

Draft Guideline on
Applications for a Decision
under Sections 9 and 24
(Exclusions and Exemptions)
and Section 15
Block Exemption Orders – 2014

Contents

1	Introduction	2
2	Exclusions and Exemptions	3
3	Confidentiality	6
4	Other Commission Procedures	7
5	Considering Whether to Make an Application or Block Exemption Application	7
6	Application Process for a Decision	10
7	Preliminary Assessment of Application	13
8	Consideration of Application	14
9	Making a Decision	16
10	Post-Decision Matters	17
11	Exercise of the Commission’s Discretion Whether to Issue a Block Exemption Order	19
12	Considering Whether to Issue a Block Exemption Order	22
13	Issuing a Block Exemption Order	23
14	Matters Arising After the Issue of a Block Exemption Order	25

Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders

*This Guideline is jointly issued by the Competition Commission (the “**Commission**”) and the Communications Authority (the “**CA**”) under sections 35(1)(b) and (c) of the Competition Ordinance (Cap 619) (the “**Ordinance**”). The Guideline sets out:*

- *the manner and form in which the Commission will receive applications for a decision or block exemption order; and*
- *how the Commission expects to exercise its power to make a decision or issue block exemption orders.*

While the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the CA in respect of the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors.¹ Unless stated otherwise, so far as a matter relates to conduct falling within this concurrent jurisdiction, references in this Guideline to the Commission are to be read as applying also to the CA.

¹ The relevant undertakings specified under section 159(1) of the Ordinance. These are licensees under the Telecommunications Ordinance (Cap 106) (the “**TO**”) or the Broadcasting Ordinance (Cap 562) (the “**BO**”), other persons whose activities require them to be licensed under the TO or the BO, or persons who have been exempted from the TO or from specified provisions of the TO pursuant to section 39 of the TO.

I Introduction

- 1.1 The Ordinance applies to all sectors of the economy. It prohibits certain conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. This conduct includes anti-competitive arrangements and abuses of a substantial degree of market power. The Ordinance also prohibits mergers which substantially lessen competition. These prohibitions are collectively referred to in this Guideline as the “**Competition Rules**”. Detailed guidance on the Competition Rules 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*.
- 1.2 The Competition Rules recognise that free and competitive markets benefit consumers, businesses and the economy. Businesses and consumers benefit from the process of rivalry in the marketplace. The Competition Rules seek to preserve that rivalry.
- 1.3 In limited circumstances, conduct which might otherwise be anti-competitive may produce benefits which should be considered in assessing the detriment caused by that conduct.
- 1.4 The Ordinance allows for a limited regime of exclusions and exemptions which, if applicable, have the effect of providing immunity to undertakings² for conduct which would otherwise be prohibited under the First Conduct Rule and/or the Second Conduct Rule (collectively, the “**Conduct Rules**”). These exclusions and exemptions are discussed in Part 2 of this Guideline. Specific guidance on exemptions and exclusions from the Merger Rule are provided in the *Guideline on the Merger Rule*.
- 1.5 Undertakings to whom an exclusion or exemption applies will not contravene the Ordinance. There is no requirement for undertakings to apply to the Commission in order to secure the benefit of a particular exclusion or exemption. Equally, undertakings may assert the benefit of any exclusion or exemption as a “defence” to any proceedings before the Competition Tribunal or other courts.

² The term “undertaking” is defined in section 2 of the Ordinance and refers to any entity (including a natural person), regardless of its legal status or the way in which it is financed, which is engaged in an economic activity. Examples of undertakings include individual companies, groups of companies, partnerships, individuals operating as sole traders, co-operatives, societies, business chambers, trade associations and non-profit organisations. Further guidance on what constitutes an undertaking is provided in the Commission’s *Guideline on the First Conduct Rule*.

- 1.6 However, the Ordinance provides that undertakings may elect to apply to the Commission under section 9 and/or section 24 (“**Application**”) for a decision under section 11 and/or section 26 (“**Decision**”) as to whether or not an agreement³ or conduct⁴ is excluded or exempt from the Conduct Rules. The Commission is only required to consider Applications for a Decision under certain circumstances.
- 1.7 Pursuant to section 15 of the Ordinance, the Commission may also issue block exemption orders (“**Block Exemption Orders**”) exempting categories of agreements that enhance overall economic efficiency (“**Excluded Agreements**”). As defined by section 15(5) of the Ordinance, Excluded Agreements are particular categories of agreements excluded from the application of the First Conduct Rule under section 1, Schedule 1 of the Ordinance. The Commission may issue a Block Exemption Order in response to an application (“**Block Exemption Application**”) or on its own initiative.
- 1.8 This Guideline provides undertakings which are considering whether to make an Application or a Block Exemption Application with general guidance on the:
- (a) procedure to follow in applying for a Decision or a Block Exemption Order; and
 - (b) process that the Commission will follow in making Decisions and issuing Block Exemption Orders.

2 Exclusions and Exemptions

- 2.1 The Ordinance provides for the following exclusions and exemptions:
- (a) general exclusions from the Conduct Rules listed under Schedule 1:
 - i. agreements enhancing overall economic efficiency;
 - ii. compliance with legal requirements;
 - iii. services of general economic interest;
 - iv. mergers;
 - v. agreements of lesser significance; and
 - vi. conduct of lesser significance(collectively, the “**General Exclusions**”);

³ A reference to “agreements” in this Guideline in the context of sections 9 and 11 of the Ordinance (Applications and Decisions regarding the First Conduct Rule) includes agreements to which an undertaking has made or given effect, is giving effect or is proposing to make or give effect.

