

1. INTRODUCTION

The prohibition against anti-competitive agreements and concerted practices is one of the key pillars of competition law. As enforcement against cartels has increased in intensity over the past few years and more countries have adopted competition laws, cartels and other forms of anti-competitive agreements have become a major concern for businesses. 2.001

The First Conduct Rule of the Ordinance prohibits anti-competitive agreements and concerted practices. Section 6 of the Ordinance reads as follows: 2.002

“(1) An undertaking must not—

(a) make or give effect to an agreement;

(b) engage in a concerted practice; or

(c) as a member of an association of undertakings, make or give effect to a decision of the association,

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

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

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

This chapter sets out in the following sections below: **(2)** the meaning of an “undertaking”; **(3)** the meaning of “agreement”, “concerted practices” and “decisions of associations of undertakings”; **(4)** the meaning of “object or effect” of preventing, restricting or distorting competition in Hong Kong; **(5)** what constitutes “serious anti-competitive conduct”; and **(6)** typical examples of conduct that is caught by the First Conduct Rule. 2.003

2. MEANING OF AN “UNDERTAKING”

The Ordinance applies to “undertakings”, which are defined as “*any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, [including] a natural person engaged in economic activity*”.¹ 2.004

(a) Entity “engaged in economic activity”

The term “undertaking” comes from European competition law, where it has been very widely construed. The central element in order for an entity to be considered an 2.005

¹ Competition Ordinance, Section 2.

“undertaking” is whether it is “engaged in economic activity”. Although not explicitly defined in the Ordinance, the Commission’s First Conduct Rule Guideline² indicates that an entity will generally be considered to be engaged in economic activity where it offers products and services on a market, irrespective of whether a profit is intended to be made.³ This is in line with well-established European law precedents, which have found that companies, partnerships, individuals, committees, sporting bodies and public bodies are all “undertakings”, to the extent they are engaged in economic activity. Therefore, in practice, companies, associations, partnerships, not-for-profit organisations, societies and individuals engaged in economic activity (such as sole traders and sub-contractors) will all be considered to be “undertakings” for the purpose of the Ordinance.

- 2.006 An entity may engage both in economic activities and in non-economic activities (e.g. activities related to the exercise of state prerogatives). In such cases, the entity will be considered to be an undertaking only to the extent of its economic activities. In addition, certain undertakings, although they engage partly or wholly in economic activities, may fall out of the scope of the First Conduct Rule by virtue of an exclusion or an exemption (e.g. “statutory bodies”, or persons engaged in specified activities).⁴
- 2.007 Finally, employees, including directors and managers, are generally not considered to be undertakings for the purpose of the Ordinance, and trade unions and other employee representative bodies acting on behalf of their members in collective bargaining with employers on work terms and conditions are not considered to be engaged in economic activity and will therefore not be considered to be undertakings for the purpose of the First Conduct Rule.

(b) Contours of an “undertaking”: the “single economic unit” doctrine

- 2.008 The First Conduct Rule only applies to agreements or concerted practice between *separate* “undertakings”, meaning entities within the same corporate group will not be subject to the First Conduct Rule as they form part of a “single economic unit” and are therefore not considered to be separate undertakings. This is consistent with the European approach.⁵

(i) How to determine whether companies form part of the same “single economic unit”

- 2.009 To determine whether an agreement has been entered into between companies within the same economic entity, it is necessary to consider whether the two companies are part of the same corporate group. In this regard, the Commission has indicated in its First Conduct Rule Guideline that it is not bound by the definition of a corporate or company group within the meaning of the Companies Ordinance⁶ or other laws.⁷

² Competition Commission, *Guideline on the First Conduct Rule*, 27 July 2015 (“First Conduct Rule Guideline”).

³ First Conduct Rule Guideline, paragraph 2.3.

⁴ Exemptions and exclusions are discussed in detail in Chapter 5 – Exemptions and Exclusions.

⁵ Case C-73/95 P *Viho Europe BV v Commission* [1996]; Case T-24/05 [2011] ECR I-000, appeal dismissed by the Court of Justice; Case C-628/10 P *Alliance One International v European Commission* [2012] 5 CMLR 738, [2012] All ER (D) 334 (Jul), ECJ.

⁶ Companies Ordinance (Cap. 622).

⁷ First Conduct Rule Guideline, paragraph 2.7.

Instead, the Commission will consider that two companies are part of the same economic unit if one has “decisive influence over the commercial policy” over the other, or if the same ultimate parent company has decisive influence over both entities to the agreement.

Decisive influence over an entity can result from having legal or de facto control over an entity and the Commission is likely to consider voting rights, control of the board and key veto rights over strategic decisions in order to determine whether an entity has decisive influence over another, thereby signifying that two entities form part of the same economic unit and thus fall outside the scope of the First Conduct Rule. 2.010

(ii) Joint ventures

The concept of a single economic unit is more complicated when applied to joint ventures. The Commission has stated in its First Conduct Rule Guideline that, generally, if a joint venture is controlled by more than one parent, it will not form part of the same single economic unit as any of its parent entities.⁸ This means that, for the most part, joint ventures should be considered to fall outside of the same economic unit as either of their parents and so conduct involving an agreement between a joint venture and one or both of its parents can be caught by the First Conduct Rule. 2.011

Paragraphs 2.068–2.071 discuss in detail how joint venture agreements are assessed under the Ordinance. 2.012

(iii) Independent distributors

Independent third-party distributors will be considered to be separate undertakings from the suppliers/manufacturers that they act for. As such, any agreements between suppliers/manufacturers and their third-party distributors will be subject to the First Conduct Rule. This is especially relevant in the context of resale price maintenance (“RPM”), since the distributors must be free to independently set the prices of the goods or services that they on-sell. The vertical relationship between suppliers and distributors is discussed in detail below at paragraph 2.079, and RPM is discussed further at paragraphs 2.080–2.089. 2.013

(iv) Genuine agents

Notwithstanding the above, if a distributor is in fact an agent acting on behalf of its principal, the parties will be considered to form part of the same single economic unit and therefore their conduct will not fall within the scope of the First Conduct Rule. Therefore, the Commission will carefully analyse the nature of a relationship between a supplier and its distributor in order to assess whether it gives rise to a genuine principal/agent relationship or not. 2.014

In this regard, it is not relevant whether the term “agent” or “agency agreement” is used by the parties. Rather, the Commission will assess whether the distributor bears any, or any significant, risk in relation to the contracts it concludes on behalf of the supplier.⁹ 2.015

⁸ First Conduct Rule Guideline, paragraph 2.10.

⁹ First Conduct Rule Guideline, paragraph 2.15.

