RESPONSE TO THE HONG KONG COMPETITION COMMISSION'S CONSULTATION ON THE DRAFT LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT

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Freshfields Bruckhaus Deringer

I. Introduction

1. Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the public consultation on the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct that has been published on 23 September 2015 (the ***Draft Leniency Policy***) and the related Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct (the ***Draft Leniency Guide***).

2. The Draft Leniency Policy has been published by the Hong Kong Competition Commission (the ***Commission***) in light of the leniency regime contemplated in the Competition Ordinance (Cap. 619) (the ***Ordinance***).

3. We set out below our comments, which are based on our significant experience and expertise in advising on competition law proceedings in numerous jurisdictions around the world.

4. The comments contained in this paper reflect the views of many in Freshfields Bruckhaus Deringer. They do not necessarily represent the views of every partner in the firm, nor do they represent the views of our individual clients.

II. Executive Summary

5. The Draft Leniency Policy and Draft Leniency Guide provide useful insight into how the Commission intends to implement the leniency regime in Hong Kong. However, we have identified a number of key issues which we will discuss in more detail below. In short, we would encourage the Commission to consider making the following amendments in the final version of its leniency policy (***Leniency Policy***):

    a. to extend the Leniency Policy to provide guidance in relation to leniency applications for anti-competitive conduct beyond hard-core cartels;
    b. to allow a marker to be placed outside of business hours;
    c. to provide clear guidance as to when and how the Commission will exercise its ability to terminate a leniency agreement;
    d. to clarify that directors of a successful leniency applicant are exempted from disqualification orders;
    e. to clarify that a declaratory order of the Competition Tribunal relating to the statement of agreed facts will be rendered at the same time as the decision in the main proceedings; and
    f. to clarify the legal basis on which the Commission can offer "*favourable treatment*", what such treatment may entail, as well as the level of cooperation required from an undertaking, not eligible for leniency, to benefit from such "*favourable treatment*".

III. Comments on the Draft Leniency Policy

Scope of the Leniency Policy

6. Pursuant to paragraphs 2.3 to 2.5 of the Draft Leniency Policy, the Commission only provides guidance for leniency in relation to agreements or concerted practices between competitors in the form of price fixing, market sharing, restriction of output and/or bid-rigging. The scope of the Draft Leniency Policy is thereby markedly narrower than the powers granted to the Commission under section 80 of the Ordinance which states that leniency agreements may be available, "*in respect of an alleged contravention of a conduct rule […]*".

7. It is clear that the Commission cannot fetter its discretion via the Leniency Policy regarding the scope of section 80 of the Ordinance. Indeed, the introduction of the Draft Leniency Policy states that the Commission does not "*preclude*" entering into a leniency agreement in respect of an alleged contravention of a conduct rule not covered by the Draft Leniency Policy. We therefore encourage the Commission to publish guidance in relation to leniency applications other than for hard-core cartel conduct. The absence of guidance creates considerable uncertainty in relation to various other types of conduct for which it would have been expected that the Leniency Policy would apply, such as: (i) information exchange which is not part of a hard-core cartel but is considered to have a harmful effect on competition, (ii) hub and spoke and (iii) resale price maintenance (***RPM***). In this respect, we note that the Commission has indicated in paragraph 5.6 of its Guideline on the First Conduct Rule that RPM could in certain circumstances qualify as serious anti-competitive conduct. Providing broader guidance would follow the approach set out in the Model Leniency Programme of the European Competition Network (***ECN***) which states that leniency programmes should not exclude the possibility of covering cartels with vertical elements.[1]

8. We therefore encourage the Commission to re-consider its approach and provide guidance – in line with the provisions of the Ordinance - for leniency applications beyond horizontal hard-core cartel conduct.

Marker hotline

9. According to paragraph 2.9 of the Draft Leniency Policy a marker request may only be placed via a hotline, which is available between 9 am and 6 pm on Mondays to Fridays (excluding public holidays).

