競爭事務委員會
COMPETITION
COMMISSION

嚴打

Combat market sharing cartels



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Why do we need competition?

In a free market economy, businesses compete with each other by offering the best range of goods and services at the best prices to consumers. A competitive market leads to better prices, products and choices for everyone. Competition also drives efficiency and innovation, and leads businesses to meet consumer demands by providing the right product at the right price and quality.

The Competition Ordinance (Ordinance) was enacted to promote competition and prohibit anti-competitive practices by businesses. Cartel conduct, which includes market sharing, bid-rigging, price fixing and output restriction, is generally regarded as a particularly harmful form of anti-competitive conduct which raises prices while reducing choices and innovation – harming consumers, businesses and the economy as a whole.

What is a market sharing cartel?

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



Market sharing cartels can occur in any industry or sector. Different types of businesses may be motivated to divide up a market so that they face less competitive pressure and are therefore able to enjoy increased market power, possibly even monopoly power, in their respective allotted markets.

Common types of market sharing cartels

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

1 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.

2 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.

3 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.

4 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.

The harm of market sharing cartels

Market sharing means that businesses don't need to compete, or compete as vigorously, for customers. As a result, market sharing cartel members may charge their respective customers higher prices without the risk (or a reduced risk) of being undercut by competitors offering a lower price. In addition to uncompetitively high prices, market sharing cartels can lead to reduced customer choice.

Legal approach and Commission priority

Under the Ordinance, market sharing is a form of serious anti-competitive conduct which is considered inherently harmful to competition. As such, market sharing is considered to have the object of harming competition and therefore the Competition Commission (Commission) is not required to show that the conduct has or is likely to have harmful effects in a market in order to establish a contravention of the Ordinance. The Commission considers market sharing cartels to be one of its enforcement priorities.



Penalties

Where a contravention of a competition rule is proven, the Competition Tribunal (Tribunal) may impose a pecuniary penalty of up to 10% of an undertaking's annual local turnover for a maximum period of three years and make other orders including, in some cases, a disqualification order that a person may not be or continue to be a director of a company for up to five years.

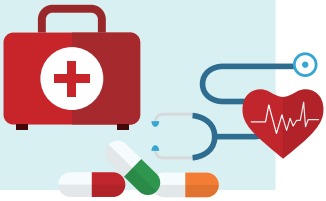
The Tribunal can also impose a pecuniary penalty on individuals involved in cartels. Victims of a market sharing cartel can also pursue "follow-on" claims for damages.

Hypothetical examples

A group of coach companies supplying services to residents at particular residential buildings meet to discuss how they operate their services across Hong Kong. To enable them all to make what they consider to be a reasonable profit, they decide to allocate between themselves a number of buildings based on the total projected number of passengers. They agree not to provide services to, or to pursue, customers that have been allocated to another company. They also agree not to launch new services without consulting each other.



Instead of competing for customers, Healthy Private Hospital (Healthy) and Lucky Private Hospital (Lucky), who are head-to-head competitors in the medical services industry, decide to collude by entering into a market sharing agreement in which Healthy agrees not to offer cancer treatment services and Lucky agrees not to offer vascular surgery services in Hong Kong.



The Commission is likely to consider that the two examples of market sharing agreements above have the object of harming competition. These agreements deprive consumers of the benefits of choice and price competition.

Myths about market sharing

Only one single service provider in an area is evidence of market sharing.

A single service provider supplying goods or services in a certain geographical area on its own cannot be taken as conclusive evidence of a market sharing cartel. It may be that having only one supplier is a competitive outcome. For example, there is only one firm that currently has the technology to supply the product or service.

Businesses with little market power will not contravene the Ordinance by sharing markets.

Market sharing is considered as a form of serious anti-competitive conduct under the Ordinance to which the exemption for smaller businesses does not apply. Businesses, big or small, should never agree with their competitors to share markets.



It would be fine for a few companies to enter into market sharing agreements as long as there are some other suppliers in the market that are not part of the market sharing agreement.

