

# Legal issues in times of an epidemic

MinterEllison LLP  
铭德有限法律责任合伙律师事务所

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## INSIDE THIS EDITION

Updates on  
Developments in the  
Debt Market during  
COVID-19 **2**

Bracing for Impact –  
Directors' Duties in  
Insolvency **3-4**

Cartels: Recent Legal  
Developments in Hong  
Kong **5-6**

## Welcome to our 3<sup>rd</sup> special bulletin in response to the coronavirus (COVID-19) outbreak

In our first and second special bulletins issued in February and March 2020, we discussed certain corporate and financial regulatory, employment, dispute resolution, insurance and contractual issues related to the COVID-19 outbreak.

In this bulletin, we draw your attention to (i) some updates on the debt market, (ii) important points in relation to directors' duties in insolvency, and (iii) a case study concerning legal proceedings brought by the Hong Kong Competition Commission. The issues highlighted in this bulletin refer to the law in Hong Kong.

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the relevant contributing authors.

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# Updates on Developments in the Debt Market during COVID-19

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With the coronavirus (COVID-19) outbreak having officially been recognized as a pandemic by the World Health Organization on 11 March 2020, it is affecting not only Chinese economic activities, but also the global market. Different industries, countries and regions are subject to different impacts caused by lockdown policies, travel restrictions, quarantined workers, shortage of supplies, factory shutdowns, delayed resumption of normal economic activities, disruption to production and supply chains, which trigger cashflow difficulties, financing needs and refinancing pressures.

In view of the uncertainty driven by the current global health crisis and the tensions brought by the US-China trade war which are expected to last for some time, companies are inclined to take a defensive approach by securing money from investors now so that they can maintain liquidity, and support their refinancing needs later.

The following are some of our recent observations on the debt market:

## Offshore bonds

PRC companies and their offshore subsidiaries which intend to issue offshore bonds in RMB or other currencies with tenors longer than one year are required to register their issuance plans with the National Development and Reform Commission of the People's Republic of China ("**NDRC**"), while bonds with maturities of less than one year do not need to be registered with NDRC.

In light of the severe impact of the rapidly-spreading coronavirus, the PRC government recently announced various measures to help combat the negative economic impact. Among various measures, NDRC now allows bond issuers who are required to complete the issuance exercise between February and June 2020 to complete the issuance by 30 June 2020.

Unrated short-term bonds that mature within one year (also known as 363 or 364 days bonds) remain popular among bond issuers due to their simple transaction structure and quick preparation time. It generally takes three to six weeks to

complete the issuance of such 364 days bonds, which is ideal for issuers with short term financing needs.

## "Anti-epidemic bonds"

In order to assist PRC companies engaged in epidemic prevention and control to access liquidity at lower cost, among other measures, PRC regulators have now encouraged such companies to issue RMB-denominated bonds in the name of fighting the COVID-19 outbreak (known as "**anti-epidemic bonds**") for sale in the PRC by establishing a "green channel" to streamline the approval process from weeks to day(s) while urging state-backed banks and institutional investors to subscribe for them. To qualify such bond issuance, issuers must commit to spending at least 10% of the issue proceeds on measures to combat the epidemic.


Coupons on short-to-medium term anti-epidemic bonds are generally low. The low rates on offer from the anti-epidemic bonds have lured the issuers to issue such bonds for the purposes of combating the epidemic and easing their capital needs. Taking advantage of this favourable policy, a wide spectrum of companies ranging from airlines to drug distributors are flocking to issue the anti-epidemic bonds, which further boost debt market transactions.

Despite recent uncertainty and volatility, demand for debt securities in general remains robust, as investors can lock in income potential with a specified duration and issuers can secure financing from investors and improve their capital structure in a relatively swift way. Debt securities investment provides an optimum window and timely match of investors and issuers under the current circumstances. All these provide a favourable investment environment for debt securities and fosters a booming debt market amidst the ongoing coronavirus outbreak.