This may be the case if title to the relevant products is transferred to the distributor and the distributor is responsible for various costs, including transport costs; costs of unsold goods or damaged products; costs associated with non-performance or late payment by customers; and advertising and other relevant costs.

3. AGREEMENTS, CONCERTED PRACTICES AND DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS

2.016 The Ordinance prohibits anti-competitive agreements, concerted practices, and decisions of an association of undertakings. These three categories are analysed in turn.

(a) Agreements

2.017 An “agreement” is very broadly defined to capture as many types of practices as possible and it includes “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”.¹⁰ It includes informal and “gentlemen’s” agreements and agreements made by any form of communication (including email, instant messages, etc.¹¹). Neither a physical meeting of the undertakings concerned, nor an actual agreement, needs to be in place in order for the Commission to determine that an agreement for the purpose of the Ordinance exists. Rather, it is sufficient for the Commission to establish that there has simply been a “meeting of minds” between the relevant parties.

(b) Concerted practices

2.018 A concerted practice is “a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition”.¹² This is taken from the European law definition of a concerted practice, as set out in the landmark *Dyestuffs* case.¹³ The application of the First Conduct Rule to concerted practices provides the Commission with a “fall-back” option, allowing it to target conduct that would otherwise fall outside the scope of the First Conduct Rule for situations where it is not possible to determine that an agreement is in place, even when applying the wide definition of agreement to the conduct.

2.019 The First Conduct Guideline explains that concerted practices typically involve an exchange of competitively sensitive information absent legitimate business reasons among competitors, who should independently determine the strategy they adopt in the market. The Commission considers that a concerted practice that has the object of harming competition is likely to occur where competitors share information on

¹⁰ Competition Ordinance, Section 2.

¹¹ In the recent Libor and forex-rigging scandals, the banks and traders involved were found liable on the basis of instant messages exchanged on private chatrooms and through mobile phones.

¹² First Conduct Rule Guideline, paragraph 2.27.

¹³ Court of Justice, *ICI v Commission (Dyestuffs)*, Cases 48/69, etc., 1972.

future prices, if they share such information with the expectation or intention that the recipient will act on it and if the recipient does, or intends to, act on it.¹⁴

Parallel behaviour in the market, where similar price movements can be observed over a period of time, in some circumstances may be indicative of a concerted practice, especially if the market is highly concentrated and transparent. In turn, however, parallelism may simply indicate that the market is in fact highly competitive. In such cases, the Commission will look for evidence corroborating the parties’ intentions or expectations to establish if a concerted practice exists. In Europe, the focus in relation to concerted practices cases is not centred around whether or not the parties intended to collaborate or to coordinate their behaviour, but rather on whether a direct or indirect contact between actual or potential competitors has the object or effect of influencing the conduct on the market of that competitor, or of disclosing to that competitor the conduct that the firm has decided to adopt.¹⁵ In terms of the burden of proof, European Courts have found a rebuttable presumption that undertakings that participate in concerted action, and remain active on the market, take into account the information provided by the other undertakings engaged in the concerted action.¹⁶

(c) Decisions of an association of undertakings

Decisions of associations of undertakings, including trade associations, professional bodies, non-profit, societies and unincorporated associations, can also be caught by the First Conduct Rule if the decision has the object or effect of harming competition.¹⁷ In such cases, both the undertakings, as members of the association, and the association itself, can be liable for breaching the Ordinance.

A decision in this regard may include the association’s constitution, rules, resolutions, rulings, guidelines or recommendations.¹⁸ Further detail on the types of decisions made by associations that could contravene the First Conduct Rule is set out at paragraphs 2.045–2.089 below.

4. THE “OBJECT OR EFFECT” OF PREVENTING, RESTRICTING OR DISTORTING COMPETITION IN HONG KONG

An important concept within the First Conduct Rule is whether an agreement, concerted practice or decision by an association of undertakings has the “object” or “effect” of preventing, restricting or distorting competition in Hong Kong.

Neither the Ordinance nor the Commission’s Guidelines provide any explanation for the distinction between the terms “preventing”, “restricting” and “distorting” competition. The First Conduct Rule Guideline simply refers to the general notion of conduct that “harms competition”. It is unlikely that the Commission will seek to

¹⁴ First Conduct Rule Guideline, paragraph 2.28.

¹⁵ Court of Justice, *Suiker Unie v Commission, (European sugar industry)* Cases 40/73 etc., 16 December 1975.

¹⁶ Court of Justice, *Commission v Ani Partecipazoni, (Polypropylene)* Case C-49/92P, 8 July 1999.

¹⁷ The concepts of anti-competitive object and effect are discussed in detail at paragraphs 2.023–2.032.

¹⁸ First Conduct Rule Guideline, paragraph 2.35.

give any further guidance or interpretation on this point, as the distinction between the terms has not been a focus of other competition authorities with similar terminology (such as the European Commission).

2.025 However, the distinction between “object” and “effect” is an important legal concept, which goes to the heart of the burden of proof in competition cases. These are alternative, rather than cumulative, requirements, meaning that, if the Commission can prove the existence of an arrangement that is considered to have the object of harming competition, it will not have to prove that the arrangement indeed results in any anti-competitive effects. In turn, if the arrangement does *not* have the object of harming competition, the onus will be on the Commission to prove that the conduct in fact is harmful to competition as it has anti-competitive effects.

(a) Object

2.026 An arrangement will be considered to have the object of harming competition where, by its very nature, it is harmful to competition, such that it can be assumed that the purpose of the agreement cannot be for any reason other than to harm competition. The “object” is best understood as the purpose or aim of the agreement viewed in its context and in light of the way it is implemented.¹⁹ In this respect, the parties’ subjective intent to harm competition is neither necessary nor sufficient to determine whether an agreement has the object of harming competition (although the Commission may take such intent into account).

2.027 Agreements between competitors (also known as horizontal agreements) that seek to fix prices, share markets, rig tenders and restrict output are considered as having the object of harming competition. These are often referred to as “cartels”. As long as the Commission can prove that such an arrangement exists, it is irrelevant whether the arrangement had any anti-competitive effects in reality, and the parties are not capable of defending the agreement by showing that it does not, or cannot, in fact, have any anti-competitive effects.²⁰ As such, the parties to an agreement having an anti-competitive object cannot argue that the agreement was not implemented, or that it had a *de minimis* impact because they have small market shares in a landmark case concerning a cartel among producers of pre-insulated pipes, the European Court confirmed that the fact that an agreement has not been implemented, or not been fully implemented, is irrelevant to the question of its existence.²¹

2.028 Agreements between parties at different levels of the supply chain (such as a manufacturer and a distributor, which are also known as vertical agreements) are less likely to be considered as having the object of harming competition than anti-competitive horizontal agreements. Those vertical agreements will therefore tend to be analysed on the basis of their likely effects. However, RPM, where a manufacturer/supplier dictates the downstream price that must be set by a distributor/retailer, may have the object of harming competition in some circumstances.²² Although the First

¹⁹ First Conduct Rule Guideline, paragraph 3.5.

