

The Hong Kong Competition Commission's  
Leniency Policy for Undertakings Engaged in Cartel Conduct

**Hong Kong Bar Association's Response to  
the Consultation Draft**

*Introduction*

1. The Hong Kong Competition Commission (“HKCC”) has released its draft Leniency Policy for Undertakings Engaged in Cartel Conduct (“the draft Policy”) for public consultation.
2. The Hong Kong Bar Association (“HKBA”) submits this Response to the draft Policy.
3. Section 80 of the Competition Ordinance (Cap 619) empowers the HKCC to make leniency agreements on any terms it considers appropriate, that in exchange for a person’s co-operation in an investigation or in proceedings under the Ordinance, the HKCC will not bring or continue enforcement proceedings before the Competition Tribunal (“the Tribunal”) for a pecuniary penalty in respect an alleged contravention of a conduct rule against an undertaking (as defined in the Ordinance) or any officer, employee or agent of the undertaking, in so far as the contravention consists of the conduct specified in the agreement. The section also provides that the HKCC must not, while a leniency agreement is in force, bring or continue proceedings before the Tribunal for a pecuniary penalty in breach of that leniency agreement.

4. The draft Policy is framed only in respect of one particular species of alleged contravention of a conduct rule, namely “engagement in cartel conduct”. Indeed the draft Policy makes it clear that it does not preclude the HKCC from entering into a leniency agreement with an undertaking with respect to an alleged contravention of a conduct rule which is not covered by the draft Policy.
  
5. The HKCC exercises a general statutory power under section 80 of the Competition Ordinance. The exercise of this statutory power is subject to judicial review, including the adoption of a policy in order to provide guidance as to the way in which the power will be exercised and to promote consistency in its exercise. As Sir Anthony Mason NPJ noted in C v Director of Immigration (2013) 16 HKCFAR 280, CFA at [74]:

“The adoption of a policy by a decision-maker exercising a very general discretion has the advantages of promoting certainty, consistency and administrative efficiency. It is, however, important that the policy adopted, whether general in character or confined to a class of persons, is not so rigid as to exclude the exercise of discretion by the decision-maker to consider the merits of the particular case and a willingness to depart from the policy, if need be, in a particular case, at least in the general run of cases. This is because the exclusion of a residual discretion as a result of a decision-maker applying a rigid policy might well, depending on the circumstances, be at variance with the very discretion created by the statute. However, where the decision-maker purports to exercise that discretion in accordance with the stated policy the manner of that exercise may be reviewed by the courts.”

6. The HKBA does not dispute that the HKCC can validly prepare the draft Policy in the present terms to set out its detailed scheme for exercising its statutory power under section 80 of the Competition Ordinance in respect of one particular species of alleged contravention of a conduct rule, so long as the HKCC recognizes and is prepared to exercise the section 80 power of entering into leniency agreements in respect of other alleged contraventions of a conduct rule in suitable cases.
7. The HKBA notes the draft Policy is couched, as far as it is possible and appropriate, in non-technical language. The Policy should not be read or interpreted as if it is a statute. Nevertheless, the Policy must not be ambiguous in its language and its proper interpretation is an objective one based on the language used and the context and purpose of the Policy. The meaning of the Policy is a question for the Tribunal and the courts. The HKCC may not adopt a “reasonable meaning” approach to determine the Policy’s meaning by itself and then seek to impose that meaning; it must accept and submit to the true meaning determined objectively by the Tribunal and the courts: Michael Fordham, *Judicial Review Handbook* (6<sup>th</sup> Ed) 29.5.9, 29.5.10.
8. The HKBA also notes that the draft Policy follows in broad terms similar leniency policies or programmes adopted by developed overseas jurisdictions.

### *Undertaking*

9. The draft Policy applies to “undertakings” and not other person or legal person. Footnote 1 to paragraph 2.1(b) of the draft Policy repeats the definition of “undertaking” in section 2(1) of the Competition Ordinance. This definition includes “group of companies”. The HKCC may wish to clarify whether a parent company can seek leniency on behalf of a subsidiary company in respect of the subsidiary company’s cartel conduct; and whether it would consider the cartel conduct of a subsidiary company as the conduct of the group of companies consisting of the parent and the subsidiary companies, so that leniency (if any) would only be considered on the basis of the group as one “undertaking”.