# Bracing for Impact – Directors' Duties in Insolvency

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At home and abroad, economies and businesses are feeling the brunt of the COVID-19 pandemic and related containment measures and consequences.

In a [recent update](#) by the Organisation for Economic Cooperation and Development (OECD), the OECD has projected that many economies will fall into recession, as the global lockdown due to the COVID-19 pandemic will affect sectors amounting to up to one third of GDP in the major economies. Locally, according to [statistics](#) published by the Hong Kong Government, in the first 2 months of 2020 compared to a year earlier, Hong Kong has seen a sharp fall in merchandise exports, a deterioration in the labour market leading to unemployment rates being the highest in nine years, and a large plunge in retail sales volume. This follows a time when the Hong Kong economy has already contracted by 1.2% for 2019 as a whole, the first annual decline since 2009.

In face of the uncertainties and challenges locally and abroad, businesses in various sectors are bracing themselves for arising insolvency risks. This client alert focuses on highlighting certain issues in particular relating to directors' duties at times as these.

## When is a company considered insolvent?

Essentially, there are two principal tests for insolvency. One test is the so-called "balance-sheet" test. This is the traditional test under which a company is insolvent if its liabilities exceed its realisable assets.

Another test of insolvency is the so-called "cash flow" test, which is sometimes called the commercial or liquidity test. Under this test, a company is insolvent if it is unable to pay its debts as they fall due. This is a ground to petition the Court to wind-up the debtor company under legislation in Hong Kong.

## Has Hong Kong introduced insolvency-related restrictions or relaxations?

Some governments around the world are imposing temporary restrictions on creditors' rights and actions for debt relief purposes, such as restricting enforcement of various acceleration or termination

rights, and raising the monetary thresholds for issuing statutory demands or filing of bankruptcies.

Whilst the Hong Kong government has introduced stimulus packages for certain sectors (such as low-interest loan guarantees for small and medium enterprises, and support/subsidy schemes for retailers and property management companies), it has not introduced insolvency-related restrictions or relaxations in respect of directors' duties or debtor's filings for insolvency.

In reality, though, the extended period of closure of the courts and court registries (from late January to until currently 3 May 2020) means that creditors have not been able to proceed with filing petitions for bankruptcy or winding-up, unless reasons of urgency can be shown. As a result, although no insolvency-related restrictions have been implemented in Hong Kong so far, the number of bankruptcy and winding-up petitions presented in February 2020 have been zero, according to statistics published by the Official Receivers' Office.

## What are the duties of a director if the company is insolvent (or is nearly so)?

When a company is insolvent (or is nearly so), the directors' duty to the company as a whole will require them to consider what would be in the best interests of the creditors of the company (instead of the shareholders), and to take every step with a view to minimising the potential loss to the creditors. A liquidator or creditor may bring proceedings against a director for breach of duty where that breach has resulted in a loss to the company.

Generally, directors:-

- (a) must not conduct the business of a company, which is insolvent or is nearly so, with intent to defraud creditors;
- (b) must not favour particular creditors; they must treat creditors equally; and
- (c) have a duty to take every step with a view to minimising the potential loss to the company's creditors once it is clear that there is no reasonable prospect of the company avoiding going into liquidation.

Directors should continuously assess whether or not the company is solvent especially in times of financial difficulties and insist that up-to-date cash flow statements, balance sheets and profit and loss statements be prepared to enable them to complete that assessment.

If a company is in financial difficulties, directors should take into account the following practical considerations:-

- (a) **Be realistic:** The actions of the directors will be judged by any liquidator, regulator, creditor or shareholder at a time when they have the benefit of hindsight. Accordingly, the directors must, at all times, be realistic as to the company's prospects of survival, giving regards to the interests of the creditors. If in doubt as to whether the directors should take steps to continue operations, restructure its debts, or voluntarily wind-up the company, directors are advised to seek legal and professional advice.
- (b) **Be careful about incurring fresh liabilities:** No new credit should be incurred without considering the overall financial position and prospects of the company to determine whether there is a reasonable chance of survival.
- (c) **Exercise extreme care when disposing of assets:** Generally speaking, directors should consider preserving the value of the company's assets when a company is in financial difficulties. When a disposal is made, it is advisable for the directors to ascertain the fair market value of the assets to be disposed of (by an independent qualified third party), and exercise care in identifying the entity to which the assets are being sold to ensure no creditor is preferred over another.
- (d) **Maintain a paper trail:** Decisions reached by each director should be properly recorded with reasons so that the director can demonstrate that his or her responsibilities are discharged.

