

**COMMENTS OF THE AMERICAN BAR ASSOCIATION'S
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
IN RESPONSE TO THE HONG KONG COMPETITION COMMISSION'S
SEPTEMBER 23, 2015 DRAFT LENIENCY POLICY FOR UNDERTAKINGS
ENGAGED IN CARTEL CONDUCT**

The views stated in these Comments are presented on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

October 30, 2015

I. Introduction

The American Bar Association Section of Antitrust Law and Section of International Law (the "Sections") are pleased to offer the following comments on the draft *Leniency Policy For Undertakings Engaged In Cartel Conduct* ("Draft Leniency Policy") published by the Hong Kong Competition Commission ("Commission") on September 23, 2015. These comments are submitted in response to the Commission's request for public comment.

The Sections commend the Commission for committing to the establishment of a Leniency Policy based on transparency and certainty. We very much appreciate the opportunity to comment on the Draft Leniency Policy and do so in the spirit of helping the Commission to meet its laudable goal.

II. Comments on Draft Leniency Policy

The comments below correspond to the indicated paragraph number of the Draft Leniency Policy.

1. Introduction

1.2. This paragraph states that leniency "should be accorded to an undertaking which is willing to terminate its participation in cartel conduct...." This is presumably to give the Commission the opportunity to ask the applicant to continue with cartel behavior in order to gather evidence. The Sections recommend that any request to continue with cartel behavior be made on a voluntary basis. Continuation of cartel activity could expose an applicant to liability, including possible criminal liability, in other jurisdictions. The applicant may also lose the opportunity for leniency in other jurisdictions if it continues with cartel conduct.¹

¹ The *Template for Leniency Agreement* (4.1 e) requires that the party "will, where the Commission has requested that [Party] continue to participate in the Cartel, act as directed by the Commission in relation to the Cartel." Consistent with the comment above, the Sections recommend that this

This paragraph also lists some of the other requirements an applicant must meet to obtain leniency, “report that conduct to the Commission and cooperate in the bringing of proceedings against other parties to the cartel.” For completeness, the Sections recommend that this clause be added, “and meet the other requirements set forth in paragraph 2.22 of this Policy.”

2. Overview and Scope of Policy

2.1b). The Draft Leniency Policy refers to “undertakings” throughout the document. Section 80 of the Ordinance, which enables the Commission to enter into leniency agreements, however, also enables the Commission to enter into leniency with persons. Is there any significance to the fact that only “undertakings” are referred to in the Draft Leniency Policy? Of course, under paragraph 2.2, leniency protection extends to a cooperating current “director, officer or employee” if an undertaking is granted leniency. But, what if an individual employee (whistleblower) comes forward on his own? The United States has an individual leniency policy that covers this situation.² The Commission may wish to provide some clarity around the treatment of an individual who comes forward to report a First Conduct Rule violation independent of his employer.³

2.1d). The Commission has done a commendable job of incorporating the widespread global practice of striving for transparency and certainty in a successful leniency program.⁴ There are several areas in the Draft Leniency Policy where a small change in language may further advance the goal of transparency and certainty. For example, this paragraph currently reads “Fourth, if the Commission exercises its discretion to offer leniency....” The Sections recommend changing this sentence to

condition be removed.

² In the United States, an individual can come forward on his/her own to seek leniency under the Department of Justice, Antitrust Division, Individual Leniency Policy, available at <http://www.justice.gov/atr/individual-lenency-policy>.

³ It appears that the Draft Leniency Policy permits an undertaking to obtain leniency even where the Commission has the cooperation of an individual. Pursuant to paragraph 2.12, an undertaking may qualify for leniency unless the Commission has already 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.” However, it may be beneficial for the Draft Leniency Policy to make the availability of leniency in this situation explicit.

⁴ It is clear the Commission has incorporated the suggestion of the International Competition Network (“ICN”) on this issue: “**Transparency and certainty** – There must be transparency and certainty in the operation of a leniency policy. Competition agencies need to build the trust of leniency applicants and their attorneys by consistently applying the leniency policy. A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.” See ICN “*Leniency Guidelines*,” available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf>.

read, “Fourth, if the undertaking meets the conditions set forth in paragraph 2.22....” This gives assurance to the undertaking that it will receive leniency if it meets the conditions. The Commission will decide if the undertaking meets the conditions for leniency, but this change assures that the Commission’s discretion is limited to the question of whether the leniency conditions are met, making the leniency policy more certain and transparent.

