

[113.004] **The Consumer Council** The first governmental body in Hong Kong with the power to address competition-related concerns was the Consumer Council, created in July 1977 under the Consumer Council Ordinance (Cap 216).¹ The Consumer Council was commissioned by the Trade and Industry Bureau to conduct a series of studies of a number of key sectors of Hong Kong's domestic economy between 1992 and 1996.² These studies reviewed the trade practices in these sectors, and provided recommendations to the government. However the impact of these reports was limited as the Consumer Council itself lacked any investigatory or enforcement powers to change behavior within any of these industry sectors.

In 1996, the Trade Practices Division of the Consumer Council published a report entitled 'Competition Policy: The Key to Hong Kong's Future Economic Success' under the guidance and supervision of a Competition Policy Committee.³ This report strongly recommended the enactment of a market-wide competition law in Hong Kong to cover horizontal and vertical collusive agreements and abuses of dominant position.⁴ The report also recommended the creation of a Competition Authority to investigate breaches of such a competition law and an Appeal Body to hear appeals against the Competition Authority's decisions.⁵

In response to the Consumer Council's report, the Trade & Industry Bureau issued the "Government Response to Consumer Council's Report Entitled 'Competition Policy: The Key to Hong Kong's Future Economic Success'" in November 1997. In this response, the Hong Kong Government rejected the argument of the Consumer Council for the need for an overarching competition law.⁶ Instead, the Government pledged to create the Competition Policy Advisory Group.

1 As to the Consumer Council see TRADE AND LABOUR (2015 Reissue) [390.128]–[390.146].

2 Consumer Council Report, 'Competition Policy: The Key to Hong Kong's Future Economic Success' (1996), https://www.consumer.org.hk/sites/consumer/files/competition_issues/199611/competitionpolicy_report.pdf para 1.2. These included studies of the banking, domestic gas supply, broadcasting, telecommunications and residential property industries, the findings of which were published by the Consumer Council as:

- Are Hong Kong Depositors Fairly Treated?, February 1994;
- Report on the Driving Instruction Industry, July 1994;
- Report on the Supermarket Industry in Hong Kong, November 1994;
- Assessing Competition in the Domestic Water Heating and Cooking Fuel Market, July 1995;

- Ensuring Competition in the Dynamic Television Broadcasting Market, January 1996;
- Achieving Competition in the Liberalised Telecommunications Market, March 1996; and
- How Competitive is the Private Residential Property Market? July 1996.

See also Trade and Industry Bureau, "Government Response to Consumer Council's Report Entitled 'Competition Policy: The Key to Hong Kong's Future Economic Success'" (November 1997), <http://www.compag.gov.hk/reference/brochure.pdf>.

- 3 Consumer Council Report, "Competition Policy: The Key to Hong Kong's Future Economic Success" (1996), https://www.consumer.org.hk/sites/consumer/files/competition_issues/199611/competitionpolicy_report.pdf.
- 4 Consumer Council Report, "Competition Policy: The Key to Hong Kong's Future Economic Success" (1996), https://www.consumer.org.hk/sites/consumer/files/competition_issues/199611/competitionpolicy_report.pdf para 8.12.
- 5 Consumer Council Report, "Competition Policy: The Key to Hong Kong's Future Economic Success" (1996), https://www.consumer.org.hk/sites/consumer/files/competition_issues/199611/competitionpolicy_report.pdf para 8.22.
- 6 Trade and Industry Bureau, "Government Response to Consumer Council's Report Entitled 'Competition Policy: The Key to Hong Kong's Future Economic Success'" (November 1997), <http://www.compag.gov.hk/reference/brochure.pdf> para 5.6–5.7.
- 7 Trade and Industry Bureau, "Government Response to Consumer Council's Report Entitled 'Competition Policy: The Key to Hong Kong's Future Economic Success'" (November 1997), <http://www.compag.gov.hk/reference/brochure.pdf> para 4.6.

[113.005] **The Competition Policy Advisory Group ('COMPAG')** Prior to the passing of the Competition Ordinance and the creation of the Competition Commission, government policy regarding competition issues was solely guided by the Competition Policy Advisory Group. COMPAG was created in December 1997 as a high-level forum within the Hong Kong government to review competition-related issues which have policy or systemic implications.¹ The goal of creating COMPAG was to promote a pro-competitive culture in the public and private sector in Hong Kong, and to handle competition-related complaints.

COMPAG is chaired by the Secretary for Commerce and Economic Development, and is made up of a further seven members.²

In May 1998, COMPAG produced its Statement on Competition Policy.³ This Statement set out the objectives of the Hong Kong

Government with regards to competition policy, and provided an overarching policy framework for sector-specific efforts to promote competition. In line with this stated policy, the government introduced statutory Competition Rules in 2000 for the telecommunications and broadcasting sectors.⁴

In June 2005, COMPAG appointed a Competition Policy Review Committee ('CPRC') to make further recommendations regarding competition policy in Hong Kong. The CPRC submitted its report to COMPAG in June 2006, recommending that a new ordinance be enacted to address anti-competitive conduct in Hong Kong across all sectors. Two public consultations were conducted in 2006 and 2008 respectively, and wide community support for such an ordinance was received.⁵

- 1 See <http://www.compag.gov.hk/about/>.
- 2 See <http://www.compag.gov.hk/member/>. COMPAG was formerly chaired by the Financial Secretary.
- 3 See <http://www.compag.gov.hk/policy/content.htm>.
- 4 See MEDIA AND COMMUNICATIONS (2013 Reissue).
- 5 Paper for the House Committee Meeting on 8 October 2010: Legal Services Division Report on Competition Bill, LC Paper No LS93/09-10 para 6. See <http://www.legco.gov.hk/yr09-10/english/bills/b201007022.pdf> and the corresponding LegCo Brief, http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf. See also Press Releases 'LegCo passes Competition Bill' 14 June 2012, at <http://www.info.gov.hk/gia/general/201206/14/P201206140621.htm>.

[113.006] The Competition Bill In 2010, the Competition Bill was submitted to Hong Kong's Legislative Council ('LegCo').¹ The earlier drafts of the bill were considered to rely heavily on the competition laws of Australia, however, later drafts showed influences from Europe and North America. The final draft of the Competition Ordinance (Cap 619) borrows liberally from each of these more established competition regimes.

- 1 See Competition Bill prepared by the Administration, LC Paper No CB(3)885/09-10, at <http://www.legco.gov.hk/yr09-10/english/bills/b201007022.pdf>.

[113.007] The Competition Ordinance The Hong Kong Competition Ordinance (Cap 619) was first enacted on 14 June 2012

by LegCo¹ and formally signed into law on 21 June 2012.² Administrative delays in the succeeding years have meant that the Ordinance has had a phased implementation. On 14 December, 2015, the Ordinance came into full effect.

- 1 See Brief for the Legislative Council: Competition Ordinance (Cap 619) Competition Ordinance (Commencement Notice 2012), http://www.legco.gov.hk/yr12-13/english/subleg/brief/177_brf.pdf.
- 2 See Competition Bill passed (14 June 2012), <http://www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf>, at A1347.

(2) ADMINISTRATIVE AUTHORITIES

(1) THE COMPETITION COMMISSION

CONTENTS

PARA	PAGE
[113.008] Establishment and Constitution of the Competition Commission	23
[113.009] Members of the Competition Commission	24
[113.010] Chairperson of the Competition Commission	26
[113.011] Chief Executive Officer	26
[113.012] Appointment of Staff	26
[113.013] Personal immunity of members of the Competition Commission	27
[113.014] General procedure for meetings of Competition Commission	27
[113.015] Voting at Competition Commission meetings	28
[113.016] Written resolutions	28
[113.017] Defects in appointment	29
[113.018] Financing and Accounts of the Competition Commission	29
[113.019] Committees	30
[113.020] Register of interests	30
[113.021] Disclosure of interests	31
[113.022] Delegation by the Competition Commission	31
[113.023] Subdelegation	33
[113.024] Delegation of power to obtain documents and information	33
[113.025] Seal of the Competition Commission	33

[113.008] Establishment and Constitution of the Competition Commission The Competition Commission is an independent statutory body established under the Competition Ordinance (Cap

619) enacted in June 2012.¹ The Competition Commission has a wide range of investigatory and enforcement powers, including the ability to investigate suspected infringements (either in response to complaints or on its own initiative) and to issue warnings and infringement notices. The Competition Commission does not have the power to impose fines or other penalties for infringements, this power being reserved to the Competition Tribunal.