⁴ A reference to “conduct” in this Guideline in the context of sections 24 and 26 of the Ordinance (Applications and Decisions regarding the Second Conduct Rule) includes conduct which an undertaking has engaged, is engaging in or is proposing to engage in.

- (b) section 3 excludes statutory bodies from the application of the Competition Rules (“**Statutory Body Exclusion**”), unless the Chief Executive in Council specifies otherwise under regulations; and
- (c) the Chief Executive in Council may:
 - i. under sections 4 and 5, provide for exclusions under regulations from the Competition Rules in respect of specified persons and persons engaged in specified activities (“**Specified Person or Activities Exclusion**”);
 - ii. under section 31, publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules on public policy grounds (“**Public Policy Exemption**”); and
 - iii. under section 32, publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules to avoid a conflict with international obligations that directly or indirectly relate to Hong Kong (“**International Obligations Exemption**”).

2.2 The Ordinance also provides that an undertaking may make an Application for a Decision to confirm whether an existing Block Exemption Order applies to its agreement(s).

2.3 Figure I below summarises which exclusions and exemptions apply in respect of each Conduct Rule.

General Exclusions

2.4 The *Guideline on the First Conduct Rule* and the *Guideline on the Second Conduct Rule* set out the Commission’s approach to assessing the application of the General Exclusions.

Scope of Statutory Body Exclusion

2.5 Statutory bodies, as defined in section 2(1) of the Ordinance, are excluded from the Competition Rules unless they are specifically brought within the scope of those rules by a regulation made by the Chief Executive in Council under section 5 of the Ordinance.

2.6 The reference to a statutory body in section 3 includes an employee or agent of the statutory body acting in that capacity. The Statutory Body Exclusion does not, however, extend to legal entities owned or controlled by a statutory body unless those entities are also statutory bodies.⁵ Moreover, the Statutory Body Exclusion does not extend to undertakings that might engage in anti-competitive arrangements with an excluded statutory body. Those undertakings remain subject to the Ordinance.

Exclusions and exemptions made by the Chief Executive in Council

2.7 Any regulations and orders made by the Chief Executive in Council in respect of exclusions and exemptions from the Conduct Rules can be found on the Commission's website.

Figure 1. Table of exclusions and exemptions from the Conduct Rules

Relevant exclusion or exemption		Exclusion or exemption from First Conduct Rule	Exclusion or exemption from Second Conduct Rule
General Exclusions	Agreements enhancing overall economic efficiency	✓	
	Compliance with legal requirements	✓	✓
	Services of general economic interest	✓	✓
	Mergers	✓	✓
	Agreements of lesser significance	✓	
	Conduct of lesser significance		✓
Block Exemption Orders		✓	
Public Policy Exemption		✓	✓
International Obligations Exemption		✓	✓
Statutory Body and Specified Person or Activities Exclusions		✓	✓

⁵ In any event, the definition of statutory body does not include a "company" as defined in the Ordinance (including a company within the meaning of section 2(1) of the Companies Ordinance (Cap 622)).

3 Confidentiality

- 3.1 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission. Any party submitting information to the Commission may request confidential treatment of that information. Such a request should be in writing and provide reasons justifying the claims to confidentiality. The Commission may seek further clarification as to the reasons justifying any claims to confidentiality.⁶
- 3.2 Section 126 of the Ordinance lists the exceptions to section 125, including a general exception for disclosures made by the Commission in the performance of its functions. Section 126 disclosures are not limited to where the Ordinance expressly requires the Commission to publish information.

Where confidentiality should not be claimed

- 3.3 In a number of instances the Commission is required by the Ordinance to make certain information pertaining to an Application or Block Exemption Application publicly available for comment.
- 3.4 Form AD and Form BE are the relevant forms, respectively, for an Application for a Decision and a Block Exemption Application. Undertakings may not refrain from answering questions in these forms on the basis of confidentiality. Where an applicant wishes to make a claim for confidentiality in respect of information in one of these forms, it should identify the relevant information and provide a statement setting out the reasons why the information is confidential pursuant to section 123 of the Ordinance. The undertaking should also submit a non-confidential version of the Application or Block Exemption Application.

Considering the scope of confidentiality claims

- 3.5 To make a Decision or to issue a Block Exemption Order, the Commission will assess the veracity and relevance of information provided by parties. This assessment is often achieved by seeking the views of other parties on information provided to the Commission.

⁶ Even if the Commission initially allows information to be treated as confidential, it may, at a subsequent point in time, require where appropriate the submitting party to re-submit the non-confidential version of the relevant document or correspondence with that item of information included.

3.6 Unnecessarily broad claims for confidentiality may:

- (a) impede the Commission's ability to assess and rely on the information provided by a party; and
- (b) increase the risk that information the party does not want to be disclosed is disclosed under section 126(1)(b) of the Ordinance.

4 Other Commission Procedures

- 4.1 Information received by the Commission from applicants or other parties cannot be confined for use only in the Commission's processes for making a Decision or issuing a Block Exemption Order. The Commission can use any information received, with or without notice, for other purposes under the Ordinance.
- 4.2 As a general matter, applicants are encouraged to seek legal advice before approaching the Commission about an Application or Block Exemption Application.