2.1e). This paragraph provides that an undertaking “must be prepared 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.” There are likely benefits to the Commission of requiring an applicant to sign such a statement. Certainly, it would memorialize the applicant’s conduct with clarity so there are no later disputes regarding the nature and scope of the conduct. However, this requirement is likely to serve as a strong disincentive to an undertaking considering making an application for leniency, particularly if the alleged cartel is global in nature.

Potential leniency applicants would have reasonable concerns that the signed statement may be discoverable, which would give them great pause about self-reporting. In Hong Kong, despite the best efforts of the Commission to maintain confidentiality of the statements, the statements may become discoverable. Perhaps a greater concern is that – in a cartel that affects a broad geographic area – the signed statement would become discoverable in one or more other jurisdictions. In the United States, for example, in a prosecution against other cartel members, the government may be required to disclose to defendants a Hong Kong leniency recipients’ agreed statement of facts. It is impossible to predict all of the various ways a signed statement of facts may become discoverable in some future litigation across the globe. A potential leniency applicant will have to consider whether obtaining leniency in Hong Kong is worth having to sign a “confession” that may prove to be damaging in enforcement actions by other agencies or in civil litigation in various jurisdictions. As is widely reported, in recent cartel matters for some cartel participants, the civil damages paid in the U.S. alone have exceeded the total fines imposed in all jurisdictions combined.

Because the benefits to the Commission of requiring a leniency applicant to “sign a statement of agreed facts” are outweighed by the likelihood that significant numbers of potential leniency applicants will decline to self-report cartel conduct to the Commission, the Sections strongly recommend that this requirement be removed from the Draft Leniency Policy.⁵

⁵ Despite best efforts, enforcement agencies simply cannot guarantee the confidentiality of signed corporate statements. That is one reason why, in the United States, leniency applications are made through oral proffers. The European Commission at one time did require written corporate statements, but these became discoverable, over the Commission’s objection, in certain civil litigation. The European Commission now provides that leniency can be obtained through oral statements: “Oral corporate statements should be clear, factual and to the point, with precise and sufficiently detailed information.” The full procedure for oral statements can be found at the European Commission DG

The *Template for a Leniency Agreement* paragraph 4.4 provides that “The Commission will not require [Party] to [sign an agreed upon statement of facts] in circumstances where the Commission decides not to commence Proceedings against any other members of the Cartel.” The Sections recommend that if the requirement of signing an agreed statement of facts is not eliminated, this sentence should be added to paragraph 2.1e).

2.2. This paragraph reads, “Where the Commission enters into a leniency agreement with an undertaking, leniency will ordinarily extend to any current director, officer or employee of the undertaking provided the relevant individuals provide complete, truthful and continuous cooperation....” What is the significance of inserting the word “ordinarily?” It raises the question of what are the extraordinary circumstances where an individual who cooperates completely, truthfully and continuously will not be extended leniency? The Sections recommend that the word “ordinarily” be deleted.

Applying for a marker

2.7. This paragraph provides “The caller may then be given a marker which identifies the time and date of the call.” The Sections recommend that “may” be changed to “will” so that the sentence reads, “The caller will then be given a marker which identifies the time and date of the call.” The Sections also recommend adding this sentence, “If the caller does not provide sufficient details to identify the conduct for which leniency is sought, the Commission will explain how the proffer is deficient.”

2.9. Under the Draft Leniency Policy, a request for a marker may only be made by calling the Hotline during business hours. The Sections recommend that the Commission provide the option of seeking a marker by email. This option may not be favored by leniency applicants since it may produce discoverable material, but it allows an even playing field for any undertaking to seek a marker whenever they have the information they believe will qualify. An email also leaves an indisputable record of the date and time the marker was sought and will be in the marker queue along with Hotline marker requests in the order in which it was received.

2.18. This paragraph reads, “Based on the proffer...the Commission will decide whether or not to make an offer to enter into a leniency agreement.” The Draft Leniency Policy will provide additional transparency and certainty if the sentence is changed to, “Based on the proffer, the Commission will decide if the applicant meets

Competition Leniency page, “*Oral Statements procedure*” available at, <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

the qualifications to enter into the leniency program.” As with our recommended change to paragraph 2.1d), the suggested change makes clear that the Commission’s discretion extends only to whether the leniency conditions are met.

