



競爭事務委員會  
COMPETITION  
COMMISSION

# Competition Law & Public Procurement

November 2024



# Outline

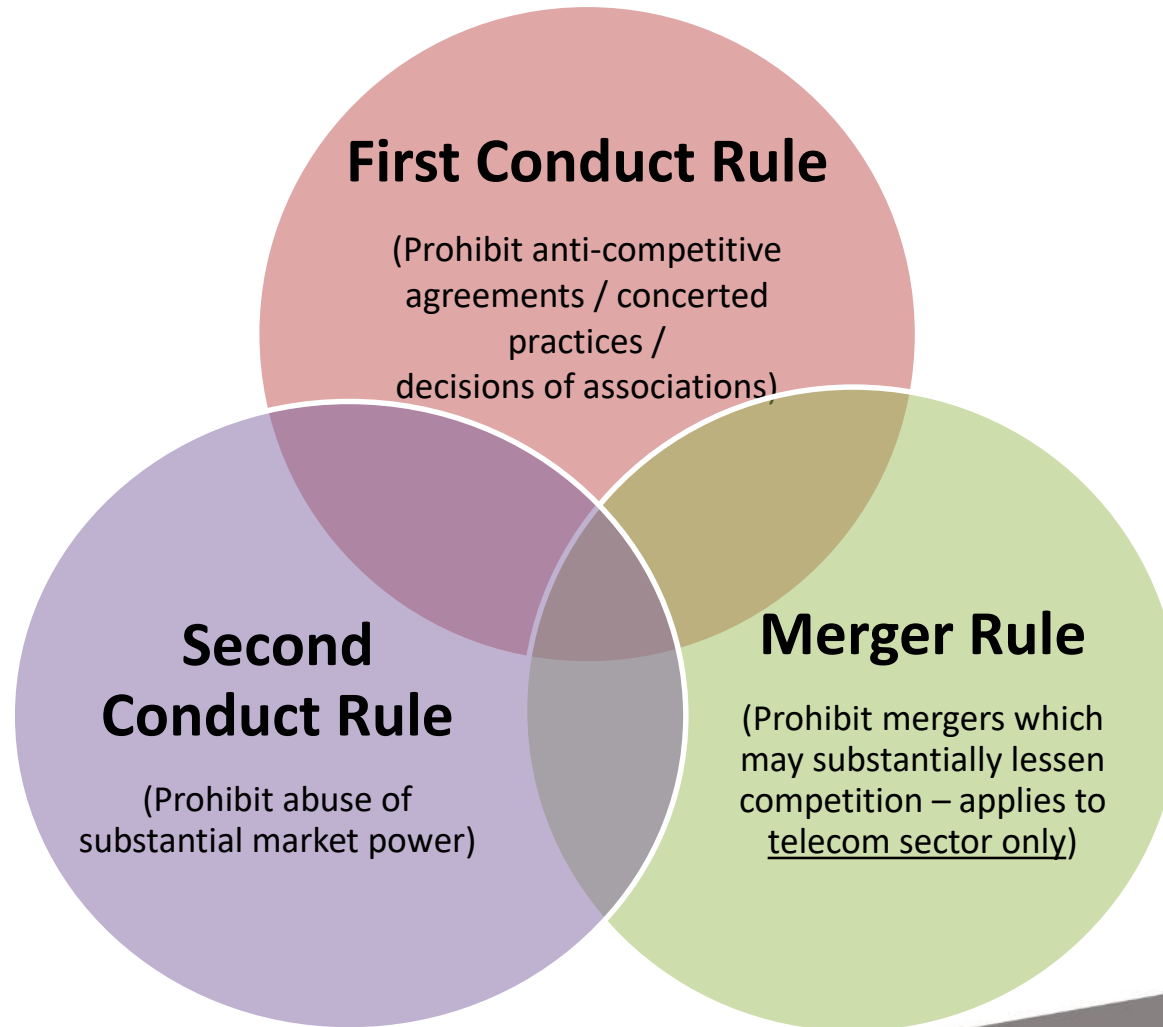
1. Competition Ordinance overview
2. Examples of types of cartel conduct
3. Red flags of bid-rigging
4. Designing tenders to protect against bid-rigging and promote competition
5. Applying the principles and the Commission's cases
6. Q&A



# 1. Competition Ordinance Overview



# Competition Rules under the CO (Cap.619)



# The First Conduct Rule (FCR)



Prohibits an **undertaking** from making or giving effect to an **agreement** if the agreement has the **object or effect** of harming competition in Hong Kong.

