

March 2020 Legal and Regulatory Update

Top stories

(i) SFC and HKEX issued a [joint statement](#) on how the government's recent COVID-19 restrictions on public gatherings might impact **annual general meetings** (“AGMs”), **extraordinary/special** general meetings (collectively as “EGMs”).

Such prohibition is currently in force until (as extended) 23 April 2020. **Exemptions** include gatherings required to be held within a specified period under applicable law and regulations.

The regulators have consulted the Government, and understand that **AGMs are therefore exempted**. EGMs will only be exempted if they satisfy this condition.

Notwithstanding such exemption, the regulators issued **guidelines** for listed issuers to consider as regards the timing/manner of holding meetings. These factors relate to **safety concerns** and **public policy** measures taken to combat the pandemic.

Firstly, should consider if it is possible to **adjourn/delay** for a reasonable period until after the prohibition period.

Secondly, on **management of physical meetings**.

Thirdly, on **follow-up shareholder communications**, explaining latest meeting arrangements.

What you should know/do:

Summary of guidelines

- **Adjourn/delay possible?**
 - Mandatory legal/regulatory timing requirements?
 - Extension of time, waiver, variation?
 - Nature of business: urgency and importance; would delay materially harm the interests of the company and shareholders as a whole?
- **Encouraged to consider a longer adjournment/delay**
 - Monitor the situation
 - Consider alternatives: voting by proxy; technology (e.g. “virtual” meetings); submit questions to management in advance
- **Management of physical meetings**
 - Safety precautions
 - Measures to limit the number of attendees

- Listing Rules require that all shareholders be treated fairly and equally; but no requirement on format of meetings
- But need to check laws of their place of incorporation; constitutional documents
- **Follow-up shareholder communications** (meeting notice already sent)
 - Confirm meeting **status**
 - **Explain the necessity** of holding the meeting during the prohibition period
 - **Meeting arrangements and precautionary measures**
- **HKICS** also issued useful [guidelines](#) to its members, including practical tips on managing physical meetings
- **Our observations:** considerations like payment/timing of **dividend** is also relevant

(ii) **Privacy Commissioner issued a [media statement](#) on impact of COVID-19.**

It addressed **practical issues** like whether **employers can collect health data** from employees; **work-from-home** arrangements and risks of **personal data privacy breach**.

The Commissioner stated that **public health and safety** of the community during the pandemic remains its **primary concern**. The Commission should be mindful of the compelling public interests when considering compliance with data protection laws, which should not be seen as hindering such measures.

Employers' collection of additional personal data to help control the spread of disease should be "**specifically related to**" and "**used for the purposes**" in relation to public health; **limited in duration and scope**. (Principles of "minimization", "purpose specification" and "use limitation").

Transition to work-from-home arrangements might mean higher risks for privacy data breaches, e.g. loss of portable devices, malware as health alerts, etc.

There are **useful Q+As**, including security tips for working-from-home.

(iii) **The Competition Commission issued a statement on the impact of COVID-19.**
(Click: [press release](#); [statement](#))

The Commission continues its operations to enforce the Competition Ordinance which remains in effect during the COVID-19 outbreak.

However, it recognises that there could be a need for additional cooperation between businesses in certain industries on a temporary basis, particularly to maintain the supply of essential goods and services.

It intends to take a **pragmatic approach** in its enforcement and advisory functions in respect of **temporary measures** which are **genuinely necessitated by the COVID-19 outbreak** and in the **interests of Hong Kong consumers and society**.

Where businesses propose such temporary measures, they or their relevant industry bodies should **contact the Commission** to discuss.

Also in this issue

Regulators

The Market Misconduct Tribunal (“MMT”) found that Magic Holdings, its 3 founders (executive directors), an **executive director** (also being **company secretary**), and a **non-executive director** were found liable for failing to make timely disclosure of inside information. Penalty order will be handed down later. (Click: [press release](#); [MMT ruling](#)) (Background: our [May 18 legal update](#))

The founder-directors were in negotiation to sell their stakes to an independent third party.

Key issues include: (i) **what stage of the negotiations** constitutes “inside information”; (ii) **leakage and loss of “safe harbour”** exemption (preserving confidentiality).

The **chairman**, and the **company secretary** were also found liable for failing to provide all directors in a timely manner, with information relevant to the determining whether it was necessary to make an announcement.

What you should know:

- **Stage of negotiations**
 - “**Specific information**”?
 - *Test*: “**substantial commercial reality**”; beyond “testing waters”; “parties intend to negotiate with a realistic view to achieve an identifiable goal”
 - *Facts*: minimum price indicated (at a significant premium over trading price); founders indicated support (i) (to be considered by full board) for buyer’s request to conduct due diligence (ii) and agreed to approach institutional shareholders
- Failure to preserve confidentiality and **loss of “safe harbour”**
 - *Facts*: (i) **leakage** (reflected in significant price movement and trading volume); (ii) **did not take reasonable measures to monitor confidentiality**
- Failure by **Chairman/Secretary** to provide all information to the board to assess disclosure
 - *Facts*: e.g. did not alert the board on significant share price movement/trading volume

- **Non-executive director** found liable
 - *Facts*: experienced businessman; a “**passive role**” to “taking reasonable measures to ensure that the company has proper safeguards to prevent a breach”
 - Contrast some INEDs that pro-actively suggested an internal controls review

What you should do/watch out for:

- “Disclosure of inside information” **remains a key area that listed companies should monitor, particularly in light of impact of COVID-19**
- Important to maintain **confidentiality** and hence any available “**Safe Harbour**”
- Roles of officers (including non-executive directors; company secretary)

Legislation

The Competition Commission commenced proceedings in the Competition Tribunal against three companies, and one individual (general manager of one of the companies) for price-fixing, market-sharing, and/or bid rigging in relation to the sale of textbooks to students attending primary and secondary schools in Hong Kong (“**cartel arrangements**”). (Click: [press release](#))

Although the cartel arrangements were arrived at prior to the Competition Ordinance, the companies had engaged in them after the Ordinance came into effect.

“**Cartels**” (infringing the “**First Conduct**” rule) is a current **enforcement focus**. (Click: our [Jan 20 Legal update](#) on another recent case).

What you should watch out for/do:

- “**First Conduct Rule**” means — parties acting together with an **agreement**, and/or engaged in a **concerted practice**, whose **object or effect** is “to prevent, restrict or distort” competition in Hong Kong
- Reinforces that “**cartel arrangements**” i.e. **price fixing, market sharing, and bid-rigging**, is a **priority enforcement area**
- All companies must steer clear of cartel practices. Those **already involved** in such practices should consider approaching the Commission for **leniency**

Published by Practising Governance Limited

April 2020