|  |
| --- |
| **FORM AD** |

|  |
| --- |
| **APPLICATION FOR A DECISIONunder sections 9 and/or 24 of the competition ordinance**  |

## *This Form AD lists the information and supporting documents which should be provided by the undertaking(s) making an application (“Applicant”) for a decision under sections 9 and/or 24 of the Competition Ordinance (Cap 619) (“Ordinance”). Before completing this Form AD, the Applicant should consult the Explanatory Note to Form AD available on the website of the Competition Commission (“Commission”) and the Commission’s Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders.[[1]](#footnote-1)*

# GENERAL INFORMATION

* 1. Specify the full name and address of the Applicant.
	2. Briefly state the purpose of the Application. This can be done, for example, as follows:

“*The Applicant makes this application for a decision from the Commission as to whether or not [the agreement and/or the conduct] specified in the Application is [excluded and/or exempt] from [the First Conduct Rule and/or the Second Conduct Rule] of the Ordinance on the basis of the information provided.*”

* 1. Provide a non-confidential description of no more than 500 words in English or 1,000 characters in Chinese summarising the nature and objectives of the agreement and/or conduct in question, and the reasons in favour of the Application.[[2]](#footnote-2)
	2. Confirm that the Applicant agrees and authorises the Commission to use the information provided in the Application for the purposes of processing the Application and making a decision under section(s) 11(1) and/or 26(1) of the Ordinance, including by publishing the non-confidential version of the completed Form AD and attached supporting documentation.
	3. Specify whether the Application is made by the Applicant or by a legal representative on behalf of the Applicant. Identify the contact details of an appropriate contact person for the Applicant and, if applicable, the Applicant’s legal representative, including the full name, title, correspondence address, email address and telephone number of such person(s). Confirm that the relevant person(s) have the Applicant’s authorisation to act for and on behalf of the Applicant regarding all matters related to the Application, including accepting service of documents from the Commission.[[3]](#footnote-3)

# the relevant parties

## The Applicant

* 1. Describe the Applicant’s business activities (e.g. nature, size, geographic scope) and highlight those business activities which are relevant to the Application.
	2. Set out the corporate (shareholding) structure of the Applicant. If the Applicant is controlled[[4]](#footnote-4) by another person or persons, controls other persons or is otherwise affiliated with other persons, the Applicant should identify the various persons concerned. Information on group relationships should additionally be provided by way of a structure chart.
	3. Provide the worldwide and Hong Kong turnover for the last financial year of the Applicant consolidated as appropriate.[[5]](#footnote-5) Copies of audited annual reports, accounts and/or equivalent documents should be attached as supporting documentation to Form AD.

## Other Relevant Party or Parties

* 1. Provide the full name, address and corresponding particulars of any other party to the agreement in question, or any other party involved in the conduct or who is, in the Applicant’s view, a relevant party, in the same manner as set out in paragraphs 2.1 to 2.3 above with respect to the Applicant as if such party were the Applicant. The name and contact details of an appropriate contact person for such party should be provided if known.

# THE AGREEMENT OR CONDUCT

* 1. Describe the agreement (for the purposes of the First Conduct Rule) and/or conduct (for the purposes of the Second Conduct Rule) which is the subject of the Application, including but not limited to: its nature, content, objectives and economic rationale, relevant date(s) and duration. Relevant documents should be attached as supporting documents to Form AD. For instance:
		1. if the Application is made in relation to a written agreement, a copy of the agreement entered into by the Applicant or the latest draft agreement proposed by the parties should be provided;
		2. if the Application is made in relation to an agreement which is not in writing, a full description of all the details of the agreement in question, and relevant documents evidencing the elements of the oral agreement should be provided;
		3. if the Application is made in relation to conduct potentially subject to the Second Conduct Rule, a full description of the conduct in question, and all documents related to the conduct (for example, any agreement concerning the conduct or correspondence evidencing the conduct) should be provided;
		4. copies of internal documents or materials prepared for the board of directors, individual directors, supervisory body or shareholders of the Applicant indicating the rationale and/or effects of the agreement and/or conduct in question.
	2. Describe the product(s) and/or service(s) to which the agreement and/or conduct in question relates.

