Certari Consulting

SUBMISSION TO HONG KONG COMPETITION COMMISSION

in response to the

DRAFT LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT

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Certari Consulting Limited

Provides policy advice to governments, enforcement training to regulators, and compliance training to companies in relation to competition law and economic regulation.

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This Submission

Sets out the views solely of Certari Consulting Ltd.

Confidentiality is not asserted in relation to any part of this submission.

Executive Summary

1. Certari Consulting Limited welcomes the issuance by the Competition Commission of the *Draft Leniency Policy for Undertakings Engaged in Cartel Conduct*. We are pleased to have the opportunity to offer the following comments on the Draft Leniency Policy.

2. The Commission's Draft Leniency Policy resembles immunity policies adopted by numerous competition authorities around the world. Although it is entitled a "leniency" policy,[1] the Commission's proposed approach is one of granting immunity (rather than penalty reductions) to the first participant in a particular cartel to disclose the existence of the cartel to the Commission and co-operate in any ensuing investigation and enforcement activity. It is disappointing to observe that the Draft Leniency Policy does not address various known issues with conventional cartel leniency or immunity policies.

3. In particular, we consider that the Draft Leniency Policy:

   - Does not respond to the demonstrated risk of *cartel recidivism,* including by undertakings that have had the benefit of a previous grant of immunity;
   - Does not promote the alignment of *individual* liabilities and incentives with corporate liabilities and incentives; and
   - Would in practice be less beneficial for Hong Kong's businesses and economy than would a *consolidated and coherent approach* to cartel disclosure, immunity from prosecution, leniency for co-operation, and sanctioning.

4. Numerous choices are required in the development of an immunity policy. In the interests of effective consultation, the Commission should disclose not only the draft policy but also its grounds for making key policy choices. It is regrettable that the Draft Leniency Policy and accompanying "Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct" are silent on the reasoning behind the Commission's choices on important issues,

1 In this the Commission follows United States convention: under the US DOJ *Corporate Leniency Policy* "immunity", "leniency" and "amnesty" all have the same meaning and refer to full immunity from prosecution.

including:

- The non-disqualification of applicants who have coerced other participants to enter the cartel;
- The non-disqualification of cartel ringleaders;
- The exclusion of applicants who are not undertakings;
- The limitation of the policy to hard-core "cartel conduct";
- The absence of provision for penalty recommendations for co-operating defendants;
- The absence of provision for "amnesty plus"; and
- The absence of provision in respect of subsidiaries and affiliates of the applicant.

5. The Draft Leniency Policy should be amended, we submit, to:

- Apply to any form of conduct that allegedly infringes the First Conduct Rule, not merely "cartel conduct";
- Provide for natural persons to apply for leniency, regardless of whether they are "undertakings", if they would or might be parties (under s 91) to a contravention;
- Provide for less stringent enforcement against undertakings that have infringed the Second Conduct Rule where they self-report the infringement and provide continuing co-operation to the Commission; and
- Require applicants for immunity to implement an adequate compliance programme as a condition of the grant of immunity, including effective internal disciplinary measures.

6. The ability to offer immunity to a co-operating cartel participant is a useful tool for a competition authority. But Hong Kong should not simply replicate the basic elements of immunity policies that other jurisdictions have adopted. In Hong Kong, we submit, it is highly desirable that the Competition Commission should substantially revise its Draft Leniency Policy and develop in its place a consolidated and coherent policy on cartel disclosure, immunity from

prosecution, leniency for co-operation, and sanctioning. A 'Draft Policy on Immunity, Co-operation and Enforcement' should be circulated together with a statement of the Commission's reasons for adopting the approaches it proposes to take.

I. Policy limited to "cartel conduct"

7. Section 80 of the *Competition Ordinance* (Cap. 619) authorizes the Commission to enter into an agreement with a person that the Commission "will not bring or continue proceedings under Part 6 for a pecuniary penalty in respect of an alleged contravention of a conduct rule", in exchange for that person's co-operation in an investigation or proceedings under the *Competition Ordinance*.

8. Given that s 80 authorizes leniency agreements in respect of an alleged contravention "of a conduct rule" it is unclear why the Draft Leniency Policy proposes that "leniency is available only in respect of cartel conduct", where "cartel conduct" is confined to the so-called "hard-core" infringements. The first issue this gives rise to is uncertainty in the distinctions between conduct contrary to the First Conduct Rule, "cartel conduct," and "serious anti-competitive conduct" as defined in *Competition Ordinance* s 2. The creation of the additional category of "cartel conduct" is unnecessary and unhelpful. The second issue is why immunity should not be available in respect of anti-competitive conduct other than the newly defined class of "cartel conduct".

