THE LAW SOCIETY OF HONG KONG 香港律師會

DRAFT LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT

SUBMISSIONS

Introduction

The Law Society has considered the draft Leniency Policy for Undertakings Engaged in Cartel Conduct ("**Draft Policy**") published on 23 September 2015 by the Competition Commission ("**Commission**") in connection with the Competition Ordinance, Cap.619 ("**Ordinance**"). In accordance with the Commission's invitation for comments on the Draft Policy, we present below our comments for the Commission's consideration.

1 General Observations

1.1 The paramount objective of a leniency programme is to create a robust and sufficiently certain framework to encourage cartel members to come forward and report illegal activity to the Commission. In accordance with this principle, the Draft Policy states that it is "designed to provide a strong and transparent incentive" to members of a cartel wishing to confess illegal conduct. An effective programme also serves other purposes; in particular, (i) it may discourage cartel formation in the first place, and (ii) it greatly assists the Commission in detecting, investigating and sanctioning cartels.

1.2 The Law Society recognises that the Ordinance imposes fundamental limitations to any leniency programme's effectiveness, first and foremost as a result of the fact that the Commission is not empowered to make decisions, including on fines. That said, the Law Society is of the view that the robustness, reliability and therefore efficacy of the regime designed in the Draft Policy could be improved in a number of ways, which are outlined below.

2 Scope of the Draft Policy

(a) Types of conduct covered

2.1 The Law Society submits the Draft Policy does not clearly articulate the conduct which is subject to the leniency programme.

2.2 The Draft Policy introduces the concept of "cartel conduct" which, according to the Draft Policy, consists of price fixing, market sharing, output restrictions and bid rigging taking place between competitors (paragraph 2.4). The Draft Policy goes on then to state that "cartel conduct" is "Serious Anti-Competitive Conduct" under the First Conduct Rule (paragraph 2.5). The Draft Policy only applies to the "cartel conduct" (paragraph 2.3).

2.3 The Law Society considers that referring to too many concepts (the scope of which being not necessarily identical) is confusing. For instance, under the Commission's Guideline on the First Conduct Rule, information exchange may in some circumstances be considered as having the object of harming competition, but it may not amount to a Serious Anti-Competitive Conduct (paragraph 5.6). It may also take place directly between competitors or through a hub and spoke arrangement. In such case it would be unclear whether or not such conduct would be a candidate for a leniency application.

2.4 The Law Society considers that the Commission should consider simplifying its description of the types of conduct subject to the Draft Policy and refrain from creating new concepts in addition to the ones introduced by the Ordinance itself. An example of how this might be achieved is to simply state that leniency will be available for all Serious Anti-Competitive Conduct, as defined in the Commission's Guidelines.

(b) Extending leniency to individuals employed by or involved with the undertakings

2.5 The Law Society welcomes statements in the Draft Policy that when 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 with the Commission" (paragraph 2.2). We agree that it is appropriate and beneficial to the fulfilment of the programme's objectives that employees of a company can be assured that a leniency agreement for a company will extend to the employees of the company.

2.6 However, the Law Society notes that the inclusion of the word "ordinarily" imports uncertainty into the Draft Policy. The Law Society suggests clarifying this paragraph to provide illustrations as to the kind of

circumstances under which the benefit of this extension may be withdrawn or not offered.

(c) Extending the leniency agreement to disqualification of directors

2.7 Furthermore, the Law Society welcomes the fact that the leniency agreement appears to extend to a commitment on the part of the Commission not to seek orders for disqualification of directors of the applicant undertaking (Annex A, Draft Leniency Agreement, Section 2.1). However, this is not made entirely clear and does not appear in the body of the Draft Policy. This is an important aspect of the programme so the Law Society recommends clarifying this point and stating it explicitly in the Draft Policy.

(d) The Commission's powers in relation to conduct not covered by the Draft Policy

2.8 The Law Society submits that the Draft Policy may benefit from greater guidance as to the Commission's proposed procedure in relation to conduct not covered by the Draft Policy.

2.9 Section 80 of the Ordinance provides that the Commission may enter into an agreement with any person not to "bring or continue proceedings for a pecuniary penalty in respect of an alleged contravention of a conduct rule" in exchange for that person's "co-operation in an investigation or in proceedings under the Ordinance".