²⁰ Ultimately, the parties may still invoke the defence-based efficiencies listed in Section 1 of Schedule 1 of the Ordinance but it would be an extremely difficult defence to win in relation to a cartel.

²¹ Court of First Instance of the European Union, *Pre-insulated Pipe Cartel*, Case T-9/99, 20 March 2002.

²² First Conduct Rule Guideline, paragraph 3.8.

Conduct Rule Guideline is not explicit as to exactly when this will be the case, it does suggest that, if a supplier implements RPM in response to pressure from a distributor seeking to limit competition at the distribution level, or to foreclose competing suppliers, this is likely to have the object of harming competition.²³ Further, it is likely that a direct, contractual obligation imposed on a distributor/retailer by a manufacturer/supplier to adhere to a specific fixed or minimum retail price will be considered as having the object of harming competition.

(b) Effect

If an arrangement is not considered to have the object of harming competition, it will still contravene the First Conduct Rule if the Commission can prove that it has, or is likely to have, anti-competitive effects. **2.029**

Anti-competitive effects are likely to arise when an agreement has an adverse effect on any of the parameters that businesses use to compete, such as price, output, product quality, product variety, or innovation. In order to assess the (likely) effects of an agreement, the Commission will first need to assess how the relevant market upon which anti-competitive effects may occur should be defined.²⁴ Once the Commission has assessed how the relevant market should be defined, it will analyse whether the parties to the agreement have market power on the relevant market. Market power, or the ability to profitably maintain prices above competitive levels, will be analysed by reference to a number of factors, including the parties’ market shares, the concentration of the market and barriers to entry and expansion. Although not a prerequisite for finding that an agreement has anti-competitive effects, an agreement that is subject to an “effects-based” analysis is more likely to harm competition if one or both of the relevant parties to the agreement have market power. Importantly, the degree of “market power” relevant for purposes of an analysis under the First Conduct Rule will be typically less than that under the Second Conduct Rule.²⁵ **2.030**

In determining whether conduct has, or is likely to have, anti-competitive effects, the Commission will consider the “counter-factual” position (i.e. it will analyse what the market conditions would have been like *absent* the relevant agreement in question). To be considered anti-competitive, any effect identified by looking at the counter-factual needs to be “more than minimal” in order to breach the First Conduct Rule. If other players in the relevant market have also entered into similar agreements to the one in question, the Commission may look at the cumulative effect of such agreements on competition and the impact the relevant agreement has on such overall cumulative effect, in order to determine whether there is an anti-competitive effect.²⁶ **2.031**

Certain restrictions to competition may form part of an otherwise legitimate agreement, for instance, non-compete clauses in a joint venture agreement, or in a co-marketing agreement. If the restriction is objectively necessary for the main agreement to make **2.032**

²³ First Conduct Rule Guideline, paragraph 6.75.

²⁴ Market definition is discussed in detail at Chapter 3 – Abuse of Substantial Market Power – The Second Conduct Rule.

²⁵ The assessment of market power is discussed in detail at Chapter 3 – Abuse of Substantial Market Power – The Second Conduct Rule.

²⁶ First Conduct Rule Guideline, paragraphs 3.25–3.27.

commercial sense, as well as proportionate and directly related (i.e. subordinate) to the aim of the main agreement, this so-called “ancillary restraint” will not be caught by the First Conduct Rule.

(c) “In Hong Kong”

- 2.033 Section 8 of the Ordinance states the far-reaching territorial application of competition law. The Ordinance seeks to protect free competition in the Hong Kong market against any conduct, wherever it takes place. The First Conduct Rule therefore captures agreements, whether they are entered into in or outside of Hong Kong that have the object or effect of restricting competition *in the Hong Kong market*.
- 2.034 Pursuant to this “effects doctrine”, which underpins most competition law regimes around the world, it is irrelevant where parties to an agreement are incorporated; where an agreement is entered into; and which law governs the agreement in question, if the agreement in question harms the Hong Kong market.
- 2.035 By way of example, if two Taiwanese manufacturers exporting certain goods into Hong Kong fix prices in Taiwan, their agreement will be subject to the First Conduct Rule, and the parties to this agreement, although Taiwanese and based in Taiwan, may be liable before the Hong Kong authorities.

5. SERIOUS VS. NON-SERIOUS ANTI-COMPETITIVE CONDUCT

- 2.036 One unique feature of the Ordinance is that, unlike most other regimes, in addition to distinguishing between object and effect, the Ordinance makes an additional distinction between serious anti-competitive conduct and non-serious anti-competitive conduct. This has procedural consequences for finding a breach of the First Conduct Rule.

(a) The four serious anti-competitive conducts

- 2.037 Price-fixing, market allocation, output restriction and bid-rigging, which are all considered as having the object of harming competition, are also all considered to be serious anti-competitive conduct. RPM, which may in some circumstances have the object of harming competition, may also sometimes be considered to be serious anti-competitive conduct since it falls within the broad definition of “*fixing, maintaining, increasing or controlling the price for the supply of goods or services*”, which is defined in section 2(1) of the Ordinance as one of the serious anti-competitive conducts.

(b) Serious anti-competitive conduct and the object/effect distinction

- 2.038 While all types of serious anti-competitive conduct have the object of harming competition, the notion of serious anti-competitive conduct is narrower than conduct that is considered to have the object of harming competition. For example, the exchange of competitively sensitive information may be an object restriction if it involves the exchange of future pricing information or information relating to future sales quantities, but, absent a finding of actual price fixing, it is not considered to be serious anti-competitive conduct.
- 2.039 Set out below is a table which shows various types of conduct and comparing whether they amount to serious anti-competitive conduct, and/or to restrictions of competition by object:

Key problematic conduct	“By object” restriction	Serious anti-competitive conduct
Price fixing	✓	✓
Market sharing	✓	✓
Limiting output	✓	✓
Bid-rigging	✓	✓
RPM	In some circumstances ^a	In some circumstances
Information exchange	The sharing of future pricing and quantity information	X

^a There is no definitive guidance as to when RPM will be considered as having the object of harming competition or as being serious anti-competitive conduct, and, in particular, whether there might be circumstances where RPM is considered a by object restriction but not a serious anti-competitive conduct. By way of illustration, RPM is likely to be considered a restriction by object, and maybe even a serious anti-competitive conduct, if a supplier implements RPM in response to pressure from a distributor seeking to limit competition at the distribution level, or to foreclose competing suppliers, or if a contractual obligation is imposed on a distributor/retailer by a manufacturer/supplier which requires the distributor/retailer to adhere to a specific or a minimum downstream price.