As in other jurisdictions, the Competition Commission is required to prepare and issue detailed regulatory Guidelines on the precise interpretation of the rules, as well as on procedural and substantive matters (eg, complaints and investigations procedures, the treatment of vertical agreements, the application of block exemptions, etc.). Other functions of the Competition Commission include promoting public understanding of the Competition Ordinance, advising the government on competition matters and, importantly, issuing block exemption orders in respect of particular categories of agreements.

1 Competition Ordinance (Cap 619) s 129: (2) The Competition Commission is a body corporate and may (a) acquire, hold and dispose of movable and immovable property; (b) sue and be sued in its own name; and (c) so far as is possible for a body corporate, exercise all the rights and powers, enjoy all the privileges and incur all the liabilities of a natural person of full age and capacity.

[113.009] Members of the Competition Commission The Competition Commission was established as a body corporate on 18 January 2013. The Competition Commission is independent of the Government and thus is not a servant or agent of the Hong Kong Government and does not enjoy any status, immunity or privilege of the Government.¹ Although the Competition Commission is independent of the Government, its members are appointed by Hong Kong's Chief Executive in Council.²

The Competition Commission's executive body consists of not less than five and not more than sixteen members, appointed by the Chief Executive.³ The appointed members are expected to have extensive experience and rich knowledge in their own industries—commerce, economics, law, small or medium-sized enterprises or public policy⁴—and will have a significant impact on the direction and enforcement priorities the Competition Commission will take. Members hold office for three year periods as specified in the member's letter of appointment.⁵ Members are entitled to such terms (including remuneration and allowances) as determined by the Chief

Executive; such remuneration and allowances are to be paid out of the funds of the Competition Commission. The Chief Executive must publish a notice in the Gazette of all member appointments to the Competition Commission.⁶

A member may, at any time, resign from office by giving written notice of resignation to the Chief Executive;⁷ notice of the resignation is not effective unless it is signed by the member concerned. Such notice will take effect on (a) the date in which the notice is received by the Chief Executive or (b) if a later date is specified in the notice, on that later date.⁸ A member may be removed from office by the Chief Executive for a number of reasons including failing to attend three consecutive meetings of the Competition Commission without (in the opinion of the Chief Executive) sufficient cause.⁹

1 Competition Ordinance (Cap 619) s 132.

2 The 'Chief Executive in Council' is the Chief Executive acting after consultation with the Executive Council, as defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

3 Competition Ordinance Schedule 5 s 2(1).

4 Competition Ordinance Schedule 5 s 2(2).

5 Competition Ordinance Schedule 5 s 2(3).

6 Competition Ordinance Schedule 5 s 2(4).

7 Competition Ordinance Schedule 5 s 4(1).

8 Competition Ordinance Schedule 5 s 4(3).

9 Competition Ordinance Schedule 5 s 5(1): The Chief Executive may remove a member from office for the following reasons: (a) fails to attend 3 consecutive meetings of the Competition Commission without (in the opinion of the Chief Executive) sufficient cause; (b) fails to comply with a conflict of interest disclosure obligation set out in any rules made by the Competition Commission under s 34 of this Schedule; (c) becomes bankrupt or is for the time being bound by a voluntary arrangement with his or her creditors; (d) is, under the Mental Health Ordinance (Cap 136), found by the Court of First Instance (or any judge of the Court of First Instance) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; (e) has been found by the Tribunal or another court to have contravened a Competition Rule; (f) is an officer of an undertaking that has been found by the Tribunal or another court to have contravened a Competition Rule; (g) has made a commitment with the Competition Commission under this Ordinance, or is an officer of an undertaking that has made such a commitment; (h) becomes a member of the Tribunal or a judge of another court; (i) is appointed by the Tribunal as an assessor under s 141; or (j) is otherwise, in the opinion of the Chief Executive, unable or unfit to perform the functions of a member.

[113.010] **Chairperson of the Competition Commission** The Chief Executive appoints one of the members (other than a member who is a public officer) to be the Chairperson of the Competition Commission.¹ The Chairperson, at any time, may resign from that office by giving written notice of resignation to the Chief Executive.² The resignation of a person from the office of Chairperson does not affect that person's term of office as a member of the Competition Commission. However, if the Chairperson ceases to be a member, he or she also ceases to be the Chairperson.³

If the Chairperson is temporarily unable to perform the functions of the office of Chairperson due to illness or absence from Hong Kong or for any other cause or if the office of Chairperson becomes vacant, the Chief Executive may appoint another member to act in place of the Chairperson and perform the functions of the Chairperson.⁴

- 1 Competition Ordinance (Cap 619) Schedule 5 s 8(1).
- 2 Competition Ordinance Schedule 5 s 8(2) and (4). The notice of resignation must be signed by the Chairperson and takes effect (a) on the date on which the notice is received by the Chief Executive or (b) if a later date is specified in the notice, on that later date.
- 3 Competition Ordinance Schedule 5 s 8(6).
- 4 Competition Ordinance Schedule 5 s 9.

[113.011] **Chief Executive Officer** With the approval of the Chief Executive, the Competition Commission will appoint a Chief Executive Officer of the Competition Commission.¹ The Chief Executive Officer is responsible for managing the administrative affairs of the Competition Commission and performing any other functions that may be assigned or delegated by the Competition Commission. The Chief Executive Officer is, with the approval of the Chief Executive, to be paid out of the funds of the Competition Commission, remuneration benefits and expenses as the Competition Commission may determine.²

- 1 Competition Ordinance (Cap 619) Schedule 5 s 10(1).
- 2 Competition Ordinance Schedule 5 s 10(2).

[113.012] **Appointment of Staff** The Competition Commission may employ staff and engage, on contracts for services, other persons it considers necessary to perform its functions. The Competition

Commission may determine the remuneration and other conditions of employment of its staff and persons engaged on contracts for services.¹

- 1 Competition Ordinance (Cap 619) Schedule 5 s 11.

[113.013] **Personal immunity of members of the Competition Commission** Under Competition Ordinance (Cap 619) s 133, any (i) members of the Competition Commission (ii) any person who is an officer or employee of the Competition Commission (iii) any person who is a member of any committee of the Competition Commission and (iv) any person who is performing any service for the Competition Commission under a contract of services,¹ is not personally liable for anything done or omitted to be done by the person in good faith in the performance or purported performance of any function of the Competition Commission under this Ordinance.²

- 1 Competition Ordinance (Cap 619) Schedule 5 s 133(2).
- 2 Competition Ordinance s 133(2).

[113.014] **General procedure for meetings of Competition Commission** Meetings of the Competition Commission are held as often as necessary to enable the Competition Commission to perform its functions. The Chairperson must convene a meeting of the Competition Commission on being given a notice for that purpose by two or more other members. The procedure for convening meetings of the Competition Commission and for conducting business at those meetings is to be determined by the Competition Commission.¹

The quorum for Competition Commission meetings is a majority of its members.² Members of the Competition Commission are permitted to attend by telephone, video conferencing or other electronic means, but will only be regarded as present at the meeting if (a) that member is able to hear the other members who are actually present at the meeting and (b) the members who are actually present at the meeting are able to hear that member.³ Meetings of the Competition Commission are presided over by the Chairperson, and in the absence of the Chairperson, the acting Chairperson.⁴

- 1 Competition Ordinance (Cap 619) Schedule 5 s 12. Subject to any rules made under Schedule 5 s 34. S 34 provides that the Competition Commission may

make rules (a) regulating the procedure to be followed at meetings of the Competition Commission and at meetings of its committees; (b) regulating the administration of the Competition Commission; and (c) regarding conflict of interest.

