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**Hong Kong Aero Engine Services Limited**  
**Competition Law Compliance Manual**

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Date: 14 December 2015

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## A. INTRODUCTION

The Competition Ordinance (Chapter 619 of the Laws of Hong Kong) contains two basic rules: the First Conduct Rule and the Second Conduct Rule.

- Under the **First Conduct Rule**, any agreement, concerted practice or decision between two or more companies which has the object or effect of preventing, restricting or distorting competition in the Hong Kong market is prohibited.
- Under the **Second Conduct Rule**, a company that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

This Manual provides basic guidance to all employees of HAESL (“the Company”) with regard to competition law to assist them in complying with it. It is written with the Competition Ordinance in mind. The Company is committed to complying with all applicable competition laws both locally and overseas. Breach of such competition laws is a serious offence and may expose the Company to severe penalties and other sanctions, and individuals to imprisonment.

You must therefore read this Manual carefully. It is not exhaustive but summarises the key competition issues that you need to be familiar with in your day-to-day role as an employee.

This Manual is divided into different sections. Sections B and C provide guidance on how to deal with competitors and other third parties respectively. Section D sets out issues which may arise through the Company’s unilateral conduct. Section E highlights points to note in the context of trade associations and industry bodies. Finally, Sections F, G, H and I provide practical guidance on what to do if there is a dawn raid, points to note in creating documents, practical Do’s and Don’ts, as well as an “FAQ”.

If you have any questions or are uncertain about how competition law might apply in a particular context, please refer your questions to your Function Head or Human Resources Department who will seek advice from HAECO’s Legal Department. If you receive a complaint (formal or informal) about a breach of the competition rules, please refer to your Function Head as soon as possible.

## B. DEALINGS WITH COMPETITORS

### 1. Basic rules

- 1.1 The Hong Kong Competition Commission (the **Commission**) considers that consumers (including businesses acting as customers) benefit from competition in the marketplace. However, the benefits of a competitive market are undermined when market participants collude with competitors on key parameters of competition such as price, output, product and services quality, product and services variety and innovation.
- 1.2 Under the **First Conduct Rule** of the Competition Ordinance, **any agreement, concerted practice or decision between two or more persons or entities which has the object or effect of preventing, restricting or distorting competition in the Hong Kong market is prohibited.**
- 1.3 In order to avoid infringing the First Conduct Rule, you must follow these four basic “don’ts”:
- (A) **DON’T** discuss or agree prices, discounts, rebates, supply terms, profit margins or any other terms of business with the Company’s competitors.
  - (B) **DON’T** agree to share markets, territories, customers or sources of supply with the Company’s competitors.
  - (C) **DON’T** agree with the Company’s competitors to limit production, markets, technical development or investment.
  - (D) **DON’T** exchange non-public<sup>1</sup> commercially sensitive information with the Company’s competitors, including information as to future prices or quantities or strategy. (See Section B.3 below for further information.)

### 2. Cartels

- 2.1 **It is illegal to engage in cartels.** Cartels are agreements or understandings with competitors to compete less aggressively. Cartels are considered to be the most serious form of competition law infringement.
- 2.2 A cartel can include not just written or oral agreements, but also “gentleman’s agreements” and any other form of “understanding” that leads to competitors taking steps to reduce the degree of competition between them.

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<sup>1</sup> For these purposes, information is considered “public” (and therefore generally may be exchanged) if it is equally accessible in terms of the cost of access to all competitors and customers. Information which is more costly for those who are not party to the information-sharing arrangements to obtain (e.g. because of the resources needed to gather and collate the information) is unlikely to be considered public.

2.3 Illegal cartels include:

- (A) **Price fixing:** You must never enter into agreements with the Company's competitors with the aim of fixing, maintaining or otherwise controlling the pricing of products or services. This includes agreements on any rebates or discounts, pricing methods, as well as on costs and terms of payment. For example, never:
- (i) contact a competitor to discuss prices; or
  - (ii) discuss with competitors the prices of key inputs that you both purchase e.g. raw materials, consumables, or services.

(Please also refer to Section B.3 on information exchange.)

**Example: Price fixing by car dealers**

In 2014, China's Hubei Province Price Bureau fined FAW-Volkswagen and eight Audi dealers a total of RMB 279 million for fixing the prices of auto sales and maintenance services. The Audi sales division of FAW-Volkswagen had arranged for the Audi dealers to reach and implement price-fixing agreements in the form of a price list and a letter of guarantee on price arrangements.

Source:

<http://www.hbpic.gov.cn/chn201201110924533/article.jsp?articleId=45084>

- (B) **Market Sharing:** You must never agree with the Company's competitors to allocate particular markets or customers to each other and/or to agree not to compete in various markets. The term "market" here includes both geographic territories and various classes of customers. For example:
- (i) don't enter into agreements with a competitor in such a way as to allocate markets, sales, territory, customers or products, or sources of supply; and
  - (ii) don't enter into discussions or make plans with a competitor to keep a new entrant (potential or actual) out of the market.

It would constitute an illegal market sharing agreement if, for instance, a travel agent agreed with a competing travel agent not to compete with each other, such that the first travel agent would target only corporate customers for business travel whilst the other travel agent would target only leisure customers. This would mean there is less competition in the market as a result of the agreement.

**Example: Sugar cartel in Germany**

In 2014, the German Federal Cartel Office imposed fines totalling €280 million on three major German sugar manufacturers for entering into anti-competitive agreements whereby the parties agreed to (among other things) confine their sales of sugar to their respective home sales areas.

Source:

[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/18\\_02\\_2014\\_Zucker.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/18_02_2014_Zucker.html)

- (C) **Bid Rigging:** You must never enter into agreements with the Company's competitors regarding prices or terms and conditions to be submitted in response to a bid request, including entering into any agreements not to bid. Similarly, when the Company issues tenders, prospective tenderers should not be agreeing with each other regarding any aspect of their responses to the Company's tender.

