

Hong Kong Competition Law Series: Part 7

2015 - THE YEAR OF COMPETITION IN HONG KONG

Information Exchange

Don't Let The Cat Out Of The Bag

Information exchange is an area of competition law that is rife with risk. There are few bright line rules on what can and cannot be exchanged, the scope of the prohibition is potentially extremely broad, and the risk of inadvertent breach is high as anti-competitive information exchange may occur spontaneously in informal settings such as social gatherings or trade association meetings.

Figuring out what you can and cannot say to a competitor is not a straightforward task, but it is an important one.

Once you let the cat out of the bag, there's no going back.



WHY IS INFORMATION EXCHANGE AN ISSUE?

Information is power. Communications between businesses take place on a daily basis and are more often than not legitimate. Competitor intelligence enables more informed competition and business practice, improves market sensitivity and facilitates industry benchmarking and self-regulation.

But with power comes responsibility, and businesses cannot always be entrusted with commercially

sensitive information. The disclosure, exchange or use of commercially sensitive information in and of itself could in some circumstances be unlawful, especially when it enables competitors to become aware of their competitors' market strategy. The sharing of commercially sensitive information artificially reduces competitive uncertainty in the market, potentially enabling competitors to align their conduct to maximise profits jointly rather than focusing on lowering prices and improving the quality of goods and services to win customers.

Information exchange is particularly risky where competitors gather under the auspices of an industry or professional association, on occasions such as committee meetings, working groups, conferences and briefings, where the concentration of competitors in the room means a single disclosure of competitively sensitive information could be particularly damaging.

WHAT CAN YOU SAY AND NOT SAY?

Whether information can be legitimately exchanged depends very much on the context of the disclosure/exchange and what the parties intend to do with it. Generally, if the information is not publicly available, and its receipt may influence the recipient's conduct on the market, disclosing it to a competitor may be problematic.

The following chart sets out roughly where the risk areas are. It is not to be taken as a substitute for case by case analysis, but it provides an idea of when you may need to take a step back and consult your legal advisors before proceeding with a conversation.

	HIGH RISK	MEDIUM RISK		LOW RISK
GRANULARITY	Individualised, specific	Individualised	Individualised	Aggregated, general
SOURCE	Private, confidential ¹	Public	Private	Public
TYPE	Pricing, output, strategy	Cost, terms, R&D, marketing, capacity		Regulatory, safety, security, broader trends
AGE	Future	Future	Current, recent	Historical
FORUM	Private	Private/Public	Private/Public	Public
MODE	Direct	Direct/Indirect	Direct/Indirect	Indirect

Generally, the more frequent and regular the exchanges of information, the greater the likelihood of anti-competitive harm. That being said, in some circumstances, even one isolated exchange of competitively sensitive information can give rise to a concerted practice.

WHAT IF A COMPETITOR DISCLOSES UNSOLICITED SENSITIVE INFORMATION TO YOU?

The mere receipt of commercially sensitive information could be sufficient to implicate you if you fail to immediately object to the disclosure of that information! The burden is on the recipient to prove that it did not use the information received, and this can be a challenging burden to satisfy. If in doubt, do not simply sit on the information received; contact your legal advisors immediately for assistance to formulate a plan of action.

Next Week

Next week we will introduce group boycotts, a type of anti-competitive conduct competition authorities typically regard as a serious violation of competition law.

¹ Additionally, disclosing private information may be a breach of your confidentiality obligations.

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