On 19 November 2015, the Competition Commission (“Commission”) published its Leniency Policy for Undertakings Engaged in Cartel Conduct (the “Leniency Policy”) and its Enforcement Policy. The publication of these two documents – together with the Commission’s appearance before the Legislative Council on 23 November 2015 – represents the final step in the lead-up to the full implementation of the Competition Ordinance (Cap. 619) (the “Ordinance”), which will take effect on 14 December 2015.

This Client Briefing looks at the key provisions of these latest policies, which are highly relevant to businesses in Hong Kong.

The leniency policy

Section 80 of the Ordinance provides that the Commission may enter into a leniency agreement to not bring or continue proceedings, in exchange for a person’s cooperation in an investigation or proceedings under the Ordinance. The Leniency Policy builds upon this barebones framework, giving guidance on important issues such as the procedure for applying for leniency, the termination of leniency agreements, undertakings which do not qualify for leniency, and the confidentiality of leniency applications. Publication of the policy follows the issuance of a draft policy in September 2015 and the subsequent public consultation process, during which the Commission received 20 submissions received from a range of stakeholders.

Key provisions of the Leniency Policy include:

- the Leniency Policy only applies to “cartel conduct”: the Leniency Policy only applies in respect of “cartel conduct”, which, in essence, refers to agreements and concerted practices amongst competitors which seek to fix prices, share markets, restrict output and/or rig bids (see paragraph 2.4 of the policy). Whilst the Commission retains the discretion to grant leniency for conduct which does not fall into that definition (e.g. “vertical” agreements such as resale price maintenance, or contraventions of the Second Conduct Rule), the exercise of such discretion would not be governed by the Leniency Policy;

- only the first undertaking to apply will receive immunity from proceedings: leniency will be granted only to the first undertaking that reports the conduct to the Commission and meets all the requirements for leniency. Undertakings which do not qualify for leniency will be subject to the Commission’s “enforcement discretion” and may receive lower levels of enforcement action (e.g. in the form of the Commission recommending to the Competition Tribunal (the “Tribunal”) a reduced pecuniary penalty or the making of an appropriate order under Schedule 3 to the Ordinance) if they cooperate with the Commission. Such undertakings would also appear to fall under the Commission’s guidance regarding settlement (see below in relation to the Enforcement Policy);

- only “undertakings” may make an application under the Leniency Policy: whilst leniency offered to an undertaking will ordinarily extend to individual officers or employees of that undertaking, such officers and employees cannot themselves apply for leniency (i.e. in their own capacity) under the Leniency Policy. It appears, however, that they may approach the Commission with an offer of settlement (see below in relation to the Enforcement Policy); and

1 Available at www.compcomm.hk/en/policy_documents.html.
• **leniency does not preclude private damages claims:** an undertaking who receives leniency may be subject to an order by the Competition Tribunal declaring that the undertaking has contravened the First Conduct Rule. Such order could then form the basis of follow-on action by a person who has suffered loss or damage as a result of the contravention under section 110 of the Ordinance.

Potential applicants should therefore consider carefully whether they fall within the scope of the Leniency Policy (as there is otherwise minimal guidance as to the approach the Commission will adopt), and the consequences of applying for leniency, including its implications for follow-on damages claims.

In relation to companies operating in the telecommunications and broadcasting sectors, it should be noted that the Communications Authority (with whom the Commission shares concurrent jurisdiction in respect of such undertakings) has decided not to adopt a leniency policy. Rather, the Communications Authority has stated that it may consider entering into leniency agreements with telecommunications and broadcasting licensees on a case-by-case basis.  

2 See press release of the Communications Authority issued on 19 November 2015.

### The enforcement policy

The Enforcement Policy sets out how the Commission intends to exercise its enforcement function in investigating possible contraventions of the First Conduct Rule and the Second Conduct Rule.

In particular, it lists the following as the key issues which the Commission will consider in deciding whether to investigate and how to resolve individual cases:

- **compliance focus:** the Commission will accord priority to cases involving:
  - (A) cartel conduct (which is defined in the same way as in the Leniency Policy) - including enforcement action against associations of undertakings, and officers of the relevant undertaking;
  - (B) other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong; and
  - (C) abuses of substantial market power involving exclusionary behaviour by incumbents (i.e. conduct which prevents or limits the ability of competitors to compete);

- **severity factors:** such as blatant disregard for the law, taking deliberate steps to avoid detection, the involvement of senior management, and previous cautions or enforcement actions by the Commission and/or Tribunal (e.g. where the Commission had previously notified the person / undertaking of its concerns, or a warning notice or infringement notice had previously been issued regarding similar conduct); and

- **effective and appropriate remedies:** the Enforcement Policy specifies certain remedial goals which the Commission will seek to achieve in choosing an appropriate remedy. For example, the Commission will generally favour remedies which, among other things, will stop the unlawful conduct speedily and impose sufficient economic sanction to encourage compliance with the Ordinance.

The Enforcement Policy also sets out the Commission’s approach towards offers of settlement. It clarifies that discussions as to settlement may be made on a “without prejudice” basis and that settlement may take the form of, e.g. an agreement not to take action against individuals who wish to provide assistance to the Commission in their personal capacity, commitments by the relevant person, or an agreement to resolve Tribunal proceedings on a
consent basis. Further information on these and other enforcement outcomes may be found in the Commission’s Guideline on Investigations, which was published in July 2015.

The Enforcement Policy also highlights the importance of having a proper system of competition compliance in place, as paragraph 4.6 provides that the Commission will take into consideration the compliance efforts of an investigated person where the person has made genuine efforts to comply with the Ordinance. Companies should therefore ensure that they would be able to demonstrate such efforts should an investigation be initiated.

What comes next

The Leniency Policy and Enforcement Policy are among the last of the documents to be issued prior to the full implementation of the Ordinance, which includes the Commission’s six Guidelines,3 various pieces of subsidiary legislation, and the Competition Tribunal Rules.4

After significant activities on the part of the Commission over the past 12 to 18 months, the preparation phase is now coming to a close as we move towards implementation. We look forward to seeing how the Commission will implement its policies, and whether the Tribunal will adopt the same approach in interpreting the Ordinance.

3 Being the guidelines on Complaints, Investigations, the First Conduct Rule, the Second Conduct Rule, the Merger Rule, and Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders. These are available at www.compcomm.hk/en/guidelines.html.

4 It is understood that a Memorandum of Understanding between the Commission and the Communications Authority will be signed shortly after full implementation occurs.