

《競爭條例》

GUIDE TO 指南

COMPETITION ORDINANCE

公營界別 FOR PUBLIC SECTOR



競爭事務委員會
COMPETITION
COMMISSION

《競爭條例》
Competition
Ordinance

1
合謀圍標
Bid Rigging
Cartels

2
合謀瓜分市場
Market Sharing
Cartels

3
合謀定價
Price Fixing
Cartels

4
合謀限制產量
Output Limitation
Cartels

5
合謀交換資料
Information
Exchange Cartels

6
搭售及捆綁銷售
Tying and
Bundling

7
寬待政策及投訴
Leniency &
Complaints

8

前言

INTRODUCTION

在自由市場經濟體系下，企業之間互相競爭，透過提供更優質或 / 及更廉宜的產品或服務吸引顧客。與沒有競爭的情況相比，具競爭的市場不僅為顧客帶來更多選擇，也讓他們受惠於較便宜的價格及更高質素的產品或服務。同時，市場競爭亦會推動營商效率，及鼓勵企業創新。反競爭行為會令消費者、企業及公營機構失去競爭所帶來的裨益，破壞香港經濟發展的重要基石。

本指南旨在協助政府部門、公共機構及執法機關的人員了解《競爭條例》（《條例》）的重點，及辨識市場上的反競爭行為。這本小冊子提供了簡易、實用的參考，有助公營機構加強偵測可能違反《條例》的行為，並向競爭事務委員會（競委會）作出舉報。

In a free market economy, businesses compete with each other to attract customers by offering products or services with increased quality or/and lower prices. This leads to customers benefitting by paying less, getting better quality and having more choice than they otherwise would. Competition in a market also enhances business efficiency and facilitates innovation. Anti-competitive practices deprive consumers, businesses and the public sector of the benefits brought by competition, and undermine one of the cornerstones that support the success of Hong Kong's economy.

This Guide has been designed to assist personnel from the government, public bodies and law enforcement agencies in understanding the key elements of the Competition Ordinance (Ordinance) and to help them identify signs of anti-competitive practices in the marketplace. It is intended as a quick, practical resource for the public sector to strengthen detection of potential contraventions of the Ordinance and for the reporting of suspected contraventions to the Competition Commission (Commission).

《競爭條例》



《競爭條例》旨在透過禁止反競爭行為來促進香港的競爭。

《條例》包括 3 項競爭守則

▶ **第一行為守則***：禁止業務實體（通常指企業）之間訂立損害香港競爭的協議（泛指任何形式的協議，包括正式協議、口頭協議或共識）及經協調做法，例如合謀定價、圍標或瓜分市場；亦禁止行業協會或專業團體作出可能損害競爭的決定。

** 由於此守則與公營界別最為相關，本指南主要闡述在這守則下所禁止的行為。*

▶ **第二行為守則**：禁止具有相當程度市場權勢的業務實體濫用該權勢，從事損害香港競爭的行為。

▶ **合併守則**：禁止具有、或相當可能具有大幅減弱香港競爭的效果的合併。目前，合併守則僅適用於持有電訊傳送者牌照的業務實體。

罰則

▶ 當競爭事務審裁處（審裁處）裁定某行為違反《條例》時，可作出以下命令，包括：

- 對已違反或牽涉入違反競爭守則的人士（包括企業）施加罰款，金額可達有關業務實體在香港的年度營業額的 10%，罰款期最長三年。
- 若審裁處裁定某人擔任董事的公司已違反《條例》，並認為該名人士作為公司董事的行為，使其不適合參與公司的管理，審裁處可取消該名人士擔任公司董事、或以任何其他方式管理公司的資格，為期可達五年。
- 終止或補救有關違例行為的其他命令。

▶ 當審裁處裁定某行為違反《條例》後，因有關行為而蒙受損失或損害的任何人士，可提出「後續」申索，追討賠償。

COMPETITION ORDINANCE



The Competition Ordinance aims to promote competition and prohibit anti-competitive practices in Hong Kong.

The Ordinance contains **3** competition rules

- **First Conduct Rule***: prohibits agreements (*in any form including formal, verbal or unspoken understandings*) and concerted practices among undertakings (*these are typically businesses*) which harm competition in Hong Kong, e.g. a cartel to fix prices, rig bids or share markets, as well as decisions of trade associations or professional bodies which may similarly harm competition.

