



Seminar for Trade Associations Getting Ready for the Full Implementation of the Competition Ordinance

29 October 2015

Outline

- Overview of the key provisions in the Competition Ordinance (“CO”)
- How the CO affects Trade Associations (what are the “Dos and Donts”)
- Hypothetical Examples
- Q&A

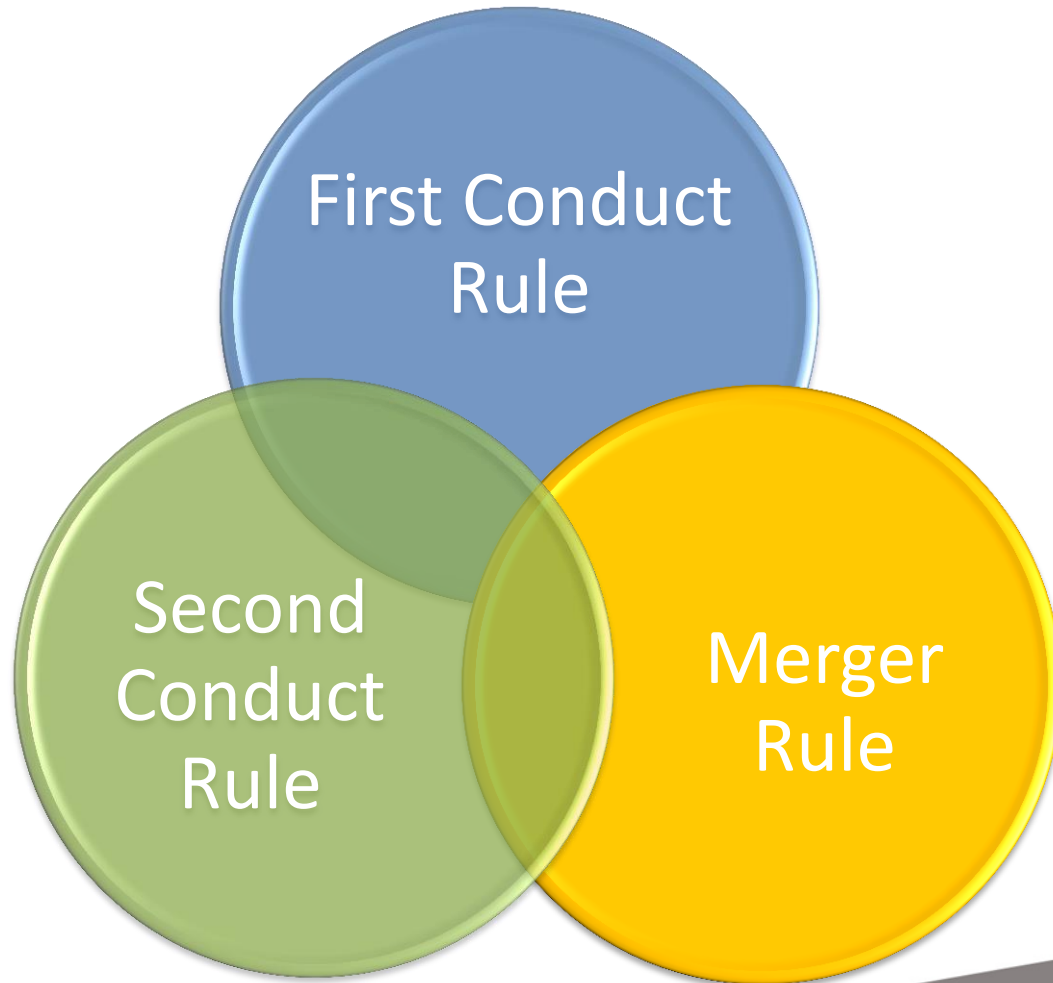


The Material Provisions of the CO

- The Competition Rules (First Conduct Rule; Second Conduct Rule; and the Merger Rule)
- The Statutory Exclusions
- Enforcement Provisions



The Competition Rules



First Conduct Rule (s6 CO)

- “(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*”



Elements of First Conduct Rule (s6 CO)

- (1) Undertaking;
- (2) Agreement /Concerted Practice / Making or giving effect to a decision of an association of undertakings;
- (3) Object or effect “harms” competition in Hong Kong.



