

Hong Kong's Forthcoming Competition Law - Where to Begin with Compliance Efforts

The Hong Kong government has finally introduced its long-awaited competition bill into the Legislative Council. Accordingly, there is some likelihood that the bill will be passed after the Legislative Council resumes sitting in October 2010.

In the context of this development, it is important that businesses operating in (or selling into) Hong Kong ensure they commence compliance preparations. Although it may take some months for active enforcement of the new law to ramp up, taking relevant preparatory steps now will assist businesses to ensure they are in a strong position for compliance once enforcement begins, and may also ensure that new deals and trading arrangements implemented in this interim period are structured in an appropriate manner and do not require later revision or abandonment.

However, for many Hong Kong businesses, who may have had little previous exposure to competition laws, knowing how and where to begin the task of preparing for competition compliance may be difficult. Given the absence of detailed information about enforcement priorities under the forthcoming law, which may potentially affect all areas of business operations and result in massive fines for violations, those business operators may benefit from guidance on how to structure and roll-out appropriate compliance initiatives.

Accordingly, based on their extensive knowledge of the Hong Kong government's intentions for the Bill, and experience helping companies implement compliance programs in relation to Hong Kong's existing sector-specific competition laws, Mayer Brown JSM's Antitrust & Competition Team have compiled a list of the five key steps that businesses

with operations or sales in Hong Kong can take now to commence their preparations for the forthcoming law and embed a culture of competition compliance within their organisation.

Although aspects of the Hong Kong competition bill remain under debate, it is clear that activities such as cartel-style collusion and 'abuse' by businesses of any substantial power they hold in particular markets (such as activities aimed at restricting new entry to the market or the legitimate expansion of competitors) will be prohibited. As these types of prohibitions are common to competition laws around the world, and the wording of Hong Kong's bill is substantially modelled on analogous laws in jurisdictions such as the European Union and Singapore, it is possible and prudent for pro-active compliance steps to be undertaken based on the learnings from other regimes.

Step 1: Senior management involvement

As mentioned above, many businesses operating in Hong Kong are being forced to address competition issues for the first time. In this context, active and visible senior management involvement in compliance initiatives will be vital - as it will help employees to recognise the importance placed on competition law issues.

Senior management support for compliance initiatives can be demonstrated in a number of ways. For example, senior individuals within the business or its Hong Kong-focussed divisions can declare their support for compliance steps in memorandums to staff and in briefing sessions. Additionally, references to the need for competition compliance can be included in business mission statements.

It is important for internal communications on this issue to stress that risks under the forthcoming competition law may arise from the activities of staff at every level of a company - including strategic decisions of the board, and informal conversations that lower level staff may have with trading partners or competitors.

Practical tip: In some businesses, it may be appropriate for a committee chaired by members of the board or senior management team to be assigned responsibility for creating a culture of competition compliance within their organisation. This committee can work with competition experts to ensure appropriate training and risk-management programs are implemented.

Step 2: Whole-of-business reviews

As noted above, competition laws can impact just about every aspect of a company's operations. Accordingly, it is important for persons charged with leading competition compliance programs to seek to identify the key risk areas for priority action.

This process commonly begins with a high level review of each of the company's main business areas, with the review focussed on pinpointing practices that regularly give rise to competition concerns (such as the circulation of sensitive business information to competitors - which can result in or facilitate price-cartels or other forms of collusion, or the imposition by suppliers of long term exclusivity obligations in their agreements with significant customers - which can make it difficult for new suppliers to enter the market and compete).

In this context, it is important to note that while Hong Kong's forthcoming competition law will no doubt share elements in common with the competition laws of more mature jurisdictions, it is also likely to contain unique provisions that relate specifically to the region's special political and economic characteristics.

Accordingly, it will be vital for all businesses - including those with significant experience of foreign competition regimes - to ensure that whole-of-business reviews are conducted by experts knowledgeable about Hong Kong's emerging competition regime.

Practical tip: It can be useful for competition questionnaires to be distributed to key staff and business leaders, as a tool to assist in the identification of competition law risks. These questionnaires should be simple and relatively quick to complete, requiring 'yes' or 'no' answers in response to questions about whether the respondent or their broader business team is involved in certain types of activity (such as liaison with competitor representatives, determination of customer pricing, and negotiation of the key terms in customer contracts). Legal and compliance experts can then examine the responses to determine appropriate areas for further review, and which staff should be prioritised for relevant competition law training. Mayer Brown JSM's Antitrust & Competition Team has compiled such a questionnaire, which can be tailored for specific clients on request.

