

ICF's Response to Draft Leniency Policy for Undertakings Engaged in Cartel Conduct under Hong Kong's Competition Ordinance – Submitted 23 October 2015

Who we are

ICF (formerly GHK) is a leading economic and public policy consulting practice in Hong Kong. We have been advising both Government and private clients here for over 20 years, on the economics and financials of major transport, infrastructure and property developments.

We have hands-on knowledge and experience of issues in competition, having advised competition authorities, regulators and private clients in Hong Kong, Singapore, UK and European Union. Sectors we have analysed include healthcare, retail, advertising, consumer credit, transport (aviation, ports & shipping, bus, rail), energy and water.

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Introduction

ICF welcomes this opportunity to provide a response to the draft Leniency Policy ("the guidance") issued by Competition Commission of Hong Kong (CCHK) on 23 September 2015.

We set out below our reflections on the draft guidelines, grouped as follows:

1. Overall view;
2. Scope of leniency;
3. Treatment of non-undertaking;
4. Cash rewards for whistle blowers; and
5. Other tools at the disposal of the Competition Commission.

1. Overall view

We welcome the consistency of the Competition Commission's leniency guidance with the policies of other competition authorities worldwide, and note the positive efforts to tailor the guidance to the specific circumstances present in Hong Kong.

The guidance is a positive first step in establishing, together with the Competition Ordinance, free and competitive market in Hong Kong for the benefit of all businesses and consumers. However, we recommend that the leniency guidance is reviewed, after a sufficient time to allow for adaption to the new regime, as leniency policy is untested in Hong Kong. This is necessary to ensure its effectiveness in deterring the formation and continuation of cartels.

We also identify four areas which should be covered in any review:

- the limitation of leniency to the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency under the policy;
- the lack of clarity for whistle blowers who are not undertakings;
- the potential of cash rewards for whistle blowers; and
- a consideration of the other tools available to the Competition Authority.

2. Scope of leniency

The draft guidelines limit leniency to the first cartel member who reports the cartel conduct to the Commission, and meets all the requirements for receiving leniency under the policy. The risk is that if two undertakings simultaneously or in parallel come forward, it is unclear how the second undertaking will be treated. If unfair that the second undertaking is punished, the second undertaking may be reluctant to whistle blow in the future. Also, it is not clear if both undertakings provide information, which would be determined to have moved first. In markets susceptible to cartel behaviour, the reluctance of an undertaking to come forward, due to the risk they come second, may increase the risk that future violations of the first conduct rule occur and go undetected.

However, taking into account the circumstances in Hong Kong, where many markets can be considered highly concentrated with three or less undertakings controlling a very high market share, providing leniency to more than the first undertaking may not sufficiently punish and deter anti-competitive behaviour (i.e. undertakings only need to come second, reducing the incentive to come first). Knowing this, undertakings may see cartel forming as profitable provided they come forward early enough to authorities on detection. In contrast the rival that comes third is punished. In highly concentrated markets such as these, leniency for the second undertaking may therefore be counterproductive by damaging the third undertaking.

3. Treatment of non-undertakings

The guidance makes clear that leniency only applies to undertakings. The Commission will consider lenient treatment of individuals (non-undertakings) on a case by case basis. Individuals are often an important source of whistle blowing and risk retribution from fellow employees and the employer for coming forward with information. It is therefore important that they receive protection when providing information that uncovers cartel activity, and are rewarded for the risks they take. The draft guidance is vague in this respect and provides no incentive for individuals with information to approach the Commission. The same rules which apply to undertakings should apply to the individual where feasible. We believe this would encourage individuals to come forward, where the undertaking is unwilling to do so.

4. Cash rewards for whistle blowers

We note that other competition authorities such as the Competition and Markets Authority (CMA) in the UK offer cash rewards for cartel whistle blowers as an added incentive, up to the value of £100,000. Some parallels are found in the US, where under the US 2010 Dodd-Frank Act, individuals who come forward and give high quality information on fraud that results in sanctions over \$1 million can be granted up to 30% of the fine imposed. While the effectiveness of these added incentives has been questioned, as those directly responsible for cartel activity are not eligible for the cash reward, a similar policy could be considered in the future. We propose that this should be investigated following any future review of the leniency policy in Hong Kong.

5. Other tools available to the Competition Commission

We would like to emphasise that leniency is not a substitute for other forms of cartel detection such as complaints, industry monitoring, economic analysis and other intelligence. It is therefore important that enforcement and market monitoring activities are adequately resourced, as this can often be the most effective deterrent to companies considering anti-competitive conduct.

We would also like to stress the importance of economics in identifying markets at high risk of cartel formation, and in the detection of existing cartels. This can support efforts to focus limited resources on the markets of greatest concern, and identify priorities for further investigation.