



# The Competition Ordinance



## 1. Purpose

This fact sheet provides general information on the Competition Ordinance for industry stakeholders' reference.

## 2. Background

Hong Kong's new Competition Ordinance applies to businesses in all sectors of the economy, including construction industry clients, contractors and sub-contractors. The Construction Industry Council (CIC) has convened a Task Force on Competition Law to help inform members about the new law.

## 3. Timetable for the new law

Some provisions have already come into effect: these provide for the establishment of a Competition Commission (the Commission), appointment of Commissioners and publication of guidelines on the new law. The "conduct rules" and the enforcement provisions of the Ordinance are not yet in force and the timetable for their commencement has not yet been announced.

## 4. Purpose of the Competition Ordinance

The Competition Ordinance aims to uphold the competitive process. Two "conduct rules" prohibit any person or company from behaving in a way that prevents, restricts or distorts competition in Hong Kong. (A "merger rule" also provides for review of potentially anti-competitive mergers but this applies only to telecommunications carriers.)

## 5. To whom does the Competition Ordinance apply?

The Competition Ordinance applies to any "undertaking", which includes: "any entity ... engaged in economic activity". Organisations of all forms (e.g. companies, trade associations, trusts) must comply, as well as individuals who are engaged in "economic activity".

Many "statutory bodies" will be exempted, initially, but the Government has stated its expectation that "they should adhere to

the competition rules even though they are not subject to the law."

Various exemptions and exclusions are provided for, and undertakings will be able to apply to the Commission either for a "block exemption" for agreements of a particular type, or a more specific "decision", where the proposed agreement or conduct can be justified on economic grounds.

## 6. What does the "First Conduct Rule" prohibit?

The "First Conduct Rule" prohibits collusive agreements and understandings between competitors. For example, rival contractors must not agree on their respective bids in a tender process; and must not share information about their proposed prices at a trade association meeting.

The First Conduct Rule does not apply to small-scale undertakings (i.e. to agreements or concerted practices among undertakings having a combined annual turnover of less than HK\$200,000,000) unless the conduct is "serious anti-competitive conduct".

"Serious anti-competitive conduct" means price fixing; allocation of sales, territories, customers or markets; limiting or controlling the production of certain goods or supply of services; or bid rigging. Even a small undertaking could be liable to prosecution and penalties if it participates in any of these four kinds of conduct.

Overseas, construction industry businesses have been heavily penalised for engaging in bid rigging, bid rotation, and cover pricing. Hong Kong businesses should take care to avoid any such practices.

## 7. What does the "Second Conduct Rule" prohibit?

The "Second Conduct Rule" prohibits abuse of a "substantial degree of market power", with the object or effect of lessening competition in a market.



### 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.

©2013 Construction Industry Council.

Address: 15/F, Allied Kajima Building  
138 Gloucester Road, Wanchai, Hong Kong  
Tel: (852) 2100 9000  
Fax: (852) 2100 9090  
Email: enquiry@hkcic.org



## The Competition Ordinance



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, and supply it an inferior quality product (while charging it the same prices), with the aim of forcing it out of the industry.

Merely having a substantial degree of market power is not an infringement of the Second Conduct Rule: it is the abuse of a substantial degree of market power to lessen competition that the law prohibits.

A “substantial degree of market power” is not defined in the Ordinance but is normally found where an undertaking is not constrained in its business decision-making by the reactions of its rivals and customers. Market shares are relevant but not decisive as to whether market power exists. Factors such as ease of entry into the market, the bargaining power of buyers and suppliers, and the degree of product differentiation are also significant. The new Commission will prepare guidelines on market definition and assessment of market power.

The Second Conduct Rule does not apply to undertakings whose individual annual turnover is less than HK\$40,000,000.

### 8. What is the role of the Competition Commission?

The Commission is responsible for enforcing the Competition Ordinance, promoting public understanding of competition law, conducting market studies and promoting competition compliance measures for businesses.

The Commission cannot impose penalties: if it considers a penalty is warranted, it must prove the infringement before the Competition Tribunal.

“Warning notice” and “infringement notice” procedures will give undertakings the opportunity to correct their conduct

and avoid prosecution. The Commission may also enter into “leniency agreements”, providing a person or corporation with immunity from pecuniary penalties in return for that person’s cooperation in an investigation or proceedings. Overseas, leniency is commonly granted to the first undertaking to defect from a cartel and cooperate with the agency in its investigation and prosecution of other cartel members.

### 9. What powers will the Competition Tribunal have?

The Competition Tribunal (to be formed in August 2013) will be made up of the judges of the Court of First Instance.

The Tribunal will have powers to:

- impose monetary penalties (up to 10% of the infringing undertaking’s annual turnover);
- make remedial orders;
- disqualify individuals from acting as company directors;
- review certain Commission decisions; and
- order payment of damages to a person who has suffered loss due to anti-competitive conduct.

### 10. What are the likely next steps?

Once the Chief Executive has appointed Commissioners, it is likely they will hire staff and begin consultation on the guidelines that further explain the new law. The Commission will probably launch a public education programme regarding the new law.

Overseas businesses commonly include competition law training in their compliance programmes, to assist their staff to avoid infringing the law. Before the Competition Ordinance comes into full force, construction industry businesses should consider whether they currently are involved in any agreement or conduct that might infringe the new law and, if so, make alternative arrangements to ensure compliance with the conduct rules.



#### 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.

©2013 Construction Industry Council.

Address: 15/F, Allied Kajima Building  
138 Gloucester Road, Wanchai, Hong Kong  
Tel: (852) 2100 9000  
Fax: (852) 2100 9090  
Email: enquiry@hkcc.org