First Conduct Rule – Horizontal agreements

- First Conduct Rule captures horizontal arrangements (arrangements between competitors)
- Examples of horizontal arrangements having the “**object**” of harming competition:
 - Horizontal “cartel” agreements involving **price fixing, market sharing, bid rigging, output restrictions (Serious Anti-competitive Conduct)**
 - Exchange of future price information = price fixing
 - Group boycotts
- Other horizontal arrangements generally assessed by reference to their **effects** e.g.
 - Joint purchasing arrangements
 - Most joint ventures
 - Agreements on standard terms



FCR hypothetical example – Price fixing

- A number of new car dealers meet to discuss supposed consumer confusion on car-financing options.
- Dealers agree to minimum interest rates on finance packages and not to offer discounts of more than 5% off the list price.
- Agreement has the object of harming competition – key elements of price should be determined independently and not in collaboration.



First Conduct Rule – Vertical agreements

- First Conduct Rule applies to vertical arrangements (arrangements between businesses at different levels of supply chain)
- Vertical arrangements which may have the “**object**” of harming competition:
 - Resale price maintenance (RPM)
 - Efficiency justification may however be possible for RPM, and in certain cases RPM may be assessed by reference to its effects
- Other than RPM, vertical arrangements generally assessed by reference to their **effects** e.g.
 - Recommended and maximum resale price restrictions
 - Exclusive distribution
- In certain cases, RPM may be Serious Anti-competitive Conduct
- Generally, vertical agreements not considered to be Serious Anti-competitive Conduct and therefore subject to:
 - Exclusion for agreements of “lesser significance”; and
 - Warning Notice mechanism



FCR hypothetical example - RPM

- HomeStore currently sells CleanupCo's products for HK\$50 – but has noticed its competitors are selling at much lower prices.
- HomeStore pressures CleanUpCo to require its customers to sell CleanUpCo products across Hong Kong at a fixed retail price determined by CleanUpCo.
- CleanupCo requires all its other customers to resell at same price as HomeStore.
- The Commission would view this arrangement as having the object of harming competition – and a form of **Serious Anti Competitive Conduct**.



Serious Anti-competitive Conduct

- Applies to First Conduct Rule Cases
- A defined term under section 2(1) of the Competition Ordinance
- Any conduct that consists of one or more of the following

Output restriction

Fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services

Market sharing

Allocating sales, territories, customers or markets for the production or supply of goods or services

Price fixing

Fixing, maintaining, increasing or controlling the price for the supply of goods or services

Bid rigging

Agreements among bidders in order to “rig” the bidding process for a tender



Serious Anti-competitive Conduct vs Other FCR contraventions

Serious Anti-competitive Conduct	Other FCR contraventions
The Commission may institute proceedings before the Tribunal without following the Warning Notice Procedure	The Commission must issue a Warning Notice to the undertaking concerned before bringing proceedings in the Tribunal
The general exclusion for agreements of lesser significance does not apply	All general exclusions apply c.f. Schedule 1 CO
The Commission may issue infringement notices instead of bringing proceedings before the Tribunal: s.67 CO	The provisions on infringement notices do not apply



Second Conduct Rule (s21 CO)

Section 21(1) “An *undertaking* that has a *substantial degree of market power* in a market must not *abuse* that power by engaging in conduct that has as its object or effect the *prevention, restriction or distortion of competition* in Hong Kong.”



Elements of Second Conduct Rule

- (1) Undertaking;
- (2) Substantial Market Power;
- (3) Abuse;
- (4) Harm to competition in Hong Kong.



SCR hypothetical example - Predatory pricing



- KowloonVend has the majority of vending machine sales in Hong Kong.
- New Vending enters the market in competition with KowloonVend and KowloonVend's sales begin to decline.
- In response, KowloonVend cuts its prices in half – its prices are now so low that it is not covering its costs and loses money with every sale of a vending machine.
- New Vending cannot compete with these low prices and eventually goes out of business.
- If KowloonVend has a substantial degree of market power, its conduct may be considered predatory and a violation of the SCR.



