



CONSTRUCTION
INDUSTRY COUNCIL
建造業議會



REFERENCE MATERIALS

FREQUENTLY ASKED QUESTIONS ON COMPETITION LAW FOR THE CONSTRUCTION INDUSTRY

Disclaimer

Whilst reasonable efforts have been made to ensure the accuracy of the information contained in this publication, the CIC nevertheless would encourage readers to seek appropriate independent advice from their professional advisers where possible and readers should not treat or rely on this publication as a substitute for such professional advice for taking any relevant actions.

Enquiries

Enquiries on this publication may be made to the CIC Secretariat at:

CIC Headquarters
15/F, Allied Kajima Building,
138 Gloucester Road,
Wanchai, Hong Kong

Tel: (852) 2100 9000

Fax: (852) 2100 9090

Email: enquiry@hkcic.org

Website: www.hkcic.org

© 2015 Construction Industry Council.

Table of Contents

Preface	4
Purpose	5
A COMPETITION LAW – OVERVIEW	6
B FIRST CONDUCT RULE	8
Price fixing	9
Market sharing	10
Output limitation	11
Bid-rigging	12
Resale price maintenance	13
Group boycott	13
Joint buying	14
Exclusivity agreements	14
C EXCHANGE OF INFORMATION	15
D JOINT VENTURES	16
E SECOND CONDUCT RULE	17
Predatory pricing	17
Tying and bundling	18
Refusal to deal	18
Margin Squeeze	19
Exclusive dealing	19
F EXEMPTIONS AND EXCLUSIONS	20
G INVESTIGATIONS	21
Feedback Form	24

Preface

The Construction Industry Council (CIC) is committed to seeking continuous improvement in all aspects of the construction industry in Hong Kong. To achieve this aim, the CIC forms Committees, Task Forces and other forums to review specific areas of work with the intention of producing Alerts, Reference Materials, Guidelines and Codes of Conduct to assist participants in the industry to strive for excellence. The CIC appreciates that some improvements and practices can be implemented immediately whilst others may take more time to adjust. It is for this reason that four separate categories of publication have been adopted, the purposes of which are as follows:

Alerts	Reminders in the form of brief leaflets produced quickly to draw the immediate attention of relevant stakeholders the need to follow some good practices or to implement some preventative measures in relation to the industry.
Reference Materials	Reference Materials for adopting standards or methodologies in such ways that are generally regarded by the industry as good practices. The CIC recommends the adoption of these Reference Materials by industry stakeholders where appropriate.
Guidelines	The CIC expects all industry participants to adopt the commendations set out in such Guidelines and to adhere to such standards or procedures therein at all times. Industry participants are expected to be able to justify any course of action that deviates from those recommendations.
Codes of Conduct	Under the Construction Industry Council Ordinance (Cap 587), the CIC is tasked to formulate codes of conduct and enforce such codes. The Codes of Conduct issued by the CIC set out the principles that all relevant industry participants should follow. The CIC may take necessary actions to ensure compliance with the Codes.

If you have attempted to follow this publication, we do encourage you to share your feedback with us. Please take a moment to fill out the Feedback Form attached to this publication in order that we can further enhance it for the benefit of all concerned. With our joint efforts, we believe our construction industry will develop further and will continue to prosper for years to come.

Purpose

The objective of these Frequently Asked Questions is to assist participants in the construction industry to comply with Hong Kong competition law. Do not assume that these Frequently Asked Questions deal with competition law exhaustively.

If you are unsure whether a particular agreement or conduct is inconsistent with competition law, seek guidance from your management, designated competition manager (if any) or legal adviser.

A COMPETITION LAW – OVERVIEW

A1. What is competition law?

Competition law in Hong Kong is governed by the Competition Ordinance (Chapter 619). The First Conduct Rule and Second Conduct Rule prohibit any person or company from behaving in a way that prevents, restricts or distorts competition in Hong Kong. Failure to comply with competition law may result in financial penalties and other sanctions.