- 2 Competition Ordinance Schedule 5 s 13(1).
- 3 Competition Ordinance Schedule 5 s 13(2).
- 4 Competition Ordinance Schedule 5 s 14.

[113.015] Voting at Competition Commission meetings Each member present at a Competition Commission meeting has one vote at that meeting, except for instances in which the number of votes for and against a motion is equal, in which case the member presiding at that meeting will have a determinative vote.¹ Regarding the procedure for voting, the member presiding at a meeting must ask each member to indicate how he or she has voted. The result of the vote, showing which way each member has voted, must be recorded in the minutes of that meeting.² Voting by secret ballot is not permitted. Any decision which is supported by a majority of the votes cast at a meeting in which a quorum is present, is considered the decision of the Competition Commission.³ Minutes of proceedings at Commission meetings, including a record of all decisions made, must be recorded and preserved.⁴

- 1 Competition Ordinance (Cap 619) Schedule 5 s 15(1) and (2).
- 2 Competition Ordinance Schedule 5 s 15(3).
- 3 Competition Ordinance Schedule 5 s 15(4).
- 4 Competition Ordinance Schedule 5 s 16.

[113.016] Written resolutions A written resolution is considered a valid resolution, even if not passed at a meeting of the Competition Commission as long as it is (a) in writing (b) proper notice of it is given to all members and (c) it is signed, or assented to, by a majority of the members by letter, fax, or other electronic transmission.¹

- 1 Competition Ordinance (Cap 619) Schedule 5 s 17(1). S 17 also provides that subject to subsection (3), the date of a resolution referred to in this section is the date on which the last of the members constituting a majority of the members signs or assents to the resolution (s 17(2)). S 17(3): If any member requests, by notice in writing addressed to the Chairperson, that a resolution proposed to be made under subsection (1) be referred to a meeting of the Competition Commission for consideration, the proposed resolution must be referred to a

meeting of the Competition Commission. S 17(4): A request under subsection (3) must be made within 14 days after the day on which the notice referred to in subsection (1)(b) is given.

[113.017] Defects in appointment Any decisions taken by the Competition Commission are not invalidated by (a) any defect in the appointment of a member (b) a vacancy amongst its members (c) the absence of a member from the meeting at which the decision was taken; or (d) any irregularity in the procedures adopted by the Competition Commission that does not affect the decision taken.¹

- 1 Competition Ordinance (Cap 619) Schedule 5 s 18.

[113.018] Financing and Accounts of the Competition Commission The Competition Commission must submit, by the 31 December each year, estimates of its income and expenditure for the next financial year to the Chief Executive.¹ The funds of the Competition Commission includes all money paid by the Hong Kong Government to the Competition Commission and appropriated for that purpose by the Legislative Council and all other money and property, including fees, interest and accumulations of income, received by the Competition Commission.²

The Competition Commission is required to keep accounts and accurate records and explanations of its financial transactions and its financial position. A statement of accounts is to be prepared as soon as practicable after the end of each financial year. The statement must give a 'true and fair' account of the state of affairs of the Competition Commission as at the end of the financial year.³ The Competition Commission is also required to appoint an auditor, as soon as practicable after the Competition Ordinance (Cap 619) enters into force.⁴

The Director of Audit may, in respect of any year of the Competition Commission, conduct an examination into the 'economy, efficiency, and effectiveness' with which the Competition Commission has used its resources in performing its functions.⁵ In order to carry out this function, the Director of Audit is entitled at all reasonable times, to have full and free access to all accounts, records and documents in the custody or under the control of the Competition Commission and make a copy of the whole or parts of any of those documents. The Director of Audit may report to the President of the Legislative Council the results of an examination conducted under

this section. However, the Director of Audit is not permitted to question the merits of the policy objectives of the Competition Commission.⁶

- 1 Competition Ordinance (Cap 619) Schedule 5 s 19.
- 2 Competition Ordinance Schedule 5 s 21
- 3 Competition Ordinance Schedule 5 s 23(1) and (2).
- 4 Competition Ordinance Schedule 5 s 24.
- 5 Competition Ordinance Schedule 5 s 27(1).
- 6 Competition Ordinance Schedule 5 s 27(3) and (4).

[113.019] **Committees** The Competition Commission has the power to establish one or more committees which can advise it on matters within the scope of the Competition Commission's function and perform functions which are delegated to it by the Competition Commission.¹ The composition of a committee (which may be made up of members of the Competition Commission or not) may include a member of the Competition Commission, to be the chairperson of that committee. The Competition Commission is responsible for appointments to such committees and must, in writing, specify the terms of reference for any committee and may, by notice in writing, amend any terms of reference of a committee.²

- 1 Competition Ordinance (Cap 619) Schedule 5 s 28(1).
- 2 Competition Ordinance Schedule 5 s 28(3) and (4).

[113.020] **Register of interests** Any member of the Competition Commission, or member of a committee established by the Competition Commission, has to disclose to the Competition Commission any interest he/she has which is of a class or description as determined by the Competition Commission.¹ The Competition Commission is required to maintain a register relating to any required disclosures which should contain details of any disclosures made including the person's name and particulars of the disclosure to be recorded on the register.² The Competition Commission must make the register available for inspection by any person either at the offices of the Competition Commission during ordinary business hours, and in any other manner which the Competition Commission considers appropriate.³

- 1 Competition Ordinance (Cap 619) Schedule 5 s 29(1).
- 2 Competition Ordinance Schedule 5 s 29(4).
- 3 Competition Ordinance Schedule 5 s 29(5).

[113.021] **Disclosure of interests** Certain interests which a member holds must be disclosed if they relate to any matter under discussion at a meeting of the Competition Commission; this includes a pecuniary interest, direct or indirect, or a personal interest greater than that which the member has as a member of the general public.¹ Such disclosures must be recorded in the minutes of that Competition Commission meeting,² if the disclosure is made by the member presiding, the member must vacate the chair during the discussion.³ The member (including one who has vacated the chair) must, if so required by a majority of the other members present, withdraw from the meeting during the discussion and must not, except as otherwise determined by a majority of the other members present, vote on any resolution concerning the matter under discussion or be counted for the purpose of establishing the existence of a quorum.⁴ The validity of any proceeding of the Competition Commission is not affected by the failure of a member of the Competition Commission to comply with these disclosures of interest rules.⁵

- 1 Competition Ordinance (Cap 619) Schedule 5 s 30(1).
- 2 Competition Ordinance Schedule 5 s 30(2)(a).
- 3 Competition Ordinance Schedule 5 s 30(2)(b).
- 4 Competition Ordinance Schedule 5 s 30(2)(c).
- 5 Competition Ordinance Schedule 5 s 30(6).

[113.022] **Delegation by the Competition Commission** The Competition Commission can delegate any of its functions to (a) a person who is a member of the Competition Commission; (b) a committee established by the Competition Commission; (c) the Chief Executive Officer; (d) an employee of the Competition Commission by name; or (e) the holder of any office in the Competition Commission, designated by the Competition Commission.¹ However, certain of the Competition Commission's functions may not be delegated,² the functions which cannot be delegated under Schedule 5 of the Competition Ordinance (Cap 619) includes:

(3) THE FIRST CONDUCT RULE: PROHIBITION OF ANTI-COMPETITIVE AGREEMENTS, CONCERTED PRACTICES AND DECISIONS

(1) UNDERTAKING

CONTENTS

PARA	PAGE
[113.049] Undertaking	68

[113.049] **Undertaking** The First and Second Conduct Rules apply to the activities of 'undertakings'. An undertaking means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes natural persons.¹ Examples of undertakings include individual companies, groups of companies, partnerships, individuals operating as sole traders or subcontractors, cooperatives, societies, business chambers, trade associations and non-profit organizations.

