

Personal, Social and Humanities Education
Key Learning Area
Video Resources for Economics
Competition Law and anti-competitive practices
Key points and Supplementary Information

(A) Content and Key points:

Part 1: Is there unfair competition in Hong Kong?

- A market with competition involves different suppliers to provide goods and services. Both suppliers and consumers can freely enter and exit the market and prices are purely determined by supply and demand.
- Monopoly or oligopoly, on the contrary, refers to one or a few supplier(s), who has or have market power to stop other competitors from entering the market. With only one or a few supplier(s), prices and output level will not be determined by market forces. Suppliers will have more power to adjust prices or quantity supplied to increase profit and violate the rights of consumers.
- The Hong Kong Telecommunications Authority was established in 1993 to monitor the first industry subject to competition regulations.
- The government started consultation on the drafting of the competition law in 2008 and tabled the Competition Bill to the Legislative Council in 2010. The bill was finally passed on 14th June, 2012.

Part 2: Definitions of Anti-competitive practices

- Anti-competitive practices generally refer to the behaviours that distort the competition environment. They can be divided into 4 main categories: (1) horizontal agreements (2) vertical agreements (3) anti-competitive mergers and (4) abuse of dominance¹.
- Horizontal agreement means unified action by competitors. Through an agreement, either explicit or implicit, they obtain more profit. Methods include price-fixing, market allocation, bid rigging, and firms acting together to block normal transactions for their own benefit.
- Vertical agreement refers to practices reducing competition within the same brand of products through restrictive conditions set by buyers or sellers in the supply chain. Methods include resale price maintenance, exclusive dealing and exclusive territories.
- Anti-competitive merger: No matter it is a horizontal or vertical merger, if the supplier is excluding other competitors through a merger, it is considered an anti-competitive practice. (The

¹ "Abuse of market power" is used in the Competition Ordinance, while "abuse of dominance" is also used in other government documents.

existing Competition Ordinance in Hong Kong, however, does not regulate company mergers.)

- Abuse of dominance: a leading firm (supplier/buyer) making use of its dominance (market power) to block others from entering the market, or undermine their ability to compete in the market.

Part 3: The DOS and DON'Ts of the Competition Ordinance

- The Competition Ordinance aims to encourage and protect competition in order to achieve more efficient resource allocation and protect consumer rights.
- Under the Competition Ordinance, the Competition Commission is the executive arm, which is legally enabled to conduct investigations into cases that infringe fair competition. With sufficient evidence, it can bring a prosecution and refer cases to the law courts for judgment.
- Worries of the small and medium-sized enterprises (SMEs): They are worried about unconsciously infringing the law, as the definition of market in the Competition Ordinance is very abstract. They hope that the government can provide guidelines for them to help SMEs to adhere to the law.
- Definition of exemption rights: What kinds of organisation can enjoy exemption? The conditions for granting exemption and the assessment itself are also very important.

Part 4: Competition Law in neighbouring region

- Taiwan Fair Trade Commission (FTC) was set up in 1992. It deals with monopolies and collective conduct (price fixing), retail restriction and competition restriction or acts that interfere with fair competition. FTC's functions include investigating, mediating and disposition of cases; reviewing laws that interfere with fair competition; consultation and education, etc.
- The implementation of competition law in Taiwan
- In the past 20 years, Taiwan's Fair Trade Act has been constantly under revision to meet Taiwan's developmental needs.
- Legislation about anti-competitive practices has been around for more than a century, but anti-competitive practices still exist. The Competition Ordinance in Hong Kong neither targets large enterprises nor assists small and medium-sized enterprises. It only tries to reduce the degree of market interference of influential market leaders. Like Taiwan's Fair Trade Act, it takes time for every law to refine, so as to achieve its goals successfully.

(B) Case Elaboration:

Shot (11:52) Mr. Pang Pin Yu - a store owner

- Mr. Pang Pin Yu is the owner of a store in Fanling, which sells many kinds of snacks that are not sold in most supermarkets. It is not that he does not want to sell mainstream products, but the prices set by the suppliers have made it impossible for him to compete with other chain stores.
- For example, the cost of one pack of Yakult was \$7.4. He sold it at \$15 for two packs and the profit for selling two packs was only \$0.2. He had to give the customers a plastic bag even when they did not buy anything else.
- Shop next door (Saint Honore Cake Shop) was selling at \$7.3 each. The purchase price for Mr. Pang was even higher than the selling price of Saint Honore. Mr. Pang was very angry and stopped selling Yakult then.
- In this case large retailers might be suspected of abusing market dominance and pressing the supplier in the market. Supplier would take care of the large companies and offer a relatively higher price for small retailer, Mr. Pang. That made it impossible for him to compete with large companies.
- Critical Thinking: From the Economic point of view, there may be other reasons for a lower average purchasing price enjoyed by the large company For example, it might be a bulk discount given to the chain store. As there was no in-depth investigation into this case carried out by any law enforcing institution; based on the given information, it cannot be concluded that the large company involves in abusing of market dominance.