5 Considering Whether to Make an Application or Block Exemption Application

- 5.1 Any undertaking may apply to the Commission for a Decision or Block Exemption Order. In addition, associations of undertakings ("**Associations**") may apply to the Commission for a Block Exemption Order.
- 5.2 There is no obligation on each undertaking involved in an agreement or conduct which is the subject of an Application or Block Exemption Application to be a party to the application or to make their own application.
- 5.3 In relation to Block Exemption Applications, the Commission expects the applicant to be representative of a wider industry interest and the applicant must demonstrate that this is the case. However, the Commission expects the cooperation of all undertakings that are party to the agreements in question to provide information which might assist the Commission in its consideration of the Block Exemption Application.

Need for a Decision or Block Exemption Order

- 5.4 It is up to undertakings and Associations to assess for themselves whether their agreements and/or conduct complies with the Conduct Rules. The Ordinance provides for certain exclusions and exemptions from the Conduct Rules in limited circumstances.
- 5.5 There is no requirement that there be a Decision or Block Exemption Order before undertakings or Associations may rely on applicable exclusions and exemptions. Undertakings or Associations may self-assess the legality of their conduct having regard to the Conduct Rules and the exclusions and exemptions from those rules.
- 5.6 If an undertaking wishes to seek greater legal certainty, it may wish to apply to the Commission for a Decision or a Block Exemption Order. An Association may similarly apply for a Block Exemption Order.

Whether to apply for a Decision or Block Exemption Order

- 5.7 A Decision may be made by the Commission in relation to any exclusion or exemption listed in Figure 1. As discussed at paragraph 1.7 of this Guideline, Block Exemption Orders may only be issued by the Commission in relation to Excluded Agreements.
- 5.8 Where similar agreements enhancing overall economic efficiency are commonly used by undertakings throughout a market, it may be more appropriate for undertaking(s) or Associations to consider seeking a Block Exemption Order for such agreements rather than apply separately for a Decision regarding their specific agreement. This is a matter which should be discussed with the Commission prior to making any application.
- 5.9 There is no need for the Commission to make a Decision before it issues a Block Exemption Order.

Lodging Applications

- 5.10 Form AD and Form BE set out the minimum information to be included in Applications for Decisions and Block Exemption Applications. These forms will be available on the Commission's website. Further detail on information required by Form AD and Form BE respectively are at paragraphs 6.16 and 11.13 of this Guideline.

- 5.11 Applicants may, and generally will, be required to provide further information during the course of the Commission's review. Applicants will be expected to provide timely responses to any such information requests.
- 5.12 Where documents in support of submissions are not available in English or Chinese, the applicant should provide a translation into one of these languages. In the appropriate circumstances, the Commission may require translations only of relevant extracts.
- 5.13 The Commission will publish and update on its website further requirements as to the format, number of electronic and/or paper copies, the relevant email address(es) to be used for submissions and other practical requirements to assist applicants.

Fee payable

- 5.14 A fee will be payable to the Commission in respect of Applications and Block Exemption Applications pursuant to section 164 of the Ordinance.⁷ The fee will be returned if the Commission declines to consider the application.

Applications and Block Exemption Applications do not provide immunity

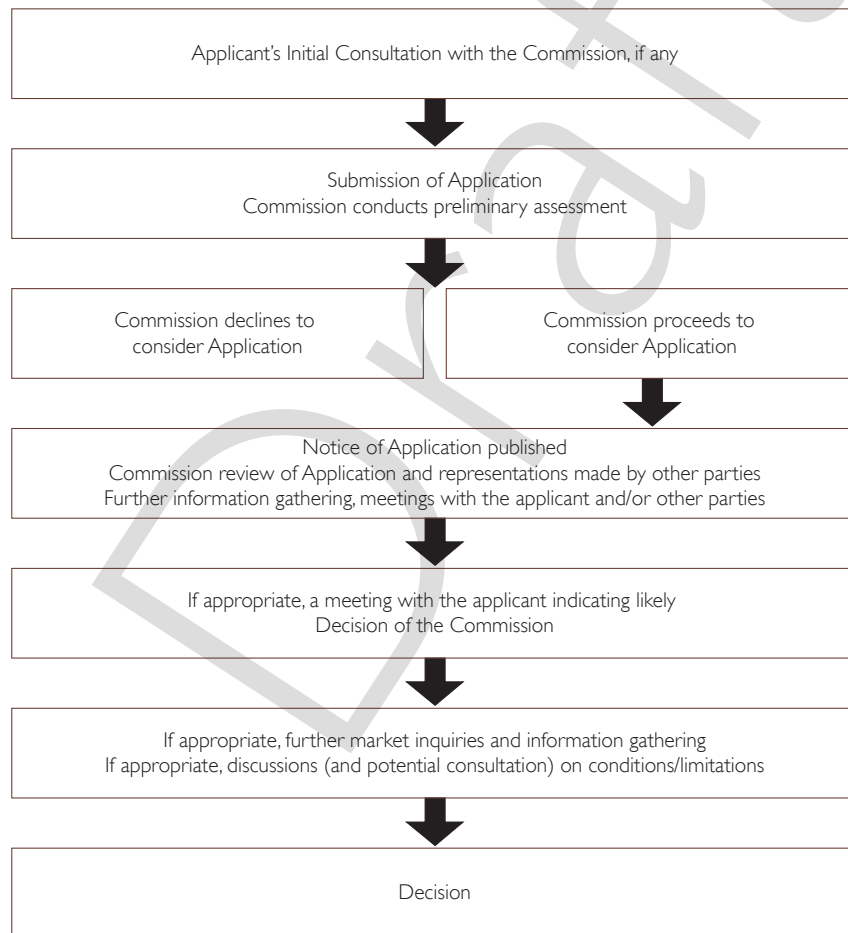
- 5.15 Where an application is made in relation to an existing agreement or conduct, the Ordinance does not afford the undertakings concerned any immunity. The Commission may in its discretion, initiate enforcement action in respect of any such agreement or conduct (including proceedings before the Tribunal) if it declines to consider an application, make a Decision, or issue a Block Exemption Order. In any such case, the Commission may use information provided by the applicant in the relevant enforcement action (see Part 12 of this Guideline).
- 5.16 Applicants are therefore encouraged to seek legal advice before making an Application or Block Exemption Application as noted above.

