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23 October 2015¹
Our Ref: SN/11(R)

Dr. Stanley Wong
Chief Executive Officer
Competition Commission
Room 3601, 36/F., Wu Chung House
197-213 Queen's Road East
Wanchai
Hong Kong

By email and by post

Dear Dr. Wong

Submission by the Hong Kong General Chamber of Commerce (“Chamber”) on the Draft Leniency Policy issued for Public Consultation by the Hong Kong Competition Commission (“Commission”)

INTRODUCTION

1. The Chamber welcomes the opportunity to provide comments on the draft leniency policy for undertakings engaged in cartel conduct (“Leniency Policy”) issued by the Commission on 23 September 2015.
2. Under the Competition Ordinance (“Ordinance”), Section 80 provides that the Commission may, in exchange for a person’s co-operation in investigation or in proceedings under the Ordinance, make an agreement with the person, on any terms it considers appropriate, that it will not bring or continue proceedings under Part 6 for a pecuniary penalty in respect of an alleged contravention of a conduct rule against that person.
3. The consultation seeks views on the Commission’s draft Leniency Policy whereby under the Leniency Policy, the Commission will agree not to commence proceedings for pecuniary penalty against undertaking engaged in cartel if they are the first to report the cartel to the Commission and undertake to co-operate fully with the Commission. The Leniency Policy will only apply to *cartels* (i.e. price fixing, sharing markets, output restriction or bid rigging) which are considered as serious anti-competitive conducts. As cartels are often coordinated and in secret, the Commission hopes to use leniency to combat cartels.

¹ This supersedes the last Chamber submission.

4. In the draft Leniency Policy, the Commission sets out the key elements of the leniency policy, the steps involved in applying for leniency, entering into a leniency agreement with the Commission if application is accepted, obligations to continue co-operation with the Commission, circumstances for termination of the leniency agreement, confidentiality obligation of the undertaking and co-operation with other competition authorities in cartels operating in multiple jurisdictions. The draft Leniency Policy also includes a draft leniency agreement that would be entered into by the undertaking with the Commission if the application for leniency is accepted by the Commission.

5. The Chamber notes that, at this stage, the Communications Authority (“CA”), which is responsible for anti-competitive conduct of undertakings operating in the telecommunications and broadcasting sectors, has indicated that it has an open mind as to whether it would adopt a leniency policy, on its own or jointly with the Commission. Indeed, we note that the CA has separately invited comments from the telecommunications and broadcasting sectors on this particular issue. The Chamber believes that the Commission should similarly keep an open mind. The Chamber also believes, for the reasons explained below, that the introduction of a leniency policy at the same time that the Conduct Rules take effect is premature, and that the issue should be revisited in 12 months time, in the light of experience under the new law.

6. The Ordinance is a new law and an important legislation which has very significant ramifications for both businesses and consumers in Hong Kong. The Chamber appreciates the efforts of the Commission to provide clarity and guidance to the business community in how the Commission will carry out its functions under the Ordinance and the opportunity to engage in a public consultation exercise. The consultation exercise is an important forum for the business community to express their views to the Commission to help seek greater clarity, certainty and understanding on various issues under the Ordinance.

TIMING OF THE LENIENCY POLICY

7. The Ordinance is a new law for Hong Kong and its substantive provisions will be brought into operation on 14 December 2015. Implementation of the Ordinance is a complex task, especially in a developed economy as in Hong Kong. There is a danger of over-enforcement which will be inconsistent with Hong Kong’s long-held tradition and preference for a light-handed regulatory approach, as exemplified by the Hong Kong SAR Government’s “Be the Smart Regulator” initiative.

8. The Commission has thus far issued the following guidelines to aid with understanding the Commission’s approach to various matters under the Ordinance:

- Guideline On The First Conduct Rule
- Guideline on The Second Conduct Rule
- Guideline on The Merger Rule
- Guideline on Complaints
- Guideline on Investigation
- Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders

9. In addition to the guidelines, the Commission has also organised numerous seminars and training sessions, as well as conducting publicity and awareness campaigns to educate members of the public on compliance with the Ordinance. The Commission is to be commended on its efforts in implementing the Ordinance, educating the public on compliance and the efforts afforded for public consultation on the various guidelines issued.

10. Nevertheless, it is still early days for the Ordinance. As such, the Chamber believes that it is *pre-mature* to introduce the leniency policy now. Competition law itself is a very novel concept in Hong Kong, a huge cultural shift for businesses, particularly the small and medium enterprises or businesses with local presence primarily. The Chamber believes that this new law and cultural shift should be allowed to sink in first before introducing the leniency policy, which effectively is to encourage undertakings to “betray” their business partners. Moreover, only the Tribunal can decide on the appropriate level of penalties: without any guidance or precedents from the Tribunal on this, businesses cannot meaningfully assess whether it is worth publicly confessing guilt and exposing themselves to the risk of civil damages claims, as well as reputational damage.

11. Indeed, the Chamber believes the approach taken by the CA is a sensible one; that is to keep an open mind on the subject. There is therefore no rush to have the leniency policy in place from day one when the Ordinance comes into force. To do so will only create chaos and confusion.

12. It should be emphasized that the Chamber is not suggesting that the Commission should not introduce a leniency policy in Hong Kong; rather, we are advocating a phased approach so that the business community is not inundated with rules and policies associated with the implementation of a new piece of legislation. The Chamber recognises that many jurisdictions with competition law have leniency programmes of various forms and shapes, but it should be recognised that a lot of these jurisdictions have a much longer history and experience in competition law than Hong Kong. The Chamber believes that this issue should be re-visited only after the Ordinance has been implemented after a certain length of time to allow Hong Kong to do so in an informed manner. A timetable could be introduced to reconsider the leniency policy in, say, 12 months’ time.

