

# CPA Australia Workshop

## Competition Ordinance (Cap. 619)

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**Presented by: Mrs Christine Koo  
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# Note

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The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our Mrs Koo.

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# The Competition Ordinance

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## The Basics

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# History

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- Ordinance enacted in June 2012
- Came into force on 14 December 2015
- Applies to all sectors of the economy
- Previously only telecommunications and broadcasting were regulated

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# Objective

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*“To prohibit conduct that prevents, restricts, distorts competition in Hong Kong, to prohibit mergers that substantially lessen competition in Hong Kong...”*

- Specifically
  - Anti-competitive agreements (the **First Conduct Rule** or **FCR**)
  - Abuse of substantial market power (the **Second Conduct Rule** or **SCR**)
- **Merger rule** currently only applies to mergers involving one or more broadcasting or telecommunications licensees

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# Enforced By

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- **Prosecuted** by the **Competition Commission (CC)** which has extensive powers to investigate suspected infringements
- Cases heard by a newly-established **Competition Tribunal** which may order
  - Cessation of Conduct
  - Fines up to 10% of turnover in Hong Kong (max 3 years)
  - Disqualification of directors (max 5 years)

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# Substantive Rules

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# The First Conduct Rule

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## First Conduct Rule (Section 6(1) CO)

*Prohibits **agreements, concerted practices and decisions of associations of undertakings** if the **object or effect... is to prevent, restrict or distort** competition in Hong Kong...*

*... unless exempted"*

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# The First Conduct Rule

## Examples of anti-competitive agreements

	Serious Anti-Competitive Conduct	Other agreements subject to review
Examples	Price fixing Sharing markets Output quotas Bid rigging Resale price maintenance?	Joint Production Joint R&D Joint purchasing Exclusive supply/purchase Resale price maintenance?
Consequences	The CC may issue proceedings in the Tribunal right away  (COPYRIGHT RESERVED)	The CC must issue a warning notice before issuing proceedings

# Prohibited Effect

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## Anti-competitive effect?

- Is an effect on competition **likely to flow** from the agreement (*para 3.17 FCR Guidelines*)
- See obiter Lam J in *TVB v Communications Authority* “no concrete effects required”
- Is the effect **more than minimal** (*para 3.26 FCR Guidelines*)?
- Requires an assessment of market power
- No safe harbours

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# The Second Conduct Rule

## Prohibited Conduct

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### Second Conduct Rule (Section 21 (1) CO)

*An undertaking that has a **substantial degree of market power** ... 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*

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# Substantial Degree of Market Power?

## **SDMP**

The ability “profitably to charge prices above competitive levels”  
arises where “undertaking does not face sufficiently effective competitive constraints”

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# What kind of conduct could be an abuse of market power?

	Object of abuse	Effect of abuse
Examples	Predatory pricing Contractual exclusivity Loyalty-inducing rebates	Tying and bundling Margin squeeze Refusals to supply
Consequences	The CC may issue proceedings in the Tribunal right away	

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# Exclusions

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## Undertaking must show

- Agreement contributes to improving production or distribution or promotes technical or economic progress
- Allows consumers a fair share of the resulting benefit
- The restrictions imposed are indispensable
- Do not afford the undertakings the possibility of substantially eliminating competition

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# Enforcement

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# What cases will the Competition Commission investigate?

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- CC can investigate where it has reasonable cause to suspect:
  - Anti-competitive agreements or
  - Abuse of a substantial degree of market power
- Leniency policy and complaints

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# Powers of investigation

## What enforcement powers does the CC have?

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- Where it suspects an infringement, the CC has the power to:
  - Require any person produce relevant documents (section 41)
  - Require any person to attend to answer questions (section 42)
  - Conduct unannounced inspections (dawn raids) under warrant (section 48)

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# Priorities?

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- CC will prioritise investigation of
  - Cartel conduct
  - Abuses of substantial market power
  - Other agreements causing significant harm in Hong Kong
- CC will take into account the following “severity factors”:
  - Deliberate conduct/blatant disregard for the law
  - Involvement of senior management
  - Previous infringement

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# Case Study

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# Q & A

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# *Television Broadcasts Ltd v. Communications Authority* (HCAL 176/2013)

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## **Facts:**

- Contractual clauses prohibiting singers in certain ways and restricting appearances for other HK television broadcasters
- Communications Authority found TVB violated the Broadcasting Ordinance, saying that the policies “*have the purposes and effect of preventing, distorting or substantially restricting competition*”
- Fined TVB HK\$900,000 and ordered TVB to rectify its practices
- TVB challenged Communications Authority

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## Issue

Whether Communications Authority's decisions infringe Art 10 HKBOR

## Judgment

- **Held:** Communications Authority's decision is quashed for procedural unconstitutionality, specifically non-compliance with art. 10 of the HKBOR:

*“ All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established by law...”*

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# Professional Accountant Body's Restriction of Accountant's Training

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## Facts

- In Portugal, Order of Chartered Accountants (“OTOC”) adopted the following measures:
  - 1/3 of Members’ CPD must be provided by OTOC
  - Remaining CPD must be obtained through training approved by OTOC
  - Details of training must be submitted 3 months in advance for approval

## Issue

- Whether the measure infringe art. 101(1) TFEU (equivalent to the **1<sup>st</sup> Conduct Rule**)

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## Judgment

- **Held:** The measures infringe art. 101(1) TFEU
- The measures distort and restrict competition
  - Distort competitions because training bodies need to obtain approval from OTOC while OTOC trainings are not subject to the same.
  - Restrict the offers by other training bodies and the advance approvals prevent them from offering up-to-date materials.
- Reject that the measures are to guarantee the quality of the services because a monitoring system other than the approval procedure could be put in place.

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# Partnership between Accountant and Barrister in Netherlands

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## Facts:

- Dutch Bar Council prohibited lawyers from entering into partnerships with non-lawyers.
- Council is concerned that lawyers cannot advise independently if they are in partnership.
- Mr. Wouters challenged the prohibition

## Issue

- Whether the prohibition infringes art. 101(1) TFEU (equivalent to the **1<sup>st</sup> Conduct Rule**)

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## Judgement

- **Held:** The prohibition did not infringe art. 101(1) TFEU
- The prohibition restricts the competition because it limits production and technical development
- However in the overall context, lawyers act in the sole interest of the client while accountants are not subject to comparable requirements of professional conduct.

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# What has the Competition Commission done so far

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## **(1) Hong Kong Newspaper Hawker Association**

- The Association issued notice to its member to increase the recommended price at which they sold to certain branded cigarette.
- Rectified its conduct by withdrawing the notice
- The Commission decides not to take any actions.

## **(2) Hong Kong Association of Banks**

- The Code of Banking Practice endorsed by the Hong Kong Monetary Authority
- The Authority decided to suspend certain provisions of the Code.
- However the Authority requires all banks that they should continue to comprehensively comply with the Code
- Now under discussion

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