⁷ The fees chargeable are to be prescribed in a regulation made by the Chief Executive of the Hong Kong SAR. Information on the relevant fees will be made available on the Commission's website.

6 Application Process for a Decision

- 6.1 Figure 2 below outlines the main steps in the application process for a Decision.
- 6.2 The Ordinance does not provide any timeframe for the Commission's review of an Application or prescribe any deadline for making a Decision. The timing of a particular review will vary depending on, for example, the complexity of the case and the availability of Commission resources.

Figure 2. Key steps for an Application



- 6.3 The Commission expects Applications to be complete and accurate. The Commission intends to specify a timeframe or deadline for the submission of responses to Commission information requests. Applicants should respond in a timely manner to any Commission information requests.

Factors the Commission will consider in determining whether to consider an application

6.4 Under sections 9(2) and 24(2) of the Ordinance, the Commission is only required to consider an Application in certain circumstances:

- (a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under the Ordinance;
- (b) the application raises a question of an exclusion or exemption under the Ordinance for which there is no clarification in existing case law or decisions of the Commission; and
- (c) it is possible to make a decision on the basis of the information provided

(collectively, the “**Suitability Factors**”).

6.5 The Commission will generally only consider Applications that fulfil all the Suitability Factors.

Novel or unresolved question of wider importance

6.6 In deciding whether an Application “*poses a novel or unresolved question of wider importance or public interest*” for the purposes of sections 9(2)(a) and 24(2)(a), the Commission may consider, in particular, the following:

- (a) the economic importance, from the point of view of the consumer, of the goods or services concerned by the agreement or conduct; and/or
- (b) the extent to which the agreement or conduct or similar agreements or similar conduct is in widespread usage in the marketplace.

No clarification in existing case law or Commission decisions

6.7 Before submitting an Application, an applicant should confirm that there is no existing guidance in the case law of the Tribunal or orders, decisions, guidelines or other publicly available materials of the Commission.

Sufficient information to make a Decision

6.8 The onus is on the applicant to provide sufficient evidence to support its Application.

- 6.9 Form AD sets out the information the Commission generally requires for the purposes of making a Decision. Applicants should also consider the *Guideline on the First Conduct Rule* and *Guideline on the Second Conduct Rule* to assist them in understanding what evidence is likely to be required to support their Application.
- 6.10 Applicants should consider what information they wish to be confidential prior to submitting this information (see Part 3 of this Guideline).

Not a hypothetical question

- 6.11 The Ordinance does not require the Commission to consider an Application if the Application concerns hypothetical questions or agreements.
- 6.12 In this context, the Commission will not generally consider an Application regarding agreements or conduct which have ceased. Undertakings may, however, apply for a Decision in relation to a future agreement or conduct in which they intend to engage. In this case, the applicant must provide sufficient details of the specific agreement or conduct that would enable the Commission to decide on the merits of the Application.

Initial Consultation prior to applying for a Decision

- 6.13 Potential applicants may approach the Commission prior to submitting an Application ("**Initial Consultation**"). While there is no obligation to engage in an Initial Consultation, the Commission strongly encourages all potential applicants to do so.
- 6.14 Initial Consultation affords the Commission an opportunity to discuss with the applicant jurisdictional and other matters. In particular, Initial Consultation may allow the Commission and the applicant to prepare for the process of making an Application by identifying key issues and possible competition concerns at an early stage and the evidence that the Commission would need to assess these concerns.
- 6.15 During the Initial Consultation the Commission may highlight to a potential applicant that an alternative procedural route under the Ordinance (e.g. offering a commitment under section 60 of the Ordinance) may be more appropriate depending on the nature of the specific conduct in question.

Preparing an Application

6.16 An Application, accompanied by the appropriate fee, should be made to the Commission by submitting a completed Form AD. Form AD requires, among other things:

- (a) information relating to the applicant and the other parties to the agreement or conduct (including contact information, a description of key business activities, information on controlling shareholders and turnover data);
- (b) a detailed description of the relevant agreement or conduct (including copies of any relevant documents (including agreements or draft agreements));
- (c) information on the provisions or elements of the agreement/conduct which might give rise to competition concerns and a detailed explanation of the nature of those concerns including possible theories of harm;
- (d) an explanation of the applicant's view of the relevant markets involved together with market share data (including for competitors) and other information on the competitive situation in such markets;
- (e) information on affected suppliers and customers and their contact details;
- (f) a reasoned explanation (including supporting evidence) as to why the applicant believes the relevant agreement/conduct satisfies the terms of a particular exclusion or exemption; and
- (g) an overview of submissions made to competition authorities in other jurisdictions with respect to the same agreement or conduct (if any).

6.17 The Commission will acknowledge receipt of all Applications it receives which comply with the requirements of Form AD.

6.18 Where an applicant has made any claims for confidentiality in relation to an Application, a non-confidential version of the Application should also be provided to the Commission. The non-confidential Application will be publicised by the Commission should it decide to consider the Application (see paragraph 8.2 of this Guideline).

