



競爭事務委員會  
COMPETITION  
COMMISSION



通訊事務管理局  
COMMUNICATIONS  
AUTHORITY

## Guideline

# **Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders**

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# **Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders**

*This Guideline is jointly issued by the Competition Commission (the “**Commission**”) and the Communications Authority (the “**CA**”) under sections 35(1)(b) and (c) of the Competition Ordinance (Cap 619) (the “**Ordinance**”). The Guideline sets out:*

- *the manner and form in which the Commission will receive applications for a decision or block exemption order; and*
- *how the Commission expects to exercise its power to make a decision or issue block exemption orders.*

*While the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the CA in respect of the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors.<sup>1</sup> Unless stated otherwise, where a matter relates to conduct falling within this concurrent jurisdiction, references in this Guideline to the Commission also apply to the CA.*

*The Guideline is not, however, a substitute for the Ordinance and does not have binding legal effect. The Competition Tribunal (the “**Tribunal**”) and other courts are responsible ultimately for interpreting the Ordinance. The Commission’s interpretation of the Ordinance does not bind them. The application of this Guideline may, therefore, need to be modified in light of the case law of the courts.*

*This Guideline describes the general approach which the Commission intends to apply to the topics covered in the Guideline. The approach described will be adapted, as appropriate, to the facts and circumstances of the matter.*

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<sup>1</sup> The relevant undertakings are specified under section 159(1) of the Ordinance. These are licensees under the Telecommunications Ordinance (Cap 106) (the “**TO**”) or the Broadcasting Ordinance (Cap 562) (the “**BO**”), other persons whose activities require them to be licensed under the TO or the BO, or persons who have been exempted from the TO or from specified provisions of the TO pursuant to section 39 of the TO.

## Introduction

- 1.1 The Ordinance applies to all sectors of the economy. It prohibits certain conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. This conduct includes anti-competitive arrangements and abuses of a substantial degree of market power. The Ordinance also prohibits mergers which may substantially lessen competition. These prohibitions are collectively referred to as the “**Competition Rules**”. Detailed guidance on the Competition Rules can be found in the Commission’s *Guideline on the First Conduct Rule*, *Guideline on the Second Conduct Rule* and *Guideline on the Merger Rule*.
- 1.2 The Competition Rules recognise that free and competitive markets benefit consumers, businesses and the economy. Businesses and consumers benefit from the process of rivalry in the marketplace. The Competition Rules seek to preserve that rivalry.
- 1.3 In certain circumstances, conduct which might otherwise be anti-competitive may produce economic benefits which should be considered in assessing the detriment caused by that conduct. In addition, conduct that may otherwise contravene the Ordinance may be considered acceptable on some public interest ground.
- 1.4 The Ordinance allows for a limited regime of exclusions and exemptions which, if applicable, means the First Conduct Rule and/or the Second Conduct Rule (collectively, the “**Conduct Rules**”) do not apply. These exclusions and exemptions are discussed in Part 2 of this Guideline and in the Commission’s *Guideline on the First Conduct Rule* and *Guideline on the Second Conduct Rule*. Specific guidance on exemptions and exclusions from the Merger Rule is provided in the *Guideline on the Merger Rule*.
- 1.5 Undertakings to whom an exclusion or exemption applies will not contravene the Ordinance. There is no requirement for undertakings to apply to the Commission in order to secure the benefit of a particular exclusion or exemption. Equally, undertakings may assert the benefit of any exclusion or exemption as a defence to any proceedings before the Tribunal or other courts.

- 1.6 However, the Ordinance provides that undertakings may elect to apply to the Commission under section 9 and/or section 24 for a decision under section 11 and/or section 26 (“**Decision**”) as to whether or not an agreement<sup>2</sup> or conduct<sup>3</sup> is excluded or exempt from the Conduct Rules (“**Application for a Decision**”). The Commission is only required to consider Applications for a Decision under certain circumstances.
- 1.7 Pursuant to section 15 of the Ordinance, the Commission may also issue block exemption orders (“**Block Exemption Orders**”) exempting categories of agreements that enhance overall economic efficiency (“**Excluded Agreements**”). As defined by section 15(5) of the Ordinance, Excluded Agreements are particular categories of agreements excluded from the First Conduct Rule by or as a result of section 1, Schedule 1 of the Ordinance. The Commission may issue a Block Exemption Order in response to an application (“**Block Exemption Application**”) or on its own initiative.
- 1.8 This Guideline provides undertakings which are considering whether to make an Application for a Decision or a Block Exemption Application with general guidance on:
- the procedure to follow in applying for a Decision or a Block Exemption Order; and
  - the process that the Commission will follow in making Decisions and issuing Block Exemption Orders.

## **2 Exclusions and Exemptions**

2.1 The Ordinance provides for the following exclusions and exemptions:

- general exclusions from the Conduct Rules listed under Schedule 1:
  - agreements enhancing overall economic efficiency;
  - compliance with legal requirements;
  - services of general economic interest;
  - mergers;
  - agreements of lesser significance; and
  - conduct of lesser significance(collectively, the “**General Exclusions**”);

<sup>2</sup> A reference to “agreements” in this Guideline in the context of sections 9 and 11 of the Ordinance (applications and Decisions regarding the First Conduct Rule) includes agreements to which an undertaking has made or given effect, is giving effect or is proposing to make or give effect.

<sup>3</sup> A reference to “conduct” in this Guideline in the context of sections 24 and 26 of the Ordinance (applications and Decisions regarding the Second Conduct Rule) includes conduct which an undertaking has engaged, is engaging in or is proposing to engage in.

- (b) section 3 provides that the Competition Rules and the enforcement provisions in Parts 4 and 6 of the Ordinance do not apply to statutory bodies (“**Statutory Body Exclusion**”), unless the Chief Executive in Council specifies otherwise under regulations; and
- (c) the Chief Executive in Council may:
  - i. under sections 4 and 5, provide for exclusions under regulations from the Competition Rules in respect of specified persons and persons engaged in specified activities (“**Specified Person or Activities Exclusion**”);
  - ii. under section 31, publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules on public policy grounds (“**Public Policy Exemption**”); and
  - iii. under section 32, publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules to avoid a conflict with international obligations that directly or indirectly relate to Hong Kong (“**International Obligations Exemption**”).

