[76.02] Broad rights of action for the Commission in case of non-compliance

Under sub-s (2), the Commission has the right to initiate proceedings against the person who made the commitment under s 67 when it has 'reasonable grounds for suspecting' non-compliance with the terms of the infringement notice. The Competition Tribunal will arguably have full jurisdiction to review the substance of the case and impose the orders it sees fit to remedy a competition law infringement, pursuant to ss 93, 94 and 95. In order words, the loss of the benefits afforded by s 75 is immediate, and the Commission does not need to 'withdraw' or 'rescind' its infringement notice before bringing legal proceedings regarding an alleged competition law infringement. The protection offered by s 75 is therefore more limited than that granted to voluntary commitments made under s 60, as for these commitments the Commission must formally withdraw its acceptance prior to bringing legal proceedings for alleged competition law infringements.

The Commission will have another ground for action where it suspects non-compliance with commitments made under s 67. As is the case for s 60 commitments, s 67 commitments can be enforced by the Tribunal under s 63. The Commission may thus also bring an action under s 63 to seek to compel the defendant to comply and the imposition of the other orders listed under s 63(2). See notes **[63.02]** and **[62.03]**.

Note that the 'reasonable grounds for suspecting' threshold which the Commission must meet under s 76 is lower than the one required for the issuance of an infringement notice under s 67. However, if the Commission choses to bring an action in respect of a competition law infringement, it should meet the higher 'reasonable grounds for believing' standard, consistent with s 92 of the Ordinance. For a discussion of the various legal thresholds used in the Ordinance, see note **[39.03]**.

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77. Registration of commitments

The Commission must register commitments made under this Division in the register maintained by the Commission under section 64 (Register of commitments) and the provisions of that section also apply, with any necessary modifications that the circumstances require, to commitments made under this Division.

[77.01] General note

The purpose of this publicity requirement is clearly the same as for s 60 commitments, ie to inform third parties who benefit from compliance with the commitments. The reference to 'any necessary modifications that the circumstances require' in s 77 is a consequence of the differences between s 60 and s 67 commitments, the most important of which is that s 67 commitments need not be 'accepted' by the Commission to have effect. Accordingly, s 64(1)(a) should be read, as regards s 67 commitments, to commitments 'made'. Further, s 67

commitments will likely take the very simple form of a party accepting to abide by the requirements of the infringement notice; accordingly the 'copy' to be kept in the register will likely be an extract of the infringement notice. Other modifications would likely be needed to s 64(1)(c) (as the Commission cannot withdraw its 'acceptance' of a commitment made under s 67) and to s 64(1)(b) (as the Commission may possibly not have the power to vary the terms of a commitment made under s 67). On the differences between commitments under the two regimes, see note **[60.13]**. On the register, see notes **[64.01]** to **[64.03]**.

78. Publication of infringement notices

If a person has made a commitment under this Division to comply with the requirements of an infringement notice, the Commission may publish the infringement notice—

(a) through the Internet or a similar electronic network; and

(b) in any other manner the Commission considers appropriate.

[78.01] Commission has discretion to publish

The wording of s 78 makes it clear that the Commission has no obligation to publish the infringement notice. Third parties will already be informed of the terms of the commitments by way of publication in the public register pursuant to s 77. Accordingly, any publication of the infringement notice will most likely be made in view of the precedential value of the analysis contained in the notice. In procedures involving multiple defendants, the Commission will however be constrained by the provisions of s 72(2) if a recipient decides not to make a commitment. As notices addressed to multiple recipients in the same case will likely be similar in content, this would arguably prevent the Commission from publishing the notices it addressed to those parties who accepted their requirements, or at least the part that is common with the notice addressed to the party who chose not accept its requirements.

On the publicity measures in the Ordinance and the omission of confidential information, see notes **[34.01]** and **[123.01]** to **[127.05]**.

Division 3—Leniency

79. Interpretation

In this Division—

officer (高級人員) means—

(a) in relation to a corporation, a director, manager or company secretary of the corporation, and any other person involved in the management of the corporation; and

(b) in relation to an undertaking (other than a corporation or partnership), any member of the governing body of that undertaking.

[79.01] Hong Kong sources and relevance of definition

The notion of 'officer' defined by s 79(1) is similar to that defined in s 2 of the Companies Ordinance (Cap 622), except that it expressly includes any other person involved in the management of the 'corporation'. This broad definition is consistent with the approach taken to define the notion of 'director' in s 2(1) of the Ordinance. See also the same section for the definition of 'company secretary', and refer to note **[2.04]** for the notion of 'director'.

The provisions of this Division 3, including s 79, refer to a 'corporation'. It is unlikely that they are meant to be limited to a 'corporation sole', but rather refer to a 'body corporate' or at least a 'company'.

The term 'officer' is used in ss 80 and 81 to refer to potential beneficiaries of leniency protection. The broad definition indicates that the Commission has a wide discretion to offer leniency benefits to any person involved in a contravention of the conduct rules.

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80. Commission may make leniency agreements

(1) The Commission may, in exchange for a person's co-operation in an investigation or in proceedings under this Ordinance, make an agreement (a ***leniency agreement***) with the person, on any terms it considers appropriate, that it will not bring or continue proceedings under Part 6 for a pecuniary penalty in respect of an alleged contravention of a conduct rule against—

(a) if the person is a natural person, that person or any employee or agent of that person;

(b) if the person is a corporation, that corporation or any officer, employee or agent of the corporation;

(c) if the person is a partner in a partnership, that partnership or any partner in the partnership, or any employee or agent of the partnership; or

(d) if the person is an undertaking other than one referred to in paragraph (a), (b) or (c), that

undertaking or any officer, employee or agent of the undertaking,

in so far as the contravention consists of the conduct specified in the agreement.