# Cartels: Recent Legal Developments in Hong Kong

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## Competition Commission v. T.H. Lee Book Company Limited, The Commercial Press (Hong Kong) Limited, Sino United Publishing (Holdings) Limited and Hui Chiu Ming (Case no. CTEA2/2020)

On 20 March 2020, the Hong Kong Competition Commission (Commission) launched legal proceedings in the Competition Tribunal against three textbook publishers (Publishers) and the general manager (who is also a director) of the first named Publisher. The defendants are alleged to have contravened the First Conduct Rule of the Competition Ordinance (Cap. 619) by operating a cartel in relation to the sale of student textbooks in Hong Kong, which involved price-fixing, market sharing and/or bid-rigging.

Amongst the orders sought by the Commission in this case are:

- a declaration that the Publishers have contravened the First Conduct Rule and that the general manager of one of the three Publishers is a person involved in such contravention within the meaning of section 91 of the Competition Ordinance;
- an order for pecuniary penalties to be paid by the Publishers and the general manager; and
- a director disqualification order against the director.

At the time of writing this bulletin, the proceedings had only just commenced so the final outcome will not be known for some time. The Competition Tribunal can impose penalties of up to 10% of the annual turnover of an undertaking (or, where the contravention occurred in more than 3 years, 10% of the undertaking's turnover for the 3 years in which the contravention occurred that saw the highest, second highest and third highest turnover), so it will be interesting to see how the case unfolds.

### What is the First Conduct Rule?

Under section 6(1) of the Competition Ordinance, an undertaking must not:

- (a) make or give effect to an agreement;
- (b) engage in a concerted practice; or

- (c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

An undertaking is broadly defined in the Competition Ordinance as meaning *"any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity"*.

If an anti-competitive agreement, concerted practice or decision has more than one object, it suffices that only one of its objects is to prevent, restrict or distort competition in Hong Kong<sup>1</sup>. The anti-competitive object of an undertaking in making or giving effect to an agreement, concerted practice or decision that affects competition may also be inferred<sup>2</sup>.

### Are there any exemptions from the First Conduct Rule?

Yes, there are limited statutory exemptions available under Schedule 1 to the Competition Ordinance. Agreements, concerted practices or decisions which are anti-competitive may be permitted if:

- they enhance overall economic efficiency by improving production or distribution or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, but at the same time without (i) imposing restrictions that are not indispensable to the objective of enhancing overall economic efficiency and (ii) giving the undertakings involved the possibility of eliminating competition in respect of a substantial part of the goods/services concerned;
- they are required for the purpose of complying with a requirement of Hong Kong law;

<sup>1</sup> Section 7(1) of the Competition Ordinance

<sup>2</sup> Section 7(2) of the Competition Ordinance

- the undertaking has been entrusted by the Hong Kong Government to provide services of general economic interest;
- in the case of an agreement, the agreement (either on its own or when taken together with another agreement) results in, or if carried out would result in, a merger; or
- the combined turnover of the undertakings involved in the anti-competitive agreement or concerted practice in any calendar year does not exceed HK\$200 million; or
- the turnover of the association of undertakings which gave effect to the anti-competitive decision in any calendar year does not exceed HK\$200 million.

The last two exemptions listed above will not apply if the anti-competitive conduct in question amounts to serious anti-competitive conduct<sup>3</sup>.

### **What amounts to serious anti-competitive conduct?**

Serious anti-competitive conduct includes any one or more of the following types of conduct:

- fixing, maintaining, increasing or controlling the price for the supply of goods or services;
- allocating sales, territories, customers or markets for the production or supply of goods or services;
- fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services; and
- bid-rigging.