In addition, group boycotts are considered to be restrictions of competition by object when competitors agree to exclude an actual or potential competitor from the market. In such instances, the boycott is likely to be intended to facilitate a wider cartel, and so it would be likely to amount to one of the four principal types of serious anti-competitive conduct.

2.040

(c) Serious anti-competitive conduct vs. non-serious anti-competitive conduct: a procedural distinction

The distinction between serious anti-competitive conduct and non-serious anti-competitive conduct is procedural: when the Commission believes that an entity contravenes the First Conduct Rule but that the contravention does not involve serious anti-competitive conduct, the Commission must issue a warning notice to the relevant parties *before* commencing proceedings before the Tribunal. The warning notice gives the parties a chance to cease the conduct by complying with the notice before a certain deadline, thus potentially avoiding review of the practice, and the possibility of sanctions being imposed, by the Tribunal. In the case of suspected serious anti-competitive conduct, the Commission is not obliged to issue the parties with a warning notice and it can instead begin proceedings directly before the Tribunal.²⁷

2.041

This procedural novelty, introduced late in the legislative debates leading up to the adoption of the Ordinance, was criticised by some commentators as affecting the effectiveness of the First Conduct Rule, essentially “gutting it” but for the most serious anti-competitive conduct. While there is merit to this argument, this approach also shows the resolve of the legislator, and thus the Commission, to focus enforcement on the most serious anti-competitive practices.

2.042

²⁷ Note, however, that the Commission is not obliged to take the case directly to the Tribunal in cases of serious anti-competitive conduct and it can instead accept commitments from parties to cease the offending conduct in lieu of taking the case to the Tribunal.

2.043 However, while the warning notice process may dilute somewhat the effectiveness of the First Conduct Rule, the Commission has decided that it would publish warning notices. To justify this approach, the Commission has invoked good governance, the Commission's duty to educate the public and the legal community about its interpretation of the Ordinance, and the need for transparency regarding the use of public funds in conducting investigations. The publication of the warning notice is likely to have a significant reputational impact on businesses, even though it does not signify a conclusive breach of the Ordinance. Therefore, while the distinction between serious anti-competitive conduct and non-serious anti-competitive conduct is indeed procedural, businesses should not approach agreements that amount to non-serious anti-competitive conduct lightly.

2.044 If parties do not cease or amend their behaviour after the deadline in the warning notice has passed, the Commission can commence proceedings before the Tribunal in relation to the conduct.

6. AGREEMENTS THAT MAY BREACH THE FIRST CONDUCT RULE

2.045 The Ordinance applies to both horizontal agreements (between competitors) and to vertical agreements (between entities at different levels of the supply chain). Typically, vertical agreements are considered to be less harmful to competition than horizontal agreements.

2.046 Set out below is a detailed overview of the types of conduct that may infringe the First Conduct Rule.

(a) Horizontal agreements

(i) Price-fixing

2.047 Agreements to fix, maintain, increase or otherwise control prices amount to violations of the Ordinance "by object" meaning, where they can be proven, the Commission will not need to establish that the agreement has any anti-competitive effects in practice.

2.048 An agreement to fix prices does not necessarily involve agreeing the final price to be charged to customers for a particular product; it also includes agreeing, directly or indirectly, the elements of the price, including agreements to fix discounts, rebates, allowances or other price advantages offered with goods or services.²⁸ For example, in the European Commission case against producers of roofing felt, members of the cartel agreed a strategy to poach and allocate the customers of competitors who were not members of the cartel, including by determining a maximum discount.²⁹

2.049 Even where price-fixing does not entirely eliminate price competition, the Commission has taken the view that it can amount to price-fixing, since competition may still be harmed (impaired) if parties agree to fix one component of a price, while competing on others.³⁰ In the *British Sugar* case, which has been cited many times since it was

²⁸ First Conduct Rule Guideline, paragraph 6.11.

²⁹ European Commission, *Belgian Roofing Felt*, Case IV/31.371, 10 July 1986.

³⁰ First Conduct Rule Guideline, paragraph 6.12.

decided in 1998, the parties were found to have engaged in a cartel and/or a concerted practice by creating an atmosphere of "mutual certainty", which allowed them to continuously raise prices, even without knowing the exact pricing levels of their competitors.³¹

(ii) Market sharing

Market sharing, or market allocation agreements, are agreements that divide up markets such that competitors do not actively compete with each other on their "allocated portion" of the market. These agreements also have the object of harming competition. They can take the form of dividing markets geographically (e.g. agreeing that one entity will only focus on Hong Kong island, while its competitor focuses on Kowloon; or agreeing not to enter particular markets where a competitor is already active); segmenting markets by customers (e.g. agreeing that one competitor will focus on targeting one particular customer, while the other competitor targets a different customer) and/or agreeing not to compete in the production/supply of certain goods or services.

However, agreements between competitors to cease production of certain products so that they can specialise in other products that they supply to each other on a reciprocal basis will not necessarily amount to a market-sharing agreement with the object of harming competition. Instead, such agreements should be analysed objectively, based on the context in which the arrangement is made.³²

(iii) Output restrictions

Although less common than price-fixing or market-sharing agreements, agreements to limit, restrict, coordinate or control output, production, supply or capacity, such as production or sales quotas, are also considered to be "hardcore" anti-competitive agreements amounting to serious anti-competitive conduct. By its very nature, the scarcity of supplies organised by the agreement is most likely to result in price increases. In addition to higher prices, output restrictions may also ultimately lead to an alignment in product quality and possibly price collusion.³³

In certain circumstances, output restrictions may have legitimate business reasons and therefore may be considered not to have an anti-competitive object. This may be the case, for instance, when competitors enter into a joint venture and agree certain production quotas for the joint venture.

(iv) Bid-rigging

Bid-rigging occurs when competitors "rig tenders", for example, they agree not to bid for a particular project; to submit "failing" or "fake" bids; or who the particular winner of a tender will be. Where bid-rigging occurs *without* the knowledge of the customer requesting the bid, it will be considered to be serious anti-competitive conduct with the object of harming competition.³⁴ An example of a recent bid-rigging case is the Singapore *motor vehicle traders* case, where the Competition Commission

³¹ European Commission, *Tate & Lyle plc (British Sugar)*, Case IV/F-3/33.709, 14 October 1998.

³² First Conduct Rule Guideline, paragraph 6.20.

³³ First Conduct Rule Guideline, paragraph 6.22.

³⁴ Competition Ordinance, Section 2(2).