#### *Cartel Conduct*

10. The intent and purpose of the draft Policy (as stated in paragraphs 1.3 to 1.5 thereof) is to provide an incentive for the detection and investigation of “cartel conduct” in contravention of the First Conduct Rule under the Competition Ordinance, a deterrent against entering into such “cartel conduct”, and a discouragement from continuing in, such “cartel conduct”. Paragraph 2.4 of the draft Policy defines “cartel conduct” for the purposes of the draft Policy to refer to agreements and concerted practices among undertakings that are, or otherwise would be if not for the cartel conduct, in competition with each other, that seeks to do one or any combination of activities that qualify as “serious anti-competitive conduct” within the meaning of that expression in section 2(1) of the Ordinance, where the “object” of those activities is the “harming” of competition.

11. The HKBA considers that the definition of “cartel conduct” can be further clarified, bearing in mind the terms of the First Conduct Rule in section 6(1) of the Competition Ordinance, the definition of “serious anti-competitive conduct” in section 2(1) of the Ordinance, and the elaboration of “object” in section 7 of the same. **Firstly**, reference should be made in paragraph 2.4 of the draft Policy as to whether section 7(1) and (2) of the Ordinance applies in the definition of “cartel conduct” for the purposes of the draft Policy. **Secondly**, the expression of “harming” of competition is not defined in paragraph 2.4. It appears necessary to state with clarity to what extent “harming” of competition for the purposes of the draft Policy correlates with the part of the First Conduct Rule that focuses the prohibition to an agreement or concerted practice whose object “is to prevent, restrict or distort competition in Hong Kong”.

#### *Marker System*

12. The draft Policy provides that the HKCC would give leniency only to the first successful applicant. Hence the draft Policy makes provision for a marker system “to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought”.
13. The HKBA agrees with paragraph 2.9 of the draft Policy of providing only one route for requesting a marker, namely by telephoning the Leniency Hotline.

14. Paragraphs 2.7 and 2.8 of the draft Policy together set out the process for the issuance of a marker. This involves the HKCC to determine whether “sufficient details” identifying the conduct for which leniency is sought has been provided. The HKBA queries whether this can be determined within the usual duration of a telephone call. This appears to be of some significance since the marker is issued in respect of the date and time of issuance and not the time of connection with the Leniency Hotline. There also appears to be room for dispute if the HKCC takes time to consider the details supplied by a caller before issuing a marker and in the meantime, a call is received from a different caller supplying details of the same or similar conduct. It would be for the HKCC to *faithfully* consider the details received in terms of “sufficiency” from each of the telephone calls and issue markers accordingly. The HKBA suggests that the HKCC should establish a streamlined internal decision-making arrangement for issuing markers.
15. The HKBA considers that the HKCC may wish to clarify that a marker may not be issued to a caller or undertaking that makes the request on an anonymous or no-names basis.

*Invitation to Apply for Leniency*

16. Paragraph 2.12 of the draft Policy makes clear that leniency will not be available under the draft Policy if the HKCC has decided to issue an infringement notice under section 67 of the Competition

Ordinance to commence proceedings in the Tribunal in respect of the cartel conduct reported by the undertaking.

17. The HKBA notes that the draft Policy makes no distinction, as it is the case in the United Kingdom, between applications for leniency where there is a pre-existing investigation and those where there is no pre-existing investigation. It may be useful for the draft Policy to state this point.

*Making the Leniency Application through a Proffer*

18. The HKBA notes that paragraph 2.15 of the draft Policy indicates that the proffer to be made is expected include *evidence* in respect of the cartel conduct; and that paragraph 2.17 indicates the HKCC may, after considering the proffer, ask the applicant to provide access to *some* evidence in support of the proffer such as documentary evidence or by making available witnesses to be interviewed by the HKCC. The HKBA is concerned whether the draft Policy, which is to be made in relation to the exercise of the power under section 80 of the Competition Ordinance, would respect claims of legal professional privilege, bearing in mind that the specific provision in section 58 of the Ordinance applies in respect of the Part 3 of the Ordinance concerning Complaints and Investigations. Additionally, the HKBA notes that the relevant guidance in the United Kingdom, *Applications for leniency and no-Action in cartel cases* (OFT 1495, July 2013), makes clear that the information that leniency applicant must provide is “non-legally privileged information, documents and evidence” (paragraphs

3.15, 5.12). The draft Policy does mention obliquely in paragraph 2.23 that following the entry of a leniency agreement, the undertaking “is required to provide the [HKCC] with all non-privileged information and evidence ...” but paragraph 5.6 has not made clear that Leniency Application Material shall not include any material that is subject to legal professional privilege. The HKBA requests the HKCC to revise the draft Policy to clarify and affirm in respect of leniency applications the protection from disclosure of materials subject to legal professional privilege, notwithstanding the fact that the HKCC appears to be drafting a separate policy on legal professional privilege.

