

A. Scope of the Draft Policy

A(1) We notice the Draft Policy only applies to undertakings engaged in cartel conduct. It does not apply to (a) conduct other than cartel conduct¹ and (b) persons who are not undertakings² and the Commission will consider case by case whether it is appropriate to provide lenient treatment in such cases.

A(2) First of all, we do not agree that there should be differential treatments for cartel and non-cartel conducts. There should be strong and transparent incentive for persons who are involved in all kinds of anti-competitive conducts to stop their conducts and report to the Commission.

A(3) Secondly, the Commission also expressly states that “an individual who is an employee of a company engaged in cartel conduct who approaches the Commission in his/her individual capacity and not on behalf of the company are not eligible to apply for leniency under the policy”³. The Commission only encourages such persons to approach the Commission on a without prejudice basis. However, it is unclear what would happen after such individuals speaking to the Commission on a without prejudice basis, particularly whether immunity would be granted to such persons in the event that the undertaking itself did not apply for leniency. This is a disincentive to an individual who may possess useful information. For example, the great uncertainty as to whether, how and when leniency will be granted will certainly disincentivize an employee who does not agree with the anti-competitive conduct of his/her employer to report the incident to the Commission. The risk of whistle-blowing is just too high for the employee to take. To extend the policy to such individuals would, in the least, enhance the transparency as to how and when leniency will be granted to them, and hence provide a, in the least, a higher degree of incentive for whistle-blowing.

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¹ Para 2.1a) of the Draft Policy

² Para 2.1b) of the Draft Policy

³ Footnote 2 of Guide to the Draft Policy

A(4) **Therefore, we suggest that the Commission can make the Draft Policy applicable to all kind of anti-competitive conducts under the Ordinance and to all persons (including both undertakings and individuals) concerned with those conducts.**

B. Steps to apply for leniency under the Draft Policy

B(1) There are 5 steps to apply for leniency under the Draft Policy. However, the Draft Policy only mentions that the “proffer” to be given by an undertaking in Step 3 of the Draft Policy shall be given on a “without prejudice” basis. It does not indicate the information provided by an undertaking in Step 1 to apply for a “marker” will be given on a “without prejudice” basis. Undertakings may face the risk that if the Commission considers that (1) the reported conduct is not a cartel conduct but other kinds of anti-competitive conducts; and/or (2) the undertaking is not the first successful applicant; and/or (3) leniency is not available for whatever reasons, the Commission may use any information received to consider whether a contravention of the Ordinance has occurred. This is particularly alarming as the information provided in Step 1 can be quite substantial as the Draft Policy requires undertaking applying for a marker to provide “sufficient details to identify the conduct for which leniency is sought”⁴.

B(2) **We recommend that the Draft Policy should provide clearly that every applicant providing information to apply for a “marker” in step 1 shall be able to do so on a “without prejudice” basis.** It is thought that by doing so incentives can be created for undertakings to report any suspected cartels, without worrying that the information they provided in the first stage will be used against them in case their application for leniency is turned down.

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⁴ Para 2.7 of the Draft Policy

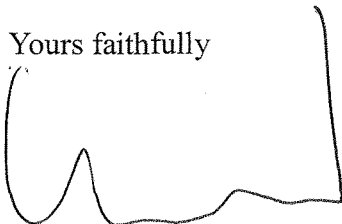
C. Jurisdictional considerations when applying for leniency

C(1) It was stated in the Draft Policy that the Commission may require the applicant to authorize it to exchange confidential information with authorities in another jurisdiction⁵. Such exchange of information may expose the applicant to claims in other jurisdictions in multi-jurisdictional cartel. For example, if another member of a multi-jurisdictional cartel learns about the whistle-blowing act in Hong Kong, and decides to come clean first in other jurisdictions where the applicant did not apply for leniency due to any reasons, the undertaking that has applied for leniency in Hong Kong may eventually be at the worst-off situation comparing with other members of the same cartel.

C(2) We suggest that the Commission to co-operate with its foreign counterparts to ensure that applicants who report the cartel first in time can be better protected as a whole in all of the related jurisdictions in the cartel. At the least, the Commission should notify the applicants before starting exchange of information with another jurisdiction.

We hope the above comments are useful for the Commission's consideration. If we could be of further assistance, please do not hesitate to contact our Partner Kenneth Wong at 2586 9833 and kenneth.wong@wkll.com; and Solicitor Cedric Poon at 2586 9846 and cedric.poon@wkll.com.

Yours faithfully



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⁵ Para 6.2 of the Draft Policy