**Example: Construction companies bid rigging**

In September 2009, the UK competition authority imposed penalties totalling £129.2 million on 103 construction firms in England for bid rigging activities on building contracts in the form of cover pricing.

Cover pricing is where one or more bidders in a tender process obtain an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which gives a misleading impression to the issuer of the tender as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender.

Source:

<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofc.gov.uk/news-and-updates/press/2009/114-09>

- (D) **Agreeing to limit production or supply:** You must never agree with competitors of the Company to fix, maintain, control, prevent, limit or eliminate the production or supply of goods or services.

**Example: Beef processors cartel**

In 2008, the European Court of Justice ruled that an arrangement between Irish beef processors, which was intended to reduce the total capacity of the processing industry by 25% in one year, had the object of harming competition.

Under the arrangement, certain beef processors had agreed to exit the industry in return for compensation from other processors.

Source:

[http://europa.eu/rapid/press-release\\_MEMO-08-728\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-08-728_en.htm?locale=en)

2.4 Cartels can also exist where competitors reach an agreement or understanding indirectly via a third party, such as a customer, supplier, agent or contractor. These are sometimes referred to as “hub and spoke” cartels. See Section C.1 below for further information.

### 3. Information exchange

3.1 **It is generally illegal to exchange non-public commercially sensitive information with competitors.**

3.2 It is important to remember that “exchange” in this context includes not only disclosure but also receipt; absent a legitimate business reason, **if you receive commercially sensitive information regarding competitors, the Company will be presumed to have taken such information into account when determining its market conduct and could be found to have infringed competition law as a result.**

3.3 It does not matter whether the exchange happens during project meetings or in casual friendly gatherings, or whether the exchange is regular or merely a one-off incident. You should observe the principles below even when you are talking to your trusted friends who work for our competitors after work about commercially sensitive topics.

#### Information you must not exchange with the Company’s competitors

3.4 **Commercially sensitive** information includes (but is not limited to) non-public information that a business would not normally want to disclose to its competitors. This includes, for example:

- (A) prices (including price, fees, pricing strategy and calculations) and price-related information, such as discounts and rebates (recent, current and future);
- (B) production costs, cost structure, profits and profit margins;
- (C) output and sales quantities (e.g. sales volumes or values, sales to particular customer groups or territories);
- (D) information relating to customers, suppliers, agents, contractors or other third parties (including detailed commercial information on relations with individual customers);
- (E) strategic information (recent, current and future) and risks;

- (F) market shares;
- (G) future plans relating to investment, advertising, marketing or promotions;
- (H) product quality, investments, technologies and innovations;
- (I) bidding information [including information about when the Company (or its competitors) will refrain from bidding]; and
- (J) the selection, rejection or termination of the Company's (or its competitors') customers, suppliers, agents and contractors.

3.5 If you are unsure whether information is commercially sensitive, consider whether the Company or its competitors would find it useful to know the information. Information is likely to be commercially sensitive if: (a) in the normal course of business, the discloser would not wish competitors to have that information as they may adapt their competitive behaviour; (b) competitors might change a commercial decision or strategy on the basis of the exchanged information; or (c) a current or potential customer or supplier may object to the exchange of that information.

3.6 **If the Company or its competitors would gain a competitive advantage from the information, then it is likely to be commercially sensitive.**

3.7 You should consult your Function Head if you are unsure of whether any information is commercially sensitive.

**Example: Confectionary manufacturers**

In January 2013, the German Federal Cartel Office imposed fines totalling €2.4 million on confectionary manufacturer Haribo and a number of its sales representatives. Senior sales staff of Haribo and other confectionary companies had exchanged information on the state of negotiations with various major retailers.

Source:

[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/01\\_08\\_2012\\_Haribo.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/01_08_2012_Haribo.html)

Can you give commercially sensitive information to anyone else?

3.8 In addition to not sharing commercially sensitive information directly with the Company's competitors, information must also not be shared indirectly with the Company's competitors through a third party, e.g. the Company's customers, suppliers, agents or contractors. (See also Section C.1 below.)

3.9 If you decide that it is really necessary to share the information with the third party, you

must highlight that the information is confidential and must not be shared with anyone else without your permission.

3.10 Where appropriate, you should ask the recipient of the information to sign a confidentiality undertaking not to disclose the information to any third party. Examples include:

- (A) where the third party concerned is likely to be in contact with the Company's competitors (e.g. a common supplier or customer); and
- (B) where the third party concerned is part of a group of companies of which a member is a competitor of the Company (for these purposes, the confidentiality undertaking would have to be carefully drafted so as not to allow disclosure to other group companies).

What information can you collect and use?

3.11 You can legitimately gather and use information that is:

- (A) genuinely public information, being information that is equally accessible in terms of cost of access to all competitors and customers, e.g. media, websites, independent industry publications;
- (B) historic information, provided it is sufficiently historic that it is not possible to infer information about the Company or its competitors' current or future strategy or prices; and
- (C) aggregated information, so long as it is not possible to extract the Company's (or its competitors') individual data from the overall data.

3.12 Insofar as general reports, studies and statistics are limited to information which is historical, aggregated, anonymised and/or publicly available, such documents can be commissioned and exchanged between competitors.

What about industry information that is collected and gathered in trade associations?

3.13 For information on what can or cannot be done in the context of trade associations and industry bodies generally, please see Section E below.