Also applies to **concerted practices**; and **decisions** of associations of undertakings.



# The First Conduct Rule (FCR)



Types of “*serious anti-competitive conduct*” / cartels

- price fixing
- market sharing
- bid-rigging
- output restriction



# The Second Conduct Rule (SCR)



Prohibits undertakings with **substantial market power** in a **market** from **abusing** that power by engaging in conduct which has the **object or effect** of harming competition in Hong Kong



## 2. Examples of types of cartel conduct





# Price Fixing - Example

- For several years the major manufacturers of photocopier paper in South East Asia participated in what they called the **AAA Club**
- They secretly met in several places around South East Asia to **agree on prices** and make sure they did not compete aggressively against each other
- Photocopier paper prices increased for buyers in that period
- The Competition Ordinance was not in force in HK. But the conduct was detected and fined in Australia and Korea



# What is Price Fixing?

- Competitors agreeing to **fix, increase, lower, maintain or control the price** for the purchase or sale of goods or services
- May involve competitors agreeing upon **a specified price, a price range or a formula to calculate prices**
- “Price” includes any element of price including **discounts, rebates, promotions, credit terms etc.**
- **Regardless of the form of the agreement:** verbal, written, electronic, etc.
- Competitors should ***independently*** determine the prices of their goods or services

“Let's fix our profit margin at 10% to ensure market stability.”



# Market Sharing - Example

- 4 manufacturers of steel tanks used in fire sprinkler systems for schools, hospital etc are in the market
- They divided up the market between themselves. Each manufacturer was assigned a list of schools, and other clients that they were permitted to offer discounts to
- Manufacturers also agreed on a high non-discounted price
- The cost of fire sprinkler systems increased significantly.
- Detected and subject to criminal proceedings in UK



# What is Market Sharing?

- Competitors collude to divide up markets by agreeing:
  - Not to sell to each others' **customers**
  - Not to compete in each other's **assigned territories/ geographical areas**
  - Not to compete in the **production or sale of certain products or services**
  - Not to **enter or expand into a market where another party to the agreement is already active**

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



# Output Limitation - Hypothetical Example

- The two main suppliers of textbooks for core subjects compete aggressively with each other in providing additional free supporting teaching resources
- The publishers are concerned that giving out these additional resources for free hurts their profits
- They meet and agree to stop offering any free supporting teaching materials in the future
- While the publishers do not agree on prices, they are still agreeing to reduce competition between themselves in this example



# What is Output Limitation?

- Competitors agree to:
  - **Fix, maintain, control, prevent, limit or eliminate** the production or supply of particular goods or services
- Examples of output:
  - Raw materials
  - Spare parts
  - Current or future products or services
- Output limitation arrangements may involve:
  - 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





# Bid-rigging - Example

- The major escalator and lift manufacturers engaged in a long running cartel which significantly increased the cost of installation and repair
- The companies coordinated their bids according to their pre-agreed cartel quotas
- To give the impression of competition, fake bids, doomed to lose in the tender, were submitted by companies who were not supposed to win the tender
- They were ultimately fined approx. 1 billion Euro



# What is Bid-rigging?

- When two or more bidders secretly agree that they will not compete with one another for particular projects
- Bid-rigging can take many forms:
  - **Bid suppression**
  - **Cover bidding**
  - **Bid rotation**
  - Others: agree on **minimum bidding prices**, or agree that **the winning bidder will reimburse other bidders' bid costs**
- Competitors should make their tender decisions *independently*

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





# 3. Red flags of bid-rigging



# Red Flags of Bid-rigging

## ▪ Suspicious signs in documents submitted

- Bids containing identical wordings, particularly if the wordings are unusual
- Bids containing the same handwriting or typeface or using identical forms or stationery
- Bids containing the same errors e.g. spelling mistakes or mistakes in calculations
- The same amendments being made to bids from different bidders
- Last-minute amendments made to bids without clear reasons
- Packaging from different companies has similar postmarks or post metering machine marks



