

**Research Assessment Exercise 2020**  
**Impact Case Study**

**University:** City University of Hong Kong |

**Unit of Assessment (UoA):** 18 – Planning and Surveying (land and other) |

**Title of case study:** Impacts of the Hong Kong first-ever Competition Law on the construction industry |

**(1) Summary of the impact**

[This case study is a pioneer in investigating the impacts of the 2015 Hong Kong first-ever Competition Law on the construction industry from four perspectives: 1) societal- this study confirms that with this law Hong Kong is now on par with other major market economies; 2) legal – an alternative solution to deal with collusion in the form of “agreement not to compete” is offered; iii) academic – concentration analyses were successfully applied to examine a number of oligopolistic construction markets; 4) sectoral – several construction contracting/trade practices that may infringe the ‘new’ competition regime were reviewed with possible responses were offered. ]

**(2) Underpinning research**

[The Hong Kong Competition Ordinance (HKCO) was enacted in 2012 and came into full force at the end of 2015. The HKCO is a cross-sector one and two measures there-in affect the construction industry: i) a general prohibition against anti-competition agreements, concerted practices and decisions of associations (The First Conduct Rule, FCR); ii) a prohibition against the abuse of substantial market power in a market (The Second Conduct Rule, SCR). The following research objectives and tasks were conducted:

**Objective I: Study the application of a competition regime to the construction industry:**

I.1 studying the theoretical underpinnings of having a competition regime.

I.2 comparing the competition legislations of other developed economies.

Desktop analyses provided invaluable input for the accomplishment of Objective I. The findings for objective 1.1 and 1.2 are reported in reference [1].

**Objective II: Prepare for the challenges arising from the new completion regime by:**

II.1 examining the minefields against the First and Second Conduct Rules.

II.2 exploring arrangements/conducts for block exemption.

II.3 suggesting compliance measures.

For II.1, the potential minefields against the First Conduct Rule include:

1. Agreement not compete
2. Joint venture arrangements
3. Tradesman wages agreements

The studies conducted for Objective II are mainly derived from interviews with industry experts and desktop analyses. The activities conducted for the study and the findings therefrom are disseminated through the references [2], [4] and [6] respectively.

For II.2, the criteria for block exemption have been studied, in particular to investigate the application to tradesmen wages agreement and joint venture agreements. The research findings suggest that these agreements are likely to be granted for exemption for the social benefits these derive. The said discussions are reported in reference [6].

For II.3, interviews with the construction community suggest that the current practices of the construction industry have been designed to guard against corruptions and not so much for anti-competition. The guidelines published by the Competition Commission are useful references.

### **Objective III: Explore implications on the business models in construction**

The studies on joint venture and tradesman wages agreements also serve this objective. Although the industry does not think that the two aforementioned practices would have competition issue. The research team does suggest the tradesman wages agreement shall apply for block exemption under Section 15 of the Competition Ordinance.

To further investigate the application of the Second conduct rule, two markets have been studied to exemplify the application of the guidelines of the Second Conduct Rule; ten-mega project market and the private residential unit market.

For the ten-mega project market, with secondary data obtained from the public domains, a market concentration analysis was conducted. It is found that the market is fairly concentrated yet there has yet sign of competition issue because of the relative not too small number of participants. The study and findings are reported in reference [4].

The concentration of the private residential unit supply market is more difficult to measure. Again from company reports, a concentration analysis was conducted and reported in reference [5].

### **(3) References to the research**

- [1] Zhao X. J., Cheung S.O. and Guo Y.S. (2014) “Hong Kong’s First Competition Law: Impact on Construction Contracting”, ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction. Vol. 6(2).
- [2] Cheung S.O. (2016) “Are Agreements not to Compete Anti-competition?”, The ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction. Vol. 8(2) May 2016 (doi:10.1061/(ASCE)LA.1943-4170.0000181).
- [3] Cheung S.O. and Shen Lu (2017) “Concentration Analysis to Measure Competition in Megaprojects”, The ASCE Journal of Management in Engineering, Vol. 33(1) [https://doi.org/10.1061/\(ASCE\)ME.1943-5479.0000464](https://doi.org/10.1061/(ASCE)ME.1943-5479.0000464).
- [4] Shen Lu and Cheung S.O. (2017) “How forming Joint Ventures may affect Market Concentration?”, The International Journal of Construction Management (published on line 10th April 2017)
- [5] Cheung S.O., Levina Brigitta and Niu Yuhan (2017) “Concentration Analysis of New Private Residential Units Market in Hong Kong”, The Journal of Construction Economics and Building, Vol. 17(2): 1-23 (June 2017).
- [6] Cheung S.O. (2016) “Will Tradesman Collective Wage Agreement be exempted from the Hong Kong Competition Ordinance?”, The Third Australasia and South-East Asia Structural Engineering and Construction Conference, Kuching, Sarawak, Malaysia, Oct 31-Nov 4, 2016.