3.14 Trade association activities and exchanges of non-commercially sensitive information are generally accepted under competition law rules where they promote the competitiveness of the industry and lead to higher technical or industry quality standards for the benefit of consumers. Information sharing and negotiations between competitors and potential competitors may however be of concern under competition law rules when they lead to collusion and reduce existing or future competition. **Trade associations should not be used as a forum for the exchange of competitively sensitive business information between competitors.**

- 3.15 You must take particular care not to provide or receive non-public commercially sensitive information in the context of trade association activities, especially price-related information (e.g. discounts, costs, terms of trading etc). You must not discuss collective boycotts, bid rigging, price fixing or market sharing arrangements. Discussions with the object or effect of reducing competition between members of the trade association or from a third party (e.g. a non-member of the trade association) must be absolutely avoided. The Company's commercial decisions must be made unilaterally and independently from that of its competitors.
- 3.16 The circulation of aggregated historical information or the collation of overall industry price trends are not prohibited by the Competition Ordinance provided it is not possible to extrapolate non-public commercially sensitive data about an individual company from such information – see [Section B.3.11](#) above.
- 3.17 When attending trade association meetings, or exchanging information, ask yourself:
- (A) Is the information you are providing **non-public and commercially sensitive and could it harm the Company** if known to our competitors, or could you make use of similar data if provided by a competitor? If so, do not disclose this information.
  - (B) Is there a **genuine pro-competitive reason** for exchanging the data? If not, you should not be exchanging the information.

- 3.18 The supply of information to “benchmarking clubs” should be treated in the same way as the supply of information to trade associations.

**Example: Danish Freight Transport Association**

In February 2009, the Danish Competition Council found that International Transport Denmark, a Danish freight transport association, engaged in illegal information exchanges with its members with the object of restricting competition by coordinating the conduct of its members and aligning prices. The relevant conduct consisted of creating and publishing: (i) a pre-fulfilled cost calculating program for freight transport by road; (ii) a cost forecast for freight transport by road; (iii) a specific rate for waiting hours; and (iv) recommendation to transport companies to pass on specific oil-related costs to customers.

Source:

<http://en.kfst.dk/Indhold-KFST/English/Decisions/20090225-ITD-has-exchanged-illegal-information-with-its-members?tc=E54958826ADF4DA190FADFA134162E12>

In December 2011, the Danish City Court fined another Danish freight transport association, Dansk Transport og Logistik, €55,000 for illegal exchange of information by publishing a calculation programme for freight transport by road with specific forecast of cost development.

Source:

<http://en.kfst.dk/Indhold-KFST/English/Judgements/20111215-Freight-transport-organization-fined-by-the-City-Court?tc=E54958826ADF4DA190FADFA134162E12>

## C. DEALINGS WITH THIRD PARTIES

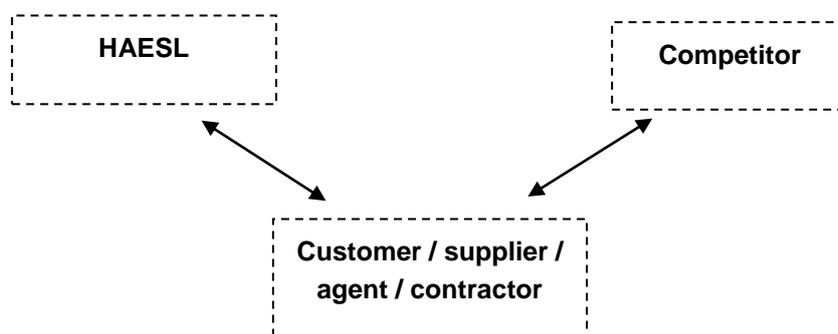
### 1. Exchange of information and hub and spoke cartels

1.1 As mentioned in Section B.2.4 above, competition risks may arise even when dealing with third parties who are not your competitors, through what are sometimes referred to as “hub and spoke” cartels. “Hub and spoke” cartels are where competitors reach an agreement or understanding indirectly via a third party, such as a customer, supplier, agent or contractor.

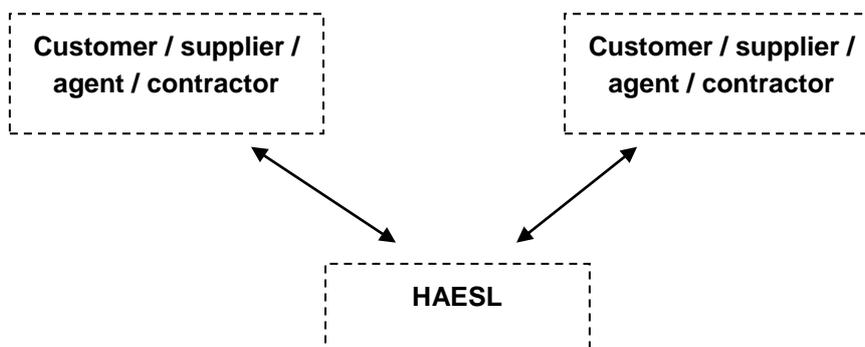
1.2 Indirect exchange of information between competitors through a third party can also amount to infringement of competition law, especially if the relevant information has the potential to facilitate coordination between players in the same market. You must therefore be mindful about the risk that commercially sensitive information might be shared indirectly with the Company’s competitors through a third party, e.g. the Company’s customers, suppliers, agents or contractors.

1.3 Two types of “hub and spoke” cartel are illustrated below.

- (A) “Hub and spoke” cartel with the Company as the “spoke” – in this scenario, the Company and its competitors are the “spokes” that are able to form an anti-competitive agreement or understanding indirectly through a common customer, supplier, agent or contractor (or other third party).



- (B) “Hub and spoke” cartel with the Company as the “hub” – in this scenario, the Company becomes the “hub” through which its customers, suppliers, agents or contractors (or other third parties) can form anti-competitive agreements or understandings by exchanging information through the Company.