The key question in determining whether an entity constitutes an 'undertaking' is whether the relevant entity is engaged in an economic activity.² The term economic activity, while not defined in the Ordinance, is generally understood to refer to any activity consisting of offering products in a market regardless of whether the activity is intended to earn a profit.³ An entity may be an undertaking for some of its activities but may not be an undertaking for other activities. Where the relevant activities are economic, the entity is an undertaking with respect to those activities for the purposes of the Competition Ordinance (Cap 619).⁴

- 1 Competition Ordinance (Cap 619) s 2(1).
- 2 Competition Commission, Guideline on the First Conduct Rule para 2.2.
- 3 Competition Commission, Guideline on the First Conduct Rule para 2.3.
- 4 Competition Commission, Guideline on the First Conduct Rule para 2.4.

(2) Single Economic Entity

CONTENTS

PARA	PAGE
[113.050] Single economic entity	69

[113.050] **Single economic entity** The First Conduct Rule does not apply to conduct involving two or more entities if the relevant entities are considered part of the same undertaking.¹ Whether or not separate entities form a single economic unit depends on the facts of each case. Generally, if entity A exercises decisive influence over the commercial policy of entity B, whether through legal or de facto control, then the Competition Commission has stated that it will consider A and B as a single economic unit and part of the same undertaking.² An agreement between a parent company and its subsidiary, or between two companies under the control of a third, will not be subject to the First Conduct Rule if the relevant controlling companies exercise decisive influence over their respective subsidiaries notwithstanding that these various entities might have separate legal personalities.³

Decisive influence is defined in the Commission's Merger Rule Guidelines as the power to determine decisions (including the making or vetoing of such decisions) relating to the strategic commercial behavior of an undertaking, such as the budget, the business plan, major investments or the appointment of senior management.⁴ When considering whether an undertaking has decisive influence, regard must be had to all the circumstances of the case and not solely to the legal effect of any instrument, deed, transfer, assignment or other act done or made.

- 1 Competition Commission, Guideline on the First Conduct Rule para 2.6.
- 2 Competition Commission, Guideline on the First Conduct Rule para 2.8.
- 3 Competition Commission, Guideline on the First Conduct Rule para 2.9.
- 4 Competition Commission, Guideline on the Merger Rule para 2.7. See also [113.172]–[113.196].

(3) Independent Distributors and Distribution Agents

CONTENTS

PARA	PAGE
[113.051] Independent distributors and distribution agents	70

[113.051] **Independent distributors and distribution agents** The First Conduct Rule will not apply where the supplier and the third party are part of the same single economic unit.¹

In certain cases, a supplier may appoint a third party to negotiate and/or conclude contracts on behalf of the supplier for the sale of the supplier's product; here the third party acts as a distribution agent for the supplier.² The First Conduct Rule does not apply to restrictions imposed in the distribution agreement on the distributor in so far as they relate to the contracts concluded on behalf of the supplier as long as the distributor is a 'true distribution agent'. This includes restrictions imposed on the distributor which limit the customers with whom the distributor can deal, the territories where the distributor can sell or the prices and conditions at which the distributor can sell the contract products.³ In such cases, the distributor is merely acting as an agent for the supplier.

Whether a third party acts as a true distribution agent depends on the facts of the case; it does not depend on whether that party is labelled an 'agent' or the agreement is labelled an 'agency agreement'. The relevant factors are the level of control which the supplier exercises over the third party and the level of financial or commercial risk borne by the third party in relation to the activities for which it has been appointed as a distribution agent by the supplier.⁴

According to the Competition Commission's Guidelines, the Competition Commission may consider that a distributor acts as a true distribution agent of the supplier if it does not bear any, or bears only insignificant, risks in relation to the contracts concluded on behalf of the supplier. This might be the case where title to the contract products is not transferred to the distributor and the distributor does not bear any, or bears only an insignificant portion, of the following non-exhaustive types of risks and costs:⁵

- (a) costs linked to the distribution of the contract products including transport costs;

- (b) costs or risks associated with the maintenance of stocks of the contract products (eg costs relating to loss of stocks or where the distributor must bear the costs of unsold stock);
- (c) responsibility for damage caused by contract products sold to third parties (product warranty);
- (d) costs or risks associated with non-performance by customers (eg late or nonpayment by the customer);
- (e) costs associated with advertising or sales promotion for the contract products;
- (f) costs associated with market-specific investments in equipment, premises or the training of personnel; and
- (g) costs associated with other activities in the same product market as the contract products where these activities are required by the supplier.

Where a supplier appoints a distributor for the purposes of distributing its products and that distributor is a true distribution agent of the supplier pursuant to the principles explained above, the Competition Commission considers that the selling function of the distributor with respect to the contract products forms part of the same undertaking as the supplier.⁶ The First Conduct Rule, therefore, does not apply to restrictions imposed in the distribution agreement on the distributor in so far as they relate to the contracts concluded on behalf of the supplier.

- 1 Competition Commission, Guideline on the First Conduct Rule para 2.11.
- 2 Competition Commission, Guideline on the First Conduct Rule para 2.13.
- 3 Competition Commission, Guideline on the First Conduct Rule para 2.16.
- 4 Competition Commission, Guideline on the First Conduct Rule para 2.14.
- 5 Competition Commission, Guideline on the First Conduct Rule para 2.15.
- 6 Competition Commission, Guideline on the First Conduct Rule para 2.16.

(4) EMPLOYEES AND TRADE UNIONS

CONTENTS

PARA	PAGE
[113.052] Employees and trade unions	72

[113.052] **Employees and trade unions** The Competition Commission does not consider an employee to be an undertaking.¹ Discussions or arrangements in relation to salary or other working conditions between one or more employees and their employer that take place within the framework of a single economic unit are outside of scope of the First Conduct Rule.² Where a trade union acts as on behalf of its members in collective bargaining with an employer on terms and conditions of work, the Competition Commission considers that the trade union is not engaged in economic activity and is not considered an undertaking.³

However, there are some instances in which a trade union may be considered an undertaking for the purposes of the Competition Ordinance (Cap 619). For example, a trade union may act as an undertaking where it carries on an economic activity in its own right, such as by operating a supermarket, a travel agency or other business. In this circumstance, the First Conduct Rule would apply to these activities of the trade union.⁴

- 1 Competition Commission, Guideline on the First Conduct Rule para 2.18.
- 2 Competition Commission, Guideline on the First Conduct Rule para 2.18.
- 3 Competition Commission, Guideline on the First Conduct Rule para 2.19.
- 4 Competition Commission, Guideline on the First Conduct Rule para 2.19.

(5) An Agreement

CONTENTS

PARA	PAGE
[113.053] An agreement	72

[113.053] **An agreement** The term 'agreement' is given a wide meaning under the Competition Ordinance (Cap 619). An agreement is defined as 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.¹

In determining whether there is an agreement for the purposes of the Competition Ordinance, the Competition Commission will seek to determine whether there is a 'meeting of the minds' between the

parties.² An agreement may be formed through an exchange of letters, emails, SMS, instant messages or telephone calls.³ An undertaking may be found to be a party to an agreement if it attended a meeting at which an anti-competitive agreement is reached and it failed to sufficiently object to, and publicly distance itself from the agreement or the discussions leading to the agreement.⁴

The Competition Commission considers that it is not necessary to show that an undertaking participated in or agreed to each and every aspect of an anti-competitive agreement for the undertaking to be held responsible for the agreement as a whole. For example, it is not necessary to show that an undertaking attended every meeting of a cartel arrangement in order for that undertaking to be held a party to the cartel.⁵

- 1 Competition Ordinance (Cap 619) s 2(1).
- 2 Competition Commission, Guideline on the First Conduct Rule para 2.23.
- 3 Competition Commission, Guideline on the First Conduct Rule para 2.23.
- 4 Competition Commission, Guideline on the First Conduct Rule para 2.24.
- 5 Competition Commission, Guideline on the First Conduct Rule para 2.26.