(2) The Commission must not, while a leniency agreement is in force, bring or continue proceedings under Part 6 for a pecuniary penalty in breach of that leniency agreement.

[80.01] Overseas and Hong Kong guidance

The Competition Ordinance is among the very few laws that provide a statutory basis for a leniency policy. None of the statutes that have served as the primary sources of inspiration for the Ordinance expressly provide for the possibility of leniency or immunity. Of those common law jurisdictions in Asia that share the same sources of inspiration, only Malaysia provides for a statutory basis (see s 41 of the Competition Act 2010). This is not to say that there is no possibility for leniency in the enforcement of competition legislation in the UK, the EU and Australia. In each of these countries, competition authorities have developed sophisticated leniency and immunity programmes, but they did so as part of their general enforcement policy rather than on the basis of express statutory provisions.

Irrespective of the legal framework, the concept of leniency is the same across competition law jurisdictions. Leniency is an investigative tool used to uncover competition law violations and encourage the production of relevant evidence. It is generally considered in the public interest to induce participants in a competition law violation that would otherwise be difficult to detect (such as a secret cartel) to come forward and self-report by granting them lenient treatment in exchange for coming forward with evidence of the infringement. Due to their ubiquitous nature in competition law jurisdictions, there is ample guidance overseas concerning leniency and immunity programmes. Australia is the better source when considering procedural aspects, because it relies on a judicial enforcement model similar to that of the Competition Ordinance. Another useful source is the United States, where the antitrust laws are also judicially enforced and whose Department of Justice was the first to introduce an immunity programme for competition law infringements. One should however bear in mind that some competition law infringements are criminal offences in these countries.

In Hong Kong, the predecessor competition law regimes in the broadcasting and telecommunications sectors did not provide for formal leniency or immunity procedures. The Communications Authority had also not formulated any formal leniency policy, although as explained in note **[60.01]** it would in some cases issue 'warnings' and 'advice' in lieu of imposing sanctions. Offers of leniency or immunity in return for cooperation are used in other contexts in Hong Kong. During the legislative process, the Administration explained that 'arrangements regarding the leniency agreement [are] similar to those regarding an accomplice-turned prosecution witness' in criminal cases. See Minutes of the twenty-eighth meeting of the Bills Committee on Competition Bill of 3 January 2012, LC Paper No CB(1)1976/11-12, at p 6 of the Appendix. Reference can also be made to the Securities and Futures Commission's long-standing practice of giving credit to

regulated persons for their cooperation in disciplinary matters, outlined in the Guidance note on cooperation with the SFC (2006). Where it seeks disqualification orders in court, the Securities and Futures Commission would also rely on summary court proceedings based on statements of facts agreed with cooperating defendants. See note **[101.05]**.

The Commission has published three policies in this regard, namely, the Leniency Policy for Undertakings Engaged in Cartel Conduct (April 2020), and the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (April 2019).

[80.02] Subsection (1) – conduct eligible for leniency

The Commission has a broad discretion to determine which competition law contraventions may be eligible for immunity under s 80. The only restriction is that immunity cannot be granted under s 80 for contraventions of the merger rule.

Overseas, leniency is mainly used to uncover conduct that would otherwise not be easy to detect, ie secret cartels. This is the approach in Australia, the EU, Malaysia and Singapore. See the Australian Competition and Consumer Commission's immunity & cooperation policy for cartel conduct – October (2019) at §§ 3 to 4, the European Commission's Notice on immunity from fines and reduction of fines in cartel cases OJ (2006) C298/17 at § 1, the Malaysia Competition Commission's Guidelines on leniency regime (2014) at §2.3, and the Competition Commission of Singapore's Guidelines on lenient treatment for undertakings coming forward with information on cartel activity cases (2009) at § 1.2. The scope of the policy is slightly broader in the UK, where leniency is available for cartels as well as for resale price maintenance practices. See the UK Competition and Markets Authority's Applications for leniency and no action in cartel cases (OFT 1495, 2013, re-adopted by the CMA in 2014) at §§ 2.1 to 2.3. The definition of cartel conduct is broadly similar in all of these jurisdictions. Cartel activity involves price fixing, bid-rigging, the establishment of output restrictions or quotas, or market sharing.

In Hong Kong, the Competition Commission has decided that its leniency policies and cooperation policy apply only to engagement or involvement in 'cartel conduct'. For the purposes of these policies, 'cartel conduct' refers to agreements and/or concerted practices between two or more undertakings which consist of (i) fixing, maintaining, increasing or controlling the price for the supply of goods or services, (ii) allocating sales, territories, customers or markets for the production or supply of goods or services, (iii) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services, or (iv) bid-rigging.

[80.03] Subsection (1) – cooperation eligible for leniency

Leniency can be granted under s 80(1) "in exchange for a person's cooperation". Under the Leniency Policy for Undertakings Engaged in Cartel Conduct (April 2020), leniency is only for the first cartel member that either:

(1) discloses its participation in a cartel of which the Commission has not yet opened an initial assessment or investigation ('Type 1 Leniency'); or