



Room 525, 5/F., Prince's Building, Central, Hong Kong
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室
電話：2521 1160, 2521 1169 圖文傳真：2868 5035
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

23 October 2015

By post and by email: consultation@compcomm.hk

Submissions on Draft Leniency Policy
Competition Commission
Room 3601, 36/F Wu Chung House
213 Queen's Road East
Wanchai
Hong Kong

Dear Sirs

DRAFT LENIENCY POLICY

The Hong Kong Association of Banks (“**HKAB**”) writes further to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct published by the Competition Commission (the “**Commission**”) on 23 September 2015 (the “**Draft Leniency Policy**”).

HKAB notes that leniency regimes are widely regarded as an important tool in assisting regulators to identify and investigate anticompetitive conduct. The introduction of a leniency regime in Hong Kong is therefore a positive step towards developing a strong and effective competition regime in Hong Kong once the Competition Ordinance comes into force (expected in December 2015). However, the decision of whether or not to apply for leniency is a complex one requiring consideration of a number of different factors. Leniency regimes are therefore only effective when the benefits of leniency are made clear to potential applicants at the outset, so as to allow applicants to assess properly the risks involved. To this end, it is crucial that the Commission's Leniency Policy provides businesses in Hong Kong with a clear understanding of how the leniency process will work, what protections leniency provides and assurances regarding any risks that would arise should an undertaking approach the Commission but find that leniency is unavailable or subsequently withdrawn.

HKAB therefore welcomes the Draft Leniency Policy and is pleased to present this submission in response to the Commission's public consultation. As with our submissions in response to the Commission's previous consultations, in reviewing the Draft Leniency Policy, we have sought feedback from our business teams in Hong Kong as we consider their understanding of competition rules to be representative of the target audience in Hong Kong once the Leniency Policy is published.

Chairman The Hongkong and Shanghai Banking Corporation Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
Standard Chartered Bank (Hong Kong) Ltd
Secretary Henry Chan

主席 香港上海匯豐銀行有限公司
副主席 中國銀行（香港）有限公司
渣打銀行（香港）有限公司
秘書 陳崇禧



We set out below our comments in response to the Draft Leniency Policy and enclose a summary of our recommendations as an Annex to this submission. We have adopted the definitions used in the Draft Leniency Policy throughout.

1. General comments

Confirm that leniency will apply in respect of all orders that may be imposed by the Competition Tribunal

- 1.1 Paragraphs 1.3, 2.1(d) and 2.24 of the Draft Leniency Policy explain that where the Commission enters into a leniency agreement with an undertaking under section 80 of the Ordinance, the Commission is not permitted to commence or continue proceedings in the Competition Tribunal for a pecuniary penalty against the undertaking with whom it has entered the leniency agreement. HKAB notes that this is consistent with section 80(2) of the Ordinance.
- 1.2 However, clause 2.1 of Annex A to the Draft Leniency Policy states that, in addition to not seeking a pecuniary penalty under section 93 of the Ordinance, the Commission agrees not to bring "*any other Proceedings (other than Proceedings for an order under section 94 of the Ordinance as mentioned in clause 4.1c) below [sic] declaring that [Party] has contravened the First Conduct Rule...*". Annex A therefore indicates that the Commission will not seek any other form of order from the Competition Tribunal other than a declaration that the undertaking in question has contravened the First Conduct Rule. HKAB agrees with the position outlined in clause 2.1 of Annex A to the Draft Leniency Policy (as explained below) and suggests that this be clarified in the main body of the Leniency Policy itself.
- 1.3 Having regard to the orders that the Competition Tribunal is empowered to impose under Schedule 3 of the Ordinance, it is clear that some of these orders may have financial consequences for a leniency applicant and will therefore be relevant to leniency applicants when assessing whether or not to make a leniency application.
- 1.4 For example, under section 1(p) of Schedule 3 to the Ordinance, the Competition Tribunal may impose "*an order requiring any person to pay to the Government or to any other specified person... an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention*". This is separate and additional to the power to order that damages are paid to any person who has suffered loss or damage as a result of the contravention under section 1(k) of Schedule 3 to the Ordinance. An order under section 1(p) of Schedule 3 could therefore be used to effectively impose a financial penalty (in addition to damages) upon application by the Commission under section 94 of the Ordinance even where no pecuniary penalty has been sought under section 93 of the Ordinance.
- 1.5 HKAB notes that, given the potential for orders that have the effect of imposing financial penalties to be sought under section 94 of the Ordinance, failure to



include protection against the seeking of such orders by the Commission under the leniency regime would seriously undermine its attractiveness to potential leniency applicants. To facilitate the effectiveness of the leniency regime, the Commission should therefore adopt the position that such protection will be provided under the leniency regime, as set out in clause 2.1 of Annex A to the Draft Leniency Policy, consistently throughout the Leniency Policy.

- 1.6 **HKAB therefore recommends that paragraphs 1.3, 2.1(d) and 2.24 of the Draft Leniency Policy be amended to confirm that the Commission will not seek any order or bring any proceedings, other than an order declaring that the undertaking in question has contravened the First Conduct Rule, against the undertaking or its current or former employees, officers and agents.**

Further guidance on how the Commission will approach undertakings (and their current or former employees etc.) which do not qualify for leniency

- 1.7 Section 4 of the Draft Leniency Policy addresses undertakings which do not qualify for leniency. However, HKAB notes that the Draft Leniency Policy does not provide any guidance on how cooperation by such undertakings will be treated by the Commission beyond suggesting that the Commission will rely on its enforcement discretion to consider giving "*favourable treatment*" to applicants that do not come first in the queue. Paragraph 4.3 of the Draft Leniency Policy provides that such favourable treatment may include making joint submissions with the cooperating undertaking to the Tribunal on, *inter alia*, the pecuniary penalty having regard to the timing, nature and extent of the cooperation provided.
- 1.8 It is unclear whether the Commission's approach will differ for undertakings that do not qualify for leniency because they are second or third etc. in the leniency queue and undertakings that are not eligible for leniency because the anticompetitive conduct that they have been involved in does not fall into one of the four categories of Serious Anti-Competitive Conduct to which the Draft Leniency Policy applies.
- 1.9 It is important that undertakings have a clear understanding of how the Commission will approach cases that do not fall within the Leniency Policy. The greater the certainty and clarity regarding the favourable treatment that undertakings (and their current or former employees etc.) may receive for cooperation outside the Leniency Policy, the greater the incentive for undertakings to come forward and cooperate with the Commission. Such cooperation is likely to have substantial advantages for the Commission in terms of the time and resources required for investigations and the strength of the case that the Commission will be able to build. It would therefore be to the benefit of both the Commission's enforcement activities and businesses in Hong Kong to ensure that there is a clear framework within which appropriate incentives are offered to businesses for cooperating with the Commission's investigations.