### **What can businesses do to protect themselves?**

The legal, commercial and reputational risks of being involved in cartel conduct are serious and should not be underestimated.

The First Conduct Rule has extra-territorial effect, so as long as competition in Hong Kong is harmed and none of statutory exemptions apply in a particular case, it does not matter that the agreement, concerted practice or decision in question has been made, given effect to or engaged in *outside* Hong Kong<sup>4</sup>.

*Competition Commission v. T.H. Lee Book Company Limited, The Commercial Press (Hong Kong) Limited, Sino United Publishing (Holdings) Limited and Hui Chiu Ming* also highlights the importance of conducting regular reviews of existing business practices. In that case, the Commission alleges that the cartel arrangements pre-dated the enactment of the Competition Ordinance, but that the Publishers did not cease the offending conduct.

Regular staff training and education at all levels of a business from front-line sales right up to directorship level can be an effective tool in combatting illegal cartel conduct.

### **The COVID-19 pandemic**

On 27 March 2020, the Commission issued a public statement acknowledging the challenges posed by the COVID-19 pandemic to the supply of essential goods and services in Hong Kong. Whilst the Commission will continue to enforce the Competition Ordinance during the pandemic, it also accepted that there may be instances in which businesses in certain industries could legitimately work together on a temporary basis in order to fulfil local demand for essential goods and services. However, for those businesses planning to do so, the Commission has invited them (or their industry bodies) to seek advice from the Commission on the application of the Competition Ordinance.

<sup>3</sup> Paragraph 5(2) of Schedule 1, Competition Ordinance.

<sup>4</sup> Section 8 of the Competition Ordinance

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# 疫症期间涉及的法律问题

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## 本版内容

新型冠状病毒爆发期间之债券市场的最新发展 2

应对冲击—董事在公司无力偿债时的责任 3

卡塔尔：香港法律的最新发展 4-5

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## 欢迎阅读本所针对新型冠状病毒爆发而编撰的第三期特别通讯

我们在第一期和第二期的特别通讯中讨论了一些与新型冠状病毒爆发有关的公司及财务监管、雇佣关系、争议解决、保险及合同的问题。

在本期特别通讯中，我们将提请您注意(i) 一些有关债券市场的最新发展、(ii) 关于董事在公司无力偿债时的重点及 (iii) 对香港竞争事务委员会提起的法律程序之案例的分析。本通讯谈及的法律事项的适用法律为香港法律。


我们希望本通讯为您提供有用的资讯，并欢迎您对日后的题目提出意见和建议。

如果您对本通讯有任何垂询，请参阅相关作者的联系方式。

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# 新型冠状病毒爆发期间之债券市场的最新发展

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随着新型冠状病毒（COVID-19）的爆发于 2020 年 3 月 11 日被世界卫生组织正式确立为大流行病，这不仅对中国经济活动产生影响，也影响着全球市场。新型冠状病毒的广泛传播导致了封锁政策、旅行限制、员工隔离、供应短缺、工厂关闭、正常经济活动延期恢复以及生产及供应链中断，这使不同行业、国家及地区均受到不同的影响，进而触发公司在现金流上困难、资金需求及再融资的压力。

鉴于因现时的全球卫生危机及中美贸易战导致的紧张局势而造成的不明朗因素预期将维持好一段时间，公司倾向于采取守势，现在就从投资者处获得资金流动性去支持其日后再融资的需求。

以下为我们近期对债券市场的观察所得：

## 离岸债券

中国公司及其境外子公司若有意发行期限超过一年的人民币或其他货币的离岸债券，必须向中华人民共和国国家发展和改革委员会（“发改委”）就其发行计划进行备案登记；而发行期限低于一年的债券则无须向发改委进行备案登记。

鉴于新型冠状病毒迅速传播而产生的严重影响，中国政府近期宣布多项措施去帮助应付对经济的负面影响。其中一项措施为发改委现在允许债券发行人就其原须于 2020 年 2 月至 6 月期间完成债券发行的期限延期至 2020 年 6 月 30 日。

