



THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

Response by the American Chamber of Commerce in Hong Kong to the Hong Kong Competition Commission's Draft Leniency Policy published on September 23, 2015

October 23, 2015

1. Introduction

The American Chamber of Commerce in Hong Kong (“**AmCham**”) appreciates this opportunity to comment on the Draft Leniency Policy (“**Policy**”) published by the Competition Commission (“**Commission**”) on September 23, 2015.

AmCham wishes to reiterate its support of the Competition Ordinance (“**Ordinance**”). We believe that more competition in a free open economy is good for Hong Kong. At the same time, as we support all the ways in which Hong Kong can maintain and strengthen its status as a major international business and financial centre, we are keen to ensure that regulation affecting businesses are clear and predictable to all members of the economy.

We welcome the Commission’s introduction of a leniency programme in connection with the Ordinance. It provides a framework to encourage members of cartels to come forward and report illegal activity and be rewarded for their candour and assistance. We commend the Commission for striking a balance between, on the one hand, ensuring that the punitive and deterrent aims of the Competition Ordinance are not sacrificed and, on the other hand, the important role that a robust leniency programme plays in an effective competition law regime.

AmCham considers that the effectiveness of the Policy and the protection it affords potential applicants would be further enhanced if certain requirements were eliminated. Such requirements (as explained in more detail below) risk being at odds with the paperless process used in other jurisdictions and do not provide sufficient protection for leniency applicants.

AmCham recognises that the Ordinance itself imposes limitations on the potential effectiveness of any leniency programme, mainly because the Commission has ultimately no decision power in terms of actual sanctions; and the Tribunal is not bound by the Commission’s recommendations. Therefore, given the significance of the Policy to AmCham and its members, we suggest that the Policy may benefit from clarification in some areas to reinforce its overall effectiveness and to encourage businesses to report cartel activity to the Commission. Greater legal certainty surrounding the Policy is beneficial to all stakeholders.

2. Clear standard for a grant of leniency

The current wording of the Policy has been interpreted by some as giving the Commission unfettered discretion to grant immunity to an eligible applicant. In particular, paragraph 2.22 of the Policy states in part, “*If the Commission decides to offer to enter into a leniency agreement ...*”, suggesting that on receipt of a proffer and any other information that Commission has requested (paragraph 2.18), the Commission may or may not grant immunity.

AmCham suggests that the absence of a clear standard for the grant of immunity for the first eligible applicant that submits a full and comprehensive proffer may interfere with the incentive to notify cartel conduct.

The Policy may benefit from prescribing a clear threshold to be satisfied for an applicant to be eligible for immunity. For instance, the Policy may indicate that the information provided in the proffer must be sufficient for the Commission to begin an investigation under section 39(2) of the Ordinance or find an infringement of the First Conduct Rule under section 92(1).

A clear standard by which the Commission will grant leniency upon receipt of a proffer will encourage potential applicants to come forward.

3. Effect of a leniency agreement

AmCham understands that the Competition Tribunal is not a party to any leniency agreement concluded under the Policy. We submit that in the interests of legal certainty, the Commission should consider clarifying the effect of a leniency agreement for the purposes of any proceedings before the Competition Tribunal.

As the key instrument which protects an undertaking from penalty due to their cooperation with the Commission, it is fundamental to the operation of the programme that businesses clearly understand the weight afforded to the leniency agreement by the Commission and ultimately the Competition Tribunal.

In this way, the Policy may benefit from setting out that it is the Commission's expectation that the Tribunal will exercise its powers in a way which is consistent with the overall aims and objectives of the Policy, in accordance with the Ordinance.

4. Leniency agreement & signing of a statement of fact

AmCham would encourage the Commission to provide more safeguards and protections for leniency applicants, in order to enhance the effectiveness of the Policy and increase legal certainty. In particular, AmCham advocates for the Commission to re-consider the inclusion of a requirement to "sign a statement of agreed facts" admitting to participation in a cartel (see paragraph 2.22 and 4.1(c) of Annex A). Such a signing requirement would be at odds with leniency policies in other jurisdictions, in particular, because it would not be in keeping with a paperless process. Moreover, such a requirement would significantly disadvantage potential leniency applications because by signing such a statement, (as specifically noted in the "Guide" at page 3) the signed statement could be used against the applicant in proceedings before the Tribunal (in particular, in the context of follow-on claims after an order by the Tribunal declaring that the applicant contravened the First Conduct Rule). This approach would possibly discourage reliance on the Policy and maintain too high a level of legal uncertainty.