19. Paragraph 2.17 of the draft Policy states that the HKCC “will provide an assurance that it will not use [evidence provided by the applicant in support of the proffer] against the applicant”. The HKCC has not elaborated on the terms of this assurance, including the proceedings under the Competition Ordinance or other legal, disciplinary or regulatory proceedings that such an assurance would usually cover.

*Offer to Enter into a Leniency Agreement*

20. Paragraph 2.22 of the draft Policy indicates the essential requirements an applicant must confirm for the purpose of entering into a leniency agreement. These requirements raise some issues for comment:

(a) The applicant has to confirm that it has not “coerced other parties to engage in the cartel conduct”. The Competition Ordinance does not make provision in respect of an undertaking coercing another undertaking to engage in conduct contravening the First Conduct Rule. The HKCC has not defined or discussed coercion of a party to engage in a serious anti-competitive conduct in contravention of the First Conduct Rule in its Guideline on the First Conduct Rule. On the other hand, the United Kingdom guidance makes it clear a high threshold, both as to the circumstances and standard of proof, has to be met for finding an undertaking to have coerced another and therefore ineligible for immunity under the United Kingdom leniency system. Since this confirmation is treated as a representation/warranty for entering into the leniency agreement and prescribed under section 81(1)(b) as one of the rationales for the HKCC to terminate a leniency agreement, the HKBA considers that the HKCC should revise the draft Policy to make better and fuller provision on the issue of an undertaking coercing another party to engage in cartel conduct.

(b) The applicant has to confirm that it is prepared to sign a statement of agreed facts admitting its participation in the cartel by reference to which the Tribunal may be asked to make an order declaring that the undertaking has contravened the First Conduct Rule. While the HKBA respects this requirement as a necessary part of the Policy, the HKBA is concerned that this confirmation stands as a pre-commitment on the part of the undertaking to accept a statement of facts prepared by the HKCC and any attempt

to negotiate on the proper terms of the statement of facts can be taken as “reasonable grounds to suspect that the information on which the [HKCC] based its decision to make the agreement was incomplete, false or misleading in a material particular” for the purpose of threatening to terminate or terminating a leniency agreement. Such a pre-commitment, in short, can produce injustice.

21. The HKBA suggests that it may be helpful to make provision in respect of an offer to enter a leniency agreement a time frame similar to that in paragraph 2.16 for the making of a proffer, so that if an applicant who has been offered with the opportunity of signing a leniency agreement fails to do so within the specified time period, the offer would lapse and the HKCC may proceed to consider the undertaking next in the marker queue.

*Disclosure of information provided by Leniency Applicants to the Commission*

22. Paragraph 5.7 of the draft Policy sets out the HKCC’s policy not to disclose Leniency Application Material, as well as the circumstances in which disclosure may be given. The HKBA observes that one such circumstances appears to countenance the possibility of a plaintiff in a follow-on damages claim to seek discovery of Leniency Application Material from the HKCC; see the Competition Tribunal Rules (Cap 619 sub leg D) rule 24. The HKBA understands that the discoverability of Leniency Application Material in follow-on proceedings is a controversial

issue that has not been settled in EU and national jurisprudence and it is the EU Damage Directive that purports to deal with the issue by providing principally for non-disclosure. Since the Competition Ordinance makes no similar provision, the HKBA expects this issue to be the subject of litigation notwithstanding HKCC's policy stated in this paragraph.

*Co-operation in Cross-border Cartel Investigations*

23. The HKBA notes that paragraph 6.2 of the draft Policy indicates that the HKCC would not as a matter of routine or course impose a condition in a leniency agreement to require a leniency applicant to authorize the HKCC to exchange confidential information with competition authorities in another jurisdiction. However, where the HKCC seeks to impose such a condition on a leniency applicant, the leniency applicant would have little bargaining power to resist and has to anticipate potential competition proceedings (civil and/or penal) in other jurisdictions. The HKCC is advised to consider whether the incentive to undertakings to co-operate with the HKCC in relation to cartel conduct would be diminished by reason of this reservation of action on its part.

**Dated: 16 October 2015.**

**HONG KONG BAR ASSOCIATION**