1.10 HKAB recognises that ultimately the level of pecuniary penalty to be imposed is a question for the Competition Tribunal. However, section 93(1) of the Ordinance suggests that the Tribunal may order a pecuniary penalty to be paid only on application by the Commission. Therefore, the Commission clearly has a key role in respect of the penalties to be imposed on undertakings which do not qualify for leniency. Whilst this is recognised in paragraph 2.4 of the Draft Leniency Policy, where the Commission refers to favourable treatment by way of a submission made jointly by the Commission and the relevant undertaking, HKAB submits that this does not go far enough to provide sufficient clarity or useful guidance. To ensure fairness and transparency, it is important that the Commission sets out in the Leniency Policy the approach that it intends to take in relation to the provision of favourable treatment and the making of joint submissions. In particular, the Commission should indicate:

- (i) what forms and level of cooperation it will take into account in deciding whether to provide favourable treatment (e.g. the making of a joint submission) to the undertaking;
- (ii) where the favourable treatment from the Commission takes the form of a joint submission to the Competition Tribunal:
 - (a) whether the Commission would propose a percentage reduction in penalty in the joint submission; and
 - (b) if so, the possible range of such reduction (and whether the reduction depends on the level of cooperation provided); and
- (iii) what other forms of “*favourable treatment*” are envisaged by the Commission.

1.11 Such guidance will be crucial for businesses in Hong Kong when assessing the risks of applying for leniency and the extent to which they should cooperate with the Commission outside the Leniency Policy.

1.12 **HKAB therefore recommends that the Commission provide further guidance on:**

- (i) **how the Commission will treat undertakings (and their current or former employees etc.) that cooperate outside the Leniency Policy;**
- (ii) **what forms and level of cooperation it will take into account in deciding whether to provide favourable treatment (e.g. the making of a joint submission) to the undertaking;**
- (iii) **where the favourable treatment from the Commission takes the form of a joint submission to the Competition Tribunal:**



- (a) whether the Commission would propose a percentage reduction in penalty in the joint submission; and
- (b) if so, the possible range of such reduction (and whether the reduction depends on the level of cooperation provided); and
- (iv) what other forms of “*favourable treatment*” are envisaged by the Commission.

Significance of the Leniency Policy and private damages actions

- 1.13 Paragraph 1.6 of the Draft Leniency Policy notes that the existence of a leniency agreement does not preclude the leniency recipient from being subjected to a follow-on action under section 110 of the Ordinance.
- 1.14 Given that an application for leniency is effectively a *de facto* admission that an infringement may have been committed, potential leniency applicants will almost invariably have an eye on the potential risk of follow-on actions. The interplay between a leniency applicant’s need to meet the requirements for leniency and the risk of increasing its exposure to or prejudicing its ability to defend itself from follow-on actions will almost invariably be a factor in an undertaking’s assessment of whether to apply for leniency. Leniency requirements that will subsequently place an applicant at a disadvantage in follow-on actions may act as a significant deterrent to applicants and undermine the purpose of the leniency regime. It is therefore important that the potential implications of obligations placed on leniency applicants for future private damages actions are borne in mind when finalising the Draft Leniency Policy.
- 1.15 HKAB recognises that the Commission has already taken some steps to address this issue, for example, by allowing proffers to be made orally (thus avoiding the creation of discoverable documents at the proffer stage). However, HKAB respectfully submits that there are aspects of the Draft Leniency Policy where greater protections or assurances could be provided to leniency applicants. Where appropriate, HKAB has highlighted this concern in relation to specific requirements within the Draft Leniency Policy later in this submission.
- 1.16 In addition, HKAB also more generally recommends that the Commission keeps in mind the potential implications of the requirements placed on leniency applicants under the Leniency Policy as a whole for future private damages actions.

2. Draft Leniency Policy

Clarify when leniency will not apply to current directors or employees

- 2.1 Paragraph 2.2 of the Draft Leniency Policy states leniency will “*ordinarily*” extend to current directors, individuals or employees of the undertaking.



- 2.2 HKAB notes that although there is no criminal cartel offence in Hong Kong for which individuals may be prosecuted, there is nonetheless a risk that the Commission may bring proceedings for disqualification orders under section 101 of the Ordinance.
- 2.3 It is therefore important that businesses and directors in Hong Kong have a clear understanding of the circumstances in which protection may not be available to individuals under the Leniency Policy. Clear guidance on this issue will:
- (i) assist undertakings or individuals to recognise and, where possible, avoid out-of-the-ordinary situations where leniency protection will not be extended to current directors, individuals or employees, and
 - (ii) enable an undertaking whose case is not “ordinary”, to factor the absence of leniency protections for current directors, individuals and employees into its assessment of whether to apply for leniency.
- 2.4 HKAB therefore recommends that **paragraph 2.2 of the Draft Leniency Policy be amended to clarify the meaning of “ordinarily”, including the circumstances in which leniency will not extend to current directors, individuals or employees of the undertaking.**
- Remove the requirement for agents, directors and former employees etc. to be expressly named in the leniency agreement
- 2.5 Paragraph 2.2 of the Draft Leniency Policy goes on to state that leniency will also cover “*any agent, former director, former officer or former employee of the undertaking specifically named in the leniency agreement*”, or, where the undertaking is a partnership, “*any agent, former partner, or former employee of the partnership specifically named in the leniency agreement*”.
- 2.6 HKAB respectfully submits that it is important for the protection under the Leniency Policy to apply equally to current and former directors, employees or partners. However, there may be practical obstacles to identifying all agents and former directors, officers, employees or partners who were involved in a cartel activity at the time that a leniency agreement is entered into as currently required by the Draft Leniency Policy. Particularly in large complex cases, the involvement of certain individuals may become clear only as the investigation progresses.
- 2.7 It is HKAB’s view that agents and former directors, officers, employees or partners should not receive less favourable treatment than current employees etc. simply where it has not been possible to identify their involvement in the cartel conduct at the time that the leniency application is made.
- 2.8 HKAB notes that in the UK, for example, the leniency regime includes a commitment that the Competition and Markets Authority (“CMA”) will not apply for a competition disqualification order against any current or former



director of a company which benefits from leniency in respect of the activities to which the grant of leniency relates.¹

