

December 17 Legal and Regulatory Update

Top stories

SFC issued new Guidance Note on co-operation

A new **Guidance Note on Co-operation with the SFC** was issued, replacing a 2006 version (Click: [press release](#); [full report](#); [FQ+A](#)).

Our focus is on the **new section** regarding proceedings in **civil courts** (s.213, 214 of the Securities and Futures Ordinance (“SFO”), and the **Market Misconduct Tribunal** (“MMT”). The Guide does **not** apply to criminal proceedings.

SFC clarifies what actions will be regarded as “**co-operation**”, factors used in assessing co-operation, and benefits including reduced sanctions.

What you should know:

- What amounts to “**co-operation**”: **beyond regulatory requirements**; not mere compliance
- How co-operation is assessed: factors include “value of the assistance” (e.g. timeliness of the co-operation, quality, extent and substance of the assistance; the resulting savings in time and resources)
- **Examples** of co-operation (for s.213 SFO and MMT proceedings): sign “statements of agreed facts”; agree on proposed orders
- SFC may agree to reduced sanctions, and issue a “co-operation letter” to another regulator describing the co-operation provided

What you should watch out for:

- We welcome clarification of what needs to be done, in order to gain the benefits of co-operation
- For specific situations, companies must assess with professional advisors which course of action (co-operation being an option) will produce the best results

Also in this issue

Legislation

(i) The Privacy Commissioner released its [“2017 Study Report on User Control over Personal Data in Customer Loyalty and Reward Programmes”](#) and an [inspection report on the personal data system of an unidentified leading estate agency](#). (Click: [press release](#))

The report on loyalty programme is noteworthy. 30 customer loyalty and reward programmes from six sectors (ie. **retail, hotel, catering, airlines, cinema and gasoline**) were examined in May 17. Important improvement areas were identified.

The report on the estate agency reflects its generally satisfactory data privacy systems.

What you should know:

Notable improvement areas for privacy policies of loyalty programmes:

- While all programmes examined have privacy policies, most of them **lack transparency**. The terms used were **“too broad and vague”**
- **No meaningful consent**: most programmes have **“bundled consents”** i.e. customers cannot only consent to the services subscribed, without agreeing to the use of their personal data for unrelated purposes
- **Lack of control over personal data**: e.g. customers cannot request for data deletion
- **Operators urged** to be “frank with their customers” about their privacy policies/practices; respect customers’ rights to personal data privacy, and provide customers with control over their own personal data

What you should do:

- Loyalty programmes are very popular in Hong Kong. Start with identifying all your company programmes. Then check the privacy policies, implement improvement areas identified above.

(ii) The Competition Commission published model **“Non-collusion clauses”** for inclusion in tender documents and contracts. (Click: [user guide and model documents](#); [press release](#))

The report sets out model **“non-collusion clauses”** for inclusion in tender documents, and a model **“non-collusive tendering certificate”** for tenderers to sign as part of tender submission to declare that the bid was developed independently. The Commissioner encouraged their adoption.

What you should know/do:

- As covered in previous updates, the Commission’s **current enforcement focus** includes “**anti-competitive collusive conduct**” (e.g. bid-rigging, market sharing, price fixing)
- The Commission encourages all procurers to consider including “non-collusion clauses” in tender invitations and subsequent formal contracts
- **Even if your documents already include similar clauses**, the Commission encourages the use of the **model clauses “as a supplement”**, to ensure “full reflection of the spirit and requirements” of the Competition Ordinance
- You should **alert your procurement team**, and pass on model clauses and certificate

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