



競爭事務委員會
COMPETITION
COMMISSION

Enforcement Policy



November 2015

1 Introduction

- 1.1 The Competition Ordinance (Cap. 619) (the “**Ordinance**”) applies to all sectors of the economy. It prohibits conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. Such conduct includes anti-competitive arrangements between undertakings and abuses of a substantial degree of market power.¹
- 1.2 The Ordinance establishes the Competition Commission (the “**Commission**”) to enforce the competition rules and promote understanding of the value of competition.²
- 1.3 One of the Commission’s functions is to investigate conduct that may contravene the competition rules and enforce the provisions of the Ordinance. The Ordinance includes specific provisions on how the Commission should exercise this function, while the *Guideline on Complaints* and *Guideline on Investigations* provide additional guidance on the processes the Commission intends to follow in receiving complaints and conducting investigations.
- 1.4 The Commission does not have the power to determine whether the Ordinance has been contravened. The Competition Tribunal (the “**Tribunal**”) and other courts are responsible for establishing whether there has been a contravention of the competition rules.
- 1.5 This Enforcement Policy supplements the Ordinance and the six Guidelines the Commission has issued to provide guidance on how the Commission intends to exercise its enforcement function in investigating possible contraventions of the First Conduct Rule and the Second Conduct Rule (collectively, the “**Conduct Rules**”)³ through:
- (a) prioritising the use of the Commission’s operational resources to investigate conduct that may contravene the Conduct Rules in an efficient and timely manner; and
 - (b) identifying an enforcement response that is suitable and proportionate where the Commission considers a contravention of the Ordinance has occurred.

¹ Further guidance on conduct prohibited by the Ordinance can be found in the Commission’s *Guideline on the First Conduct Rule*, *Guideline on the Second Conduct Rule* and *Guideline on the Merger Rule*.

² While the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the Communications Authority in respect of the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors. This Policy only applies to the Commission.

³ The Enforcement Policy does not apply to the Commission’s approach to assessing cases under the *Merger Rule*.

2 The Commission's core investigation principles

- 2.1 All Commission investigations will be conducted in accordance with six core principles:

Professional: The Commission will be impartial and base its decisions on the facts available in each matter.

Confidential: To protect the interests of parties involved in investigations of possible contraventions of the Conduct Rules, the Commission will conduct investigations in confidence and will generally not make public comments about on-going investigations.

Engaged: The Commission will engage with the subjects of its investigations about its concerns and the progress of the investigation.⁴

Timely: The Commission will strive to conduct investigations in an efficient and timely manner.

Proportionate: The Commission will seek resolutions that are proportionate to the nature of the conduct and harm caused or likely to occur.

Transparent: The Commission will be transparent, making the outcomes of investigations public as set out in its *Guideline on Investigations*.

3 Prioritisation and exercise of discretion

- 3.1 While all complaints are carefully considered, to appropriately manage its resources the Commission cannot conduct a detailed investigation into every complaint it receives or competition issue it becomes aware of. Not all cases will merit further investigation and, when considered in the context of the Commission's other work, not all investigations will merit the Commission devoting substantial resources to the matter.

⁴ Subject to operational and confidentiality considerations and the specific provisions of the Ordinance.

- 3.2 The Commission intends to exercise the discretion it has under the Ordinance to direct its resources to the investigation and enforcement of matters that provide the greatest overall benefit to competition and consumers in Hong Kong. Where it identifies a possible contravention, the Commission will seek to take action that is proportionate to the conduct and the resulting harm.
- 3.3 To this end, when considering whether to investigate and how to seek to resolve individual cases, the Commission will consider three key issues in addition to the specific facts of the case:
- (a) Compliance Focus;
 - (b) Severity Factors; and
 - (c) Effective and Appropriate Remedies.

Compliance Focus

- 3.4 During the initial years of the operation of the Ordinance, the Commission believes that its resources should be focussed on encouraging compliance with the Ordinance in the Hong Kong economy as a whole, rather than focussing on specific sectors. The Commission will achieve this through a mix of education, engagement and enforcement. The Commission's enforcement function will encourage compliance by:
- (a) targeting anti-competitive conduct that is clearly harmful to competition and consumers in Hong Kong; and
 - (b) commencing proceedings in the Tribunal in appropriate cases to, over time, obtain judicial interpretation of the Ordinance.
- 3.5 When considering whether to investigate a particular case, the Commission will accord priority to those cases which involve any one or more of the following types of conduct:
- (a) cartel conduct;
 - (b) other agreements⁵ contravening the First Conduct Rule causing significant harm to competition in Hong Kong; and
 - (c) abuses of substantial market power involving exclusionary behaviour by incumbents.

