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## **1. Purpose**

- 1.1 The purpose of BEC Competition Ordinance Compliance Manual (herein referred as “Manual”) is to remind BEC and its staff members, and BEC Members and their staff members would not breach the Competition Ordinance (Chapter 619 of the Laws of Hong Kong) (herein referred as “Ordinance”) during the performance of all BEC activities and meetings.

## **2. Highlights of the Competition Ordinance**

- 2.1 The Ordinance came into effect on 14 December 2015. The Ordinance prohibits 3 types of anti-competitive conduct described under the First Conduct Rule, the Second Conduct Rule and the Merger Rule which are collectively known as the "competition rules".
- 2.2 The First Conduct Rule prohibits anti-competitive agreements. These include price fixing and price restrictions, market sharing, output limitation, bid-rigging, joint buying, group boycotts, exclusive distribution and exclusive customer allocation.
- i. The First Conduct Rule of the Ordinance prohibits businesses from making or giving effect to an agreement, engaging in a concerted practice, or making or giving effect to a decision of an association, if the object or effect is to harm competition in Hong Kong.
  - ii. In determining whether an agreement has the object of harming competition, we must look at and consider not only the content of the agreement, but also the way it is implemented, and its context. The First Conduct Rule does not apply to an agreement between undertakings, or a concerted practice engaged in by undertakings, if the combined turnover of the undertakings for the turnover period does not exceed HK\$200 million.
  - iii. For example, Companies A, B and C are the main retailers in Hong Kong for a type of solar panel and Supplier D provides its solar panel products to each of the competing retailers. Company A informs Supplier D of its plan to raise the retail price of the solar panel next week by HK\$100 “if B and C do the same” and asks Supplier

D to ensure “this message is understood”. Supplier D immediately informs Companies B and C and they support to raise the price. Company A proceeds with the price increase the following week and the other retailers follow within a few days. This example is likely to be viewed as an agreement or a concerted practice involving all four entities with the object of harming competition, constituting Serious Anti-competitive Conduct under the Ordinance.

- iv. Further information can be found in the Competition Commission’s Guideline on the [First Conduct Rule](#).

### 2.3 The Second Conduct Rule prohibits abuse of market power.

- i. The Second Conduct Rule prohibits undertakings with substantial market power in a market from abusing that power by engaging in conduct which has the objective or effect of harming competition in Hong Kong.
- ii. The types of conduct that may contravene this rule include predatory pricing, tying and bundling, margin squeeze conduct, refusals to deal and exclusive dealings.
- iii. The Second Conduct Rule does not apply to conduct engaged by an undertaking the turnover of which does not exceed HK\$40 million for the turnover period.
- iv. For example, Companies A and B are the only two companies selling non-toxic building materials in Hong Kong. Company A has the majority of sales while Company B is a recent entrant in the market. Company B sells their products in a lower price in order to gain the market share. In response, Company A cuts its price in half and loses money with each unit sold until Company B cannot compete with these low prices and eventually goes out of business. The commission may assess Company A’s conduct as predatory pricing and a contravention of the Second Conduct Rule.
- v. Further information can be found in the Competition Commission’s Guideline on the [Second Conduct Rule](#).

### 2.4 The Merger Rule prohibits anti-competitive mergers and acquisitions.

- 2.5 The First Conduct Rule and the Second Conduct Rule apply to all sectors of the Hong Kong economy. At present, the Merger Rule only applies to mergers involving carrier license holders within the meaning of the Telecommunications Ordinance (Cap 106) and which will not apply to BEC.

### **3. Penalties for Breach**

- 3.1 The Ordinance establishes two statutory institutions, the Hong Kong Competition Commission (“the Commission”) and the Competition Tribunal (the “Tribunal”) for the purposes of investigation, enforcement, adjudication and the imposition of penalties.
- 3.2 The Commission investigates conduct that may contravene the competition rules and has a number of provisions at its disposal to resolve the issue.
- i. According to Section 60 of the Ordinance, the Commission may accept from a person a commitment to take any action or refrain from taking any action that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule.
  - ii. Where the Commission has reasonable cause to believe that there has been a contravention of the First Conduct Rule that does not involve serious anti-competitive conduct, the Commission must issue a Warning Notice before commencing proceedings in the Tribunal, providing the parties an opportunity to cease the conduct within a specified period.
  - iii. Where the Commission has reasonable cause to believe that there has been a contravention of the First Conduct Rule and/or the Second Conduct Rule, the Commission may offer an Infringement Notice where the Commission will offer not to bring proceedings on the condition that the Company makes a commitment to comply with the requirement of the notice.
  - iv. The Commission may initiate proceedings before the Tribunal to seek appropriate orders and sanctions, including initiating proceedings against persons involved in a contravention of a competition rule.