期限在一年之内的无评级短期债券（也称为“363 或 364 天债券”）因其简单的交易结构及较快的准备时间，仍然收到债券发行人的欢迎。完成该类

364 天债券的发行一般只需 3 至 6 个星期的时间，对于有短期融资需求的发行人而言是较理想的。




## “防疫债券”

为帮助参与疫情防控的中国公司以较低的成本取得流动资金，除其他措施外，中国监管机构现在还鼓励这些公司以抗击新型冠状病毒爆发的名义发行在中国销售的人民币债券（称为“防疫债券”），方法是通过建立“绿色通道”以简化审批过程，将需要数周的审批流程减至数天（或一天），同时敦促国家支持的银行及机构投资者认购该等债券。为获得该等债券的发行资格，发行人须承诺将发行收益的至少 10% 用于抗击疫情的措施上。

短期至中期的防疫债券的利息一般较低。防疫债券较低的发行利率吸引发行人发行该类债券，以抗击疫情及减轻其资本需求。大量从航空业至药品分销业的各领域公司均希望从此项优惠政策中得益至而发行防疫债券，进一步促进债券市场的交易。

尽管有近期的不明朗及波动，债务证券的需求总体而言仍然甚殷，因为投资者可在指定期间内锁定其潜在收入，而发行人则可以相对快速的方式从投资者处获得融资以及改善其资本结构。在目前的情况下，债务证券投资为投资者及发行人提供了一个理想的窗口和在最适当的时候撮合了两者。上述种种均为债务证券提供了一个有利的投资环境，以及在持续爆发的新型冠状病毒中促进了债券市场的蓬勃发展。

# 应对冲击—董事在公司无力偿债时的责任

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无论在国内或国外，经济和商界都正受到新冠病毒大流行及相关防疫措施和后果所带来的冲击。

经济合作及发展组织（经合组织）在最近刊发的一份出版物中预测，由于新冠病毒大流行导致的全球性封锁将影响构成主要经济体近 1/3 的生产总值的产业，让许多经济体陷入衰退。在香港，根据香港政府公布的数据，香港在 2020 年的前两个月较去年同期经历了商品出口的骤降，劳动市场情况恶化导致失业率上升至九年以来的最高，零售市场销售量亦大幅下跌。在此之前，香港经济已在 2019 年总体下跌了 1.2%，是自 2009 年以来的第一次全年下跌。

面对国内外的各种不明朗的因素及困难，各行各业正准备应对不断增加的无力偿债的风险。本特别通讯文着重强调有关公司董事在这种非常时期应负上的责任。

## 一家公司何时会被视为无力偿债？

基本上，衡量无力偿债有两个标准，其中为“资产负债表”标准，在这个传统标准下，一家公司在其负债超出了可变现的资产时，即属破产。

另一标准为“现金流”标准，亦称商业或流动性标准，在这标准下，一家公司在无法偿付其到期的债务时，即属无力偿债。这也是依据香港法律向法庭提起负债公司清盘程序的理由之一。

## 香港有否引入与无力偿债有关的限制或宽限？

为缓解债务，世界上有些政府正在对债权人的权利及债权人诉讼施加临时性的限制，例如限制行使各种提前支付或解除合同的权力，并提高发出法定要求偿债书或提起破产程序的最低金额限制。

虽然香港政府对某些行业引入了刺激经济措施（例如对中小型企业低利息贷款担保及对零售业和物业管理公司的支持/补助计划），其并未就公司董事的责任或债务人申请破产施予任何限制或宽限措施。

事实上，香港法院和法庭登记处延长关闭期（从 2020 年 1 月底至现时所定的 2020 年 5 月 3 日）意味着除非证明有紧急原因，当事人和利益相关者一直未能向法院递交个人破产或公司清盘的申请。因此，尽管目前香港仍未施行无力偿债有关的限制，根据破产管理署的数据，在 2020 年 2 月递交的个人破产及公司清盘的申请数均为零。