# reasons for the application

* 1. Specify whether, in the absence of the exclusion(s) or exemption(s) specified in paragraph 4.2 below, the First Conduct Rule and/or the Second Conduct Rule is considered to be applicable to the agreement and/or conduct in question. Explain the reasons for this by elaborating on how the agreement and/or conduct may prevent, restrict or distort competition in the relevant market(s)[[6]](#footnote-6) in Hong Kong.

Applicants seeking a decision as regards whether section 1 (*Agreements enhancing overall economic efficiency*) of Schedule 1 to the Ordinance applies to an agreement must also complete the Annex to Form AD available on the website of the Commission.

* 1. Specify which exclusion(s) or exemption(s) the Applicant considers applicable to exclude or exempt the agreement or conduct in question from the First Conduct Rule and/or the Second Conduct Rule.[[7]](#footnote-7) In particular, specify whether the agreement or conduct in question is:
		1. excluded from the First Conduct Rule and/or the Second Conduct Rule pursuant to any of the General Exclusions in Schedule 1 to the Ordinance, namely:
			1. section 1 (*Agreements enhancing overall economic efficiency*) of Schedule 1;
			2. section 2 (*Compliance with legal requirements*) of Schedule 1;
			3. section 3 (S*ervices of general economic interest etc.*) of Schedule 1;
			4. section 4 (*Mergers*) of Schedule 1;
			5. section 5 (*Agreements of lesser significance*) of Schedule 1;
			6. section 6 (*Conduct of lesser significance*) of Schedule 1;
		2. exempt from the First Conduct Rule pursuant to a block exemption order issued by the Commission under section 15 of the Ordinance. Applicants should specify the applicable block exemption order;
		3. exempt from the First Conduct Rule or the Second Conduct Rule pursuant to an order of the Chief Executive in Council made under section 31 (*Exemptions on public policy grounds*) of the Ordinance or section 32 (*Exemption to avoid conflict with international obligations*) of the Ordinance. Applicants should specify the applicable order of the Chief Executive in Council; and/or
		4. excluded from the First Conduct Rule or the Second Conduct Rule as a result of the exclusion in section 3 (*Application to statutory bodies*) of the Ordinance or the exclusion in section 4 (*Application to specified persons and persons engaged in specified activities*) of the Ordinance. Applicants should specify any applicable Regulation made by the Chief Executive in Council under section 5 of the Ordinance.
	2. Explain why the exclusion(s) or exemption(s) specified at paragraph 4.2 above applies to the agreement or conduct in question and how the conditions (if any) attaching to the relevant exclusion(s) or exemption(s) are satisfied. The Applicant should attach and refer to relevant supporting documentation where necessary.[[8]](#footnote-8)

Applicants should note in particular that arguments that an agreement is excluded from the application of First Conduct Rule by or as a result of section 1 (*Agreements enhancing overall economic efficiency*) of Schedule 1 of the Ordinance must be substantiated with supporting evidence of the relevant efficiencies concerned.[[9]](#footnote-9)

# Suitability Factors[[10]](#footnote-10)

* 1. Explain why the Application:
		1. poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under the Ordinance; and
		2. 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.

# Submissions or applications to competition authorities in other jurisdictions

* 1. State whether any submission or application has been made to a competition authority in another jurisdiction in relation to the agreement or conduct in question. If so, in each case:
		1. indicate the authority or authorities involved in such submission or application; and
		2. provide information on when such submission or application was made, the file number(s) issued by the relevant authority or authorities (if any) and a summary of the status of the submission or application in the jurisdiction concerned.

