

香港特別行政區政府
商務及經濟發展局
工商及旅遊科



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5 March 2015

Ms Mary SO
Clerk to Panel
Panel on Administration of
Justice and Legal Services
Legislative Council

Dear Ms So,

**Panel on Administration of Justice and Legal Services
Draft Court Procedural Rules for the Competition Tribunal**

I refer to your letter of 24 February 2015 on the above subject, requesting the following information -

- (a) relationship between the contravention of the first conduct rule under section 6 of the Competition Ordinance (“the CO”) (Cap. 619) and the second conduct rule under section 21 of the CO; and
- (b) procedures for members of the public to seek remedies due to contravention in the requirements of the CO.

Our response is set out in the ensuing paragraphs.

Relationship between the contravention of the first conduct rule and the second conduct rule

2. Section 6 of the CO¹ sets out the first conduct rule, which prohibits anti-competitive agreements or concerted practices between undertakings, and decisions of an association of undertakings which have the object or effect to prevent, restrict or distort competition in Hong Kong. Section 21 of the CO² sets out the second conduct rule, which provides that an undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

3. The first conduct rule applies to agreements³ involving two or more undertakings which have the object or effect of preventing, restricting or distorting competition in Hong Kong. It is not a prerequisite under the first conduct rule to establish that any of the concerned undertakings has reached any particular degree of market power. For example, undertakings agree to engage

¹ Section 6 of the CO states that

‘(1) An undertaking must not—

- (a) make or give effect to an agreement;
- (b) engage in a concerted practice; or
- (c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

(2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).

(3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “first conduct rule”.’

² Section 21 of the CO states that,

‘(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

(2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—

- (a) predatory behaviour towards competitors; or
- (b) limiting production, markets or technical development to the prejudice of consumers.

(3) Without limiting the matters that may be taken into account in determining whether an undertaking has a substantial degree of market power in a market, the following matters may be taken into consideration in any such determination—

- (a) the market share of the undertaking;
- (b) the undertaking’s power to make pricing and other decisions;
- (c) any barriers to entry to competitors into the relevant market; and
- (d) any other relevant matters specified in the guidelines issued under section 35 for the purposes of this paragraph.

(4) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “second conduct rule”.’

³ For the purpose of this letter, the term “agreement” will be read as also encompassing a concerted practice and a decision of an association of undertakings.

in serious anti-competitive conduct like price-fixing or bid-rigging would have contravened the first conduct rule by virtue of such conduct even if they individually or collectively do not have substantial market power.

4. On the other hand, the second conduct rule is only applicable to an undertaking which, on its own, has substantial degree of market power. Such an undertaking may contravene the second conduct rule if it engages in anti-competitive conduct unilaterally by abusing its market power.

5. Therefore the first and second conduct rules are applicable in different contexts and one is not the pre-condition of the other. Notwithstanding this, it is possible for an undertaking to have contravened both the first conduct rule and the second conduct rule. For instance, if an undertaking with substantial market power abuses that power to cause harm to competition through an agreement with other undertakings, it is possible for that conduct to be considered as contravention of both the first conduct rule and the second conduct rule.

6. The Competition Commission (“the Commission”) is the statutory authority to enforce the CO. In accordance with the CO, the Commission has prepared draft guidelines (“Draft Guidelines”) to, among other things, indicate the manner in which it expects to interpret and give effect to the conduct rules. Explanations and examples of possible contraventions are given in the Draft Guidelines (accessible at this website: http://www.compcomm.hk/en/draft_guidelines_2014.html). The Commission will finalise the guidelines after completion of the consultation with the LegCo and relevant persons.

Procedures for members of the public to seek remedies due to contravention in the requirements of the CO

7. The CO provides that any person may, in accordance with guidelines issued by the Commission, lodge a complaint with the Commission alleging that an undertaking has contravened, is contravening or is about to contravene a competition rule. The Commission is not required to investigate a complaint if it does not consider it reasonable to do so. The Draft Guidelines indicating how complaints are to be made and handled by the Commission are available in the website mentioned in paragraph 6 above.

8. The Commission may conduct any investigation into any conduct that constitutes or may constitute a contravention of a competition rule of its own volition, in response to a complaint, or in response to referral by the Court of First Instance, the Competition Tribunal or the Government. If, after investigation, the Commission has reasonable cause to believe that a

contravention of a competition rule has occurred, it has several courses of actions available including, should the Commission consider appropriate, bringing proceedings to the Competition Tribunal. If the Tribunal is satisfied 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 and/or make any order it considers appropriate against that person which include, among other things, an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention.

9. Only the Commission may bring proceedings to the Competition Tribunal against an undertaking on ground of any act which is in contravention of a conduct rule. The CO, however, provides for follow-on right of action such that a person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule will have a right to bring action under section 110 in the Competition Tribunal.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Sam Hui', written in a cursive style.

(Sam Hui)

for Secretary for Commerce and Economic Development