

# EXPLANATORY NOTE TO FORM AD

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*Terms used in Form AD, the Annex to Form AD and this Explanatory Note bear the same meaning as in the Competition Commission's Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders, Guideline on the First Conduct Rule and Guideline on the Second Conduct Rule.*

## 1 Introduction

- 1.1 Form AD<sup>1</sup> is to be used by undertakings making an application (“**Applicants**”) to the Competition Commission (“**Commission**”) or the Communications Authority (“**CA**”) for a decision under section 9 and/or section 24 of the Competition Ordinance (Cap 619) (“**Ordinance**”) as to whether or not an agreement<sup>2</sup> (in the case of section 9 of the Ordinance) or conduct of an undertaking (in the case of section 24 of the Ordinance) is excluded or exempt from the First Conduct Rule and/or the Second Conduct Rule (“**Application**”).
- 1.2 Where an Application is made in respect of an agreement or conduct falling within the concurrent jurisdiction of the Commission and the CA under section 159 of the Ordinance, references to the Commission in Form AD and this Explanatory Note include the CA as the context requires. Applications in respect of matters falling within the concurrent jurisdiction of the Commission and the CA under section 159 of the Ordinance may be made to either the Commission or the CA.
- 1.3 Undertakings intending to make an Application are advised to consult the Commission's *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders* (the “**Applications Guideline**”).<sup>3</sup>

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<sup>1</sup> A reference to Form AD in this Explanatory Note includes the Annex to Form AD as the context requires.

<sup>2</sup> Unless the context otherwise requires, a reference to an “agreement” in the Explanatory Note to Form AD, Form AD or the Annex to Form AD is to be read as applying equally to, or in relation to, a “concerted practice” and a “decision” of an association of undertakings (with any necessary modifications). An Application under section 9 of the Ordinance may therefore concern an agreement, concerted practice or a decision of an association of undertakings. The terms “agreement”, “concerted practice” and “decision” are explained in the Commission's *Guideline on the First Conduct Rule*.

<sup>3</sup> The Guidelines of the Commission and the CA under the Ordinance are available on the respective authorities' websites: [www.commcomp.hk](http://www.commcomp.hk) and [www.coms-auth.hk](http://www.coms-auth.hk).

1.4 For detailed guidance on the exclusions and exemptions potentially applicable to Applications, Applicants are referred to Part 2 of the Applications Guideline and the Annexes to the Commission's *Guideline on the First Conduct Rule* and *Guideline on the Second Conduct Rule*. A summary of the applicable exclusions and exemptions available under the Ordinance is provided in Figure 1 below.

Figure 1: 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 (Schedule 1 to the Ordinance)	Agreements enhancing overall economic efficiency (section 1 of Schedule 1)	✓	
	Compliance with legal requirements (section 2 of Schedule 1)	✓	✓
	Services of general economic interest (section 3 of Schedule 1)	✓	✓
	Mergers (section 4 of Schedule 1)	✓	✓
	Agreements of lesser significance (section 5 of Schedule 1)	✓	
	Conduct of lesser significance (section 6 of Schedule 1)		✓
Block Exemption Orders (section 15 of the Ordinance)		✓	
Public Policy Exemption (section 31 of the Ordinance)		✓	✓
International Obligations Exemption (section 32 of the Ordinance)		✓	✓
Statutory Body and Specified Person or Activities Exclusions (sections 3 and 4 of the Ordinance)		✓	✓

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- 1.5 Decisions in respect of past Applications, which are available on the Commission's website, may also be a useful reference for undertakings considering making an Application.
  - 1.6 Undertakings intending to make an application for a decision under section 11 of Schedule 7 to the Ordinance in relation to a merger should use Form M published by the CA regarding the information and supporting documents which should be provided in making such applications.

## 2 How to make an Application using Form AD

- 2.1 Applicants should structure their Application by following the Part and paragraph numbering of Form AD and by providing the information requested.
- 2.2 Applications should set out all relevant information clearly and concisely so as to assist the Commission in making a decision. Additional information or supporting documentation not referenced in Form AD may be included in an Application if it would enable the Commission to have a better appreciation of the merits of the Application.
- 2.3 All supporting documentation should be attached to the Application as annexures. The documentation should be indexed and numbered in an appropriate format and cross referenced as necessary.

## 3 Language and translations

- 3.1 Applications may be made in Chinese or English. Supporting documentation in any other language must be accompanied by an appropriate Chinese or English translation. Translations of extracts of supporting documentation may be acceptable in certain cases.<sup>4</sup>

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<sup>4</sup> Supporting documentation should be submitted in their original language together with the appropriate translation.