- 2.9 HKAB therefore **recommends that paragraph 2.2 of the Draft Leniency Policy be amended to provide a broader assurance that leniency will also extend to former agents, partners or employees of the leniency applicant and removes the requirement that such individuals be named in the leniency agreement.**

Clarify whether any form(s) of information exchange may qualify for leniency

- 2.10 Paragraphs 2.3 to 2.5 of the Draft Leniency Policy explain that leniency is available only to cartel conduct, a term that is not defined in the Ordinance. The Draft Leniency Policy goes on to explain that cartel conduct is conduct that has the object of harming competition, i.e. the four categories of conduct outlined in paragraph 2.4 of the Draft Leniency Policy. The Draft Leniency Policy states that cartel conduct is considered by the Commission to fall within the definition of serious anti-competitive conduct under section 2(1) of the Ordinance.
- 2.11 HKAB notes that the use of different wording in paragraph 2.4 of the Draft Leniency Policy to that used to define serious anti-competitive conduct in the Ordinance implies that cartel conduct is a narrower concept. This is likely to cause uncertainty as to what conduct is eligible for leniency under the Leniency Policy. Further, the reference to cartel conduct being one of the listed activities, which each have the object of harming competition, may cause further confusion as the scope of infringements that have the object of harming competition may well be broader than the four activities listed in paragraph 2.4 of the Draft Leniency Policy. If the Commission's intention is to restrict the availability of leniency to serious anti-competition conduct, as defined in the Ordinance, then HKAB considers that it would be clearer and provide greater legal certainty to remove the references to cartel conduct and object infringements, and simply refer to the concept of serious anti-competitive conduct in the Ordinance.
- 2.12 However, the Ordinance itself does not contain any limitation of the forms of conduct that the Commission may make a leniency agreement with. While HKAB recognises that cartels tend to be the most serious form of anti-competitive behaviour, HKAB respectfully submits that in the context of Hong Kong there may be other forms of conduct that, although not cartels, may warrant the offer of leniency protection in order to facilitate the identification and investigation of such conduct by the Commission.

¹ Paragraph 2.10, Applications for leniency and no-action in cartel cases. OFT's detailed guidance on the principles and process ("CMA Leniency Guidance") July 2013. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

- 2.13 The restriction in paragraphs 2.3 to 2.5 of the Draft Leniency Policy suggests, for instance, that the anti-competitive exchange of information (outside of a price-fixing arrangement) is not covered by the Draft Leniency Policy. However, the Commission's Guideline on the First Conduct Rule provides that the Commission will likely consider that the sharing in private of individual future price intentions or plans has the object of harming competition². The same guidance also suggests that the exchange of future price intentions may be assessed as price fixing³ but is not definitive in this regard. These suggest that it may therefore be open to the Commission to accept leniency applications in respect of conduct that involves the exchange of future price intentions under the Draft Leniency Policy.
- 2.14 Either way, it is important that businesses in Hong Kong have a clear understanding of what conduct is eligible under the Leniency Policy in order to assess whether to apply for leniency.
- 2.15 HKAB therefore **recommends that the Draft Leniency Policy be amended to clarify the scope of conduct that is eligible for leniency, including whether any form(s) of information exchange will fall within the scope of the Leniency Policy and where the Commission will draw the line. If the Commission's intention is to offer leniency only in respect of serious anti-competitive conduct as defined in the Ordinance then HKAB recommends that references to cartel conduct and object infringements be removed to ensure legal clarity and certainty.**

Provide further clarifications regarding the information required to obtain a marker and whether applicants will be told their place in the leniency queue

- 2.16 Paragraphs 2.6 to 2.20 of the Draft Leniency Policy address how an undertaking may apply for leniency. This process includes first an application for a marker, which requires that the applicant (or its legal advisor) provides the Commission "*sufficient details to identify the conduct for which leniency is sought*".
- 2.17 The undertaking with the highest ranking marker will then be invited to submit a proffer, which the Draft Leniency Policy confirms may be made in hypothetical terms but which must include a detailed description of the cartel, the participating entities, the applicant's role, the evidence the applicant can provide in respect of the cartel, and an explanation of how the conduct affects or related to competition in Hong Kong.

² Paragraph 6.39, Guideline on the First Conduct Rule.

³ Paragraph 6.12, Guideline on the First Conduct Rule.



- 2.18 HKAB notes that it is unclear from the Draft Leniency Policy:
- (i) what information the Commission expects to be provided to obtain a marker,
 - (ii) that such information can be given on a no-names basis; and
 - (iii) whether applicants will be told at this stage their position in the leniency queue.
- 2.19 In view of the provision for subsequent proffers to be made on hypothetical terms, HKAB considers the Leniency Policy should confirm that the process for obtaining a marker can be conducted on a similarly no-names or hypothetical basis.
- 2.20 Further clarity is also needed in the Leniency Policy on what information is required to obtain a marker and what level of detail the Commission expects to be "*sufficient details to identify the conduct for which leniency is sought*". To assist businesses in Hong Kong in understanding what is required, it would be helpful if the Commission provided examples in the Leniency Policy to illustrate the type of information and level of detail required.
- 2.21 HKAB considers that it is important for the creation of an effective leniency regime that potential applicants are given an opportunity to check to what extent leniency is available (i.e. whether they would be first, second or third etc. in the queue) on a no-names basis.
- 2.22 Although the Commission offers assurance in the Draft Leniency Policy that it will not use actual evidence provided by an applicant in a proffer against that applicant, this does not preclude the Commission from using information that the Commission has received through the leniency process to investigate an applicant if they do not successfully receive leniency, e.g. as they are not first in the queue.
- 2.23 Consequently, there is a real risk that, if it is not possible to ascertain the availability of leniency on a no-names basis, potential applicants may be deterred from seeking leniency by the prospect that they could find themselves in a materially worse position as a result of trying and failing to obtain leniency than if they had not come forward at all. Such a deterrent would undermine the effectiveness of the leniency regime and be counterproductive to the Commission's aims in introducing the Leniency Policy.
- 2.24 HKAB therefore **recommends that:**
- (i) **the Draft Leniency Policy be amended to introduce a method by which potential applicants may check the availability of a first-place marker on a no-names basis;**