Shot (14:00) Mr. Ting Siu Kwan - Supervisory Chairman, Hong Kong Metal Merchants Association

- As the owner of an ironware store, Ting Siu Kwan thinks the Competitive Ordinance has been of little help to the small and medium-sized enterprises (SMEs).
- He considered that there are many SMEs in Hong Kong and their operating costs are getting higher and higher. It is more difficult to run SMEs than before. They don't bother to deal with large companies as they are too busy with their own businesses. He also believed that every large company wants to monopolise the market. They have the power to influence suppliers, but how can small companies do that? If SMEs sue them, large companies can then press the suppliers not to sell goods to the small companies. Suppliers will take care of the big clients (large companies) first (for the fear of losing these big clients) and therefore dare not supply for the SMEs (small ones) or set many harsh conditions for them.

(C) Explanations for certain parts of the video:

Shot (9:17)

Content: Vertical agreements often create fewer problems than horizontal agreements, as they tend to encourage retailers to make more effort to sell, which often stimulates demand and encourages competition.

Elaborations: Common vertical agreements include three types, namely 1) resale price maintenance, 2) exclusive dealing and 3) exclusive territories. The reasons why they may help stimulating demand and encouraging competition will be explained as follows:

- 1) Resale price maintenance: Resale price maintenance enables a manufacturer to ensure a certain level of profit for the retailers and this helps to induce its retailers to provide an appropriate level of pre- and post-sales services (e.g. product information or test drives in cars) in a sales transaction. Another possible motive for resale price maintenance is signaling. In certain cases consumers may perceive a product sold at a very low price as having inferior quality. To prevent such a perception, a manufacturer may require its retailers not to sell its product below a pre-specified level. Both better services provided by the retailers and higher quality products help stimulating demand and encouraging competition.
- 2) Exclusive dealing: Exclusive dealing will benefit consumers in ensuring the exclusive retailers' offer of pre- and post-sales services. It also assures quality, protects the reputation of the manufacturer and stimulates demand and encourages competition.
- 3) Exclusive territories: Exclusive territories takes place when distributors are assigned exclusivity within a geographic area. It provides an incentive for retailers to increase sales and promotional efforts and in turn increases demand and encourages competition.

Shot (10:45)

Content: Through a horizontal merger, the merged company can enjoy a higher degree of economies of scale to share the operating costs, which will lower the average cost of operation.

Note: Mind that the company enjoys a higher degree of economies of scale though merger in this case. That means its scales of production is enlarged and it is a long run case. There is no fixed cost, i.e. all operating costs are variable.

Shot (11:30)

Content: What is abuse of dominance? It refers to a leading firm (supplier/buyer) making use of its dominance (market power) to block others from entering the market, or undermine their ability to compete in the market.

Remarks: The one that abuses market dominating position may not be a supplier; it can also be a buyer. **Mr. Pang Pin Yu's (Store Owner)** case illustrates that the large company (Saint Honore Cake Shop) was suspected of abusing market dominance and pressing Hong Kong Yakult Co. Ltd. to offer a much higher price to Mr. Pang. That makes it impossible for him to compete with the large company. In this example, retailers were buyers in the wholesale market. It is noted that one that abusing market dominating position may not be a supplier. **A buyer that has market power can also abuse market dominance.** (Note: Saint Honore is a supplier (seller) in the retail market, it supplies goods to the consumers. Students should be reminded that when they mention about buyer or seller, it is important to specify which market they are referring to, so as to avoid confusion.)

Shot (15:56)

Content: According to the interviewee, when Singapore introduced its Competitive Act, the Hong Kong SAR government teased it as a toothless ordinance. Now, ours is even less powerful than Singapore's. For example, we have removed private action, so SMEs (small and medium-sized enterprises) have no way to seek compensations for losses due to unfair competition.