9. In the United States, the Department of Justice's *Corporate Leniency Policy* and its *Leniency Policy for Individuals* both are limited to so-called "hard-core" cartel conduct but this reflects the fact that criminal prosecution has for many years been limited to hard-core violations of Section 1 of the *Sherman Act*.[2] In other jurisdictions, leniency is typically available in relation to any conduct that would infringe the relevant prohibition on anti-competitive agreements. The attempt in the Draft Leniency Policy to distinguish between a set of First Conduct Rule infringements for which leniency will be available, and a residue of First Conduct Rule infringements for which leniency will be unavailable (or will be assessed "case by case"), is not explained by the Commission. It is likely

2 SW Waller "The Incoherence of Punishment in Antitrust" (2003) 78 *Chicago-Kent Law Review* 207.

to produce uncertainty and thereby reduce potential applicants' willingness to apply for leniency. We submit that para 2.5 and the definition of "cartel conduct" in para 2.4 of Draft Leniency Policy should be deleted and a new para 2.3 inserted as follows:

> 2.3 The Leniency Policy applies to any conduct in alleged contravention of the First Conduct Rule.

10. Since s 80 authorizes agreements to "not bring or continue proceedings" the Commission perhaps considers (although it does not say so) that immunity for co-operation would not serve a useful purpose in respect of Second Conduct Rule infringements. A policy for the Commission to make submissions to the Competition Tribunal regarding reduction of pecuniary penalties, or seeking remedies other than pecuniary penalties, in cases where a person self-reports involvement in a contravention of the Second Conduct Rule and provides ongoing co-operation would be likely to have significant value both for the Commission and the business community. Such "co-operation policies" have been successful in other jurisdictions.[3]

11. The Commission perhaps considers (although it does not say so) that s 80 authorizes the Commission merely to agree to refrain from commencing or continuing "proceedings for a pecuniary penalty", so does not authorize the Commission to enter an agreement to recommend reduced pecuniary penalties, or to seek other orders rather than pecuniary penalties. The better view, however, is that the Commission has discretion to do so, independently of an explicit statutory power. Elsewhere, the Commission recognizes its discretion beyond the strict bounds of s 80. The proposed template "Leniency Agreement" annexed to the Draft Leniency Policy provides that:

> "…the Commission agrees not to bring Proceedings for a pecuniary penalty under section 93 of the Ordinance **or any other Proceedings** (other than Proceedings for an order under section 94 of the Ordinance as mentioned in clause 4.1c [relating to an order declaring contravention of the first conduct rule])…".[4]

12. Presumably the Commission felt (although it does not say so) that a leniency

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3 See, e.g. Australian Competition and Consumer Commission *Cooperation Policy for Enforcement Matters* (July 2002); New Zealand Commerce Commission *Cartel Leniency Policy and Process Guidelines* (2011) Part 4 "Cooperation".

4 Draft template "Leniency Agreement" clause 2.1 (emphasis added).

policy would be ineffective if the Commission did not commit itself to refrain from seeking s 94 orders generally. In doing so, the Commission evidently recognizes its prosecutorial discretion. We submit that the Commission may appropriately exercise its discretion to reward co-operation in Second Conduct Rule investigations and prosecutions and that the leniency policy should be revised to address this.

II. Policy applies to "undertakings" only

13. The Draft Leniency Policy states that "only an *undertaking* may apply for leniency under the policy"[5] although "[t]he Commission will consider on a case by case basis"[6] whether it will enter a leniency agreement with a person who is not an undertaking. The Draft Leniency Policy does not explain the Commission's reasons for imposing this limitation. The Commission's approach differs from that in the United States, for example, where the Department of Justice operates both a *Corporate Leniency Policy* and a *Leniency Policy for Individuals*.[7]

14. It is unclear why a natural person (e.g. an employee of a cartel participant) should not be able to seek immunity under the policy in Hong Kong. Section 80 of the *Competition Ordinance* refers to "a person's co-operation" rather than an undertaking's co-operation and expressly contemplates circumstances in which "the person is a natural person".

15. While the conduct prohibitions under *Competition Ordinance* ss 6 and 21 apply to an "undertaking", it is clear from s 91 that a natural person may be "involved in a contravention of a competition rule" and therefore be exposed to pecuniary penalties or other orders under Part 6. This creates the opportunity for a "race to disclose" between an undertaking that is a cartel participant and an individual, such as an officer or employee of the undertaking, as Scott Hammond has explained:

> So long as one of its employees has individual exposure, the company remains at great risk. If the company self-reports the conduct under the Corporate Leniency

5 Competition Commission Draft Leniency Policy (2015), para 2.1(b).

6 Ibid, foreword.

7 Available online at: < http://www.justice.gov/atr/leniency-program > (accessed 22 October 2015).

> Policy, then the company and all of its co-operating executives will avoid criminal prosecution. However, if the company delays or decides not to report, then the company puts itself in a race for leniency with its own employees. … [I]f the company does not report the conduct first, then the executive may come forward on his [sic] own and report the conduct for his own protection, thereby potentially leaving the company out in the cold.[8]

16. Given that individuals bear potential personal liability under the *Competition Ordinance*, it is puzzling that the Commission proposes to exclude individuals as leniency applicants and thereby exclude this incentive for individuals (and undertakings) to self-report.

