

HONG KONG COMPETITION COMMISSION

Consultation – Draft Leniency Policy

Submission

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1. This submission

We welcome the opportunity to make a submission to the Hong Kong Competition Commission in relation to its Draft Leniency Policy (**DLP**).

The submission recommends that the DLP be amended to include a requirement that, as a condition of a grant of immunity, leniency applicants undertake to implement an adequate compliance program.

The submission draws on our previous publications.¹ The Commission is referred to those publications for further details on the relationship between leniency policy and compliance programs.

We would be pleased to expand on or discuss any aspect of this submission with the Commission.²

2. Reasons for incorporating a compliance programme requirement in the DLP

The relationship between corporate leniency policies and compliance programs is poorly recognised. Corporations are the prime target of offers of leniency. However, such policies do not

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¹ See Brent Fisse, 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015, Bloomsbury), ch 10, pp179-206; Caron Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 *Journal of Antitrust Enforcement* 126. See also Joe Murphy, 'Combining Leniency Policies and Compliance Programmes to Prevent Cartels' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015, Bloomsbury), ch 16, pp315-333.

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require corporate applicants to undertake to establish an adequate compliance program as a condition of leniency.

The failure to incorporate a compliance program requirement in leniency policies is problematic for the following reasons:

- a corporation that has brazenly allowed employees to engage in cartel conduct can qualify for leniency without taking precautions against future cartel conduct;
- it is possible for corporations to engage in strategic leniency by playing repeated games of ‘enter into cartel, get leniency’;³
- disregard of compliance programs in the context of corporate leniency policies is difficult to reconcile with the significance of such programs under the United States Sentencing Guidelines,⁴ in corporate practice⁵ and in competition authority pronouncements (including recent speeches by representatives of the US Department of Justice;⁶ and the European Commission⁷);
- compliance programs and leniency policies potentially can reinforce each other but a corporate leniency applicant is free not to have a compliance program in place or to

³ Gaming is increasingly recognised as a challenge for the leniency system. See eg W Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart Publishing, 2008) 137; G Spagnolo, ‘Self-Defeating Antitrust Laws: How Leniency Programs Solve Bertrand’s Paradox and Enforce Collusion in Auctions’ (2000) FEEM Working Paper No 52.2000, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236400; DD Sokol, ‘Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement’ (2012) 78 *Antitrust Law Journal* 201, 212; C Harding, C Beaton-Wells and J Edwards, ‘Leniency and Criminal Sanctions: Happily Married or Uneasy Bedfellows?’ in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion*, Hart Publishing, 2015, ch 11, pp233-260.

⁴ Under these Guidelines an effective compliance program is relevant as a mitigating factor in sentencing. See United States Sentencing Commission, ‘Guidelines Manual’ (November 2013) §§ 8B2.1, 8C, www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf.

⁵ Notably the Antitrust and Competition Law Compliance Discussion Group’s ‘Model Agency Policy for Promoting Anti-Cartel Compliance Programs’ (Model Agency Policy) requires that, to be granted corporate leniency, an applicant ‘must either have in existence an effective anti-cartel compliance program or agree to implement one’ (at § 1.4). This discussion group is a non-profit network of individuals ‘who share an interest in the development of effective anti-cartel compliance programs as a means to prevent and detect cartel behavior’. The group includes corporate counsel, as well as academics, compliance professionals and former competition authority personnel. See Antitrust and Competition Law Compliance Discussion Group, ‘Our Mission’, www.compliance-network.com/about-us/.

⁶ See eg B Baer, ‘Prosecuting Antitrust Crimes’ (Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington DC, 10 September 2014) www.justice.gov/atr/public/speeches/308499.pdf; B Snyder, ‘Compliance Is a Culture, Not Just a Policy’ (International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop, 9 September 2014) www.justice.gov/atr/public/speeches/308494.pdf.

⁷ See eg J Alumnia, ‘Compliance and competition policy’ (Speech 10/586 at Businesseurope and US Chamber of Commerce Competition Conference, 25 September 2010) http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm. See also the statement on the European Commission website at http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

adopt a program that fails to convey the significance of corporate and individual leniency policies;

- a successful corporate leniency applicant may abstain from taking internal disciplinary action against the employees who participated in the cartel conduct or failed to take reasonable steps to prevent that conduct; and
- compliance programs may be used in attempts to obstruct or circumvent leniency policies yet leniency policies do not squarely address this risk.

It is particularly important that new competition authorities recognise the relationship between leniency and compliance. Such authorities can draw on leniency policies not only to facilitate detection, prosecution and deterrence of cartel conduct, but also to assist in building awareness of the need for compliance programs amongst the business community. This would be of value especially amongst domestic businesses to which competition law is relatively unfamiliar.