10. In a global regulatory enforcement environment, where undertakings may consider applying for leniency in a number of jurisdictions at the same time, it is undesirable for marker requests to only be received during Hong Kong business

[1] Explanatory note to the European Competition Network Model Leniency Programme as revised in 2012, paragraphs. 13-14.

hours. In other jurisdictions, provisions are made to cater for "*out of hours*" marker requests. For example, in the EU a marker can be requested outside business hours by sending an e-mail.[2] We would recommend that the Commission make similar provisions.

Commission's power to unilaterally terminate a leniency agreement in case of incomplete information

11. According to paragraph 3.1 of the Draft Leniency Policy, "*the Commission may terminate a leniency agreement where*, inter alia, *the Commission has reasonable grounds to suspect that the information on which it based its decision to make the agreement was incomplete, false or misleading*". This wording corresponds with section 81(b) of the Ordinance. We consider that it would be appropriate for the Commission to provide guidance as to what constitutes "*reasonable grounds*" for terminating a leniency agreement given that if it has to terminate a leniency agreement, the Commission will be expected to demonstrate that it has "*reasonable grounds*" for terminating the agreement.

12. This is particularly important in relation to termination on the grounds that the leniency applicant provided "*incomplete information*" given that it will typically be very difficult (if not practically impossible) for an undertaking to ascertain whether the information it has provided is complete. Apart from the fact that it may be practically impossible to have an overview of all information available within the undertaking, information may simply not be in the possession of the undertaking (e.g. information may be taken by former employees). In our view, if the undertaking can demonstrate that it has not concealed the information there should be no grounds for withdrawing the leniency agreement.

13. We therefore consider that the Commission should set out clear guidance as to when it may terminate a leniency agreement on the grounds that the leniency applicant has provided "*incomplete information*". The current lack of guidance may disincentivise undertakings from seeking leniency and undermine the Commission's policy goals.

14. As a starting point, it would be helpful for the Commission to state that it will not withdraw a leniency agreement insofar as the leniency applicant has used its best endeavours in providing information to the Commission. Moreover, we would recommend that the Commission set out some of the factors it will consider in assessing whether to withdraw a leniency agreement, including:

    a. establishing some form of materiality threshold;
    b. providing the undertaking with an opportunity to explain why the information may be incomplete as there may be legitimate reasons for not being able to provide certain information; and

[2] See http://ec.europa.eu/competition/cartels/leniency/leniency.html on which it is indicated that the telephones are monitored from 09.00 to 17.00 on weekdays. Outside of these times, the relevant email address should be used.

c. whether the undertaking has been given an opportunity to remedy the issue.

Director's exemption from disqualification orders

15. Pursuant to paragraph 2.2 of the Draft Leniency Policy, a leniency agreement will in principle also extend to current and former directors, officers and employees of the leniency applicant, provided that those individuals provide complete, truthful and continuous cooperation. However, the Draft Leniency Policy is currently silent as to whether the Commission may still apply for a disqualification order against directors as provided for in section 102 of the Ordinance.

16. We would welcome an express confirmation in the Leniency Policy that the directors of a successful leniency applicant will not be subject to applications from the Commission for such disqualification orders. We believe that in the absence of such a statement, there is a risk that board members of undertakings who are considering whether to apply for leniency may be disincentivised from doing so and that may ultimately undermine the Commission's policy aims.

Declaratory order on statement of agreed facts

17. Pursuant to paragraph 2.22(f) of the Draft Leniency Policy, the Commission may seek an order from the Competition Tribunal that the leniency applicant has contravened the First Conduct Rule.

18. We recognise that it may be desirable for the Commission to seek what is - in effect - a declaratory judgment. An issue arises as to the timing of the making of the declaratory judgment by the Competition Tribunal. We would recommend that the Leniency Policy sets out that the declaratory judgment be made at the same time as the decision is handed down by the Competition Tribunal in the main proceedings relating to the relevant cartel.

19. We consider that this is necessary to avoid potentially infringing the right of the defence of the other alleged cartelists. More specifically, those other alleged cartelists may be mentioned in the statement of agreed facts (agreed between the leniency applicant and the Commission) and the Competition Tribunal's declaratory judgment order but may not have had a chance to defend themselves if the declaratory judgment is made before the Competition Tribunal hearing in the main proceedings.