** This Guide mainly focuses on prohibitions under this rule which is of most relevance to the public sector.*

- **Second Conduct Rule**: prohibits an undertaking with a substantial degree of market power from abusing that market power by engaging in conduct which harms competition in Hong Kong.
- **Merger Rule**: prohibits mergers that have, or are likely to have, the effect of substantially lessening competition in Hong Kong. Presently, the Merger Rule applies only to mergers where a party holds a telecommunications carrier license.

Penalties

- **Where the Competition Tribunal (Tribunal) rules that there has been a contravention of the Ordinance, the Tribunal can make orders including the following:**
 - The payment of a pecuniary penalty by any person (including undertakings) who contravened, or was involved in the contravention of, the competition rule. The pecuniary penalty may be up to 10% of an undertaking's annual turnover in Hong Kong for up to 3 years.
 - The disqualification of a person from being a director of or otherwise managing a company for up to 5 years, where the Tribunal considers the person's conduct as a director of a contravening company makes them unfit to be involved in managing a company.
 - Other orders to cease and remedy the contravention.
- **After the courts have determined there to be a contravention of the Ordinance, persons who have suffered loss or damage as a result of the contravention can pursue 'follow-on' claims for such damages.**

合謀圍標



圍標一般涉及兩個或以上的業務實體，彼此間同意不就某招標項目互相競爭。

常見形式

圍標可能以不同形式出現，包括：

- ▶ **抑制投標：**一名或多名競爭對手協定不投標，或撤回已遞交的標書。
- ▶ **掩護式投標：**競爭對手同意出價高於預設中標者，或提出吸引力稍遜(甚至招標者不會接受)的條款。
- ▶ **輪流中標：**競爭對手協定在一連串的合約中輪流中標。
- ▶ **其他形式：**競爭對手協定最低出價，或協定中標者會支付其他投標者的投標支出。

警示

招標過程中如出現以下跡象，可能顯示有圍標的情況：

- ▶ 不同的標書有相似之處——同樣的錯誤(例如串錯字，計錯數)、筆跡相同、字體一樣，或訂價一致等
- ▶ 在沒有充分理由的情況下，投標者突然撤回標書
- ▶ 某投標者同時為自己及另一位競爭對手入標
- ▶ 某投標者從未中標，卻不斷參與競投；或是甚少入標的投標者一旦入標，便例必中標
- ▶ 中標者屢次將合約工作分判予落敗的投標者
- ▶ 大多數投標者突然以相同的加幅提高報價而沒有任何解釋
- ▶ 投標者在某些招標項目的報價相對較高，但在其他類似項目的報價卻相對較低
- ▶ 有可疑言論顯示投標者之間或已訂立協議，例如投標者表示其報價參考了「業界建議價格」

「不合謀條款」範本

競委會發表了一套「不合謀條款」及「不合謀投標確認書」的範本，採購人員可考慮加入其招標文件及採購合約內，以防範可能在採購過程中出現的合謀行為。



BID RIGGING CARTELS



Bid-rigging generally involves two or more undertakings agreeing that they will not compete with one another in tenders for particular projects.

Common Types

Bid-rigging may be achieved in many ways, including the following:

- **Bid suppression:** one or more competitors agree not to bid, or withdraw a bid submitted previously.
- **Cover bidding:** competitors agree to submit bids with higher prices or less attractive (or unacceptable) terms than the bid of the designated winner.
- **Bid rotation:** competitors agree to take turns at being the winning bidder on a series of contracts.
- **Others:** competitors agree on a minimum bidding prices or agree that the winning bidder will reimburse other bidders' bid costs.