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## 4 Confidentiality and privileged materials

- 4.1 A non-confidential version of the completed Form AD and attached supporting documentation will be published by the Commission if it proceeds to consider the Application.<sup>5</sup> Therefore a non-confidential version of the Application must be prepared by redacting all confidential information appearing in the confidential version of the completed Form AD and supporting documentation.
- 4.2 Where relevant, the confidential version of the Application must contain a statement in writing in accordance with section 123(2) of the Ordinance identifying information redacted in the non-confidential version of the Application and explaining why the information should be treated as confidential. This statement does not need to be reproduced in the non-confidential version.
- 4.3 Applicants are advised not to include any materials protected by legal professional privilege in either versions of the Application where they do not intend to waive privilege over that material. The Commission will not accept privileged material on the basis that privilege is waived only for the purposes of the Application (a partial waiver) absent an express agreement to that effect with the Commission.<sup>6</sup>

## 5 Signature and declaration

- 5.1 Both the confidential and non-confidential versions of the Application must be signed, dated and accompanied by a declaration in accordance with the requirements of Form AD confirming that all information given in the submitted Form AD and all attached documents is true, complete and correct. Provision of incomplete information may result in the Commission not being able to process the Application. Pursuant to sections 14 and/or 29 of the Ordinance, the Commission may rescind a decision made on an Application if it has reason to believe that the information provided by the Applicant on which it based its decision was incomplete, false or misleading in a material particular.

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<sup>5</sup> See paragraph 3.6 of the Applications Guideline. The non-confidential version of the Application will be published by the Commission on its website and/or otherwise released to relevant third parties for the purposes of seeking their views on the Application.

<sup>6</sup> See paragraph 4.1 of the Applications Guideline.

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## 6 Initial consultation

6.1 Applicants are encouraged to approach the Commission for an Initial Consultation prior to making an Application. Applicants are referred to paragraphs 6.12 to 6.15 of the Applications Guideline for further details.

## 7 Submitting Form AD

7.1 Completed Applications should be submitted by sending the following to the office of the Commission:

- (a) two hardcopies and one electronic copy of the signed original of the confidential Form AD with all supporting documentation; and
- (b) one hardcopy and one electronic copy of the signed original of the non-confidential Form AD with all redacted supporting documentation.

7.2 Electronic copies of the completed Form AD and supporting documents must be provided in PDF format and in original file format.<sup>7</sup> Confidential and non-confidential versions should be in separate files and/or folders. All text in the PDF files (save for redacted text in the non-confidential version) must be searchable. Electronic copies should be submitted in CD-ROM, DVD or USB memory stick format.

## 8 Fees for making an Application

8.1 Details of the fees for making an Application are provided in the Competition (Fees) Regulation (Cap 619G).

8.2 With respect to Applications made to the Commission, further information on the applicable fees, and information on the waiver, reduction or refund of fees, can be found in the Commission's guidance on *Fees Payable for Making an Application to the Competition Commission*.<sup>8</sup>

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<sup>7</sup> Quantitative material should in any event be provided in Excel format as appropriate.

<sup>8</sup> Available on the Commission's website at: [www.commcomp.hk](http://www.commcomp.hk).

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- 8.3 Unless the applicable fee has been waived with the prior agreement of the Commission, Applications should be accompanied by a cheque made payable to “Competition Commission” in the amount required by the Competition (Fees) Regulation.
- 8.4 With respect to Applications made to the CA, the fees payable are to be determined in accordance with the Competition (Fees) Regulation.

## 9 Requests for further information and the Annex to Form AD

- 9.1 In general, Applicants should discuss with the Commission during the Initial Consultation the scope of information required for the purposes of completing Form AD.
- 9.2 The Commission may request further information from the Applicant to assist in its review and expects Applicants to offer prompt and full cooperation in this respect.
- 9.3 In general, the Annex to Form AD need only be completed in respect of Applications for a Commission decision that a particular agreement is excluded from the application of the First Conduct Rule by or as a result of section 1 (*Agreements enhancing overall economic efficiency*) of Schedule 1 to the Ordinance.
- 9.4 The Commission in its discretion may, however, request some or all of the information required under the Annex to Form AD in respect of Applications concerning other exclusions or exemptions, to the extent that the information would be relevant to the Commission’s examination of the Application. See further in this respect the Annex to Form AD.