



競爭事務委員會
COMPETITION
COMMISSION

The Competition Ordinance and **SMES**

What is
the Competition
Ordinance
about





The Competition Ordinance and SMEs

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What is the Competition Ordinance about ?



The Competition Ordinance (Ordinance) prohibits anti-competitive conduct by businesses.

Most deals done by businesses every day enhance competition, driving efficiency and economic growth. However, businesses can also harm competition.

1. All businesses can harm competition by cooperating with their competitors instead of competing to win customers.
2. Businesses, though usually larger businesses, may harm competition if they enter other arrangements that have enough impact on a market to harm competition.
3. Large businesses with substantial market power may harm competition when acting alone.



SMEs and the Competition Ordinance

SMEs thrive in economies with competition law. As consumers, SMEs are likely to be victims of anti-competitive conduct where there is no law in place to prevent such practices. The Ordinance brings SMEs in Hong Kong the protections available to SMEs in almost every other jurisdiction in the world. With these protections come four main responsibilities which the Competition Commission (Commission) calls “The Four Don’ts”.

1. Agreeing with competitors to cooperate instead of compete

Compete. Don't cheat – The Four Don'ts

Regardless of their size, there are four things businesses should **never** agree with their competitors to do.



1. Fix prices



- including an agreement on a formula to calculate prices or elements of price such as discounts, rebates, promotions or credit terms
- including verbally or in writing, “a wink and a nod”, or at an association’s meeting

“Let’s sell our items for cost plus 10% to ensure market stability.”

Just say **“No!”**



2. Restrict output



- including restricting the volume or type of particular goods or services

“We should cut our production to address this oversupply.”

Just say **“No!”**



Such arrangements, known as cartels, undermine the competitive process and contravene the First Conduct Rule of the Ordinance.

The Commission will take action to stamp out such practices where they impact Hong Kong. This may include taking action against the individuals involved in cartels, as well as their businesses.



3. Share markets



- including allocating customers by geographic area, agreeing not to compete for each other's customers and agreeing not to enter or expand into a competitor's market

"If you don't compete with me in Kennedy Town, I won't compete with you in Sai Ying Pun."

Just say "No!"



4. Rig bids



- agreeing who should "win" a bid
- supporting the designated winner by refraining from bidding, withdrawing bids or submitting bids with higher prices / unacceptable terms

"I'll bid high on this tender if you let me win the next tender."

Just say "No!"



2. Other arrangements between businesses that can harm competition

Information sharing

Businesses often share information. This is normal commercial behaviour that rarely has anti-competitive impacts.



Hypothetical Example:

The only five suppliers of pre-packaged fresh fruit in Hong Kong are facing considerable wastage of unsold products, as demand is unstable over seasons. To address the issue, they hire an independent market research company to collate unsold fruit data. Each week, the company publishes on its website the consolidated data so as to allow suppliers to better predict demand. Individual suppliers are not able to elicit another individual's competitively sensitive information.



The Commission is **unlikely** to consider that this information exchange has the object or effect of harming competition. The aggregated and arguably historic nature of the information exchanged, and the fact that the information is exchanged in public makes it less likely that harmful effects will arise. Moreover, the information exchange appears to give rise to efficiencies.



However some information sharing harms the competitive process.

Businesses competing vigorously for customers rarely seek private conversations with their competitors. Sharing **commercial secrets** like **future prices** with your competitors can be the same as price fixing.

Hypothetical Example:

A trade association for junk owners collects from and circulates to its members information on their respective proposed future prices. This includes information as to the proposed prices for specific journeys. The information is not made available to the public and is circulated in advance of a seasonal price review by the association members.

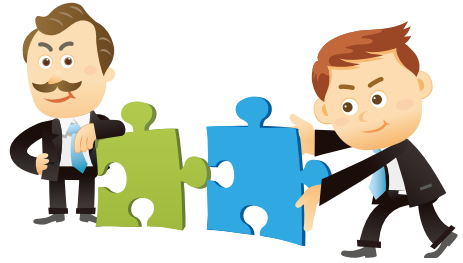


The Commission would consider this arrangement as having the object of harming competition. The information exchange allows the junk owners to adjust their future pricing to reflect the proposed pricing of competitors and thus reduces price competition in the market. The information exchange arrangement is an indirect form of price fixing.

If you share commercial secrets to cooperate rather than compete with your competitors, you are probably breaching the Ordinance.

Joint ventures

Joint ventures, particularly those between SMEs seeking to deliver a product or service they could not deliver alone, are often good for competition.



Hypothetical Example:

A tender is announced to construct a high-rise office building in Mong Kok. The tender requires bidders to have significant manpower to be able to complete the project and sets out a minimum financial resource threshold for the bidder. Two small construction companies, TungBuild Ltd and ChungConstruct Co, considered independently bidding for the tender. However, neither company has sufficient manpower or financial capital to satisfy the tender specifications. Tung and Chung therefore submit a joint bid where they would combine their resources to deliver the project. Six other bids were submitted by larger construction companies.