A2. When does the Competition Ordinance come into effect?

Some parts of the Competition Ordinance are already in operation. However, the substantive parts that impact the construction industry are not yet in operation. Those parts are expected to come into effect in the second half of 2015.

A3. What type of behaviour is prohibited by competition law?

Broadly speaking two categories of behaviour are prohibited by competition law.

First, agreements and concerted arrangements between undertakings, or associations of undertakings, that have the purpose or effect of harming competition are prohibited by the First Conduct Rule. For example, rival contractors must not agree on their respective bids in a tender process or agree on prices that will be charged for goods and services.

The Second Conduct Rule prohibits undertakings with substantial market power from abusing their market power by engaging in conduct that prevents, restricts or distorts competition. For example, a monopoly supplier of a material must not delay deliveries of its product to a particular customer who has recently entered the industry with the aim of forcing it out of the industry.

A4. Does competition law apply to all businesses?

The Competition Ordinance applies to any “undertaking”, which includes any entity engaged in economic activity.

Organisations of all forms (e.g. companies, partnerships, sole traders, cooperative societies and non-profit organisations) must comply if they are engaged in economic activity.

A5. Does competition law apply to individual employees and workers’ unions?

Competition law does not apply to employees as they are not regarded as “undertakings”. As such, collective bargaining by employees and trade unions is not prohibited by competition law.

A6. Does competition law apply to trade associations?

Trade associations are “associations of undertakings” if its members are undertakings. Competition law applies to practices of such trade associations. For example, a decision by a trade association to recommend that a particular supplier be boycotted will infringe the First Conduct Rule. In that case, both the trade association and its members may incur liability under the Ordinance.

A7. Does competition law apply to small businesses?

All undertakings (including small businesses) are prohibited from engaging in “Serious Anti-competitive Conduct” (i.e. bid-rigging, market sharing, output limitation and price fixing). Such conduct would infringe the First Conduct Rule.

A limited exclusion from the First Conduct Rule may operate where the conduct complained of is not “Serious Anti-Competitive Conduct” *and* the combined global gross revenues of the undertakings involved are less than HK\$200,000,000.

An exclusion from the Second Conduct Rule may be available where the undertaking engaging in the conduct has global gross revenues of less than HK\$40,000,000.

A8. Does competition law apply to the Government?

You must comply with competition law when dealing with the Government, for example when bidding for a Government tender. The Government and, subject to some exceptions, statutory bodies, cannot be penalised for conduct that may infringe the First and Second Conduct Rules.

A9. What are the penalties for infringing competition law?

Serious penalties can be imposed for infringing competition law by the Competition Tribunal. These include:

- (a) fines up to 10% of the infringing undertaking’s annual turnover;
- (b) remedial orders to stop the infringement and take steps to promote competition;
- (c) disqualifying individuals from acting as company directors; and
- (d) ordering payment of damages to a person who has suffered loss due to anti-competitive conduct.

A10. Can I avoid serious penalties if I discover that my business has infringed competition law?

If certain conditions are satisfied, the Commission may enter into a “leniency agreement” with an undertaking, which provides an undertaking with immunity from penalties in return for the undertaking’s cooperation in an investigation or a Tribunal case against another person.

A11. What should construction industry participants do to ensure compliance with competition law?

Participants in the construction industry should:

- (a) develop a competition law compliance policy and risk management protocols;
- (b) review business practices and commercial contracts to determine whether they comply with competition law;
- (c) raise awareness of competition law within the organisation, particularly through training of relevant staff who may interact with competitors. Refresh this on a regular basis; and
- (d) undertake regular internal audits.

B FIRST CONDUCT RULE

B1. To what types of agreements and conduct does the First Conduct Rule apply?

The First Conduct Rule applies to:

- (a) agreements;
- (b) concerted practices; and
- (c) decisions of an association of undertakings.

The term “agreement” is interpreted widely and includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral and whether or not enforceable or intended to be enforceable. For example, a “gentleman’s agreement” not to bid in a tender will infringe the First Conduct Rule.