7 Preliminary Assessment of Application

7.1 The Commission will conduct a preliminary assessment based on the information provided by the applicant. The purpose of the preliminary assessment is to decide whether the Commission will consider the Application based on the Suitability Factors and other issues outlined in paragraphs 6.4 to 6.12 of this Guideline.

Potential outcomes of preliminary assessment

- 7.2 After a preliminary assessment of an Application, the Commission will either:
- (a) decline to consider the Application; or
 - (b) elect to consider the Application.
- 7.3 If the Commission declines the Application, it will inform the applicant that it will not consider the Application. Such an outcome does not constitute a Decision. It also does not indicate the Commission's position on whether the relevant agreement or conduct:
- (a) is excluded or exempt from application of the Conduct Rules; or
 - (b) raises a concern under the Conduct Rules.
- 7.4 If the Commission elects to consider the Application under section 10 or 25 of the Ordinance, it will inform the applicant.
- 7.5 The timeframe for preliminary assessment will depend on the nature and complexity of each matter, as well as the resources available to the Commission at the time. Where the applicant has engaged with the Commission in an Initial Consultation and provides an Application consistent with the issues discussed during that consultation, the timeframe for preliminary assessment may be shorter than otherwise.

8 Consideration of Application

- 8.1 Where the Commission decides to consider an Application under sections 10 or 25 of the Ordinance, it will:
- (a) publicise the Application; and
 - (b) engage with parties likely to be affected by a Decision.

Publicising the Application

- 8.2 The Commission will publicise an Application in accordance with sections 10(1) or 25(1) of the Ordinance, including by posting a notice of the Application together with a non-confidential version of the Application on the Commission's website.

Engagement with parties likely to be affected by a Decision

- 8.3 The Commission will engage with, and consider representations from, parties likely to be affected by a Decision (for example, competitors, suppliers, or customers of the applicant) in accordance with sections 10(1) or 25(1) of the Ordinance. Pursuant to section 10(2) of the Ordinance, the Commission will specify the period within which representations about the Application may be made when it publishes the notice of the Application. Interested parties will be given at least 30 calendar days to make representations about the Application beginning after the day on which the notice is first published.
- 8.4 During this process, the Commission may meet with the applicant and other parties as appropriate. The Commission may also seek the views of trade associations, sectoral regulators or industry representative bodies. The Commission will seek additional information from the applicant or other parties as appropriate.
- 8.5 With a view to transparency in its decision making, the Commission will generally publish submissions and representations on its website. For this reason, the Commission requires the applicant and other parties to submit non-confidential versions of their submissions and representations if confidentiality claims are being made.

Engagement with the applicant

- 8.6 The Commission may invite the applicant to provide additional written submissions or further evidence in response to representations received.
- 8.7 During the review of the Application, the Commission may also have one or more meetings with the applicant to discuss such matters as the following:
- (a) any concerns raised by the Application;
 - (b) any preliminary views about the merits of the Application; and
 - (c) any questions raised by the information submitted by the applicant or submitted by or obtained from third parties.
- 8.8 The applicant will be given an opportunity to comment or to make further submissions in a timely manner during or after the relevant meeting.

- 8.9 After the completion of the review of the Application and before making a Decision, the Commission may meet with the applicant to convey its views on the merits of the Application and any conditions and limitations being considered. The applicant will be given an opportunity to comment at the meeting or in a timely manner after the meeting.
- 8.10 Generally, the Commission will not publish a draft of its proposed Decision for public comment. However, the Commission may choose in certain cases to publish a draft when the Decision is likely to be of wider relevance for the market.

9 Making a Decision

- 9.1 After reviewing relevant information and considering representations made within the timeframe for consultation, the Commission will make a Decision in accordance with sections 11 or 26 of the Ordinance. The Decision may be that the agreement or conduct:
- (a) is not excluded or exempt from application of the Conduct Rules;
 - (b) is excluded or exempt from application of one or more of the Conduct Rules; or
 - (c) is excluded or exempt from application of one or more of the Conduct Rules, subject to conditions or limitations.
- 9.2 Sections 11(3) and 26(3) of the Ordinance require the Commission to inform the applicant in writing of the Decision, the date of the Decision and the reasons for it.
- 9.3 A non-confidential version of the Decision will be published on the Commission's website and register in accordance with section 34 of the Ordinance.

Effect of a Commission Decision

- 9.4 Under sections 12 and 27 of the Ordinance, where the Commission makes a Decision that an agreement or conduct is excluded or exempt, the undertaking specified in the Decision is immune from action under the relevant Conduct Rule with respect to that agreement or conduct.

- 9.5 The need for conditions or limitations on Decisions will be considered on a case by case basis. However, the Commission will likely limit the duration of a Decision's effect if the Decision confirms the applicability of an exclusion or exemption.⁸ Undertakings may however continue to rely on any applicable exclusions and exemptions after the expiry of a Decision.
- 9.6 A Decision that the agreement or conduct is not excluded or exempt from the application of the Conduct Rules:
- (a) is not a finding that the agreement or conduct contravenes the Conduct Rules; and
 - (b) does not necessarily mean that the Commission believes the agreement or conduct contravenes one of the Conduct Rules.
- 9.7 Such a Decision only represents the Commission's view that the agreement or conduct does not meet the requirements under the Ordinance for a relevant exclusion or exemption.

