

INTRODUCTION

This submission has been prepared by members of the Hong Kong Competition Association (“HCA”). The HCA is an informal group of lawyers, researchers, consultants, monitoring trustees, in-house and students primarily based in Hong Kong, who all share a strong interest in the development of fair and efficient competition law in and outside of Hong Kong. The HCA was set up in October 2014 and is registered under the Societies Ordinance (CAP 151 of the Laws of Hong Kong). More information can be found on the HCA’s website: www.hkcompetitionassociation.org

The HCA is grateful for this opportunity to comment on the Draft Leniency Policy (the “Policy”) issued on 23 September 2015. We remain available to discuss or clarify our submission with the Competition Authorities.

Please note that the terms and expressions defined in the Policy have the same meanings in the following comments.

OVERALL COMMENTS

Overall, we believe that the Policy is well written, and that the mechanism it puts in place will be able, with a minimum amount of improvements, to encourage parties to come forward to the Competition Commission (the “Commission”) to report existing cartels and to deter future cartel conduct. The Policy would benefit from increased clarity in some places, which are addressed below.

In addition, we believe that practical examples in the form of hypothetical scenarios would make the Policy more readily accessible. Such illustrations have been provided in the Guidelines. These are particularly beneficial to non-lawyers, small business owners and trade associations which may not have the means to afford specialist competition advice. Adopting the same approach helps to add clarity to the Policy. This is in line with HCA’s mission to make competition law more accessible.

DETAILED COMMENTS

Our specific comments address the following areas:

1. Scope
2. Process
3. Confidentiality
4. Draft Template Agreement

1. Scope

a. Other routes for leniency

The Policy is one of the ways undertakings can apply for leniency under section 80 of the Competition Ordinance (“CO”). However, the Policy does not clearly state that undertakings may still apply for leniency under section 80, even when they do not qualify under the Policy. Two examples of where this could cause confusion and counter-productive results are undertakings wanting to apply for leniency (1) for non-cartel activity, and (2) when proceedings have already been started at the Competition Tribunal. Without the certainty that some form of leniency is available to them, undertakings in these situations will refrain from applying, therefore depriving themselves of the benefits of section 80, and depriving the Commission of information on anti-competitive activity.

We suggest that, at least, the Commission clarifies that other routes are available for leniency under section 80 and, at most, provides guidance on what the process and principles are under these alternative routes.

Finally, the draft Policy says: *"2.12. Leniency will not be available under this policy if the Commission has decided to issue an infringement notice under section 67 of the Ordinance or to commence proceedings in the Tribunal in respect of the cartel conduct reported by the undertaking."* It would be helpful if the Commission could clarify what *"the Commission has decided"* means. At what stage in an investigation will the Commission be deemed to have taken a decision? If this point is not clarified it may be a major disincentive to whistleblowers.

b. Lack of clarity in relation to “coercion”

The Policy is unavailable to undertakings which have coerced other parties into a cartel. However we note that there is no clear definition of what “coerce” means under paragraph 2.22 (b) of the Policy. In the UK, the situation is clearer and there is a precise set of criteria that defines which undertaking is not eligible for leniency based on their coercive behaviour. Pressures and incentives are common in the business world, and the border between a strong incentive and a soft pressure can be blurry. A successful cartel requires a punishment mechanism to enforce the rules of the group, something that can also be interpreted as coercion in some cases. As a result, the Commission runs the risk of discouraging undertakings from applying for leniency, because they lack certainty as to whether their behaviour qualifies as coercion under the Policy. In addition, without a clear set of criteria for coercion, businesses are at risk of being treated differently while being in the same situation, something that would be unfair and which a policy or a guideline is precisely designed to avoid. Therefore, it would be useful if the Commission could provide clear examples and hypothetical cases, to allow parties to determine whether they may have coerced others into entering a cartel.

If an undertaking has taken the lead in a cartel, the Policy does not clarify whether this will have any impact on a leniency application. We suggest that the Policy

clarifies that even ring leaders can apply for leniency, as long as they have not coerced other parties into a cartel and that they meet all the conditions.

- c. Additional clarity is needed for immunity from directors' disqualification orders

We suggest an automatic immunity from director disqualification orders, as it is the practice of the UK CMA concerning Type A Immunity. The Draft Leniency Policy suggests at para. 2.2 that the leniency agreement ordinarily extends to cover current directors and employees, and the wording of paragraph 1.1f and 2.1 of the Draft Template Agreement suggests that director disqualification proceedings are also barred under the leniency agreement. Nonetheless, the Draft Leniency Policy does not indicate at what stages the applicant will be informed of the scope of the leniency agreement, i.e. whether the directors are immune from disqualification orders. The lack of certainty in securing immunity may deter those holding a decisive role in the undertaking from applying for leniency.

2. Process

- a. Statement of Facts

The Policy clearly states that it does *"not preclude the possibility of a follow-on action under section 110 of the Ordinance against cartel members, including a party to the leniency agreement, by persons who can prove that they have suffered loss or damage as a result of the cartel"*. Follow-on actions have the potential to lead to substantial awards. However, applicants for leniency must be prepared to sign a Statement of Facts. The Policy does not spell out the scope of the Statement of Facts or what form is it to take – e.g. will it be attached to the leniency agreement? This requires clarification as this uncertainty could be a major disincentive to whistleblowers. To promote legal certainty, it might be possible to set out the scope of a template Statement of Facts in the attachment to the draft Policy/ draft leniency agreement?

- b. No admission of contravention before at least one other party is found in contravention

There is no obligation to comply with paragraph 4.1 of the Policy unless after at least one other cartel member has been found by the Competition Tribunal to have contravened the First Conduct Rule. Currently, paragraph 4.4 of the Policy prevents the undesirable situation where the leniency recipient is prejudiced vis-à-vis other cartel members in follow-on actions if the Competition Commission refrains from prosecuting the cartel. Nonetheless, it is possible that the leniency recipient may still be prejudiced if, after a full-blown proceeding, there is no successful prosecution of other cartel members (because of *inter alia* lack of cogent evidence and misapprehension of the First Conduct Rule). In this situation, the leniency recipient alone is susceptible to follow-on actions in particular because all interested parties would be aware of the leniency agreement.

In accordance with the principle that the leniency recipient should not be placed in a position worse than other cartel members, it is reasonable to demand admission of the contravention only after other cartel members have been found to be in contravention of the First Conduct Rule. This practice does not prejudice the right of injured parties to seek redress against the cartel members if there was indeed a cartel.

c. Concurrent jurisdiction

The Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct states: *"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. 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."* It is somewhat unusual that the CA hasn't published a policy yet. Might there be a scope for problems and potentially regulatory arbitrage if the Commission and CA have concurrent jurisdiction but divergent leniency policies? Will this be addressed in the MOU to be signed between the CA and the Commission?

3. Confidentiality

a. Confidential treatment of applicants under the Policy and outside of the Policy

The parties would benefit from additional certainty, in particular in relation to the risk of follow-on action for damages, if the Policy clearly stated what the confidential treatment of leniency documents will be. In particular, the Policy would be more attractive to undertakings if it were to provide a confidentiality advantage that is not available outside of the Policy (i.e. for applicants under section 80 of the CO but not under the Policy).

b. Standard non-disclosure agreement needed

There is currently no standard non-disclosure agreement provided with the Policy. Parties approaching the Commission may need additional certainty as to what information will remain confidential until a leniency agreement is entered into.

4. Draft Template Agreement

We suggest incorporating the leniency policy and section 80 of the CO at paragraph 9.2 of the model agreement for reference.