

Hong Kong Competition Commission Brings Major Changes to Leniency Program

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The Hong Kong Competition Commission (“Commission”) has brought significant changes to its leniency program. In particular, (1) leniency will now be available to individuals; and (2) corporate leniency applicants will, under certain circumstances, receive additional protection from follow-on damage claims.

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Background

The Hong Kong Competition Ordinance (“Ordinance”) prohibits cartel conduct under its “First Conduct Rule.” The Commission can commence proceedings for violations of the First Conduct Rule before the Competition Tribunal (“Tribunal”), which can impose pecuniary penalties of up to 10% of an undertaking’s total gross revenues generated in Hong Kong for the duration of the contravention (capped at three years). The Ordinance does not distinguish between individuals and undertakings with respect to the maximum pecuniary penalty that can be imposed by the Tribunal, and there is not yet any precedent on this issue. The Tribunal also has jurisdiction to adjudicate follow-on damage claims.

The Commission’s previous leniency framework for cartel conduct was governed by two policies: the “Leniency Policy for Undertakings Engaged in Cartel Conduct” (the “Leniency Policy,” published in November 2015), and the “Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct” (the “Cooperation Policy,” published in April 2019) (see our previous articles [here](#) and [here](#) for further discussion of these policies). The Commission’s new policies (available [here](#) and [here](#)) expand upon the pre-existing framework for leniency applicants who report or provide substantial assistance to the Commission in connection with its investigations into cartel conduct, incentivizing early reporting by both undertakings and individuals.

Leniency for Individuals

The Commission has demonstrated a willingness to prosecute individuals under the Ordinance; the four most recent cartel cases brought (and currently pending) before the Tribunal all include individuals. However, **under** the previous version of the Leniency Policy, only undertakings were eligible to apply for leniency (undertakings are defined as “any entity (including natural persons), regardless of its legal status or the way in which it is financed, which is engaged in an economic activity”). This meant that employees or directors who may have, of their own accord, wished to “blow the whistle on a company” would not be able to benefit from the Leniency Policy.

In a dramatic shift, the new Leniency Policy for Individuals makes leniency available to the first individual involved in cartel conduct who reports the cartel to the Commission. In exchange for the reporting individual’s full cooperation, the Commission will not take any proceedings against the leniency applicant in relation to the reported conduct.

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Notably, leniency is only available to individuals who report *before* the Commission has granted a leniency marker to an undertaking under the Leniency Policy for Undertakings (by contrast, the Commission may still grant an additional marker to the first undertaking to apply for leniency even in instances in which the Commission has already granted leniency to an individual involved in the same cartel).

The new policy addresses a gap in the Commission's leniency program and will have significant implications, incentivizing directors and employees to blow the whistle on an employer that refuses to come forward.

Enhanced Protection Against Damage Claims

Under the previous version of the Leniency Policy, the Competition Commission could initiate proceedings before the Tribunal against the leniency applicant for an order that an offense had been committed (but not for the imposition of pecuniary penalties). This created a disincentive to report, as a successful leniency applicant could, by reporting cartel conduct, also expose itself to follow-on damages claims based on the Tribunal's order.

In order to address this issue, Commission will now distinguish between "Type 1" and "Type 2" applicants in the revised policy. Type 1 applicants refer to undertakings that report cartel conduct *before* the Commission has opened an initial assessment or commenced an investigation. Type 2 applicants are undertakings that report *after* the Commission has opened an assessment or commenced an investigation.

Under the revised policy, the Commission will agree to not commence proceedings before the Tribunal against both Type 1 and Type 2 successful applicants, which will include not bringing proceedings for an order declaring that the applicant has contravened the Ordinance. However, for Type 2 applicants, the Commission *may still issue an infringement notice* requiring the applicant to admit to contravention of the First Conduct Rule, in order to permit a follow-on action for damages against the undertaking. The Commission will not issue such a notice unless victims have initiated follow-on action against other undertakings found to have contravened the First Conduct Rule by participation in the cartel conduct covered by the leniency agreement.

Conclusion

The revised Leniency Policy for Undertakings and the new Leniency Policy for Individuals substantially alter the incentive scheme for reporting cartel conduct in Hong Kong. The Leniency Policy for Individuals will encourage employees and directors to report behavior that they previously had little incentive to disclose. The distinction between Type 1 and Type 2 applicants provides a further incentive for undertakings to disclose any cartel conduct as soon as possible.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition Practice Group, or the following lawyers in the firm's Hong Kong office:

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