10 Post Decision Matters

Rescission

- 10.1 Sections 14 and 29 of the Ordinance provide that the Commission may rescind a Decision where the Commission has reason to believe that:
- (a) there has been a material change of circumstances since the Decision was made; or
 - (b) the information on which it based the Decision was incomplete, false or misleading in a material particular.
- 10.2 Where the Commission proposes to rescind a Decision, it will advise the undertaking specified in the Decision of its intention to do so and publicise the proposed rescission in accordance with sections 14(2) and 29(2) of the Ordinance, including by posting a notice of the proposed rescission on the Commission's website. This will include publishing a statement on the Commission's website that it is considering rescinding a Decision and the reasons why, and inviting the undertaking specified in the Decision and those persons it considers likely to be affected to make representations about the proposed rescission within the period specified in the notice.

⁸ The Commission will be particularly likely to limit the duration of a Decision to the extent that the Decision provides that an agreement is excluded from the application of the First Conduct Rule by or as a result of the General Exclusion for agreements enhancing overall economic efficiency.

- 10.3 Under sections 14(4) and 29(4), persons making representations will be given at least 30 calendar days to make representations on the proposed rescission beginning after the day on which the notice is published.
- 10.4 In accordance with sections 14 and 29 of the Ordinance, the Commission will engage with, and consider representations from, the persons likely to be affected by the proposed rescission. This may include meeting with them.
- 10.5 With a view to transparency in its decision making, the Commission will generally publish submissions and representations on its website. For this reason, the Commission requires submission of non-confidential versions of any submissions and representations.
- 10.6 Following a consideration of any representations received within the period identified in the notice of proposed rescission, the Commission may then proceed to issue a notice of rescission in line with the requirements of sections 14 and 29 of the Ordinance. This will be published on the Commission's website and register in accordance with section 34 of the Ordinance.
- 10.7 Where the Commission rescinds a Decision, undertakings for which the Decision provided immunity from action under the Ordinance lose their immunity from the date the rescission takes effect with regard to anything done after that date.

Compliance with conditions or limitations

- 10.8 Where the Commission has made its Decision subject to conditions or limitations, the Commission will monitor the undertaking's compliance with those conditions or limitations.
- 10.9 If an undertaking fails or ceases to comply with a condition or limitation subject to which a Decision has effect, sections 12(2), 13(1), 27(2) and 28(1) of the Ordinance provide that the immunity pursuant to that Decision ceases to apply with effect from the date on which the non-compliance begins.
- 10.10 Where an undertaking loses its immunity in view of a failure to comply with a condition or limitation, the Commission is entitled under section 13 or 28 to take enforcement action under the Ordinance.

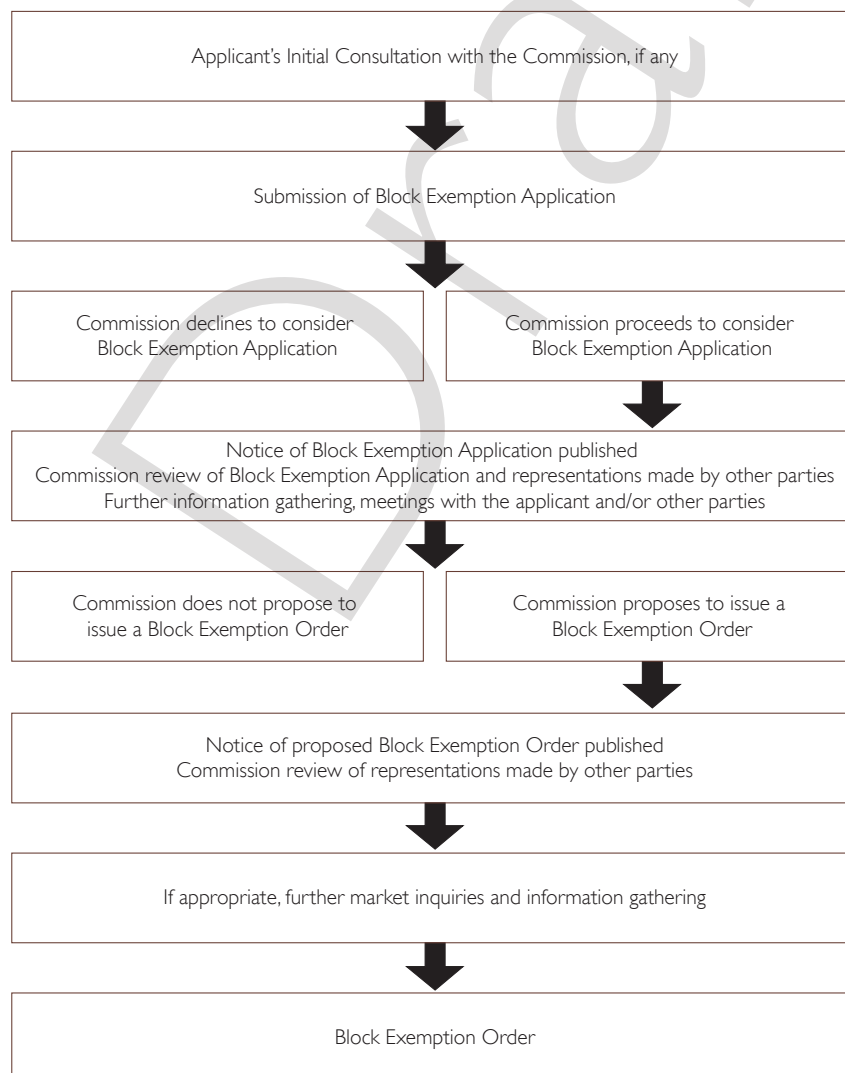
11 Exercise of the Commission's Discretion Whether to Issue a Block Exemption Order