“Concerted practice” means cooperation between undertakings that falls short of an agreement. For example, sharing commercially sensitive information with a competitor may be a concerted practice.

“Decisions of an association of undertakings” includes decisions of trade associations, cooperatives, disciplinary bodies, professional associations, societies and regulatory bodies.

B2. What types of agreements and conduct will contravene the First Conduct Rule?

The following types of agreements are regarded as Serious Anti-competitive Conduct and will almost inevitably infringe the First Conduct Rule: (a) price fixing; (b) market sharing; (c) output limitation; and (d) bid-rigging. Group boycotts and resale price maintenance will also usually infringe the First Conduct Rule. In certain circumstances exclusive distribution agreements and joint purchasing agreements may also infringe the First Conduct Rule.

B3. Does the First Conduct Rule apply to agreements with undertakings which are not competitors?

The First Conduct Rule applies to certain types of agreements between undertakings at different levels of the supply chain (e.g. distribution agreements) as well as conduct involving trade associations. In these cases, the First Conduct Rule applies to agreements with non-competitors.

B4. Does the First Conduct Rule apply to agreements with subsidiaries, parent or group companies?

The First Conduct Rule does not apply to agreements between undertakings which are under common control or if one of the undertakings involved has decisive influence over the other. Competition law also does not apply to agreements between “genuine agents” and principals.

Price fixing

B5. What is price fixing?

Price fixing means agreeing with competitors to fix, maintain, increase or control the price for the supply of goods or services. It is prohibited under the First Conduct Rule.

B6. My prices are publicly available to all customers – can I share this information with my competitors?

If your prices are “genuinely public”, i.e. any member of the public can access them without significant effort or cost (e.g. publicly available price lists on a website), then current (but never future) prices could, in principle, be shared with competitors.

However, the Competition Commission may query why a competitor is asking for publicly available prices. Therefore, the much better approach is to direct your competitor to where the publicly available prices can be

found.

B7. I have inadvertently revealed future prices to a competitor (for example, by emailing the wrong recipient). Have I infringed the First Conduct Rule?

There are no exclusions for an inadvertent breach of the First Conduct Rule. However, if you have taken steps to rectify the mistake immediately (for example, by asking the recipient of the email to delete it) and the error is not repeated, the Competition Commission is unlikely to impose a penalty.

B8. I have heard through market rumour that my competitor is likely to increase its prices. Can I follow suit?

The source of the information is important here rather than how you act on the information. The First Conduct Rule will be infringed if the information has been revealed to you by a competitor. However, the First Conduct Rule is unlikely to be infringed if the information is a result of your own analysis (“putting two and two together”) from, for example, information published in an industry journal.

B9. I regularly supply information on my prices to a construction consultancy which uses this data in their reports. Can I continue doing so?

You can provide sensitive information to a consultancy but its reports on current or future pricing must be sufficiently aggregated to ensure that an individual competitor’s price cannot be worked out. This may be difficult in concentrated markets. Alternatively, historic pricing data can generally be published.

B10. SMEs have little bargaining power against competitors with substantial market power. Can SMEs jointly set prices to counter the competitive pressure?

No. This would amount to prohibited price-fixing.

Market sharing

B11. What is market sharing?

Market sharing means agreeing with competitors to allocate sales, territories, customers or markets for the production or supply of goods or services. It is prohibited under competition law.

B12. A powerful competitor has repeatedly “warned” me not to approach its customers. What should I do?

Agreeing with a competitor not to approach certain customers or not to sell

in a particular territory will infringe the First Conduct Rule. You should continue acting unilaterally and seek legal advice (and potentially report the competitor to the Competition Commission.)

B13. Can I refuse to supply goods to certain territories in Hong Kong?

You should never discuss, exchange information on or agree with competitors the allocation or division of sales or territories. However, you are free to choose which territories you supply, so long as the decision is taken unilaterally, with no discussion, understanding or agreement with any competitor.

