

## Competition Law in Hong Kong and China: Why a Compliance Policy Should be Your Company's Priority

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Hong Kong is on the verge of introducing a comprehensive competition law. Additionally, China's Anti-Monopoly Law has commenced, and can apply to the conduct of both mainland Chinese and foreign businesses.

Accordingly, now is the time for businesses in the region to introduce policies to ensure their staff, and competition regulators, recognise that they are serious about competition law compliance.

### Why Should Business be Concerned about These Laws?

There is a common perception that competition laws only impact the largest, most dominant business players. The truth is very different. While some large firms will face unique issues under Hong Kong and China competition laws, those laws also contain provisions that apply equally to both small and medium sized businesses and to multinational corporations.

Those provisions regulate a wide range of business conduct, not limited to the high-level decision making of senior executives. Indeed, many competition provisions are most relevant to the day-to-day activities of employees involved in sales promotion, price-setting, selection of trading and "cooperation" partners and coordination of distribution arrangements. In relation to such activities, it can often be difficult to discern the line between lawful vigorous competition and conduct that may be deemed anti-competitive and unlawful.

This is significant, as substantial penalties can be imposed on any business that breaches competition laws. For example, under Mainland China's Anti-Monopoly Law, fines of up to 10% of business turnover can be imposed on businesses that participate in certain unlawful arrangements. In Hong Kong, it is proposed that fines up to HK\$10 million will apply, while staff of non-compliant businesses may be disqualified from holding directorships or other senior positions for up to five years. Further, non-compliant businesses risk having key customer and trade agreements deemed unenforceable, and being sued for damages by competitors and customers.

### KEY POINTS:

- Competition laws are set to have a significant impact on businesses in both China and Hong Kong. This includes SMEs as well as large corporations.
- Companies should be taking compliance steps now, including by implementing compliance policies.
- Compliance policies can help to reduce the incidence of, and even penalties from, infringement.
- Compliance policies should be comprehensive, tailored to reflect relevant business activities, and supported by senior management.
- Implementation of training programs and comprehensive business reviews are also important steps in ensuring compliance.

### Why Implement a Compliance Policy?

There are a number of steps that businesses can take to help ensure compliance with competition laws.

One of the most important initial steps is the introduction of a competition compliance policy.

An appropriately worded policy can alert employees to the broad scope of conduct regulated by competition laws and ensure they appreciate the serious consequences that may flow from an infringement - both for the business and for them as individuals. Not only will this encourage compliance, but it will also help employees to recognise when their business might be the victim of anti-competitive agreements or conduct, in which case they will be well-placed to protect the best interests of the business.

It should also be noted that a business that has taken adequate steps to achieve compliance but has nonetheless committed an infringement will commonly receive a reduction in the amount of financial penalty imposed by competition regulators.

## What Should a Compliance Policy Contain?

A competition compliance policy will commonly be designed to achieve three fundamental aims.

Firstly, it should articulate to all company employees (and the outside world) the company's overarching commitment to comply with competition laws, and provide some basic guidelines for business conduct to optimise compliance.

Secondly, it should place a duty on all employees to conduct their business dealings within the overarching policy, to seek legal advice where there is uncertainty about how competition laws may impact proposed activity, and to report activities that they suspect infringe competition law.

Thirdly, it should articulate a commitment to take disciplinary action against employees who intentionally or negligently involve the firm in an infringement of competition law.

With these aims in mind, it is appropriate for each business to tailor its competition compliance policy to reflect the particular industry it is engaged in and its market position. Employees are unlikely to place much emphasis on a policy that appears to have no direct relevance to them, or which includes examples that seem irrelevant or confusing. Accordingly, care should be taken to ensure that compliance policies are seen as relevant, informative and practical.

Additionally, it is important that the policy is seen to be supported by all levels of management. For this purpose, it can be helpful to include leadership statements in the policy from key executives and business leaders.

## What Else can be Done?

The introduction of a compliance policy is a key step in promoting competition compliance throughout all levels of an organisation. However, it is important that the introduction and promotion of such a policy is accompanied by other measures designed to raise staff awareness and understanding of competition laws.

Tailored training programs can be particularly effective in promoting understanding of competition issues, and of a businesses' compliance policies and procedures. These programs should be offered to both existing staff, and to "new starters" as part of induction programmes.

More generally, comprehensive compliance programmes and business reviews can provide a formal framework for ensuring that the business as a whole, as well as individual employees and executives, comply with competition laws. It can also assist businesses to identify actual or potential infringements at an early stage, enabling appropriate remedial action.

## Compliance with Local *and* Foreign Laws

China and Hong Kong have joined the ranks of more than 100 countries by deciding to introduce competition laws. Most of these foreign competition regimes apply not only to conduct occurring within the relevant foreign jurisdiction, but also to conduct occurring elsewhere (such as in China or Hong Kong) if that conduct affects a market in the foreign jurisdiction. Accordingly, an effective compliance program needs to account for the potential application of foreign competition laws. Additionally, businesses in China and Hong Kong need to ensure that any foreign entities they control act in accordance with the competition laws of their home jurisdiction.

Businesses that are part of international corporate groups will benefit from having an overarching group compliance policy. Having 'minimum' standards of acceptable conduct for group companies, supplemented by tailored local compliance programs where necessary, will assist to ensure compliance is recognised as a group priority and that conduct expectations are clear and consistent for employees at all times.

## How can JSM Assist?

JSM's Antitrust & Competition Team is experienced in developing compliance policies and procedures for businesses in the region, tailored to reflect the key risks that China and Hong Kong's anti-competitive conduct prohibitions raise for different industries and businesses. The team is also available to conduct appropriate reviews, and to roll-out tailored training programs, to optimise business compliance with competition laws.

Additionally, the team can utilise the resources of Mayer Brown's global antitrust practice to ensure compliance policies and procedures reflect the demands of both local and relevant international competition laws.

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