# OTHER INFORMATION

* 1. Provide any other information or supporting documentation that would enable the Commission to have a better understanding of the merits of the Application.
	2. Provide details of steps taken to notify any other relevant party or parties that the Application is being submitted. Indicate whether any of those parties have received a copy of the Application and if so, whether confidential information was included in the copy. If the Applicant considers that it is not practicable to notify, or there are other reasons for not notifying, other relevant parties of the Application, explain why that is the case.

# SIGNATURE AND declaration

* 1. Conclude the Form AD with the date of the Application and the name and signature of the Applicant, a senior officer of the Applicant authorised to sign on its behalf or the Applicant’s legal representative.
	2. This must be followed by the declaration below which should be made and signed by the Applicant or the authorised officer of the Applicant.

*I understand that under section 172 of the Ordinance, it is an offence to provide any information that is false or misleading in a material particular to the Commission under the Ordinance if the person providing it knows that it is false or misleading, or is reckless as to whether it is. I also understand that if the person committing the offence is a body corporate, its officers may be guilty of an offence under section 175 of the Ordinance.*

*I believe that, as regard, this Application and all supporting documentation attached hereto:*

*(a) all information provided is true, complete and correct;*

*(b) all estimates are identified as such and are best estimates of the Applicant based on the underlying facts; and*

*(c) all opinions expressed are honestly held.*

*Signature:*

*Name:*

*Position held:*

*Tel. number:*

*Email address:*

*Date:*

1. Where an Application is made in respect of an agreement or conduct falling within the concurrent jurisdiction of the Commission and the Communications Authority under section 159 of the Ordinance, references to the Commission in this Form AD include the Communications Authority as the context requires. [↑](#footnote-ref-1)
2. This non-confidential summary may be used by the Commission for purposes of publishing a notice of the Application on the Commission’s website. [↑](#footnote-ref-2)
3. The relevant authorisation should be attached to Form AD in support of the Application. [↑](#footnote-ref-3)
4. For purposes of this Form AD, a controlling relationship can be assumed to exist where one party:

(a) owns more than half the capital or business assets of another entity;

(b) has the power to exercise more than half the voting rights of another entity;

(c) has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the other entity;

(d) has the right to manage the affairs of another entity; or

(e) has a *de facto* power to manage the affairs of another entity. [↑](#footnote-ref-4)
5. If the Applicant does not have a financial year, the worldwide and Hong Kong turnover for the preceding calendar year should be provided. [↑](#footnote-ref-5)
6. The term “relevant market” has a technical meaning in competition analysis and the manner in which the Commission defines the market may differ from how businesses typically think of a market. For information on the Commission’s general approach to market definition, Applicants should consult Part 2 of the Commission’s *Guideline on the Second Conduct Rule*. [↑](#footnote-ref-6)
7. Applicants are referred to the Annexes to the Commission’s *Guideline on the First Conduct Rule* and *Guideline on the Second Conduct Rule*. [↑](#footnote-ref-7)
8. Where the Application is for a decision that the agreement or conduct in question is excluded from the application of the First Conduct Rule and/or the Second Conduct Rule by or as a result of section 5 (*Agreements of lesser significance*) and/or section 6 (*Conduct of lesser significance*) of Schedule 1 to the Ordinance, to the extent the relevant turnover is not already provided under paragraph 2.3 above, copies of audited annual reports, accounts and/or equivalent documents showing the turnover for the relevant turnover period in accordance with the Ordinance and the Competition (Turnover) Regulation (Cap 619C) should be attached as supporting documentation to Form AD. Further guidance on the calculation of turnover for this purpose is available in the Commission’s guidance on *How to Assess “Turnover” for Exclusions from the Competition Ordinance Conduct Rules*. [↑](#footnote-ref-8)
9. Applicants are referred to the Annex to the Commission’s *Guideline on the First Conduct Rule*. [↑](#footnote-ref-9)
10. See paragraphs 6.4 to 6.11 of the Commission’s *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders* for further information on the Suitability Factors. [↑](#footnote-ref-10)