- 3.3 The Tribunal and other courts are responsible for establishing whether there has been a contravention of the competition rules and will impose penalties on the parties.
- i. If the Tribunal is satisfied that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of up to 10% of the Turnover in Hong Kong of the undertaken for each year of infringement, up to a maximum of 3 years. If the period of contravention exceeds 3 years, the amount will be capped at 10% of its turnover in Hong Kong for the 3 years in which the turnovers are highest, second highest and third highest. In this context, “turnover” means the total gross revenues of the undertaking.
  - ii. The Tribunal may, on application by the Commission, make a disqualification order against an individual if the Tribunal has determined that a company has contravened a competition rule, and the individual’s conduct makes him or her unfit to be concerned in the management of a company.
  - iii. The disqualification order prohibits a person, for a specified period not exceeding 5 years, from being a director, a liquidator or provisional liquidator, a receiver or manager and in any way being concerned or taking part in the promotion, formation or management of a company.
  - iv. The Ordinance indicated that the individual’s conduct would render him/her unfit to be in the management of a company if his/her conduct contributed to the contravention of the Ordinance or he/she had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it or the individual did not know but ought to have known that the conduct of the company constituted the contravention.
- 3.4 Aside from the statutory liabilities listed above, a third party may bring a follow-on private action once there has been a determination that a contravention of a conduct rule has taken place. The third party who has suffered loss or damage as a result of the contravention may seek compensation by commencing legal proceedings in the Tribunal.
- 3.5 Where the person committing an offence under the Ordinance is a corporation, its directors, company secretaries or other persons involved in its management may also commit the

offence if it is committed with their consent or attributable to neglect by them.

#### **4. Effective Date**

- 4.1 This Manual was approved by BEC's Board of Directors in Board Meeting held on 26 September 2016 and takes effect on 13 October 2016.

#### **5. Scope**

- 5.1 This Manual provides guidelines for BEC and its staff members, and BEC Members and their staff members during the following BEC related activities and meeting (including but not limited to), and to ensure BEC would not inadvertently support activities that breaches the Ordinance.

- i. The interaction, discussion or co-operation in relation to or during BEC activities or meetings.
- ii. The use or disclosure of BEC Members related information.
- iii. The benchmarking and sharing of best practices or industry statistics.

#### **6. Definitions**

- 6.1 Meeting – Including but not limited to meetings of Board, Executive Committee, Communications and Membership Committee, Advisory Groups, task force groups and working groups.

#### **7. General Guideline**

- 7.1 In general, BEC and its staff member, and BEC Members and their staff members should comply the Ordinance at all the times during all BEC activities and meetings and adhere the following guidelines but not limited to:

- i. Avoid any form of concerted and collusive behavior (Section 8).
- ii. Avoid any exchange of commercially sensitive information (Section 9).
- iii. Avoid any form of benchmarking and sharing of best practices or industry statistics which are not public information (Section 10).
- iv. Follow the meeting guidelines (Section 11).

7.2 BEC would continue to help BEC members and their staff members to understand developments relevant to industry and promote industry's interest. BEC should not:

- i. Recommend or require that BEC members and their staff members set particular prices or fees for their products and services.
- ii. Impose restrictions on BEC members and their staff members with regard to the other terms and conditions on which they sell their products and services.
- iii. Facilitate the sharing of competitively sensitive information.

## **8. Avoid any form of Concerted and Collusive Behaviour**

8.1 During all BEC activities and meetings, BEC and its staff members, and BEC Members and their staff members should avoid any form of concerted or collusive behavior that has the object or effect of preventing, restricting or distorting competition, including but not limited to:

- i. Directly or indirectly fix purchase or selling prices or other trading terms.
- ii. Limit or control production, markets, technical development or investment.
- iii. Share markets or sources of supply.

8.2 During all BEC activities and meetings, BEC and its staff members, and BEC Members and their staff members should avoid to discuss or reach any understandings with other entities

which aim to or have the effect of regulating:

- i. Prices, terms and conditions of sale and intended changes of those.
- ii. Current or future levels of output or capacity.
- iii. Costs, profits, margins or market shares.
- iv. Sharing or allocation of markets.
- v. Distribution and supply practices.
- vi. Bids, or their intention to bid or not to bid for any contracts or programmes.
- vii. Selection, retention of and relations with customers or suppliers.
- viii. New products, services or product/ service innovations.
- ix. Business, marketing or sales strategies.

