

## Circular

Circular No. 16-01 (CR)

### *First Conduct Rule*

- Do not enter into or give effect to agreements which have the object or effect of preventing, restricting or distorting competition, in particular do not engage in price fixing, market sharing, output limiting, or bid rigging with your competitors.
- Make commercial decisions for your business independently.
- Do not participate in meetings where anti-competitive agreements are likely to be reached or discussed.
- Refrain from seeking competitively sensitive information from competitors or discussing or sharing such information with competitors or acting on such information.

### *Estate Agency Associations and Members*

- Refrain from issuing recommendations to members on rates of commission.
- Do not give effect to recommendations of estate agency associations which may harm competition.

### *Second Conduct Rule*

- Undertakings with a substantial degree of market power must not abuse their market power by engaging in conduct which has the object or effect of preventing, restricting or distorting competition.

### *Commitment to Compliance*

- Take appropriate and practicable steps such as risk identification, risk assessment, risk mitigation and regular reviews, to ensure that the estate agency business does not contravene the requirements of the Competition Ordinance.

## Compliance with the Competition Ordinance

The Competition Ordinance (Cap. 619) (“Ordinance”), the objective of which is to prohibit conduct that prevents, restricts or distorts competition in Hong Kong, has come into full effect as from

14 December 2015. The Ordinance applies to all sectors of the economy, including the estate agency industry. This Circular sets out certain guidelines to assist estate agency companies<sup>1</sup> to comply with the Ordinance when carrying out their estate agency businesses.

## **Overview of the Ordinance**

(2) The Ordinance prohibits undertakings (i.e. entities that are engaged in economic activity) from engaging in the following three types of conduct:

- (a) anti-competitive agreements (“First Conduct Rule”);
- (b) abuse of substantial market power (“Second Conduct Rule”);  
and
- (c) anti-competitive mergers and acquisitions in the telecommunications sector.

The rules which estate agency companies must comply with are the First Conduct Rule and the Second Conduct Rule (where applicable). Certain key provisions in the Ordinance which relate to the First Conduct Rule and the Second Conduct Rule are set out in the **Annex**.

## **Compliance with the Conduct Rules**

### *First Conduct Rule*

#### *Dealing with Competitors*

(3) The First Conduct Rule prohibits undertakings from making or giving effect to anticompetitive agreements, concerted practices and decisions of trade associations. In particular, it seeks to prevent competitors from colluding on key parameters of competition such as

---

<sup>1</sup> The term “estate agency company” or “estate agency companies” refers to licensed estate agents under the Estate Agents Ordinance and which may be “undertakings” for the purpose of the Competition Ordinance.

price, output or how they bid to harm competition in Hong Kong.

(4) Estate agency companies must not enter into agreements or engage in concerted practices which have the object or effect of preventing, restricting or distorting competition in Hong Kong. They must refrain from making or entering into arrangements (in writing or otherwise, expressed or implied) with their competitors to cooperate on pricing or other commercially strategic issues instead of competing with one another, such as agreeing on a formula to calculate commission or elements of commission such as discounts, rebates or other incentives, agreeing on dividing markets by geographic area, types of properties or customers, or agreeing not to enter into or expand into the other's market (by geographic area or otherwise).

(5) Estate agency companies should make their commercial decisions independently. They should determine their own strategies in the market, and in particular, their policies as regards rates of commission, scope of services and other competitive parameters. Estate agency companies must always make their own decisions about commission or negotiate individually with their customers rather than adopting or following any standard rate in the industry or a rate that is set collectively in any way.

(6) Estate agency companies must not discuss or exchange with their competitors competitively sensitive information such as information relating to planned pricing strategy, promotion plans and incentives etc. They should distance themselves from the discussions when attending a meeting if they have any suspicion during the meeting that an anti-competitive agreement is likely to be reached or discussed. Estate agency companies should withdraw from the meeting once it becomes clear that the meeting is anti-competitive in nature and such withdrawal from the meeting should be recorded.

(7) A concerted practice typically involves an exchange of competitively sensitive information between competitors. Estate agency companies should refrain from seeking (directly or indirectly through a third party, formally or otherwise) competitively sensitive information such as information relating to planned pricing strategy, promotion plans

and incentives etc. from their competitors or discussing or sharing such information with their competitors or acting on such information.

*Estate Agency Associations and Members*

(8) The First Conduct Rule also applies to decisions of an association of undertakings. Estate agency associations are associations of undertakings under the Ordinance and members of an estate agency association are therefore prohibited from making or giving effect to association decisions which have the object or effect of harming competition, even if the decisions were made before the full commencement date of the Ordinance.

