

**Unclassified****English - Or. English**

20 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION FOR-THE-MARKET – Contribution from Hong Kong, China****- Session IV -****6 December 2019**

This contribution is submitted by Hong Kong, China under Session IV of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: [oe.cd/cmkt](http://oe.cd/cmkt).

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**JT03454970**

## *Competition for-the-market*

### **- Contribution from Hong Kong, China -**

The Hong Kong Competition Commission (**HKCC**) provides its written contribution in response to the “Call for Country Contributions” in relation to competition for-the-market.

#### **1. Enforcement**

##### **1.1. Assessment of contract award**

1. Hong Kong’s competition law regime does not include cross sector merger review powers. The merger regime applies only to the telecommunication sector which has a specialist regulator.
2. Therefore there are no circumstances where a contract award would be subject to a merger review process by the HKCC. There is similarly no legal requirement for contract awards to be subject to any competition assessment. Absent any indication of bid rigging or other anti-competitive conduct, concerns about the impact on competition arising from contract awards by Government are treated as a matter for advocacy rather than enforcement.
3. Although the HKCC does not have a role in assessing the award of concession the HKCC is vigilant in relation to bid-rigging in such markets. The HKCC provides regular training seminars and guides to Government to help them identify red flags in their procurement activity. See [Guide to the Competition Ordinance for the Public Sector and "Getting the most from your tender" brochure](#).

##### **1.2. Enforcement action where there is competition for-the-market**

4. The HKCC has not yet brought before the Competition Tribunal any cases which involved instances of competition for-the-market. This may however simply reflect that competition law in Hong Kong is relatively new. Last year we succeeded in the Competition Tribunal in our first two cases involving bid rigging in the IT sector and market sharing and price fixing in relation to flat renovations in a public housing estate<sup>1</sup>. In this second case, price fixing and market sharing were facilitated by the identification of “*appointed contractors*” who were given certain advantages in terms of winning business from new tenants on the housing estate. We do not, however, consider this as an instance of competition for-the-market.
5. Hong Kong’s Competition Ordinance (Cap 619) (the Ordinance) does not specifically address competition for-the-market. The conduct rules in the Ordinance are largely drawn from Article 101 and 102 of the Treaty of the Functioning of the European Union (TFEU). The Hong Kong Competition Tribunal has stated “*EU case law is of*

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<sup>1</sup> Both cases are currently under appeal.

*obvious value in relation to the interpretation and application of the first conduct rule*<sup>2</sup>. When considering the appropriate approach to enforcement action where there is competition for-the-market, we will pay particular attention to European precedents.

6. The HKCC’s “[Guideline on the Second Conduct Rule](#)” (the SCR Guideline) which provide guidance on how the HKCC deals with abuses of substantial market power,<sup>3</sup> highlights that when assessing market power in bidding markets, it may be necessary to do so over an extended period. The SCR Guideline states (emphasis added):

- Sometimes buyers choose their suppliers through procurement auctions or tenders. The main feature of bidding markets is that there is “competition for the market” as opposed to competition in the market. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are infrequent (so that suppliers are more likely to bid), and where suppliers are not subject to capacity constraints (so that all suppliers are in a position to place competitive bids). **If competition at the bidding stage is effective, a high market share at a given point in time would not necessarily reflect long term market power. For this reason, it may be more appropriate to assess market power over an extended period.**

7. In relation to exclusive dealing the SCR Guideline states (emphasis added):

- In cases where competitors can compete on equal terms for the entirety of each individual customer’s demand, exclusive dealing is unlikely to harm competition unless the duration of the exclusivity gives rise or is likely to give rise to a foreclosure effect. **In the case of bidding markets for example, where there is competition for the market, exclusivity might merely be the result of a highly competitive market.**

8. In practice the Commission looks at the competitive dynamics in a market, including the presence of competition for-the-market, before coming to a conclusion on market power or whether specific conduct amounts to an abuse. For example, winning the right to operate a concession may confer (at least temporarily) substantial market power. Having won such a right it may be reasonable to expect exclusivity. Indeed had the concession not conferred exclusivity there may have been little incentive to compete to win it. In such circumstances the HKCC is less likely to be concerned about an abuse of substantial market power. Where it is a Government issued concession, it will be concerned about a lack of a level playing field; or if the winning provider becomes so entrenched that they are immune from ongoing competitive pressure. These concerns are best addressed, in the first instance, through HKCC’s advocacy efforts.

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<sup>2</sup> Competition Commission v Nutanix Hong Kong Limited and others (CTEA 1/2017) Paragraph 24.

<sup>3</sup> The SCR Guideline does not have binding effect. The Competition Tribunal and other courts are responsible for interpreting the law.

## 2. Advocacy

### 2.1. Introduction

9. The HKCC has a statutory role to advise the Government of the Hong Kong Special Administrative Region (the Government) on competition matters<sup>4</sup>. In some instances this is provided in response to specific requests by a Government Department or Bureau to evaluate a policy proposal<sup>5</sup>. In other instances the HKCC proactively raises concerns or responds to public consultations. The HKCC also provides regular training, roundtable discussions and has offered detailed advice on the adoption of pro-innovation procurement procedures.

