

FAQs for SMEs

1. How might SMEs benefit from the introduction of a competition law?

A competition law could benefit both big and small enterprises. In particular, it could protect SMEs by deterring bigger companies from adopting abusive or other anti-competitive practices. In concrete terms, competition law could make it difficult for big companies to impose artificial entry barriers to the various markets, thereby helping SMEs to enter the markets and trade more freely. SMEs could also benefit from the lower costs of inputs that might occur in a more competitive environment.

2. Will the introduction of a competition law impose unnecessary constraints on the business models and practices of companies (SMEs in particular), and affect their flexibility?

The purpose of competition law is to maintain free competition, not to restrict business models and practices, and it certainly should not affect SMEs' business flexibility.

Even with a competition law in place, companies are still free to compete in terms of price and quality and in terms of differentiated goods and services. Restrictions on SMEs would be minimal. Given their lack of market power, SMEs' normal business practices, such as exchanging information, are unlikely to have the effect of significantly preventing, restricting or distorting competition.

3. Anti-competitive behaviour is not prevalent in our industry. Why should the Government introduce a cross-sector competition law, rather than regulate only those industries where there are serious competition problems?

As pointed out in the public discussion document, as anti-competitive conduct may occur in any sector, there are no strong grounds for targeting only certain individual sectors or industries for regulation. Whilst there might be a common perception that certain specific sectors are particularly vulnerable to anti-competitive behaviour, the profile of complaints to Competition Policy Advisory Group (COMPAG) in recent years indicates that there is concern that anti-competitive conduct exists in many sectors. In addition, the current competition policy set out in the COMPAG Statement does not discriminate between sectors, but applies equally to all.

In addition, were the Government to restrict competition regulation only to certain sectors, it would be difficult to define clearly the exact scope of the many individual sectors in Hong Kong, and therefore to put effective regulatory mechanisms in place.

Finally, under sector specific laws it could be difficult to deal with cross-sector anti-competitive conduct, an example being the bundling of services across different sectors.

4. Will SMEs infringe the competition law unknowingly?

We believe that it is unlikely that SMEs would unwittingly fall foul of the law. Given that, on an individual basis, SMEs lack market power, their actions would be unlikely to have the effect of significantly preventing, restricting or distorting competition. Regulation of SME conduct is not normally a priority for overseas competition authorities. For example, in the USA, the Anti-trust Guidelines for Collaborations among Competitors issued jointly by the Federal Trade Commission and the Department of Justice state that, other than in extraordinary circumstances, the authorities do not challenge a collaboration between competitors when the market shares of the participants and the collaboration involved collectively account for no more than 20% of the relevant market.

Subject to the availability of resources, a competition regulator could provide appropriate advisory services to SMEs to help them better meet challenges that may arise in the compliance process.

5. Given that SMEs do not have market power, and that their actions are unlikely to have the effect of significantly preventing, restricting or distorting competition, could the Government simply exclude SMEs from the competition law?

We need to taken into account many factors when considering exclusions or exemptions. Having too many exclusions and exemptions would likely dilute the effectiveness of a competition law. However, under certain circumstances, exemptions could be allowed if this was in the public interest.

When deciding on the circumstances under which to propose exemptions or exclusions for SMEs, the Government would take account of Hong Kong's actual

situation and listen carefully to the views of different sectors of the community.

6. Some SMEs are worried that after the introduction of a competition law, big enterprises might make unreasonable complaints against them, or even take civil action in the courts to disrupt their operations. How could the Government stop this from happening?

The Competition Policy Review Committee (CPRC) has recommended that only the regulatory authority should have formal investigative powers. The regulator would filter out most trivial, frivolous or malicious complaints at an early stage.

Overseas experience generally shows that there are few competition cases initiated by private parties. If the regulator has not found any infringement of the law, it is difficult for a private party to adequately discharge the burden of proof that would be required to successfully argue a case in court.

The discussion document mentioned that, in order to address the concern of SMEs, one possible approach would be to limit the right to private action so that it could be pursued only after the regulator had made a decision that the conduct in question constituted an infringement of competition law. If that decision was subject to appeal, the right to private action could only be exercised upon the expiry of the appeal period, or upon the determination of any appeal that confirmed the earlier finding of the competition regulator.

7. If SMEs are the subject of unreasonable complaints, would they need to incur significant legal and litigation fees to prove that they are innocent?

The procedures by which a complaint might be pursued against enterprises would most likely not be the same as court procedures as commonly understood. First, the competition regulator would likely filter out most trivial, frivolous or malicious complaints at an early stage.