- 1.4 To **avoid the risk of becoming involved in a “hub and spoke” cartel**, when dealing with customers, suppliers, agents and contractors you must take care to ensure that:
- (A) if a third party (e.g. customer, supplier, agent or contractor) has access to any of the Company’s non-public commercially sensitive information, it must not share this information with any of the Company’s competitors. For example, a confidentiality agreement should be entered into with such third party;
  - (B) if a third party (e.g. customer, supplier, agent or contractor) has access to non-public commercially sensitive information belonging to any of the Company’s competitors, you must not see, receive or request this information from the third party (even if you think it will be helpful to you). If such third party does disclose non-public commercially sensitive information belonging to the Company’s competitor to you, you should: (a) clearly respond (in writing where possible, otherwise a written record of the verbal response should be kept) that you do not wish to receive any more commercially sensitive information in the future and; (b) ensure that the Company does not use the information received in making its own business decisions; and
  - (C) if a third party (e.g. customer, supplier, agent or contractor) provides the Company with any of its own non-public commercially sensitive information, you must not disclose this information to any other customers, suppliers, agents or contractors of the Company respectively (i.e. the competitors of the third party who provided the information).
- 1.5 For example, if a retail customer tells its supplier when it intends to implement across-the-board retail price increases, the supplier must not disclose this information to any competitors of that retail customer (even if those competitors press the supplier for the information).
- 1.6 Similarly, if a distributor supplies goods to two competing retailers, neither retailer may request any confidential information (e.g. about impending retail price rises) about its competitor from the distributor.

## **2. Resale price maintenance**

- 2.1 Resale price maintenance (“**RPM**”) refers to agreements between a supplier and a reseller on the price at which the reseller will sell on a product to its own customers. RPM, whether it involves setting a specific price, or just a minimum or “floor” price, is illegal in many jurisdictions around the world. The Commission has confirmed its position that agreements involving direct or indirect RPM are likely to have the object of harming competition and thus in violation of the Competition Ordinance.
- 2.2 RPM could also take other, less obvious forms:
- (A) fixing the reseller’s margin;
  - (B) fixing the maximum level of discount the reseller can grant from a prescribed

price level;

- (C) making the grant of rebates or reimbursement of promotional costs conditional on a fixed level of resale price; and
- (D) linking resale price to the resale price of competing suppliers.

2.3 Therefore, **you must not agree fixed or minimum resale prices with the Company's independent customers.**

Can the Company make or be required to follow recommendations regarding resale prices or set maximum prices?

- 2.4 Where a supplier merely recommends a resale price to a distributor or requires a reseller to respect a maximum resale price, the Commission will not consider this to have the *object* of harming competition. However, the Commission will look at whether such an arrangement would have the *effect* of harming competition.
- 2.5 Recommended or maximum resale price agreements may give rise to a concern where they serve to establish a "focal point" for distributor pricing (i.e. where the distributors generally follow the recommended or maximum price), and/or where they soften competition between suppliers or otherwise facilitate coordination between suppliers. The actual market position of the supplier would be taken into consideration in assessing whether such arrangements have the actual "effect" of harming competition. The more the supplier has market power in the relevant market, the more likely it is that the conduct will have the effect of harming competition. If in doubt, please consult your Function Head for further advice.
- 2.6 Generally speaking, a supplier can make non-binding recommendations on resale prices only if customers or distributors are told clearly in writing (and it is indeed the case in practice) that they are free to set their own prices. In addition, it must not incentivise, monitor or coerce customers or distributors in any way into following the recommended resale prices.

- 2.7 Recommended or maximum resale price arrangements, when they are combined with measures (such as price monitoring systems) which make them work in reality as fixed or minimum prices, may be assessed in the same manner as RPM (for which see Sections C.2.1 to C.2.3 above).

**Example: Distributor of leading outdoor brand**

In 2012, the Korean Fair Trade Commission imposed a fine of KRW 5.25 billion (around US\$4.5 million) on Goldwin Inc. for engaging in resale price maintenance. Goldwin Inc., the sole distributor for the outdoor brand North Face in South Korea, had required retailers to comply with its designated resale prices and had sanctioned retailers that failed to do so by suspending supplies, terminating contracts and imposing fines.

*Source: Korea Fair Trade Commission press release dated 7 May 2012*

**3. Exclusivity agreements / non-compete obligations**

- 3.1 Provisions which grant exclusivity to a party or place restrictions on a party's ability to supply or purchase competing products may raise competition concerns. Such provisions can arise in a number of contexts.

- 3.2 Examples include:

- (A) **Exclusive distribution agreements** (where a supplier assigns exclusivity for the resale of its products in a particular territory to a single distributor) and **exclusive customer allocation agreements** (where a supplier assigns exclusivity for resale to a particular group of customers to a single distributor).

Generally, such agreements will restrict competition only if the supplier or the distributor has market power or if multiple exclusive distributorships are granted to the same party in a way that may substantially restrict competition between brands. Other relevant factors include the extent of the exclusivity (e.g. whether the exclusivity is granted over a very wide territory), the prevalence of exclusive distributorships in the market, and whether the arrangements may be justified on the basis that they create efficiencies (e.g. they encourage distributors to invest and build up the brand image of a new product).

If, for example, a car distributor was granted an exclusive distributorship for every brand of passenger car that is imported into Hong Kong for 20 years, this would have the effect of excluding other car resellers from the market and will likely be considered to be anti-competitive.

- (B) **Non-compete obligations imposed by a supplier** (e.g. where a buyer / wholesaler is obliged not to make purchases from competitors of the supplier) generally will be anti-competitive only if leads to: (a) a loss of in-store competition between brands (this is relevant where the restriction is imposed on

a retailer and not e.g. a wholesaler); or (b) those competitors being excluded from the market. If, for example, competing suppliers have recourse to other buyers who are not bound by non-competes, then the non-compete obligation is unlikely to give rise to significant competition concerns. In assessing the anti-competitive effect of a non-compete, the market position of the supplier and its competitors, the duration and scope of the restriction, and the prevalence of non-competes on the market will be relevant.

- (C) Non-competition, non-solicitation and confidentiality<sup>2</sup> clauses in **joint venture agreements** must be analysed on a case-by-case basis to assess whether they can be justified according to accepted competition principles. In short, the geographical scope, the products and/or services covered, and the duration of the restriction must mirror (and not exceed) the scope of the joint venture.
- (D) Exclusivity provisions encountered in the context of **M&A transactions** – i.e. requiring a party to negotiate exclusively with the other party – are usually less likely to raise competition concerns as they generally will not have an anti-competitive effect on the market, provided that the duration of the exclusivity is not longer than is reasonable.

