

## Practice Circular on Compliance with the Competition Ordinance

### Questions and Answers (Q&As)

Notes:

1. All references to:
  - a. “EAA” shall mean the Estate Agents Authority.
  - b. “Commission” shall mean the Competition Commission.
  - c. “Ordinance” shall mean the Competition Ordinance (Cap. 619).
  - d. “Conduct Rules” shall mean the First Conduct Rule and the Second Conduct Rule; and “conduct rule” shall mean the First Conduct Rule or the Second Conduct Rule.
  - e. “SMEs” shall mean the small and medium-sized enterprises.
  - f. “Practice Circular” shall mean Circular No. 16-01 (CR) issued by the EAA on Compliance with the Ordinance.
  - g. “Tribunal” shall mean the Competition Tribunal.

The words and expressions used in these Q&As shall have, unless the context otherwise requires, the same meaning as those words and expressions have in the Practice Circular.

2. These Q&As are for general reference only. The answers/solutions suggested in the Q&As are not exhaustive and they do not constitute legal or professional advice. In considering whether a licensee has breached the Practice Circular, the EAA will consider each case on its own merits. You should seek legal or professional advice as and when necessary, especially on the interpretation of relevant legal provisions and specific advice on any individual case. In this

context you should note that the application of competition law is highly fact sensitive and the general statements in these Q&As are not a substitute for professional legal advice.

The EAA makes no warranty as to the completeness of the information set out in these Q&As, or the appropriateness of their use as a guide in any particular circumstances. The EAA will not accept any liability or responsibility whatsoever for any loss or damage caused to any person howsoever arising from any use, misuse of, or reliance on the contents of these Q&As.

## Q&As

### Liability under the Ordinance

**Q1.      The Conduct Rules apply to undertakings. Do the Conduct Rules apply to individual licensees operating as sole proprietors of estate agency businesses or estate agency partnerships?**

Answer: Yes.

Under the Ordinance, “undertaking” means any entity engaged in economic activity, and this includes companies, partnerships and individuals operating as sole proprietors. The key question is whether the relevant entity or natural person is engaged in an economic activity. While an individual partner is not an undertaking, an individual partner may still incur liability under the Ordinance as a person involved in a contravention by the partnership of which he is a member.

**Q2.** Referring to Q1 above, will an individual licensee (e.g. salesperson) who works for an estate agency company or partnership be liable under the Ordinance if he has been involved in a contravention of a conduct rule in the course of carrying out his estate agency work?

Answer: Yes.

While the Conduct Rules apply to undertakings, the Ordinance allows the Commission to seek, and the Tribunal to impose, sanctions against any person who has been involved in a contravention of a conduct rule by his employer undertaking. In this regard, the Commission may initiate proceedings against *persons* involved in a contravention of a conduct rule as defined in section 91 of the Ordinance, and persons in this context include persons – whether or not natural persons who are not themselves undertakings – who aided and abetted, counselled or procured any other person to contravene a conduct rule, induced or attempted to induce another person to contravene a conduct rule, were in any way knowingly concerned in or party to a contravention or conspired with another to contravene a conduct rule. The employees of an estate agency company (or partnership) may therefore incur liability as a result of section 91 of the Ordinance where they are involved in a contravention of the Conduct Rules.

**Q3.** Referring to Q2 above, will an estate agency company be held responsible for the wrongdoings of individual licensees (e.g. salespersons) who work for them under the Ordinance?

Answer: Yes.

Where an estate agency company employee is involved in a contravention of the Conduct Rules by his employer undertaking, both the company and the employee can incur liability under the Ordinance.

*Commission*

**Q4. Does the present industry practice of charging commission at the rate of 1% of the purchase price for sale and purchase and half a month's rental for tenancies ("typical rate of commission") by estate agency companies in respect of secondary market transactions contravene the First Conduct Rule?**

**Answer:** This depends on whether it can be shown that the industry practice is the result of an anti-competitive agreement or understanding between undertakings, a concerted practice or decision of an association of undertakings.