If the regulator considered that the case was worth pursuing, it will first make informal enquiries. At this early stage, it would not be necessary for a firm that was the subject of a complaint to engage legal advice in preparing its response (although it would be free to do so if it wished). If the regulator found that the complaint was unreasonable, it would close the investigation immediately.

Even if the regulator believed that there was anti-competitive conduct, it might not necessarily take the matter before the courts, thereby requiring all involved parties to incur significant legal fees. If the impact of the conduct in question on the economy were not great, the regulator might reach an early settlement with the party under investigation rather than initiate formal judicial proceedings. Such a settlement could be in the form of a payment, or of an undertaking to stop the conduct in question, or both.

8. In order to get volume discounts, SMEs may engage in joint purchasing activities. Would this violate competition law?

Generally speaking, joint purchasing activities by SMEs are unlikely to have the effect of significantly preventing, restricting or distorting competition. Overseas competition regulators generally recognise that joint purchasing often brings economic benefits, like enabling participants to centralize ordering, and to combine warehousing or distribution functions more efficiently, even though this may also include anti-competitive elements. In many situations, overseas competition authorities apply appropriate arrangements or exemptions to deal with such matters.

In dealing with such cases, overseas regulators consider the following factors: whether an agreement allows participants to continue to compete against each other; the financial interests of participants in the agreement; the extent to which the entity formed by the agreement can act as an independent decision maker (i.e., not be affected by the individual participants); and whether this entity would give participants access to sensitive business information of other parties to the agreement.

9. If a few SMEs came together to set prices jointly, would this infringe the competition law?

Whether or not a type of conduct constitutes an infringement of competition law can depend on whether it prevents, restricts or distorts competition. In overseas jurisdictions, price-fixing is generally considered to be conduct that prevents, restricts or distorts competition. Nonetheless, in some jurisdictions the setting of recommended prices by trade association may be allowed, especially when this could bring about net public benefits (such as facilitating information flow or improving operational efficiency).

In cases where pricing agreements between SMEs do not prevent, restrict or distort

competition, this may be because such an agreement is not enforceable, or would not prevent other firms who were not parties to the agreement lowering their own prices.

10. Sometimes SMEs may counter anti-competitive behaviour by big enterprises by jointly setting their prices or allocating markets among themselves. Would such conduct constitute infringement of competition law?

If SMEs were to consider that they were victims of anti-competitive conduct by big enterprises, they should lodge a complaint to the competition regulator, rather than counter such conduct by themselves engaging in anti-competitive behaviour.

11. If the regulator makes a decision that an SME has infringed the competition law, could the management and employees concerned be imprisoned?

The CPRC has recommended that infringement of competition law should only lead to civil penalties, which could include fines and disqualification of individuals involved from being company directors for a certain period of time. Therefore, people infringing competition law will not be jailed under the current proposal.

Hong Kong businessmen are generally law-abiding. We thus believe that civil penalties should have sufficient deterrent effect.

12. Would a competition law be a “toothless tiger”? After the introduction of the competition law, would there be more companies entering and competing in the industries currently dominated by one or a few big enterprises?

Competition is not a panacea. It would not solve all competition related problems. Yet the law should not be a “toothless tiger”. Under a competition law, the regulatory body could have appropriate power to investigate possible anti-competitive conduct and sanction enterprises and individuals who infringe the law. It could also send a clear signal as to the standards of business conduct that are acceptable in Hong Kong.

Many people are concerned about the problem of some industries being dominated by a few big enterprises. The CPRC took the view that the objective of introducing a competition law should be to improve economic efficiency by prohibiting anti-competitive conduct, not to stimulate or introduce competition artificially. The CPRC did not recommend that the Government regulate market structures, as the size

of an enterprise may be due to its operational efficiency. Also, the competition law should not be a tool for the Government to help SMEs to combat big enterprises. Hence, the introduction of competition law might not help companies enter industries dominated by a few big enterprises. However, after the enactment of a competition law, if big enterprises were to abuse their dominant market position and distort competition in the market, the regulator could conduct formal investigations. If anti-competitive conduct was proven, the regulator could of course take appropriate action against the enterprise.

In addition, some people might be concerned about competition within some public service sectors (for example, electricity supply and bus services). Since our domestic market is relatively small, some sectors, characterised by significant economies of scale, may only have enough room for a few big companies to operate efficiently. From the angle of production efficiency, these “natural monopolies” may be the most efficient economic arrangements. Nonetheless, without any regulatory mechanism, these “natural monopolies” could set their prices at too high a level (i.e., higher than the marginal cost) or set outputs at too low a level, which would in turn harm consumers’ interests and overall economic benefits. As far as these industries are concerned, even after the introduction of a competition law, the regulation of profits, scale of operations and other performance indicators would come under the schemes of control for these industries.