(9) Estate agency associations should therefore refrain from giving any instruction or making any recommendation to members on rates of commission or any other commercial terms, in order to prevent their members from breaching the First Conduct Rule. Likewise, estate agency companies which are members of an estate agency association should not give effect to any recommendations of the association which may harm competition.

(10) If an estate agency association is also engaged in an economic activity in its own right (e.g. carrying out estate agency work), it may also be regarded as an undertaking under the Ordinance. In such a case, the estate agency association concerned shall also comply with the First Conduct Rule in respect of its activities.

*Second Conduct Rule*

(11) The Second Conduct Rule only applies where an undertaking has a **substantial degree of market power** in a market and it **abuses** that power by engaging in a conduct which has the object or effect of preventing, restricting or distorting competition.

(12) Generally, undertakings having high market shares are more likely to have a substantial degree of market power. Very large-sized estate agency companies may therefore possibly have substantial market

power in the market and they should be vigilant to ensure that they do not contravene the Second Conduct Rule.

(13) Estate agency companies which have a substantial degree of market power should note that neither the Ordinance nor the Guideline on the Second Conduct Rule<sup>2</sup> sets out an exhaustive list of anti-competitive abusive conduct. Nevertheless, conduct that has a foreclosure effect on competitors in the market is more likely to constitute an abuse and they should refrain from engaging in such conduct which may harm competition.

(14) Estate agency companies which have a substantial degree of market power should also note that the application of the Second Conduct Rule does not preclude the parallel application of the First Conduct Rule to the same conduct. For example, abusive conduct which takes the form of an agreement or a concerted practice may also contravene the First Conduct Rule at the same time, depending on the facts and circumstances of the case.

### **Commitment to Compliance**

(15) The management of estate agency companies should take appropriate and practicable steps to ensure that their businesses, including their employees or persons under their control, do not contravene the requirements of the Ordinance. Such steps may include:

- (a) risk identification: reviewing work practices and daily operations of the estate agency business to identify areas of competition risks. The risks faced by estate agency companies will depend on the type (e.g. the property markets which they are engaged in) and size of their operation;
- (b) risk assessment: working out how serious the identified risks are (e.g. classifying such risks as low, medium or high and assessing which employees are in the high risk areas);

---

<sup>2</sup> See paragraph 16 below.

- (c) risk mitigation: developing and adopting proper measures to mitigate and manage the identified risks (e.g. setting up policies, procedures and training for members of staff to reduce the likelihood of the occurrence of the risks occurring, and on how to detect and deal with such risks when they occur); and
- (d) regular reviews: reviewing the work practices and compliance strategies regularly to ensure that the estate agency business has an effective compliance culture. Whether estate agency companies decide to review their compliance efforts on an annual basis or less frequently, there may be occasions that they should consider a review outside the regular cycle, such as when there are business takeovers or if the estate agency company concerned is subject to a competition law investigation etc.

(16) The Competition Commission (“Commission”) has issued guidelines (“Guidelines”) on the Conduct Rules<sup>3</sup>. The Guidelines set out how the Commission intends to interpret and give effect to the Conduct Rules in the Ordinance and they may be downloaded from the Commission website at [www.compcomm.hk/en/legislation\\_guidance/guidance/first\\_conduct\\_rule/files/Guideline\\_The\\_First\\_Conduct\\_Rule\\_Eng.pdf](http://www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf) and [www.compcomm.hk/en/legislation\\_guidance/guidance/second\\_conduct\\_rule/files/Guideline\\_The\\_Second\\_Conduct\\_Rule\\_Eng.pdf](http://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf). Estate agency companies should refer to the Guidelines which may help determine whether their conduct complies with the Conduct Rules and are advised to seek legal advice on their implication, where necessary.

(17) The Commission also published two brochures to assist small and medium-sized enterprises<sup>4</sup> to understand the basic requirements

<sup>3</sup> The guidelines are entitled “Guideline on the First Conduct Rule” and “Guideline on the Second Conduct Rule” respectively.