Merger Rule

- Only applies in mergers involving holders of carrier licenses: s.4 Sch. 7 CO
- Commission has concurrent jurisdiction with the Communications Authority



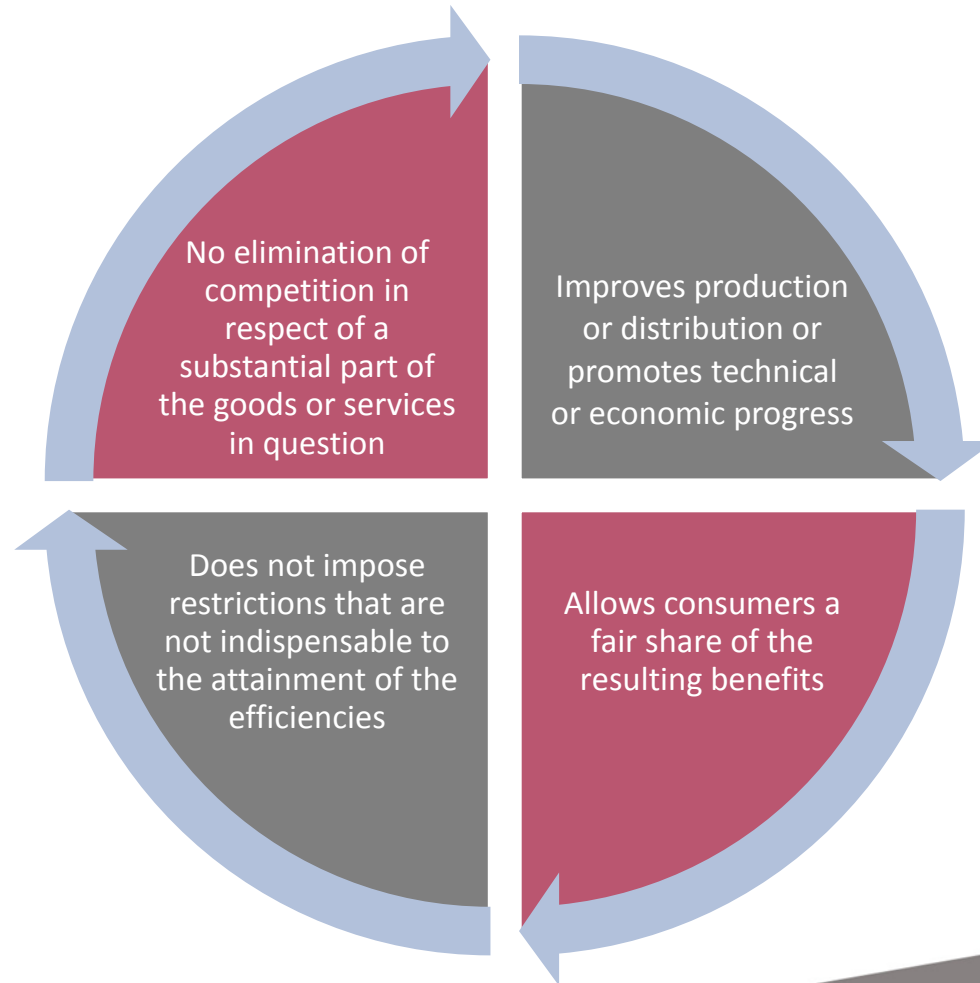
Statutory Exclusions (Schedule 1 CO)

1. Economic efficiency exclusion (First Conduct Rule only)
2. Compliance with legal requirements (**Hong Kong law**)
 - Mere encouragement or acceptance by Government or statutory body of anti-competitive behaviour insufficient
3. Services of General Economic Interest
4. Mergers
5. Lesser conduct/agreements exclusion – particularly relevant for SMEs
 - First Conduct Rule: **combined** turnover \leq HK\$200m - agreement between SME and larger company may not benefit from exclusion
 - Second Conduct Rule: turnover \leq HK\$40m