- (ii) **paragraph 2.7 of the Draft Leniency Policy be amended to:**
 - (a) **clarify the type of information and level of detail required to obtain a marker, with illustrative examples; and**
 - (b) **confirm that it is possible to provide sufficient details to identify the conduct for which leniency is sought on a hypothetical basis; and**
- (iii) **paragraph 2.8 of the Draft Leniency Policy be amended to provide that, where multiple markers are issued, applicants will be told where their marker is ranked in the leniency queue.**

Explain why leniency is not available following the commencement of proceedings and clarify that leniency is available even after the commencement of an investigation

- 2.25 Clause 2.12 of the Draft Leniency Policy states that leniency will not be available in situations where the Commission has already decided to issue an infringement notice or to commence proceedings in respect of the cartel activity for which leniency is sought.
- 2.26 HKAB notes that section 80 of the Ordinance envisages that the Commission may make leniency agreements even after proceedings have been commenced. The position taken in the Draft Leniency Policy is therefore more restrictive than the Ordinance. HKAB respectfully submits that it would be helpful for the Commission to explain in the Leniency Policy the reasons why (notwithstanding the Commission's powers to do so under the Ordinance) the Commission will not enter into leniency agreements with undertakings where proceedings have already been initiated.
- 2.27 Separately, HKAB notes that clause 2.12 of the Draft Leniency Policy suggests leniency is available to undertakings where the Commission is aware of cartel activity (e.g. due to a tip off by a current or former employee or complaint from a third party etc.) but has not yet reached the stage of issuing an infringement notice or commencing proceedings. HKAB notes that this is consistent with the Ordinance and agrees with this position as, even in circumstances where the Commission has begun its investigations into suspected cartel activity, the evidence and cooperation offered by a leniency applicant may be crucial in progressing an investigation to the stage where the Commission is able to issue an infringement notice or issue proceedings. It is therefore important that an incentive continues to be available to potential leniency applicants in these circumstances. To ensure the effectiveness of this incentive and in the interests of legal certainty, it would be helpful for the Commission to provide assurance on the circumstances in which leniency will continue to be available even though it may be on notice of or have commenced an investigation into suspected cartel activity.



2.28 **HKAB therefore recommends that paragraph 2.12 of the Draft Leniency Policy be amended to:**

- (i) **explain why (notwithstanding the Commission’s powers to do so under the Ordinance) the Commission will not enter into leniency agreements with undertakings where proceedings have already been initiated; and**
- (ii) **provide an assurance that leniency will be available, even where the Commission is aware of or has commenced an investigation into, suspected cartel activity provided that the Commission has not decided to issue an infringement notice or to commence proceedings in the Tribunal in respect of that cartel activity.**

Clarify that undertakings will not be required to produce evidence on the effects of cartel activity in Hong Kong

2.29 Paragraph 2.15 of the Draft Leniency Policy states that a proffer should include an “*explanation of how the cartel conduct affects or relates to competition in Hong Kong to establish a jurisdictional nexus*”.

2.30 HKAB understands the need to establish a jurisdictional nexus, but notes that any such explanation should not require an undertaking to provide evidence or information regarding the actual effects of the cartel conduct within Hong Kong. Such evidence would prejudice the undertaking’s ability to defend itself against subsequent private damages claims, from which the Draft Leniency Policy provides no protection. Any requirement to do so would substantially lessen the attractiveness of the Leniency Policy to potential applicants and undermine the leniency regime in Hong Kong.

2.31 **HKAB therefore recommends that paragraph 2.15 of the Draft Leniency Policy be amended to clarify that the requirement for an explanation to establish jurisdictional nexus does not require undertakings to provide evidence of the effects of the cartel conduct in Hong Kong.**

Provide further guidance on when a leniency applicant should terminate its involvement in cartel activity

2.32 Paragraph 2.22(c) of the Draft Leniency Policy states that the applicant will need to confirm that it has, absent consent from the Commission, terminated its involvement in the cartel.

2.33 HKAB notes that it is unclear from the Draft Leniency Policy precisely at which stage a leniency applicant should take steps to cease its participation in the cartel and the circumstances in which the Commission is likely to give consent to continue participation. Given the importance of carefully managing the termination of cartel activities by a leniency applicant so as to avoid prejudicing the Commission’s own investigations or tipping off other cartelists, HKAB



considers that it is important that these points be addressed clearly in the Leniency Policy.

2.34 HKAB therefore **recommends that the Draft Leniency Policy be amended to clarify:**

- (i) **the stage at which a leniency applicant should take steps to cease its participation in the cartel; and**
- (ii) **the circumstances in which the Commission is likely to give consent to continue participation.**

Clarify on a consistent basis that information regarding the leniency application may be disclosed if the Commission has given its prior consent

2.35 Paragraph 2.22(d) of the Draft Leniency Policy states that the applicant will need to confirm that it will keep the leniency application and process confidential “*except as required by law*”. This is inconsistent with paragraph 5.1 of the Draft Leniency Policy, which also states that disclosure is permitted where the Commission has given its prior consent.