III. Cartel recidivism and the neglect of compliance

17. The propensity for cartel participants to re-offend by participating in subsequent cartels has been observed overseas. A study of appeals against European Commission cartel decisions published in 2005 found an "awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels."[9]

18. On cartel recidivism in the European Community, Wouter Wils has reported:

> Statistically, it appears that recidivists more than proportionately benefit from immunity from fines under the [EC] Leniency Notice: During the 5-year period 2006-2010, the European Commission adopted decisions finding 38 cartels. The sum of the number of undertakings found to have participated in these cartels was 255, and the number of findings of recidivism 31. Slightly less than one out of eight (12%) of the undertakings found to have participated in cartels were thus recidivists. For 28 out of 38 cartels the Commission granted immunity from fines to an undertaking in application of the Leniency Notice. Among the 28 immunity recipients, 7 were recidivists. One out of four (25%) of the immunity recipients were recidivists.

19. Obviously, it is highly unsatisfactory for an undertaking to be granted immunity from prosecution in respect of cartel participation and yet to be found at a later period engaging in the same kind of anti-competitive conduct a second time. It is particularly troubling that, having re-offended, immunity recipients can apply for leniency on a second occasion, and be eligible for a grant of immunity a second time. This is foreseeable under the Draft Leniency Policy, as it is presently drafted. It is disappointing that the Draft Leniency Policy makes no reference to recidivism or the enforcement response to it.

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8 Scott C Hammond "Cornerstones of an Effective Leniency Program" presented on Chilean Competition Day, Santiago, Chile, September 9, 2009.

9 C Harding and A Gibbs "Why Go to Court in Europe? An analysis of cartel appeals 1995-2004" (2005) 30 *European Law Review* 349 at 369.

20. Recidivism has been treated by courts, including the European Court of Justice, as an aggravating circumstance for the purpose of setting penalties and might be so treated by the Competition Tribunal in Hong Kong. Recidivism is sometimes proposed as a ground for withholding immunity. Each of these responses might increase the net deterrence from cartel involvement for an undertaking (though the latter is problematic[10]).

21. As a step beyond mere deterrence, Caron Beaton-Wells[11] and Brent Fisse[12] have advocated that a leniency applicant should be required to implement an adequate compliance programme as a condition of a grant of immunity. Although many competition agencies advocate the voluntary implementation of compliance programmes by businesses, the failure to require implementation of an adequate compliance programme has been a glaring omission from the same agencies' leniency policies.[13]

22. Compliance programmes and leniency policies can and should be mutually reinforcing.[14] An effective leniency policy should make immunity conditional on instituting or reforming the undertaking's compliance programme to an adequate state, which process can be overseen by the agency during the period of co-operation.[15] An adequate compliance policy[16] should not only reduce the risk of an undertaking re-offending against the cartel prohibition, it should encourage and accelerate an undertaking's ability to detect and respond to an infringement. As an aspect of compliance programme implementation, the agency may oversee internal disciplinary action by the undertaking against

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10 "The more cartelists are excluded from seeking immunity or leniency, the less these benefits [of cartel de-stabilisation and improved evidence collection] can accrue." WPJ Wils "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis" (2012) 35 *World Competition* 20.

11 C Beaton-Wells "Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study" (2014) 2 Journal of Antitrust Enforcement 126 at 168.

12 B Fisse "Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity" in C Beaton-Wells and C Tran (eds) *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015, Bloomsbury) Ch 10, pp 179-206.

13 B Fisse, ibid, at 180 - 184.

14 See, C Beaton-Wells, supra n 11, at 159 – 160.

15 B Fisse, supra n 12, at 180 - 184.

16 On the characteristics of an adequate compliance programme, see B Fisse, supra n 12, at 193 – 197.

culpable executives.[17]

23. By taking the opportunity to ensure that undertakings' compliance programmes are adequate and that internal disciplinary mechanisms are effective, the leniency policy in Hong Kong could help to avoid or reduce recidivism among leniency applicants.

IV. Immunity and the Communications Authority

24. Previously, the Commission's various guidelines (e.g. on complaints, investigations, and each of the competition rules) have been expressed to be "jointly issued by the Competition Commission and the Communications Authority", reflecting a common approach by the two bodies in respect of matters under their concurrent jurisdiction under Part 11 of the *Competition Ordinance*. We note that the Draft Leniency Policy does not refer to the Communications Authority, though "[t]he Communications Authority may perform the functions of the Commission under [the Competition] Ordinance, in so far as they relate to the conduct of undertakings that are [telecommunications or broadcasting licensees]."

25. *Competition Ordinance* s 161 requires that the Commission and the Communications Authority must, as soon as reasonably practicable after the section commences, "…prepare and sign a Memorandum of Understanding, for the purpose of co-ordinating their functions…". This MOU has yet to be disclosed, however, so telecommunications and broadcasting licensees may be concerned to understand the role and approach of the Communications Authority in respect of agreements under s 80. We submit that this should be addressed in a revised 'Draft Policy on Immunity, Co-operation and Enforcement'.

V. Conclusion

26. In conclusion, we submit that the Competition Commission should amend the Draft Leniency Policy to incorporate changes that address the concerns identified above. A revised 'Draft Policy on Immunity, Co-operation and

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17 B Fisse, supra n 12, at 197 – 200.

Enforcement' should be published for comment, together with the Commission's statement of its reasons for the approaches it proposes to take.

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