2.2 The Ordinance also provides that an undertaking may make an Application for a Decision to confirm whether an existing Block Exemption Order applies to an agreement.

- 2.3 Figure 1 below summarises which exclusions and exemptions apply in respect of each Conduct Rule.

*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
<b>General Exclusions</b>	Agreements enhancing overall economic efficiency	✓	
	Compliance with legal requirements	✓	✓
	Services of general economic interest	✓	✓
	Mergers	✓	✓
	Agreements of lesser significance	✓	
	Conduct of lesser significance		✓
<b>Block Exemption Orders</b>		✓	
<b>Public Policy Exemption</b>		✓	✓
<b>International Obligations Exemption</b>		✓	✓
<b>Statutory Body and Specified Person or Activities Exclusions</b>		✓	✓

## **General Exclusions**

- 2.4 The *Guideline on the First Conduct Rule* and the *Guideline on the Second Conduct Rule* set out the Commission's approach to assessing whether the General Exclusions apply.

## **Scope of Statutory Body Exclusion**

- 2.5 Statutory bodies, as defined in section 2(1) of the Ordinance, are excluded from the Competition Rules unless they are specifically brought within the scope of those rules by a regulation made by the Chief Executive in Council under section 5 of the Ordinance.

- 2.6 The reference to a statutory body in section 3 of the Ordinance includes an employee or agent of the statutory body acting in that capacity. The Statutory Body Exclusion does not, however, extend to legal entities owned or controlled by a statutory body unless those entities are also statutory bodies.<sup>4</sup> Moreover, the Statutory Body Exclusion does not extend to undertakings that might engage in anti-competitive arrangements with an excluded statutory body. Those undertakings remain subject to the Ordinance.

### **Exclusions and exemptions made by the Chief Executive in Council**

- 2.7 Any regulations and orders made by the Chief Executive in Council in respect of exclusions and exemptions from the Conduct Rules can be found on the Commission's website.

## **3 Confidentiality and Disclosure**

- 3.1 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to or obtained by the Commission. The following categories of information are defined as confidential under section 123 of the Ordinance:
- (a) information that has been provided to or obtained by the Commission in the course of, or in connection with, the performance of its functions under the Ordinance, that relates to:
    - i. the private affairs of a natural person;
    - ii. the commercial activities of any person that are of a confidential nature; or
    - iii. the identity of any person who has given information to the Commission;
  - (b) information that has been given to the Commission on terms that or in circumstances that require it to be held in confidence; or
  - (c) information given to the Commission that has been identified as confidential information in accordance with section 123(2) of the Ordinance.

<sup>4</sup> In any event, the definition of statutory body does not include a "company" as defined in the Ordinance (including a company within the meaning of section 2(1) of the Companies Ordinance (Cap 622)).

- 3.2 Section 126(1) of the Ordinance permits the disclosure of confidential information by the Commission in certain circumstances, including disclosures made by the Commission in the performance of any of its functions, or in carrying into effect or doing anything authorised by the Ordinance. Section 126(1) disclosures are therefore not limited to where the Ordinance expressly requires the Commission to publish information and, subject to the provisions of the Ordinance, the Commission may in certain circumstances disclose confidential information without the consent of relevant parties.
- 3.3 Parties submitting information to the Commission in the context of the Commission's consideration of an Application for a Decision or Block Exemption Application should also refer to Part 6 of the *Guideline on Investigations*.

### **Claiming confidentiality in applications**

- 3.4 Paragraphs 6.16 and 11.13 of this Guideline, as well as Form AD, the relevant form for an Application for a Decision, set out certain information to be provided to the Commission by applicants. Undertakings may not refrain from providing this information solely on the basis that the information is confidential as defined under section 123(1) of the Ordinance.
- 3.5 As explained further in the Commission's *Guideline on Investigations*, where an applicant wishes to make a claim for confidentiality under section 123(1)(c) of the Ordinance, including in respect of information provided to the Commission in the context of an application, the applicant should identify the relevant information and provide a statement in writing setting out the reasons why the identified information is, in the applicant's opinion, confidential.
- 3.6 In the case of an Application for a Decision, applicants should submit both confidential and non-confidential versions of their application. The non-confidential version of the application will be published by the Commission on its website with a view to consulting interested parties and/or otherwise released to relevant third parties for the purposes of seeking their views on the application.

### **Considering the scope of confidentiality claims**

- 3.7 Section 126(1) of the Ordinance permits the Commission to disclose confidential information in a number of circumstances. As noted at paragraph 3.2 of this Guideline, section 126(1)(b) of the Ordinance permits the disclosure of information by the Commission in the performance of any of its functions, or in carrying into effect or doing anything authorised by the Ordinance.

- 3.8 To make a Decision or to issue a Block Exemption Order, the Commission will assess the veracity and relevance of information provided by parties. This assessment is often achieved by seeking the views of other parties on information provided to the Commission.
- 3.9 Due to the operation of the Ordinance, unnecessarily broad claims to confidentiality under section 123(1)(c) may:
  - (a) impede the Commission's ability to assess and rely on the information provided by a party; and/or
  - (b) increase the risk that information the party does not want to be disclosed is disclosed under section 126(1)(b) of the Ordinance.<sup>5</sup>
- 3.10 Applicants in particular should consider the scope of any confidentiality claim made in relation to their Application for a Decision or Block Exemption Application. While confidentiality claims may often be necessary and appropriate in relation to specific information provided in support of an Application for a Decision or Block Exemption Application, overly broad claims may impede the Commission's ability to assess the application in a timely manner.

## 4 Other Commission Procedures

- 4.1 Absent an express agreement with the Commission, information provided voluntarily to the Commission by applicants or other parties, including information protected by legal professional privilege, will not be accepted on a 'without prejudice' basis or otherwise on terms that its use is limited for the sole purpose of the Commission making a Decision or issuing a Block Exemption Order.<sup>6</sup> The Commission can use any information received in the context of an application, with or without notice to interested parties, for other purposes under the Ordinance. This includes for the purposes of considering whether a contravention of the Ordinance has occurred and/or with a view to enforcement where there has been a contravention.<sup>7</sup>
- 4.2 As a general matter, applicants are encouraged to seek legal advice before approaching the Commission about an Application for a Decision or Block Exemption Application.