### **(4) Details of the impact**

The Hong Kong first ever competition law was enacted in July 2013- the Hong Kong Competition Ordinance (HKCO). With the setting up of the Competition Commission authorized under the Ordinance, implementation guidelines were issued in 2015 and the law came into effect in December 2015. This study is among the first that were conducted in response to the enactment of the Hong Kong first-ever Competition Ordinance. The impacts of this case study can be considered in the following 4 perspectives:

#### Societal:

Competition requires market players to improve efficiency in order to attract customers. More significantly, innovations derived from competition have been proved to be the most welcomed outcome of competition. In many developed economies, competition legislation has been used to regulate markets by setting up rules to guard against or penalize anti-competition behaviour. These rules serve to safeguard competitive processes. Hong Kong has been well known as being the freest economy in the world. The enactment of the HKCO is the formal establishment of a competitive regime in Hong Kong. This case study confirms Hong Kong has reached a milestone in providing level playing fields for market players.

#### Legal:

Bid rigging has been an issue in construction contracting for many years. Most practices of bid rigging happen in very subtle ways. The most controversial form of bid-rigging is agreement not to compete. The issue was deliberated in *HKSAR v Chan Wai Yip & Ors* [2011] 1 HKC 580. The Hong Kong Government alleged that from June to July 2004, the defendants had conspired to defraud the Food and Environmental Hygiene Department (“FEHD”). The various defendants had among themselves agreed not to compete in the auction and had secretly drawn lots for stalls that they would bid for at the respective reserve price at the auction. The defendants were charged with conspiracy to defraud and were all convicted. On appeal to the Court of Appeal, the Hong Kong Government relied on the pre-allotment and the agreement not to compete as the constituent elements of the conspiracy to defraud. The Court of Final Appeal of Hong Kong held that no conspiracy to defraud was found and the defendants were found not guilty as in common law, agreement not to compete is not illegal per se. Moreover, with the FCR of the HKCO, a new legal sanction becomes available to address this issue.

Another legal issue studied is about forming joint venture. It has been suggested that forming joint venture would lower competition because the number of players will be reduced. Anti-competition hazards of horizontal joint ventures also include potency of collusions and increasing entry barriers. Moreover, forming joint-venture is very commonly practiced in construction. This case study examined will forming joint venture infringe the FCR. For the market analysis of the ten-mega project, market concentration is not much lowered. As such, the industry can continue to practice joint-venture as long as the number of players in the market remain sufficient to engender competition.

#### Academic:

For the SCR, market concentration analyses were carried out for private residential unit market and ten-mega project market. The study aptly demonstrated the application of the two concentration indexes (Concentration Ratio (CR) and Herfindahl-Hirschman Index HHI). Two construction markets were studied: Ten-mega project market and private residential unit market.

Although both markets were found to be moderately concentrated but there was no evidence of abuse of market power. The impact of this part of the case study is the successful use of the two concentration indexes in construction. No previous work in this area at least for the last ten years. The methodology and approach in handling secondary data are exemplary.

#### Sectoral:

Some of the sectoral practices were reviewed in the light of the new Competition Ordinance.

First, the use of fee scales for professional services. Although the actual use of fee scale is very rare in Hong Kong, with the FCR, even proposed/suggested fee scale is not allowed.

Second, in Hong Kong under collective wages agreement (CWA), the associations of the key trades would review annually the daily wages for their members. The associations would come up with suggested daily wages. Contractors or subcontracts will employ these tradesmen with the regard to the suggested daily wage. It is suggested that the industry should apply for

block exemption for the benefits derivable from such agreements to the economy in general and sectoral efficiency in particular.

Summary:

This pioneer study on the Hong Kong first-ever competition law has the afore-mentioned four aspects of meaningful impacts. |

**(5) Sources to corroborate the impact**

**5.1** ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 2014 Best Scholarly Paper.

Zhao X. J., Cheung S.O. and Guo Y.S. (2014) “Hong Kong’s First Competition Law: Impact on Construction Contracting”, ASCE JLADR, Vol. 6(2): May 2014.

**5.2** Second Award for the Hong Kong Institute of Surveyors outstanding dissertation/thesis award (Final year Project Quantity Surveying Division)

Shen L (2014) “Hong Kong Competition Ordinance Impact on the construction industry: Market Concentration and Entry Barriers Analysis”

**Keynote:**

Cheung S.O. (2017) “Housing Supply and Major Infrastructure Projects in Hong Kong”, 41<sup>st</sup> AUBEA. 3-5 July 2017, RMIT, Australia. |