**3.3 Please speak to your Function Head if you have any questions in relation to any of the above arrangements.**

**Example: Exclusive distribution of iPhone handsets**

In 2009, the French Competition Authority accepted commitments from Apple and France Telecom / Orange to terminate all exclusivity arrangements relating to the latter's distribution of iPhones. The French Competition Authority was of the view that these exclusivity provisions could weaken competition between mobile operators, taking into account the position of Orange, the attractiveness of the iPhone, and the scope and duration of the application of the exclusivity (five years with a possible withdrawal period after three years).

Source:

[http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=316&id\\_article=1297](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=316&id_article=1297)

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<sup>2</sup> In this context, confidentiality clauses refer to provisions which restrict a party from using confidential information relating to the joint venture after the termination of the joint venture (e.g. when one joint venture partner acquires the interest of the other partner).

## D. UNILATERAL CONDUCT

### 1. Abuse of market power

- 1.1 The law places extra obligations on companies in markets where they are strong. Under the **Second Conduct Rule, a company that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.** A company that has a sufficiently strong market position such that it is not constrained by its competitors will qualify as having a “substantial degree of market power”.
- 1.2 Whether a company has a substantial degree of market power in a product market involves complex economic and legal analyses. The Commission did not provide any indicative market share threshold in their guidelines.
- 1.3 If you are in doubt as to whether the Company has a substantial degree of market power in a particular market, please discuss with your Function Head.
- 1.4 It is not a problem to have a substantial degree of market power but, in markets where the Company is in this position (if any), it must not abuse this power by engaging in conduct that has the object or effect of harming competition in Hong Kong. An anti-competitive effect may arise in particular when the conduct results in the anti-competitive foreclosure of existing competitors or new entrants to the market. In other words, it is illegal to use anti-competitive ways (rather than greater efficiency) to prevent potential competitors from entering a market or existing competitors from expansion.
- 1.5 The following is a non-exhaustive list of conduct which may be considered abusive.
  - (A) **Predatory pricing:** if the Company has a substantial degree of market power in a market, then it will be illegal for the Company to engage in predatory pricing (i.e. price its products or services at below cost in order to eliminate competitors).

**Example: British Airways (BA) / Eurostar**

In November 2004, the French Competition Council received a complaint from BA alleging that Eurostar, a provider of rail passenger transport between Paris and London, had abused its dominant position by offering cheap tickets that did not cover its costs and saturating capacity in order to foreclose BA from the Paris to London market.

The Council found that although Eurostar held a dominant position in the market for passenger transport on the Paris-London line, its policies were not predatory nor did it have an anti-competitive effect on the market.

Source: <http://www.conseil-concurrence.fr/pdf/avis/07d39.pdf>

- (B) **Exclusive arrangements:**<sup>3</sup> Exclusivity agreements with third parties may raise competition concerns where they restrict competition, for example by conferring an unfair advantage on one of the Company's suppliers or by binding a customer to the Company (so that competitors cannot compete for that customer's business).

In particular, exclusivity arrangements may be illegal if the Company has a substantial degree of market power in the relevant market. For example, if a company has a substantial degree of market power in the supply of widgets, it may constitute an abuse if the company requires a customer to purchase all or almost all of its widgets only from the company (thus excluding smaller competitors).

**Example: White rum exclusive distribution**

In 2002, the UK competition authority investigated Bacardi-Martini Limited, a company which was dominant in the supply of white rum, for requiring pubs and bars to sell only its white rum products. The authority closed its investigation after Bacardi gave assurances that it would cease its anticompetitive behaviour.

Source:

[http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/news-and-updates/press/2003/pn\\_10-03](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/news-and-updates/press/2003/pn_10-03)

- (C) **Tying / Bundling:** If the Company has a substantial degree of market power in

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<sup>3</sup> See Section C.3 above for a more detailed discussion of exclusivity agreements

relation to a particular market, it may be illegal for the Company to make the sale of its products or services in that market (the “tying” products or services) conditional upon the purchase of other products or services (the “tied” products or services). This is referred to as “tying”.

If the Company has a substantial degree of market power in relation to a particular market, it may also be illegal for the Company to “bundle” its products or services. “Bundling” occurs where products or services are sold jointly in fixed proportions or where they are made available for sale separately, but at a higher aggregate price than the bundled product or service.

**Example: Microsoft tying Windows Media Player to Windows OS**

In 2004, the European Commission found that Microsoft had engaged in abusive conduct by tying Windows Media Player to its Windows operating system (such that the latter could not be purchased without the former). Microsoft’s conduct effectively meant that it was leveraging its dominant position in the market for personal computer operating systems into the market for media players.

Source: [http://europa.eu/rapid/press-release\\_IP-04-382\\_en.htm](http://europa.eu/rapid/press-release_IP-04-382_en.htm)

- (D) **Loyalty rebates:** If the Company has a substantial degree of market power in a market, it may be illegal for the Company to grant fidelity (or loyalty) rebates or discounts that have the effect of binding customers to it in that market.

Discounts or rebates may however be permitted where the reduction can be justified on the basis of genuine cost savings. For example, standardised rebates (where the purchasing threshold over which rebates apply is the same for all customers) are generally less likely to raise competition concerns. Quantity rebates (i.e. rebates which are conditional on the size of a particular order) may also be permitted if they reflect genuine cost savings due to economies of scale and are made available to all customers without restricting their choice of supplier.

**Example: British Airways (BA) loyalty rebates**

In August 1999, the European Commission imposed a fine of €6.8 million on BA for providing loyalty rebates to travel agents. Under BA's commission scheme, a travel agent who met the targets for sales growth received an increase in the commission paid on all BA tickets sold by the agent, not just on the tickets sold after the target is reached. This was equivalent to a loyalty discount, i.e. a discount based not on cost savings but simply on customers' loyalty. The Commission's decision was upheld by the European Court of Justice in 2007.