2.36 HKAB notes that it is likely that leniency applicants will find themselves in situations where they are obliged by soft law requirements or requests of other competition and sectoral regulators (whether domestic or overseas) to disclose information about leniency applications even where there is no strict legal requirement to do so. In such situations it is vital that it is open to applicants to seek the Commission’s consent to disclosure under the Leniency Policy and that there is clear guidance on the circumstances in which the Commission is likely to grant such consent. This is particularly important for HKAB as its members are active in the banking industry and are also regulated by the Hong Kong Monetary Authority (“HKMA”), as well as global sectoral regulators in jurisdictions where HKAB members are active. Assurance from the Commission that disclosures requested by the HKMA would not jeopardise any leniency application would therefore be very helpful to HKAB members.

2.37 HKAB therefore **recommends that:**

- (i) **paragraph 2.22(d) of the Draft Leniency Policy be amended for consistency with paragraph 5.1 to confirm that disclosure is also permitted where the Commission has given its prior consent; and**
- (ii) **section 2 of the Draft Leniency Policy be amended to provide guidance on the circumstances in which the Commission is likely to grant consent to disclosure.**

Amend the requirement for all evidence to be provided without delay to an ongoing requirement to cooperate

- 2.38 Para 2.23 of the Draft Leniency Policy states that once an undertaking has entered into a leniency agreement it must provide the Commission with “*all non-privileged information and evidence relating to the cartel conduct without delay*”. HKAB notes that undertakings may not be able to comply with this strict requirement in large complex global cases where there may be a lengthy evidence gathering process. Instead, HKAB respectfully submits that an ongoing requirement to cooperate would be more appropriate than a requirement to be able to provide all information immediately at the outset as it more accurately reflects the ongoing and, often lengthy, nature of cartel investigations and the continuing cooperation required from leniency applicants throughout this process.
- 2.39 HKAB therefore **recommends that paragraph 2.23 of the Draft Leniency Policy be softened to refer to an ongoing requirement to cooperate with the Commission, rather than requiring all evidence without delay.**

Provide assurance that evidence given by a leniency applicant will not be used against the applicant where the Commission terminates a leniency agreement

- 2.40 Paragraph 3.2 of the Draft Leniency Policy provides that the Commission may at its discretion commence proceedings against an undertaking or persons previously covered by a leniency agreement if the agreement is terminated. It is not clear from this provision whether the Commission could use evidence provided by the applicant as part of the leniency agreement against the applicant (or individuals previously protected by the leniency agreement). By contrast, paragraph 2.17 of the Draft Leniency Policy provides an assurance that evidence given by a leniency applicant in a proffer will not be used against the applicant.
- 2.41 HKAB notes that if the Commission reserves the right to use information provided by a leniency applicant against that applicant in circumstances where the Commission has terminated a leniency agreement, this may first act as a deterrent to undertakings coming forward under the leniency regime and, second, affect the extent to which undertakings are willing to proactively provide candid information to support the Commission’s investigations as part of the leniency process if there is a risk that the leniency agreement may subsequently be terminated.
- 2.42 By comparison, the European Commission expressly confirms in its notice on leniency that in the event that the European Commission decides that immunity is not available to an applicant, the undertaking may withdraw the evidence that it provided for the purposes of the immunity application or request that the



information be considered for a reduction of fine.⁴ HKAB notes that in Hong Kong, where (as currently drafted) the Draft Leniency Policy does not provide for any reduction in fines for undertakings other than a successful leniency applicant, it is particularly important that undertakings should be able to seek to withdraw evidence provided in the context of leniency if that leniency is subsequently terminated by the Commission. Failing this, HKAB respectfully submits that, at the very least, the Commission should confirm that it would not seek to use evidence specifically created for the purposes of the leniency application (e.g. a written proffer or other Leniency Application Material, as defined in the Draft Leniency Policy), which may be highly prejudicial to the undertaking and was created in good faith as part of the leniency process, against an undertaking whose leniency agreement was terminated by the Commission.

- 2.43 In the interests of ensuring the effectiveness of the leniency regime, HKAB therefore **recommends that paragraph 3.2 of the Draft Leniency Policy be amended to include an assurance that the Commission will not use evidence (or, at the very least, Leniency Application Material created specifically for the purposes of the leniency application) given by a leniency applicant against it if leniency is withdrawn.**

Amend the Draft Leniency Policy to provide that leniency materials will not be disclosed by the Commission even where a leniency agreement is terminated

- 2.44 Paragraph 5.7(d) states that the Commission's policy not to disclose Leniency Application Material will not apply if the Commission terminates the leniency agreement.
- 2.45 Leniency Application Material, particularly those provided to the Commission in good faith as part of an application for leniency, are by their very nature highly sensitive and potentially very prejudicial to the leniency applicant. The disclosure of such materials in connection with subsequent private damages actions could, for example, seriously impact on the ability of undertakings whose leniency agreements have been terminated to defend themselves in subsequent proceedings compared to if they had never applied for leniency in the first place.
- 2.46 HKAB considers that putting potential applicants at risk that their Leniency Application Material may be disclosed if the leniency agreement is terminated places leniency applicants who have lost leniency at a substantial disadvantage vis-à-vis other companies who have not cooperated at all with the Commission. It is reasonable to assume that this could act as a deterrent to undertakings coming forward under the leniency process and to affect the extent to which they

⁴ Paragraph 20, Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298/11, 8.12.2006).



are willing to proactively create full and frank Leniency Application Material for the purposes of a leniency application. As previously observed by the European Commission, “*the willingness of companies to provide comprehensive and candid information is crucial to the success of the leniency programme*”.⁵ HKAB respectfully submits that any requirement in the Leniency Policy which deters such candid disclosures by a leniency applicant may ultimately undermine the effectiveness of the leniency regime in Hong Kong.

- 2.47 HKAB further notes that the Ordinance does not relieve the Commission of its obligations to keep information confidential under Part 8 of the Ordinance in the event that a leniency agreement is terminated. However, the drafting of paragraph 5.7(d) of the Draft Leniency Policy may raise a concern that the Commission would not consider itself bound by the requirements of Part 8 where the Commission has terminated a leniency agreement. HKAB therefore believes that it is also important that the Leniency Policy provides assurance that the Commission will continue to adhere to its Part 8 obligations in the event that a leniency agreement is terminated.
- 2.48 HKAB therefore recommends that the Draft Leniency Policy be amended to:
- (i) **remove paragraph 5.7(d); and**
 - (ii) **confirm that the Commission will not disclose Leniency Application Material even where a leniency agreement is subsequently terminated and will continue to be bound by Part 8 of the Ordinance.**

Clarify whether leniency will transfer to the next undertaking in the queue if a leniency agreement is terminated

- 2.49 Section 3 of the Draft Leniency Policy addresses termination of leniency agreements. HKAB notes, however, that it is unclear whether leniency will transfer to the next undertaking in the queue if the original leniency agreement is terminated.
- 2.50 If leniency will be available to the next undertaking in the queue then this may act as an incentive for undertakings to come forward to put down a marker even where they are not the first in the queue. It is important that undertakings (including those who are first in the queue) have a clear understanding of and legal certainty around the consequences of termination of a leniency agreement when they are considering whether to put down a marker for leniency.

