

# 競爭法與旅行社

## Competition law and travel agents

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《競爭條例》明年全面實施後，旅行社務須適應改變。

**When the Competition Ordinance takes full effect next year, travel agents will have to adapt to change.**

**競**爭法又稱為反壟斷法、反托拉斯法等，並不新鮮的事物，即使單以近代而言，早在十九世紀末、二十世紀初，加拿大、美國、德國、瑞典等國家就已為促進競爭而立法了。中國內地也已於二零零八年施行《反壟斷法》，以保障公平競爭，提高經濟效率，維護消費者利益。

香港是否應藉著立法來保障公平競爭？政府與各方相關人士為此討論了十多年。終於，二零一二年通過了《競爭條例》，二零一三年成立了競爭事務委員會，二零一四年十月公佈了六份指引的草稿，向公眾諮詢意見。明年各指引定稿時，《競爭條例》就會全面實施了。

### 第一及第二行為守則

上述六份指引涵蓋了六個範疇：第一行為守則、第二行為守則、合併守則、投訴、調查、豁免及豁免，其中與旅行社關係最密切的，應是第一及第二行為守則；至於合併守則，目前只適用於涉及《電訊條例》傳送者牌照持有人的合併交易，所以與旅行社完全無關。以下對各指引草稿的簡介，只會觸及關乎旅行社與議會的內容；讀者如果想瞭解詳情，可到競委會網站查閱([www.compcomm.hk](http://www.compcomm.hk))。

根據第一行為守則，如協議或經協調做法損害在香港的競爭，業務實體不得訂立或執行該協議或從事該經協調做法；如業務實體組織的決定損害在香港的競爭，業務實體組織的成員不得作出或執行該決定。業務實體包括公司、公司集團、行業協會等，也包括自然人，但倘若兩個實體屬於同一個業務實體，例如受第三家公司控制的兩家公司，則

**C**ompetition law, also known as anti-monopoly law, anti-trust law, etc, is anything but new. Even in modern times, such countries as Canada, the United States, Germany and Sweden sought to promote competition through legislation as early as the late 19th and early 20th centuries. Mainland China also implemented the Anti-Monopoly Law in 2008 in order to protect fair competition, raise economic efficiency and safeguard the interests of consumers.

Should Hong Kong legislate to protect fair competition? This was the question the Government and related parties had discussed for over a decade. Finally, the Competition Ordinance was passed in 2012 and the Competition Commission established in 2013. Six draft guidelines, released in October 2014 for public consultation, are expected to be finalised next year, by which time the Ordinance will be fully implemented.

### First and Second Conduct Rules

The six guidelines cover six areas: the First Conduct Rule, the Second Conduct Rule, the Merger Rule, complaints, investigations, and exclusions and exemptions. Of these areas, the First and Second Conduct Rules should have the closest bearing on travel agents; and the Merger Rule, which at present only deals with holders of carrier licences under the Telecommunications Ordinance, does not concern travel agents at all. The following sketch of the guidelines only touches on those contents that are related to travel agents and the TIC. Readers who wish to learn more about them may visit the website of the Commission at [www.compcomm.hk](http://www.compcomm.hk).

**According to the First Conduct Rule, an undertaking must not make or give effect to an agreement, or engage in a concerted practice if the agreement or the concerted practice harms competition in Hong Kong; and a member of an association of undertakings must also not make or give effect to a decision of the association if the decision harms competition in Hong Kong.** Undertakings include companies, groups of companies, trade associations, etc, as well as natural persons, but if two entities are part of the same undertaking, such as when two companies are under the control of a third, then the First Conduct Rule does not apply. An

第一行為守則並不適用。所謂協議，包括任何明示或隱含、以書面或口頭形式作出的協議、安排、承諾等；而經協調做法，指未達到協議程度的協同形式。至於業務實體組織的決定，無須限於具約束力的決定，也包括不具約束力的建議。