<sup>5</sup> See paragraphs 6.11 and 6.12 of the Commission's *Guideline on Investigations* for more information.

<sup>6</sup> For example, in respect of information which is legally privileged, an applicant might wish to waive privilege only for the purpose of the Commission making a Decision or issuing a Block Exemption Order. Absent an express agreement with the Commission, the Commission will not accept information on this basis for the purposes of an application.

<sup>7</sup> See further in this respect paragraph 5.16 of this Guideline.

## **5 Considering Whether to Make an Application for a Decision or Block Exemption Application**

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- 5.1 Any undertaking may apply to the Commission for a Decision or Block Exemption Order. In addition, associations of undertakings (“**Associations**”) may apply to the Commission for a Block Exemption Order.
- 5.2 There is no obligation on each undertaking involved in an agreement or conduct which is the subject of an Application for a Decision or Block Exemption Application to be a party to the application or to make their own application. However, the Commission generally expects the cooperation of all undertakings that are party to the agreements in question to provide information which might assist the Commission in its consideration of the Application for a Decision or Block Exemption Application.
- 5.3 The Commission expects the category of agreements that are the subject of a Block Exemption Application to be representative of agreements in wider use in one or more industries, and the applicant must demonstrate that this is the case.
- 5.4 For sector specific Block Exemption Applications, applicants are encouraged to provide evidence showing there is a greater need for cooperation between undertakings in the relevant sector as compared with other sectors in the economy.

### **Need for a Decision or Block Exemption Order**

- 5.5 It is up to undertakings and Associations to assess for themselves whether their agreements and/or conduct comply with the Conduct Rules. The Ordinance provides for certain exclusions and exemptions from the Conduct Rules in limited circumstances.
- 5.6 There is no requirement that there be a Decision or Block Exemption Order before undertakings or Associations may rely on applicable exclusions and exemptions. Undertakings or Associations may self-assess the legality of their conduct having regard to the Conduct Rules and the exclusions and exemptions from those rules.

- 5.7 If an undertaking wishes to seek greater legal certainty, it may wish to apply to the Commission for a Decision or a Block Exemption Order. An Association may similarly apply for a Block Exemption Order.

## **Whether to apply for a Decision or Block Exemption Order**

- 5.8 A Decision may be made by the Commission in relation to the applicability of any exclusion or exemption listed in Figure 1. As discussed at paragraph 1.7 of this Guideline, Block Exemption Orders may only be issued by the Commission in relation to Excluded Agreements.
- 5.9 Where similar agreements enhancing overall economic efficiency are commonly used by undertakings throughout a market, it may be more appropriate for undertaking(s) or Associations to consider seeking a Block Exemption Order for such agreements rather than apply separately for a Decision regarding their specific agreement. This is a matter which should be discussed with the Commission prior to making any application.
- 5.10 There is no need for the Commission to make a Decision before it issues a Block Exemption Order.

## **Lodging applications**

- 5.11 Paragraphs 6.16 and 11.13 of this Guideline set out certain information to be included in Applications for Decisions and Block Exemption Applications respectively. Form AD, which is the relevant form for an Application for a Decision, will be available on the Commission's website.
- 5.12 Applicants will generally be required to provide further information during the course of the Commission's review. Applicants will be expected to provide timely responses to any such information requests.
- 5.13 Where documents in support of applications are not available in English or Chinese, the applicant should provide a translation into one of these languages. In the appropriate circumstances, the Commission may require translations only of relevant extracts.
- 5.14 The Commission will publish the most up-to-date requirements for applications on its website to assist applicants.

### ***Fee payable***

- 5.15 The Commission may require the payment of a fee in respect of Applications for a Decision and Block Exemption Applications pursuant to section 164 of the Ordinance.<sup>8</sup> Any fee imposed will be returned if the Commission does not consider the application for any reason. Information on relevant fees will be published on the Commission's website.

### **Applications for a Decision and Block Exemption Applications do not provide immunity**

- 5.16 Where an application is made in relation to an existing agreement or conduct, the Ordinance does not afford the undertakings concerned any immunity from enforcement action during the Commission's review of the application. The Commission may in its discretion, initiate enforcement action in respect of any such agreement or conduct (including proceedings before the Tribunal) if it does not, for whatever reason, consider the application, make a Decision, or issue a Block Exemption Order. In any such case, the Commission may use information provided by the applicant in the relevant enforcement action as set out in Part 4 of this Guideline.
- 5.17 Applicants are therefore encouraged to seek legal advice before making an Application for a Decision or Block Exemption Application.