Red Flags

The following conduct in the tender process may suggest the existence of bid-rigging:

- 🚩 Similarities in bids – same irregularities (e.g. typos, miscalculations), handwriting, typeface, or identical pricing etc.
- 🚩 Bids that are suddenly withdrawn without good reason
- 🚩 A bidder submits both its own and a competitor's bid
- 🚩 A bidder that never wins but keeps on bidding or rarely bids but always wins when it does
- 🚩 The winning bidder repeatedly subcontracts work to unsuccessful bidders
- 🚩 Sudden and identical increases in price by most bidders without explanation
- 🚩 A bidder that bids relatively high in some tenders but relatively low in other similar tenders
- 🚩 Suspicious statements indicating that bidders may have reached an agreement, e.g. bidders justifying their prices by referring to 'industry suggested prices'

Model Non-Collusion Clauses

The Commission has published a set of model 'Non-collusion clauses' and a 'Non-collusion certificate' which procurers may incorporate in their tender documents and contracts so as to safeguard procurements against cartel conduct.



合謀瓜分市場



瓜分市場是指競爭對手之間訂立協議，將一個或多個市場分割，例如同意不爭奪彼此的顧客、不進入或不將業務擴展至對手的市場。

常見形式

合謀瓜分市場的競爭對手可能會協定：

- ▶ **不在特定產品或服務的生產或銷售上互相競爭**
甲公司同意只生產產品 X，而乙公司同意只生產產品 Y。
- ▶ **不在與對方協定的區域 / 地域內銷售**
競爭對手之間同意只在各自獲分配的地域內銷售，而不在其他對手獲分配的地域銷售。
- ▶ **不向對方的顧客銷售**
競爭對手之間同意只向各自獲分配的顧客或顧客類別銷售，而不會向其他對手獲分配的顧客銷售。
- ▶ **不進入或不將業務擴展至協議另一方已活躍的市場**
保持原狀，讓各現有市場參與者在其固有市場繼續經營。

警示

市場上如出現以下行為，可能顯示有瓜分市場的情況：

- ▶ 競爭對手突然停止在某個地域或向某個顧客銷售產品 / 提供服務
- ▶ 競爭對手將顧客轉介予其他競爭者
- ▶ 銷售員或投標者表示某顧客或某合約是「屬於」某個競爭對手的
- ▶ 負責銷售或市場推廣的人員持有分配顧客的名單，或標示地域分配的地圖
- ▶ 潛在投標者提及地域或地區範圍，或顯示有瓜分市場的安排

MARKET SHARING CARTELS



A market sharing cartel is an agreement between competitors to divide the market or markets among themselves, for example by agreeing not to compete for each other's customers, or not to enter or expand into a competitor's market.

Common Types

In a market sharing cartel, competitors might agree **NOT** to:

▶ **compete in the production or sale of certain products or services**

Company A agrees it will only produce product X, while company B agrees it will only produce product Y.

▶ **sell in each other's agreed territories / geographical areas**

Competitors agree to sell only to customers in their own allocated geographical areas, and agree not to sell to customers in geographical areas allocated to other competitors.

▶ **sell to each other's customers**

Competitors agree to sell only to their allocated customers or classes of customers, and agree not to sell to customers allocated to the other competitors.

▶ **enter or expand into a market where another party to the agreement is already active**

Allocate markets by leaving incumbents in place to maintain the status quo.

Red Flags

The following conduct on the market may suggest the existence of market sharing:

- ▶ Competitors suddenly stop selling in a territory or to a customer
- ▶ Competitor refers customers to other competitors
- ▶ A salesperson or bidder says that a particular customer or contract 'belongs' to a certain competitor
- ▶ Lists or maps of the allocation of customers or territories are kept by sales or marketing employees
- ▶ Prospective bidders may make references about territories or areas that may indicate market sharing arrangements



合謀定價

合謀定價是指競爭對手之間協定調高、訂定、維持或以其他方式操控其貨品或服務的售價，但他們未必是議定就某貨品收取同樣的價錢。合謀定價可以有多種形式，而「價格」則涵蓋任何價格元素（例如折扣或回贈）。

常見形式

合謀定價有不同形式，包括競爭對手之間協議：

- 跟從指定價格或某個價格範圍
- 訂定價格上調的特定數額 / 加幅
- 採用劃一的公式計算價格 / 利潤
- 訂定構成價格的不同元素，如折扣、回贈、優惠或信貸條款
- 取消或減少折扣
- 維持價格下限、特定利潤率或價目表
- 在大小、數量或種類不同的貨品或服務之間維持特定的價格差異

