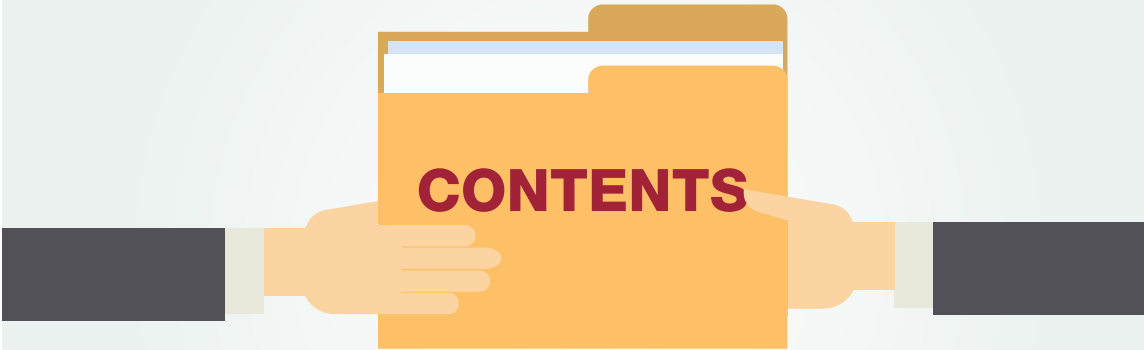




競爭事務委員會
COMPETITION
COMMISSION

INFORMATION EXCHANGE





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Why do we need competition?

Competition is the foundation of a vibrant and sustainable market. In a free market economy, businesses compete with one another to win customers by offering the best range of products and services at the best prices. This drives lower prices, better product and service quality, and more choices for consumers. It also fosters innovations and business efficiency.

To achieve these benefits, businesses should make independent decisions on prices, products and their competitive strategy. Independence ensures that businesses strive to outperform one another, creating greater value for consumers and the economy.

The Competition Ordinance (Ordinance) was enacted to safeguard competition and prohibit anti-competitive practices by businesses.



What is information exchange under the Competition Ordinance?

In the normal course of business, companies exchange information on various matters without posing any risk to competition. For example, sharing industry best practices on employee safety standards does not involve matters on which businesses typically compete. That kind of exchange is generally harmless and, in some cases, even beneficial for the market.

However, exchanging certain types of information, such as prices, elements of price, customers, costs or marketing plans with competitors can harm competition. These are referred to as “commercially sensitive” information. Generally, information relating to prices and quantities is considered the most sensitive. Sharing this kind of information reduces uncertainty between businesses, making it easier for them to predict and align their behaviour. This undermines the pressure on businesses to compete through reducing prices or enhancing quality etc. and will almost always result in higher prices, quality deterioration and fewer choices.

An exchange of information may raise concern under the Ordinance if it has the object or effect of harming competition. For instance, competitors sharing information on future individual intentions or plans with respect to price, or other parameters of competition, will likely be considered as having the object of harming competition. Where an exchange of information does not have the object of harming competition, it may still contravene the Ordinance if it has (or is capable of having) an anti-competitive effect.



Whether the exchange of information is considered to have the object or effect of harming competition depends on the circumstances of the case, including:

- 1 The degree to which the information is commercially sensitive:** information relating to prices, its constituent components, and quantities is generally the most commercially sensitive
- 2 The age of the information:** sharing future or current information is more likely to raise concern than sharing historical information
- 3 The level of detail of the information:** sharing individualised or company-specific information is more likely to harm competition than sharing aggregated and anonymised information
- 4 Characteristics of the market:** for instance, exchanging information among a few rivals in a concentrated market is more likely to harm competition
- 5 Frequency of the information exchange:** frequent exchanges are more likely to be problematic

Examples of safe and unsafe information to disclose or receive

Generally safe	Generally unsafe
Information on best practices, e.g. safety, emission standards etc.	Future pricing intentions and elements of price, e.g. discounts, commission rates, rebates etc.
Information related to sustainability credentials	Commercial strategies, including Information related to tenders or bidding intentions
Information to help predict demand and avoid shortages	Information related to costs, e.g. employee salaries, production costs
Public policy or regulatory matters	Information related to quantities, e.g. sales volume, turnover, market shares etc.

The above table is non-exhaustive and provides only a general idea of examples of types of information that are generally regarded as safe or unsafe to disclose or receive. Ultimately, whether an exchange of information would be considered as harming competition depends on the actual circumstances.

