

Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct

Introduction

Section 80 of the Competition Ordinance (the “Ordinance”) provides that the Commission may make a leniency agreement with a person that it will not bring or continue proceedings in the Competition Tribunal (the “Tribunal”) for a pecuniary penalty in exchange for the person’s cooperation in an investigation or in proceedings under the Ordinance.

The Competition Commission (the “Commission”) has released for public consultation a draft leniency policy for undertakings¹ engaged in cartel conduct (**Draft Cartel Leniency Policy**).

Under the Draft Cartel Leniency Policy, the Commission will agree not to bring proceedings in the Tribunal for a pecuniary penalty against the first cartel member who reports the cartel conduct to the Commission *and* meets all the requirements for receiving leniency under the policy.

What is cartel conduct?

Cartel conduct, in short, refers to arrangements between competitors to fix prices, share markets, restrict output or rig bids which have the object of harming competition.

The Commission considers cartel conduct to be Serious Anti-competitive Conduct under section 2(1) of the Ordinance.

Further guidance on cartels and Serious Anti-competitive Conduct is provided in the Commission’s *Guideline on the First Conduct Rule*.

Scope of policy

The Draft Cartel Leniency Policy only applies to undertakings engaged in cartel conduct. Where an undertaking enters a leniency agreement with the Commission under the Draft Cartel Leniency Policy, leniency will usually extend to the employees and officers of that undertaking.

The Draft Cartel Leniency Policy does not apply to conduct other than cartel conduct, nor to persons who are not undertakings.² The Commission will consider case by case whether it is appropriate to provide lenient treatment to persons in such cases.

¹ The term “undertaking” is defined in section 2 of the Ordinance and refers to any entity (including a natural person), regardless of its legal status or the way in which it is financed, which is engaged in an economic activity. Examples of undertakings include individual companies, groups of companies, partnerships, individuals operating as sole traders or subcontractors, co-operatives, societies, business chambers, trade associations and non-profit organisations. Further guidance on what the Commission considers to constitute an undertaking is provided in the Commission’s *Guideline on the First Conduct Rule*.

Why introduce a leniency policy for cartel conduct?

The Draft Cartel Leniency Policy is designed to help the Commission combat cartels.

Cartels differ from other types of anti-competitive conduct. First, they are universally condemned as economically harmful. Second, cartels are usually organised and implemented in secret, making them more difficult to detect.

The Commission's Draft Cartel Leniency Policy is designed to provide a strong and transparent incentive for a cartel member to stop its cartel conduct and to report the cartel to the Commission. It provides this incentive by providing leniency which is close to a 'winner takes all' approach. The Commission will only agree not to seek pecuniary penalties against the first undertaking member who reports the cartel conduct to the Commission *and* meets all the requirements under the policy.

This incentive to break from the cartel increases the risk of detection and discourages continuation of cartel conduct. By increasing the risk and cost of participating in a cartel, the draft policy should also deter the formation of new cartels that would harm competition in Hong Kong.

Global precedents, local context

The broad approach of the Draft Cartel Leniency Policy is consistent with similar policies of competition authorities around the world, which have been widely adopted and proven to be successful in helping to combat cartels. However, it is tailored to the specific circumstances of Hong Kong, taking into account the Ordinance and Hong Kong's court system.

One tool at the Commission's disposal

While the Commission considers that a cartel leniency policy will be an important tool to help identify and prevent cartels, it is not the only way the Commission will seek to identify and prevent cartel conduct in Hong Kong. For example, complaints, industry monitoring, economic analysis and other intelligence will be used to seek to identify cartels affecting Hong Kong.

Role of the draft Leniency Agreement

Sections 80 and 81 of the Ordinance provide the framework for entering (and terminating) a leniency agreement with the Commission.

² For example, an individual who is an employee of a company engaged in cartel conduct and wishes to approach the Commission in his/her individual capacity and not on behalf of the company. Such persons are not eligible to apply for leniency under the policy. The Commission encourages such persons to [speak to a legal representative and to] approach the Commission on a without prejudice basis.

To ensure potential leniency applicants understand the general nature of their obligations should they successfully apply for leniency for cartel conduct, a draft leniency agreement is attached to the Draft Cartel Leniency Policy.

The leniency policy and follow-on damages proceedings before the Tribunal

Private parties may only bring proceedings before the Tribunal seeking damages flowing from cartel conduct as a follow-on action *after* the conduct has been determined³ to be a contravention of the Ordinance.

The Commission has decided that it will not preclude, through the operation of the Draft Cartel Leniency Policy, the possibility of private actions for damages against successful leniency applicants. Therefore the successful leniency applicant will be required to sign a statement of agreed facts admitting its participation in the cartel, by reference to which the Tribunal may be asked to make an order declaring that the undertaking has contravened the First Conduct Rule.

The outcome of this requirement is generally consistent with the leniency regimes implemented by other competition authorities around the world, where leniency applicants are exposed to the risk of orders for damages by private parties who can prove they were harmed by cartel conduct.

Broader discretion remains in determining what action to take

As set out in the Commission's *Guideline on Investigations*, where the Commission has evidence which it considers demonstrates that a contravention of a Competition Rule has occurred or may occur, the Ordinance provides it with a range of options to resolve its concerns. These include express powers to accept Commitments under section 60 and to commence proceedings before the Tribunal for orders which may include seeking a pecuniary penalty against one party.

In cases of Serious Anti-Competitive Conduct such as cartel conduct, the Commission is more likely to seek strong sanctions against the undertakings engaged in such conduct. However, nothing in this policy prevents the Commission from deciding not to bring proceedings before the Tribunal against members of a reported cartel, or not to seek a penalty in such proceedings, where it considers other resolutions are more appropriate.

The Commission and the Communications Authority

While the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the Communications Authority ("CA") in respect of the anticompetitive conduct of undertakings operating in the telecommunications and broadcasting sectors.

³ Pursuant to section 110 of the Ordinance

At this stage, the CA has an open mind as to whether it should adopt, whether on its own or jointly with the Commission, a leniency policy and, if so, when that should take place. The CA would invite views on these matters from the broadcasting and telecommunications licensees. The CA would also welcome submissions received in this consultation from the broadcasting and telecommunications licensees with respect to the Commission's Draft Cartel Leniency Policy in deciding on the way forward in that regard.