## **6 Application Process for a Decision**

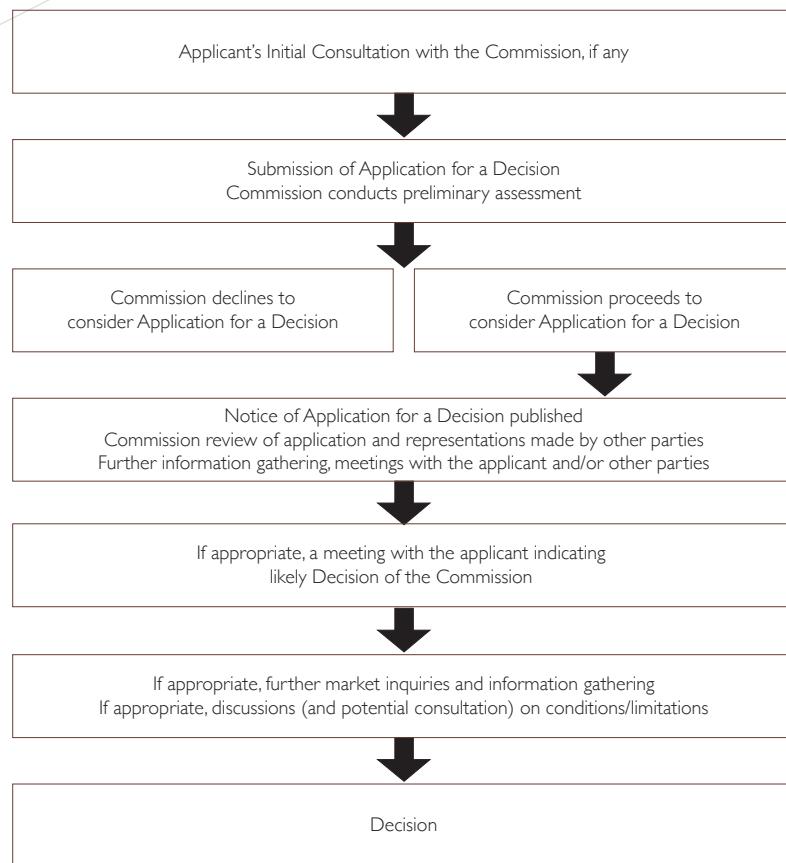
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- 6.1 Figure 2 below outlines the main steps in the application process for a Decision.
- 6.2 The Ordinance does not provide any timeframe for the Commission's review of an Application for a Decision or prescribe any deadline for making a Decision. The timing of a particular review or time required to make a Decision will vary depending on, for example, the complexity of the case and the availability of Commission resources. The Commission will, however, endeavour to process applications expeditiously.

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<sup>8</sup> The fees chargeable are to be prescribed in a regulation made by the Chief Executive of the Hong Kong SAR.

Figure 2. Key steps for an Application for a Decision



- 6.3 The Commission expects Applications for a Decision to be complete and accurate. The Commission intends to specify a timeframe or deadline for the submission of responses to Commission information requests. Applicants should respond in a timely manner to any Commission information requests.

## Factors the Commission will consider in determining whether to consider an application

- 6.4 Under sections 9(2) and 24(2) of the Ordinance, the Commission is only required to consider an Application for a Decision in certain circumstances:

- (a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under the Ordinance;
- (b) the application 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; and

- (c) it is possible to make a decision on the basis of the information provided (collectively, the “**Suitability Factors**”).
- 6.5 The Commission will generally only consider Applications for a Decision that fulfil all the Suitability Factors.

#### ***Novel or unresolved question of wider importance or public interest***

- 6.6 In deciding whether an Application for a Decision “*poses a novel or unresolved question of wider importance or public interest*” for the purposes of sections 9(2)(a) and 24(2)(a), the Commission may consider, in particular, the following:
- (a) the economic importance, from the point of view of the consumer, of the products or services concerned by the agreement or conduct; and/or
  - (b) the extent to which the agreement or conduct or similar agreements or similar conduct is in widespread usage in the marketplace.

#### ***No clarification in existing case law or Commission decisions***

- 6.7 Before submitting an Application for a Decision, an applicant should verify that there is no existing clarification in the case law of the Tribunal or other Hong Kong courts, or decisions of the Commission.

#### ***Sufficient information to make a Decision***

- 6.8 Under sections 9(2)(c) and 24(2)(c) of the Ordinance, the Commission is only required to consider an application if it is possible to make a decision on the basis of the information provided. Accordingly, the applicant should provide sufficient evidence to support its Application for a Decision.
- 6.9 Paragraph 6.16 of this Guideline sets out the information the Commission generally requires for the purposes of making a Decision. Applicants should also consider the Commission’s *Guideline on the First Conduct Rule* and *Guideline on the Second Conduct Rule* which will assist them in understanding what evidence is likely to be required to support their Application for a Decision.

#### ***Not a hypothetical question***

- 6.10 The Ordinance does not require the Commission to consider an Application for a Decision if it concerns hypothetical questions, agreements or conduct.

6.11 In this respect, the Commission will not generally consider an Application for a Decision regarding agreements or conduct which have ceased. Undertakings may, however, apply for a Decision in relation to a future agreement or conduct in which they intend to engage. In this case, the applicant must provide sufficient details of the specific agreement or conduct that would enable the Commission to decide on the merits of the Application for a Decision.

### **Initial Consultation prior to making an Application for a Decision**

- 6.12 Potential applicants may approach the Commission prior to submitting an Application for a Decision (“**Initial Consultation**”). There is no obligation to engage in an Initial Consultation, but the Commission strongly encourages all potential applicants to do so.
- 6.13 While an Initial Consultation may take place on a confidential basis, confidential information provided to the Commission during an Initial Consultation will be treated in accordance with Part 8 of the Ordinance and the terms of this Guideline relating to the provision of confidential information to the Commission. Accordingly, absent an express agreement with the Commission, information provided voluntarily to the Commission in the context of an Initial Consultation, including information protected by legal professional privilege, will not be accepted on a ‘without prejudice’ basis or otherwise on terms that its use is limited for the sole purpose of the Initial Consultation and/or subsequent application. The Commission can use any information received in the context of an Initial Consultation, with or without notice to interested parties, for other purposes under the Ordinance including enforcement purposes (see paragraph 4.1 of this Guideline).
- 6.14 An Initial Consultation affords the Commission an opportunity to discuss with the applicant jurisdictional and other matters. In particular, the Initial Consultation may allow the Commission and the applicant to prepare for the process of making an Application for a Decision by identifying key issues and possible competition concerns at an early stage and the evidence that the Commission would need to assess these concerns.
- 6.15 During the Initial Consultation the Commission may highlight to a potential applicant that an alternative procedural route under the Ordinance may be more appropriate depending on the nature of the specific conduct in question. The Commission may also indicate to the applicant whether the Application for a Decision appears likely to satisfy the Suitability Factors.