**第一行為守則主要針對合謀協議**，因為這種行為會導致價格上漲、產量下降，以及產品的品質、種類及創新減少等後果。性質嚴重的合謀協議例子包括：訂定價格、市場瓜分、產量限制、圍標、交換未來價格的資料等。**與旅行社的運作較為相關的，應是訂定價格及資料交換。**價格涵蓋任何價格元素，尤其包括任何折扣、降價或有關貨品供應的其他好處等；凡是涉及價格元素的協議就是訂定價格。訂定價格既可以是競爭對手之間直接訂立的協議，也可以用間接方式達成，例如業務實體同意索價不低於市場上的任何其他價格。此外，**由行業協會向成員發出價格建議的做法，也算是訂定價格。**如業務實體之間交換資料的結果會令其知悉競爭對手的市場策略，則這種資料交換可以損害競爭。因此，競爭對手交換未來定價意向的資料，會被視為限制競爭。

按照第二行為守則，在市場中具有相當程度的市場權勢的業務實體，不得藉損害在香港的競爭的行為，而濫用該權勢。所謂具有相當程度的市場權勢，並沒有單一的標準，最明顯的表現形式是，業務實體能在持續一段時間內提高價格至競爭水平之上而仍然有利可圖。雖然市場佔有率是判斷是否具有相當程度的市場權勢的因素之一，但並非唯一的決定因素；市場佔有率高並不必然就是相當程度的市場權勢。其他因素包括業務實體作出定價及其他決定的能力，競爭者進入市場的任何障礙等。可能構成濫用市場權勢行為的例子包括：攻擊性定價、搭售及捆綁銷售、利潤擠壓行為、獨家交易等。如業務實體一年內的營業額不超過港幣四千萬元，則第二行為守則並不適用。

## 豁免及其他事宜

《競爭條例》提供了一個有限的豁免及豁免機制，令業務實體的一些行為得到豁免。雖然業務實體無

agreement includes any agreement, arrangement, promise, etc, whether express or implied, written or oral; and a concerted practice refers to a form of cooperation which falls short of an agreement. As for a decision of an association of undertakings, it need not be limited to binding decisions; non-binding recommendations are also included.

**The First Conduct Rule mainly targets cartel agreements** because they give rise to higher prices, reduced output and reduction of product quality, variety and innovation. Examples of cartel agreements of a serious nature include price fixing, market sharing, output restrictions, bid rigging, exchange of future price information, etc, of which **price fixing and information exchange should be more closely related to the operation of travel agents.** Price includes any element of price, particularly any discount, price concession or other advantages in relation to the supply of products; and any agreement with respect to a price element amounts to price fixing. Whereas price fixing may involve directly agreed upon agreements between competitors, it can also be achieved by indirect means, such as when undertakings agree not to charge less than any other price in the market. Apart from that, **issuing a recommendation on prices by a trade association to its members is also price fixing.** If the exchange of information between undertakings results in their becoming aware of the market strategies of competitors, this kind of information exchange may harm competition. As such, the exchange of information on future price intentions between competitors will be considered a restriction on competition.

**According to the Second Conduct Rule, an undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that harms competition in Hong Kong.** There is no single criterion as to what constitutes a substantial degree of market power, but the most obvious manifestation of market power is the ability of an undertaking profitably to raise prices above the competitive level for a sustained period. While market share is a factor for determining substantial market power, it is not the sole determining factor; and a high market share does not always imply substantial market power. Other factors include an undertaking's power to make pricing and other decisions, the existence of any barriers to entry to competitors into the market, etc. Examples of conduct that may constitute an abuse of substantial market power include predatory pricing, tying and bundling, margin squeeze conduct, exclusive dealings, etc. The Second Conduct Rule does not apply to undertakings whose annual turnover does not exceed HK\$40 million.