2.19. This may already be clear from other paragraphs, but for further clarity the Sections recommend that this sentence be added, “Communications in connection with the proffer may be made by the undertaking’s legal representative.”

Step 4: Offer to Enter into a Leniency Agreement

2.21. Consistent with earlier suggestions, the Sections recommend changing, “If the Commission decides” to “If the applicant meets the requirements for leniency....”

2.22f). We have already advanced the Sections’ strong recommendation that the requirement of an undertaking signing a statement of facts be eliminated from the Draft Leniency Policy.

3. Termination of the Leniency Agreement

3.1. The Draft Leniency Policy states that the Commission may terminate the agreement where “the Commission has reasonable grounds to suspect that the information on which it based its decision to make the agreement was incomplete, false or misleading in a material particular....” We appreciate that the language “reasonable grounds to suspect...” appears in section 81 of the Ordinance, but the word “suspect” may seem to a potential applicant to be both vague and a very low bar for termination. The Sections recommend that the Commission consider substituting “believe” for “suspect,” resulting in a standard under which leniency can be terminated “where the Commission has a reasonable basis to believe....”

The Sections also recommend that a new sentence be added to the Draft Leniency Policy that reads, “The parties acknowledge the procedure for terminating this Agreement is set out in section 81 of the Ordinance.” This will conform the Draft Leniency Policy to the *Template for a Leniency Agreement*, paragraph 5.2. The Sections also recommend that the Commission enhance the clarity regarding the termination process with the addition of the following sentence, “Section 81 of the Ordinance provides for notice to the undertaking of the proposed termination and the reasons supporting this determination and an opportunity to be heard before a leniency agreement is terminated.”

4. Undertakings which do not Qualify for Leniency

4.1-- 4.4. The Sections appreciate that the Commission does not impose pecuniary penalties, and that it can only (as in many jurisdictions) make recommendations to the Tribunal regarding appropriate financial penalties. Even with this limitation, it may be advisable to give some guidance on what the Commission will be prepared to recommend with respect to reduced pecuniary

penalties for a cooperating undertaking which does not qualify for leniency, and what such a cooperating undertaking would have to do to qualify for such consideration. For example, the EU policy for companies that do not qualify for 100% immunity from fines reads, “The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.”⁶ While the United States has not provided formal guidance on fine reductions for subsequent cooperators, potential cooperating parties have the comfort of knowing that they are likely to obtain certain approximate levels of reduced fines for cooperation based on public comments from agency officials and available precedent. The Sections recommend that some guidance be given regarding the Commission’s likely recommendations with respect to reductions in pecuniary penalties for undertakings which cooperate but which do not qualify for leniency.

5. Confidentiality and Non-Disclosure

5.2. Confidentiality is a primary concern of any potential leniency applicant and the Commission has addressed confidentiality throughout the Draft Leniency Policy. Here, the Sections recommend the addition of a sentence that would give further assurances regarding the scope of the non-disclosure commitment, as follows, “The confidentiality and non-disclosure commitment extends to any civil litigation the undertaking faces, or any action by other enforcement agencies, except as may be provided by law, or paragraph 6, Cooperation in Cross-border Cartel Investigations.

6. Cooperation in Cross-border Cartel Investigations

6.2. The Draft Leniency Policy provides that, as a condition of entering into a leniency agreement, the Commission may “require a leniency applicant to authorise the Commission to exchange confidential information with authorities in another jurisdiction.” The *Template for Leniency Agreement* similarly provides that the condition of “continuous and complete cooperation” includes “. . . providing appropriate waivers (to be determined by the Commission) to enable the Commission and the relevant competition authorities . . . to . . . exchange relevant information and coordinate their investigations . . .” This requirement of compulsory waivers may deter some potential applicants from coming forward in Hong Kong over concern that they may be required to permit the Commission to disclose information to jurisdictions where the applicant does not have conditional leniency for various reasons. It is common practice for leniency applicants to voluntarily grant waivers between competition authorities in jurisdictional pairs where the applicant has conditional leniency in each jurisdiction. However, it would be overly burdensome to require an applicant in Hong Kong to potentially expose itself to prosecution in other jurisdictions by virtue of its cooperation in Hong Kong.