## **Preparing an Application for a Decision**

- 6.16 An application, accompanied by the appropriate fee, should be made to the Commission by submitting a completed Form AD. Form AD requires, among other things:
- (a) information relating to the applicant and the other parties to the agreement or conduct (including contact information, a description of key business activities, information on controlling shareholders and turnover data);
  - (b) a detailed description of the relevant agreement or conduct (including copies of any relevant documents such as agreements or draft agreements);
  - (c) information on the provisions or elements of the agreement/conduct which might give rise to competition concerns and an explanation of the nature of those concerns including possible theories of harm;
  - (d) an explanation of the applicant's view of the relevant markets involved together with market share data (including for competitors) and other information on the competitive situation in such markets;
  - (e) information on affected suppliers and customers and their contact details;
  - (f) an explanation (including supporting evidence) as to why the applicant believes the relevant agreement/conduct satisfies the terms of a particular exclusion or exemption; and
  - (g) where submissions/applications have been made to competition authorities in other jurisdictions with respect to the same agreement or conduct, a list of the relevant jurisdictions, information on when the submissions/applications were made, and an indication of the status of the various submissions/applications in the jurisdictions concerned.
- 6.17 The applicant should submit a non-confidential version of the Application for a Decision to the Commission. The non-confidential version will be publicised by the Commission should it consider the Application for a Decision (see paragraph 8.2 of this Guideline).
- 6.18 The Commission will acknowledge receipt of all Applications for a Decision it receives.

## 7 Preliminary Assessment of Application for a Decision

7.1 The Commission will conduct a preliminary assessment based on the information provided by the applicant. The purpose of the preliminary assessment is to determine whether the Suitability Factors are present in a given case.

### Potential outcomes of preliminary assessment

7.2 After a preliminary assessment of an Application for a Decision, the Commission will either:

- (a) decline to consider the Application for a Decision; or
- (b) proceed to consider the Application for a Decision.

7.3 If the Commission declines to consider the Application for a Decision, it will provide an explanation of this outcome to the applicant in writing. Such an outcome does not constitute a Decision under section 11 and/or section 26 of the Ordinance. It also does not indicate the Commission's position on whether the relevant agreement or conduct:

- (a) raises a concern under the Conduct Rules; or
- (b) is or is not excluded or exempt from the Conduct Rules.

7.4 If the Commission proceeds to consider the Application for a Decision, it will inform the applicant.

7.5 The timeframe for preliminary assessment will depend on the nature and complexity of each matter, as well as the resources available to the Commission at the time. Where the applicant has engaged with the Commission in an Initial Consultation and provides an Application for a Decision consistent with the issues discussed during that consultation, the timeframe for preliminary assessment may be shorter than otherwise.

## **8 Consideration of Application for a Decision**

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- 8.1 Where the Commission decides to consider an Application for a Decision under sections 10 or 25 of the Ordinance, it will:
- (a) publicise the Application for a Decision; and
  - (b) engage with parties likely to be affected by a Decision.

### **Publicising the Application for a Decision**

- 8.2 The Commission will publicise an Application for a Decision in accordance with section 10(1) or 25(1) of the Ordinance, including by posting a notice of the application together with a non-confidential version of the application on the Commission's website.

### **Engagement with parties likely to be affected by a Decision**

- 8.3 The Commission will engage with, and consider representations from, parties likely to be affected by a Decision (for example, competitors, suppliers, or customers of the applicant) in accordance with section 10(1) or 25(1) of the Ordinance. Pursuant to sections 10(2) and 25(2) of the Ordinance, the Commission will specify the period within which representations about the Application for a Decision may be made when it publishes the notice of the application. Interested parties will be given at least 30 calendar days to make representations about the Application for a Decision beginning after the day on which the notice is first published.
- 8.4 During this process, the Commission may meet with the applicant and other parties as appropriate. The Commission may also seek the views of trade associations, sectoral regulators or industry representative bodies. The Commission will seek additional information from the applicant or other parties as appropriate.
- 8.5 With a view to transparency in its decision making, the Commission will generally publish any written representations on its website. For this reason, the Commission requires the applicant and other parties to provide non-confidential versions of their written representations.

### ***Engagement with the applicant***

- 8.6 The Commission may invite the applicant to provide additional written representations or further information in response to representations received from other parties.

- 8.7 During the review of the Application for a Decision, the Commission may also have one or more meetings with the applicant to discuss such matters as the following:
- (a) any concerns raised by the Application for a Decision;
  - (b) any preliminary views about the merits of the Application for a Decision; and
  - (c) any questions raised by the information submitted by the applicant or submitted by or obtained from third parties.
- 8.8 The applicant will be given an opportunity to comment or to make further submissions in a timely manner during or after the relevant meeting.
- 8.9 After the completion of the review of the Application for a Decision and before making a Decision, the Commission may meet with the applicant to convey its views on the merits of the Application for a Decision and any conditions and limitations being considered. The applicant will be given an opportunity to comment at the meeting or in a timely manner after the meeting.
- 8.10 The Commission may choose in certain cases to consult third parties on a proposed Decision where:
- (a) the proposed Decision, if made, is likely to be of wider relevance for the market; or
  - (b) the Commission considers that the views of parties likely to be affected by the proposed Decision, if made, would assist the Commission in its assessment of the application.

## **9 Making a Decision**

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- 9.1 After reviewing relevant information and considering representations made within the timeframe for consultation, the Commission will make a Decision in accordance with section 11 or 26 of the Ordinance. The Decision may be that the agreement or conduct:
- (a) is not excluded or exempt from the Conduct Rules;
  - (b) is excluded or exempt from one or more of the Conduct Rules; or

- (c) is excluded or exempt from one or more of the Conduct Rules, subject to conditions or limitations.
- 9.2 Sections 11(3) and 26(3) of the Ordinance require the Commission to inform the applicant in writing of the Decision, the date of the Decision and the reasons for it.
- 9.3 A non-confidential version of the Decision and the Commission's reasons for it will be published on the Commission's website. The Commission will also make an entry in the Commission's register of Decisions and Block Exemption Orders in respect of the Decision.

### **Effect of a Commission Decision**

- 9.4 Under sections 12 and 27 of the Ordinance, where the Commission makes a Decision that an agreement or conduct is excluded or exempt, the undertaking specified in the Decision is immune from action under the Ordinance with respect to that agreement or conduct.
- 9.5 The need for conditions or limitations on Decisions will be considered on a case by case basis. However, the Commission will likely limit the duration of a Decision's effect if the Decision confirms the applicability of an exclusion or exemption.<sup>9</sup>
- 9.6 A Decision that the agreement or conduct is not excluded or exempt from the Conduct Rules does not necessarily mean that the Commission has formed a view on whether it has reasonable cause to believe that a contravention of the Conduct Rules has occurred in connection with that agreement or conduct.