⁵ Throughout this policy, "agreement" has the same meaning as that defined in section 2(1) of the Ordinance. Further guidance on what constitutes an agreement is provided in the Commission's *Guideline on the First Conduct Rule*.

Enforcement Policy

Cartel conduct

3.6 Cartel conduct refers to:

- (a) agreements; and
- (b) concerted practices,

among undertakings that are, or otherwise would be if not for the cartel conduct, in competition with each other, that seek to do one or any combination of the following activities, which have as their object preventing, restricting or distorting competition in Hong Kong:

- (a) fix prices;
- (b) share markets;
- (c) restrict output; or
- (d) rig bids.⁶

3.7 Cartels differ from most other forms of anti-competitive conduct in that they are universally condemned as economically harmful behaviour. As set out in the Commission's *Guideline on the First Conduct Rule*, the Commission takes the view that cartel conduct contravenes the First Conduct Rule, has the object of harming competition and is Serious Anti-competitive Conduct under section 2 of the Ordinance.

3.8 The Commission also considers it is important to deter associations of undertakings and individuals from involvement in cartel conduct by undertakings. As such, where the Commission considers cartel conduct in contravention of the First Conduct Rule has occurred, in addition to taking action against undertakings who engaged in the cartel conduct, the Commission may prioritise taking action against:

- (a) associations of undertakings; and/or
- (b) officers, including directors of undertakings⁷

who participated or were otherwise involved in the cartel conduct.

⁶ These forms of conduct are discussed in paragraphs 6.10 to 6.15, 6.17 to 6.19, 6.21 to 6.24 and 6.26 to 6.29 of the Commission's *Guideline on the First Conduct Rule*.

⁷ "Officer" has the meaning under section 79 of the Ordinance (which includes directors and managers of the undertaking).

Other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong

- 3.9 The Commission will also accord priority to other agreements that contravene the First Conduct Rule which result or are likely to result in significant harm to competition in one or more markets in Hong Kong.

Abuses of substantial market power involving exclusionary behaviour by incumbents

- 3.10 The Second Conduct Rule is contravened where an undertaking with a substantial degree of market power in a market abuses that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. The Commission will accord particular priority to conduct involving exclusionary behaviour by incumbents operating in one or more markets in Hong Kong.
- 3.11 Exclusionary behaviour is conduct focussed on preventing or limiting the ability of competitors to compete. Part Five of the *Guideline on the Second Conduct Rule* sets out examples of exclusionary behaviour. Exclusionary behaviour results in the undertaking with a substantial degree of market power being able to charge higher prices or reduce product quality or choice, to the detriment of Hong Kong consumers and the Hong Kong economy.

Severity Factors

- 3.12 In addition to its Compliance Focus, in determining how to seek to resolve individual cases where the Commission considers that the Ordinance has been contravened, it will also take into account whether the conduct involves one or more of the following severity factors (collectively “**Severity Factors**”)⁸:
- (a) the conduct demonstrates a blatant disregard for the law;
 - (b) the deliberateness of the conduct, including whether the person⁹ engaging or involved in the conduct took deliberate steps to avoid detection;
 - (c) the conduct was engaged in by or under the direction of the senior management of an undertaking;

⁸ For the avoidance of doubt, the Severity Factors are to assist the Commission decide what enforcement action to take where it considers a contravention of the Ordinance has occurred. In cases where the Commission has decided to bring proceedings before the Tribunal for a pecuniary penalty or other order, sections 93 to 96 and sections 100 to 104 of the Ordinance apply.

⁹ Throughout this policy, “person” has the same meaning as that defined in section 2(1) of the Ordinance.