# Red Flags of Bid-rigging

- **Suspicious bidding/ winning patterns and behaviours**
  - Regular bidders fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders
  - Bids that are suddenly withdrawn
  - A bidder submits both its own and a competitor's bid and bidding documents
  - A pattern of winning bidders revealed over time (bids being won in a pattern such as A, B, C, A, B, C, or particular bidders always winning contracts of a particular type or size)
  - A bidder that never wins but keeps on bidding
  - A bidder that rarely bids but always wins when it does so
  - The winning bidder repeatedly subcontracts work to unsuccessful bidders or potential competitors for the bid
  - The winning bidder does not accept the contract and is later found to be a subcontractor



# Red Flags of Bid-rigging

- **Suspicious pricing**
  - Sudden and identical increase in prices by most bidders while there have been no substantial increase in costs
  - Bids with identical pricing either on a lump sum basis or line item basis (especially when continued over a period of time)
  - A bidder that bids relatively high in some tenders but then relatively low in other similar tenders
- **Other red flags**
  - Indications that the bidders have communicated with each other (e.g. one bidder having knowledge of a competitor's bid)
  - Suspicious statements indicating that bidders may have reached an agreement (e.g. bidders justifying their prices by referring to 'industry suggested prices', use of the same terminology by various bidders when explaining price increases)
  - Bidders meet privately before submitting bids, regularly socialising together or appearing to hold regular meetings
  - A new company enters the market and bids at a much lower price (i.e. the new bidder may have disrupted an existing bid-rigging cartel)



# What to do if you see red flags or other suspicious conduct?

- Keep record of the communication materials with bidders
- Do not throw away materials (including envelopes)
- Maintain written internal records of phone calls and meetings with bidders
- Continue to carry on the procurement exercise
- Report suspicious activity to the Commission
  - Completing an Online Complaint Form at [www.compcomm.hk](http://www.compcomm.hk)
  - Email: [complaints@compcomm.hk](mailto:complaints@compcomm.hk)
  - Reporting number: (852) **3462 2118**
  - Leniency hotline: (852) **3996 8010**



## **4. Designing tenders to protect against bid-rigging and promote competition**



# Why schools may be vulnerable to bid-rigging ?

- Easy to divide the market based on location/school type
- School purchasers may be unaware of what is happening in other schools
- Products may be available only from a handful of competitors
- Some products may have regular repeated orders with “low demand elasticity”
- Public procurement process are more transparent which may make it easier for cartelists to divide markets and ensure there is no cheating



# Non-Collusion Clauses

- Published by the Commission for procurers' reference and adaptation
- Including non-collusion clauses in tender documents: to alert tenderers of the prohibitions against and consequences of cartel conducts
- Including non-collusion clauses in formal contracts: to provide contractual protections to procurers in the event that the tender process has been subject to collusion
- The 2023 version has added new clauses that require bidders to disclose information on their beneficial ownership which, in turn, will provide procurers with greater clarity as to the competitiveness of the procurement process



Model Non-Collusion Clauses and  
Non-Collusive Tendering Certificate



Chinese:

[https://www.compcomm.hk/tc/media/press/files/Model\\_Non\\_Collusion\\_Clauses\\_and\\_Non\\_Collusive\\_Tendering\\_Certificate\\_Chi.pdf](https://www.compcomm.hk/tc/media/press/files/Model_Non_Collusion_Clauses_and_Non_Collusive_Tendering_Certificate_Chi.pdf)

English:

[https://www.compcomm.hk/en/media/press/files/Model\\_Non\\_Collusion\\_Clauses\\_and\\_Non\\_Collusive\\_Tendering\\_Certificate\\_Eng.pdf](https://www.compcomm.hk/en/media/press/files/Model_Non_Collusion_Clauses_and_Non_Collusive_Tendering_Certificate_Eng.pdf)