<sup>4</sup> The Commission published a separate brochure entitled “The Competition Ordinance and Trade Associations” to help trade associations understand the Ordinance and to provide practical guidance on what trade associations should and should not do to minimise the risk of contravening the Ordinance. The brochure may be downloaded from the Commission website at [www.compcomm.hk/en/media/press/files/CC\\_TA\\_Brochure\\_Eng.pdf](http://www.compcomm.hk/en/media/press/files/CC_TA_Brochure_Eng.pdf).

of the Ordinance and to review their business practices and develop a compliance strategy respectively. The brochures may also be downloaded from the Commission's website at [www.compcomm.hk/en/media/reports\\_publications/files/CC\\_SME\\_Brochure\\_Eng.pdf](http://www.compcomm.hk/en/media/reports_publications/files/CC_SME_Brochure_Eng.pdf) and [www.compcomm.hk/en/media/reports\\_publications/files/CC\\_SME\\_Compliance\\_Toolkit\\_Eng.pdf](http://www.compcomm.hk/en/media/reports_publications/files/CC_SME_Compliance_Toolkit_Eng.pdf). Estate agency companies are advised to refer to the brochures to better understand the Ordinance, identify risk areas and set up compliance measures etc. according to the information provided in the brochures, where applicable.

If an estate agency company is found to have breached the Ordinance in its estate agency business, it may also have breached the Code of Ethics issued by the Estate Agents Authority ("EAA") in failing to refrain from activities which may infringe the law, in which case it may be subject to disciplinary action by the EAA.

April 2016

*Attention: Licensees should note that the guidelines contained in this circular only set out certain matters which licensees must pay attention to in their practices with regard to the requirements of the Ordinance, and they are not meant to be exhaustive. They are advised to read the full text of the Ordinance, which is available at [www.legislation.gov.hk](http://www.legislation.gov.hk), for a better understanding of the provisions which may be relevant to and are required to be observed or complied with in their practice.*

**Holders of Statements of Particulars of Business  
should bring this Circular to the attention of all staff  
engaged in estate agency work.**

**Summary of certain key provisions of the Competition Ordinance  
related to the First Conduct Rule and Second Conduct Rule**

**1. First Conduct Rule**

1.1 The First Conduct Rule prohibits agreements and concerted practices among undertakings<sup>1</sup>, as well as undertakings' implementing trade association decision as members of an association of undertakings, which have as their object or effect the prevention, restriction or distortion of competition in Hong Kong<sup>2</sup>.

1.2 The rule applies irrespective of whether the conduct took place in Hong Kong or outside Hong Kong, as long as its object or effect is to prevent, restrict, or distort competition in Hong Kong<sup>3</sup>.

1.3 "Agreement" is defined to include 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<sup>4</sup>.

1.4 "Concerted practice" is not defined in the Ordinance. The Competition Commission ("Commission") considers that a concerted practice is a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition<sup>5</sup>.

1.5 The First Conduct Rule applies where the object or effect of

---

<sup>1</sup> An undertaking means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity (section 2(1)).

<sup>2</sup> Section 6(1)

<sup>3</sup> Section 8

<sup>4</sup> Section 2(1)

<sup>5</sup> See paragraph 2.27 of the Guideline on the First Conduct Rule issued by the Commission in July 2015 ("Guideline on the First Conduct Rule")



an agreement or concerted practice or decision is to **harm** competition in Hong Kong. The following four types of conduct are defined in the Ordinance as “serious anti-competitive conduct”<sup>6</sup>:

- (a) price fixing: fixing, maintaining, increasing or controlling the price for the supply of goods or services;
- (b) market sharing: allocating sales, territories, customers or markets for the production or supply of goods or services;
- (c) output restrictions: fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services; and
- (d) bid rigging: agreements among bidders in order to “rig” the bidding process for a tender.

1.6 An agreement or a concerted practice which does not have an anti-competitive object may nevertheless contravene the First Conduct Rule if it has an anti-competitive effect<sup>7</sup>.

1.7 The Ordinance provides for certain exclusions and exemptions from the First Conduct Rule<sup>8</sup>. For example, the First Conduct Rule does not apply to an agreement between undertakings, a concerted practice engaged in by undertakings, or a decision of an association of undertakings if their combined turnover does not exceed \$200,000,000 provided that the conduct is **not** serious anti-competitive conduct as defined by the Ordinance<sup>9</sup>.

[Note: For further information on the Commission’s interpretation

---

<sup>6</sup> The Commission considers that agreements between competitors to fix prices, to share markets, to restrict output or to rig bids are agreements which have the object of harming competition (paragraphs 3.7 of the Guideline on the First Conduct Rule).

<sup>7</sup> Paragraph 3.16 of the Guideline on the First Conduct Rule

<sup>8</sup> Schedule 1

<sup>9</sup> Section 5(1) Schedule 1

and intended approach to the application of the First Conduct Rule and the relevant exclusions and exemptions, please refer to its *Guideline on the First Conduct Rule* (available at [www.compcomm.hk](http://www.compcomm.hk)) where various types of potentially anticompetitive commercial arrangements are discussed in detail with illustrative examples.]