(6) Concerted Practice

CONTENTS

PARA	PAGE
[113.054] Concerted practice	73

[113.054] **Concerted practice** The First Conduct Rule also applies to cooperation between the parties which constitutes a concerted practice. A concerted practice is a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition.¹ A concerted practice will generally involve an exchange of competitively sensitive information between competitors.²

The Commission will look at the circumstances in each case to determine whether there has been a concerted practice. The Competition Commission will consider that a concerted practice will

Guidelines or recommendations of the association, whether made by the board, members, a committee or an employee of the association.⁴ A decision may still fall within the First Conduct Rule where it is non-binding. For example, recommended fee scales and 'reference' prices of trade and professional associations are decisions of associations of undertakings which the Competition Commission would likely consider as having the object of harming competition.⁵ Both the undertakings, as members of the association of undertakings and the association may incur liability where they make or give effect to a decision of the association which has the object or effect of harming competition.⁶

The Competition Commission initiated a project concerning trade and professional associations in 2015. The project comprised of advocacy, review and direct engagement with associations on potential anti-competitive practices. From June to October 2015, the Commission reviewed the information of over 350 trade associations with official websites. In the review, the Competition Commission identified over 20 associations whose public practices appeared to place them at high risk of contravening the Competition Ordinance after it came into full effect on 14 December 2015. Examples of the risky practices included price recommendation or fee scales as well as codes of conduct or rules that may restrict competition between competing association members.

On 14 March 2016, the Competition Commission announced the progress of this project. In the period immediately before or following commencement of the Competition Ordinance, twelve associations removed or were in the course of removing one or more of their price restrictions or fee scales.⁷ While the Competition Commission received positive engagement during the project, it stated that there were some trade and professional associations still engaging in conduct that placed the association and their members at risk of contravening the Competition Ordinance.⁸

- 1 Competition Ordinance (Cap 619) s 6(1)(c).
- 2 Competition Commission, Guideline on the First Conduct Rule para 2.34.
- 3 Competition Commission, Guideline on the First Conduct Rule para 2.34. See also [113.123].
- 4 Competition Commission, Guideline on the First Conduct Rule para 2.35.
- 5 Competition Commission, Guideline on the First Conduct Rule para 2.36.
- 6 Competition Commission, Guideline on the First Conduct Rule para 2.37.

- 7 https://www.compcomm.hk/en/media/press/files/project_on_trade_and_professional_associations_EN.pdf.
- 8 The following twelve associations have indicated publicly that they had revised their conduct or were in the process of doing to remove one or more price restrictions or fee scales: Hong Kong Container Tractor Owner Association, Hong Kong Real Estate Agencies General Association, Hong Kong Society of Notaries, The Association of Accredited Advertising Agencies of Hong Kong, The Hong Kong Federation of Insurers, The Hong Kong Institute of Surveyors, The Hong Kong Jewellers' & Goldsmiths' Association, The Hong Kong Jewellery & Jade Manufacturers Association, The Institution of Fire Engineers (Hong Kong Branch), The Kowloon Pearls, Precious Stones, Jade, Gold & Silver Ornament Merchants Association, The Law Society of Hong Kong, Travel Industry Council of Hong Kong. See https://www.compcomm.hk/en/media/press/files/Project_on_trade_and_professional_associations_EN.pdf.

(9) Trade Associations and Industry Bodies

CONTENTS

PARA	PAGE
[113.057] Trade associations and industry bodies	77

[113.057] **Trade associations and industry bodies** In general, the normal activities of trade associations and industry bodies should not give cause for concern under the Competition Ordinance (Cap 619). A trade association will be an association of undertakings for the purposes of the First Conduct Rule if the members of the trade association are undertakings.¹ The Competition Commission's Guidelines provide some examples of competition law issues which may arise with respect to trade associations and industry bodies, for example;

- (a) *Terms of membership of associations*: the rules of admission to membership of the relevant association should be transparent, proportionate, non-discriminatory, based on objective standards and provide for an appeal procedure in the event of a refusal to admit a party to membership. Rules of admission which do not satisfy these criteria may be viewed as having the object or effect of harming competition.²
- (b) *Certification practices*: The Competition Commission recognizes that certifications or quality labels awarded by

a trade association can be valuable to consumers in terms of recognizing quality etc.. Where such certification is available to all suppliers that meet objective and reasonable quality requirements it is unlikely to raise competition law concerns.³ However, the Commission may consider certification practices as having the object or effect of harming competition when additional obligations are imposed on members as regards the products they can buy or sell or where restrictions are imposed on members' pricing or marketing conduct.⁴

(c) *Standard terms*: Standard terms in industries can benefit consumers by, for example, making it easier to compare conditions offered and can therefore facilitate switching between alternative suppliers. However, the Competition Commission considers that where standard terms define the nature of, or relate to the scope of the product, their use may limit product variety and innovation. Similarly, standard terms relating to price can harm price competition.⁵ As a general proposition, standard terms which do not affect price are unlikely to raise concerns under the First Conduct Rule if participation in the process for adopting the terms is open and the standard terms are non-binding and accessible to all market participants.⁶

(d) *Standardization agreements*: agreements where businesses outline the definition of technical or quality requirements with which, for example, current or future products must comply can often increase competition and lower production and sales costs which benefits consumers. However, agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors will likely be considered by the Competition Commission as having the object of harming competition. Other forms of standardization agreement generally require an analysis of their actual or likely effects on competition.⁷

- 1 Competition Commission, Guideline on the First Conduct Rule para 6.54.
- 2 Competition Commission, Guideline on the First Conduct Rule para 6.57.
- 3 Competition Commission, Guideline on the First Conduct Rule paras 6.59–6.60.

- 4 Competition Commission, Guideline on the First Conduct Rule para 6.61.
- 5 Competition Commission, Guideline on the First Conduct Rule para 6.64.
- 6 Competition Commission, Guideline on the First Conduct Rule para 6.66.
- 7 Competition Commission, Guideline on the First Conduct Rule para 6.68.

(10) The First Conduct Rule

CONTENTS

PARA	PAGE
[113.058] The First Conduct Rule	79

[113.058] The First Conduct Rule Under the First Conduct Rule, 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.¹

An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted practice that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.² If an agreement, concerted practice or decision has more than one effect, it will be considered to have the effect of preventing, restricting or distorting competition for the purposes of the Competition Ordinance (Cap 619) if one of those effects is to prevent, restrict or distort competition.³

1 Competition Ordinance (Cap 619) s 6(1).

Under the Competition Ordinance, agreements and decisions breaching the First Conduct Rule are not immediately nullified, but may be nullified by the Tribunal under s 1(i) of Schedule 3 of the Competition Ordinance. Presumably these agreements may also be nullified at common law on public policy grounds, such as in *Sit Kam Tai v Gammon Iron Gate Company Limited & Ors* [2010] HKCU 1658 at para 76. Provisions relating to nullity of contracts includes s 2(4) of the UK Competition Act 1998; art 101(2) of the Treaty on the Functioning of the European Union; s 34(3) of the Singapore Competition Act 2004.

object, if it can be shown the agreement has an anti-competitive effect.¹ When determining whether an agreement has an anti-competitive effect, the Competition Commission may consider not only the actual effects but also effects that are likely to flow from the agreement.² For an agreement to have an anti-competitive effect on competition, it must have, or be likely to have, an adverse impact on one or more of the parameters of competition in the market, such as price, output, product quality, product variety or innovation.³

In assessing whether the conduct has the actual or likely effects of harming competition, the Competition Commission may assess what the market conditions would have been in the absence of the conduct (the counter-factual) and compare this with the conditions resulting where the conduct is present. Where the effect of an agreement on the competitive process is insignificant, the Competition Commission considers that the agreement does not contravene the First Conduct Rule on the basis of its effects.⁴

- 1 Competition Commission, Guideline on the First Conduct Rule para 3.16.
- 2 Competition Commission, Guideline on the First Conduct Rule para 3.17.
- 3 Competition Commission, Guideline on the First Conduct Rule para 3.18.
- 4 Competition Commission, Guideline on the First Conduct Rule para 3.26.