To avoid contravening the First Conduct Rule, estate agency companies should make their commercial decisions independently. Estate agency companies which do not make independent decisions on commission rates but collude or have colluded with competitors on the rate they will charge regardless of whether the rate is considered a typical rate of commission charged by the industry will contravene the First Conduct Rule. In this context estate agency companies are reminded that simply discussing proposed commission rates or their typical commission practices with competitors entails risks under the Ordinance.

Please refer to paragraphs 4 and 5 of the Practice Circular.



**Q5.** Referring to Q4 above, can estate agency companies continue to state the commission rate of 1% of the purchase price in the estate agency agreement if their clients do not object to it?

Answer: The law does not stipulate the amount or the rate of commission an estate agency company is entitled to, and estate agency companies are free to determine independently their own policy about commission rates and/or whether to negotiate with their clients on the rate. However, estate agency companies must not participate in discussions with competitors on any standard commission rate in the industry or otherwise agree a standard rate. The decision as to which rate to charge – including whether to charge a commission rate of 1% of the purchase price – must be an independent decision of the estate agency company.

Please refer to paragraphs 4 and 5 of the Practice Circular.

**Q6.** Can licensees respond to a customer enquiry about commission that charging 1% of the purchase price is “a customary practice or a norm”, “a standard rate in the industry” or that all other estate agency companies would charge the same rate?

Answer: No.

Licensees should not respond to a customer enquiry about commission that charging 1% of the purchase price is “a customary practice or a norm”, “a standard rate in the industry” or that all other estate agency companies would charge the same rate.

To avoid contravening the First Conduct Rule, estate

agency companies should make their commercial decisions independently. They 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.

In this regard, the management of estate agency companies should prepare guidelines on the company's policy regarding commission for staff to follow and provide sufficient training for relevant staff on how they should properly respond to customers' enquiries on commission.

Please refer to paragraphs 5 and 13 of the Practice Circular.

**Q7.** **Several estate agency companies charge their clients a commission at a rate of 1% of the purchase price at present. Will an agreement between them that some estate agency companies will charge their commission at a fixed rate of 1% of the purchase price (i.e. they will not negotiate with clients for any reduction of the commission) whereas others will set their commission at a rate of 1.5% of the purchase price but they will give a discount (or cash rebate) of 0.5% of the purchase price to their clients at the same time so that clients will effectively pay 1% of the purchase price contravene the First Conduct Rule?**

Answer: Yes.

Estate agency companies must not enter into agreements with their competitors to cooperate on pricing or other commercially strategic issues (e.g. commission rates, discounts, rebates and other incentives) instead of competing with one another. In the above scenario, by

agreeing that those charging a higher rate of commission (e.g. 1.5% of the purchase price) would give a bigger discount or cash rebate (e.g. 0.5% of the purchase price), the estate agency companies concerned in effect agreed on the final rate of commission that they will charge (i.e. 1% of the purchase price) notwithstanding the fact that they seem to have different rates of commission and incentives. In any event, the agreement on the level of discount or cash rebate itself contravenes the First Conduct Rule. As a general rule, matters such as commission rates, discounts or rebates should be determined independently by estate agency companies.

The conduct in the above scenario is highly likely to be considered serious anti-competitive conduct under the Ordinance.

Please refer to paragraphs 4 and 5 of the Practice Circular.

**Q8. Will the offering of cash rebate by a large-sized estate agency company to purchasers in the sale of first-hand residential properties contravene the Conduct Rules?**

Answer: Not necessarily.

Offering a cash rebate does not of itself contravene the Conduct Rules. In theory, if the estate agency company concerned has a substantial degree of market power and it offers a cash rebate to such an extent that it does not cover its costs in an attempt to force one or more other estate agency companies out of the market and/or to undermine the ability of other estate agency companies to compete effectively, then such conduct may be considered by the Commission to be an abuse in contravention of the Second Conduct Rule. In practice, however, establishing that an

estate agency company has a substantial degree of market power is a complex matter and should not be confused with merely being a big player in the market with deep pockets.

If the estate agency company concerned reached an agreement or engaged in a concerted practice with another estate agency company to offer cash rebate at a particular rate or amount, the conduct will contravene the First Conduct Rule.

Please refer to paragraphs 13 and 14 of the Practice Circular.