5. Treatment of subsequent applicants

AmCham considers that the effectiveness of the Policy could be further enhanced by providing guidance on the treatment of second and subsequent applicants for leniency. We acknowledge that the Policy adopts a 'winner-takes-all' approach in which the first successful applicant receives full immunity whilst subsequent companies who wish to offer voluntary cooperation to the Commission must rely on agreements outside of the scope of the Policy. Under the Policy, the Commission retains a discretion to give "favorable treatment" to subsequent applicants which may take "various forms" (paragraph 4.2).

AmCham encourages the Commission to provide additional guidance on the meaning of "favorable treatment" and how the Commission will determine whether favorable treatment is warranted in any case. The Commission may also consider noting that it expects that the Competition Tribunal will take into account the aims of the Policy and the Commission's recommendations in relation to favorable treatment. This would provide some assurances to potential applicants that even a subsequent applicant can expect to be treated leniently.

Clearer guidance on the treatment of subsequent applicants may improve the efficacy of the Policy. By improving the clarity and predictability of the treatment of subsequent applicants, more

businesses are likely to consider notifying the Commission of illegal conduct and this will result in better and more information becoming available to the Commission.

6. Treatment of information regarding conduct not covered by the Policy

AmCham welcomes the inclusion in the Policy of a ‘without prejudice’ basis according to which the Commission will not use information or evidence submitted in a leniency proffer against an applicant (paragraphs 2.15 and 2.17 of the Policy). AmCham considers the inclusion of this protection an important aspect of a leniency programme.

Further, as the Commission has focused on the most serious breaches of the law, the Policy only applies to Serious Anti-Competitive Conduct under the First Conduct Rule (that is, price fixing, bid rigging, market sharing and output restrictions) (paragraph 2.3).

AmCham wishes to draw the Commission’s attention to potential ambiguity in the Policy as to whether and how the ‘without prejudice’ protection applies to information about conduct outside of the scope of the Policy which may be disclosed in the course of a leniency application (that is, conduct that is not Serious Anti-Competitive Conduct).

AmCham suggests clarifying that any information and evidence collected by the Commission in the course of a leniency application will not be used against the applicant in the context of any investigation under the Ordinance. We submit that this clarification will create greater certainty and, in turn, encourage more parties to come forward to the Commission.

7. Application process

AmCham welcomes the inclusion of a multi-staged application process whereby an applicant is able to apply for a marker to record its intention to apply for leniency after which it will be invited by the Commission to make a formal proffer of leniency.

We do however wish to express our concern with respect to certain aspects of the process, which may be perceived as unclear by a potential leniency applicant, and which may be potentially out of step with other leniency regimes. As described in more detail below, we submit that it may in some circumstances be appropriate to issue further guidance to improve the certainty of the application process, whereas on another matter, we respectfully encourage the Commission to reconsider its position:

The level of detail to be provided at the marker stage

One of the key features of an effective marker system is to avoid setting too high a threshold for an applicant to secure a marker. The purpose of a low threshold is to encourage applicants to come forward as early as possible and create the impetus for cartel members to notify the Commission of illegal conduct.

AmCham considers that the Policy would benefit from a clarification that the only information required by the Commission in order to grant a marker is the minimum information that would enable it to determine whether a marker has already been granted in respect of that cartel conduct.

Signing a non-disclosure agreement as a pre-requisite to a leniency application

AmCham acknowledges that an effective leniency policy typically necessitates a high degree of confidentiality: AmCham thus welcomes the inclusion of confidentiality obligations on the applicant in the Policy. AmCham would nonetheless caution against requiring the applicant to “*sign a non-disclosure*” agreement (paragraph 2.14), since this is out of step with the paperless approach employed in other jurisdictions and would not provide sufficient protections for the leniency applicant.

The requirements for the proffer

AmCham also considers that the Policy would benefit from providing further guidance in relation to the requirements of the proffer. We welcome that the Policy sets out the contents of a proffer at paragraph 2.15. However, we encourage the Commission to provide additional guidance on the specific criteria which will be used by the Commission to assess an application at the proffer stage. For instance, the proffer must contain a “detailed description of the cartel”. However, it is not clear what constitutes a “detailed description of the cartel”.

Further guidance on the matters which are relevant to the Commission’s assessment of a leniency application will assist potential applicants to assess whether to make a leniency application and to ensure that they submit full and sufficient proffers.

To assure both legal certainty for the parties and a robust Policy, AmCham suggests that the Commission provides clarification on the types of details required by the Commission to grant leniency.

The American Chamber of Commerce in Hong Kong is the largest international chamber in Hong Kong and represents a broad and diverse membership