B14. Can SMEs jointly share markets to counter competitive pressure from competitors with substantial market power?

No. This would amount to prohibited market sharing.

Output limitation

B15. What is output limitation?

Output limitation means agreeing with competitors to fix, maintain, control, prevent, limit or eliminate the production or supply of goods or services. It is prohibited under competition law.

B16. In order to solve an industry crisis and protect employment, the industry trade association has imposed quotas on production. Is this permissible?

Agreeing quotas with competitors or through an industry association is output limitation and will infringe the First Conduct Rule. The fact that this has been done to protect employment is likely to be viewed as irrelevant.

B17. In order to improve environmental standards, the industry has agreed to limit the amount of time a cement kiln can be active during a month. Is this permissible?

Agreeing limits on how long production machinery is active is likely to result in reduced production and will be viewed as output limitation. The fact that this has been done to raise environmental standards will only be relevant if the limitations are imposed by law rather than agreed between competitors.

B18. It is common knowledge in the industry that a major multinational cement producer has plans to build a large cement plant in the near future. This is likely to result in excess capacity. With this in mind, a number of industry participants have started to mothball plants. Does this infringe the First Conduct Rule?

Reducing output in anticipation of excess capacity does not infringe competition law so long as these decisions are taken unilaterally without consulting competitors.

Bid-rigging

B19. What is bid-rigging?

Bid-rigging occurs where undertakings exchange commercially sensitive information on, or agree strategy with, competitors when bidding for (or considering whether or not to bid for) projects or when responding to invitations to tender. It is prohibited under competition law.

B20. An organisation has issued a tender for a major project but the tender terms are extremely onerous. Can I jointly approach the organisation with my competitors to discuss these terms?

You should not discuss the terms of any tenders with your competitors as this may be viewed as price fixing and/or bid-rigging. If you jointly approach the entity that issued the tender request (principal), the principal may report you to the Competition Commission. You can of course discuss the terms of the tender with the principal individually.

B21. I do not have the resources to tender for a project on my own but can submit a competitive bid if I team up with another competitor. Is this permissible?

This is a complex and evolving area of the law and it is advisable to seek legal advice before making a joint bid.

However, in general terms, joint bidding is usually permissible if the joint bidders are unable to bid individually (a decision they must make on their own). It is advisable to disclose a joint bid to the principal.

It is important to ensure that confidential business information is not shared between joint bidders.

B22. Can I use the same subcontractors for all my tender submissions?

Yes. In general this would not infringe competition law.

B23. I am procuring construction services. How do I spot bid-rigging?

There are a number of indicators that bid-rigging may be taking place but you must assess the totality of the circumstances. In general, look for:

- (a) Suspicious bid behaviour – for example, likely winners not submitting bids, bids containing similar errors and bids submitted in a similar format.
- (b) Suspicious bidding patterns – for example, different bidders winning

according to a rational pattern or the same bidder bidding high for some tenders but much lower for others.

(c) Suspicious pricing – for example, identical prices or rebates.

If you think you have some or all of the above evidence, consider making a complaint to the Competition Commission, presenting the evidence you have.

Resale price maintenance

B24. What is resale price maintenance?

Resale price maintenance occurs when a supplier establishes a fixed or minimum resale price to be observed by the buyer for a product.

B25. Can I recommend a resale price?

Yes, it is generally permissible to recommend resale prices. However, you must ensure that the recommended price does not become a *de facto* minimum price. This can happen if you repeatedly remind the buyer of the recommended price or provide incentives to follow the recommended price.

B26. Can I fix a maximum price?

Yes, it is generally permissible to fix a maximum price. However, in certain circumstances a maximum price can act as a *de facto* minimum price, for example, if the buyer is incentivised to sell at a certain “benchmark maximum price”.

B27. Can I offer discounts or rebates to buyers who agree to sell at a particular price or above a particular price?

No. Any incentive offered to sell at a particular price or stick to a minimum price is resale price maintenance and prohibited by the First Conduct Rule.