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<sup>9</sup> The Commission will be particularly likely to limit the duration of a Decision to the extent that the Decision provides that an agreement is excluded from the application of the First Conduct Rule by or as a result of the General Exclusion for agreements enhancing overall economic efficiency.

## 10 Post Decision Matters

### Rescission

- 10.1 Sections 14 and 29 of the Ordinance provide that the Commission may rescind a Decision where the Commission has reason to believe that:
- (a) there has been a material change of circumstances since the Decision was made; or
  - (b) the information on which it based the Decision was incomplete, false or misleading in a material particular.
- 10.2 Where the Commission proposes to rescind a Decision, it will advise the undertaking specified in the Decision of its intention to do so and publicise the proposed rescission in accordance with sections 14(2) and 29(2) of the Ordinance, including by posting a notice of the proposed rescission on the Commission's website. This will involve publishing a statement on the Commission's website that it is considering rescinding a Decision and the reasons why, and inviting the undertaking specified in the Decision and those persons it considers likely to be affected to make representations about the proposed rescission within the period specified in the notice.
- 10.3 Under sections 14(4) and 29(4) of the Ordinance, persons making representations will be given at least 30 calendar days to make representations on the proposed rescission beginning after the day on which the notice is published.
- 10.4 In accordance with sections 14 and 29 of the Ordinance, the Commission will engage with, and consider representations from, the persons likely to be affected by the proposed rescission.
- 10.5 With a view to transparency in its decision making, the Commission will generally publish any written representations on its website. For this reason, the Commission requires the applicant and/or other parties to provide non-confidential versions of their written representations.

- 10.6 Following consideration of any representations received within the period identified in the notice of proposed rescission, the Commission may then proceed to issue a notice of rescission in line with the requirements of sections 14 and 29 of the Ordinance. This will be published on the Commission's website and an entry will be made in the register of Decisions and Block Exemption Orders in accordance with section 34 of the Ordinance.
- 10.7 Where the Commission rescinds a Decision, undertakings for which the Decision provided immunity from action under the Ordinance lose their immunity from the date the rescission takes effect with regard to anything done after that date.

### **Compliance with conditions or limitations**

- 10.8 Where the Commission has made its Decision subject to conditions or limitations, the Commission will monitor the undertaking's compliance with those conditions or limitations.
- 10.9 If an undertaking fails or ceases to comply with a condition or limitation subject to which a Decision has effect, sections 12(2), 13(1), 27(2) and 28(1) of the Ordinance provide that the immunity pursuant to that Decision ceases to apply with effect from the date on which the non-compliance begins.
- 10.10 Where an undertaking loses its immunity in view of a failure to comply with a condition or limitation, the Commission is entitled under section 13 or 28 to take enforcement action under the Ordinance.

## **11 Exercise of the Commission's Discretion Whether to Issue a Block Exemption Order**

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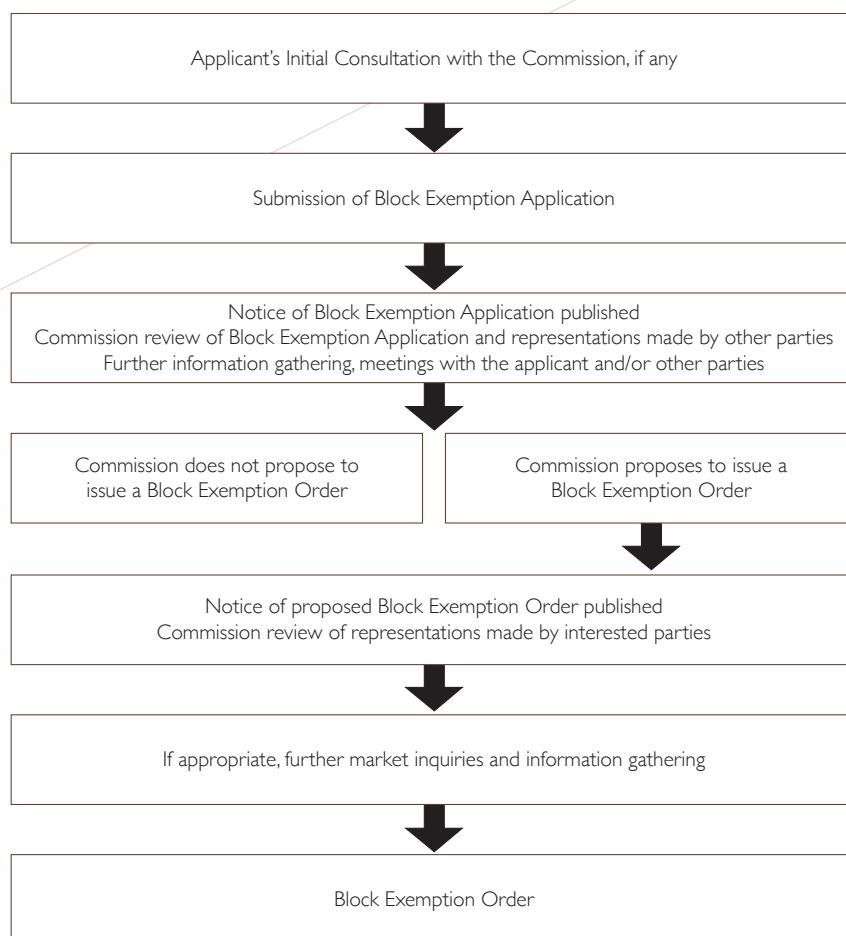
- 11.1 Section 15(1) of the Ordinance provides the Commission with the discretion to issue a Block Exemption Order where it is satisfied that a particular category of agreement is an Excluded Agreement.

