

Consumer Council

Submission to the Competition Commission on Draft Leniency Policy for Undertakings Engaged in Cartel Conduct

Introduction

1. The Consumer Council (the Council) is pleased to submit its views concerning the Draft Leniency Policy for Undertakings Engaged in Cartel¹ Conduct (the Draft) released by the Competition Commission (the Commission). This submission sets out the Council's response.
2. The Council believes that a well-designed and well-managed leniency policy contributes to effective enforcement against cartel and *agrees that a waiver of penalty provides the incentive to cartel participants to provide information to the Commission.*
3. Different jurisdictions have different leniency schemes and distinct features: whether the competition authority (a) offers leniency only to the first "effective" informant; (b) applies leniency up to full waiver of financial penalty; (c) only offers leniency before the investigation begins; (d) does not offer leniency to repeated offenders; and (e) does not offer leniency to cartel organizer or ringleader.
4. Different models were adopted in the US, EU and Australia. In Asia, seven jurisdictions including Hong Kong have leniency program². Indonesia, Thailand and Vietnam do not have leniency program. In Hong Kong, the Commission proposes that it will offer 100% waiver of financial penalty, only before the start of the investigation, to the first "effective" informant and the proposed policy does not preclude repeated offenders and cartel organizers.
5. Different features (with applicable features denoted by ✓) under six Asian leniency regimes are tabulated below:

¹ Paragraph 3.7 of Guideline of the First Conduct Rule issued by the Commission defined cartel as "Agreements between competitors to fix prices, to share markets, to restrict output or to rig bids are agreements which the Commission considers to have the object of harming competition. Agreements of this kind, often called "cartel" agreements, are inherently harmful to competition and are universally condemned."

² They are China, Chinese Taipei, Japan, Malaysia, Singapore and South Korea.

Table 1 Features of Asian Leniency Programs

	China	Chinese Taipei	Japan	South Korea	Malaysia	Singapore
Only to the first informant						
Up to full waiver of penalty	√	√	√		√	√
Only offered before the investigation		√				
Not offered to repeated offenders				√		
Not offered to cartel organizers		√	√			

6. Many Asian jurisdictions offer leniency not just to the first “effective” informant but also adopt some partial immunity arrangement to other cooperated cartel applicants. In Hong Kong the proposal is that leniency is only offered to the first "effective" party but that the Commission may offer, using its enforcement discretion, other undertakings that cooperate with the Commission in its investigations, favourable treatment. This provision provides little certainty to firms about the extent to which they might benefit even if they fully cooperate with the Commission.
7. The Council understands that a generous leniency policy offering pecuniary penalty reductions to several reporting firms may induce cartel reporting and could improve a competition authority’s success rate in prosecution. On the other hand, the generous leniency policy can be abused by cartel members to commercially damage other members of the cartel, who outside of the cartel, are the cooperating firm's competitors. At the end, the overall social welfare may be reduced.
8. The proposed policy, put forward by the Commission, the full waiver of pecuniary penalty is available to the first applicant only, so as to provide a strong incentive for a would-be applicant to race to be the first. The Council considers that the arrangement of the leniency policy may have the unwanted effect of discouraging those second or third-in-line, when a cartel member is trying to come forward but recognizes or suspects³ that someone has blown the whistle. The fear of detection may induce other cartel members to destroy evidence, given that subsequent applicants cannot leapfrog the first applicant even if they possess crucial information to furnish to the Commission, unless the first applicant eventually fails to fulfill his/her obligation of the leniency agreement.

³ A leniency applicant’s non-participation in a cartel is likely to fuel speculation that it has blown the whistle, thus alerting other cartel members.

9. By incentivizing those second or third-in-line to come forward, the Commission can also obtain high quality information that is otherwise unavailable. For instance, in a recent EU cases, Company X was fined under Cartel Case A, where Company X possessed information not only on Cartel Case A but also on Cartel Case B. It was willing to provide information on Cartel Case B in exchange for fine reduction on Cartel Case A. Under the Draft put forward by the Commission, Company X would no longer be granted any fine reduction on Cartel Case A in any event, and the Commission is likely to lose the opportunity to engage with Company X obtaining information about Cartel B.
10. *To counteract the adverse effect of the first come first serve and encourage other cartel members to make applications, the Council suggests offering tiered rewards for those second and third in priority, say up to 50% and 30% penalty reduction as adopted by other jurisdictions.* The Commission can thereby obtain quality information and corroborating evidence from multiple applicants, instead of relying on one whistleblower alone.
11. All other Asia jurisdictions (as illustrated in Table 1) can offer leniency allowing partial penalty reduction to the second informant or other informants cooperating with their competition authorities. The broadened scope of leniency application to the second informant and the third informant is also seen in the US, EU and Australia.
12. *The Council suggests the Commission granting tiered waivers of penalty (as proposed above) to leniency applicants taking into account their priority status, involvement in the cartel (whether the undertaking is the cartel organizer) and quality of information.*

Scope of leniency protection

13. The leniency agreement under the current proposal will ordinarily extend not only to any current director officer or employee of the undertaking, but also extend to any agent, former director, former officer or former employee of the undertaking specifically named in the leniency agreement. It is unclear why these former persons (directors or employee) should be included in the leniency protection, given that they may not agree to the decision for the leniency application and would not be able to affect how the current employee, management and directors provide useful information to the Commission. *The Council suggests that the scope of leniency protection should be limited to current participants that the Commission considers crucial for investigation or proceeding of the*

case involved, unless there is compelling evidence indicating that the former participants are influential and contribute substantially in the leniency application.

Jurisdictional issues

- 14. The Council notes that the Commission shares concurrent jurisdiction with the Communications Authority (CA) in respect of enforcing the Competition Ordinance in the telecommunications and broadcasting sectors. However, the CA is not bound by the Commission's leniency policy, when eventually established.*

- 15. The Council considers it desirable for the two authorities to reach a coherent policy on leniency and other related competition policy, and would suggest close communication between them with a view to arriving at a coherent policy.*

*Consumer Council
October 2015*