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Submissions on Draft Leniency Policy
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Submission on Draft Leniency Policy Issued for Public Consultation by the Hong Kong Competition Commission

Introduction

We thank the Commission for the opportunity to provide submissions in response to its consultation on the proposed leniency policy for Hong Kong. The Commission is to be commended for its efforts, both in developing the policy and in seeking input from the community.

Key Observations:

Certainty: Any leniency policy, to be successful in encouraging cartelists to come forward, must provide a high degree of certainty as to what they will receive in return. We respectfully submit that there is a need for greater detail as to what is needed to qualify successfully for immunity in Hong Kong. At present, it is not entirely clear what an applicant must provide to obtain immunity or whether, if someone comes forward latter with more information, the "first-in" is at risk of loosing its immunity status. It is also not clear what degree of cooperation (including from employees who may have left the company, or indeed Hong Kong) must be provided.

Subsequent whistle-blowers: Second and third-in applicants are very valuable for a competition agency (to drive the leniency race and then corroborate/expand evidence provided by the immunity applicant). We appreciate the limitations in the relevant provisions of the Ordinance and the uncertainty that exists in respect of the Tribunal's approach to leniency agreements. However, we would encourage the Commission to find some way of giving more incentive to those who are not "first-in", to come forward. There would also be advantages for the Commission in extending the policy to allow parties to come forward after investigations or proceedings have been commenced.

Scope of admissions: A properly articulated notion for 'cooperation' can address the Commission's need for certainty/confidentiality without requiring the applicant to commit its confession to writing with implications for cartel exposure/damages elsewhere. We are concerned that the policy as currently structured, which requires a written confession to secure a leniency agreement, will give cause for hesitation, as companies will be concerned at the exposure they will face, both in follow-on actions in Hong Kong and proceedings in other jurisdictions.

We expand on these and other points in the following sections.

Introductory section of Policy

Conduct qualifying for leniency: the Policy does not preclude the Commission from granting leniency in respect of a contravention which is not covered by the Policy. However, successful leniency regimes tend to have three key ingredients: high risk of enforcement; significant sanctions and transparency/predictability. In the absence of predictability as to covered conduct, it is probably unrealistic to expect that companies will come forward to report a violation (especially given the need for a written statement – see below). It might also be undesirable for the Commission to have to field applications in various areas without having determined what should, from a policy perspective, qualify for leniency.

Who is eligible for leniency: the Policy does not *generally* apply to persons that are not undertakings. This means that individuals are unlikely to come forward. It seems that the Commission prefers to retain flexibility rather than close-off options. But when it comes to leniency (and the serious implications of a confession), more discretion is not necessarily in the best interests of the community as this creates uncertainty with the result that parties will be less likely to apply for leniency. We would respectfully submit that there are advantages in being clear at the outset and then expanding eligibility criteria in future.

Comments on Policy

Para 1.2: Does a company need to terminate? That can sometimes tip-off a co-cartelist. Other leniency regimes are flexible by allowing a company to continue to participate in the cartel with the agency's permission (while dawn raids are coordinated etc.). This flexibility seems to be contemplated by para 2.22 (e), but could be clearer.

Para 2.1(c): Notwithstanding the institutional challenges in Hong Kong, there is a need to give some certainty/predictability to those companies that are not "first-in" if the Commission wants to provide a real incentive to confess and cooperate. Competition agencies stand to benefit from subsequent applicants whose evidence can corroborate/expand that provided by the immunity applicant. We query whether the Commission can do anything to give further certainty to subsequent applicants?

Para 2.12: Immunity is only available in relatively narrow circumstances. Other regimes acknowledge that, even where an investigation has started, there may be efficiencies in allowing immunity, e.g. where the agency did not already have sufficient evidence to find an infringement. There is a potential evidential issue here too. Para 2.12 indicates that leniency will not be available if the Commission has decided to issue or commence proceedings. The Commission may find itself having to prove that it is not simply using information provided to it to launch investigations. It would be preferable for the policy to reference an objective step which is taken and seen to have been taken.

Para 2.14: If an applicant is required to sign a confession, this may put the applicant in a worse position than its co-cartelists who did not self-report. This is likely to make companies reluctant to come forward, because of the implications for other countries as much as in Hong Kong where they face extensive penal and other remedies in follow-on actions, as set out in Schedule 3 of the Ordinance. We query why a written confession is needed? In other countries, the need to keep the application secret is part of the ongoing cooperation requirement – i.e. if the company gives it away, then it loses leniency which is obviously not in its interests. This also seems at odds with the fact that the proffer can be made orally.

Para 2.15: It is not very clear what an applicant would have to provide to obtain immunity, leaving considerable discretion with the Commission. It is also unclear what is meant by "hypothetical" and "without prejudice" – especially as this paragraph seems to envisage quite detailed information. It would be of assistance if this could be clarified and any discretion reduced to the bare minimum. These are key issues which need to be clarified in order to provide the proper incentive for cartelists to come forward.

Para 2.22: There is no obvious need for this type of agreement. All of these conditions could be woven into the notion of full and continuous cooperation.

Para 2.23: The provision of witnesses can be difficult. The company should not lose out on immunity simply because a witness shows bad faith. There should be some reasonable limit as to what a company is expected to do to compel witnesses (including ex-employees) availability. A wider point we would make (especially given the Commission's ability to terminate leniency agreements) is that more guidance should be provided on what is meant by "cooperation".

Para 3.1: The degree of discretion given to the Commission here is likely to discourage applicants from coming forward. A single company rarely has all the facts. New information –relating to products and geographies – may emerge but that does not mean that the company which was first to break ranks and self-report should

lose immunity. The key issue is not whether the information was incomplete but rather whether the company failed to disclose all the information it had.

Para 3.2: If leniency is terminated, then the Commission should not be able to use the information which has been provided to it. A separate team should begin the investigation afresh.

Section 4: Companies that are not first-in can only hope for "favourable treatment". It would be desirable, if possible, for the Commission to provide more certainty about how it will exercise its enforcement discretion in such circumstances.

Para 6.2: In our respectful submission, this goes too far. It will often be in an applicant's interest to give a waiver but that should not be a condition of leniency. The facts may vary markedly across countries.

Yours faithfully,

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