(c) Risks associated with an application

- 5.036** The Commission will grant exemptions only after a thorough and lengthy analysis of all the factors at play. During that time, parties are exposed. As frustrating as a protracted application process may be, companies must understand that a poorly designed exemption containing numerous conditions and limitations can be less advantageous than relying on self-assessment to determine internally whether agreements and conducts are likely to breach the law.
- 5.037** The Commission has made an effort to indicate that it is a highly approachable institution. However, due to the risks associated with engaging in discussions with the regulator, companies should exercise great caution in assessing their position before seeking additional legal certainty by formally applying to the Commission for a decision in relation to whether an exclusion applies or an exemption can be granted.

CHAPTER 6

COMPLAINTS

	PARA.
1. Introduction	6.001
2. How to File a Complaint with the Commission	6.006
3. What Does a Complaint Need to Include?	6.009
4. Assessment of Complaints by the Commission	6.012
5. Confidentiality of Complaints	6.017
6. Complaints Made So Far to the Commission	6.021

1. INTRODUCTION

There are several ways that the Commission could find out about potential anti-competitive conduct and decide to conduct an investigation. Information and tip-offs about an alleged breach of the Ordinance can come from leniency applicants and whistleblowers; from other regulators or bodies in Hong Kong; as a result of market studies conducted by the Commission; or simply from the Commission conducting its own research. 6.001

However, one of the principal ways that the Commission will find out conduct that potentially violates the Ordinance is via complaints. The importance of complaints is further reinforced by the fact that, absent any standalone right of action, the ability to lodge a complaint may be the only avenue initially available to victims of anti-competitive conduct. This explains in large part the liberalism with which the Commission has designed its approach to complaints. 6.002

Any person may lodge a complaint to alert the Commission to a suspected contravention of the Ordinance, and the Commission is hoping that people use this opportunity to come forward with substantive, non-frivolous complaints that it can act upon. 6.003

It is likely that the Commission will rely heavily on complaints to drive its enforcement agenda, especially in its first few years of activity, while it remains a new regulator seeking legitimacy and with a mandate to address pressing needs. 6.004

This chapter explores in the following sections: (2) the process for filing a complaint with the Commission; (3) the information required to make a complaint; (4) how the Commission will assess complaints; (5) confidentiality issues surrounding complaints; and (6) the complaints filed so far with the Commission. 6.005

2. HOW TO FILE A COMPLAINT WITH THE COMMISSION

Any person, including individuals, companies, other regulators or public authorities and concern groups, may lodge a complaint with the Commission under the Ordinance and there is no “standing test” requiring a party making a complaint to demonstrate that it is adversely affected by, or has any interest in, the relevant matter in order to make a complaint. This indicates a clear intent from the legislator to allow anyone to be able to approach the Commission to file a complaint, signalling a hope that indeed complaints will come forward and will be a fertile source for discovering potential breaches of the Ordinance. 6.006

The Commission is the sole authority with the power to receive complaints for competition matters, with the exception that the Communications Authority has joint jurisdiction with the Commission to receive complaints relating to telecoms and broadcasting companies. The process for making a complaint and the criteria for the assessment of complaints is the same whether the complaint is made to the Commission or to the Communications Authority. 6.007

The Commission accepts complaints in any format, including by email, by phone, by mail, by completing an online form made available on the Commission’s website, or 6.008

even in person at the Commission's office. The Commission is also willing to receive either named or anonymous complaints, as well as those filed directly or through an intermediary such as a legal adviser.¹ This openness and lack of formalism in the complaint-filing process illustrates the fact that the Commission is setting low procedural thresholds for making complaints, so as to encourage as many complainants as possible to come forward.

3. WHAT DOES A COMPLAINT NEED TO INCLUDE?

- 6.009** The Commission hopes that complainants will provide as much relevant information as possible in making complaints, in order to allow it to assess whether to follow up on a complaint or not.
- 6.010** The Complaints Guideline sets out the types of information complainants are encouraged to provide, including information on the parties involved, a description of the relevant conduct, information on any relevant documents and, where relevant, information about the impact of the conduct on the complainant or other parties involved. However, the guideline emphasises that it is not imperative to provide all of this information in order to make a complaint and there are no set criteria which, if met, will result in a complaint being "valid".² Nevertheless, it is clear that substantiated complaints are more likely to be followed up and prioritised by the Commission than those lacking in substance or with little or no supporting information.
- 6.011** The Complaints Guideline also indicates that the Commission may provide more guidance about the information needed from complainants from time to time.

4. ASSESSMENT OF COMPLAINTS BY THE COMMISSION

- 6.012** While complaints are one of the most useful ways for the Commission to gather information about alleged anti-competitive practices, its limited resources, at this stage mean that it cannot consider each and every complaint in detail.
- 6.013** The Ordinance explicitly provides the Commission with the discretion to decide not to follow up on complaints, if it considers that it is reasonable to do so, for example because a complaint is trivial, frivolous or vexatious, or it is misconceived or lacking in substance.³ The Commission's discretion in this regard is wide and it allows the Commission to avoid being paralysed by numerous, non-substantiated complaints, which could potentially take up a significant amount of time and resources. It is likely that the Commission will exercise this discretion regularly, deciding not to act upon a large number of complaints that are made.

¹ Competition Commission, *Guideline on Complaints*, 27 July 2015 ("Complaints Guideline"), paragraph 2.1.
² Complaints Guideline, paragraph 2.4.
³ Competition Ordinance, Section 37(2).

If the Commission does decide not to follow up on a complaint, it will provide an explanation of this outcome to the complainant in writing. The Complaints Guideline does not articulate the extent to which the Commission would have to motivate its decision not to launch an investigation. Only time will tell whether disappointed complainants might successfully argue that such rejection by the Commission amounts to a decision subject to judicial review. Nevertheless, a rejection letter does not preclude the Commission from later deciding that it wishes to reconsider the issues raised in a complaint, for example because it has increased capacity to investigate an issue or because it has uncovered additional evidence which is relevant to the complaint.⁴

Other potential outcomes after having reviewed a complaint are that the Commission will review the matter further by conducting an initial investigation or it will recommend that the complainant refers the complaint to another government body or agency. In the case of the latter, the Commission will inform the complainant in writing of this decision. In the case of the former, the Commission will endeavour to keep the complainant informed as to the progress of the matter, subject to any overriding considerations such as the need to preserve confidentiality.⁵

If a complainant no longer wishes to cooperate with the Commission in relation to a complaint, the Commission is still able to proceed with investigating the complaint, if it considers it is reasonable for it to do so.⁶ Further detail on the Commission's investigation process is provided in Chapter 7 – Investigations.