Group boycott

B28. What is a group boycott?

A group boycott is an agreement or understanding amongst competitors not to do business with targeted individuals or undertakings.

B29. A monopoly supplier has been charging me a price I consider to be very high. Can I agree with other purchasers to boycott the supplier?

No. An agreement with other purchasers to boycott a particular supplier will infringe the First Conduct Rule. However, in certain circumstances it may be permissible to enter into joint purchasing agreements with competitors.

B30. A commission agent, which specialises in sales to multinationals, has increased the commission it charges. Can I agree with my competitors to sell direct to multinationals and boycott the agent?

No. Any decision taken not to use the particular agent must be taken unilaterally without consultation with your competitors. It may however be possible, subject to the rules on joint ventures (see below), to form a joint venture which will sell directly to multinationals.

Joint buying

B31. What is joint buying?

Joint buying (also known as group buying) arises when undertakings agree to purchase products jointly. For example, a number of small companies may group together so that they will have stronger purchasing and bargaining power. This may enable them to compete against larger competitors. Joint buying will generally be permissible if the joint buyers together do not have market power.

Exclusivity agreements

B32. What is an exclusivity agreement?

An exclusive distribution agreement involves a supplier assigning a single distributor the right to resell a product in a particular territory. An exclusive customer allocation agreement involves a supplier assigning exclusivity to a single distributor for resale to a particular group of customers.

Exclusive supply and purchase agreements involve a buyer agreeing to purchase all, or almost all, of its requirements from a single supplier.

B33. I am the largest (but not dominant) supplier of aggregates in the region. I wish to enter into exclusive, long-term agreements with a number of small readymix manufacturers. The agreements require the manufacturers to exclusively source aggregates from me. Is this permissible?

Each case must be assessed on its own facts but *prima facie* it appears that such conduct may infringe the First Conduct Rule as it may act as a barrier to other aggregates suppliers entering or expanding in the market.

The position may be different if a small supplier is seeking to enter into exclusive supply arrangements.

C EXCHANGE OF INFORMATION

C1. Can I exchange information with competitors?

You may contravene the First Conduct Rule if you exchange information with competitors. This may expose you to prosecution and penalties under the Competition Ordinance.

You must never discuss or exchange confidential, business sensitive information.

You may discuss publicly available information and matters of general interest with competitors (e.g. governmental policy, regulatory changes, industry problems, industry lobbying).

C2. Can I provide information to a trade association?

You may pass information to a trade association on a confidential basis and on the basis that it is not provided to:

- (a) other members of the trade association;
- (b) employees of such members working for the trade association; or
- (c) any third party,

unless the trade association uses it in a manner that will not contravene competition law.

Trade associations may utilise information obtained from members to supply market information to members, provided that the data is:

- (a) historical;
- (b) aggregated sufficiently to prevent disaggregation or identification of participants; or
- (c) publicly available without making significant effort or incurring any significant cost.

C3. My company is a member of a trade association which meets regularly to discuss a range of industry issues, including market information and rumours on individual suppliers' financial positions. Can we continue to do this without infringing the law?

As stated above, you may discuss publicly available information with competitors, but you must never discuss or exchange confidential, business sensitive information.

C4. What should I do if anti-competitive conduct is discussed at a meeting which I attend?

Presence at meetings where anti-competitive conduct is discussed or

competitive information is exchanged may be enough to infringe competition law. You should:

- (a) check the agenda in advance to identify impermissible discussion items, and object if any are identified;
- (b) if one of these subjects is raised, state that you disagree with the matter being discussed and that you must leave if the discussion continues. Leave if the discussion continues; and
- (c) make sure your objection is noted in the minutes and report the occurrence to your legal team immediately.

D JOINT VENTURES

D1. Can I enter into a joint venture with a competitor?

Joint ventures between competitors present particular problems under the First Conduct Rule. The Competition Commission's approach to such joint ventures has not yet been clarified. Consult your designated competition manager or legal adviser prior to entering into any joint venture arrangements.