- 11.1 Section 15(1) of the Ordinance provides the Commission with the discretion to issue a Block Exemption Order where it is satisfied that a particular category of agreement is an Excluded Agreement.
- 11.2 Under section 15(2) of the Ordinance, the process leading to the Commission issuing a Block Exemption Order may be initiated in one of two ways. The Commission may:
- (a) of its own volition and without having received any application, decide to initiate a process to consider whether to issue a Block Exemption Order ("**Commission Initiated Process**"); or
 - (b) in response to an application by one or more undertakings or an Association, decide to initiate a process to consider whether to issue a Block Exemption Order.
- 11.3 The Commission considers that the issue of a sector specific Block Exemption Order should be seen as an exceptional measure. The Commission will take into account whether the resources required for considering whether to issue a Block Exemption Order are likely to be proportionate to the expected public benefit of issuing such an order before commencing this process.
- 11.4 As outlined in paragraphs 5.4 to 5.6 of this Guideline, there is no requirement that the Commission issue a Block Exemption Order in order for undertakings or Associations to rely on the exclusion for agreements enhancing overall economic efficiency. Undertakings or Associations may self-assess the legality of their conduct having regard to the First Conduct Rule and the applicable exclusions and exemptions from those rules.
- 11.5 Block Exemption Orders may be relevant to a substantial portion of the Hong Kong economy. Developing a thorough understanding of the markets and potential impact of the Block Exemption Order may take considerable time. The Commission notes that in jurisdictions which provide for a block exemption regime similar to the regime under the Ordinance, it is not unusual for the process leading to the issue of a block exemption to take several years.
- 11.6 All undertakings and Associations considering making Block Exemption Applications are strongly encouraged to approach the Commission for an Initial Consultation before making any such application (see paragraphs 11.10 to 11.12 of this Guideline).

Process for applying to the Commission to issue a Block Exemption Order

- 11.7 Figure 3 below outlines the main steps in the application process for a Block Exemption Order.
- 11.8 The Ordinance does not provide any timeframe for the Commission's review of a Block Exemption Application or prescribe any deadline for making a Block Exemption Order. The timing of a particular review will vary depending on, for example, the complexity of the case and the availability of Commission resources.
- 11.9 A review of a Block Exemption Application is likely to take considerably more time compared with an Application.

Figure 3. Key steps for a Block Exemption Application



Initial Consultation for a Block Exemption Application

11.10 Potential applicants should approach the Commission prior to submitting a Block Exemption Application. While there is no obligation to engage in an Initial Consultation, the Commission strongly encourages all potential applicants to do so.

11.11 The Initial Consultation is to identify whether:

- (a) it is possible that the relevant category of agreements may be Excluded Agreements;
- (b) a Block Exemption Application is the appropriate procedure under the Ordinance;
- (c) there is likely to be sufficient evidence available for the Commission to consider issuing a Block Exemption Order; and
- (d) the resources required to consider whether to issue a Block Exemption Order are likely to be proportionate to the expected public benefit of issuing such an order.

11.12 In particular, Initial Consultation may allow the Commission to indicate to the applicant whether it is likely to consider the Block Exemption Application.

Preparing a Block Exemption Application

11.13 A Block Exemption Application, accompanied by the appropriate fee, should be made to the Commission by submitting a completed Form BE. Form BE requires, among other things:

- (a) information relating to the applicant and the parties to the agreements concerned by the proposed Block Exemption Order (including, to the extent available to the applicant, contact information, a description of key business activities for the parties concerned);
- (b) details of the category of agreement concerned by the proposed block exemption order (including copies of a sufficiently representative sample of agreements falling within the relevant category);
- (c) information on the provisions or elements of the agreements falling within the relevant category of agreement which might give rise to competition concerns and a detailed explanation of the nature of those concerns including possible theories of harm;
- (d) an explanation of the view of the applicant on the definition of the relevant markets affected together with market share data (including for competitors) and other information on the competitive situation in such markets;

- (e) information on affected suppliers and customers and their contact details to the extent available to the applicant;
- (f) a reasoned explanation (including supporting evidence) as to why the applicant believes the relevant category of agreement satisfies the terms of section 1 of Schedule 1 to the Ordinance (agreements enhancing overall economic efficiency);
- (g) if relevant, an explanation of factors in support of the applicant's claim that it is representative of a wider industry interest; and
- (h) in the case of an application involving a category of agreement which may be commonly adopted sector-wide, evidence that operations in the relevant sector show an enhanced need for cooperation between undertakings and that there would be a material negative impact on the functioning of the relevant markets contrary to the interest of consumers should a sector specific block exemption order not be issued.

11.14 The Commission will acknowledge receipt of all Block Exemption Applications it receives which comply with the requirements of Form BE.

12 Considering Whether to Issue a Block Exemption Order

- 12.1 Where the Commission is considering whether to issue a Block Exemption Order, based on either a Commission Initiated Process or a Block Exemption Application, it will:
- (a) publicise the Commission Initiated Process or Block Exemption Application; and
 - (b) engage with persons likely to be affected by a Block Exemption Order.
- 12.2 The Commission will assess whether the relevant category of agreement is eligible for a Block Exemption Order in accordance with the principles explained in the Commission's *Guideline on the First Conduct Rule*.
- 12.3 The timeframe for this assessment will depend on the nature and complexity of the matter, as well as the resources available to the Commission at the time. As set out above, considering whether to issue a Block Exemption Order is a complex process which may take some time.

12.4 After this process, the Commission will elect whether to issue a Block Exemption Order. This means the Commission may:

- (a) decline to issue a Block Exemption Order;
- (b) propose to issue a Block Exemption Order; or
- (c) propose to issue a Block Exemption Order subject to conditions or limitations.