警示

市場上如出現以下行為，可能顯示有合謀定價的情況：

- 🚩 報價比預期高出許多
- 🚩 不同供應商同時調整價格，而且調整數額或幅度相同，及與背後的成本無關
- 🚩 新供應商的報價比慣常使用的供應商低很多
- 🚩 不同供應商的價格長期保持一致，尤其是當他們之前的價格並不相同
- 🚩 取消折扣，尤其發生在過往有提供折扣的市場

PRICE FIXING CARTELS



Price fixing is when competitors agree to increase, fix, maintain or otherwise control the price at which their goods or services are sold. It is not necessary that competitors agree to charge exactly the same price for a given item. Price fixing can take many forms, and 'price' in this context includes any element of price (e.g. discount or rebate).

Common Types

Examples of price fixing include agreements between competitors to:

- adhere to a specified price or a price range
- fix a certain amount / percentage on price increase
- adopt a standard formula to calculate prices / margins
- fix elements of price such as discounts, rebates, promotions or credit terms
- eliminate or reduce discounts
- maintain floor prices, a certain profit margin or a price schedule
- maintain certain price differentials between different sizes, quantities or types of products or services

Red Flags

The following conduct on the market may suggest the existence of price fixing:

- 🚩 Quotes are much higher than expected
- 🚩 Prices from different suppliers change in the same amount or percentage at the same time, without relation to underlying costs
- 🚩 A new supplier's price is much lower than the usual suppliers
- 🚩 Prices from different suppliers stay identical for long periods of time, especially when they were previously differentiated
- 🚩 Discounts are eliminated, especially in a market where discounts were previously available



合謀限制產量

競爭對手之間協議訂定、維持、控制、防止、限制或消除貨品或服務的生產或供應，即屬限制產量。減少貨品供應量的協議在本質上會導致價格上漲。

生產或供應的貨品例子

- ▶ 原材料
- ▶ 必要的設備
- ▶ 零件
- ▶ 現在或未來的貨品或服務

常見形式

限制產量協議的形式可包括：

- ▶ 生產或銷售限額安排，以限制某貨品在市場上的數量或種類
- ▶ 限制或協調投資計劃的協議
- ▶ 控制產能的協議

警示

- ▶ 即使有足夠的生產技術及資源讓供應商可滿足市場需求，但有關貨品仍然嚴重短缺，這可能顯示市場上存在著限制產量的協議。

然而，某些正當的商業安排，亦可能涉及各方協定產量。例如，在聯營的情況下，聯營各方可能會為聯營企業設定某個特定產量。

OUTPUT LIMITATION CARTELS



Output limitation is when competitors agree to fix, maintain, control, prevent, limit or eliminate the production or supply of particular goods or services. Agreements which reduce the output level of a product by their very nature result in price increases.

Examples of 'Output'


- ▶ Raw materials
- ▶ Essential facilities
- ▶ Spare parts
- ▶ Current or future products or services

Common Types

Output limitation arrangements may involve the following:

- ▶ Production or sales quota arrangements limiting the **volume** or **type** of products available in the market
- ▶ Agreements to limit or coordinate investment plans
- ▶ Agreements to control supply capacity

Red Flag

- ▶  Where a certain product is scarce on the market even though the technology and resources exist for suppliers to meet demand, this may suggest the existence of an output limitation agreement.

However, some legitimate commercial arrangements may involve parties agreeing on output. For example, in the case of a joint venture, parties to the joint venture may agree on a particular level of output for the joint venture.

合謀交換資料



在正常業務運作中，企業之間可就不同事宜交換資料而無損競爭。然而，當互為競爭對手的企業交換影響競爭的敏感資料，可能會引起問題。

交換資料的方式：

- 競爭對手之間直接交換；或
- 透過行業協會或第三方間接交換

影響競爭的敏感資料

影響競爭的敏感資料包括與以下範疇有關的資料：

- 價格
- 銷量
- 價格元素或定價策略
- 產品質素
- 顧客
- 宣傳計劃
- 生產成本
- 風險及投資
- 產量
- 技術及創新
- 營業額

一般而言，與價格及銷量有關的資料屬於最敏感的資料。如果競爭對手之間私下分享與價格有關的未來意向或計劃，則可能具有損害競爭的目的。

至於交換其他資料會否引起競爭問題，則視乎情況而定，例如交換資料的次數是否頻密、資料影響競爭的敏感程度、資料新舊、所交換資料的內容細節，或有關資料是否具體至涉及個人或個別公司等。

INFORMATION EXCHANGE CARTELS



In the normal course of business, businesses exchange information on a variety of matters with no risk to the competitive process. However, concerns may arise where businesses which are competitors exchange information which is competitively sensitive.