⁵ Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003 in the case of *National Grid vs ABB et al* [2012] EWHC 869. Available at: http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf.



- 2.51 In the interests of legal certainty, HKAB recommends that the Draft Leniency Policy be amended to clarify whether leniency will be available to the next undertaking in the leniency queue if a leniency agreement is terminated.

Provide further assurance regarding the disclosure of leniency materials

- 2.52 Paragraphs 5.5 to 5.8 of the Draft Leniency Policy addresses the Commission's obligation to preserve the confidentiality of any confidential information provided to the Commission and its commitment to use best endeavours to protect confidential information created solely for the purpose of making a leniency application and the Commission's records of the leniency process.

- 2.53 HKAB notes the views of regulators such as the European Commission that the disclosure of leniency materials to third parties in the context of private damages actions risks undermining the purpose and effectiveness of cartel investigations and leniency programmes. HKAB believes that this is no less true and potentially would have even greater impact in the context of Hong Kong, where the development of an effective leniency regime will be critical in supporting the enforcement of the Ordinance as it is implemented for the first time in Hong Kong.

- 2.54 HKAB therefore recommends that the Draft Leniency Policy be amended to provide further assurances:

- (i) on the steps that the Commission would consider to constitute its best endeavours to protect leniency materials; and
- (ii) that the Commission would firmly resist requests for disclosure in the context of private damages actions.

Amend to ensure that undertakings do not automatically lose leniency for non-material breaches

- 2.55 Paragraph 5.4 of the Draft Leniency Policy states that a leniency applicant will cease to be eligible for leniency if it breaches its confidentiality and non-disclosure commitments.

- 2.56 HKAB notes that the automatic loss of leniency may be disproportionate in cases where there is only a one-off, minor breach of confidentiality.

- 2.57 HKAB therefore recommends that paragraph 5.4 of the Draft Leniency Policy be amended as follows: "*If a leniency applicant materially breaches its confidentiality and non-disclosure commitments, the applicant may cease to be eligible for leniency under this policy*".



3. Annex A to the Draft Leniency Policy: Template for Leniency Agreement with an Undertaking Engaged in Cartel Conduct

Amend the requirements in relation to disclosure

- 3.1 Clause 3.1 of Annex A to the Draft Leniency Policy provides that the leniency applicant represents and warrants that it has not disclosed the fact it has applied for leniency or the Confidential Application Material to any third party without the “*express written consent of the Commission*”.
- 3.2 HKAB notes that, particularly during the early stages of a leniency application, it may often be preferable for communications between the Commission and a leniency applicant to take place orally to avoid the creation of discoverable documents that may later be discoverable in the context of private damages actions.
- 3.3 In addition, HKAB notes that where an undertaking comprises a group of companies, it may be necessary for a subsidiary to make disclosures to other group companies, e.g. the parent company, for management and corporate governance purposes. In the interests of clarity and legal certainty, it would be helpful to include an assurance that other group companies will not constitute a “third party” for the purpose of Clause 3.1 of Annex A to the Draft Leniency Policy.
- 3.4 HKAB therefore recommends that clause 3.1 of Annex A to the Draft Leniency Policy be amended to:
- (i) remove the requirement for consent in writing; and
 - (ii) confirm that disclosures to other members of a corporate group will not constitute a “*disclosure to any third party*”.

Make the list of conditions in clause 4.1(a) of Annex A to the Draft Leniency Policy exhaustive

- 3.5 Clause 4.1(a) of Annex A to the Draft Leniency Policy lists the forms of “*continuous and complete cooperation*” that an applicant is required to provide as a condition to the Agreement. However, the scope of the list is left open by the use of the wording “*this includes but is not limited to*”. The absence of an exhaustive list of obligations introduces an element of uncertainty for undertakings seeking to comply with this condition.
- 3.6 HKAB notes that the consequences for a leniency applicant of breaching the condition in clause 4.1 are significant as the applicant will lose its leniency and consequently may be exposed to substantial fines. Given the severe consequences of breaching the condition, it is important that undertakings have a clear and precise understanding of the obligations that are included in the requirement to maintain “*continuous and complete cooperation*”.

- 3.7 In the interests of legal certainty and clarity, HKAB therefore **recommends that the list of conditions in clause 4.1(a) is made exhaustive by the removal of the wording “this includes but is not limited to”.**

Require undertakings to use reasonable endeavours to facilitate the complete and truthful cooperation of current officers and employees

- 3.8 Clause 4.1 (a)(i) of Annex A to the Draft Leniency Policy states that as a condition of the leniency agreement, the leniency applicant must facilitate and secure the “*complete and truthful cooperation of its current officers and employees... this includes the giving of full and true information to the Commission during any Commission interviews and full and true evidence in Court if so required*”.

- 3.9 HKAB notes that it may not be in an undertaking’s power to ensure that such cooperation is given by its current officers and employees. For example, although a leniency applicant can use its reasonable endeavours to make relevant persons available at the Commission’s request, it is not possible for the undertaking to control whether individuals then answer the Commission’s questions fully and truthfully. This will be even truer in complex global cartel cases where individuals may face criminal prosecutions in other jurisdictions, such as the UK or US, for their involvement in the cartel conduct. In such circumstances, the individuals will likely adopt the approach recommended by their independent legal counsel, which may include refusing to cooperate with the Commission.

- 3.10 HKAB considers that it would be disproportionate for a cooperating leniency applicant (and its cooperating current officers or employees) to lose their leniency in circumstances where the applicant has used reasonable endeavours to procure such cooperation but a single individual has chosen of his or her own accord not to cooperate.