## 若公司无力偿债（或接近无力偿债），董事有何责任？

当一家公司无力偿债（或接近无力偿债）时，公司的董事的整体责任要求他们考虑什么对公司债权人最为有利（而非股东），并须采取措施减轻债权人的损失。若因董事违反董事责任而给公司造成损失，清盘人或债权人可以向该等公司董事提起违反董事责任之程序。

一般而言，董事：

- (a) 不得以欺骗债权人意图经营一家无力偿债或接近无力偿债的公司的业务；
- (b) 不得优待特定债权人；必须平等对待债权人；
- (c) 一旦公司明显地没有合理的可能可避免进入清算程序时，有责任采取每一项措施以减轻债权人的损失。

董事应一直评估公司是否具有偿债能力，尤其是当公司处于财务困难的时候，董事应要求及时更新现金流量表、资产负债表及利润表以便其完成评估。

若公司陷入财务困难，董事应作出以下实际考量：

- (a) **实事求是：**任何清算人、监管者、债权人或股东都有着可在事后评断董事所采取的行动的优劣。因此，董事必须时刻对公司的生存前景抱着实事求是的态度，并考虑债权人的利益。若董事就是否应采取继续经营公司业务、重组公司债务或主动申请公司清盘等问题存有疑问，董事应征求法律及专业意见。
- (b) **避免产生新的债务：**在未对公司整体财务状况及公司前景进行评估从而判断公司是否有合理可能存续的情况下，应避免产生新的债务。
- (c) **在处置资产时须格外小心：**一般来说，在公司出现财务困难时，董事应当考虑保全公司资产的价值。董事在处理资产时，应通过独立的合格第三方就该等资产确定公平的市场价值，并谨慎地为该等资产物色买家，以保证没有债权人获得优待。
- (d) **保持文件记录：**每一位董事所做的决定及理由都应作妥善记录，证明董事已履行其责任。

# 卡特尔：香港法律的最新发展

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## 案件：竞争事务委员会对天利行书局有限公司、商务印书馆（香港）有限公司、联合出版（集团）有限公司及许超明 (CTEA2/2020)

香港竞争事务委员会(「**竞委会**」)在2020年3月20日于竞争事务审裁处提起法律诉讼，控告三间教科书出版社(「**出版社**」)及上述第一间出版社的总经理(其同时担任上述第一间出版社的董事)。被告人涉嫌违反第619章《竞争条例》中的第一行为守则，于香港销售教科书中进行合谋行为，包括合谋定价、瓜分市场和/或进行围标。

竞委会在上述案件申请的命令包括：

- 宣布三间出版社违反第一行为守则及其中一间出版社的总经理是《竞争条例》第90条所定义的牵涉入违反竞争守则的人；
- 出版社及第一间出版社的总经理支付罚款的命令；及
- 取消该董事担任公司董事的资格命令。

在撰写这份特别通讯之时，上述案件的诉讼程序才刚刚开始，所以最终的审判结果要待一段时间后方可知晓。竞争事务审裁处可以命令违反竞争守则的人向特区政府支付总额不得超过有关的业务实体在该项违反发生的每一年的营业额的10%(或如该项违反发生的年度多于3个，总额不得超过有关的业务实体在该等年度内录得最高、次高及第三高营业额的3个年度的营业额的10%)，所以上述案件的发展将会非常值得关注。

## 甚么是第一行为守则？

根据《竞争条例》第6(1)条，如某协议、经协调做法或业务实体组织的决定的目的或效果，是妨碍、限制或扭曲在香港的竞争，则任何业务实体

- (a) 不得订立或执行该协议；
- (b) 不得从事该经协调做法；或
- (c) 不得作为该组织的成员，作出或执行该决定。

业务实体在《竞争条例》中被广泛定义为「*任何从事经济活动的实体(不论其法定地位或获取资金的方式)，包括从事经济活动的自然人*」。

如某协议、经协调做法或决定有多于一个目的，而其中一个目的是妨碍、限制或扭曲竞争，则该协议、经协调做法或决定即属妨碍、限制或扭曲竞争为目

的。<sup>1</sup>即使仅可凭推论而确定，某协议、决定或经协调做法的目的是妨碍、限制或扭曲竞争，某业务实体仍可被视为作出或执行有该目的之该协议或决定，或从事有该目的之经协调做法。<sup>2</sup>