Information exchange can take place:

- directly among competitors; or
- indirectly through a trade association or a third party

Competitively Sensitive Information

Competitively sensitive information includes information relating to:

- price
- elements of price or price strategies
- customers
- production costs
- quantities
- turnover
- sales capacity
- product quality
- marketing plans
- risks and investments
- technology and innovations

Generally, information relating to price and quantities is considered to be the most competitively sensitive. If competitors share information in private on future intentions or plans with respect to price, the information exchange may have the object of harming competition.

Other types of information exchange may raise concerns depending on, for instance, the frequency of information exchange, the degree to which the information is competitively sensitive, whether the information is historical or current, the detail of the information exchanged or how individualised or company specific the information exchanged is.

搭售及 捆綁銷售

(第二行為守則)



當供應商將顧客購買一種產品（被搭售產品）作為向其銷售另一種產品（搭售產品）的先決條件，即構成搭售（即搭售產品並不作單獨銷售）。捆綁是指由兩件或以上產品組成的套裝以折扣價出售。

- ▶ 搭售及捆綁銷售是常見的商業做法，通常會促進競爭，原因是此等做法往往可以降低生產、交易及資訊成本，並為消費者提供更多選擇及帶來方便。
- ▶ 然而，在搭售產品市場內具有**相當程度市場權勢***的業務實體，可憑藉搭售及捆綁銷售，來封殺被搭售產品市場內的競爭對手，或阻止新經營者進入該市場；過程中該業務實體利用在搭售產品市場內的市場權勢，來影響被搭售產品市場的競爭。
- ▶ 反競爭的搭售及捆綁銷售或會違反《條例》中的第二行為守則。

* 一般而言，具有相當程度市場權勢是指業務實體有能力在持續一段時期內，將價格定在高於有競爭情況下的水平，而仍然有利可圖。

TYING AND BUNDLING



(under the Second Conduct Rule)

Tying occurs when a supplier makes the sale of one product (the tying product) conditional upon the purchase of another (the tied product) from the supplier (i.e. the tying product is not sold separately). Bundling refers to situations where a package of two or more products is offered at a discount.

- ▶ Tying and bundling are common commercial arrangements that often promote competition as they may result in reduced production, transaction and information costs as well as increased convenience and variety for consumers.
- ▶ However, an undertaking with a **substantial degree of market power*** in the tying market can use tying and bundling to foreclose competitors or new entrants in the tied market by leveraging its substantial degree of market power from the tying market into the tied market.
- ▶ Anti-competitive tying and bundling may contravene the Second Conduct Rule of the Ordinance.

** Generally speaking, substantial market power is the ability of an undertaking to profitably charge prices above competitive levels over a sustained period.*

寬待政策 及投訴



寬待政策

- ▶ 根據《競爭條例》，合謀行為的成員或協助他們的人均可能會被嚴懲。
- ▶ 根據競委會的《合謀行為寬待政策》，**首名**向競委會舉報合謀行為而又符合所有寬待條件的合謀成員，將可免被競委會尋求施加罰款。
- ▶ 成功申請人將需要簽訂寬待協議，確認曾經參與合謀。
- ▶ 任何人士及企業均可致電寬待熱線 +852 3996 8010 申請寬待。
- ▶ 競委會會將所有機密資料保密，包括寬待申請人的身份。

作出投訴

競委會接受任何形式的投訴及查詢，包括：

- ▶ 直接；
- ▶ 以匿名方式；或
- ▶ 透過中介人（例如法律顧問）。

你可透過以下途徑向競委會投訴或查詢：

- ▶ **填寫網上投訴或查詢表格**：www.compcomm.hk
- ▶ **電郵**：complaints@compcomm.hk
- ▶ **電話**：[+852 3462 2118](tel:+85234622118)
- ▶ **郵遞**
- ▶ **親臨**競委會辦事處（必須預約）