"Favourable treatment" in exchange for cooperation

20. Paragraph 4.2 of the Draft Leniency Policy specifies that the Commission will rely on its enforcement discretion to consider providing "*favourable treatment*" to undertakings that do not qualify for leniency, but who nonetheless cooperate with

the Commission in connection with an investigation of alleged contraventions of the First Conduct Rule.

21. We welcome the Commission's attempt to afford some type of "*favourable treatment*" to other undertakings that support the Commission in its investigation. However, there is uncertainty in relation to the offer of "*favourable treatment*" since, (i) the Commission has not stated on what basis it is proposing such a framework, (ii) it is unclear what this "*favourable treatment*" might mean in concrete terms in Competition Tribunal proceedings, and (iii) it is unclear what undertakings would need to do to benefit from this "*favourable treatment*". We address each point in turn below.

Basis for granting "favourable treatment"

22. Neither the Ordinance, nor the Tribunal rules provide any clear basis for such "*favourable treatment*". We also note that section 93 of the Ordinance does not impose any obligation on the Competition Tribunal to consider the cooperation of the undertaking concerned in the investigation when determining the amount of the pecuniary penalty (although it is not precluded from doing so).

23. We are also aware that the Hong Kong leniency regime appears to resemble the general approach in Australia, where until recently courts followed joint penalty recommendations of the Australian Competition and Consumer Commission (the ***ACCC***) and a cooperating party. However, this practice has been called into question by a decision of the Full Federal Court of Australia of 1 May 2015 (currently under appeal) in which it ruled that in light of the public interest in imposing sanctions, it is the Court's sole responsibility to set the amount of such penalties and it did not have to follow a recommendation of a public authority, such as the ACCC, and indeed prohibited the making of submissions by the public authorities on penalties.[3]

24. We would therefore welcome clarification from the Commission as to the legal basis for offering such "*favourable treatment*".

Benefits of "favourable treatment"

25. The Commission has not set out clearly what the "*favourable treatment*" will mean in concrete terms. It is unclear, for instance, whether the Commission's policy is that the leniency applicant could or should receive a fine reduction. If the Commission is proposing fine reductions then a number of questions would need to be addressed in the Leniency Policy, including:

[3] Full Federal Court of Australia, *FWBII v CFMEU* [2015] (under appeal).

a. are all recipients of "*favourable treatment*" afforded an equal fine reduction, or is the policy to award differing levels of fine reductions to each leniency applicant?
b. assuming the "*favourable treatment*" does not result in equal fine reductions, how would the level of fine reductions then be determined?
c. having then offered a leniency applicant a fine reduction, how does the Commission then intend to deliver that reduction from the independent Competition Tribunal?

Required cooperation in exchange for "favourable treatment"

26. The Draft Leniency Policy does not specify the level of cooperation required for a leniency applicant to be afforded "*favourable treatment*".

27. Insofar as it is possible, we would encourage the Commission to rely on international best practice, in order to provide further guidance in this respect. For example, while it is based on a different leniency regime, in the EU an undertaking that cannot qualify for immunity may still benefit from a reduction of its fine if it provides "*evidence of significant added value*". The Court of Justice of the European Union has also confirmed that the information provided by a leniency applicant should not only facilitate the authority's task of establishing the existence of the infringement but should also reveal a genuine spirit of cooperation, going beyond the general cooperation obligation.[4]

28. Based on the above, we would recommend that the Commission to further specify in its Leniency Policy the level of cooperation that is required from an undertaking in order to receive "*favourable treatment*".

IV. Conclusion

29. In conclusion, we would like to emphasise again that we strongly welcome the Draft Leniency Policy which provides guidance to the business and legal communities on the scope of the leniency regime and how leniency applications shall be made. In providing comments in this response, we are endeavouring to suggest ways in which the Commission could further clarify certain specific issues.

30. We would be happy to provide any further explanation of the points raised in this response, either in a meeting or otherwise. If such further discussion would be helpful, please contact:

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[4] Court of Justice of the European Union, Joined Cases C-293/13P and C-294/13P, *Fresh Del Monte Produce v Commission and Commission v Fresh del Monte Produce* [2015] par. 184.

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