Hong Kong Competition Commission has published its draft Cartel Leniency Regime rules, and in this post we discuss what the notice does, who the notice applies to, and answer specific questions around leniency applications.

What has happened?

On 23 September, the Hong Kong Competition Commission (“HKCC”) issued its draft cartel leniency policy ahead of the country’s new competition law coming into effect this December. The draft policy can be commented on over the next month, and will be issued in final form before the law comes into force. Hong Kong passed its Competition Ordinance in June 2012 and is expected to begin enforcement on 15 December this year. The new leniency regime will be a key component of the new regime. It will provide both an incentive for businesses to “blow the whistle” on illegal behaviour in return for immunity from fines, and will be a vital tool for the HKCC’s fight against suspected cartels.
Read our previous post on the Hong Kong Competition Ordinance for more background reading.

What does the notice do?

Illegal “hard core” cartel conduct (that is, price fixing, bid rigging, market allocating and restricting output) is notoriously difficult for competition regulators to detect. Cartels are by their nature secretive and there is usually little evidence of their existence. To this end, most established competition regimes use leniency policies to detect cartel conduct. Leniency policies generally grant immunity from prosecution to the first member of a cartel to inform the competition regulator of the cartel.

Like comparable regimes around the world, Hong Kong’s leniency notice grants immunity from antitrust fines to the first participant to report a cartel to the HKCC and meet the requirements for immunity (which include providing detailed information to the HKCC). Once immunity is granted and a leniency agreement is entered into, the leniency applicant will be obliged to co-operate with the HKCC throughout its investigation and potential prosecution of the other cartel members.

If an undertaking does not qualify for leniency, they may still co-operate with the HKCC. The HKCC may then use its discretion to consider providing “favourable treatment” to that undertaking, which may include making joint submissions on the level of fines to the Competition Tribunal or courts. This is in contrast to the European and UK regimes where fines are imposed directly by the competition authorities, so the competition authorities can then agree to impose reduced fines in exchange for co-operation.

Who does the notice apply to?

The HKCC’s leniency policy applies only to “undertakings” (i.e. businesses) involved in cartel conduct. It does not apply to private individuals who wish to seek immunity (although the
HKCC will consider whether to enter into leniency agreements with such individuals on a case by case basis. However, if an undertaking is granted immunity, that immunity will usually flow through to the directors, officers and employees of that undertaking.

The HKCC will have concurrent jurisdiction with the Communications Authority in relation to cartels and other breaches of competition law by companies operating in the telecommunications and broadcasting sector. As things stand, the Communications Authority has not determined whether it will adopt a leniency policy and, if so, whether it will do so jointly the HKCC. However, the HKCC’s leniency notice will apply to the telecommunications and broadcasting sector regardless.

Can leniency applicants be sued by cartel victims?

Victims of cartel conduct can bring follow-on private actions under Hong Kong’s competition law – that is, private individuals and businesses will be able to claim damages only if the Competition Tribunal has held that there has been a breach.

The draft leniency notice clarifies that leniency applicants can still be privately sued for damages arising from their illegal cartel conduct. In order to be granted leniency, the leniency applicant must be prepared to sign a statement of agreed facts admitting its participation in the cartel. The Competition Tribunal will then be asked to make a declaration of breach. This makes it possible for affected customers to bring private actions against the leniency applicant in order to recover their loss.

Are leniency applications and documents discoverable in follow on proceedings?

Documents and admissions made by leniency applicants are valuable evidence in follow on proceedings brought by affected customers. The discoverability of such documents in private damages actions has been a vexed issue as courts and competition authorities attempt to balance the effectiveness of leniency policies against the interests of full disclosure in court proceedings. The recent EU Damage Directive, which will be incorporated into the laws of
member states, makes it clear that leniency statements cannot be disclosed in private court proceedings and that other materials included in the file of a competition agency (whether provided by a leniency applicant or otherwise) may only be disclosed when no party or third party is reasonably able to provide that evidence.

It is unclear whether information provided to the HKCC by leniency applicants will be discoverable in follow on proceedings. The leniency notice imposes confidentiality obligations on both the HKCC and the leniency applicant, and the HKCC’s policy is not to disclose leniency materials unless compelled to do so by the Tribunal or a court. Ultimately, whether leniency materials are discoverable will be a question for the Hong Kong courts to determine. However, it is likely that the requirement to sign a detailed statement of facts and then have a declaration of breach made by the Competition Tribunal reduces the importance of obtaining leniency materials. That said, other materials provided to the HKCC by leniency applications are still likely to provide useful evidence and it can be expected that their discoverability will be challenged at some stage in the Hong Kong courts.

What happens now?

Hong Kong’s competition law comes into force on 14 December 2015. The HKCC will accept comments on the draft leniency statement until 23 October and will come into effect when the law takes force. The Communications Authority is also accepting comments from broadcasting and telecommunications companies as to whether it should adopt its own leniency policy and, if so, the form that it should take.

Contact Us

Please get in touch with BLP if you want to discuss any aspects of the HKCC’s leniency notice, or the new Hong Kong competition law regime more generally.
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