Source: [http://europa.eu/rapid/press-release\\_IP-99-504\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-99-504_en.htm?locale=en);  
[http://europa.eu/rapid/press-release\\_MEMO-07-103\\_en.htm](http://europa.eu/rapid/press-release_MEMO-07-103_en.htm)

- (E) **Refusal to supply:** If the Company has a substantial degree of market power in a market, then it may be illegal for the Company to refuse to supply a new customer or to stop supplying an existing customer which may compete with the Company in the same or different market without objective justification.

**Example: Refusal to supply spare parts**

In a 1988 preliminary ruling in relation to Volvo, the European Court of Justice expressed that the following conduct by proprietors of car body panel designs may, in certain circumstances, be considered abusive: an arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level, or a decision to no longer supply spare parts for a particular model (even though many cars of that model were still in circulation).

Source:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61987CJ0238>

- (F) **Margin squeeze:** If the Company has a substantial degree of market power in an upstream market and is also active in a downstream market, it would be an abuse for the Company to set its upstream prices to downstream competitors; and its retail prices to consumers (with which downstream competitors have to compete) at levels that have the effect of squeezing its competitors' margins and preventing them from competing effectively. Relevant factors as to whether the margin squeeze is abusive include the indispensability of the upstream input and the level of the margin squeeze.

**Example: Margin squeeze in the delivery of drugs**

In 2003, the UK Office of Fair Trading fined Genzyme Limited £6.8 million for abusing its dominant position in the market for the supply of drugs treating Gaucher disease. Genzyme was also active in the downstream market of delivering drugs to patients in their homes, in which it had one competitor. Through its pricing policy for its drug, Genzyme was found to have squeezed the margin available to its competitor.

Source:

<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/genzyme>

- 1.6 If you wish to offer or enter into any of the above types of arrangements in markets where the Company may have a substantial degree of market power, you must first consult your Function Head.

## E. TRADE ASSOCIATIONS AND INDUSTRY BODIES

- 1.1 As mentioned in Section B.3, **trade associations should not be used as a forum for the exchange of competitively sensitive business information between competitors.** This Section E should be read in conjunction with Sections B.3.13 to B.3.18 above.
- 1.2 To avoid violation of the Competition Ordinance, you should take note of the following in respect of trade association meetings.
- (A) An agenda should be circulated in advance of the meeting, clearly setting out the items to be discussed at the meeting.
  - (B) The trade association should remind its members before the meeting that information sharing and negotiations between members may give rise to competition law concerns and therefore members should not exchange non-public or commercially sensitive information.
  - (C) You **must not participate in any unauthorised discussion or activity which may give rise to competition law concerns** (see Sections B.3.13 to B.3.18 above for further information). If potentially anti-competitive discussions take place at the meeting, you should immediately state that you are leaving the meeting and ensure that a note of your objection and early departure is made in the minutes. Report the incident immediately to your Function Head (who will then be able to decide whether any action needs to be taken in the Company's best interests).
- 1.3 Members are therefore allowed to exchange information of a public or purely general nature such as general reports, studies, statistics and other forms of aggregated data provided it is not possible to extrapolate non-public commercially sensitive data about an individual company from such data.
- 1.4 If individualised data must be exchanged, only historical data should be disclosed. Typically, data of more than 12 months old may be disclosed; however this depends on the circumstances of the particular market and the rate at which data ceases to be competitively sensitive. Any data which is more than 12 months old but which is still competitively sensitive should not be exchanged.
- 1.5 Discussions regarding the following are generally acceptable and will not violate competition law:
- (A) health and safety standards;
  - (B) quality control issues;
  - (C) topics for training sessions; and
  - (D) new and proposed legislation and regulations (particularly with a view to making

industry-wide representations to relevant Government departments). However, note that it would not be permissible to discuss or exchange information on how terms and conditions of trade, margins or prices would be affected by the proposed changes.

- 1.6 You must not discuss the following within the forum of a trade association or industry body:
- (A) recommendations as to prices to be charged, discounts or rebates (even if not strictly enforced by members of the association or body or not binding on members);
  - (B) which supplier to use, or not to use, with a view to agreeing on a collective basis;
  - (C) the quantities of product to be produced or sold, or the amounts of product needed to meet the requirements of a particular contract;
  - (D) terms and conditions (whether industry-wide or member-specific), to the extent that this involves the disclosure of members' non-public or commercially sensitive information or practices; and
  - (E) technical standards of dimension, design, quality or performance of goods or materials to be used, or not used, to the extent that this potentially eliminates competition on these standards or excludes certain players from the market unless the standards are approved by a nationally recognised standards organisation.
- 1.7 The above applies in all situations involving competitors or employees from other companies, not just in trade or supply association meetings, but also at other business functions or meetings as well as casual friendly gatherings.
- 1.8 The above list is in no way exhaustive. Other types of activity (e.g. the refusal of admission to eligible applicants to join the association without good reason, or, in certain circumstances, the joint establishment of industry standard terms and conditions<sup>4</sup>) may be caught by the competition rules. Consult your Function Head if you are unsure whether a proposed trade association activity is permitted.
- 1.9 **It should be noted that where a member of an association makes or gives effects to a decision of the association which harms competition, both the member and the association may be liable under the Ordinance.**

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<sup>4</sup> Agreements on the use of standard terms may restrict competition. However, concerns are less likely where the terms do not affect price, participation in the process for adopting the terms is open, and the terms are non-binding and accessible to all market participants.

- 1.10 If any of the above items are discussed during a trade association meeting, you must also notify your Function Head.

**Example: United Kingdom Agricultural Tractor Registration Exchange**

In 1992, the European Commission concluded that the exchange of information by members of a trade association for manufacturers and importers of agricultural tractors was anti-competitive. Even though the data was aggregated, the highly concentrated state of the market meant that data relating to the individual businesses could be distinguished.