⁶ See European Commission DG Competition, “*About the Leniency Policy*” available at <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

The Sections maintain that eligibility for a leniency program should never be conditioned upon a grant of a waiver of confidentiality to permit communication with an agency in another jurisdiction. The decision of whether or not to grant a waiver is complex. Considerations include the applicant's eligibility for leniency in the other jurisdiction, the legal risks (including criminal sanctions for firms and individuals) in the other jurisdiction, and the strength and application of privilege and confidentiality rules in the other jurisdiction. These considerations, all legitimate, militate against a requirement that applicants grant waivers as a condition for participation in a leniency program. Moreover, such a requirement is antithetical to the notion of self-reporting. The Sections are unaware of any jurisdiction that currently compels the granting of waivers as a condition of leniency.⁷ The Sections strongly recommend that this requirement be eliminated.

Accordingly, in this paragraph, and in the corresponding paragraph of the Template for a Leniency Agreement with an Undertaking Engaged in Cartel conduct, the Commission should make clear that the sharing of the leniency applicant's information will take place only if the applicant has made a voluntary waiver. Moreover, the paragraph should contain clear language that the Commission will not require any waiver of attorney-client privilege (or its equivalent) as a condition for obtaining leniency.

III. TEMPLATE FOR LENIENCY AGREEMENT

The Sections also have some comments/recommendations regarding the Template for Leniency Agreement. Many of these comments mirror those made regarding the Draft Leniency Policy.

3. Representations and Warranties of [Party]

3.1e). One of the representations the applicant makes to the Commission is "that any opinion provided to the Commission with respect to the Cartel Conduct was, and still is, honestly held." It is not clear to the Sections what this means. The Sections recommend that this sentence be deleted. The applicant already represents in section 3.1(d) "that the information provided to the Commission prior to entering this Agreement as part of the Leniency Application was, and still is, neither false nor misleading in any material particular."

Leniency Conditions for Party

4.1a) i). The Sections recommend that this sentence begin with "using its best endeavors." This will conform the condition to that set forth in the next paragraph, 4.1a)ii).

⁷ The Singapore Competition Commission has also issued a Draft Leniency Policy which also includes a similar compulsory waiver requirement. The Sections are making similar comments to the Singapore Commission strongly recommending that this requirement be eliminated.

4.1 a) iii). This paragraph of the Template requires the applicant to provide waivers at the Commission's request to share information with other jurisdictions. As discussed previously, the Sections strongly recommend that the exchange of information with other jurisdictions be done on a voluntarily basis.

4.1 c) This condition relates to the requirement that the applicant "agree to and sign a statement of agreed facts." As discussed earlier, this requirement will be a significant deterrent to an applicant seeking leniency. The Sections strongly recommend that this requirement be removed.

4.1d). The Sections recommend that the qualifier "using its best endeavors" be moved to the beginning of the sentence so that the qualifier applies to all persons covered by the leniency agreement. The sentence would read: "will use its best endeavors to ensure that its officers, employees, representatives [and persons listed in Schedule A and Schedule B to this Agreement] will keep confidential...."

4.1 e). The Template also requires that the party "will, where the Commission has requested that [Party] continue to participate in the Cartel, act as directed by the Commission in relation to the Cartel." The Sections recommend that this condition be deleted. The Commission can make such a request on a voluntary basis, but to require the undertaking to continue in the cartel may expose it to criminal liability in other jurisdictions, or even disqualify it from receiving leniency in other jurisdictions.

4.4. The Template states that a Party does not have to sign an agreed upon statement of facts "where the Commission decides not to commence proceedings against any other members of the cartel." As noted earlier, the Sections strongly recommend that the requirement that the party sign an agreed upon statement of facts be eliminated. But, if that requirement is not eliminated, this statement should also be added to the Draft Leniency Policy to be sure an applicant is aware of it.

Termination

5.2. This paragraph states "[t]he Parties acknowledge the procedure for termination is set out in section 81 of the Ordinance." To provide additional clarity in the Template, the Sections recommend that the Commission add the sentence, "Section 81 of the Ordinance provides for notice to the undertaking of the proposed termination and the reasons supporting this determination and an opportunity to be heard before a leniency agreement is terminated."