2.10 However, the Draft Policy only applies to "cartel conduct" as defined by the Draft Policy. The Commission has not set out guidance on how it intends to deal with applicants for leniency falling outside of the scope of the Draft Policy, for instance, cartel activity not amounting to "Cartel Conduct" and/or Serious Anti-Competitive Conduct and cartel conduct involving decision of associations rather than agreements or concerted practices.

2.11 Similarly, the Law Society considers it important to clarify that the 'without prejudice' protection applies to information about conduct outside of the scope of the Draft Policy which may be disclosed in the course of a leniency application (that is, conduct that is not "cartel conduct" as defined in the Draft Policy) (paragraph 2.15). This includes evidence relating to conduct not benefiting from the Draft Policy, for example, a contravention of the Second Conduct Rule.

(e) Commencement and/or continuation of proceedings

2.12 The Law Society also wishes to bring to the Commission's attention to a possible source of uncertainty in relation to the availability of a leniency agreement in connection with proceedings that have commenced.

2.13 Section 80 of the Ordinance provides that the Commission may enter into an agreement with any person not to "bring or continue proceedings" whereas pursuant to the Draft Policy the Commission only undertakes not to commence proceedings against an applicant who enters into a leniency agreement (paragraph 1.3). According to the Policy, leniency is not available if an infringement notice has been issued or proceedings have been commenced (paragraph 2.12). In contrast, paragraph 2.24 provides that where the Commission enters into a leniency agreement, it may not "commence or continue proceedings in the Tribunal" (consistent with the Ordinance), envisaging circumstances whereby the Commission has granted leniency in respect of conduct for which proceedings have commenced.

2.14 The Law Society would welcome more clarity in relation to the circumstances under which leniency may be offered after the commencement of proceedings by the Commission.

3 Practice and procedure

3.1 The Law Society welcomes the inclusion of a marker system in the leniency application process such that an applicant may apply for a marker to record its intention to apply for leniency with the aim of protecting its position in the queue with respect to a cartel. We do however wish to express our concern with some aspects of the process which may be perceived as unclear.

(a) The level of detail to be provided at the marker stage

3.2 The current wording of the Draft Policy requires that a party wishing to secure a marker must provide "sufficient details to identify the conduct for which leniency is being sought" (paragraph 2.7).

3.3 The Law Society submits that the Policy would benefit from further clarification that the only information required by the Commission in order to grant a marker is the minimum information which would enable it to determine whether a marker has already been granted in respect of that cartel conduct (and therefore whether a marker is available).

3.4 Furthermore, the Draft Policy may benefit from clarifying how the marker queue system will apply to a number of independent cartels. For example, an applicant may provide information in relation to a number of separate cartels to the Commission but the Draft Policy is not clear on whether each cartel will form the basis of an individual queue (and similarly, how each cartel will be defined). The Draft Policy may benefit from illustrations to facilitate understanding as such system will be novel in Hong Kong.

(b) The requirements for the proffer

3.5 The Law Society also considers that the Policy would benefit from providing further guidance in relation to the requirements of the proffer beyond that set out at paragraph 2.15 of the Draft Policy. For instance, a proffer must contain a "detailed description of the cartel" but it is not clear from the Draft Policy exactly what details are required from an applicant. Furthermore, paragraph 2.18 indicates that "based on the proffer and any additional information. ...., the Commission will decide whether or not to make an offer".

3.6 By way of example, if the description of the cartel is sufficiently "detailed" but does not satisfy the Commission with regard to scope (an applicant may not specify the duration of the cartel or may not be aware of the geographical reach of the activity), the Draft Policy does specify whether or how this affects the validity of the leniency application. Similarly, the standard of evidence that the Commission will demand be satisfied for leniency to become available is not clear.

3.7 By way of illustration, in Singapore, Japan and Korea, the standard and information required by the competition authorities in each jurisdictions to grant immunity are similar and relatively clear. For the grant of leniency in these jurisdictions, the applicant must be the first to provide the respective authority with all information and evidence of the cartel activity available to it before an investigation has commenced and, in the case of Singapore and South Korea, the relevant authority must not already have sufficient information to establish the existence of the alleged cartel activity, the applicant must have reported upon discovery of the illegal activity, etc.

3.8 Further guidance on the matters which are relevant to the Commission's assessment of the leniency application will assist potential applicants to submit full and sufficient applications.