Supplementary point: Though the SMEs cannot sue those large firms directly, there is still way for them to get compensations from those large enterprises due to unfair competition. According to the decision of the Competition Tribunal, SMEs can seek compensation through follow-on actions. Relevant information can be found in the last section of this document, diagrammatic presentation for the implementation of the Competition Ordinance.

(D) First and Second Conduct Rule²: (Original text)

First Conduct Rule: Prohibition of anti-competitive agreements, concerted practices and decisions

- (1) An undertaking must not—
- (a) make or give effect to an agreement;
 - (b) engage in a concerted practice; or
 - (c) as a member of an association of undertakings, make or give effect to a decision of the association,

If the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

- (2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to , or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).
- (3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “first conduct rule”.

Second Conduct Rule: Abuse of market power

- (1) An undertaking has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.
- (2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—
- (a) predatory behavior towards competitors; or
 - (b) limiting production, markets or technical development to the prejudice of consumers.
- (3) Without limiting the matters that may be taken into account in determining whether an undertaking has a substantial degree of market power in a market, the following matters may be taken into consideration in any such determination—
- (a) the market share of the undertaking;
 - (b) the undertaking’s power to make pricing and other decisions;
 - (c) any barriers to entry to competitors into the relevant market; and
 - (d) any other relevant matters specified in the guidelines issued under section 35 for the purposes of this paragraph.
- (4) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “second conduct rule”.

² Competition Ordinance

(E) Concerns of Consumer Council for eliminating stand-alone private action³

The relevant provisions on stand-alone private right of action have been taken out of the Competition Bill. Mr. Thomas Cheng, Chairman of the Council's Working Group on the Competition Bill pointed out that the removal of stand-alone private action would reduce the right of consumers and SMEs to protect their own interests in face of anti-competitive behaviour.

With the removal of stand-alone private action, consumers in the future must rely on the Competition Commission to handle or investigate their complaints.

The Council believes that it is critical for the future Competition Commission, being the sole channel for redress of consumer grievances against anti-competitive behaviour, to be sufficiently funded. It worried that Competition Commission may not be allocated with sufficient fund.

(F) Competition Policy vs Competition Law vs Competition Bill vs Competition Ordinance

There are some differences among the competition policies for different countries or regions. Generally, **competition policy** includes the aim of keeping intervention to a minimum, ensuring a fair economic play ground and the enactment of competition law.

The aim of the competition policy of Hong Kong is to enhance economic efficiency and the free flow of trade, thereby also benefiting consumer welfare. The aim should not be to benefit or to target specific sectors, nor to stimulate or introduce competition artificially. Rather, the key objectives should be to reinforce business and consumer confidence, enhance Hong Kong's pro-enterprise, pro-market environment and to provide a level playing-field for all by combating anti-competitive behaviour⁴.

³ Consumer Council Press release: No Further Concessions on the Competition Bill dated October 24, 2011 (http://www.consumer.org.hk/website/ws_en/news/press_releases/2011102401.html)

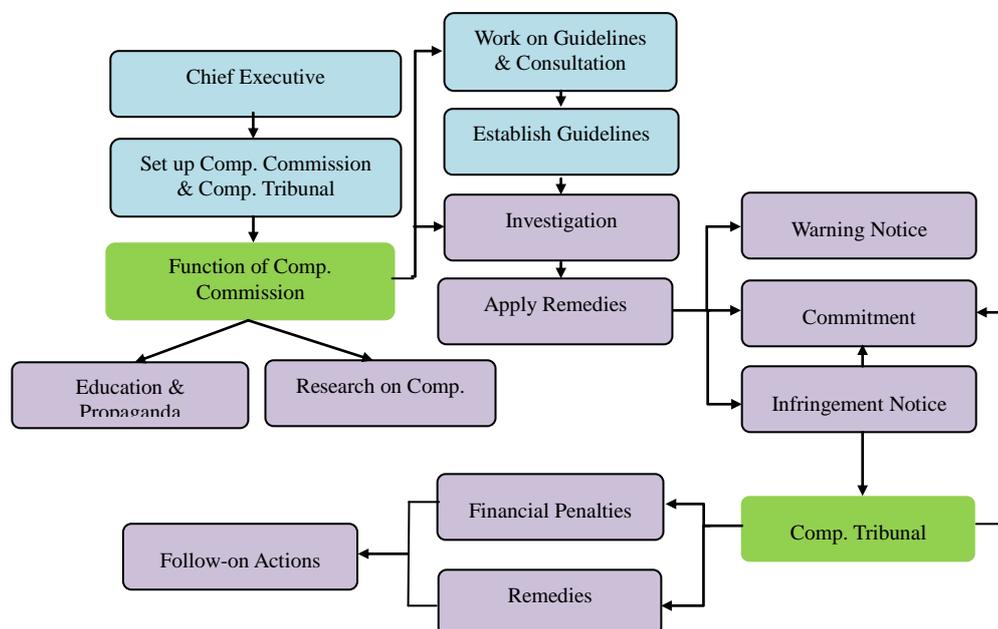
⁴ Report on the Review of Hong Kong's Competition Policy (2006-06) Para.26 (http://www.cedb.gov.hk/citb/doc/en/Policy_Responsibilities/cprc.pdf)

