

Questions and Answers

1. How was the case discovered? Was it from a complaint?

The case was discovered as a result of an anonymous complaint from a member of the public received in 2017.

2. What are the procedures to be taken before the case is brought to the Competition Tribunal (Tribunal)? When will the case be heard?

The proceeding has started with the Competition Commission (“Commission”) filing an Originating Notice of Application (“ONA”) today and the case is now before the Tribunal. The ONA will be served on Linde HKO Limited and Mr. Tse Chun Wah, and leave of the Tribunal will be sought to serve the ONA on Linde GmbH, which is a company based in Germany.

The hearing will take place after the various intermediate steps (such as the discovery process) have been taken. The date of the hearing will then be fixed by the Tribunal.

3. What is the Second Conduct Rule under the Competition Ordinance?

The Second Conduct Rule seeks to prohibit businesses with a *substantial degree of market power* from *abusing* that power to prevent, restrict or distort competition in Hong Kong. Any conduct by a business with substantial market power which has the object or effect of harming competition is potentially abusive. While there is no exhaustive list of what may constitute abusive conduct, the Commission’s Guideline on the Second Conduct Rule illustrates certain exclusionary types of abuse e.g. [refusals to deal](#), [margin squeeze](#), [predatory pricing](#), [tying and bundling](#), and how they can have the object or effect of harming competition in the market, thereby ultimately limiting choices available to consumers.

However, it should be pointed out that competition law is *not* concerned with the *mere* possession of a substantial degree of market power. It is only when there is an *abuse* of such power that raises concerns.

4. What is “substantial degree of market power” under the Second Conduct Rule?

Market power refers to the ability of an undertaking to profitably charge prices above competitive levels, or restrict output or quality below competitive levels, for a sustained period of time. A substantial degree of market power arises where an undertaking does not face sufficiently effective competitive constraints from other market participants (such as its actual or potential competitors as well as customers) in the relevant market.

In assessing whether an undertaking has a substantial degree of market power, the Commission will consider a number of factors, including the market share of the undertaking, its power to make pricing and other decisions, countervailing buyer power, barriers to entry or expansion into the relevant market, and other market-specific characteristics.

As a matter of fact, only a limited number of large businesses are likely to have substantial market power. Small and medium-sized undertakings may be victims of abusive conduct under the Second Conduct Rule.

5. What is the impact/harm brought by the alleged conduct in the case?

The Commission alleges that, between October 2015 and January 2018, Linde¹ used its monopoly position in the supply of medical gases² (upstream market) and engaged in a series of exclusionary acts against MGI (Far East) Limited, the only other potential service provider in the downstream medical gas pipeline systems (“MGPS”) maintenance market for public hospitals. To the extent that the relevant gases are essential inputs to the provision of MGPS maintenance services, this series of conduct resulted in harming competition in the MGPS maintenance market, which in turn, affected the interest of consumers of such services - which are mostly public hospitals³ in Hong Kong.

6. What is the penalty for both undertakings and individuals if they are found guilty?

Maximum penalties of a contravention of the Competition Ordinance for an undertaking include a pecuniary penalty of up to 10% of the undertaking’s annual Hong Kong turnover per contravention for a maximum period of three years.

The Tribunal may also issue orders requiring individuals to pay a pecuniary penalty or disqualifying them from serving as director of a company for a period of up to 5 years.

Additionally, the Tribunal may issue orders requiring payment of damages to any person who has suffered loss or damage as a result of the contravention, or other orders to cease and remedy the contravention at issue.

7. What would be the consequences for an overseas company found to have contravened the Hong Kong Competition Ordinance?

It would bear the consequences for such a contravention, including potential pecuniary penalty, just as any company based in Hong Kong. Maximum pecuniary penalty would be up to 10% of the overseas company’s annual Hong Kong turnover per contravention for a maximum period of three years.

8. How many complaints / enquiries has the Commission received so far? How many are Second Conduct Rule related?

As at end of November 2020, the Commission had received over 4,600 complaints and enquiries and they were related to a wide variety of sectors. Around 55% of the complaints and enquiries were on the First Conduct Rule which prohibits anti-competitive agreements and over 17% raised concerns under the Second Conduct Rule which prohibits the abuse of substantial market power.

¹ Linde HKO Limited and Linde GmbH, collectively referred to as “Linde”.

² Medical oxygen, medical nitrous oxide, Entonox and medical air.

³ During the period of the alleged contravention, there were 42 public hospitals (accounting for approximately 86% of hospitals beds) and 12 private hospitals (accounting for approximately 14% of hospital beds), in Hong Kong.