## Exemptions and other matters

The Competition Ordinance provides for a limited regime of exclusions and exemptions, which allows certain conduct of undertakings to be exempted. Although there is no need for an undertaking to apply to the Commission in order to benefit from a particular

須向競委會申請已可受惠於特定的豁免或豁免，但也可以向競委會提出申請，以釐定某協議或行為會否獲得豁免或豁免。競委會只會在特定情況下才考慮有關申請，例如申請涉及公眾利益問題，而該問題屬於全新的；或者申請帶出的問題在現存案例法中仍未釐清。

公眾人士可向競委會投訴涉嫌損害競爭的行為，但競委會可行使酌情權，不去一一調查所有投訴。如競委會完成調查，可能有以下結果：不採取進一步行動，接受受調查方所作承諾，發出告誡通告，發出違章通知書，在競爭事務審裁處提起法律程序等。

## 議會的各種規例

議會自成立以來，就已按需要不時發出各種指引及守則，目的不僅是保障旅客利益、維護行業聲譽，確保旅行社賺取合理利潤也是原因所在。在這些規例中，競委會已經表示，第二百一十五號和第二百一十九號指引都可能違反《競爭條例》。

第二百一十五號指引(及其前身)為外遊旅行團的服務費訂出上限；當初發出指引的原因，是因為有些旅行團的團費甚低，但服務費反而甚為高昂，往往誤導了消費者，加上服務費不在旅遊業賠償基金的保障範圍之內，消費者的保障也受到損害。為解決這些問題，議會才給服務費定出上限，以免旅行社收取過高的服務費。

至於第二百一十九號指引(及其前身)，這主要是機票代理商為顧客提供與票務有關的服務時，議會建議它們收取的服務費金額。議會發出這個指引的原因，是航空公司近年不斷削減旅行社的佣金，有些航空公司更實行零佣金政策，令機票代理商難以生存，議會於是希望藉著這個指引，鼓勵機票代理商向顧客收取服務費，從而維持競爭力，並與航空公司重新建立健康的關係。

無論如何，《競爭條例》全面實施後，議會的一些指引及守則都需要修訂甚或撤銷，而旅行社的一些經營策略也都需要大加轉變，才可以適應異於從前的營商環境。✎

exclusion or exemption, it may also make an application to ascertain whether an agreement or conduct is excluded or exempted from the Conduct Rules. The Commission will only consider applications in specified circumstances: whether the application poses novel questions of public interest, whether it raises a question for which there is no clarification in case law, etc.

Members of the public may complain to the Commission about conduct suspected of harming competition, but the Commission may exercise its discretion not to investigate all complaints. Possible outcomes of an investigation include the Commission taking no further action, accepting a commitment from parties under investigation, issuing a warning notice, issuing an infringement notice, initiating proceedings in the Competition Tribunal, etc.

## Various rules of TIC

**Since its establishment, the TIC has from time to time issued various directives and codes of conduct whenever the need has arisen, with the objectives of not only protecting the interests of travellers and the reputation of the industry, but also ensuring a reasonable level of profits for travel agents.** Of these rules, the Commission has already indicated that Directive Nos. 215 and 219 may violate the Competition Ordinance.

Directive No. 215 and its predecessors, which set a ceiling for the service charges of outbound package tours, were first stipulated because consumers were often misled by package tours with exceedingly low tour fares and exceptionally high service charges, and also because the protection for consumers was diminished as a result of service charges not covered by the Travel Industry Compensation Fund. To address the problems, the TIC set a ceiling for service charges so that travel agents are banned from collecting service charges considered too high.

As for Directive No. 219 and its predecessors, they are mainly about the amounts of service fees the TIC recommends for ticketing agents when they provide ticketing-related services for customers. The rationale behind these directives is to encourage ticketing agents to collect service fees from customers given that the airlines have been slashing their commission to travel agents in recent years, some even launching a zero commission policy, thus making ticketing agents struggle to survive. The TIC therefore hopes that the directive can help them maintain competitiveness and re-establish a healthy relationship with the airlines.

In any event, when the Competition Ordinance is fully implemented, some of the TIC's directives and codes of conduct need to be amended or even revoked; and some of the business strategies of travel agents also need to be greatly changed in order to adapt themselves to a business environment different from the previous one. ✎