# Non-Collusive Tendering Certificate

- For tenderers to sign as part of their tender submission to declare that the bid is developed independently
- For tenderers to commit to disclosing sub-contracting arrangements relating to the tenders
- Where the bid is submitted jointly by two or more parties (e.g. multiple persons or companies acting in a joint venture), all such parties should sign the certificate



# Pre-tender stage

## DOs

- Do learn about the market
- Do consider allowing bidding on a portion of a large contract so that smaller bidders can participate, if possible
- Do ensure clarity but avoid predictability, e.g. by publishing a long-term schedule of procurement for similar product/ service
- Do define tender requirements in terms of functional performance, rather than by reference to specific technologies or brands of products
- Do minimize the administrative cost imposed on bidders, and keep it low e.g. by not requiring unnecessary information

## DON'Ts

- Don't unnecessarily restrict the size, composition or nature of businesses who can bid
- Don't set experience as an essential requirement
- Don't provide "guide price" or indicate size of your budget to potential bidders
- Don't let one potential bidder (for example the incumbent) to help design the tender or set the criteria
- Don't share intended prices (or other elements of the bid) of one bidder with another

# Tender stage

## DOs

- Do allow sufficient time for suppliers to prepare and submit a bid
- Do require bidders to submit bids on a line item basis rather than lump sum bids
- Do restrict communications among bidders
- Do include 'non-collusion clauses' in tender documents and contracts and require bidders to sign a "non-conclusive" certificate

## DON'Ts

- Don't bring bidders together – e.g. arranging a site visit all together
- Don't disclose the identities of bidders. Use numbers, rather than names, to identify them at a (virtual) briefing session
- Don't disclose to bidders that you have suspicions/reported to the Commission



# After-tender stage

## DOs

- Do award a public award in a reasonable timeframe
- Do pay contractors in a reasonably timely manner without unjustified delay
- Do monitor bidding activities and identify problematic situations
- Do develop a database that contains past and present bid results
- Do encourage and require employees to report suspicions
- Do report suspected behaviours with evidence to the Commission/ provide procurement data for Commission's screening

## DON'Ts

- Don't delay the award of a contract unduly
- Don't delay the payment to the contractor without good justification
- Don't disclose the details of the bids, especially publicly, which may facilitate collusions



# 5. Applying the principles and the Commission's cases



# Applying the principles

## Cheap Printers

- For its printer procurement, a school decides on a supplier who offers the lowest quote per machine.
- The ink cartridges for the selected printer are brand-specific, with no generic substitutes in the market. They are very expensive.
- In addition the maintenance service can only be provided by the same supplier, and at a very high cost, otherwise all the warranty services would be voided.



## Questions

1. What are the key issues?
2. What would you do as a school principal/ administrator?



# Applying the principles

## IT Training for Teachers

- A salesperson approached a primary school about providing an extensive training course for teachers on using latest information technology in class.
- When told that the school was interested but a procurement process was necessary the salesperson said she would sort it out.
- The school issued a public tender and eventually received proposals from 5 bidders. The fee provided by the salesperson's company is 30% cheaper than the other four, and the specifications in their technical proposals were very similar, if not the same.

## Questions

1. What are the key issue?
2. What would you do as a school principal/ administrator?



# Applying the principles

## Bad busses

- Over the years, a school has received many complaints from parents about the school bus service that is expensive and unreliable.
- The current provider proposes a 10% price increase for the next year.
- The vice principal talks with the provider who explains that he has chatted with other bus companies and no one else is willing to provide the service for the school and so there is no point in having a tender. He says his company is considering pulling out unless they agree the increase



## Questions

1. What are the key issues?
2. What would you do as a school principal/ administrator?



# Applying these principles

## Long-lasting Lab Equipment

- A school network has been working with a lab equipment supplier for a decade.
- The 10 year contract has expired.
- However, the school network has decided to extend the contract for another 10 years with the existing provider.
- The justification is that the current supplier is the only one who can supply the specific brand of lab equipment.



