, and should set clear guidelines for the treatment of companies and individuals cooperating with Commission investigations, but not protected by the Leniency Policy.

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2 http://www.compcomm.hk/en/media/press/files/Leniency_Policy_Eng.pdf.

3 See Keynote Speech by Miss Anna Wu, Chairperson Competition Commission, March 2015, available at http://www.compcomm.hk/en/media/speeches/files/Fighting_Cartels_20150327.pdf; see *also* the Commission's "Enforcement Policy" in which it confirmed that cartel conduct will be afforded investigative priority in the "initial years", available at http://www.compcomm.hk/en/media/press/files/Enforcement_Policy_Eng.pdf.

4 Sections 6, 21 and Schedule 7 of the Ordinance, respectively.

5 See para. 3.3 of the Guideline on the First Conduct Rule.

6 Section 2 of the Ordinance.

7 See Leniency Policy at para. 2.4.

8 See Section 82(1) of Ordinance and paragraphs 7.14 and 7.15 of the Guideline on Investigations.

9 See Part 6 of the Ordinance.

10 If the conduct took place for longer than three years, the years in which the highest revenues were reported will be taken into account.

11 See Section 110 of the Ordinance. This rule will not prevent private parties from raising defences based on the Competition Rules in any litigation before the Court of First Instance. In that case, there is a possibility to transfer the case (or parts of it) to the Tribunal (see Sections 113 and 114 of the Ordinance).

12 http://www.compcomm.hk/en/media/speeches/files/Fighting_Cartels_20150327.pdf.

13 http://www.compcomm.hk/en/enforcement/consultations/past_consultations/draft_leniency_policy.html.

14 http://www.compcomm.hk/en/legislation_guidance/policy_doc/leniency_policy.html.

15 Leniency Policy at para.s 1.1 – 1.3.

16 *Ibid.*

17 *Ibid*.

18 See footnote 1 of the Leniency Policy.

19 See Section 6 prohibiting anticompetitive agreement: "*An undertaking must not […]*" and Section 7 prohibiting abuses of substantial market power: "*An undertaking that has a substantial degree of market power in a market must not […]*".

20 Section 92 of the Ordinance states that "*if the Tribunal is satisfied […] that a person has contravened, or has been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate*".

21 See para. 1.4 of the Leniency Policy.

22 *Ibid,* at para.s 4.1 – 4.3

23 *Ibid* at footnote 2.

24 *Ibid,* at para. 2.13.

25 See the definition in Section 2(1) of the Ordinance.

26 See para. 2.4 of the Leniency Policy.

27 *Ibid,* at para. 2.5.

28 *Ibid,* at para.s 2.6 – 2.11.

29 *Ibid,* at para.s 2.12 – 2.17.

30 *Ibid,* at para.s 2.18 – 2.24.

31 *Ibid*, at para. 2.20. Note, however, that the Commission may seek to obtain access to the information proffered by an applicant by using its general investigation powers under the Ordinance.

32 *Ibid,* at para.s 2.25 – 2.26 and 2.29.

33 *Ibid,* at para. 2.26 (f).

34 *Ibid,* at para.s 2.27 – 2.30.

35 *Ibid,* at para. 2.2.

36 *Ibid,* at para.s 3.1 – 3.6.

37 http://www.compcomm.hk/en/enforcement/consultations/past_consultations/submission_leniency.html

38 *Ibid,* at para.s 5.1- 5.4 and 2.15.

39 *Ibid,* at para. 2.16.

40 Section 126 lists the exceptions where the Commission may disclose the information with lawful authority.

41 Leniency Policy at para.s 5.7-5.9.

42 *Ibid,* at paragraphs 6.1 – 6.3.