- 11.2 Under section 15(2) of the Ordinance, the process leading to the Commission issuing a Block Exemption Order may be initiated in one of two ways. The Commission may:
- (a) of its own volition and without having received any application, decide to initiate a process to consider whether to issue a Block Exemption Order (“**Commission Initiated Process**”); or
  - (b) in response to an application by one or more undertakings or an Association, consider whether to issue a Block Exemption Order.
- 11.3 The Commission considers that the issue of a sector specific Block Exemption Order should be seen as an exceptional measure. The Commission will take into account whether the resources required for considering whether to issue such a Block Exemption Order are likely to be proportionate to the expected public benefit of issuing the order before commencing this process.
- 11.4 As outlined in paragraphs 5.5 to 5.7 of this Guideline, there is no requirement that the Commission issue a Block Exemption Order in order for undertakings or Associations to rely on the exclusion for agreements enhancing overall economic efficiency. Undertakings or Associations may self-assess the legality of their conduct having regard to the First Conduct Rule and the applicable exclusions and exemptions from those rules.
- 11.5 Block Exemption Orders may be relevant to a substantial portion of the Hong Kong economy. Developing a thorough understanding of the markets and potential impact of the Block Exemption Order may require extensive consultation with multiple stakeholders. The Commission notes that in jurisdictions which provide for a block exemption regime similar to the regime under the Ordinance, it is not unusual for the process leading to the issue of a block exemption to take a considerable period of time.
- 11.6 All undertakings and Associations considering making Block Exemption Applications are strongly encouraged to approach the Commission for an Initial Consultation before making any such application (see paragraphs 11.10 to 11.11 of this Guideline).

## **Process for applying to the Commission to issue a Block Exemption Order**

- 11.7 Figure 3 below outlines the main steps in the application process for a Block Exemption Order.
- 11.8 The Ordinance does not provide any timeframe for the Commission's review of a Block Exemption Application or prescribe any deadline for making a Block Exemption Order. The timing of a particular review will vary depending on, for example, the complexity of the case and the availability of Commission resources.
- 11.9 A review of a Block Exemption Application is likely to take considerably more time compared with an Application for a Decision.

*Figure 3. Key steps for a Block Exemption Application*



## **Initial Consultation for a Block Exemption Application**

11.10 Potential applicants should approach the Commission prior to submitting a Block Exemption Application. While there is no obligation to engage in an Initial Consultation, the Commission strongly encourages all potential applicants to do so.

11.11 The Initial Consultation affords applicants the opportunity to discuss their proposed Block Exemption Application with the Commission while allowing the Commission to identify:

- (a) whether it is possible that the relevant category of agreements may be Excluded Agreements;
- (b) whether a Block Exemption Application is the appropriate procedure under the Ordinance;
- (c) whether there is likely to be sufficient evidence available for the Commission to consider issuing a Block Exemption Order;
- (d) the resources that might be required to consider the Block Exemption Application and issue an eventual Block Exemption Order; and
- (e) whether in all the circumstances of the case, including the wider regulatory context and the overall competition regime in Hong Kong, a Block Exemption Order would be appropriate.

11.12 While an Initial Consultation may take place on a confidential basis, confidential information provided to the Commission during an Initial Consultation will be treated in accordance with Part 8 of the Ordinance and the terms of this Guideline relating to the provision of confidential information to the Commission. Accordingly, absent an express agreement with the Commission, information provided to the Commission in the context of an Initial Consultation, including information protected by legal professional privilege, will *not* be accepted on a ‘without prejudice’ basis or otherwise on terms that its use is limited for the sole purpose of the Initial Consultation and/or subsequent application. The Commission can use any information received in the context of an Initial Consultation, with or without notice to interested parties, for other purposes under the Ordinance including enforcement purposes (see generally paragraph 4.1 of this Guideline).

## **Preparing a Block Exemption Application**

11.13 A Block Exemption Application, accompanied by the appropriate fee, should be made to the Commission by submitting:

- (a) information relating to the applicant and the parties to the agreements concerned by the proposed Block Exemption Order (including, to the extent available to the applicant, contact information, a description of key business activities for the parties concerned);
- (b) details of the category of agreement concerned by the proposed block exemption order (including copies of a sufficiently representative sample of agreements falling within the relevant category);
- (c) information on the provisions or elements of the agreements falling within the relevant category of agreement which might give rise to competition concerns and an explanation of the nature of those concerns including possible theories of harm;
- (d) an explanation of the view of the applicant on the definition of the relevant markets affected together with market share data (including for competitors) and other information on the competitive situation in such markets;
- (e) information on affected suppliers and customers and their contact details to the extent available to the applicant;
- (f) an explanation (including supporting evidence) as to why the applicant believes the relevant category of agreement satisfies the terms of section 1 of Schedule 1 to the Ordinance (agreements enhancing overall economic efficiency);
- (g) if relevant, an explanation of factors in support of the applicant's claim that the category of agreements that are the subject of the application are representative of agreements in wider use in one or more industries; and
- (h) in the case of a sector specific Block Exemption Application, evidence showing a greater need for cooperation between undertakings in the relevant sector as compared with other sectors in the economy.<sup>10</sup>

11.14 The Commission will publish the most up-to-date requirements for applications on its website to assist applicants.

11.15 The Commission will acknowledge receipt of any Block Exemption Application it receives.

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<sup>10</sup> Applicants for a sector specific Block Exemption Order are encouraged to provide this information but this is not a mandatory requirement.

## 12 Considering Whether to Issue a Block Exemption Order

- 12.1 Where the Commission is considering whether to issue a Block Exemption Order, based on either a Commission Initiated Process or a Block Exemption Application, it will:
- (a) publicise by way of a notice on the Commission's website the Commission Initiated Process or a notice that it has received a Block Exemption Application; and
  - (b) engage with persons likely to be affected by a Block Exemption Order.
- 12.2 The Commission will assess whether the relevant category of agreements are Excluded Agreements in accordance with the principles explained in the Commission's *Guideline on the First Conduct Rule*.
- 12.3 When considering whether to issue a Block Exemption Order, the Commission will have regard to the views of persons likely to be affected by a Block Exemption Order and the various considerations listed at paragraph 11.11 of this Guideline.
- 12.4 As set out in paragraph 11.8 above, the timeframe for the Commission's assessment will depend on the nature and complexity of the matter, as well as the resources available to the Commission at the time.
- 12.5 After this process, the Commission will elect whether to propose to issue a Block Exemption Order. This means the Commission may:
- (a) not propose to issue a Block Exemption Order;
  - (b) propose to issue a Block Exemption Order; or
  - (c) propose to issue a Block Exemption Order subject to conditions or limitations.
- 12.6 If this process was initiated by a Block Exemption Application, the Commission will provide an explanation of this outcome to the applicant in writing.