(13) Restrictions Necessary for a Legitimate Purpose

CONTENTS

PARA	PAGE
[113.061] Restrictions necessary for a legitimate purpose	82

[113.061] **Restrictions necessary for a legitimate purpose** In instances where the main arrangement covered by an agreement is not in itself harmful to competition, the Commission considers that restrictions contained in the agreement which are necessary for the agreement to be workable (sometimes termed ‘ancillary restrictions’) fall outside the prohibition in the First Conduct Rule. If the main purpose of an agreement is not harmful to competition, it becomes necessary to assess whether particular individual restrictions

contained in the agreement also do not contravene the First Conduct Rule because they are ancillary to the main purpose of the agreement.¹

A restriction of competition will be ancillary when it is directly related to and objectively necessary for the implementation of a separate, main (non-restrictive) agreement and proportionate to it.² If, without the restriction, the main non-restrictive agreement would be difficult or impossible to implement, the restriction might be regarded as objectively necessary and proportionate.³

- 1 Competition Commission, Guideline on the First Conduct Rule paras 3.28–3.29.
- 2 Competition Commission, Guideline on the First Conduct Rule para 3.30.
- 3 Competition Commission, Guideline on the First Conduct Rule para 3.32.

(14) EXCLUSION FOR AGREEMENTS ENHANCING OVERALL ECONOMIC EFFICIENCY

CONTENTS

PARA	PAGE
[113.062] Exclusion for agreements enhancing overall economic efficiency ...	83

[113.062] **Exclusion for agreements enhancing overall economic efficiency** Competition Ordinance (Cap 619) s 1 of Schedule 1 provides for general exclusions from the Conduct Rules. The First Conduct Rule does not apply to any agreement that:

- (a) contributes to:
 - (i) improving production or distribution; or
 - (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;¹
- (b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a) above;² and,
- (c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.³

If barriers to entry or expansion are considered low, then it is more likely that potential competitors will impose some form of constraint on an undertaking and prevent it from profitably sustaining prices above competitive levels. The Competition Commission will generally consider high market shares which have been consistently high over a period of time as a possible indicator of barriers to entry or expansion.⁴

The Competition Commission notes that in order for the entry or expansion to be considered as an effective constraint, the entry or expansion must be timely, likely and sufficient.⁵

- (a) *Timely*: entry or expansion is likely to occur within a period of time which will serve to deter or defeat the exercise of market power;⁶
- (b) *Likely*: entry or expansion should be profitable or at least an expectation that entry or expansion will be profitable;⁷
- (c) *Sufficient*: the entry or expansion will occur on a sufficient scale to prevent or deter undertakings from exercising market power.⁸

- 1 Competition Commission, Guideline on the Second Conduct Rule para 3.15.
- 2 Competition Commission, Guideline on the Second Conduct Rule para 3.15.
- 3 Competition Commission, Guideline on the Second Conduct Rule para 3.16.
- 4 Competition Commission, Guideline on the Second Conduct Rule para 3.17.
- 5 Competition Commission, Guideline on the Second Conduct Rule para 3.18.
- 6 Competition Commission, Guideline on the Second Conduct Rule para 3.18.
- 7 Competition Commission, Guideline on the Second Conduct Rule para 3.18.
- 8 Competition Commission, Guideline on the Second Conduct Rule para 3.18.

[113.104] **Examples of barriers to entry and expansion** The Commission will consider various types of barriers to entry or expansion:

- (1) *Regulatory and legal barriers*:¹ Government regulations or an industry sector regulator may lead to barriers to entry or expansion. Intellectual property rights ('IPRs') may also amount to legal barriers when they prevent or make more difficult entry or expansion by (potential) competitors.² Similarly, a regulation which limits the number of

undertakings which can operate in a market through a requirement that parties obtain licenses can be a form of barrier to entry.

- (2) *Structural barriers*: Certain costs such as sunk costs are an example of structural barriers.³ The Commission has provided some examples of sunk costs which may come under consideration, including investments in product research and development, the construction of a specialized production facility, start-up marketing and on-going advertising expenditures.⁴ Economies of scale can amount to a barrier to entry or expansion in certain cases, for example, where average cost falls as output increases.⁵ In a market where there are large economies of scale, then a competitor will need to enter on a large scale (in relation to the size of the market) in order for the entry to be effective.⁶ Network effects can also be considered as a barrier to entry. The Commission considers that network effects may act as a barrier to entry or expansion because an incumbent may have the advantage of significant network effects, which an entrant would lack unless it can displace the incumbent's network.⁷
- (3) *Strategic barriers*: Strategic barriers are barriers which are created or enhanced by incumbents in a particular market, possibly with a view to deterring potential entry or expansion.⁸ The Commission has provided some examples of such strategic barriers, such as where an incumbent builds excess capacity in an attempt to send a signal to potential new entrants that it could push prices down to levels which, while still profitable for the incumbent, would not permit new entrants to earn sufficient revenue to cover their sunk costs.⁹

- 1 Competition Commission, Guideline on the Second Conduct Rule para 3.20.
- 2 The Commission notes that IPRs are indicative of a substantial degree of market power only when the product or technology protected by the IPR corresponds to a relevant product or technology market. IPRs do not automatically give rise to barriers and do not necessarily imply substantial market power as firms might well be able to invent around the relevant IPR. Competition Commission, Guideline on the Second Conduct Rule para 3.21.
- 3 Sunk costs are costs that are incurred on entering or remaining active in a market, cannot be economically recouped within a short period of time, and are not recoverable on exit.
- 4 Competition Commission, Guideline on the Second Conduct Rule para 3.23.
- 5 Competition Commission, Guideline on the Second Conduct Rule para 3.25.

- 6 Competition Commission, Guideline on the Second Conduct Rule para 3.25.
- 7 Competition Commission, Guideline on the Second Conduct Rule para 3.27.
- 8 Competition Commission, Guideline on the Second Conduct Rule para 3.27.
- 9 Competition Commission, Guideline on the Second Conduct Rule para 3.28.

[113.105] **Countervailing buyer power** The countervailing buyer power of buyers and the structure of the buyers' side of the market may prevent a supplier from having a substantial degree of market power. The stronger the buyer power, the less likely a supplier may have a substantial degree of market power. The Competition Commission considers buyer power as more a matter of bargaining strength and whether buyers have a choice between alternative suppliers rather than the size of a particular buyer.¹ The Competition Commission notes that buyer power is more likely to be present where one or more of the following factors apply:²

- (a) the buyer is well informed about different sources of supply and could readily, at little cost to itself, and within a reasonable period, switch its substantial purchases (although not necessarily all of its purchases) from a given supplier;³
- (b) the buyer could potentially commence production itself relatively quickly (this could occur where the buyer can vertically integrate);
- (c) the buyer is considered as an important customer for the supplier (so that the supplier is willing to offer better terms to keep the buyer as a customer); and/or
- (d) the buyer can intensify competition among suppliers by purchasing through a competitive tender.