An agreement to allocate markets is considered to have the object of harming competition and so, if proven, this agreement would be considered a contravention of the Ordinance. Where a market sharing agreement has an anti-competitive object, it is not necessary to demonstrate that the agreement has harmful effects in the market. Therefore, even though some other suppliers not being part of the market sharing agreement would mean that consumers still have some choice, this is not a factor considered by the Commission in assessing the conduct.

All in all, the best way for firms to avoid contravening the Ordinance by market sharing is not to collude with each other. Competition law requires that businesses make independent operational and strategic decisions including what products to produce or services to offer at what price, where to operate and which customers to pursue.

Market sharing red flags

Market sharing cartel members often keep lists allocating customers or they may have maps with each other's allotted territories. Sales or marketing employees may be given these in order to do their work and can be a useful source of market sharing evidence. Procurement officers may also hear references from prospective bidders about territories or areas that may indicate market sharing arrangements.

Signs to look out for

Competitors suddenly
stop selling in a territory

Competitors suddenly
stop selling to a customer



Competitor
refers customers to other competitors

Salesperson or prospective bidder says that
a particular customer or contract "belongs" to a certain competitor

What can you do when you suspect market sharing?

Market sharing cartels often operate in secret and can therefore be difficult to detect. Members of the public, employees, individual businesses, trade organisations, Government departments and other public agencies are invited to report to the Commission any suspected market sharing cartel.

Do the right thing - report your suspicions

Complainants and whistleblowers are important sources for identifying possible market sharing. The Commission will accept complaints and queries in any form, including those provided to the Commission directly and/or anonymously or through an intermediary (such as a legal adviser).

When reporting a suspected market sharing cartel to the Commission, complainants and whistleblowers should provide the Commission with as much information as possible. Preserve all available evidence as soon as you suspect market sharing.

DO NOT indicate to suspected members of the market sharing cartel or make public the fact that you are making a complaint to the Commission. If a market sharing cartel is in operation, this will alert the cartel members and may substantially reduce the prospect of the Commission securing sufficient evidence to be able to take enforcement action against the cartel members.

How to report a market sharing cartel to the Commission?

A complaint can be made to the Commission by:

- Visiting the reporting website: www.compcomm.hk/reporting
- Email : complaints@compcomm.hk
- Phone : +852 3462 2118
- Post : Competition Commission
  19/F, South Island Place, 8 Wong Chuk Hang Road
  Wong Chuk Hang, Hong Kong
- In person at the Commission's office (by appointment only)

Apply for leniency or cooperation

Market sharing cartel members – or those who support them – may face severe penalties under the Ordinance. However, the Commission will not commence proceedings in the Tribunal against the **first** undertaking or individual who self-reports the cartel conduct to the Commission and meets all other requirements for receiving leniency. This includes **not** seeking a pecuniary penalty or for an order declaring that the successful leniency applicant has contravened the Ordinance. Employees and officers of an undertaking that obtains leniency will also be protected from proceedings if they cooperate with the Commission's investigation.

Cartel members which do not benefit from the leniency policies may also cooperate with the Commission in exchange for a discount of up to 50% off the pecuniary penalty the Commission would otherwise recommend to the Tribunal.

The Commission's cartel leniency policies and cooperation policy are available on its website **www.compcomm.hk**.

How to apply for leniency or cooperation?

- Call Leniency Hotline at +852 3996 8010 between 8am and 6pm, Hong Kong time, Monday to Friday (excluding public holidays)
- Send email to Leniency@compcomm.hk
- In ongoing investigations, contact the relevant Case Manager for cooperation

Confidentiality

The Commission will generally seek to protect any confidential information received which includes:

- The identity of complainants, whistleblowers and leniency/cooperation applicants
- Any confidential information provided by complainants, whistleblowers and leniency/cooperation applicants
- The leniency/cooperation application process, including the respective agreement.

Leniency/cooperation applicants must in turn commit to keeping their contact with the Commission confidential.

More information

To learn more about the Competition Ordinance and the Competition Commission's work, please visit our website www.compcomm.hk.

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Disclaimer

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