Source: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992D0157>

## F. DAWN RAIDS AND EMERGENCY PLANNING

### 1. Arrival of investigators

- 1.1 Under the Competition Ordinance, the Commission may investigate suspected anti-competitive conduct in Hong Kong. This includes the power to conduct an unannounced visit to search premises and obtain documents, information and other items for the purposes of its investigation without advance notice (often called a “dawn raid”).
- 1.2 If there is a visit from the Hong Kong Competition Commission, you should:
- (A) stay calm and be courteous;
  - (B) notify your Function Head immediately;
  - (C) request to take a copy of their proof of identity and any authorisation (the “**Authority Document**”). Check that the authorisation is valid (e.g. check date, specified authority, agency and officers carrying out the search, specified target and premises to be searched, underlying infringement that gives rise to the search). Be sure that the Authority Document refers to the right premises (i.e. the premises they are seeking to search);
  - (D) inform the Commission that you would like the Company’s legal advisers to be present during the search (discussed in further detail at paragraph 1.3 below);
  - (E) escort the Commission staff into a meeting room in the first instance whilst you wait for external lawyers to arrive; and
  - (F) enlist one staff member to “shadow” each officer. Do not leave the officers to search through the files or to wander around the premises on their own.
- 1.3 According to the Commission’s own guidelines, where the Company has requested that its legal advisers be present during a search, and there is no internal lawyer already on the premises, officers of the Commission should wait a reasonable time for the Company’s external legal advisers to arrive. However, the Commission is not required to do so if, for example, it believes that waiting for a legal adviser to arrive would adversely impact the efficacy of the search, or if the legal advisers cannot arrive at the premises in a timely manner.

### 2. The Commission’s powers and the duty to cooperate

- 2.1 The Commission’s power to conduct a dawn raid must be conducted under a warrant obtained from a judge of the Court of First Instance.
- 2.2 Parties who are subject to a dawn raid are under a general duty to co-operate with the Commission within the scope of the warrant. Failure to do so may result in the Company facing fines and/or individuals facing criminal penalties.

## **G. DOCUMENT CREATION AND RECORD KEEPING GUIDELINES**

### **1. Document creation / retention guidelines**

1.1 **Careless use of words can make legitimate activity appear suspect.** Remember that everything could be used as evidence in a competition investigation. Before putting anything in writing, consider whether it would be better discussed over the phone with legal advisers first. Read every communication carefully to ensure that it could not be misconstrued. Please pay particular attention to the following guidelines when recording information (in any format, including emails and handwritten notes).

- (A) Use words carefully – consider how they will appear several years later and out of context.
- (B) Careless use of words can make legitimate activity appear suspicious.
- (C) Avoid possibly guilty-sounding vocabulary e.g. “shred”, “please destroy after reading”.
- (D) Avoid anti-competitive wording e.g. “we have virtually eliminated the market”, “alienate other players”, “if we do this, we will remove all competition”.
- (E) Avoid disparaging remarks about competitors or their products.
- (F) Avoid giving the impression that a customer is getting preferential treatment e.g. “This is a special deal only for you”.
- (G) Avoid any suggestion that an “industry view” has been reached on a particular issue e.g. price levels.
- (H) If you make reference to information in relation to pricing or competitors' activities (e.g. in an email) obtained through legitimate means (e.g. publicly available sources), make it clear where you got the information from.
- (I) Keep accurate notes of all meetings or calls with competitors.
- (J) Mark all pricing, cost and other associated commercially sensitive information provided (legitimately) to any third party as “Confidential”.
- (K) Mark all correspondence with internal or external legal advisers seeking legal advice as “*Privileged and Confidential*”.

## H. PRACTICAL TIPS: DO'S AND DON'TS

Do's	Don'ts
<b>General</b>	
DO make independent decisions in the Company's best interests based on freely and properly available information.	DO NOT agree with competitors to fix prices, discounts, rebates, surcharges, employee or contractor remunerations etc.
DO exercise caution when dealing with competitors and trade associations.	DO NOT notify competitors of price changes.
DO exercise caution in your behaviour, especially with regards to activity in markets where the Company has or may have a substantial degree of market power.	DO NOT divide up the market with competitors.
<p>DO seek legal advice (before taking any action) in the following circumstances:</p> <ul style="list-style-type: none"> <li>• if you are unsure as to whether something might be anti-competitive or not;</li> <li>• if you suspect bids may have been rigged;</li> <li>• before forming a joint venture or submitting a joint bid;</li> <li>• if you are unsure about a particular agenda item at a trade association or industry body meeting; or</li> <li>• if you receive any complaints regarding a breach of competition law.</li> </ul>	<p>DO NOT engage in collusive tendering, including:</p> <ul style="list-style-type: none"> <li>• agreeing not to submit a bid at all;</li> <li>• agreeing to submit a bid that is deliberately too high or one containing (known) unacceptable terms; or</li> <li>• agreeing to apportion bid rigging gains by either refunding the costs of preparing cover bids or subsequent contract allocation.</li> </ul>
DO use words carefully. Careless use of words can make legitimate activity appear suspect.	DO NOT destroy emails, company files or work diaries other than in accordance with normal procedures.
<b>Information exchange</b>	
DO make sure that you have a legitimate purpose for sharing any information with a competitor or through a trade association.	<p>DO NOT exchange or disclose <u>non-public commercially sensitive information</u> with competitors (whether directly or indirectly through third parties) including:</p> <ul style="list-style-type: none"> <li>• historic, current or future price information</li> </ul>