Step 3: Appropriate policies and procedures

Once a business has conducted a whole-of-business review with the support of senior management, it will be able to pinpoint the aspects of its day to day trading that may present the most risk from a competition compliance perspective.

Compliance documents such as competition policies and procedures can then be drafted to assist in the management of these risks. These documents should incorporate warnings and guidance notes specifically tailored to be relevant to employees and the industry in which the business operates.

In addition to highlighting the primary "dos and dont's" for employees, these documents should impose a clear duty on all employees (including senior executives) to take individual responsibility for

ensuring their conduct is in compliance with competition laws.

Further, the policies and procedures should:

- advise staff how to react in the event of an unannounced inspection by a competition regulator such as the proposed new Competition Commission in Hong Kong; and
- identify an appropriate legal or compliance representative to whom queries relating to competition law compliance can be directed (refer Step 5).

It should be noted that in many jurisdictions around the world, competition-related fines may be reduced where reasonable and documented efforts have been made to ensure implementation of a competition compliance programme. Hong Kong may well follow suit in this regard.

Note that Mayer Brown JSM's Antitrust & Competition Team has compiled a checklist of the essential features of competition policies and procedures, which can be provided to clients on request.

Practical tip: To ensure the benefits of competition compliance and education initiatives are not diluted when new employees join, it is prudent to ensure that induction programs includes a competition law component, and for new employees to receive a copy of existing compliance policies and procedures.

Step 4: Education

Most violations of competition laws do not arise due to a wilful disregard of the law, but rather due to the complex nature of the laws and the fact that they are frequently not well understood by employees. This is a particular problem in relation to a jurisdiction like Hong Kong, which has not previously had comprehensive cross-sector competition laws.

Accordingly, it is important that businesses with operations or sales in Hong Kong educate employees about competition laws and ensure practical training programs relating to the Hong Kong law are rolled out. Ideally, these training programs will be tailored for each of the key (Hong Kong-focussed) groups within the business, highlighting risks and issues likely to arise in the course of that group's regular activities.

It is also important that periodic 'refresher' courses are held (say, on a yearly basis). This can assist to ensure that staff remain alert to ongoing risks, and are updated on any changes in the law. As noted above, steps should also be taken to ensure that competition-related training is provided for new employees as part of induction programs.

Practical tip: Competition compliance training can be rolled-out in a variety of ways. For smaller organisations, informal seminars may be most appropriate. For larger organisations, video presentations and e-learning programmes may be preferred. Ideally the training should be tailored, practical and engaging - using methods such as 'role plays' to simulate real life business situations and to retain the interest of employees. Mayer Brown JSM's Antitrust & Competition Team is experienced in conducting tailored training sessions for employees at all levels, and 'train the trainer' sessions for in-house legal teams.

Step 5: Promotion of reporting mechanisms

Mechanisms should be put in place to encourage staff to report self-involvement or suspicions of competition law infringements to senior management. These mechanisms should be promoted to all staff, along with assurances from senior management that the business encourages proactive reporting of infringements, and will respect relevant requests for anonymity and confidentiality.

As noted in Step 3 above, it is advisable for a particular team or individual to be designated as the 'key contact' in relation to competition law issues, or (in larger organisations) for a hotline to be available for reporting of suspected violations.

Additionally, steps should be taken to ensure employees to have readily available access to legal advice on whether or not a particular transaction, agreement or arrangement complies with competition law.

Practical tip: A business should not just be concerned with identifying potential competition law violations within their organisation. It is also prudent to ensure employees are on the lookout for violations by trading partners and competitors. Where these occur, the business may wish to consider submitting a complaint (which may be anonymous) to the Hong Kong regulators, who will be required to investigate appropriately substantiated complaints.

Conclusion

With introduction of Hong Kong's long-awaited competition law now a real possibility in the coming months 2010, competition compliance should be at the top of the agenda for businesses with operations or sales in Hong Kong.

Mayer Brown JSM's Antitrust & Competition team is experienced in assisting businesses to carry out audits and implement compliance programmes designed to manage competition law risks. We can also help businesses decide how best to approach the education of employees.

If you would like any further advice on the issues raised in this article or competition law issues generally, please contact Mayer Brown JSM's Antitrust & Competition Team.

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