The Competition Commission will consider buyer power where it is 'sufficient' in a market, ie, buyer power will not be considered as an effective constraint where it ensures that only a particular or limited segment of customers is shielded from the exercise of market power.⁵ In addition, countervailing buyer power should be reasonably foreseeable for some future period, and not merely temporary or transient.⁶

Although buyer power will be a consideration in determining whether an undertaking has a substantial degree of market power, a buyer who has a substantial degree of market power in the market where it purchases particular products is also subject to the Second Conduct Rule. If a buyer in its capacity as buyer engages in conduct

which has the object or effect of harming competition, the buyer may be found to have contravened the Second Conduct Rule.⁷

Once the Commission has established that an undertaking has a substantial market power, it will then seek to determine whether that undertaking has abused its substantial market power position.

- 1 Competition Commission, Guideline on the Second Conduct Rule para 3.29.
- 2 Competition Commission, Guideline on the Second Conduct Rule para 3.29.
- 3 Competition Commission, Guideline on the Second Conduct Rule para 3.29.
- 4 Competition Commission, Guideline on the Second Conduct Rule para 3.29.
- 5 Competition Commission, Guideline on the Second Conduct Rule para 3.30.
- 6 Competition Commission, Guideline on the Second Conduct Rule para 3.31.
- 7 Competition Commission, Guideline on the Second Conduct Rule para 3.32.

(3) ABUSE OF SUBSTANTIAL MARKET POWER

CONTENTS

PARA	PAGE
[113.106] In general	127
[113.107] Object and effect of restricting or distorting competition	128
[113.108] The concept of abuse	129
[113.109] Types of conduct	130

[113.106] **In general** 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.¹ Conduct may, in particular, constitute such an abuse if it involves (a) predatory behavior towards competitors; or (b) limiting production, markets or technical development to the prejudice of consumers. What is abusive conduct under the Second Conduct Rule is not limited to the examples in the Competition Ordinance (Cap 619) and 'abusive conduct' is an open category.²

- 1 Competition Ordinance (Cap 619) s 21(1).
- 2 Competition Commission, Guideline on the Second Conduct Rule para 1.8.

[113.107] Object and effect of restricting or distorting competition
Under the Competition Ordinance (Cap 619), an undertaking may be taken to have engaged in conduct that has the object to prevent, restrict or distort competition if that object can be ascertained by inference.¹ If conduct has more than one effect, it has the effect of preventing, restricting or distorting competition under the Competition Ordinance if one of its effects is to prevent, restrict or distort competition.² The Competition Commission considers that potentially any conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong may constitute abusive conduct where the conduct is attributable to an undertaking with a substantial degree of market power.³

The Competition Commission will conduct an objective assessment of the aims of particular conduct in order to determine whether it has the object of distorting competition. The object of such conduct refers to the purpose or aim of the conduct viewed in its context and the way it is implemented, it is not the subjective intentions of the undertaking concerned.⁴ However, the Competition Commission may take into account a relevant undertaking's subjective intention when conducting an assessment of whether particular conduct has the object of harming competition.⁵ Where the Competition Commission has shown that conduct has the object of harming competition, it does not need to be demonstrated that the conduct has anti-competitive effects or is likely to have anti-competitive effects.⁶

Conduct which does not have the object of harming competition may still contravene the Second Conduct Rule if it has the effect of harming competition. When demonstrating that conduct has an anti-competitive effect, the Competition Commission may consider not only any actual effects but also effects that are likely to flow from the conduct.⁷

The Commission considers that conduct might have the actual or likely effect of harming competition where it results in or is likely to result in:⁸

- (a) higher prices;
- (b) a restriction in output;
- (c) a reduction in product quality or variety; and/or
- (d) anti-competitive foreclosure.

In order for conduct to have the actual or likely effect of harming competition, it must harm the process of competition and cause harm to consumers, and not simply harm an individual competitor.⁹ The aim of the Competition Ordinance is to protect competition in the market and not protect competitors or the commercial interests of particular market participants.¹⁰

- 1 Competition Ordinance (Cap 619) s 22(2).
- 2 Competition Ordinance s 22(3).
- 3 Competition Commission, Guideline on the Second Conduct Rule para 1.8.
- 4 Competition Commission, Guideline on the Second Conduct Rule para 4.8.
- 5 Competition Commission, Guideline on the Second Conduct Rule para 4.8.
- 6 Competition Commission, Guideline on the Second Conduct Rule para 4.9.
- 7 Competition Commission, Guideline on the Second Conduct Rule para 4.16.
- 8 Competition Commission, Guideline on the Second Conduct Rule para 4.18.
- 9 Competition Commission, Guideline on the Second Conduct Rule para 4.19.
- 10 Competition Commission, Guideline on the Second Conduct Rule para 4.19.

[113.108] The concept of abuse Anti-competitive foreclosure is one key way in which abusive conduct may in particular result in harm to competition. Anti-competitive foreclosure occurs when competitors, actual or potential, are denied access to buyers of their products or to suppliers as a result of the conduct of the undertaking with a substantial degree of market power.¹

The Competition Commission will consider possible justifications put forward by an undertaking for an alleged abuse of a substantial degree of market power, in particular the Competition Commission will consider whether the conduct in question is indispensable and proportionate regarding a legitimate aim unrelated to the harm to competition allegedly caused.²

Unlike the general exclusion from the applications of the First Conduct Rule for agreements enhancing overall economic efficiency, the Competition Ordinance (Cap 619) does not provide for any comparable efficiency-based exclusion for conduct within scope of the Second Conduct Rule.³ However, the Commission's guidance provides that undertakings can argue that conduct does not contravene the Second Conduct Rule because it entails efficiencies sufficient to guarantee no net harm to consumers. The Competition

a downstream market where it also operates.¹¹ Essentially the undertaking with a substantial degree of market power in the upstream market 'squeezes' the margin between the price it charges for the input to its competitors on the downstream market and the price its downstream operations charge to its own customers, as a result the downstream competitor is unable to compete effectively.¹² The Commission may consider the following factors when assessing whether conduct amounts to an abusive margin squeeze:

- (i) *The nature of the upstream input concerned:* An anti-competitive effect is more likely if the upstream product is an indispensable input from the perspective of the participants in the downstream market. Although the Commission will not exclude possible margin squeeze even if there are alternatives available for the upstream input.¹³
- (ii) *The level of margin squeeze:* A margin squeeze occurs where the difference between the downstream prices charged by the firm with substantial market power and the upstream prices it charges its competitors in the downstream market for the relevant input is (a) negative or (b) at least insufficient to cover the downstream product-specific costs of the firm with substantial market power.¹⁴
- (d) *Refusals to deal*
Generally, an undertaking is free to decide with whom it will or will not do business and very often will have legitimate reasons for not trading with a particular party. The Competition Commission notes that a refusal to deal by an undertaking with a substantial degree of market power can be abusive in limited or exceptional circumstances.¹⁵ The Competition Commission notes that competition concerns with refusal to deal are more likely to arise where the undertaking with the substantial degree of market power is vertically integrated (ie, it competes in the downstream market with the party with whom it refuses to deal).¹⁶
- (e) *Exclusive dealing*
Exclusive dealing is considered quite common in commercial arrangements and in most cases will not harm competition. In certain circumstances, an undertaking with substantial market power may attempt to foreclose

competitors by preventing them from selling to customers through exclusive dealing arrangements.¹⁷ Examples of exclusive dealing which could raise competition concerns includes arrangements requiring a customer to purchase, directly or indirectly, all or a substantial proportion of its requirements of a particular product from a particular undertaking.¹⁸ Other obligations, such as stocking requirements, may have the same effect as exclusive purchasing even though they do not, strictly speaking, entail exclusivity.¹⁹

The Commission has indicated that it will have particular concerns with exclusive dealing arrangements where:²⁰