- 3.11 HKAB therefore **recommends that clause 4.1(a)(i) of Annex A to the Draft Leniency Policy be amended as follows: “using its reasonable endeavours to facilitate and secure the complete and truthful cooperation of its current officers and employees”.**

Replace best endeavours requirement to identify, facilitate and secure the cooperation of current and former agents and former officers and employees with reasonable endeavours, acknowledging that in some cases it may not be possible to procure such cooperation

- 3.12 Clause 4.1 (a)(ii) of Annex A to the Draft Leniency Policy provides that a leniency applicant must use its best endeavours to identify, facilitate and secure the cooperation of its current and former agents and former officers and employees, including by making relevant persons available to the Commission on a best endeavours basis.



- 3.13 For the same reasons as are discussed in paragraph 3.9 above, it may not be in any undertaking's power to secure the "*complete and truthful cooperation*" of individuals. This is even more the case in relation to former agents, officers and employees, as such individuals are unlikely to be bound by any contractual or other obligations to assist the applicant.
- 3.14 It is also likely that an undertaking would face practical obstacles to making relevant persons available to the Commission. For example, former officers and employees are likely to be employed by another undertaking (often a competitor, who may also be under investigation for participation in the same cartel activity) or are potentially located overseas. In cases where the former employee has moved to a competitor who may also be under investigation for participation in the same cartel activity, there is a serious risk that any efforts by the leniency applicant to procure the cooperation of the former employee could lead to the former employee tipping off his/her new employer. In such circumstances it may not be possible to procure the cooperation of a former employee without prejudicing the Commission's investigation. In any event, even if the new employer is not under investigation, the leniency applicant will likely need to rely on each individual's current employer agreeing to make the individual available during the working week as it will be outside the applicant's power to do so.
- 3.15 HKAB therefore considers that it would be disproportionate for a cooperating leniency applicant (and its cooperating current and former agents, former officers and employees) to lose their leniency in circumstances where the applicant has used reasonable endeavours to procure cooperation but a single individual has chosen of his or her own accord not to cooperate.
- 3.16 HKAB further notes that a requirement to use "*best endeavours*" may require significant expenditure of time, effort and money, in some circumstances arguably even at the sacrifice of some of the leniency applicant's commercial interests. By contrast, a requirement to use "*reasonable endeavours*" would be a much more reasonable approach as it is unlikely to require the leniency applicant to sacrifice its commercial interests to fulfil the condition.
- 3.17 HKAB therefore respectfully submits that it would be more proportionate to impose a "*reasonable endeavours*" obligation on leniency applicants to secure the cooperation of its current and former agents and former officers and employees. In the interests of certainty, it would also be helpful for the Leniency Policy to acknowledge that there may be circumstances in which it is not possible to procure such cooperation, giving examples of such circumstances, and confirm that leniency will not be lost in these cases.
- 3.18 HKAB therefore **recommends that Clause 4.1(a)(ii) of Annex A be amended to:**
- (i) **replace references to "*best endeavours*" with "*reasonable endeavours*";**
and



- (ii) **acknowledge, with examples, that there may be circumstances in which it is not possible to procure such cooperation and confirm that leniency will not be lost in such circumstances.**

Further guidance on the process for agreeing the statement of facts

- 3.19 Clause 4.1(c) of Annex A to the Draft Leniency Policy provides that the leniency applicant will have to satisfy the Commission that it agrees to and signs a statement of agreed facts admitting to its participation in the cartel conduct as a condition of the leniency agreement.
- 3.20 HKAB notes that there is currently no guidance in the Draft Leniency Policy or provision in the terms of Annex A to the Draft Leniency Policy to govern how the contents of the statement of agreed facts will be determined.
- 3.21 The scope of any admissions made by the leniency applicant in such a statement will be of significant importance to the applicant as it they will likely form the basis and set the scope for subsequent private actions, from which no protection is available under the Draft Leniency Policy. To ensure that the leniency applicant's rights of defence in respect of such private actions is not prejudiced, it is crucial that leniency applicants are afforded reasonable opportunities make representations and rebuttals to the Commission regarding the content of the agreed statement of facts without putting their leniency applications at risk.
- 3.22 In the absence of any guidance or assurances from the Commission, the requirement for the statement of facts to be signed "*to the satisfaction of the Commission*" may raise further concerns that, ultimately, the Commission could effectively require leniency applicants to sign a statement of facts chosen by the Commission or risk losing the protection of leniency. Furthermore, HKAB respectfully requests that the Commission confirm it will not require from the leniency applicant any admission of liability or admission that the relevant conduct led to anti-competitive effects.
- 3.23 HKAB therefore **recommends that:**
- (i) **the Draft Leniency Policy be amended to provide further guidance on the process that the Commission will follow when agreeing the facts to be included in the agreed statement of facts, including in this process adequate opportunities for leniency applicants to make submissions regarding the scope of the statement of agreed facts;**
 - (ii) **the Commission confirm that it will not require from the leniency applicant any admission of liability or admission that the relevant conduct led to anti-competitive effects; and**
 - (iii) **the first sentence of clause 4.1(c) of Annex A is qualified to require the "reasonable satisfaction of the Commission".**



HKAB trusts that the Commission will give due consideration to the issues and recommendations set out in this submission. Should it be of assistance to the Commission, HKAB would be pleased to discuss the submission or any specific matter in relation to the Draft Leniency Policy further.

Yours faithfully

A handwritten signature in black ink, appearing to be "Henry Chan", written in a cursive style.

Henry Chan
Secretary

Encl. – Summary of HKAB's recommendations



Annex

Summary of HKAB's recommendations

HKAB respectfully suggests that the following changes be made to the Draft Leniency Policy.

