

PART 1

INTERPRETATION

2. Interpretation

- (1) In this Ordinance -
- “agreement” (協議) includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings;
- “Broadcasting Authority” (廣管局) means the Broadcasting Authority established by section 3 of the Broadcasting Authority Ordinance (Cap. 391);
- “Commission” (競委會) means the Competition Commission established by section 128;
- “company” (公司), in addition to the meaning given by section 2(1) of the Companies Ordinance (Cap. 32), includes a “non-Hong Kong company” within the meaning of that Ordinance and a company registered under Part IX of that Ordinance;
- “competition matter” (競爭事宜) means any matter involving or having a connection with -
- (a) a contravention or alleged contravention of a competition rule; or
 - (b) any decision relating to a competition rule, that has been made or is to be made under this Ordinance;
- “competition regulator” (競爭規管者) means any one of the following -
- (a) the Commission;

(b) the Telecommunications Authority; or

(c) the Broadcasting Authority;

“competition rule” (競爭守則) means -

(a) the first conduct rule;

(b) the second conduct rule; or

(c) the merger rule;

“conduct” (行為) means any conduct, whether by act or omission;

“conduct rule” (行為守則) means -

(a) the first conduct rule; or

(b) the second conduct rule;

“confidential information” (機密資料) has the meaning given by section 122;

“contract of employment” (僱傭合約) means any agreement, whether in writing or oral, express or implied, under which one person (an “employer”) agrees to employ another and that other agrees to serve the employer as an employee, and also includes a contract of apprenticeship;

“director” (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director;

“document” (文件) includes information recorded in any form;

“first conduct rule” (第一行為守則) has the meaning given by section 6;

“functions” (職能), except in section 129, includes powers and duties;

“funds of the Commission” (競委會資金) means the funds of the Commission, as specified in section 21 of Schedule 5;

“Government” (特區政府) does not include a company that is wholly or partly owned by the Government;

“information” (資料) includes information contained in a document;

“infringement notice” (違章通知書) means an infringement notice issued under section 66(2);

“investigation” (調查) means an investigation conducted under Part 3;

“leniency agreement” (寬待協議) means a leniency agreement made under section 79;

“member” (委員), in relation to the Commission, means a member of the Commission appointed under section 2 of Schedule 5;

“merger” (合併) has the meaning given by section 3 of Schedule 7 read together with section 5 of that Schedule;

“merger rule” (合併守則) has the meaning given by section 3 of Schedule 7;

“person” (人), in addition to the meaning given by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), includes an undertaking;

“President” (主任法官) means the President of the Tribunal appointed under section 135;

“reviewable determination” (可覆核裁定) has the meaning given by section 81;

“serious anti-competitive conduct” (嚴重反競爭行為) means any conduct that consists of any of the following or any combination of the following -

(a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;

(b) allocating sales, territories, customers or markets for the production or supply of goods or services;

(c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;

(d) bid-rigging;

Note -

See also subsection (2).

“second conduct rule” (第二行為守則) has the meaning given by section 21;

“shadow director” (幕後董事), in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that the directors act on advice given by that person in a professional capacity;

“statutory body” (法定團體) means a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include -

(a) a company;

(b) a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306);

(c) a society registered under the Societies Ordinance (Cap. 151);

(d) a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33); or

(e) a trade union registered under the Trade Unions Ordinance (Cap. 332);

“Telecommunications Authority” (電管局局長) means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106);

“Tribunal” (審裁處) means the Competition Tribunal established by section 133;

“undertaking” (業務實體) means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity.

(2) For the purposes of the definition of “serious anti-competitive conduct” -

“bid-rigging” (圍標) means -

(a) an agreement -

(i) that is made between or among 2 or more undertakings whereby one or more of those undertakings agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity

controlled by any one or more of the parties to the agreement; or

(b) a submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by an agreement -

(i) that is made between or among 2 or more undertakings; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement;

“goods” (貨品) includes real property;

“price” (價格) includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of goods or services;

“supply” (供應) -

(a) in relation to goods, means sell, rent, lease or otherwise dispose of the goods, an interest in the goods or a right to the goods, or offer so to dispose of the goods or of such an interest or right; and

(b) in relation to services, means sell, rent or otherwise provide the services or offer so to provide the services.

PART 4

ENFORCEMENT POWERS OF COMMISSION

Division 1 - Commitments

59. Commitments

(1) The Commission may accept from a person a commitment to -

- (a) take any action; or
- (b) refrain from taking any action,

that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule.

(1A) The action referred to in subsection (1)(a) does not include making a payment to the Government.

(2) If the Commission accepts a commitment under this section, it may agree -

- (a) not to commence an investigation or, if it has commenced an investigation, to terminate it; and
- (b) not to bring proceedings in the Tribunal or, if it has brought proceedings, to terminate them.