COMMENTS ON THE DRAFT LENIENCY POLICY

13. For the Leniency Policy to be an effective tool, undertakings who are considering reporting on cartel activities will need to be clear as to what they will get themselves into. It is also important that leniency agreements must be fair and workable.

14. The Chamber believes the draft Leniency Policy is problematic and unclear in a number of aspects. Our comments and queries on the draft Leniency Policy are set out as under.

- The Commission retains the discretion, whether or not to accept the leniency application.
- It is not clear what information the caller, when applying for a marker, will be asked to provide. The draft simply says “sufficient details to identify the conduct”, but what would constitute sufficient details? Would the identity of the caller be required at this stage?

- The request for a marker may only be made by calling the designated leniency hotline. Would the call be recorded? Would information provided at this stage be used against the caller?
- There is no time frame spelt out as to when the Commission will complete its preliminary determination on whether the reported conduct is cartel conduct and whether leniency is available.
- It is not clear whether the Commission will inform the applicant if it does not qualify or if leniency is not available.
- When an undertaking is invited to apply for leniency by providing a proffer, the application may be made orally or in writing. Any communication with the Commission relating to the proffer or the subject matter may be made orally or in writing. It is not clear whether any information provided orally will be recorded or reduced to writing. If not, this would be problematic and may give rise to potential problems with miscommunication.
- Again, there is no time frame spelt out as to how long the Commission would take to decide whether or not to make an offer to enter into a leniency agreement following the submission of the proffer and any additional information by the applicant.
- There is a need for greater detail on what is needed to get over the line for immunity. The Chamber would note the guidance given in paragraph 9 of the EU leniency notice ([http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN)) for example.
- It is not clear the extent of the pecuniary penalty that the undertaking would be exposed to (other than what is already stated in the Ordinance as the maximum) if they were fined, given that it will be decided by the Competition Tribunal so there is no guidance available yet since the Ordinance is not in operation yet. It would be very difficult for the applicant to weigh up the advantages and disadvantages for blowing the whistle since they do not know the likely penalty they would be exposed to if caught out.
- The draft Leniency Policy only gives immunity from fines to the first successful leniency applicant, effectively a full immunity or the “winner takes all”. The subsequent applicants or undertakings who do not qualify but who agree to cooperate with any investigations of the Commission may receive some form of “favourable treatment” from the Commission. However the form of “favourable treatment” is vague. Will it be a reduction of fine and what would be the quantum of reduction? Will the amount be the same for all subsequent applicants or will this be calculated according to a sliding scale or some other formula?
- If a leniency application is accepted, the undertaking will be required to enter into a leniency agreement with the Commission. A number of onerous obligations would be imposed on the undertaking. One of the key obligations is to provide continuing co-operation with the Commission in its investigation including in proceedings against other undertakings that engaged in the cartel or against other

persons involved in the cartel. This continuing co-operation will be burdensome and protracted. It is not clear whether the co-operating undertaking will have its legal costs reimbursed or is expected to bear its own legal costs.

- According to the draft Leniency Policy, a successful leniency applicant will not be immune from any follow-on damage claims by any person who has suffered loss or damage as a result of the alleged cartel. Given the broad range of remedies that can be sought by a follow-on claimant (as set out in Schedule 3 of the Ordinance), this poses serious ramifications for any potential leniency applicant, particularly where they are required to sign a statement of agreed facts admitting to their participation in the cartel by reference to which the Competition Tribunal may be asked to declare that the undertaking has contravened the First Conduct Rule.
- The requirement to make a written confession is itself problematic. 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. If the confession will be disclosable, it 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.
- The provision of witnesses is not always straight-forward. A company should not be disadvantaged on immunity simply because a witness shows bad faith. There should be reasonable limits as to what a company is expected to do to make witnesses (including ex-employees) available. Given the Commission's ability to terminate leniency agreements, more guidance should be provided on what is meant by cooperation.
- The suggestion that leniency may be revoked if the information that is provided by the applicant is incomplete is of concern. It is not likely that a single company will have all the facts. New information may, and often does, emerge in regimes that promote leniency applications by second and third in. That does not mean that the first in should lose immunity. The question should not be whether the company had complete facts about the cartel, but whether it disclosed all the information it had.
- The draft Leniency Policy permits the Commission to share confidential information with other competition authorities; this is a condition of the leniency agreement. Therefore, undertakings involved in the cartel, including the successful leniency applicant, will be subject to possible prosecutions in other jurisdictions. With respect, we believe this goes too far and it should not be a condition of leniency that applicants provide waivers. The facts may be quite different across different countries. If the Commission maintains this position, potential leniency applicants will need to weigh out very carefully the pros and cons of reporting to the Commission.

CONCLUSION

15. The Chamber recommends that Hong Kong be given more time to get accustomed to competition law. Both the business community and the Commission would also benefit from time to see how the Tribunal develops its practices and relevant procedures, before consideration is given to introducing a leniency regime.

16. If a regime is to be introduced at this stage, it should be subject to a longer and more rigorous consultation. This will give stakeholders greater opportunity to review the policy and make more detailed submissions on this important area. The policy as currently drafted, in some important respects, departs from norms seen in other developed regimes such as the EU. This is exacerbating, unnecessarily, the already significant levels of uncertainty coming from the very significant changes that the new competition law is bringing to the Hong Kong legal landscape.

17. We would therefore hope that the Commission will take our comments into account especially with regard to a cautious and gradual approach to the introduction of a leniency policy so as to minimise disruptions in an already difficult and challenging operating environment.

Yours sincerely,



Shirley Yuen
CEO

cc: The Hon. Jeffrey Lam, Chairman
Legislative Council Panel on Economic Development