(Government regulation provides information on calculation of turnover; Commission will also publish guidance)



Economic efficiency exclusion



The Commission

Investigation

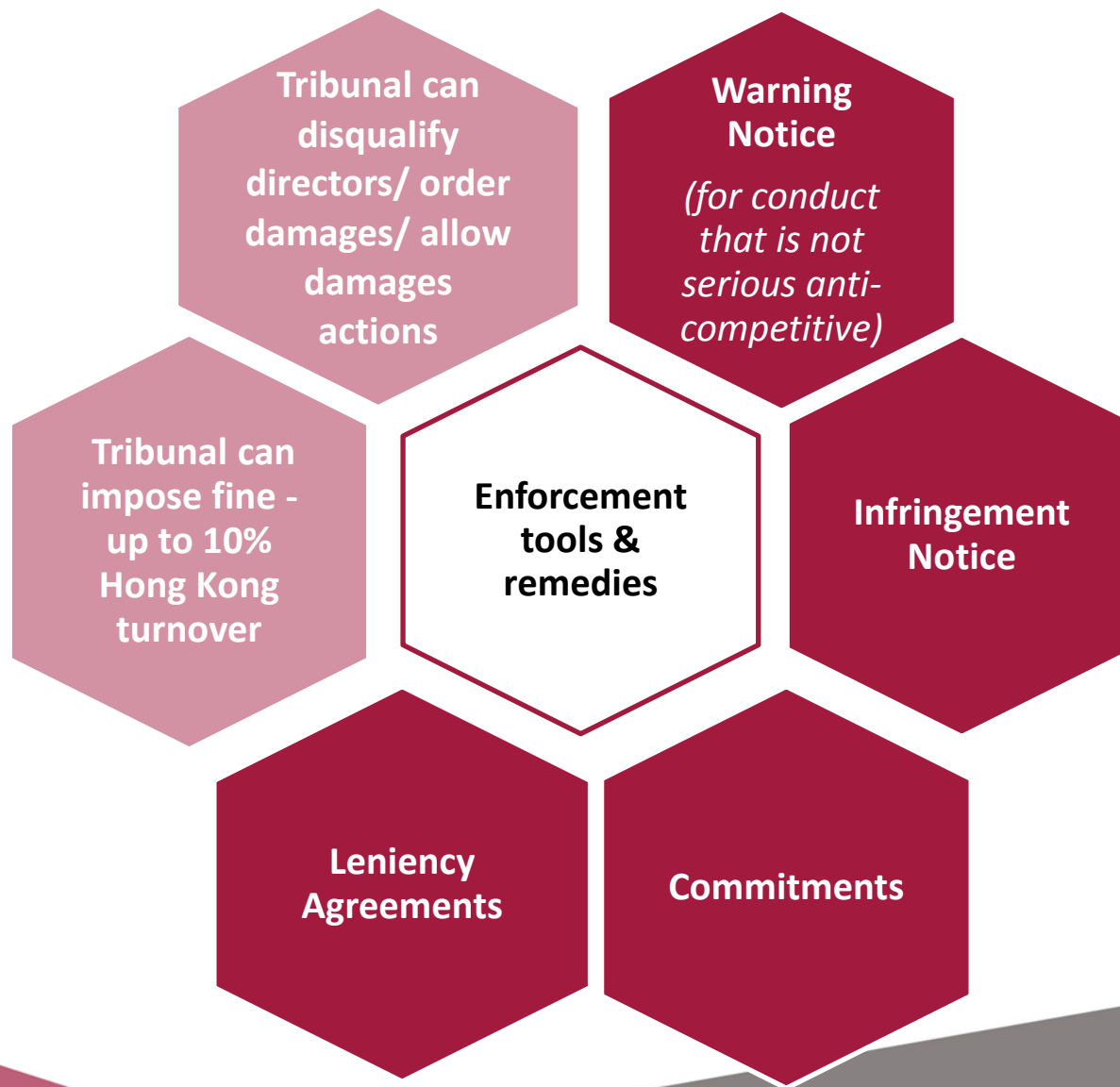
- Receives complaints
- Investigates cases. Range of enforcement powers – e.g. onsite inspections, requests for documents and interviews
- Can resolve cases by coming to agreement with parties under investigation or applying to Tribunal