Such a joint venture will not contravene the Ordinance. It creates competition where there would have been less. However, Tung and Chung would need to be careful that any competitively sensitive information they share is necessary for the purposes of the Joint Venture.

SMEs must take care not to allow the terms of the joint venture to impact other aspects of their business by, for example, fixing prices at which they supply their non-joint venture products. Such conduct is likely to amount to a cartel and one of The Four Don'ts.

Agreements with suppliers and customers

Entering into arrangements with suppliers and customers is the life-blood of a market economy. Almost all of these arrangements – known as vertical arrangements – do not harm competition so will not contravene the Ordinance. This is particularly the case when vertical arrangements only involve SMEs.

However, some vertical arrangements can cause major harm to competition.

If you think a vertical arrangement is quashing your ability to compete, you should report this to the Commission.

Where there is a risk a vertical arrangement may contravene the Ordinance, its effects are considered on a case by case basis.

Hypothetical Example:

SportCo, a global brand, is a medium-sized player in the HK market for sports equipment. As in other places, it appoints an exclusive distributor for Hong Kong. To become the SportCo exclusive distributor, the company is obliged only to sell SportCo products and not to sell products from SportCo's competitors. The distributor is responsible for all promotional activities.



Exclusive distribution agreements will not generally be considered to have the object of harming competition. The restrictions placed on the distributor serve to incentivise the promotion of the SportCo brand and are likely justifiable.

The main exception to usually considering the effects of vertical arrangements on a case by case basis is **Resale Price Maintenance (RPM)**. RPM is when one business (such as a manufacturer) tries to set the price at which its customer (such as a retailer) can sell an item or imposes a minimum resale price on the customer. Such arrangements can undermine retailers' and similar businesses' pricing freedom. While the Commission says RPM may have the object of harming competition in certain cases, this will depend on the specific arrangement including if there is a sufficient efficiency justification for the RPM.

Hypothetical Example:

NailCo, a manufacturer of nails and screws for DIY and construction purposes sells its products in Hong Kong through independent retail stores. NailCo requires each of the stores to sell its products at a price stipulated by NailCo.



NailCo justifies its pricing policy as a means of ensuring an orderly market and to avoid customer confusion as a result of differing prices across Hong Kong. NailCo claims the arrangement affords retailers a healthy profit margin.



The Commission would view this arrangement as having the object of harming competition. NailCo's justifications appear merely to suggest that RPM is a good way of keeping prices high.

If you are being forced into RPM arrangements by your customers or suppliers, you should report this to the Commission.

3.

SMEs are free to act alone

SMEs acting alone cannot harm competition.



Can SMEs sell items below cost?

Yes - always!



Can SMEs bundle two of their own products for sale together?

Yes - always!



Can SMEs refuse to supply someone?

Yes - always!



SMEs making such tactical decisions risk harming themselves, but they will not harm competition. In limited circumstances, large businesses with substantial market power making the same decisions may harm competition. That is why businesses with substantial market power have special responsibilities under the Second Conduct Rule of the Ordinance.

If you feel a large business with market power has harmed competition through anti-competitive conduct, you should report this to the Commission.

The Competition Commission's role

The Competition Commission enforces the Ordinance and advocates for greater competition in Hong Kong.

The Commission acts independently in the public interest – not in the interests of individual complainants or sectors of the economy.

In fulfilling its role, the Commission will:

- Help SMEs get ready, willing and able to comply with the Ordinance.
- Hear complaints from SMEs who are concerned that anti-competitive practices in the marketplace are impacting their business.

What if I am being investigated?

Complaints that the Commission may receive about SMEs and even investigations will often be resolved without penalties being imposed on businesses. If an SME is under investigation for a possible contravention of the Competition Ordinance, the Commission will usually be in regular contact with that business. Where parties swiftly alter any conduct of concern in response to the Commission's enquiries, this will increase the likelihood of the Commission taking no further action. When the Commission considers that remedial actions are warranted it will inform the affected business of its views before taking action. For example, the Commission will not usually commence proceedings in the Competition Tribunal without talking to the businesses or individuals involved first.

Learning more

To learn more about how the Competition Commission interprets and enforces the Ordinance, please visit our website www.compcomm.hk.





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Disclaimer

The information provided in this booklet is for general reference only. It does not provide an exhaustive guide to the application of the Competition Ordinance (Ordinance). For a complete and definitive statement of the law, refer to the Ordinance itself. The Competition Commission (Commission) makes no express or implied warranties of accuracy or fitness for a particular purpose or use with respect to the above information. The above suggestions will not affect the functions and powers conferred on the Commission under the Ordinance.