12.5 If this process was initiated by a Block Exemption Application, the Commission will inform the applicant of this outcome.

13 Issuing a Block Exemption Order

13.1 Where the Commission proposes to issue a Block Exemption Order, section 16 of the Ordinance prescribes a process that must be undertaken before issuing the Block Exemption Order.

13.2 In accordance with section 16(1) of the Ordinance, the Commission will publicise the proposed Block Exemption Order. This will include posting on the Commission's website a notice of the proposed Block Exemption Order.

13.3 Under section 16(1) of the Ordinance, the Commission will also engage with, and consider representations from, persons likely to be affected by a Block Exemption Order. The Commission may also invite relevant parties to provide additional written submissions or further evidence in response to representations received. The Commission will seek additional information from parties as necessary.

13.4 Under section 16(3) of the Ordinance, persons will be given at least 30 calendar days to make representations on the proposed Block Exemption Order beginning after the day on which the notice is first published.

13.5 With a view to transparency in its decision making, the Commission will generally publish submissions and representations on its website. For this reason, the Commission requires the applicant and other persons to submit non-confidential versions of their submissions and representations.

13.6 After the process set out in section 16 of the Ordinance, the Commission will decide:

- (a) not to issue a Block Exemption Order;
- (b) to issue a Block Exemption Order; or
- (c) to issue a Block Exemption Order subject to conditions or limitations.

13.7 A decision not to issue a Block Exemption Order:

- (a) is not a finding that the category (or any) of the agreements subject of the application for a Block Exemption Order contravenes the First Conduct Rule; and
- (b) does not necessarily mean that the Commission believes the category (or any) of the agreements contravenes the First Conduct Rule.

13.8 Where the Commission decides to issue a Block Exemption Order (with or without conditions or limitations), it will proceed to issue the Block Exemption Order in line with the requirements of section 15 of the Ordinance. The Block Exemption Order will be published on the Commission's website and register in accordance with section 34 of the Ordinance.

Effect of issuing a Block Exemption Order

13.9 Under section 17 of the Ordinance, where the Commission issues a Block Exemption Order, an agreement that falls within a category of agreement specified in the Block Exemption Order is exempt from the application of the First Conduct Rule. However, the Block Exemption Order does not provide any exemption from the operation of the Second Conduct Rule.

13.10 Pursuant to section 15(3)(b) of the Ordinance, the Commission may specify a date from which a Block Exemption Order is to cease to have effect. The need to include conditions or limitations in Block Exemption Orders will be made on a case by case basis.

13.11 The Commission is required by section 19(1) of the Ordinance to commence a review of a Block Exemption Order on the date specified in that order for the commencement of the review. Under section 15(4) of the Ordinance, this review date must occur no later than five years from the date of the Block Exemption Order.

14 Matters Arising After the Issue of a Block Exemption Order

- 14.1 The Commission must commence a review of a Block Exemption Order on the date specified in the order for the commencement of the review.
- 14.2 The Commission may, however, review a Block Exemption Order at any time prior to the specified date in the Order for the commencement of a review if it considers it appropriate to do so. Section 19(3) of the Ordinance provides that when deciding whether or not to review a Block Exemption Order prior to the specified review date, the Commission may consider a number of matters but must consider the following:
- (a) the desirability of maintaining a stable and predictable regulatory environment in relation to competition;
 - (b) any developments that have taken place in the economy of Hong Kong or in the economy of any place outside Hong Kong that affect the category of agreement that is the subject of the Block Exemption Order; and
 - (c) whether any significant new information relating to the particular category of agreement has come to the knowledge of the Commission since the Block Exemption Order was first issued.
- 14.3 After its review, the Commission may vary or revoke the Block Exemption Order.
- 14.4 Where the Commission proposes to vary or revoke a Block Exemption Order, it will publicise the proposed variation or revocation in accordance with section 20 of the Ordinance. This will include posting a notice of the proposed variation or revocation on the Commission's website and inviting those persons the Commission considers likely to be affected to make representations about the proposed variation or revocation within the period specified in the notice.
- 14.5 Under section 20(4) of the Ordinance, persons will be given at least 30 calendar days to make representations on the proposed variation or revocation beginning after the day on which the notice is first published.
- 14.6 In accordance with section 20(2) of the Ordinance, the Commission will engage with, and consider representations from, parties likely to be affected by the proposed variation or revocation. This may include meeting with these parties.

- 14.7 With a view to transparency in its decision making, the Commission will generally publish submissions and representations on its website. For this reason, the Commission requires parties to submit non-confidential versions of their submissions and representations.
- 14.8 Following a consideration of any representations received within the period identified in the notice of proposed variation and revocation, the Commission may then proceed to issue a notice of variation or revocation in line with the requirements of section 20 of the Ordinance.

Undertakings' compliance with conditions or limitations

- 14.9 Where the Commission has made a Block Exemption Order subject to conditions or limitations, the Commission will monitor compliance with those conditions or limitations.
- 14.10 If an undertaking fails or ceases to comply with a condition or limitation subject to which a Block Exemption Order has effect, sections 17(2) and 18(1) of the Ordinance provide that the immunity pursuant to that Block Exemption Order ceases to apply to that undertaking with effect from the date on which the non-compliance begins.
- 14.11 Where an undertaking loses its immunity in view of a failure to comply with a condition or limitation, the Commission is entitled under section 18(3) of the Ordinance to consider taking enforcement action to the extent that the undertaking is involved in a contravention of the First Conduct Rule.

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