General

1. **Paragraphs 1.3, 2.1(d) and 2.24** of the Draft Leniency Policy be amended to confirm that the Commission will not seek any order or bring any proceedings, other than an order declaring that the undertaking in question has contravened the First Conduct Rule, against the undertaking or its current or former employees, officers and agents.
2. The Commission provide further guidance on:
 - (i) how the Commission will treat undertakings (and their current or former employees etc.) that cooperate outside the Leniency Policy; and
 - (ii) what forms and level of cooperation it will take into account in deciding whether to provide favourable treatment (e.g. the making of a joint submission) to the undertaking;
 - (iii) where the favourable treatment from the Commission takes the form of a joint submission to the Competition Tribunal:
 - (a) whether the Commission would propose a percentage reduction in penalty in the joint submission; and
 - (b) if so, the possible range of such reduction (and whether the reduction depends on the level of cooperation provided); and
 - (iv) what other forms of "*favourable treatment*" are envisaged by the Commission.
3. The Commission keeps in mind the potential implications of the requirements placed on leniency applicants under the Leniency Policy as a whole for future private damages actions.

Draft Leniency Policy

4. **Paragraph 2.2** of the Draft Leniency Policy be amended to clarify the meaning of "*ordinarily*", including the circumstances in which leniency will not extend to current directors, individuals or employees of the undertaking.
5. **Paragraph 2.2** of the Draft Leniency Policy be amended to provide a broader assurance that leniency will also extend to former agents, partners or employees



- of the leniency applicant and removes the requirement that such individuals be named in the leniency agreement.
6. The Draft Leniency Policy be amended to clarify the scope of conduct that is eligible for leniency, including whether any form(s) of information exchange will fall within the scope of the Leniency Policy and where the Commission will draw the line. If the Commission's intention is to offer leniency only in respect of serious anti-competitive conduct as defined in the Ordinance then HKAB recommends that references to cartel conduct and object infringements be removed to ensure legal clarity and certainty.
 7. The Draft Leniency Policy be amended to introduce a method by which potential applicants may check the availability of a first-place marker on a no-names basis.
 8. **Paragraph 2.7** of the Draft Leniency Policy be amended to:
 - (i) clarify the type of information and level of detail required to obtain a marker, with illustrative examples; and
 - (ii) confirm that it is possible to provide sufficient details to identify the conduct for which leniency is sought on a hypothetical basis.
 9. **Paragraph 2.8** of the Draft Leniency Policy be amended to provide that, where multiple markers are issued, applicants will be told where their marker is ranked in the leniency queue.
 10. **Paragraph 2.12** of the Draft Leniency Policy be amended to:
 - (i) explain why (notwithstanding the Commission's powers to do so under the Ordinance), the Commission will not enter into leniency agreements with undertakings where proceedings have already been initiated; and
 - (ii) provide an assurance that leniency will be available, even where the Commission is aware of or has commenced an investigation into, suspected cartel activity provided that the Commission has not decided to issue an infringement notice or to commence proceedings in the Tribunal in respect of that cartel activity.
 11. **Paragraph 2.15** of the Draft Leniency Policy be amended to clarify that the requirement for an explanation to establish jurisdictional nexus does not require undertakings to provide evidence of the effects of the cartel conduct in Hong Kong.
 12. The Draft Leniency Policy be amended to clarify:
 - (i) the stage at which a leniency applicant should take steps to cease its participation in the cartel; and



- (ii) the circumstances in which the Commission is likely to give consent to continue participation.
13. **Paragraph 2.22(d)** of the Draft Leniency Policy be amended for consistency with paragraph 5.1 to confirm that disclosure is also permitted where the Commission has given its prior consent.
14. **Section 2** of the Draft Leniency Policy be amended to provide guidance on the circumstances in which the Commission is likely to grant consent to disclosure.
15. **Paragraph 2.23** of the Draft Leniency Policy be softened to refer to an ongoing requirement to cooperate with the Commission rather than requiring all evidence without delay.
16. **Paragraph 3.2** of the Draft Leniency Policy be amended to include an assurance that the Commission will not use evidence (or, at the very least, Leniency Application Material created specifically for the purposes of the leniency application) given by a leniency applicant against it if leniency is withdrawn.
17. The Draft Leniency Policy be amended to:
- (i) remove paragraph 5.7(d); and
 - (ii) confirm that the Commission will not disclose Leniency Application Material even where a leniency agreement is subsequently terminated and will continue to be bound by Part 8 of the Ordinance.
18. The Draft Leniency Policy be amended to clarify whether leniency will be available to the next undertaking in the leniency queue if a leniency agreement is terminated.
19. The Draft Leniency Policy be amended to provide further assurances:
- (i) on the steps that the Commission would consider to constitute its best endeavours to protect leniency materials; and
 - (ii) that the Commission would firmly resist requests for disclosure in the context of private damages actions.
20. **Paragraph 5.4** of the Draft Leniency Policy be amended as follows: “*If a leniency applicant materially breaches its confidentiality and non-disclosure commitments, the applicant may cease to be eligible for leniency under this policy*”.

Annex A to the Draft Leniency Policy

21. **Clause 3.1** of Annex A to the Draft Leniency Policy be amended to:



- (i) remove the requirement for consent in writing; and
 - (ii) confirm that disclosures to other members of a corporate group will not constitute a “*disclosure to any third party*”.
22. The list of conditions in **Clause 4.1(a)** of Annex A to the Draft Leniency Policy be made exhaustive by the removal of the wording “*this includes but is not limited to*”.
23. **Clause 4.1(a)(i)** of Annex A to the Draft Leniency Policy be amended as follows: “*using its reasonable endeavours to facilitate and secure the complete and truthful cooperation of its current officers and employees*”.
24. **Clause 4.1(a)(ii)** of Annex A be amended to:
- (i) replace references to “*best endeavours*” with “*reasonable endeavours*”; and
 - (ii) acknowledge, with examples, that there may be circumstances in which it is not possible to procure such cooperation and confirm that leniency will not be lost in such circumstances.
25. The Draft Leniency Policy be amended to provide further guidance on the process that the Commission will follow when agreeing the facts to be included in the agreed statement of facts, including in this process adequate opportunities for leniency applicants to make submissions regarding the scope of the statement of agreed facts.
26. The Commission confirm that it will not require from the leniency applicant any admission of liability or admission that the relevant conduct led to anti-competitive effects.
27. The first sentence of **clause 4.1(c)** of Annex A is qualified to require the “*reasonable satisfaction of the Commission*”.