What to do if you receive commercially sensitive information?

While businesses that disclose commercially sensitive information risk contravening the Ordinance, recipients of such information are equally at risk.

If you receive commercially sensitive information from a competitor, take the following steps immediately to protect yourself from competition law risks.



If in doubt, businesses should seek legal advice.

Information exchanged through a third party

Exchange of commercially sensitive information may occur directly between competitors or indirectly through a third party, such as a trade association or a supplier, with the understanding or assumption that the third party will pass the information on to competitors. This is likely to have the same effect as exchanging the information directly and is treated in the same way under the Ordinance.

In such cases, the third party could also face penalties for being part of the information exchange.

Practical tips for trade associations

Trade associations play an important role in promoting industry interests. They facilitate interaction among members who may be competitors and provide them with platforms for sharing information. While sharing information on matters such as employee safety standards or best practices is legitimate and beneficial to members of the trade associations, due care must be taken to avoid collecting and sharing commercially sensitive information among members.



Points to note for trade associations:



Exercise caution when collecting information from members. Information should be handled by the staff of the association or a third party, independently from members. Sharing aggregated, anonymised, and historical information is generally unlikely to raise concerns.



Establish clear guidelines to prevent discussion on anti-competitive topics during meetings. A one-page quick guide for trade association meetings is available on the Commission's website.



Appoint a competition compliance officer to oversee activities.



What are the consequences of a contravention?

Exchanging commercially sensitive information such as future pricing intentions with competitors can amount to “Serious Anti-competitive Conduct” (SAC) under the Ordinance.

Where a conduct is considered to be SAC, the Commission can bring proceedings against relevant undertakings and/or persons in the Competition Tribunal (Tribunal) without issuing a warning notice first. Businesses, regardless of their size, are not exempt from the Ordinance when it comes to SAC conduct¹.

¹ While there is an exclusion from the First Conduct Rule for arrangements between businesses where their combined turnover is ≤ \$200 million, that exclusion will not apply if the arrangement is SAC as defined by the Ordinance.

Penalties

Where a contravention of the Ordinance is proven, the Tribunal may impose a fine of up to 10% of an undertaking's annual local turnover for a maximum period of 3 years.

The Tribunal may also impose penalties on individuals including fines and a director disqualification order for up to 5 years.

Companies and individuals found to have contravened, or been involved in a contravention of the Ordinance may also be subject to “follow-on” claims for damages by victims of the contravention.



Hypothetical examples

1 A trade association for leisure boat owners collected and circulated information among its members regarding their planned rental price increases for the year ahead. The information was not made available to the public but circulated to the members before they typically set their prices.



The Commission would view this information exchange scheme as having the object of harming competition and a form of SAC. Companies in the market are expected to make pricing decisions independently.

By sharing the information, the owners of leisure boats were able to adjust their future pricing to reflect the proposed pricing plans of competitors. Price competition weakened as a result of reduced market uncertainty. The information exchange arrangement would likely result in prices higher than otherwise.

2 A premium pet food brand Lucky Cat sold its products primarily through three retail chains namely “Super Premium Pets”, “Online Animals” and “5-Star Pets”.

A Vice President of Super Premium Pets emailed Lucky Cat, stating their intention to raise the prices of Lucky Cat’s products by 8% next month, “as long as Online Animals and 5-Star Pets do the same”. Shortly after, a Lucky Cat executive forwarded this email to the two other retailers.

A sales director at Online Animals replied with “that’s a good idea”. 5-Star Pets received the email but did not respond. The Lucky Cat executive then relayed these responses back to Super Premium Pets.

All three retailers raised their prices for Lucky Cat’s products by 8% the following month.



This scenario is likely to be viewed as an agreement or concerted practice with the object of harming competition. The Commission would consider the arrangement to be SAC.

By using Lucky Cat as a conduit to communicate its intended price increase to its competitors indirectly, Super Premium Pets removed competitive uncertainty by ensuring its rivals would follow its price increase.

Even though the sales director from Online Animals merely endorsed Super Premium Pets' idea, the endorsement itself can be treated as a form of commercially sensitive information, effectively communicating Online Animals' intent to align its pricing strategy with Super Premium Pets (via Lucky Cat).

5-Star Pets may feel that it steered clear of the indirect information exchange as it gave no response to the information passed on by Lucky Cat. Nonetheless, 5-Star Pets could still benefit from the coordinated price increase because it did receive and could use the information received, and did not explicitly reject what was being proposed. Therefore, 5-Star Pets is unlikely to escape liability.

