



# What does the Competition Ordinance Mean to HR?

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*In June 2012, the first cross-sector competition law in Hong Kong was passed as the Competition Ordinance (Cap. 619) (the “CO”). Since then, the Competition Commission (the “Commission”), the investigative body under the CO, and the Competition Tribunal, the adjudicative body, have been set up, and are currently preparing for the full implementation of the CO.*

Headed by experts from mature competition law jurisdictions such as Australia and the European Union, the Commission has indicated it has already commenced work informally and is monitoring various situations of public concern, responding to inquiries from the public and conducting studies and research on a range of competition related issues in Hong Kong.

Importantly, the Commission has published a set of draft guidelines (“**Guidelines**”) to the

CO, which will soon be finalised in consultation with the Legislative Council. The Guidelines, designed to be of general, sector-neutral application, outline how the Commission expects to interpret and give effect to the competition rules and address certain procedures under the CO. Once the Guidelines are finalised and its preparation work completed, the CO will be ready for full implementation at a date to be set by the government.

### What are the Competition Rules and How do They Affect HR?

The CO lays down two basic conduct rules. The First Conduct Rule prohibits agreements and concerted practices among two or more businesses that have the object or effect of restricting competition in Hong Kong. The Second Conduct Rule prohibits a business with substantial market power from abusing that power by engaging in conduct that has the object or effect of restricting competition in Hong Kong.

In relation to HR practices and employment matters, the main concerns will likely be related to the First Conduct Rule. Practices such as wage-fixing, exchange of sensitive HR related information, industry-wide collective negotiations, or non-solicitation agreements between competitors could give rise to competition law issues.

#### Wage Fixing

If two or more competitors in a market have agreed to fix wages for a particular type and level of staff, this could be wage fixing. Wage fixing is a form of price fixing, which will likely violate the CO when it comes into force.

Companies within the same corporate group may still be able to maintain a uniform wage policy. The First Conduct Rule will not apply to companies within a “single economic unit”. Generally, if one company in the group has decisive influence or control over the commercial policy of another (e.g. a parent company with respect to its wholly-owned subsidiaries), they will be considered part of a “single economic unit”, instead of independent entities.

#### Exchange of Sensitive Information

Communications between employers that touch on wages, commissions, benefit allowances and bonuses will likely raise competition law issues, especially where those communications concern their future intentions.

As wage-related discussions tend to undermine competing employers’ independent wage-setting behaviour, they will likely be considered anti-competitive and looked at more closely from the Commission’s perspective.

Particular care should be taken not to disclose wage-related information in the presence of



competitors at industry forums and trade association meetings, where a large number of HR representatives gather to discuss industry issues. The CO applies equally to casual discussions occurring before and after a formal meeting. All that is required to establish an infringement under the CO is a “meeting of minds” between HR representatives of competing employers.

According to the Guidelines, a business may be deemed to have participated in practical coordination with a competitor (i.e. a “concerted practice”) by mere attendance at a meeting where anti-competitive discussion had taken place. HR representatives who find themselves inadvertently caught up in potentially anti-competitive discussions should publicly distance themselves by immediately voicing their objection, and, if those discussions continue despite their objection, leave the meeting, and ensure a record of their departure is made.

Information exchange applies not only to wage-related information, but any competitively sensitive information, including hiring strategy and numbers. Generally, the risk of contravening the CO will depend on the nature and age of information, whether it is publicly available and its competitive relevance to the recipient(s). Discussions that could result in coordinated strategies or negatively impact the competitive process between employers should be approached with caution and, if in doubt; legal advisers should be consulted before engaging in potentially sensitive discussions.

#### Collective Bargaining

The CO does not apply to collective bargaining between employees and a single employer, or employers within a single economic unit. As employees are an integral part of an undertaking, the Commission is of the view that collective bargaining between a group of employees and their employer in relation to employment matters such as salaries and conditions of work will not

contravene the CO. This is the case even where the employees are represented by a trade union acting as their agent in negotiations with an employer.

On the other hand, industry-wide collective bargaining may be caught under the CO. Where a trade union represents *employees of more than one employer*, in collective negotiations with *two or more employers* who are competitors in the industry, those negotiations could potentially be anti-competitive. In some jurisdictions collective bargaining is expressly exempted from competition law. In Hong Kong, it remains to be seen whether the Commission will issue a block exemption for collective bargaining.

## Trade Associations

The Commission has clarified in its revised draft Guidelines that any decision or recommendation made by or through a trade association comprising of competitors can potentially be anti-competitive, even if not binding on its members. Recommended fee scales and “reference” wages or commission rates suggested by trade associations would likely contravene the CO.

## Non-poaching Agreements

Non-poaching agreements are permissible only if reasonable in duration and scope and ancillary to a legitimate commercial interest, such as in the context of M&A activity. Outside of these legitimate purposes, any arrangement or understanding between competitors not to poach the other’s employees will likely harm or even eliminate competition in the relevant jobs market, and restrict the mobility of labour.

## Potential Penalties

The Competition Tribunal has power to make a range of orders against individuals and/or companies who have contravened the CO. Potential sanctions include orders for disgorgement of profits, payment of damages, declarations that agreements or parts of agreements are void, director disqualification of up to five years, and fines, imposed on individuals as well as companies, amounting to a maximum of 10% of corporate group turnover in Hong Kong.

## Compliance

Like all effective risk management, competition law compliance requires a cultural shift. Old

habits die hard. It may take time to train HR personnel and change ingrained practices.

Employers are advised to start reviewing their practices and procedures early, in particular their interactions with competitors, as well as their terms of engagement with intermediaries such as recruiters and salary consultants.

The Commission has already started work informally, and is receiving information from the public on potential anti-competitive conduct, which it may keep on file for future investigation. In order to be ready for the full implementation of the CO, it would be prudent for employers to provide compliance training to employees and put in place internal policies and guidelines, so that regardless of their role or position within the business, they are able to identify, avoid and resolve competition law risk from day one.



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