## Questions

1. What are the key issues
2. What would you recommend the school does?



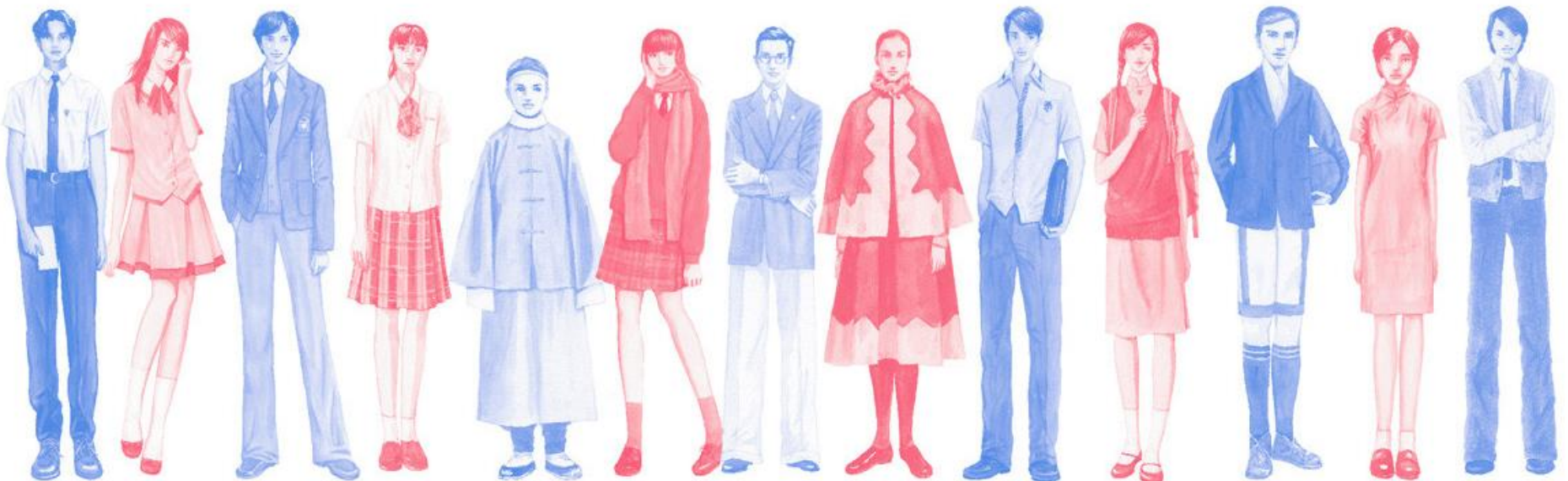
# Applying these principles

## Unfair Uniforms

- An administrator reaches out to a few school uniform suppliers. All reply that they no longer supply the requested school jackets.
- They do not give any reasons but direct the school to approach a particular uniform supplier in the district where the school is located.

## Questions

1. What are the key issues?
2. What would you recommend the school does?



# Cases brought before the Competition Tribunal

## IT bid-rigging (CTEA1/2017)

- March 2017: The Commission commenced proceedings in the Tribunal, alleging that 5 IT companies engaged in **bid-rigging** in relation to a tender issued by the Hong Kong Young Women's Christian Association for the supply and installation of a new IT system
- Judgement:** The Tribunal ruled that 4 of the companies contravened the First Conduct Rule of the Competition Ordinance and they had to pay a total penalty of over HK\$7.16 million and over HK\$8.6 million of the Commission's legal costs



# Cases in the Competition Tribunal

## Cleansing service cartel case (CTEA2/2021)

- December 2021: The Commission commenced proceedings in the Tribunal against 2 undertakings and 3 individuals
- It is the Commission's case that the two undertakings **exchanged commercially sensitive information** in relation to 17 tenders submitted to the Hong Kong Housing Authority ("HA") for the procurement of cleansing services for public housing estates and other buildings under HA's management
- The Commission has reasonable cause to believe that such conduct amounts to **price fixing**, a serious anti-competitive conduct in contravention of the First Conduct Rule of the Competition Ordinance
- During the course of the Commission's execution of a search warrant at one of the undertakings' office, certain individuals had tried to delete relevant electronic evidence and the Commission has referred this obstruction of its investigation powers to the Police for **criminal investigation**



# Key Messages

1. Cartels and bid-rigging are unfair and no different from stealing
2. There are things that you can do to protect your schools from cartels and bid-rigging



# Thank You!