3

There were five suppliers of pre-packaged fresh fruit to retailers in Hong Kong. Demand was unstable, fluctuating seasonally and varying according to retailers' locations. Consequently, the suppliers frequently experienced significant unsold stock and waste.

To address the problem, the suppliers hired an independent consultant to collate information on unsold fruit on a daily basis and publish on its website weekly statistics about unsold fruit quantities broken down by location, without identifying the individual suppliers. Individual suppliers are unable to use the data to extract commercially sensitive information pertaining to any specific competitor.

The data allowed the suppliers to better predict demand and benchmark their performance against that of the sector as a whole.



The Commission is unlikely to consider that this agreement has the object or effect of harming competition. The information, exchanged in an aggregated form, being historic, and made available to the public, is unlikely to have harmful effects.

Even if there were some concerns, the agreement to exchange the information appears to give rise to efficiencies. In particular, the high levels of waste suggest that the market was not working effectively. The information exchange sought to correct this and did not eliminate competition among the suppliers.

What can you do when you suspect a contravention?

Report your suspicions

If you suspect that an information exchange may have contravened the Ordinance, report it to the Commission. The Commission will accept complaints and queries in any form, including those provided to the Commission directly and/or anonymously, or through an intermediary (such as a legal adviser).

When reporting a suspected contravention to the Commission, complainants and whistleblowers should provide as many details as possible. Information which is particularly useful includes:

- Communications related to the information exchange arrangement
- Records of conversations (in any forms including instant messages and emails)
- Written log of relevant events

Preserve all available evidence as soon as you suspect a contravention.

To support the Commission's ability to investigate the reported conduct, complainants should not alert the suspects or publicly disclose that a complaint has been filed. Doing so could greatly reduce the likelihood of the Commission securing sufficient evidence to take enforcement actions.

How to report a suspected case to the Commission?

A complaint can be made to the Commission by:

- 🌐 Completing an online complaint form on the Commission's website (www.compcomm.hk)
- @ Email : complaints@compcomm.hk
- ☎ Phone : +852 3462 2118
- ✉ Post : Competition Commission
19/F South Island Place, 8 Wong Chuk Hang Road,
Wong Chuk Hang, Hong Kong
- 👤 In person at the Commission's office (by appointment only)

Apply for leniency or cooperation

Businesses exchanging commercially sensitive information with competitors may be considered as engaging in cartel conduct and subject to severe penalties under the Ordinance. However, the Commission will not commence proceedings in the Tribunal against the first undertaking or individual who self-reports the cartel conduct to the Commission and meets all other requirements for receiving leniency. This includes not seeking a pecuniary penalty or an order declaring that the successful leniency applicant has contravened the Ordinance. Employees and officers of an undertaking that has obtained leniency will also be protected from proceedings if they cooperate with the Commission's investigation.

Cartel members which do not benefit from the leniency policies may also cooperate with the Commission in exchange for a discount of up to 50% off the pecuniary penalty the Commission would otherwise recommend to the Tribunal.

The Commission's cartel leniency policies and cooperation policy are available on its website.

How to apply for leniency or cooperation?

- Call Leniency Hotline at **+852 3996 8010** between 8am and 6pm, Hong Kong time, Monday to Friday (excluding public holidays)
- Send email to **Leniency@compcomm.hk**
- In ongoing investigations, contact the relevant Case Manager for cooperation

Confidentiality

The Commission is committed to protecting confidential information provided to it which includes:

- The identity of complainants, whistleblowers and leniency or cooperation applicants
- Any confidential information provided by complainants, whistleblowers and leniency or cooperation applicants
- The leniency or cooperation application process, including the respective agreement

Leniency or cooperation applicants must in turn commit to keeping their contact with the Commission confidential.



To learn more about the Competition Ordinance and the Competition Commission's work, please visit our website

www.compcomm.hk



Free risk assessment tool, compliance programme template and training materials on the Competition Ordinance are available on the SME Competition Compliance Hub

sme.compcomm.hk



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Disclaimer

The information provided in this brochure is for general reference only. It does not provide an exhaustive guide to the application of the Competition Ordinance (Ordinance). For a complete and definitive statement of the law, refer to the Ordinance itself. The Competition Commission (Commission) makes no express or implied warranties of accuracy or fitness for a particular purpose or use with respect to the above information. The above suggestions will not affect the functions and powers conferred on the Commission under the Ordinance.