10. The advice provided by the HKCC to the Government frequently relates to tendering arrangements where there is competition for-the-market. A common concern is that, once a contract is awarded, the successful bidder may become entrenched and assume that they are not at risk of being replaced in subsequent tenders regardless of performance or future bid price. Our advice in such circumstances often involves measures for preserving future competition. This may include: addressing asset ownership, end of contract period arrangements, information sharing by winners and tender design. We have also noted a tendency of the Government Departments to offer either very long contract terms or short term contracts with recurring renewals without a competitive tender process. This not only raises concerns about infrequent competition but also makes it harder for challengers to bid on the basis of spreading the cost of their initial investment over a long contract length as the initial term may be short.

11. To provide insight into both the competition issues that the HKCC identifies and how it addresses them, we set out below a short case study of a recent, ongoing advocacy engagement in relation to driving schools.

### 2.2. Driving school case study

#### 2.2.1. Background

12. Space in Hong Kong is limited and land costs are very high. This means that, while the Government does not usually limit the number of businesses in a market, certain economic activity will only take place on land that has been designated for that purpose. One example of this is driving schools. Four sites have been designated in different areas of Hong Kong for the operation of driving schools. It is difficult for someone to set up a driving school on non-designated land – there would normally be more profitable uses of the land.

13. The Lands Department of the Government auctions each designated site on the basis that, subject to minimum technical requirements, the driving school operator offering the highest price wins the right to use the site. In the past once awarded the Government would renew the arrangement with the incumbent on a recurring basis. The driving schools operating at each site are free to charge for car driving lessons as they see fit.<sup>6</sup>

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<sup>4</sup> Section 130(d) of the Ordinance.

<sup>5</sup> There is a Government wide circular which effectively recommends engagement with the HKCC for Government Departments or Bureaus where they identify possible competition concerns.

<sup>6</sup> There are regulations on the price for motorbike lessons as these must take place in a driving school.

14. Until recently, a single company owned driving schools at three of the four designated sites and charged a uniform price across all of them. The driving school at the fourth site was independently owned. This independent driving school charged substantially lower prices for driving lessons. We assume it provided a significant competitive constraint on the operator of the other three driving schools.

### *2.2.2. The Concern*

15. Due to redevelopment, the fourth designated driving school site was moved and the right to operate at the replacement designated driving school site was auctioned off. The company that owned the driving school at the other three sites won the auction by offering a higher land premium to the Government. They commenced operation on 1 October 2019.

16. The HKCC, as well as members of the public, had concerns that once all of Hong Kong's driving schools were owned by the same company prices would increase. While it is possible to learn to drive in Hong Kong without going to a designated driving school, there are several advantages for those doing so. A significant portion of the driving test takes place in driving schools, the routes are more predictable, and there is easier access to driving test slots. The competitive constraints imposed by individual driving instructors appear to be weaker than between separately owned driving schools.

17. The HKCC sees this case as illustrative of a wider concern it has with a common practice where the award of concessions (including franchises, licences or land rights etc.) are auctioned off on the basis of maximizing the premium to be paid to the Government. In such instance, once minimum requirements are met, no assessment is made of other considerations. This allows companies that hold existing rights to submit high bids to eliminate competitors. If successful, they can recover the high bid price by charging monopoly (or near monopoly) prices across all their operations. While the Government may benefit, at least in the short term, consumers do not. In the long term, the Government may also lose out as there may be no alternative to the incumbent monopoly provider in future tenders, allowing them to offer low bids.

### *2.2.3. The HKCC's Approach*

18. The HKCC prioritized this issue for engagement. The HKCC's initial strategy was to prepare an OpEd to highlight the concern with the reduction in competition in the driving school market. We intended this to be used to illustrate our wider concern about the lack of consideration given to competition in the award of such rights.

19. However, when staff of the HKCC met to discuss the issue with the relevant Government officials, the officials proved very receptive to our concerns and expressed willingness to work with the HKCC to adopt a process which would be more responsive to non-land price criteria including the effects on competition and consumer prices. This work is ongoing and the HKCC is currently looking to other jurisdictions and examples of tender design that does capture impact on price and competition for the final consumers. If successful we hope this can provide a model for other similar tenders.

20. As to the evidence relied upon<sup>7</sup>, our task in this instance was made easier by the fact that the competition concerns were evident. We were able to communicate in simple language why consumers could be harmed by the market moving from there being two providers of driving schools to there being a single provider.

21. Our view is that, in general, Government officials do want to adopt policies that maximize competition in both the tender processes and once the concession has been awarded. There is, however, a preference for straightforward, well-established and hard to legally challenge approaches which often prioritize income to the Government. Also, given that Hong Kong's competition law and policy regime has only been in place for less than four years, some policy makers are still getting familiar with the HKCC perspective, and often find difficulties in factoring competition consideration into the concession tender process. Therefore, the HKCC strongly prefers to take a collaborative approach in offering practical assistance to the Government. This way, it also helps the HKCC to quickly build up trust and rapport with various Government departments in the HKCC's early years.

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<sup>7</sup> Question 1(d) in the Advocacy section of the Annex for the Call for contribution.