D2. Can I enter into a joint venture with a non-competitor?

Joint ventures with parties that provide complimentary goods or services and who are not competitors will be unlikely to infringe competition law, provided that they do not impose restrictions on the joint venture parties.

Exchange of information between, or provision of information to, joint venture participants who are not competitors is less likely to infringe competition law but must be carefully considered on a case-by-case basis.

D3. Are there any exemptions available for joint ventures?

A joint venture may be exempted from the First Conduct Rule if it:

- (a) amounts to a "merger" as defined in the Competition Ordinance; or
- (b) enhances overall economic efficiency.

A joint venture agreement that amounts to a "merger" between undertakings may be permissible even if it harms competition. A joint venture will be a "merger" if it performs, on a lasting basis, all the functions of an autonomous economic entity.

E SECOND CONDUCT RULE

E1. To whom does the Second Conduct Rule apply?

The Second Conduct Rule only applies to undertakings:

- (a) that have a substantial degree of market power in a market; and
- (b) whose annual global turnover exceeds HK\$40 million.

E2. When does an undertaking have a substantial degree of market power in a market?

There is no single test to determine if an undertaking has a substantial degree of market power. This depends on the totality of the circumstances including barriers to entry in the market, buyer power and whether it is a dynamic industry.

As a rule of thumb, undertakings with less than 30% market share are unlikely to have a substantial degree of market power, while undertakings with more than 50% market share are likely to have a substantial degree of market power.

E3. What types of conduct will contravene the Second Conduct Rule?

An undertaking that has a substantial degree of market power in a market will contravene the Second Conduct Rule if it abuses that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

In particular, conduct may constitute an abuse if it involves:

- (a) predatory behaviour towards competitors; or
- (b) limiting production, markets or technical development to the prejudice of consumers.

The following types of conduct may also, in certain circumstances, contravene the Second Conduct Rule: (a) predatory pricing; (b) anti-competitive tying and bundling; (c) margin squeeze; (d) refusal to deal; and (e) exclusive dealing.

Predatory pricing

E4. What is predatory pricing?

Predatory pricing occurs when an undertaking with a substantial degree of market power in a market sets prices so low that it deliberately forgoes profits in an attempt to force one or more competitors out of the market and/or in an attempt to otherwise “discipline” competitors. This may allow the undertaking to charge higher prices once the competition is eliminated.

However, below cost pricing may not be abusive if it is for a legitimate commercial objective. For example, a genuine promotional offer of limited duration may be permitted.

Tying and bundling

E5. What is tying and bundling?

Tying occurs when a supplier makes the sale of one product conditional on the purchase of another. Bundling occurs when a package of two or more products is sold at a discount.

Tying and bundling are common market strategies that generally do not harm competition. However, they may have anti-competitive effect if they eliminate competitors' ability to sell the tied or bundled product, resulting in competitors exiting the market.

E6. I manage a company that has a substantial degree of market power in the market for the supply of certain machinery. A customer has purchased a piece of machinery from me. Can I insist that it only uses my company's spare parts for the machine?

Tying of spare parts and machinery by a company with a substantial degree of market power may be anti-competitive. However, this will depend on whether there is an objective justification (e.g. safety, optimum performance of the machine).

E7. I am trying to purchase cement from a producer that has a substantial degree of market power in the market. The producer is insisting that I also purchase asphalt from it in order to receive a large discount. I do not wish to purchase asphalt from it – what can I do?

Bundling cement and asphalt without any justification may constitute an abuse of market power and infringe the Second Conduct Rule.

Refusal to deal

E8. What is a refusal to deal?

A refusal to deal occurs when an undertaking refuses to:

- (a) supply a product or service to a particular entity, or agrees to supply only on unreasonable terms; or
- (b) grant access to facilities which may be essential for other competitors to operate in a market or refuses to grant such access on reasonable terms.