**Q9. The Ordinance contains certain exclusions specifically for SMEs. Will an agreement between two small-sized estate agency companies, each with an annual turnover of HK\$1 million, to charge their clients a commission at a fixed rate of 1% of the purchase price contravene the First Conduct Rule?**

Answer: Yes.

Although the annual turnover of HK\$1 million of the two estate agency companies is rather small, the price-fixing agreement between them mentioned above involves “serious anti-competitive conduct” as defined by the Ordinance. As such, the agreement is not excluded from the application of the First Conduct Rule.

The Ordinance provides for certain exclusions and exemptions from the First Conduct Rule. 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

HK\$200 million provided that the conduct is not serious anti-competitive conduct as defined by the Ordinance.

*Estate Agency Associations and Members*

**Q10. Referring to paragraph 9 of the Practice Circular, what should an estate agency association do with regard to recommendations on rates of commission which it has previously made to members, if any?**

Answer: Estate agency associations should refrain from giving any instruction or making any recommendations to members on rates of commission or any other commercial terms, in order to prevent their members from breaching the First Conduct Rule. Therefore, the estate agency association concerned should expressly inform members that they should make their own commercial decisions independently and that recommendations previously made by the association on rates of commission before the implementation of the Ordinance (if any) are no longer in force.

**Q11. Referring to Q10 above, what should an estate agency company which is a member of an estate agency association do with regard to recommendations on rates of commission previously made by the association, if any?**

Answer: An estate agency company which is a member of the estate agency association should not give effect to any recommendations of the association which may harm competition, irrespective of whether the recommendations were made before or after the implementation of the Ordinance. Moreover, as a member of the association, the

estate agency company should not participate in making such a recommendation.

Please refer to paragraph 9 of the Practice Circular.

**Q12. What should an estate agency company do if it has any suspicion during a meeting with other estate agency companies that an anti-competitive agreement about fixing commission rates is being discussed?**

Answer: The estate agency company should distance itself from the discussion if it has any suspicion during the meeting that an anti-competitive agreement is being discussed. It 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.

Please refer to paragraph 6 of the Practice Circular.

*Second Conduct Rule*

**Q13. Are there any exemptions for SMEs from the Second Conduct Rule?**

Answer: Yes.

The Second Conduct Rule does not apply to an undertaking whose annual turnover does not exceed HK\$40 million.

**Q14. With regard to the Second Conduct Rule, please give an example of abusive conduct by an estate agency company which has a substantial degree of market power.**

Answer: An example of abusive conduct would be charging commission so low and/or offering incentives to such an extent that the estate agency company does not cover the costs of the estate agency service in an attempt to force one or more competing estate agency companies out of the market (or prevent a competitor from entering the market), in the expectation of charging higher prices in the longer term.

However, a key question will always be whether the estate agency company has a substantial degree of market power and the mere fact that the company is very large, very well resourced and/or has a large market share would not be determinative.

**Q15. Will estate agency companies with an annual turnover of more than HK\$40 million be automatically considered to have a substantial degree of market power in the market?**

Answer: No.

To determine whether an undertaking has substantial market power, one must carefully define the relevant market and analyse a series of factors affecting the undertaking's ability to act without competitive constraints in that market. The Commission's *Guideline on the Second Conduct Rule* provides detailed explanations as to what these factors are and how substantial market power will be assessed. There is no simple turnover or market share threshold for this purpose.

Please refer to paragraph 12 of the Practice Circular.

On Compliance

**Q16. What should the management of an estate agency company do to mitigate the chance of contravention of the Conduct Rules?**

Answer: The management of estate agency companies should take appropriate and practicable steps to ensure that their businesses, including their employees and persons under their control, do not contravene the requirements of the Ordinance. Such steps may include risk identification, risk assessment, risk mitigation and regular review.

In this regard, estate agency companies should refer to the guidelines on the Conduct Rules issued by the Commission which may help determine whether their conduct complies with the Conduct Rules and other easy-to-follow compliance guides available on the Commission's website at [www.comppcomm.hk](http://www.comppcomm.hk) to review their business practices and develop a compliance strategy respectively, where applicable. They may also wish to consider seeking professional legal advice as appropriate.

Please refer to paragraphs 16 and 17 of the Practice Circular.

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