5. CONFIDENTIALITY OF COMPLAINTS

Whether or not a complaint is made anonymously, the Commission is under a general obligation not to disclose any confidential information, including information that relates to the identity of any person who has given information to the Commission.⁷ This provision is aimed at not only ensuring that the Commission can follow up complaints in private (i.e. the fact of the complaint ought to remain confidential), thus allowing it to conduct effective investigations, but it also guarantees complainants' anonymity. The Ordinance provides, however, that the Commission may disclose confidential information when such a disclosure is ordered by the courts, or when it is necessary for the performance of its functions under the Ordinance. Therefore, the Commission will not normally disclose the identity of a complainant, without their consent, unless there are exceptional circumstances that compel it to do so.

In return, the Commission requests that complainants keep their complaints confidential, in order to avoid the Commission's ability to successfully investigate a complaint being hindered by publicity. Although it cannot demand that complainants adhere to this, it has asked that complainants who wish to make their complaint public

⁴ Complaints Guideline, paragraph 5.3.
⁵ Complaints Guideline, paragraphs 5.1–5.4.
⁶ Complaints Guideline, paragraph 4.2.
⁷ Competition Ordinance, Section 125.

inform the Commission of their intention to do so prior to disclosing the information to the public.⁸

6.019 Finally, as a result of the obvious advantages of secrecy when it is conducting an investigation, the Commission has indicated that it will not comment on what it is investigating.⁹

6.020 One of the consequences of these confidentiality provisions is that parties on the receiving end of a complaint do not know they are the subject of a complaint and therefore there is no right of defence at the complaint stage. In practice, it is very likely that the Commission will have carefully considered a complaint and proceeded to commence an initial assessment of a case before the party that has allegedly contravened the Ordinance is aware that it is under scrutiny. This is discussed in detail at Chapter 7 – Investigations.

6. COMPLAINTS MADE SO FAR TO THE COMMISSION

6.021 Even prior to the Ordinance coming into force, a number of parties already approached the Commission with complaints relating to alleged anti-competitive behaviour. The Commission's 2015 annual report reveals that between 20 July 2014 and 31 March 2015, one-third of the 96 queries it received might have been classified as complaints that warranted further assessment by the Commission if the Ordinance were in force on these dates. These potential complaints primarily related to the travel and hospitality, fuel and energy, telecommunications, real estate and property management sectors, and they were primarily made by small-and-medium-sized entities and individuals, with the vast majority of them relating to the First Conduct Rule.¹⁰

6.022 Although the Commission lacked the investigation powers to act on these complaints as the Ordinance was not in force as the time they were made, it appears to have taken each of these queries seriously, recording them in its annual report and noting that it would keep evidence of them for future reference.

6.023 In addition, the first two market studies conducted by the Commission in 2015, in the petrol retail market¹¹ and the building maintenance sector,¹² are believed to have been triggered by a high number of complaints from the public in these industries, either directly to the Commission or, historically, to the Consumer Council which then passed on the complaints to the Commission. Market studies are discussed in Chapter 7 – Investigations.

⁸ Complaints Guideline, paragraph 3.2.

⁹ Complaints Guideline, paragraph 3.1.

¹⁰ Competition Commission, *Annual Report 2014/2015*, pp. 46–48.

¹¹ South China Morning Post, *Competition Commission targets petrol market in Hong Kong*, 28 April 2015.

¹² South China Morning Post, *Hong Kong's competition watchdog eyes oil prices, building maintenance as ordinance nears*, 17 February 2015.

CHAPTER 7

INVESTIGATIONS

	PARA.
1. Introduction	7.001
2. The Different Phases of the Investigation Process	7.005
(a) Before the investigation: market studies.....	7.006
(b) Before the investigation: initial assessment phase.....	7.012
(i) No enforcement powers until there is a “reasonable cause to suspect that a contravention has taken place”.....	7.013
(ii) The Commission’s discretion to investigate.....	7.015
(iii) Outcome of the initial assessment phase	7.017
(c) Investigation phase	7.026
(i) Powers of the Commission during the investigation phase.....	7.027
(d) After the investigation	7.040
(i) No further action.....	7.041
(ii) Warning notice.....	7.044
(iii) Infringement notice	7.048
(iv) Commitments	7.051
(v) Commencement of proceedings before the Tribunal	7.055

1. INTRODUCTION

The Commission does not have the power to impose fines, rather its role is to investigate possible contraventions of the Ordinance and to bring proceedings before the Tribunal if it considers that a breach of the Ordinance has occurred. 7.001

The Commission may learn about alleged contraventions of the Ordinance via several channels. A complaint about an alleged contravention may be made to the Commission by an aggrieved third party;¹ a leniency applicant may “blow the whistle” to the Commission, disclosing evidence of a cartel in exchange for immunity from fines or for lenient treatment; or the Commission may find out about a possible contravention of the law via its own research, market knowledge or as a result of another investigation. Upon learning about a possible contravention of the Ordinance, the Commission may decide to investigate. As is commonly the case in other jurisdictions, the Commission has a wide discretionary power when deciding whether or not to investigate a case, or to continue an existing investigation at each stage of the investigation process. 7.002

In addition to conducting investigations, the Commission is able to carry out market studies, which allow it to assess whether a market is functioning in a competitive manner, without requiring the Commission to have a reasonable suspicion, at that stage, that a contravention of the Ordinance has occurred. 7.003

In this chapter, we will explain the Commission’s investigation process, setting out the different stages of the process and the Commission’s powers at each stage of the investigation. 7.004

2. THE DIFFERENT PHASES OF THE INVESTIGATION PROCESS

The investigation process is split into two different phases: after an initial assessment phase, the Commission may decide to take the case through to the investigation phase. Until it does so, the Commission cannot use its compulsory investigation powers. 7.005

(a) Before the investigation: market studies

Although not formally part of the investigation process, market studies are often used by competition authorities as a “first step” to gather information and uncover possible anti-competitive conduct, as a prelude to conducting a formal investigation. Market studies allow the Commission to probe a sector as a whole, without needing the reasonable suspicion that a contravention of a competition rule has occurred that the Commission needs to initiate an actual investigation. The Commission has the power to conduct market studies pursuant to Section 130 of the Ordinance. 7.006

The Commission may launch a market study to better understand an industry or because it has suspicions that a sector may not be functioning in a competitive manner, but it falls short of having evidence that a conduct rule has been breached. Although market 7.007

¹ Complaints are discussed in detail in Chapter 6 – Complaints.

studies are the “lightest” form of intervention by the Commission, they serve as useful tools for the Commission to learn more about the competitive dynamics of a sector and they can potentially reveal anti-competitive conduct, leading to the initiation of a formal investigation by the Commission. They are also far-reaching, as exempt bodies or entities can receive information requests in the context of market studies.