E9. I manage a company that has a substantial degree of market power in the cement market. We have been supplying cement to a readymix producer for a few years but now have plans to manufacture readymix

ourselves. Can we refuse to supply cement to the readymix producer?

A refusal to supply by a company that has a substantial degree of market power with the intention of reducing competition in the downstream market is likely to be viewed as anti-competitive and infringe the Second Conduct Rule unless there is an objective justification.

E10. I manage a company that has a substantial degree of market power in the cement market. We have been supplying cement to a readymix producer for a few years but recently the customer has failed to make payment and there are rumours that it may become insolvent. Can I refuse to supply the customer?

Yes. In this situation you have an objective justification (i.e. the customer is not credit worthy) to stop supplies and refusal to supply will not infringe the Second Conduct Rule. However, you must consider supplying the customer once it can prove it is credit worthy.

Margin Squeeze

E11. What is margin squeeze?

Margin squeeze may be regarded as a *de facto* refusal to supply. It occurs where a supplier that has a substantial degree of market power in a market:

- (a) supplies a product or service which is a key input or component in a downstream market in which both itself and competitors operate; and
- (b) sets a price for the key product or service which has the object or effect of protecting the supplier from competitors in that downstream market (e.g. by setting an unreasonably high price).

Exclusive dealing

E12. What is exclusive dealing?

Terms that reward customers for their loyalty are a common and legitimate part of business. They may be prohibited, however, where they have the effect of excluding competing sources of supply.

Exclusive dealing occurs, for example, when:

- (a) a supplier that has a substantial degree of market power requires a customer to purchase all or most of a good or service the customer requires from that supplier only;
- (b) a supplier that has a substantial degree of market power grants a customer rebates or discounts on condition the customer purchases all or most of a good or service the customer requires from that supplier only;
or
- (c) a purchaser that has a substantial degree of market power requires or

incentivises a supplier to supply a good or service to that purchaser only.

E13. I manage a company that has a substantial degree of market power in the supply of a certain product. I offer rebates to my customers only if they purchase 80% of their requirements from me. Can I continue to do this?

It is likely that this will be viewed as anti-competitive and infringe the Second Conduct Rule as it has the effect of shutting out other competitors from the market.

E14. My company has a substantial degree of market power in the supply of readymix in the market. I only purchase cement supplies from companies which do not supply any of my competitors. Is this permissible?

Exclusive supply agreements entered into by a company with a substantial degree of market power may infringe the Second Conduct Rule as it restricts access to cement for other competitors.

F EXEMPTIONS AND EXCLUSIONS

F1. What exemptions and exclusions apply in relation to the conduct rules?

The Competition Ordinance provides for exclusions and exemptions from the First and Second Conduct Rules. They provide immunity to undertakings for conduct that would otherwise be prohibited.

Exemptions and exclusions may be available:

- (a) for small- to medium-sized enterprises;
- (b) for agreements that enhance overall economic efficiency;
- (c) for mergers;
- (d) where the conduct is necessary to comply with legal requirements; and
- (e) where the operation of the conduct rules would obstruct the provision of services of general economic interest.

These exclusions are only likely to be availed in limited circumstances and are very unlikely to apply to exclude serious anti-competitive conduct.

G INVESTIGATIONS

G1. I have received a notice from the Competition Commission requiring me to produce or provide documents or information. What should I do?

Unless you have a reasonable excuse, you must produce or provide the document or information requested. Failure to do so is an offence, and you may be liable to a fine of up to HK\$200,000 and to imprisonment for up to 1 year.

You must not:

- (a) destroy, dispose of, falsify or conceal a document requested in the notice; or
- (b) produce or provide documents or information that you know (or should know) is false or misleading in a material particular.

You may be entitled to withhold the production or provision of documents or information that is protected by legal professional privilege.

G2. I have received a notice from the Competition Commission requiring me to attend the Commission to answer questions. What should I do?

Unless you have a reasonable excuse, you must attend before the Commission to answer questions that are relevant to an investigation. Failure to do so is an offence, and you may be liable to a fine of up to HK\$200,000 and to imprisonment for up to 1 year.

