

FAQs – HK Competition Commission responds to common concerns

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New [Frequently Asked Questions \(FAQs\)](#) have just been released by the Hong Kong Competition Commission (**HKCC**). The FAQs do not change the laws that came into full force on 14 December 2015 (see [here](#)) but they do provide businesses with responses and a better understanding of the HKCC's position regarding common concerns on how to comply with the new Competition Ordinance (**CO**).

The key FAQs you need to know are set out in a snapshot below:

Is the HKCC's role to monitor prices? **NO**

- **The CO does not seek to regulate prices, nor is HKCC's role an enforcement authority for price regulation.** However, the HKCC is initiating a study into the Hong Kong auto-fuel markets in response to public concerns on fuel charges which have been said to be "quick to rise and slow to drop".
- **As long as businesses make their pricing decisions independently, such decisions "will almost never raise competition concerns"**. Except, if a business with substantial market power independently decides to price below cost (i.e. engages in predatory pricing) to drive out competitors then this may raise a competition concern.
- **In general, the HKCC welcomes businesses charging lower prices** based on competition on the merits.

If prices are the same everywhere, does this mean there's a breach? **NO**

- **Just because businesses have the same prices does not necessarily mean there is evidence of price-fixing or a breach** of the CO. Market conditions might mean that prices naturally gravitate towards the same price (also called "parallel pricing", and this does not require any arrangements between competitors).

Are mere recommendations on prices acceptable? **YES**

- **Identifying retail prices as "suggested" or "recommended"** are unlikely to raise competition concerns so long as they are merely recommendations, and retailers are free adjust their prices upwards or downwards to compete with each other. Mere price

recommendations are recognised as common practice for many manufacturers and distributors.

- **But be warned, a mere recommended retail price must not be coupled with other measures** (e.g. penalties or a withdrawal of incentives) that effectively requires a retailer to follow the recommendation. Such practice may not be a "true" recommended price and could breach the CO. The HKCC will look to the substance to see if it is a true recommendation.
- **If you are a manufacturer or distributor, and you require a retailer to observe a fixed or minimum resale price**, this could be classified as "resale price maintenance" in breach of the CO.

Should I always use a tender process for goods or services contracts? **NO**

- **Businesses are generally free to choose how they will contract for goods or services**, and whether or not a tender process is used to select a contractor does not, of itself, raise concerns under the CO.
- **But if you do use a tender to buy goods or services**, concerns in relation to tender procedures may be relevant if there is an indication that bidders who should be competing to win a tender have entered into an anti-competitive arrangement with each other. The CO does not provide that the customer tender must be conducted in a particular way.

Can I offer products in a bundle? **DEPENDS**

- **For small and medium enterprises**, tying and bundling practices are common commercial arrangements and generally they do not harm competition or breach the CO.
- **But if a business with substantial market power** engages in tying or bundling, this may breach the CO if it harms competition in Hong Kong (e.g. where the conduct results in anti-competitive foreclosure).

Can I appoint an exclusive distributor in Hong Kong to distribute goods? **DEPENDS**

- **Generally, if your exclusive distribution agreement (i) is unlikely to have an anti-competitive effect on competition in the relevant market; or (ii) has an applicable exemption or exclusion in the CO**, then such distribution agreement should not cause concerns under

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the CO. Harming competition in a relevant market is likely to occur if one of the parties to the agreement has market power and the agreement is likely to foreclose its rivals' access to the market. As the effects of exclusive agreements can vary considerably the HKCC is generally not in a position to provide further guidance in this regard.

- **But, even if an exclusive distribution agreement is considered to have anti-competitive effects**, the agreement may nonetheless benefit from the general exclusion for agreements 'enhancing the overall economic efficiency' under the CO provided the relevant conditions are met.

Can employment contracts have non-compete clauses? YES

- **A unilateral imposition by employers of non-compete obligations on employees is unlikely to harm competition** or breach the CO unless they are of an unduly long duration and/or relate to an expertise which is in very limited supply. This assumes that the imposition of the restriction is an independent decision of the employer.
- **But be warned, competitors sharing or agreeing on certain terms and conditions** of their employees' employment contracts is likely to harm competition and breach the CO.

I'm dealing with an 'exempt statutory body' - do competition laws still apply? YES

- **Businesses who are not exempt but engage in anti-competitive conduct in their dealings with statutory bodies are still subject to competition laws.** A list of exempt statutory bodies can be found [here](#) in Annex A.
- **Exempt statutory bodies are still expected to adhere to the 'spirit of competition rules'.** In this regard, we note that the government plans to review the exemption for statutory bodies three years after the full commencement of the CO.

The FAQs serve to remind companies and individuals of the need to consider the implications of the CO and competition laws in conducting their businesses as well as the interaction of the CO with other laws, such as employment law.

For more on Hong Kong's competition law and updates, please visit Hogan Lovells' [Competition Bites](#) page.

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