## **9. Avoid any Exchange of Commercially Sensitive Information**

9.1 During all BEC activities and meetings, BEC and its staff members, and BEC Members and their staff members should avoid:

- i. Any exchange of competitively sensitive information, which is information that, if disclosed, would give the recipient sufficient confidential and commercial information to allow it to have knowledge of and/or to predict the other party's market behaviour and thus reduce the uncertainty under conditions of competition.
- ii. Exchange or discuss information with the intention of, or which has the effect of preventing, restricting or distorting competition and some examples of information are listed as follows:

Examples of information that is likely to be competitively sensitive	Examples of information that is unlikely to be competitively sensitive
<ul style="list-style-type: none"> <li>• Prices or pricing trends</li> <li>• Discounts or rebates</li> <li>• Terms and conditions of sale, payment terms</li> <li>• Individual customers or transactions or other information which is very precise</li> <li>• Levels of output or capacity (existing or future)</li> <li>• Costs, overheads, profits or margins</li> <li>• Market shares</li> <li>• Distribution and supply practices</li> <li>• Bids, or intention to bid or not to bid for any contacts or programmes</li> <li>• Selection, retention of and relations with customers or suppliers</li> <li>• Competitively sensitive information on development of new products, services or product/service innovations</li> <li>• Business, marketing or sales plans or strategies (existing or future)</li> <li>• Commercial behaviour or competitive position that a company would not normally disclose to third party</li> <li>• Confidential information that is likely to give the receiving party a competitive advantage</li> </ul>	<ul style="list-style-type: none"> <li>• Publicly available information</li> <li>• Sufficiently historic information that does not give an indication of current or future competitive environment or strategy</li> <li>• General industry practices, trends or conditions or general market developments in which no company specific information is disclosed</li> <li>• General, anonymised and aggregated information</li> </ul>

## 10. **Avoid any Form of Benchmarking and Sharing of Best Practices or Industry Statistics which are not Public Information**

10.1 During all BEC activities and meetings related to benchmarking exercises or data

exchanges undertaken by BEC, BEC and its staff members, and BEC Members and their staff members should observe the following guidelines:

- i. BEC will keep individual company data strictly confidential.
- ii. BEC will disseminate the data in an aggregated form which does not identify a particular participants.
- iii. For benchmarking studies, each participating company shall be ranked anonymously in the report, and each company shall be individually informed of its actual performance.
- iv. Participants submitting their data must not disclose or communicate their individual information to other participants.
- v. Participants must not discuss matters individual company data before, after or at a meeting or any other meeting of BEC.

## **11. Follow the Meeting Guidelines**

11.1 During all BEC meetings, the Chairman and Secretary should observe the following guidelines.

11.2 Before the meeting,

- i. Review the agenda to determine if there is any information to be discussed is likely to be competitively sensitive information between any of the meeting participants.
- ii. If disclosure of competitively sensitive information is essential, make sure that the information is anonymised or aggregated to prevent identification, when finalising the agenda and other meeting materials.

11.3 During the meeting,

- i. At the start of the meeting, if necessary, remind the meeting participants to observe

the Ordinance and the guidelines of the Manual.

- ii. Make sure that contents of the discussion are related to the agenda items.
- iii. Ensure the minutes are taken for recording the attendance and the discussions during the meetings.
- iv. Ensure no competitively sensitive information is disclosed or discussed.
- v. If the discussion involves information that is competitively sensitive to certain participants at the meeting, ask the relevant participants to abstain from the meeting when such competitively sensitive information is being discussed. The departure of these relevant participants from the discussion should be recorded in the minutes. The subsequent circulation of the minutes (draft and final version) to these relevant participants should not contain the commercially sensitive information.
- vi. If the departure of the relevant participants will make the meeting or discussion futile, stop the meeting or discussion immediately and ensure the minutes contain a record of why it has been stopped.
- vii. If a meeting participant wishes to clarify whether he/she can discuss a particular topic in view of competition law implications, defer the discussion of the topic so as to allow the participant to obtain his/her own legal advice.
- viii. If a meeting participant feels uncomfortable with the information or issues being discussed in view of competition law implications, he/she should immediately inform the chairman of the meeting, leave the meeting and ask that his/her departure be recorded in the minutes.

11.4 After the meeting,

- i. Make sure that the minutes or related materials do not contain any competitively sensitive information.
- ii. Inform BEC CEO or his/her delegate immediately, if any concern is noted.

## **12. Audit Requirement**

- 12.1 The compliance to this Manual shall be audited at least once in each BEC financial year. The audit shall be conducted by the Compliance Officer(s) or person(s) delegated by CEO.
- 12.2 The auditor(s) shall record all the findings and submit the result to the CEO or his/her delegate.
- 12.3 In case of non-compliance to this Manual is observed, the root cause(s) shall be investigated. Corrective and preventive action(s) shall be taken to rectify the non-conformance.

## **13. Further Information**

- 13.1 If any staff member is interested in finding out more information regarding the guidelines and details of the new Competition Ordinance, please visit the [Competition Commission's website](#) for more information.
- 13.2 This Manual may also be updated from time to time and notification will be made accordingly.
- 13.3 Please contact the HR & Administration Department at 2784 3900 for further queries.

## **14. Disclaimer**

The Manual is intended to be for reference and general information purposes only. If you have any questions regarding the Manual, you should seek legal advice in conjunction to the use of the Manual.

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