## 第一行为守则有任何的豁免及豁免吗？

有的，《竞争条例》附表一提供有限度的法定豁免及豁免。在下列情况下，反竞争的协议、经协调做法或决定将可能得到允许：

- 对提升整体经济效率，改善生产或分销有贡献，并同时容许消费者公平地分享所带来的利益，但(i)并不对有关的业务实体施加对达致提升整体经济效率的目的来说并非不可或缺的限制及(ii)并不令有关的业务实体有机会就有关的货品或服务的相当部份消除竞争；
- 实行的目的是为了遵守香港法律的某种规定；
- 该业务实体被香港特区政府委托营办令整体经济受益的服务；
- 在订立协议的情况下，任何协议(不论是其本身或连同另一协议)导致合并的范围内，或在如施行该协议便会导致合并的范围内，第一行为守则不适用于该协议；
- 如某些业务实体牵涉到反竞争协议或经协调做法，而在任何公历年某营业期的总计营业额不超过\$200,000,000；或
- 如某业务实体组织使反竞争决定生效，而在任何公历年某营业期的营业额不超过\$200,000,000；

最后的两个项豁免及豁免的情况不适用于牵涉严重反竞争行为的协议、经协调做法或业务实体组织的决定。<sup>3</sup>

## 严重反竞争行为是如何构成的？

严重反竞争行为是指由任何以下行为或以下行为的任何组合构成的行为：

- 订定、维持、调高或控制货品或服务的供应价格；
- 为生产或供应货品或服务而编配销售、地域、顾客或市场；

<sup>1</sup> 《竞争条例》第7(1)条

<sup>2</sup> 《竞争条例》第7(2)条

<sup>3</sup> 《竞争条例》附表1第5(2)条

- 订定、维持、控制、防止、限制或消除货品或服务的生产或供应；及
- 围标。

## 企业如何能保护自己？

如企业牵涉到合谋行为，在法律、商业及名誉上所带来的风险是严重及不能低估的。

第一行为守则具有治外法权的效力，如果该协议或决定影响香港的竞争，又不符合任何法定的豁免及豁免，即使该协议、经协调做法或决定是在香港境外作出、执行或从事的，也会违反第一行为守则。<sup>4</sup>

*竞争事务委员会对天利行书局有限公司、商务印书馆（香港）有限公司、联合出版（集团）有限公司及许超明案*强调定期审查商业惯常做法的重要性。在上述案件中，竞委会指控该合谋行为早于《竞争条例》生效前已经存在，但出版社没有于《竞争条例》生效后即时暂停有关违法行为。

企业定期为各个阶层的员工举办培训及教育，不论是前线销售员工至董事阶层，都是打击非法合谋行为的有效工具。

## 新型冠状病毒疫情的事宜

竞委员会在 2020 年 3 月 27 日发表了一份公开声明，表示其了解到新型冠状病毒疫情对香港企业的营运及重要物资及服务的供应所面对困难。在疫情期间，竞委会会继续执行《竞争条例》，竞委会同时明白到某些行业的企业，尤其是为了向消费者持续供应必需的货品及服务，在这段期间或有需要短暂地及合理地加强彼此间的合作，但是企业之间如有意进行该等短暂的安排，竞委已主动联络他们(或其行业协会)，商讨《竞争条例》如何应用于其建议的安排上。

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<sup>4</sup> 《竞争条例》第 8 条

**铭德及有关办事处：**

阿德莱德 奥克兰 北京 布里斯班 堪培拉 达尔文 黄金海岸 香港 伦敦 墨尔本 珀斯 上海 悉尼 乌兰巴托 惠灵顿

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