- (i) the undertaking with a substantial degree of market power has imposed exclusive purchasing obligations on many customers;²¹
- (ii) it is likely that consumers as a whole will not derive a benefit;²² and
- (iii) the relevant obligations, as a whole, have the effect of preventing the entry or expansion of competing undertakings because, for example, the exclusive purchasing locks up a significant part of the relevant market—that is, where there is anti-competitive foreclosure.²³

- 1 Competition Commission, Guideline on the Second Conduct Rule para 5.4.
- 2 Competition Commission, Guideline on the Second Conduct Rule para 5.4.
- 3 Competition Commission, Guideline on the Second Conduct Rule para 5.6(a).
- 4 Competition Commission, Guideline on the Second Conduct Rule para 5.6(b).
- 5 Competition Commission, Guideline on the Second Conduct Rule para 5.7.
- 6 There are many types of tying. For example, technical tying occurs when the tying product is designed in such a way that it only works properly with the tied product, and not with alternatives offered by competitors. Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product. Competition Commission, Guideline on the Second Conduct Rule para 5.8.
- 7 Competition Commission, Guideline on the Second Conduct Rule para 5.8.
- 8 Competition Commission, Guideline on the Second Conduct Rule para 5.8.
- 9 Competition Commission, Guideline on the Second Conduct Rule para 5.10.
- 10 Competition Commission, Guideline on the Second Conduct Rule para 5.11.
- 11 Competition Commission, Guideline on the Second Conduct Rule para 5.12.
- 12 Competition Commission, Guideline on the Second Conduct Rule para 5.13.

- 13 Competition Commission, Guideline on the Second Conduct Rule para 5.14.
- 14 Competition Commission, Guideline on the Second Conduct Rule para 5.15(a).
- 15 Competition Commission, Guideline on the Second Conduct Rule para 5.15(b).
- 16 Competition Commission, Guideline on the Second Conduct Rule para 5.16.
- 17 Competition Commission, Guideline on the Second Conduct Rule para 5.19.
- 18 Competition Commission, Guideline on the Second Conduct Rule para 5.24.
- 19 Competition Commission, Guideline on the Second Conduct Rule para 5.24.
- 20 Competition Commission, Guideline on the Second Conduct Rule para 5.27.
- 21 Competition Commission, Guideline on the Second Conduct Rule para 5.28.
- 22 Competition Commission, Guideline on the Second Conduct Rule para 5.28(a).
- 23 Competition Commission, Guideline on the Second Conduct Rule para 5.28(b).

(4) REBATES

CONTENTS

PARA	PAGE
[113.110] Rebates	134

[113.110] **Rebates** Rebates are generally considered a normal part of commercial negotiations. The Competition Commission considers that rebates may harm competition when granted by an undertaking with substantial market power, in cases the rebates have foreclosure effects similar in nature to those caused by exclusive purchasing obligations.¹ Examples of rebates which could raise concerns include conditional rebates, in particular loyalty or fidelity rebates which involve the grant of a rebate to customers as a reward for particular purchasing behavior.²

The Competition Commission notes that retroactive rebates have the potential to foreclose the market significantly since buyers switching portions of their demand to an alternative supplier would

lose the rebate in respect of all product purchased and not only the incremental amount for which the buyer is considering alternative suppliers.³

Individualized rebates (where the thresholds are tailored to individual customers) can also raise competition concerns since they enable the undertaking with a substantial market power to set a threshold at such a level that will maximize its foreclosure effect.⁴

Standardized rebates which apply to all customers and general quantity rebates, conditional on the size of a particular order, are less likely to raise competition concerns. Generally, quantity rebates which are conditional on the size of a particular order, are also unlikely to raise competition concerns unless they are considered to be predatory in nature.⁵

- 1 Competition Commission, Guideline on the Second Conduct Rule para 5.30.
- 2 Competition Commission, Guideline on the Second Conduct Rule para 5.30.
- 3 Competition Commission, Guideline on the Second Conduct Rule para 5.31.
- 4 Competition Commission, Guideline on the Second Conduct Rule para 5.32.
- 5 Competition Commission, Guideline on the Second Conduct Rule para 5.32.

(5) INTELLECTUAL PROPERTY RIGHTS AND FAIR, REASONABLE AND NON-DISCRIMINATORY TERMS

CONTENTS

PARA	PAGE
[113.111] Intellectual Property Rights and Fair, Reasonable and Non-Discriminatory Terms	135

[113.111] **Intellectual Property Rights and Fair, Reasonable and Non-Discriminatory Terms** Given the importance of Intellectual Property Rights ('IPRs') in encouraging innovation, the Commission has indicated that it will consider an undertaking's refusal to license an IPR as a contravention of the Second Conduct Rule only in exceptional circumstances.¹ When analyzing IPR issues, the Competition Commission will consider the factors for refusal to deal cases and also consider, for example, whether a refusal to license

prevents the development of a secondary market or new product or otherwise limits technical development resulting in consumer harm.²

Situations may arise where an undertaking with a substantial degree of market power holds an IPR which is essential to an industry standard, and that undertaking gave a commitment at the time when the standard was adopted by the industry that it would license the IPR on Fair, Reasonable And Non-Discriminatory terms ('FRAND' terms), the Competition Commission considers that a subsequent refusal to honor the FRAND commitment may amount to an abuse.³ Furthermore, it may also be an abuse for the holder of a standard essential patent with a FRAND commitment to seek injunctive relief against a willing licensee in certain circumstances.⁴ Whether or not a refusal to honor a FRAND commitment amounts to an abuse in the form of a refusal to deal will depend on the facts of the case.

- 1 Competition Commission, Guideline on the Second Conduct Rule para 5.21.
- 2 Competition Commission, Guideline on the Second Conduct Rule para 5.21.
- 3 Competition Commission, Guideline on the Second Conduct Rule para 5.22.
- 4 Competition Commission, Guideline on the Second Conduct Rule para 5.22.

(6) DECISIONS UNDER SECOND CONDUCT RULE

CONTENTS

PARA	PAGE
[113.112] Decisions under Second Conduct Rule	136

[113.112] **Decisions under Second Conduct Rule** Decisions of the Competition Commission under the Second Conduct Rule are generally the same as those for the First Conduct Rule (see [113.082] and [113.083] above), save that the First Conduct Rule provides for block exemptions as set out in Competition Ordinance (Cap 619) s 15.

(7) EXCLUSION AND EXEMPTIONS FROM THE SECOND CONDUCT RULE

CONTENTS

PARA	PAGE
[113.113] In general	137
[113.114] Compliance with legal requirements	138
[113.115] Services of general economic interest	138
[113.116] Mergers	140
[113.117] Conduct of lesser significance	140

[113.113] **In general** In addition to the exclusions outlined in Competition Ordinance (Cap 619) s 31 (exemption on public policy grounds) and s 32 (exemption to avoid conflict with an international obligation), Schedule 1 provides for the following exclusions in respect of the Second Conduct Rule:

- (a) compliance with legal requirements;
- (b) services of general economic interest;
- (c) mergers; and
- (d) conduct of lesser significance.

The Second Conduct Rule does not apply where it is excluded by or as a result of the application of an exclusion in Competition Ordinance Schedule 1.¹

An undertaking is not required to apply to the Commission in order to secure the benefit of a particular exclusion or exemption outlined in Schedule 1. Undertakings can self-assess to determine whether their conduct falls within the terms of a particular exclusion or exemption. Similarly, an undertaking may assert the benefit of any exclusion or exemption as a defense in any proceedings before the Tribunal or other courts.²

While there is no requirement for undertakings to apply to the Competition Commission, undertakings may choose to apply to the Commission under Competition Ordinance s 24 for a decision pursuant to s 26 of the Competition Ordinance as to whether or not the conduct in question is excluded or exempt from the Second Conduct Rule. Applying to the Competition Commission will give an undertaking greater certainty regarding its business practices,