(3) If the Commission accepts a commitment under this section, it may not -

- (a) commence or continue an investigation; or
- (b) bring or continue proceedings in the Tribunal,

in relation to any alleged contravention of a competition rule in so far as that investigation or those proceedings relate to matters that are addressed by the commitment.

(4) To avoid doubt, the Commission may still commence or continue an investigation or bring or continue proceedings in the Tribunal, after accepting a commitment under this section -

- (a) in relation to matters that are not addressed by the commitment; or
- (b) in relation to persons who are not subject to the commitment.

(5) If the Commission decides to accept a commitment under this section, it must, as soon as practicable after accepting it -

- (a) give notice in writing of that decision to the person who made the commitment, together with a copy of the commitment; and
- (b) register the commitment on the register of commitments maintained under section 63 (Register of commitments).

66. Commission may issue infringement notice

~~(1) Subsection (2) applies where the Commission has reasonable cause to believe that a contravention of a conduct rule has occurred, but has not yet brought proceedings in the Tribunal in respect of that contravention.~~

(1) Subsection (2) applies where -

- (a) the Commission has reasonable cause to believe that -

- (i) a contravention of the first conduct rule has occurred and the contravention involves serious anti-competitive conduct; or
- (ii) a contravention of the second conduct rule has occurred; and
- (b) the Commission has not yet brought proceedings in the Tribunal in respect of the contravention.

(2) The Commission may, instead of bringing proceedings in the Tribunal in the first instance, issue a notice (an “infringement notice”) to the person against whom it proposes to bring proceedings, offering not to bring those proceedings on condition that the person makes a commitment to comply with requirements of the notice.

(3) The requirements of an infringement notice may include, but are not limited to, the following requirements –

- ~~(a) to pay a sum not exceeding \$10,000,000 to the Government;~~
- (b) to refrain from any specified conduct, or to take any specified action, that the Commission considers appropriate; and
- (c) to admit to a contravention of the relevant conduct rule.

(4) The action that may be specified by the Commission under subsection (3)(b) does not include making a payment to the Government.

Division 4 - Warning Notices

80A. Warning notices

(1) If the Commission has reasonable cause to believe that -

(a) a contravention of the first conduct rule has occurred; and

(b) the contravention does not involve serious anti-competitive conduct,

the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a "warning notice") to the undertaking.

(2) A warning notice must -

(a) describe the conduct (the "contravening conduct") that is alleged to constitute the contravention;

(b) identify the undertaking (the "contravening undertaking") that has engaged in the contravening conduct;

(c) identify the evidence or other materials that the Commission relies on in support of its allegations;

(d) state -

(i) that the Commission requires the contravening undertaking to cease the contravening conduct within the period (the "warning period") specified in

the notice, and not to repeat that conduct after the warning period;

(ii) that, if the contravening conduct continues after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and

(iii) that, if the contravening undertaking repeats the contravening conduct after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct; and

(e) indicate the manner in which the contravening undertaking may cease the contravening conduct.

(3) In determining the warning period, the Commission must have regard to the amount of time which the contravening undertaking is likely to require to cease the contravening conduct.

(4) After the expiry of the warning period -

(a) if the Commission has reasonable cause to believe that the contravening conduct continues after the expiry, the Commission may bring proceedings in the Tribunal against the

contravening undertaking in respect of the
contravening conduct; and

(b) if the Commission has reasonable cause to
believe that the contravening undertaking
repeats the contravening conduct after the
expiry, the Commission may bring proceedings
in the Tribunal against the contravening
undertaking in respect of the contravening
conduct and the repeated conduct.

(5) To avoid doubt, proceedings under subsection (4) may
not be brought in respect of any period that precedes the warning
period.

PART 6

ENFORCEMENT BEFORE TRIBUNAL

91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.

(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters -

- (a) the nature and extent of the conduct that constitutes the contravention;
- (b) the loss or damage, if any, caused by the conduct;
- (c) the circumstance in which the conduct took place; and
- (d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.

~~(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total -~~

- ~~(a) 10% of the turnover of the undertaking concerned, for the year in which the contravention occurred; or~~
- ~~(b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.~~

(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed -

- (a) 10% of the turnover of the undertaking concerned for the year in which the contravention occurred;
- (b) if the contravention has continued for a period of more than one year but not more than 3 years, 10% of the turnover of the undertaking concerned for each year in that period; or

(c) if the contravention has continued for a period of more than 3 years, 10% of the turnover of the undertaking concerned for the 3 years in that period that saw the highest, second highest and third highest turnover.

(4) In this section -

~~“turnover” (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong;~~

“turnover” (營業額) means the total gross revenues of an undertaking obtained in Hong Kong;

“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.