



Once is Enough!

A single isolated instance of exchange of information could infringe the first conduct rule¹ ("FCR"). This could be the effect of an application of the Competition Ordinance (Cap. 619) ("CO") that has come into full operation on 14 December 2015.

Although exchange of information is not expressly mentioned in FCR, the Competition Commission considers that a concerted practice typically involves an exchange of competitively sensitive information². Competitively sensitive information includes information relating to price, elements of price or price strategies, customers, production costs, quantities, turnover, sales, capacity, product quality, marketing plans, risks, investments, technologies and innovations. Information relating to price and quantities (information concerning sales, market shares, sales to particular customer groups or territories) is generally the most competitively sensitive³. Whether the exchange of such information is made as a part of concerted practice depends on the circumstances of each case.

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") is comparable to our FCR. The European jurisprudence has supported standalone information exchange being held as infringing conduct⁴. The provisions of TFEU require that each economic operator must determine independently the policy which the operator intends to adopt on the market. Although that requirement of independence does not deprive economic operators the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market⁵. The concept of concerted practice implies, besides undertakings' concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two⁶. There is a rebuttable presumption that by making contact with one another, such conduct will follow⁷.

The Competition Commission seems to have adopted the European jurisprudence. Its

Guideline states that it is prepared to infer from information exchange without legitimate business reason that the party providing the relevant information had done so with the expectation or intention to influence a competitor's conduct in the market and the recipient of such information acted or intended to act on the information exchanged⁸. Whether the Hong Kong Courts would take the same view is yet to be ascertained but it would be prudent to refrain from exchanging any competitively sensitive information with any outside party.

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1. "First conduct rule" means the prohibition imposed by section 6(1) of Competition Ordinance.
 2. Guideline on the First Conduct Rule, 27 July 2015, para 2.28.
 3. Ibid, para 6.39.
 4. T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08) [2009] ECR I-4529, para 60-62.
 5. Hüls AG v Commission (C-199/92) [1999] ECR I-4287, para 159-160.
 6. Ibid, para 161.
 7. T-Mobile, para 162.
 8. Guideline on the First Conduc Rule, para 2.29f.

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PLEASE NOTE

The law and procedure on this subject are very specialized. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

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