



Hong Kong Competition Commission expands leniency program

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On 29 April 2019, the Hong Kong Competition Commission ("HKCC") published the [Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct](#) ("**Cooperation Policy**"). In essence, the Cooperation Policy expands HKCC's [Leniency Policy](#), published in November 2015, just before the full implementation of the Competition Ordinance.

The expansion occurs in two main directions. First, the benefits of the existing leniency program can only accrue to a single company involved in a cartel (*i.e.*, the first one to submit significant evidence on the cartel), while the Cooperation Policy is available to subsequent applicants. Second, the Cooperation Policy puts forward a new concept – "Leniency Plus" – which allows a company participating in a cartel to submit evidence of a new, separate cartel to HKCC and get credit for its cooperation in relation to both the "old" and "new" cartels.

More detail and more certainty

Under the Leniency Policy, if successful in an application for leniency, HKCC will not seek proceedings against the applicant in the Competition Tribunal (in Hong Kong, HKCC is not empowered to impose monetary penalties directly). However, one of the main drawbacks of the Leniency Policy was that it only applies to the first successful applicant who reports the cartel conduct to HKCC, and subsequent applicants could be left empty-handed.

To be fair, HKCC had indicated its willingness to reduce enforcement actions against subsequent cartel members which assist HKCC in the investigation. However, this willingness was expressed in relatively vague terms (*e.g.*, "rely on its enforcement discretion") and no specific benefits were mentioned (for example, the amount of a potential reduction of the fine) in the Leniency Policy. Generally, vague guidelines deter self-reporting on unlawful conduct. Unless a company is certain it can

benefit from immunity or a reduction of fines, it will not have an incentive to self-report.

In that sense, the Cooperation Policy provides further clarifications. Under the new policy, HKCC stipulates the further incentives it is willing to extend to other companies which disclose cartel misconduct: a discount of up to 50% off the pecuniary penalty, which HKCC would otherwise recommend to the Competition Tribunal, is available.

More specifically, prior to the commencement of any Competition Tribunal proceedings, the first applicant under the Cooperation Policy (after the leniency applicant) will be given a recommended discount of up to 50%.

Applicants coming forward thereafter will be given a recommended discount between 20% and 40%, depending on the timing, nature and value of the cooperation provided.

If a company cooperates with HKCC only after the commencement of enforcement proceedings against it, it may be given a recommended discount of up to 20%.

In addition, HKCC may agree not to bring any proceedings against current and former officers, employees, partners and agents of the applicant company, as long as they provide complete, truthful and continuous cooperation with HKCC's investigation.

As with its [position on the Leniency Policy](#), we do not expect the Communications Authority – which enjoys parallel enforcement powers with HKCC in the telecoms sector – to adopt a similar program to the Cooperation Policy.

"Leniency Plus"

The Cooperation Policy also proposes a novelty in Hong Kong competition law, the "Leniency Plus" system.

Under that system, a company cooperating with HKCC in relation to one cartel may also be involved in a second, unrelated cartel. If the company applies for leniency for the second cartel, it may not only be granted immunity for

the second cartel, but HKCC may apply an additional 10% discount on the fine HKCC recommends to be imposed for the company's involvement in the first cartel.

This idea of extending cooperation from a first to a second cartel comes from the "Amnesty Plus" program used in the United States by the Department of Justice ("**DOJ**"). HKCC's Chief Executive Officer previously prosecuted cases at the DOJ, and the DOJ's program has been very successful. Hence it is not surprising to see the proposal of the "Leniency Plus" program being launched in Hong Kong.

Procedure under the Cooperation Policy

The procedure for applying and benefiting from the Cooperation Policy is similar to that laid out under the Leniency Policy, involving a number of steps:

- **Stage 1** – HKCC or the company under investigation may approach each other to propose cooperation under the Cooperation Policy.
- **Stage 2** – The company will need to provide documents and detailed information regarding the cartel. The company's employees, officers, partners and agents may also be asked to be interviewed by HKCC.
- **Stage 3** – The company will enter into a Cooperation Agreement with HKCC, which includes an agreed summary of facts. HKCC will indicate the maximum penalty it will recommend to the Competition Tribunal, which will incorporate the discount applied for the cooperation provided. The company will ordinarily be required to confirm, amongst other things, that it is willing to make submissions to the Competition Tribunal that it has contravened the Competition Ordinance, pay a pecuniary penalty in a sum assessed by the Competition Tribunal, and pay HKCC's costs of the proceedings against it.
- **Stage 4** – The company is expected to continue cooperation with HKCC throughout

the investigation and proceedings and comply with the terms of the Cooperation Agreement. At an appropriate time, HKCC issues a final letter to the company to confirm that all conditions of the Cooperation Agreement have been complied with.

Drawbacks

As with a company benefiting from immunity under the Leniency Policy, an applicant under the Cooperation Policy not only needs to agree with HKCC on a summary of facts but will usually be required to admit involvement in the cartel. Such an "admission" will need to be filed jointly with HKCC to the Competition Tribunal.

This procedural step represents a risk for companies willing to come forward and self-report. Even if HKCC and the Competition Tribunal take measures to safeguard the confidentiality of that filing, the risk of a leakage could act as a deterrent for companies. A leakage of a document admitting a cartel infringement could be used in court litigation not only in Hong Kong but potentially also in other jurisdictions. In the case of a cross-border cartel, the risks of civil damages claims elsewhere could become a factor for companies deciding whether or not to apply for a reduction of fines under the Cooperation Policy in Hong Kong.

Another potential deterrent for a company to apply under the Cooperation Policy is that, in the event that the application for cooperation is rejected, HKCC may use the documents and detailed information obtained indirectly: the authority can use its acquired knowledge to "develop facts through further investigation," which likely means it will request the documents and information from the company afresh. This is notwithstanding the fact that these documents and information were obtained on a without prejudice basis. In addition, if HKCC terminates the Cooperation Agreement with the company (for example, because the company provided false

information), the documents and information provided can be used directly against the company.

Conclusion

By publishing the Cooperation Policy, HKCC is expanding its investigatory tools by defining a framework in which other cartelists which do not qualify for leniency under the Leniency Policy may be encouraged to disclose their misconduct. The aim is to resolve liability without having to incur the time and cost of litigation. As the maximum fine for a contravention of the Competition Ordinance is 10% of a company's turnover for each year in which the breach occurred (up to a maximum of three years), providing clearer incentives to cooperate with HKCC will further destabilize the operation of cartels as it introduces distrust among cartel members.

The Cooperation Policy also brings Hong Kong's leniency and cooperation arrangements more in line with overseas jurisdictions such as the European Union. Other regulatory departments in Hong Kong, such as the Securities Futures Commission and the Hong Kong Monetary Authority, have also adopted similar cooperation arrangements to encourage the disclosure of regulatory breaches and misconduct in order to save significant time, costs and resources to both the regulator and the company or individual concerned.

However, it must be noted that while HKCC may make recommendations to the Competition Tribunal as to the pecuniary penalty that should be imposed on a cartel member, the final decision on the penalty amount rests with the Competition Tribunal.

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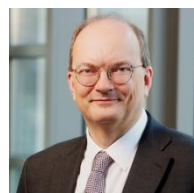
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