

## Hong Kong Competition Law

### INVESTIGATION SERIES: PART 11

#### Exclusions and Exemptions - Application for a Decision

The Competition Ordinance (the “Ordinance”) provides for a limited regime of exclusions and exemptions. Agreements or conducts falling within the scope of an exclusion or exemption will not contravene the First Conduct Rule and/or the Second Conduct Rule (the “Conduct Rules”). There is no requirement to apply to the Competition Commission (the “Commission”) for a decision to secure the benefit of a particular exclusion or exemption.

However, undertakings needing greater legal certainty may choose to apply to the Commission for a **Decision** under section 9 and/or section 24 of the Ordinance. Under these circumstances you are always encouraged to seek legal advice as early as possible before considering submitting an application and of course contacting the Commission.



#### Overview of Exclusions and Exemptions

The Conduct Rules will not apply to:

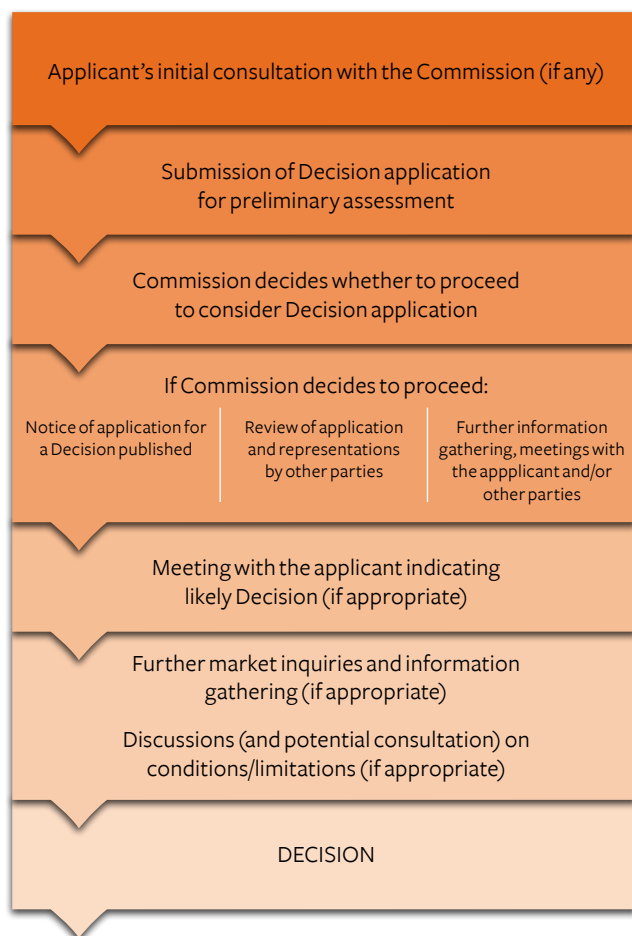
- Agreements enhancing overall economic efficiency, i.e., agreements that help to improve

production or distribution or promote economic or technical development which benefit consumers (note however that this exclusion only applies to the First Conduct Rule).

- Agreements or conducts made or engaged in for the purpose of complying with a legal requirement imposed by Hong Kong law or for the purpose of providing a service of general economic interest (when entrusted by the Government to do so).
- Mergers (however mergers are still subject to the merger rules requiring telecommunications mergers to be notified).
- Agreements or conducts of lesser significance: agreements are excluded from the First Conduct Rule when the combined turnover of the undertakings party to the agreement is less than HK\$200 million (insofar as it does not involve serious anti-competitive conduct); anti-competitive conduct will not be caught by the Second Conduct Rule when the turnover of the undertaking is less than HK\$40 million.
- Statutory bodies unless specifically brought within the scope by regulation of the Chief Executive (such as the Federation of Hong Kong Industries). It does not extend to undertakings who may engage in anti-competitive arrangements with an excluded statutory body or to entities controlled by a statutory body.
- Agreements and conducts exempted by the Chief Executive on public policy grounds or to avoid a conflict with international obligations that directly or indirectly relate to Hong Kong.

## What Does the Application Process Involve?

The Commission's review of an application is not subject to any deadlines. The time required to make a Decision depends on the complexity of the case and the availability of Commission resources.



## SHOULD APPLICANTS SEEK INITIAL CONSULTATIONS?

The Commission encourages potential applicants to engage in initial consultations before submitting their applications. These consultations facilitate identification of key issues, possible competition concerns and procedural alternatives for the applicants (if any) at an early stage.

It is important to note that, absent any express agreement from the Commission, information provided voluntarily will not be accepted on a 'without prejudice' basis. In other words, the Commission may use information provided voluntarily to them for the purpose of considering whether an undertaking has contravened the Ordinance and initiate enforcement action accordingly.

## WHEN WILL THE COMMISSION CONSIDER AN APPLICATION FOR A DECISION?

The Commission is only required to consider an application where:

1. The application poses novel or unresolved questions of wider importance or public interest – the Commission will consider the economic importance of the products or services from the point of view of the consumer as well as the extent to which the agreement or conduct in question can be relevant to other sectors in Hong Kong;
2. The application raises a question for which there is no clarification in existing case law or Commission decisions; and
3. It is possible to make a decision on the basis of the information provided.

The Commission will not consider applications concerning hypothetical questions, agreements or conduct.

## WHAT IS THE EFFECT OF A DECISION?

The Commission may decide whether an agreement or conduct is excluded or exempt from the Conduct Rules, and to impose conditions or limitations as appropriate. If an undertaking fails to comply with a condition or limitation to which a Decision is subject, the Decision will cease to apply with effect from the date on which the non-compliance begins.

Decisions are only granted in respect of whether a specific exclusion or exemption applies so that a decision that an agreement or conduct is not excluded or exempt is no indication as to whether a contravention of the Ordinance has occurred.

The Commission may rescind a Decision if it has reason to believe that there has been a material change of circumstances since the Decision was made or the information on which the Decision was based was incomplete, false or misleading.

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