	<p>(including prices charged to customers, discounts, rebates, special terms, cost prices, raw materials etc.);</p> <ul style="list-style-type: none"> <li>● historic, current or projected sales targets;</li> <li>● profit margins and revenues;</li> <li>● key indicators of price determination;</li> <li>● business relations with tenants, suppliers or other third parties; and</li> <li>● future marketing plans and business intentions.</li> </ul>
<p>Trade association meetings</p> <ul style="list-style-type: none"> <li>● DO keep a copy of the agenda and minutes of each meeting.</li> <li>● DO review each agenda in advance.</li> <li>● DO stick to the agenda in meetings with competitors.</li> </ul> <p>DO voice any objections you may have if the discussion strays into anti-competitive topics and make sure there is a written record of this.</p>	<p>DO NOT exchange invoices, price lists or other price information with competitors (unless objectively justified e.g. for the purpose of a joint bid where you would not have the capability to submit a stand-alone bid).</p>
<p>DO keep a record of the source of information on competitors' activities (e.g. publicly available sources, media).</p>	<p>DO NOT disclose commercially sensitive information to the media.</p>
<p>DO clearly respond in writing if you do not wish to receive any more commercially sensitive data in the future (if sent to you).</p>	

## I. FREQUENTLY ASKED QUESTIONS

### **Question 1**

Can I cooperate with competitors legally under competition law?

#### **Answer**

As a starting point, competitors in the same market should make independent decisions about their commercial strategies to compete with each other for business.

In principle, cooperation between competitors is permissible to the extent that this does not have the object or effect of preventing, restricting or distorting competition in Hong Kong. There may be pro-competitive reasons why cooperation with competitors is desirable. However, this is not a straightforward assessment and involves both legal and economic analyses. In order to minimise the risk of violation of the law, you should avoid cooperation and direct contact with competitors as far as possible.

- In any event, cooperation with competitors must not include: fixing, maintaining, increasing or controlling prices 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; or
- bid-rigging.

Before engaging in any form of cooperative venture with competitors (such as joint bids or joint ventures), you should speak to your Function Head in advance.

Please refer to Section B of this Manual for further information on general rules for dealings with competitors.

### **Question 2**

Can I ask friends who work with competitors of the Company in an informal setting about their commercial costs, pricing, performance and strategies? What should I do if my friends or any third parties start sharing such information with me?

#### **Answer**

You should not ask for any non-public commercially sensitive information (especially current and future pricing and strategic information) whether in a work or informal context.

If sensitive topics come up during your conversations, you should keep the conversation general and, if necessary, say that it is the policy of your employer, HAESL, for employees not to

disclose any commercially sensitive information about the Company itself or receive such information about its competitors. If they continue to discuss commercially sensitive information, you should end the conversation or leave, and report the incident immediately to your Function Head (who will then be able to decide what action (if any) to take).

Please refer to Sections B and E of this Manual for further information.

### **Question 3**

Is it OK so long as I obtain non-public commercially sensitive information about competitors through a third party such as a consultant?

#### **Answer**

You may still infringe competition law if the subject matter of the exchange is commercially sensitive whether or not the exchange is directly between competitors or indirectly through a third party.

Please refer to Section B of this Manual for further information.

### **Question 4**

Can I agree with competitors on non-price terms, e.g. marketing approach?

#### **Answer**

Competition law does not only catch price-related terms. You may infringe competition law by agreeing with competitors on non-price terms (or sharing sensitive non-price information with competitors) if that has the object or effect of preventing, restricting or distorting competition in Hong Kong.

Please refer to Section B of this Manual for further information.

### **Question 5**

Does the Hong Kong Competition Ordinance have retrospective effect?

#### **Answer**

No it doesn't. If the relevant conduct occurred prior to the Competition Ordinance coming into effect on 14 December 2015 and the conduct is not continuing after such date, the Competition Ordinance would not apply to the conduct. However, the Competition Ordinance does catch on-going conduct that is anti-competitive. If the conduct continues after the Competition Ordinance has come into effect, then the Competition Ordinance would apply to such on-going conduct.

### **Question 6**

I work in my company's wholesale business for a sports footwear brand. Can I ask my colleagues who work in the retail business about the strategies and pricing of their other wholesalers or suppliers of footwear brands that compete with mine?

#### **Answer**

No. Employees from the wholesale business must ensure that they do not use or receive competitively sensitive information about competing brands from their colleagues in the retail business. Internal ring-fencing rules should be put in place to ensure that such information does not flow to the wholesale business. If there are no such internal ring-fencing procedures, the company will likely be presumed to have taken into account the pricing or other strategic intentions of those competing brands in setting the prices and policies of its wholesale business.

Please refer to Section B of this Manual for further information.

### **Question 7**

My supplier has provided me with recommended selling prices for its products. Do I need to follow these recommendations? Could this give rise to competition concerns?

#### **Answer**

You are not obliged to follow the recommended selling prices. If you decide that it is in the Company's commercial interests to adopt the recommended price, you are free to do so. If, however, you decide it is in the Company's interests to adopt a retail price that is higher or lower than the recommended price, you should go ahead and do so.

Provided these are genuine recommended prices in practice, this will not infringe the Competition Ordinance. However, if the supplier puts pressure on you or takes action to enforce these recommended prices, or there is an implicit agreement or common understanding between the supplier and the Company on the resale price, this could be an infringement of the First Conduct Rule.

Please refer to Section C of this Manual for further information on recommended resale price agreements.

### **Question 8**

A very important customer is asking me whether I have been funding the promotions of its competitor (who is also my customer) and, if so, to provide it with the same promotional funding for the same period of time so it can match the prices. What should I do?

#### **Answer**

You should resist any pressure from a third party (including a customer), to disclose information regarding the competitively sensitive information of a competing third party, in order to avoid

becoming involved in a “hub and spoke” cartel. Competitively sensitive information includes non-public information on the discounts or promotions a customer is receiving from a supplier.

Similarly, you should determine the promotional strategy in respect of a customer independently of your arrangements with any other customer. You should not act as a conduit through which competing customers can reach an agreement or understanding on their terms of business.

Please refer to Section C of this Manual for further information on “hub and spoke” cartels.