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## INTERNATIONAL BAR ASSOCIATION ANTITRUST COMMITTEE

### SUBMISSION TO THE HONG KONG COMPETITION COMMISSION IN RESPONSE TO ITS DRAFT LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT AND GUIDE TO THE DRAFT LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT

23 OCTOBER 2015

#### 1. INTRODUCTION

- 1.1 This submission is made to the Hong Kong Competition Commission (“**Commission**”) on behalf of the Hong Kong Working Group (“**Working Group**”) of the Antitrust Committee of the International Bar Association (“**IBA**”).<sup>1</sup>
- 1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at <http://www.ibanet.org>.
- 1.3 The Working Group's comments draw on the vast experience of the IBA's members in competition law and practice in the Asia-Pacific region and other major competition law jurisdictions across the globe. The contributors to the Working Group's submission are listed in Annex 1.
- 1.4 In this submission, the Working Group offers comments on the Commission's Draft Leniency Policy for Undertakings Engaged in Cartel Conduct (“**Leniency Policy**”) as well

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<sup>1</sup> The submission does not necessarily reflect the views of the organisations at which individual members of the Working Group are employed.

as on the Commission's Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct ("**Guide**"), both dated 23 September 2015. We provide our recommendations with respect to: (1) undertakings and persons entitled to leniency, (2) leniency procedures, and (3) other actions and investigations.

## **2. UNDERTAKINGS AND PERSONS ENTITLED TO LENIENCY**

- 2.1 The Guide notes that the Commission's leniency policy is close to a "winner takes all" approach. One implication of this approach is that, if a previous applicant is successful, there is no guarantee that subsequent applicants will benefit from a reduction in fine. Such an approach could potentially affect the extent to which subsequent applicants would be willing to proactively engage and cooperate with the Commission in respect of cartel conduct on a voluntary basis. With this in mind, it would be helpful to have additional guidance on the favourable treatment available to subsequent applicants. In order to encourage cooperation, we also ask that the Commission specifically affirm the importance of granting discounts.
- 2.2 In section 2.2 of the Leniency Policy, the Commission lists the natural persons that may be entitled to leniency. With respect to such protection, we recommend that the Commission: (1) explain the meaning of "ordinarily" in the context of the clause "leniency will ordinarily extend" and (2) instead of specifically listing the agents, former directors, former officers and former employees who are protected, cover all such natural persons (subject to the obligation to cooperate) who are not specifically excluded by name. We would also request that the Commission add "or the natural persons who are also entitled to leniency" to the last sentence of section 2.17. The Commission's proposed approach to extending protection to agents under the Leniency Policy does not necessarily promote consistency with standard global practice. We therefore suggest that the Commission consider eliminating protection for agents under the Leniency Policy.
- 2.3 The benefits of leniency extend to directors, but the Commission's position on disqualification orders against the directors of the undertaking that has been granted leniency is not clear. We recommend that the Commission states whether it will seek disqualification orders against directors of undertakings that are found to have engaged in cartel conduct.
- 2.4 Section 2.12 of the Leniency Policy provides that leniency is not available where the Commission has "decided" to issue an infringement notice or to commence proceedings in the Tribunal. In the interest of transparency, "decided" should be deleted and the Leniency

Policy revised to provide that leniency is not available after the Commission has "issued" an infringement notice or "commenced" proceedings in the Tribunal.

### **3. LENIENCY PROCEDURES**

- 3.1 Sections 2.6 to 2.9 of the Leniency Policy detail the steps for applying for a marker. The function of the marker is to assist in reserving a place for the applicant for a certain amount of time to perfect the marker and to identify whether anyone else has applied for leniency. Having regard to this function, it would be helpful if the Leniency Policy could contain more detail on the minimum information needed for a marker to be accepted. In this respect, we would also recommend that the Leniency Policy make it clear that the only information required by the Commission in order to grant a marker is the minimum information which would enable it to determine whether a marker has already been granted and therefore whether a marker is available for the conduct in question. In addition, we request that the Commission provide an applicant with the option of receiving oral or written confirmation of its marker status.
- 3.2 The Leniency Policy also leaves some uncertainty around the ability of an applicant to obtain leniency after the Commission has commenced an investigation. We would recommend that the Leniency Policy provide for an anonymous approach that would allow an applicant to discuss the particular circumstances of a case and the availability of leniency in the circumstances with the Commission.
- 3.3 The drafting of section 2.17 of the Leniency Policy suggests that evidence provided to the Commission by an applicant in support of an application for leniency made through a proffer will not be used by the Commission against the applicant. Section 5.7(d) of the Leniency Policy suggests that the Commission may be able to disclose material forming part of the leniency application in the event that the leniency agreement is terminated. This may give rise to a degree of uncertainty for applicants as to the effect of an assurance given by the Commission under Section 2.17 in the event that the leniency agreement connected to the provision of such evidence is terminated. We would request that the Commission provide clarification as to the circumstances in which an applicant can rely upon an assurance given by the Commission under section 2.17 of the Leniency Policy in respect of evidence provided in support of a proffer, and the effect of such an assurance in the event that leniency agreement connected to the provision of such evidence is terminated.
- 3.4 The Guide provides that the successful leniency applicant will be required to sign a

statement of agreed facts, admitting its participation in the cartel. We recommend that this requirement be eliminated. Such requirement disadvantages leniency applicants, which receive no protection or benefits in follow-on private damage actions and could reduce the incentives to seek leniency from the Commission in respect of otherwise appropriate circumstances. As a procedural matter, we also note that the obligation to sign a non-disclosure agreement is at odds with a paperless process.

#### **4. OTHER ACTIONS AND INVESTIGATIONS**

- 4.1 We note that the Communications Authority is undecided on the merits of a leniency policy. We recommend that the benefits of leniency be extended so as to preclude a situation where the Commission enters into a leniency agreement, but the Communications Authority brings an action in the Tribunal for a penalty.
- 4.2 Section 6.2 of the Leniency Policy provides that the Commission may require a leniency applicant to authorize the Commission to exchange confidential information with authorities in other jurisdictions. We recommend that this requirement be eliminated as such an approach is not consistent with standard global practice.

**CONTRIBUTORS**

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