

Date: 23 October 2015

By Email

Competition Commission (the "**Commission**")
Room 3601, 36/F Wu Chung House
213 Queen's Road East
Wai Chai, Hong Kong

Dear Sirs

Consultation on the draft cartel leniency policy for undertakings engaged in cartel conduct issued by the Commission on 23 September 2015 (the "Draft Policy")

We welcome the opportunity to comment on the Draft Policy. In general, as we read the Draft Policy together with the ECN Model Leniency Programme and other leniency programmes such as that of US and UK, we consider the Draft Policy lack some important elements which would make the Draft Policy work.

We are in no way knowledgeable in this area and our comments are just based on our preliminary understanding of leniency programmes in other jurisdictions. We summarise our comments and suggestions as follows:

1. Full and partial immunities

We note that in the ECN Model Leniency Programme, there are various different types of leniency cases (i.e. applications for immunity before an inspection, immunity after an inspection and for a reduction in fines). It is desirable for the Commission to adopt similar approach, to provide opportunities for undertakings to cooperate with the Commission even if they do not qualify for full immunity, either because they may fail to meet the relevant evidential threshold or because of the role they play in the cartel.

2. The marker system

A clear and consistent marker system has to be in place to provide proper incentives for undertakings to come forward with information about cartels. The benefits of a marker system are materially undermined if it is discretionary, or where markers are granted on a basis that is in any way unclear or uncertain.

In this regard, the Draft Policy only provides "when the Commission is contacted, the caller will be asked to provide **sufficient** details to identify the conduct for which leniency is sought. The caller **may** then be given a marker which identifies the time and date of the call."

The Draft Policy has no guidance on what details would constitute "sufficient". Much clearer guidance should be provided on the precise information that will be required, and any other requirements that must be met by a leniency applicant, before a marker will be given.

In addition, the word "may" means it is in the discretion of the Commission whether to award a marker. In the absence of a clear and achievable threshold, there is a real risk that undertakings may not be prepared to come forward with information about cartels.

We therefore recommend that the Commission makes the grant of a marker automatic once the evidentiary conditions are met and that it limits the initial information to be provided to the strict minimum in line with what is required under the UK and US regimes.

3. Invitation to apply for leniency

What complicates the matter even further is after step 1 (applying for a marker), when it comes to step 2, leniency will still not be available under the Draft 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."

That means even if a leniency applicant has obtained a marker from step 1, it may nonetheless not be immune from proceedings if the Commission decides so at step 2. In such degree of uncertainty involved, undertakings will be more inclined to take the risk of later detection than to come forward by themselves at all.

4. Undertakings which do not qualify for leniency

The Draft Policy states that "the Commission will rely on its enforcement discretion to consider providing favourable treatment to undertakings which cooperate with the Commission".

Again, clear guidance on what favourable treatment will undertakings get should be given to provide certainty of the Draft Policy and encourage undertakings' cooperation with the Commission.

As mentioned in paragraph 1 above, the Commission may consider to follow the ECN Leniency Programme, which states the value of cooperation depends on the timing (including whether a leniency applicant was the first, second or third, etc. to apply) and the quality and nature of the evidence submitted.

5. Draft Leniency Agreement (Annex A to the Draft Policy)

5.1 The concept of "coercion"

As one of the representation and warranties, the leniency applicant has to confirm it has not coerced other parties to engage in the cartel conduct.

The interpretation of this concept is essential to understanding the impact in practice of the exclusion from the leniency programme under the Draft Policy and we submit that the Commission should add detailed guidance as to the interpretation of "coercion" in the Draft Policy.

5.2 Leniency Conditions

One of the conditions of the Draft Leniency Agreement is to facilitate and secure the complete and truthful cooperation of its current officers and employees. However, given these individuals may be exposing themselves to criminal sanctions in any country, the employees or directors may on independent legal advice refuse to answer any questions. In such circumstances, there is very little the leniency applicant can do to make the employees or directors assist the Commission.

Similarly, the obligation to not remove, destroy, tamper with or modify evidence may not be met if a rogue employee or director did so contrary to the directions of the leniency applicant.

If this were to happen, the leniency applicant will lose immunity despite providing significant assistance and co-operation during the Commission's investigation. We would suggest that these leniency conditions be slightly amended to provide that the leniency applicant "use all best endeavours" to comply with the leniency conditions.

Conclusion

We would suggest the Commission to enhance the clarity and certainty of the guidance under the Draft Policy and as appropriate, harmonise the Draft Policy with well-established leniency programmes in other jurisdictions.

Yours faithfully

China Telecom Global Limited

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(By Email)