Competition law can be considered as an integral part of competition policy. It is the legal framework and regulations to maintain fair and free competition in the market. It is also a general term referring to the relevant legal frameworks in different judiciaries.

On 14 July 2010, the Hong Kong Government introduced a Competition Bill to the Legislative Council, after the public consultation in 2008. **Competition Bill** is the name of the draft legislation before formally establishing the relevant Competition Law in Hong Kong.

The Competition Bill was passed by the Legislative Council on 14 June 2012. Hong Kong **Competition Ordinance** (Cap 619) ('Competition Ordinance') is the particular name of the legislation used in the Hong Kong Special Administrative Region.

(G) Diagrammatic presentation for the implementation of the Competition Ordinance⁵



Elaborations:

- The Competition Commission is not a servant or an agent of the Government to ensure independence and credibility of its work. Similar to the appointments of other independent regulatory authorities, the Chief Executive (CE) shall appoint members to the Commission, including the Chairperson.
- Given that competition law is a new and difficult area of law and has to be applied in the circumstances of Hong Kong, it is best dealt with by a specialized Tribunal to allow this dedicated adjudicative body to accumulate experience and expertise in this specific area of law. This specialized Tribunal will be set up within the Judiciary at the level of a superior court of record to task this onerous and difficult responsibility to judicial officers of considerable experiences in dealing with complex commercial cases⁶.
- The Tribunal consists of the judges of the Court of First Instance appointed in accordance with section 6 of the High Court Ordinance (Cap.4).

⁵ Handout of the Seminar of Competition Law in Hong Kong by Dr. Hung Tin Yau, held by Personal, Social and Humanities Education Section, Curriculum Development Institute, Education Bureau on 25 September 2012

⁶ Overview of Major Components of the Competition Bill (Nov 2010) (<http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121109cb1-320-2-e.pdf>)

- The Chief Executive, acting in accordance with the recommendation of the Judicial Officers Recommendation Commission, is to appoint two of the members of the Tribunal to be the President and Deputy President of the Tribunal respectively⁷.
- The functions of Competition Commission include (1) Education, (2) Market research on Competition, (3) Public consultation and develop relevant guidelines and (4) Investigation into anti-competitive behaviour. If there is any suspicion of anti-competitive practices, warning notice or infringement notice may be issued to the relevant parties.
- Warning Notice vs Infringement Notice: A “warning notice” is only a warning. If the relevant company does not correct the suspected illegal practices, legal consequence may not be a must. The company in question does not need to make legally binding commitment to the Competition Commission. However, Infringement Notice is of more serious in nature. The relevant company has to admit and cease the infringement. If the company refuses to cease the infringement, it is very likely that the Commission will take further legal action against it.
- The introduction of “Warning Notice” mechanism intends to reduce the SMEs worries of infringing the law unconsciously. Warning notice mechanism only applies to the infringement of the anti-competitive practices stated in the “first conduct rule” and SMEs. On the other hand, Consumer Council believes that the practice of warning notices should be withdrawn after the law has been in effect for a certain time.
- If the relevant company receives an infringement notice and refuses to desist the infringing practice, the case will be brought before a Competition Tribunal. If it is found guilty, the Competition Tribunal is empowered to apply financial penalties or a full range of remedies (e.g. not increasing the price, continuing supplying goods to the relevant firms) for contravention of the conduct rules.
- Follow-on actions: Persons who have suffered loss or damage as a result of conduct that a Court or the Tribunal has determined to be a contravention of a conduct rule will have a right of commencing a follow-on action.

⁷ Competition Ordinance