- 7.008** The Commission has not been granted enforcement powers as part of the market study process. As a result, the process is a voluntary one and market players cannot be compelled to cooperate with the Commission during the market study process. Nevertheless, it can be expected that most entities will cooperate at least to a minimum extent if they are approached by the Commission to participate in a market study, so as to maintain good relations with the Commission. In some cases, cooperating with the Commission at the market study stage may be a way to minimise the risk of an investigation being launched.
- 7.009** Prior to the substantive provisions of the Ordinance coming into force, the Commission had already begun two markets studies, which it was able to do since its market study powers under Section 130 of the Ordinance came into force before the provisions bringing the conduct rules came into force. The two market studies initiated by the Commission to date are in the retail fuel and the building maintenance sectors. These two market studies are a direct result of public pressure to look into these issues, following a high number of complaints in these two sectors about perceived anti-competitive conduct or, more generally, high prices. As of April 2016, the Commission had not announced the results of these two market studies.
- 7.010** The Commission does not have any powers to compel changes to be made following a market study. It cannot, for example, demand that businesses make divestment following a market study in order to introduce a new entrant to the market, making it more competitive. This is in contrast to other competition authorities, such as the UK authority, which recently compelled the divestment of some UK airports following a market study.²
- 7.011** However, the Commission may use its findings from a market study to make recommendations to government or other regulatory bodies. Alternatively, the Commission may uncover sufficient evidence during a market study to initiate an investigation into breach of a conduct rule. The Commission is not compelled to take action following a market study so if, in fact, the study does not reveal anything particularly useful to the Commission, it can simply close the case without taking further steps.

(b) Before the investigation: initial assessment phase

- 7.012** Prior to commencing an investigation, the Commission may conduct an “initial assessment”, which acts as a screening mechanism, allowing the Commission to assess

² In 2009, following a two-year investigation into the market for airport services, the UK competition authority found that common ownership of airports by the same operator prevented competition between them. The authority ordered airport operator BAA to divest three airports in the UK, including Gatwick, Stansted and one Scottish airport.

whether it is appropriate to conduct a formal investigation into an alleged conduct or activity.

(i) No enforcement powers until there is a “reasonable cause to suspect that a contravention has taken place”

At the initial assessment phase, the Commission will try to determine whether it is reasonable to conduct an investigation and whether there is sufficient evidence to establish a reasonable cause to suspect that a contravention of a competition rule has occurred.³ Until this is established, the Commission cannot use its compulsory investigation powers. It cannot, for instance, obtain a warrant to conduct a dawn raid, or demand that a company provides information or appears before the Commission. Instead, during the initial assessment phase, the Commission will rely on voluntary contacts with people who may have knowledge of suspected conduct and on publicly available information and it may conduct surveys. The Commission may also, depending on the circumstances, contact the undertakings that are the subject of an initial investigation, requesting relevant information from them, although the Commission cannot compel such undertakings to provide it with any information at this stage.⁴

In determining whether or not to follow the initial assessment phase with a formal investigation, the Commission will take into consideration a range of factors, including whether the evidence suggests the Ordinance has been contravened; the potential impact of the alleged conduct on competition and consumers; the chances of success of the case and the Commission’s own enforcement strategies, priorities and objectives.⁵ The final element the Commission will take into consideration is “whether the resource requirements of further investigation are proportionate to the expected public benefit”. This does not mean, however, that an expensive investigation will automatically be shunned by the Commission. All the elements cited above will be considered together in a cost/benefit analysis and the Commission may decide that the high cost of a contemplated investigation will be outweighed by the large public benefits that are likely to be produced.

(ii) The Commission’s discretion to investigate

The Ordinance requires the Commission to have “reasonable cause to suspect that contravention of a competition rule has taken place, is taking place or is about to take place” in order for it to commence an investigation.⁶ The Commission interprets this as conferring a low threshold on it, considering that it only needs to satisfy itself “beyond mere speculation” that a contravention of the Ordinance has taken place, and not as needing evidence that “on balance, tends to suggest that a contravention has occurred”.⁷

³ Competition Commission, *Guideline on Investigations*, 27 July 2015 (“Investigation Guideline”), paragraph 3.1.

⁴ Investigation Guideline, paragraph 3.4.

⁵ Investigation Guideline, paragraph 3.6.

⁶ Competition Ordinance, Section 39.

⁷ Investigation Guideline, paragraph 5.1.

- 7.016 The Commission is not bound by timeframes when making a decision whether to commence an investigation and there is no time limit by which the initial assessment phase must be completed, as each case will vary on the nature and complexity of each matter, and on the resources available to the Commission at the time. However, the Commission notes that some initial assessment phases may be very short.⁸
- (iii) Outcome of the initial assessment phase**
- 7.017 There are four possible outcomes to the initial assessment phase:⁹
- (A) No further action
- 7.018 If, at the end of the initial assessment phase, the Commission determines that it would not be reasonable to conduct an investigation, or that there is not sufficient evidence to establish a reasonable cause to suspect that a contravention of the competition rules has taken place, it can decide to take no further action.
- 7.019 The Investigation Guideline indicates that, where the matter was opened following a complaint by a member of the public, the Commission will provide an explanation as to why it is taking no further action to the complainant in writing.¹⁰ It is unclear whether this explanation will be made public, although it is possible that this will be the case when multiple complaints have been received.
- 7.020 If the Commission decides not to take action, complainants will have very few options at this stage, as there is no right of private action for an alleged contravention of the Ordinance. It will be possible to challenge the Commission's refusal to open an investigation under the judicial review process, but the Commission's large discretion to open an investigation means that the bar for judicial review will be very high and it is likely to be extremely difficult to prove that the Commission erred in its decision not to open an investigation.
- (B) Opening of an investigation
- 7.021 If the Commission is satisfied that it would be reasonable to open an investigation, and that the initial assessment phase revealed sufficient evidence to establish a reasonable cause to suspect that a contravention of the Ordinance has taken place, it can open an investigation.
- 7.022 Where the Commission chooses this course of action, it will endeavour to keep complainants informed as a matter progresses. However, confidentiality considerations and the need to be able to conduct effective investigations mean that the Commission will most likely not inform complainants of internal steps, such as whether a matter is at the initial assessment phase or whether a formal investigation has been opened.¹¹

⁸ Investigation Guideline, paragraph 3.2.

⁹ Investigation Guideline, paragraph 4.1.

¹⁰ Investigation Guideline, paragraph 4.2.

¹¹ Investigation Guideline, paragraph 4.4.

