



Joint venture could be anti-competitive

Joint ventures could infringe the First Conduct Rule¹ (“FCR”) if they have the object or effect of harming competition. This could be the effect of an application of the Competition Ordinance (Cap. 619) (“CO”) that has come into full operation on 14 December 2015.

Joint ventures cover a wide spectrum of cooperative arrangements between undertakings. They come within the ambit of FCR as agreements. If European jurisprudence on Article 101(1) of the Treaty on the Functioning of the European Union, which provisions are similar to our FCR, may serve as a guide, “agreement” is not required to be legally binding. It would be sufficient that there is concurrence of wills².

Joint ventures are often horizontal agreements but could be vertical agreements. A horizontal agreement is an agreement made by two or more actual or potential competitors each operating at the same level of the production or distribution chain³. A vertical agreement is an agreement between undertakings that operate, for the purpose of the agreement, at different level of the production or distribution chain⁴. Joint production, joint tendering, joint selling, distribution and marketing are some examples of joint venture agreements.

A simple way to ensure that a joint venture would not be concerned with FRC is to effect the joint venture by way of a Merger⁵. Merger in the present context means the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity⁶. Even though a joint venture may harm competition, it may still be excluded from FCR if it enhances overall economic efficiency⁷. Hence, in planning a joint venture, there is one more aspect that must be considered.

**KW Kau
Consultant**

kwkau@cmkoo.com.hk

Click [here](#) for profile

1st Dec 2016

-
1. "First conduct rule" means the prohibition imposed by section 6(1) of Competition Ordinance.
 2. Bayer v. Commission, (case T-41/96) [2000] ECR II-3383 para. 69.
 3. Competition Commission, Guideline on the First Conduct Rule, 15 July 2015, para. 6.2.

4. Ditto, para. 6.5.
5. Section 4 of Schedule 1 of CO.
6. Section 2(1) of CO and section 3(4) of Schedule 7 of CO.
7. Section 1 of Schedule 1 of CO.

Mr. Kau Kin Wah is former Senior Assistant Legal Adviser of the Legal Service Division of the Legislative Council Secretariat. He has extensive experience in legislation scrutiny, public law issues and investigatory committees. He is also experienced in land law and conveyancing.

PLEASE NOTE

The law and procedure on this subject are very specialized. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

Published by Christine M Koo & Ip, Solicitors & Notaries LLP@2016