## **13 Issuing a Block Exemption Order**

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- 13.1 Where the Commission proposes to issue a Block Exemption Order, section 16 of the Ordinance prescribes a process that must be undertaken before issuing the Block Exemption Order.
- 13.2 In accordance with section 16(1) of the Ordinance, the Commission will publicise the proposed Block Exemption Order. This will include posting on the Commission's website a notice of the proposed Block Exemption Order.
- 13.3 Under section 16(1) of the Ordinance, the Commission will also engage with, and consider representations from, persons likely to be affected by a Block Exemption Order. The Commission may also invite relevant parties to provide additional written representations or further information in response to representations received. The Commission will seek additional information from parties as necessary.
- 13.4 Under section 16(3) of the Ordinance, persons will be given at least 30 calendar days to make representations on the proposed Block Exemption Order beginning after the day on which the notice is first published.
- 13.5 With a view to transparency in its decision making, the Commission will generally publish any representations on its website. For this reason, the Commission requires the applicant (if any) and other persons to provide non-confidential versions of their written representations.
- 13.6 After the process set out in section 16 of the Ordinance, the Commission will decide:
  - (a) not to issue a Block Exemption Order;
  - (b) to issue a Block Exemption Order; or
  - (c) to issue a Block Exemption Order subject to conditions or limitations.
- 13.7 If the Commission decides not to issue a Block Exemption Order, it will provide an explanation of this outcome to the applicant in writing if the process was initiated by a Block Exemption Application. A decision not to issue a Block Exemption Order does not necessarily mean that the Commission has formed a view on whether it has reasonable cause to believe that a contravention of the First Conduct Rule has occurred in connection with the category (or any) of the agreements subject of the Block Exemption Application.

I 3.8 Where the Commission decides to issue a Block Exemption Order (with or without conditions or limitations), it will proceed to issue the Block Exemption Order in line with the requirements of section 15 of the Ordinance. The Block Exemption Order and the Commission's reasons for issuing it will be published on the Commission's website and an entry will be made in the Commission's register of Decisions and Block Exemption Orders.

### **Effect of issuing a Block Exemption Order**

I 3.9 Under section 17 of the Ordinance, where the Commission issues a Block Exemption Order, an agreement that falls within a category of agreement specified in the Block Exemption Order is exempt from the First Conduct Rule. However, the Block Exemption Order does not provide any exemption from the operation of the Second Conduct Rule.

I 3.10 Pursuant to section 15(3)(b) of the Ordinance, the Commission may specify a date from which a Block Exemption Order is to cease to have effect. The need to include conditions or limitations in Block Exemption Orders will be made on a case by case basis.

I 3.11 The Commission is required by section 19(1) of the Ordinance to commence a review of a Block Exemption Order on the date specified in that order for the commencement of the review. Under section 15(4) of the Ordinance, this review date must occur no later than five years from the date of the Block Exemption Order.

## **14 Matters Arising After the Issue of a Block Exemption Order**

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I 4.1 The Commission must commence a review of a Block Exemption Order on the date specified in the order for the commencement of the review.

- 14.2 The Commission may, however, review a Block Exemption Order at any time prior to the specified date in the Order for the commencement of a review if it considers it appropriate to do so. Section 19(3) of the Ordinance provides that when deciding whether or not to review a Block Exemption Order prior to the specified review date, the Commission may consider any number of factors but must consider the following:
- (a) the desirability of maintaining a stable and predictable regulatory environment in relation to competition;
  - (b) any developments that have taken place in the economy of Hong Kong or in the economy of any place outside Hong Kong that affect the category of agreement that is the subject of the Block Exemption Order; and
  - (c) whether any significant new information relating to the particular category of agreement has come to the knowledge of the Commission since the Block Exemption Order was first issued.
- 14.3 After its review, the Commission may vary or revoke the Block Exemption Order.
- 14.4 Where the Commission proposes to vary or revoke a Block Exemption Order, it will publicise the proposed variation or revocation with reasons in accordance with section 20 of the Ordinance. This will include posting a notice of the proposed variation or revocation on the Commission's website and inviting those persons the Commission considers likely to be affected to make representations about the proposed variation or revocation within the period specified in the notice.
- 14.5 Under section 20(4) of the Ordinance, persons will be given at least 30 calendar days to make representations on the proposed variation or revocation beginning after the day on which the notice is first published.
- 14.6 In accordance with section 20(2) of the Ordinance, the Commission will engage with, and consider representations from, parties likely to be affected by the proposed variation or revocation.
- 14.7 With a view to transparency in its decision making, the Commission will generally publish any written representations on its website. For this reason, the Commission requires parties to provide non-confidential versions of their written representations.

14.8 Following a consideration of any representations received within the period identified in the notice of proposed variation and revocation, the Commission may proceed to issue a notice of variation or revocation with reasons in line with the requirements of section 20 of the Ordinance.

### **Undertakings' compliance with conditions or limitations**

14.9 Where the Commission has made a Block Exemption Order subject to conditions or limitations, the Commission will monitor compliance with those conditions or limitations.

14.10 If an undertaking fails or ceases to comply with a condition or limitation subject to which a Block Exemption Order has effect, sections 17(2) and 18(1) of the Ordinance provide that the immunity pursuant to that Block Exemption Order ceases to apply to that undertaking with effect from the date on which the non-compliance begins.

14.11 Where an undertaking loses its immunity in view of a failure to comply with a condition or limitation, the Commission is entitled under section 18(3) of the Ordinance to consider taking enforcement action to the extent that the undertaking is involved in a contravention of the First Conduct Rule.



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