3. International approaches to the relationship between leniency policy and compliance programs

At present leniency policies do not make corporate leniency conditional on an adequate compliance program being put in place or having been put in place before the application for leniency. This is a major gap in anti-cartel enforcement today. However, compliance programs are commended by competition authorities in several major jurisdictions on the basis that they help to prevent or detect breaches of the law and, in the event of cartel conduct, may increase the chance of early detection and the ability to be the first to make an application for leniency. For example:

- the United Kingdom's Competition & Markets Authority has a guidance document that notes that one potential advantage of an 'effective competition law compliance culture' is 'the early detection and termination of any infringements that have been committed by the business allowing, in appropriate cases, immunity or leniency applications to be made, potentially helping to reduce or eliminate financial penalties'.⁸ The guidance document also suggests that, as part of competition law compliance training with respect to potential cartel risks, attention be drawn to the fact and significance of immunity and leniency programs;
- the Canadian Competition Bureau's Corporate Compliance Bulletin states that '[a] compliance program may assist a business in the early detection of a contravention of the

⁸ Office of Fair Trading, 'How Your Business Can Achieve Compliance with Competition Law' (Guidance, OFT1341, June 2011) p6, at www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf. This guidance document has been adopted by the Board of the Competition & Markets Authority.

criminal provisions of the Act, thereby allowing it to benefit from the advantages of being either an Immunity or Leniency applicant.’⁹ Further, in the revised version of this Bulletin issued in June 2015, the Bureau states that it ‘may encourage’ the Public Prosecution Service of Canada ‘to require that an applicant implement a credible and effective program using this Bulletin as a guide in conjunction with any grant of immunity or leniency’.¹⁰

Under the World Bank’s leniency policy for corruption,¹¹ those who perform contract work for the Bank and who voluntarily disclose to it their involvement in corruption can avoid debarment. However, unlike current leniency policies in the competition law field, the World Bank requires leniency applicants to implement compliance programs and the programs must be monitored. The Bank describes its Voluntary Disclosure Program as follows:

The [Voluntary Disclosure Program] gives firms, other entities, or individuals who have entered into or been a party to contracts related to projects financed or supported by the IBRD, IDA, IFC, or MIGA the opportunity to confidentially partner with the World Bank and:

- a. Cease corrupt practices;
- b. Voluntarily disclose information about Misconduct that is sanctionable by the Bank (*e.g.*, fraud, corruption, collusion, coercion) by conducting internal investigations at the Participant’s cost; and
- c. Adopt a robust ‘best practice’ corporate governance Compliance Program which is monitored for 3 years by a Compliance Monitor.

In exchange, the Bank does not publicly debar Participants for disclosed past Misconduct and keeps their identities confidential. If, however, a Participant does not disclose all Misconduct voluntarily, completely, and truthfully; continues to engage in Misconduct; or violates other material provisions of the Terms & Conditions of the [Voluntary Disclosure Program], that Participant faces mandatory 10-year public debarment in accordance with regular World Bank procedures.¹²

4. Main elements of an approach in making an adequate compliance program a leniency condition

Important elements of making an adequate compliance program a condition of leniency are as follows:

⁹ Competition Bureau, ‘Corporate Compliance Programs’ Bulletin no. 2015-06-03, p5, at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf).

¹⁰ Competition Bureau, ‘Corporate Compliance Programs’ Bulletin no. 2015-06-03, p6, at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf).

¹¹ See The World Bank, ‘Voluntary Disclosure Program’ (2013) <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/EXTVOLDISPRO/0,,menuPK:2720511~pagePK:64168427~piPK:64168435~theSitePK:2720459,00.html>.

¹² The World Bank, ‘VDP Guidelines for Participants’ (2011) 8, http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

- the condition should require adoption and implementation of an adequate compliance program for a period of at least three years, backed by an undertaking by deed or statutory court-enforceable undertaking to comply with that condition;
- the mechanism of enforced self-regulation should be used to facilitate administration by the competition authority and to help guard against corporate cheating, with annual compliance reports and, if necessary, interim special reports by a suitably qualified independent reviewer with access to all relevant information;
- the concept of an ‘adequate compliance program’ should be defined along the lines of § 8B2.1 of the United States Sentencing Guidelines but the competition authority should issue guidelines that address the significant issues that arise from the relationship between corporate leniency and compliance programs should be added;
- the guidelines should stipulate that the implications of leniency policies, including the increased chance of detection and the right of employees to apply for individual leniency, need to be communicated clearly to employees and included in compliance training;
- the leniency policy should make appropriate internal disciplinary action an element of an adequate compliance program and use the mechanism of enforced self-regulation to require a successful corporate leniency applicant to report what internal disciplinary action it has taken to the independent compliance program reviewer;
- the guidelines should state that internal disciplinary action against employees implicated in cartel conduct may be delayed where necessary to secure their co-operation in order to satisfy a corporate leniency condition requiring the corporation to co-operate with an investigation of that cartel conduct;
- the competition authority should guard against the undue compromise of individual accountability by providing in its guidelines that the corporation’s internal leniency/whistleblower policy will not shelter employees involved in cartel conduct from internal disciplinary sanctions but rely on other incentives such as a reduction in the severity of the sanction;
- the guidelines should counter attempts to hinder or circumvent leniency policies (for example, where a compliance program encourages employees not to create document trails) by providing that a compliance program is not adequate where its design or implementation has the purpose or likely effect of obstructing, evading or manipulating a leniency policy; and

- the competition authority should aim to prevent repeated ‘enter into cartel, get immunity’ games by amending its corporate leniency policy to bar corporate leniency for an applicant who has previously been granted leniency or, alternatively, increasing the statutory maximum penalty applicable to cartel recidivists (as by doubling the maximum for a repeat offender and trebling it for a third-time offender) and offering recidivists who are the first to report a subsequent cartel the incentive of being sentenced in accordance with a lower maximum penalty than that which would otherwise apply.

If further information is needed about any of the elements outline above we shall be happy to provide it.