- (C) Alternative means of addressing the issue
- The Commission has several alternative options available to it, if it finds indications that a market may not be competitive but it chooses not to open an investigation. One of these options is to refer the matter to another agency, which the Commission may do if it considers that another body, such as the Communications Authority, the Independent Commission Against Corruption, or the Securities and Futures Commission is better placed to look into a matter. **7.023**
- Another alternative is for the Commission to open a market study if it has not already undertaken one as part of the pre-investigation stage. Market studies are discussed at paragraphs 7.006–7.011. **7.024**
- (D) Voluntary resolution of the matter
- Competition authorities are often more interested in seeing anti-competitive behaviour cease rather than in prosecuting violators. Therefore, the Commission could decide to accept commitments by an entity to voluntarily change its behaviour in order to alleviate any concerns the Commission has at the end of the initial assessment phase. Commitments are discussed at paragraphs 7.051–7.054. **7.025**
- (c) Investigation phase**
- If the Commission decides to launch an official investigation, it will begin its "investigation phase", at which point it may use its compulsory information gathering powers, granted to it under the Ordinance. Parties who fail to comply with orders issued at this phase face potentially serious consequences. **7.026**
- (i) Powers of the Commission during the investigation phase**
- (A) Written requests for documents and information
- The Commission can issue written notices to obtain documents or specified information, pursuant to Section 41 of the Ordinance (a "**Section 41 Notice**") if it has reasonable cause to suspect that a person has, or may have, possession or control of documents or information relating to the contravention of the competition rule.¹² "Documents" in this instance is defined widely to include "information recorded in any form".¹³ **7.027**
- The Commission must indicate in the Section 41 Notice the subject matter and the purpose of the investigation¹⁴ and it can also specify in the notice the time, place, manner and form in which any document or information is to be produced.¹⁵ The Commission's powers pursuant to issuing the Section 41 Notice include the ability to request explanations about the documents it has gathered, including from former employees of the relevant undertaking.¹⁶ **7.028**

¹² Competition Ordinance, Section 41.

¹³ Competition Ordinance, Section 2.

¹⁴ Competition Ordinance, Section 41(3)(a).

¹⁵ Competition Ordinance, Section 41(4).

¹⁶ Competition Ordinance, Section 41(5)(ii).

7.029 It is a criminal offence to fail to comply with a Section 41 Notice, to destroy or falsify documents, or to provide false or misleading documents or information to the Commission.¹⁷ In order to be valid, the Section 41 Notice must make this clear.

(B) Request for attendance before the Commission to answer questions

7.030 Pursuant to Section 42 of the Ordinance, the Commission can require in writing any person to attend before it at a time and place specified in the written notice (“Section 42 Notice”). As with the Section 41 Notice, a Section 42 Notice requiring a person to appear before the Commission must indicate the subject matter and the purpose of the investigation, and must make clear the nature of the criminal offences that apply to non-compliance with the notice (for example, in relation to providing false or misleading documents or information to the Commission).

7.031 The Investigation Guideline states that the Commission may summon current or former employees, competitors, customers, distributors, suppliers, representatives of relevant trade associations or complainants to appear before it pursuant to a Section 42 Notice. It also clarifies that the same person may be called upon to answer the Commission’s questions more than once and that, if necessary, interviews with the Commission may last more than one day (in which case the person interviewed will not be “detained” or restrained in any way, but will simply be required to attend an interview on the following day or on another date).

7.032 Persons appearing in front of the Commission can be accompanied by a lawyer. The Investigation Guideline requires that lawyers representing persons appearing before the Commission hold a Hong Kong practising certificate.¹⁸

(C) Dawn raids

7.033 Unannounced inspections by the Commission, or “dawn raids”, are the most powerful tools in the Commission’s arsenal. After obtaining a warrant from the Court of First Instance, the Commission can arrive at premises unannounced, in order to obtain documents, information and any other items that are relevant to its investigation (including electronic items and personal belongings).

7.034 A Commission may obtain a warrant to search premises where it has reasonable grounds to suspect that there are, or are likely to be, documents that may be relevant to a Commission investigation on the premises. Dawn raids are not limited to an investigated company’s office or production site: the Commission may obtain a warrant to search “any premises” and this could include the investigated party’s suppliers or customers sites. Further, although the Ordinance and the Investigation Guideline do not expressly state as much, it is likely that “any premises” will be interpreted widely to mean that the Commission can raid individuals’ private homes if they consider that there are reasonable grounds to suspect documents relevant to an investigation are housed there.

¹⁷ Competition Ordinance, Sections 52, 53 and 55.

¹⁸ Investigation Guideline, paragraph 5.19.

The warrant authorises the Commission to enter and search the premises specified in it and, as a result, companies should carefully check that the company name and address specified in the warrant are correct, as, if they are not, there may be grounds to assert that the Commission is not permitted to enter the premises. 7.035

The warrant gives the Commission broad powers to, among other things, use reasonable force to enter the premises if necessary, remove any obstructions to the execution of the warrant and take any relevant actions to preserve documents or prevent interference with them.¹⁹ The Commission can also: 7.036

- search any part of the specified premises, including desks, bookshelves and cabinets, and take away anything that might appear relevant, including hard drives, servers and mobile phones;
- take possession of, and/or make copies of, documents that appear relevant;
- request any person on the premises to produce any document or to give an explanation of any document appearing to be relevant;
- require an explanation as to why documents cannot be found, if relevant; and
- demand that a document is produced in a form that can be taken away – for instance by requesting that emails are copied on to a USB drive.

The Commission is not obliged to wait for legal advisers to arrive at the premises before commencing its search. However, if parties have requested that their lawyer be present and there is no in-house lawyer already on the premises, the Commission has indicated that it will wait for a reasonable time for external counsel to arrive.²⁰ 7.037

Although the Commission has very wide-ranging powers during a dawn raid, it does not have unfettered access to whatever it wants. In particular, the Commission is not permitted to access documents that are covered by legal professional privilege (where a document has been created for the purpose of seeking legal advice), and the Commission may only seize documents that are relevant to the scope of its investigation, as set out in the warrant. In relation to the former, in December 2015, the Commission published a guidance document setting out how it will treat claims of legal professional privilege during an investigation, including the approach the Commission will take to contested documents, where the party under investigation claims privilege over a document but the Commission either disputes the claim or forms the view that only a part of the document is covered by legal professional privilege.²¹ In relation to the latter, although not yet clear, it is likely that the description of the investigation in the warrant will be as broad as possible, so as not to restrict the Commission’s powers too much in this respect. 7.038

It is a criminal offence to fail to comply with any order of the Commission’s inspectors when they are acting under a warrant, and it is a criminal offence to obstruct the 7.039

¹⁹ Investigation Guideline, paragraph 5.30.

²⁰ Investigation Guideline, paragraph 5.31.

²¹ Competition Commission, *Investigation Powers of the Competition Commission and Legal Professional Privilege*, 31 December 2015.