投訴人向競委會舉報時應注意：

- ▶ 盡量提供詳細資料
- ▶ 一旦懷疑有違例情況，應立即保留所有證據
- ▶ **切勿**向涉嫌違例者透露或公開表示你正在作出投訴

LENIENCY & COMPLAINTS



Leniency

- ▶ Cartel members – or those who support them – may face severe penalties under the Competition Ordinance.
- ▶ The Commission will offer immunity from pecuniary penalties to the **first** cartel member who reports the cartel conduct and meets all other requirements of the Commission's Cartel Leniency Policy.
- ▶ The successful applicant will need to sign a leniency agreement acknowledging its participation in the cartel
- ▶ Businesses and individuals can apply for leniency by calling the Leniency Hotline at +852 3996 8010
- ▶ The Commission will seek to protect confidential information including the identity of leniency applicants

Filing a Complaint

The Commission accepts complaints and queries in any form, including those provided:

- ▶ directly;
- ▶ anonymously; or
- ▶ through an intermediary (such as a legal adviser).

A complaint or query can be made by:

- ▶ **Online submission:** www.compcomm.hk
- ▶ **Email:** complaints@compcomm.hk
- ▶ **Telephone:** +852 3462 2118
- ▶ **Post**
- ▶ **In person** at the Commission's office (by appointment only)

When reporting a suspected case to the Commission, complainants should:

- ▶ include as much information as possible
- ▶ preserve all available evidence as soon as you suspect a contravention
- ▶ **not** alert the suspects or make public that you are making a complaint

對競爭的影響評估



在制訂及執行各項公共政策和計劃時，有否顧及對競爭的影響可謂日益重要。制訂政策時，如沒有充分考慮市場競爭，便可能產生有利合謀的市場條件，或妨礙各種新形式的市場競爭，窒礙香港經濟的健康發展。因此，公營界別人員在制訂政策初期，需認清及評估新措施對競爭的影響。

以下四大問題有助辨識擬推出的政策是否會引起競爭問題：

- 1 供應商的數目或類別有否受到限制？
- 2 供應商競爭的能力有否受到限制？
- 3 政策有否削弱供應商競爭的動機？
- 4 政策有否限制了顧客的選擇及可獲得的資訊？

如果以上任何一條問題的答案是「有」的話，則表示所建議的政策極有可能導致競爭減少，或令市場權勢坐大，最終影響價格、效率及創新。

儘管以上問題並不能涵蓋所有情況，但公營界別人員可以此作為進行評估的第一步，用以檢視新制訂、甚至現有政策及措施對競爭可能造成的風險及影響。如欲進一步徵詢意見，歡迎電郵至 PolicyAdvice@compcomm.hk 與競爭事務委員會聯絡。



A QUICK CHECKLIST ON COMPETITION ASSESSMENT



Competition consideration plays an increasingly important role in the formulation and execution of public policy and programmes. Failure to adequately take competition into account in policy making may create market conditions conducive to collusion and prevent new forms of competition, hampering the healthy development of the Hong Kong economy. Therefore, it is important for officials in the public sector to recognise and assess the impact of new initiatives on competition during the early stage of their formulation.

Here are the four pillar questions that would help identify potential competition concerns in policy initiatives:

- 1** Are there limits on the number or range of suppliers?
- 2** Are there limits on the ability of suppliers to compete?
- 3** Does it reduce the incentive of suppliers to compete?
- 4** Does it limit the choices and information available to customers?

If the answer to any of the above is positive, the proposal may very likely lead to a decrease in competition or an increase in market power, thus affecting prices, efficiency and innovation.

This is not an exhaustive list of questions to ask but it serves as a quick first step to assist officials in assessing the competition risks and impacts of new, or even existing, policies and initiatives. You are welcome to contact the Competition Commission by sending an email to PolicyAdvice@compcomm.hk if further advice is needed.



詳情請瀏覽競委會網站

For more information, please visit the Commission's website

www.compcomm.hk



競爭事務委員會
COMPETITION
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