You must not provide information that you know (or should know) is false or misleading in a material particular. You may be entitled to withhold the production or provision of documents or information that is protected by legal professional privilege.

G3. The Competition Commission has asked me to provide a statutory declaration. What should I do?

Unless you have a reasonable excuse, you must provide the statutory declaration. Failure to do so is an offence, and you may be liable to a fine of up to HK\$200,000 and to imprisonment for up to 1 year.

G4. What should I do if my company is presented with an entry and search warrant?

You should immediately contact your in-house and/or external legal advisers and ask them to attend. Request the person executing the warrant to wait for the legal advisers to arrive before the search commences.

You may request the person executing the warrant to produce the warrant and evidence of the person's authority to execute the warrant.

It is an offence, punishable by a fine of up to HK\$1,000,000 and to

imprisonment for up to 2 years, if you:

- (a) fail to comply with the warrant;
- (b) obstruct any person exercising a power under the warrant;
- (c) destroy, dispose of, falsify or conceal a document requested; or
- (d) produce or provide documents or information that you know (or should know) is false or misleading in a material particular.

You should consider whether any of the documents or information requested are protected by legal professional privilege.

G5. How can my company prepare for a raid by the Competition Commission?

You should:

- (a) put in place protocols for dealing with raids by the Commission;
- (b) conduct training sessions to ensure that staff members know what role they have to play during a raid (whether senior executives or junior staff such as receptionists); and
- (c) consider running “mock” raids in order to prepare and train staff.

G6. What if a notice or warrant requests a document or information that is confidential?

A person is not excused from producing or providing a document or information to the Commission on the ground that it is confidential. Subject to some exceptions, the Commission must preserve the confidentiality of confidential information obtained pursuant to a notice or warrant.

G7. What is a leniency agreement?

The Commission may, in exchange for a person’s co-operation in an investigation or in a Tribunal case, make an agreement, on any terms it considers appropriate, that it will not take any action against the person in respect of an alleged contravention of a conduct rule.

G8. What should I do if I know or suspect that I or my company has breached a competition law?

Take all necessary action to rectify the breach as quickly and practicably as possible, and immediately seek legal advice.

G9. What should I do if I know or suspect that a third party has breached a competition law?

You may notify the Commission by lodging a complaint or query directly or through an intermediary (such as a legal advisor) on an anonymous or non-anonymous basis.

Feedback Form

Reference Materials – Frequently Asked Questions on Competition Law for the Construction Industry

Thank you for reading this publication. To improve our future editions, we would be grateful to have your comments.

(Please put a "✓" in the appropriate box.)

1. As a whole, I feel that the publication is:	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
Informative	<input type="checkbox"/>				
Comprehensive	<input type="checkbox"/>				
Useful	<input type="checkbox"/>				
Practical	<input type="checkbox"/>				
2. Does the publication enable you to understand more about the Competition Law for the construction industry?	Yes	No	No Comment		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
3. Have you made reference to the publication in your work?	Quite Often	Sometimes	Never		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
4. To what extent have you incorporated the recommendations of the publication in your work?	Most	Some	None		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5. Overall, how would you rate our publication?	Excellent	Very Good	Satisfactory	Fair	Poor
	<input type="checkbox"/>				
6. Other comments and suggestions, please specify (use separate sheets if necessary).					
Personal Particulars (optional):*					
Name: <u>Mr. / Mrs./ Ms./ Dr./ Prof./ Ir / Sr ^</u>					
Company: _____					
Tel: _____					
Address: _____					
E-mail: _____					

* The personal data in this form will be used only for this survey. Your data will be kept confidential and dealt with only by the Construction Industry Council.

^ Circle as appropriate.

Please return the feedback form to:

CIC Secretariat – Council Services

E-mail: enquiry@hkic.org

Address: 15/F, Allied Kajima Building, 138 Gloucester Road, Wan Chai, Hong Kong

Fax No.: (852) 2100 9090