(c) Confidentiality waiver

3.9 The Draft Policy reiterates the Commission's general obligation to preserve the confidentiality of confidential material (paragraph 5.5). The Draft Policy also states that the Commission's policy will be not to disclose material collected as part of the leniency application other than under specific circumstances, including those due to legal requirement or with a waiver obtained from the relevant undertaking.

3.10 However, the Law Society submits that requiring a leniency application to provide a blanket authorisation to the Commission to exchange confidential information with an authority in another jurisdiction may jeopardise the incentive for an applicant to come forward (paragraph 6.2).

3.11 The Commission is invited to give more guidance as to the circumstances under which a waiver may be considered and the terms under which it would be obtained. This would be in line with other leading jurisdictions such as Singapore, Japan, Korea, the European Union and the United States of America.

4 Partial leniency

4.1 The Law Society considers that the aims of the Draft Policy could be better achieved by providing a more robust framework on the treatment of subsequent applicants for leniency. Under the current draft, the first successful applicant receives full immunity whilst subsequent companies who wish to be rewarded for cooperation must rely on the discretion of the Commission and Competition Tribunal to give them "favourable treatment" (paragraph 4.2). In limiting the Draft Policy to first eligible applicants, the Commission has taken a restrictive approach which favours a race to full immunity.

4.2 This approach is not necessarily warranted by the Ordinance. Under Section 80 of the Ordinance, the Commission is free to enter into leniency agreements with whoever it decides at any point in time. Under the Commission's Guideline on Investigations, the Commission notes that following an investigation, its competition concerns may be addressed by an order made by the Tribunal upon the consent of the Commission and the parties involved (paragraph 7.23). A consent order of this kind may include a declaration that the undertaking has contravened the Ordinance and the imposition of a pecuniary penalty. The Tribunal is empowered to make such orders on the application of the Commission under section 94 of the Ordinance. It is therefore open to the Commission to enter into an agreement (under the Commission's general enforcement powers) with a subsequent cooperating applicant stating that it will apply to the Tribunal for an order upon consent of the applicant which may impose a reduced penalty on the undertaking. If applicable, the Commission would be free to enter into these arrangements in parallel to proceedings for a pecuniary penalty for other undertakings not involved in the leniency process.

4.3 The Law Society suggests that, in the interests of ensuring that the programme provides an incentive for all potential applicants, the Draft Policy could set out that the Commission would enter into such a consent order with the cartel participant, in exchange for the cooperation, as a result of which the Commission would commit to seek a 50% discount from the pecuniary penalty that the Tribunal would otherwise impose on the second applicant and 25% for the third applicant, subject to the conditions of

ongoing cooperation with the Commission. This would afford more clarity than the present draft provides.

4.4 This approach is reflected in various international jurisdictions. For instance, the leniency programme for the European Union provides specific levels of penalty discounts for the second and third applicants. Partial leniency has also been adopted in Singapore, South Korea, Japan and Canada.

4.5 By improving the clarity and predictability of the how the Commission would exercise its enforcement discretion in relation to subsequent applicants, more undertakings are likely to consider notifying the Commission of illegal conduct and this will result in better and more information becoming available to the Commission. It may also lead to less lengthy cartel investigations, saving the Commission time and resources.

5 Exchanges with overseas authorities

5.1 See 3.9 to 3.11 above.

6 Concurrent jurisdiction with Communications Authority

6.1 It is noteworthy that the Communications Authority, which shares concurrent jurisdiction under the Ordinance in relation to telecommunications and broadcasting matters, has not yet proposed to be a party to the leniency policy. The Law Society would invite the Commission and the Communications Authority to both commit to adopting the leniency policy and to make it clear that a marker obtained with either one of them will be respected by both, so that parties are not at risk of having gone in to "the wrong Authority'. Otherwise, this creates considerable confusion and uncertainty for persons dealing with conduct actually or potentially related to telecommunications or broadcasting. This is not just an issue for telecommunications and broadcasting licensees, given that conduct that might straddle into other sectors.

6.2 If the Communications Authority does not propose to also adopt the leniency policy, the Law Society would invite the competition authorities to explain the reasons for this and to provide guidance on how conduct that straddles communications and non-communications markets would be handled if a leniency applicant were to come forward to the Commission. In such circumstances, the Law Society would also consider it necessary to have this issue and the risks it might give rise to for potential leniency applicants squarely flagged in the leniency policy, along with guidance on whether information that might have been provided to the Commission in support of

a leniency application would, or might, be shared with the Communications Authority.

The Law Society of Hong Kong
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