Exclusions and exemptions

- Applications for decision on exclusion/exemptions
 - NB: exclusion/exemptions are automatically applicable, no need for prior decision from Commission
- Issues block exemption orders – of own volition or following application



Enforcement tools and remedies



Trade Associations

- May be subject to the Conduct Rule if the Association **itself** is regarded as being an undertaking.
- May, in any event, incur secondary liability even if not regarded as being an undertaking: s.91 CO *“aids, abets, counsel or procures”*; *“induces or attempts to induce”*; *“directly to indirectly knowingly concerned in or a party to the contravention”* etc.



Dos



Trade Associations

1. Continue to help members understand developments relevant to their industry and promote their industry's interests to government and customers.
2. Educate members on the Competition Ordinance.
3. Establish a Competition Ordinance compliance policy for the association; appoint or nominate an officer to oversee the compliance efforts of the association.
4. Exercise care when collecting information from members and avoid facilitating the sharing of competitively sensitive information.
5. Ensure that membership of the association is based on clear, objective and qualitative criteria; set up an appeal procedure for refusal to grant or suspension of a membership.
6. If your association certifies or awards quality labels to members to recognise that they have met certain industry standards, ensure that such certifications are based on objective and reasonable quality requirements and available to all that meet those requirements.
7. If your association is involved in setting standard industry terms relating to the supply of products or services, ensure that any standard-setting process is open and that the terms do not affect the price charged to customers. The standard terms should also be non-binding and effectively accessible to members and non-members.



Trade Associations

Don'ts



1. Don't recommend or require that members set particular prices for their products or particular fees for their services.
2. Don't impose restrictions on members with regard to the other terms and conditions on which they sell their products (for example, by fixing credit terms of sale).
3. Don't help members divide up their sales territories, including by geographic areas, types of customers or types of products.
4. Don't set or recommend production targets for members.
5. Don't coordinate or facilitate collusive tendering by members.
6. Don't help members share competitively sensitive information, i.e. strategic information that a business normally doesn't want its competitors to know, with each other.
7. Don't organise or encourage a boycott by members against targeted individuals / businesses.
8. Don't have rules or codes restricting or reducing competition among members, for example, imposing terms that members should not solicit employees from competitors, or rules limiting members' discount/ promotional activities.
9. Don't use arbitrary rules to admit and/or expel members.
10. Don't prevent members from developing alternative standards or providing products that do not comply with the association's standards



Hypothetical Example 1

A trade association in the insurance sector circulates **non-binding** standard policy terms for car insurance to members.



The terms **do not relate to the maximum coverage, premiums or other price elements.**

A large number of insurers use the standard terms, but contracts are **varied** and **tailored** to individual client needs.

The standard terms are accessible to all insurers on equal terms including potential new entrants.



Hypothetical Example 1 (cont)

The Commission is **unlikely** to have concerns regarding these standard terms.

The insurance policies that adopt such standard terms are **still tailored to individual customer needs**.

The standard terms may **also encourage competition as they allow consumers to compare the various products on offer, facilitate switching between insurers and assist new companies to enter the market**.



Hypothetical Example 2

A trade association for junk owners collects from and circulates to its members information on their **proposed future prices**.

This includes information on the proposed prices they will be charging for specific journeys.

The information **is not made available to the public** and is circulated in **advance** of a seasonal price review by the association members.



Hypothetical Example 2 (cont)



This arrangement would give rise to serious concerns for the Commission and **liability could result for the trade association and its members.**

The information exchange allows the junk owners to adjust their **future pricing** to reflect the proposed pricing of competitors and thus **reduces price competition in the market.**

The information exchange arrangement is an **indirect form of price fixing.**





Thank you!

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