## 2. **Second Conduct Rule**

2.1 The Second Conduct Rule prohibits an undertaking with substantial market power from abusing that power by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong<sup>10</sup>.

2.2 The prohibition applies to conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong even if the conduct engaged by the undertaking is outside Hong Kong<sup>11</sup>.

2.3 The following matters may be taken into account in determining whether an undertaking has a substantial degree of market power in a market:

- (a) the market share of the undertaking;
- (b) the undertaking's power to make pricing and other decisions;
- (c) any barriers to entry to competitors into the relevant market; and
- (d) any other relevant matters<sup>12</sup>.

---

<sup>10</sup> Section 21(1)

<sup>11</sup> Section 23

<sup>12</sup> Section 21(3)

2.4 The Second Conduct Rule applies where an undertaking with a substantial degree of market power in a market **abuses** that power by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong.

2.5 Without limiting the scope of conduct that may constitute an abuse of substantial market power, abusive conduct may include the following:

- (a) predatory behaviour towards competitors; or
- (b) limiting production, markets or technical development to the prejudice of consumers<sup>13</sup>.

2.6 The Ordinance provides for certain exclusions and exemptions from the Second Conduct Rule. For example, the Second Conduct Rule does not apply to an undertaking whose annual turnover does not exceed \$40,000,000<sup>14</sup>.

[Note: For further information on the Commission's interpretation and intended approach to applying the Second Conduct Rule and the relevant exclusions and exemptions, please refer to its *Guideline on the Second Conduct Rule* (available at [www.compcomm.hk](http://www.compcomm.hk)) where market definition and market power assessment methodologies, as well as various types of abusive conduct are discussed in detail with illustrative examples.]

### **3. Enforcement Procedures and Sanctions**

3.1 When investigating a suspected contravention of the Ordinance, the Commission has powers to:

- (a) require a person to produce any document or copy of any document or provide the Commission with

---

<sup>13</sup> Section 21(2)

<sup>14</sup> Section 6(1) of Schedule 1

specified information relating to any matter the Commission reasonably believes to be relevant to an investigation<sup>15</sup>;

- (b) require a person to attend before the Commission to answer questions relating to any matter the Commission reasonably believes to be relevant to an investigation<sup>16</sup>; and
- (c) enter and search premises where authorised by warrant<sup>17</sup>.

3.2 Following its investigation, if the Commission has reasonable cause to believe that a contravention of the First Conduct Rule has occurred and the contravention does not involve serious anti-competitive conduct, the Commission must, before bringing proceedings in the Competition Tribunal (“Tribunal”), issue a warning notice to the undertaking concerned<sup>18</sup>.

3.3 If the Commission has reasonable cause to believe that a contravention of the First Conduct Rule involving serious anti-competitive conduct has occurred, or that a contravention of the Second Conduct Rule has occurred, it may institute proceedings before the Tribunal direct without following the warning notice procedure.

3.4 Once the Tribunal is satisfied that a contravention has occurred, it has a range of sanctions available to levy against a contravening party<sup>19</sup>. These include pecuniary penalty, director disqualifications, prohibition and other orders<sup>20</sup>. As regards

---

<sup>15</sup> Section 41

<sup>16</sup> Section 42

<sup>17</sup> Section 48

<sup>18</sup> Section 82

<sup>19</sup> Including the undertaking and persons involved in contravention of the competition rule. See section 91.

<sup>20</sup> Part 6 and Schedule 3

pecuniary penalty, the Tribunal may impose a fine up to 10% of the turnover of the undertaking involved for up to three years in which the contravention occurred<sup>21</sup>.

[Note: Undertakings potentially subject to an investigation or Tribunal proceedings may approach the Commission to see if the Commission will accept a commitment to the Commission's satisfaction in order to achieve early settlement. For further information on the Commission's investigation procedures and possible outcomes, please refer to its Guideline on Investigations (available at [www.compcomm.hk](http://www.compcomm.hk)).]

*Attention: Licensees should note that the information contained in this Annex only contains a summary of some key provisions of the Ordinance related to the First Conduct Rule and the Second Conduct Rule and is not meant to be exhaustive. Licensees are advised to refer to the Competition Commission's website [www.compcomm.hk](http://www.compcomm.hk) for a better understanding of the Ordinance and their legal rights and obligations thereunder. For compliance assessment in relation to specific business conduct, licensees are encouraged to seek independent legal advice.*

---

<sup>21</sup> Section 93