Enforcement Policy

- (d) the person engaged or involved in the conduct has previously been:
 - i. advised by the Commission that the Commission has concerns about the conduct, given a reasonable opportunity to alter its conduct, but has not done so;
 - ii. issued a warning notice or infringement notice, or has previously entered a commitment under the Ordinance regarding similar conduct; or
 - iii. found by the Tribunal to have contravened the Ordinance.

Effective and Appropriate Remedies

3.13 As set out in the *Guideline on Investigations*, the Commission has a range of enforcement responses at its disposal, depending on the conduct in question, to seek to resolve a matter it considers may contravene the Ordinance. Regardless of which option is used, the Commission will generally favour remedies which would achieve the following remedial goals (collectively “**Remedial Goals**”):

- (a) the remedy will stop the unlawful conduct speedily;
- (b) the remedy will undo the harm caused by the contravening conduct, such as by affording damages to affected parties in cases where this can be efficiently achieved;
- (c) the remedy will impose sufficient economic sanction to encourage compliance with the Ordinance, both by the persons involved in the contravention and other participants in the market;
- (d) the remedy:
 - i. is consistent with previous remedies that have been applied in matters involving similar conduct, particularly taking into account the factors listed in section 93 of the Ordinance if the Commission is seeking a pecuniary penalty;
 - ii. reflects the culpability of the respective parties bearing in mind the extent of their cooperation with the Commission (see below); and
 - iii. sets an appropriate standard for future similar cases (if there are no existing precedents).

- 3.14 When applying these Remedial Goals, the Commission will endeavour to identify enforcement responses that are proportionate to the context of the conduct and the harm caused or likely to occur.
- 3.15 Where proceedings are before the Tribunal, the Tribunal has the sole power to determine the appropriateness of a particular order in the specific circumstances of the case.

4 Other considerations in assessing the appropriate enforcement response

Cooperation and settlement

- 4.1 Persons may wish, at any time, to cooperate with the Commission in its investigations. The Commission will take such cooperation into account in considering the proportionate enforcement response in relation to that person.
- 4.2 Persons may also wish to approach the Commission to seek to settle a matter. Approaches to the Commission to discuss settlement may be made on a “without prejudice” basis.
- 4.3 The Commission will rely on its general enforcement discretion to consider offers of settlement. Settlement may take various forms, such as:
- (a) the Commission agreeing not to take action against individuals who wish to provide assistance to the Commission in their personal capacity in return for their cooperation;
 - (b) the person entering a commitment with the Commission not to engage in anti-competitive conduct again, and/or to offer appropriate redress to parties affected by the conduct; or
 - (c) the person agreeing to resolve Tribunal proceedings on a consent basis through a statement of agreed facts and by seeking specific orders.

Enforcement Policy

- 4.4 If the Commission decides to apply for a penalty or other order before the Tribunal, settlement may, to the extent permitted by law, involve the Commission agreeing to make submissions for a reduced penalty and/or other appropriate orders by the Tribunal having regard to the timing, nature, value and extent of cooperation provided.
- 4.5 Where cooperation relates to cartel conduct, the Commission will exercise this discretion mindful of the Commission's *Leniency Policy for Undertakings Engaged in Cartel Conduct*.

Compliance efforts of persons under investigation

- 4.6 The Commission will take into consideration compliance efforts of persons under investigation where those persons can demonstrate that they have made a genuine effort to comply with the Ordinance.

Working with other domestic authorities

- 4.7 Conduct which contravenes the Ordinance may also involve conduct that contravenes other laws in Hong Kong. The Commission will maintain close liaison with other domestic authorities as permitted by the Ordinance and subject to the Commission's operational requirements¹⁰ to achieve an appropriate outcome in cases where multiple authorities are working on the same broader conduct.

Efficacy

- 4.8 At any stage of the Commission's consideration of a matter, the Commission may reassess its priorities to make the best use of its limited public resources. In this context, the Commission may take into account additional factors in deciding how to resolve a matter, including:
- (a) other matters currently under consideration by the Commission, the Tribunal and other courts; and
 - (b) whether the resource requirements of further investigation or the proposed resolution are proportionate to the expected public benefit.

¹⁰ For avoidance of doubt, where such cases relate to cartel conduct, the Commission will apply the protections it offers to leniency applicants and the information provided by those applicants in the Commission's *Leniency Policy for Undertakings Engaged in Cartel Conduct*.



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