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Competing in Hong Kong

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The Competition Ordinance (Commencement) (no 2.) Notice 2015 was published in the Gazette on 17 July 2015, which declares 14 December 2015 as the effective date for the rule. This Ordinance, first outlined in 2012, restricts four types of conduct that are described as anti-competition – pricing manipulation, market division/allocation, output restriction or control, and bid rigging. Though not specifically targeted at employment matters, it is clear that the Competition Ordinance (CO) restricts practices like wage-fixing, formal and informal sharing of pay or benefits related information with competitors, industry-wide negotiations that impact wages and employment terms, and no-poaching agreements.

Overview

The following specific conducts are classified as anti-competitive and are prohibited (Chapter 619, S 2, "Interpretation"):

Price Manipulation - The CO prohibits collusion between competitors on prices, price calculation formulae, discounts, etc. From an HR perspective, it prohibits two or more employers from verbal or written, formal or informal collusion on the setting of wages, benefits, allowances, bonuses, variable pay and other terms of employment. Mere sharing of information is sufficient to be in violation of the ordinance – no proof of actual action or anti-competitive consequences are required.

Market Division / Allocation - The CO prohibits firms from dividing or allocating customers, suppliers or geographies among themselves, instead of allowing firms to make competitive decisions around these. In an HR context, firms are prohibited from entering into formal or informal no-poaching agreements with competitors, except in extenuating circumstances such as those arising from a merger or divestiture.

Restriction or Control of Output - This is when competitors agree to limit the volume or type of goods or services made available in the market, as this impacts their price.

Bid Rigging - Bid rigging occurs when firms involved in a bid agree not to compete, or to compete so that a pre-determined member of the group will win. In an HR context, this could extend to competing firms colluding on the hiring outcome of a group of candidates.

It is important to note that the existence of any one or more of the conducts mentioned above could be sufficient for a firm to be in violation of the CO. Legal experts agreed that mere presence at a conversation at which sensitive information has been disclosed by a competitor, or being party to a non-binding wage-fixing agreement with competitors could be a violation of

How you can respond

McLagan recommends the immediate reevaluation of all critical risk factors associated with the CO including market intelligence / benchmarking policies and practices, association memberships, wage-related agreements and no-poaching agreements.

For direct consultation on further implications, please contact us.

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the CO. The Competition Tribunal has the power to take action against both individuals and companies who have contravened the CO. Potential penalties include fines, damages, voiding of agreements, director disqualifications, and more.

Immediate Next Steps for HR

Review benchmarking practices
The Competition Commission has acknowledged that market benchmarking is one of the legitimate reasons for firms to share sensitive information. However, the Competition Commission advises that the information be shared with a 'disinterested third party', who would then disclose the information to the competitors in an anonymized and aggregated format.

While most firms participate in market benchmarking surveys for information related to cash compensation, they may also rely on 'industry sources' for data on salary increase projections, allowances, benefits and trends. Collecting sensitive information directly from competitors would be a violation of the CO and firms should therefore ensure that this information is collected through a third party going forward.

Review association and networking group memberships
Firms are often part of industry associations or networking groups that meet periodically to discuss topics of interest. The purpose of some of these may be to determine / share information that could be classified as sensitive information by the CO, for example employer associations that suggest reference wages or commission rates.

Firms should review all formal and informal association and networking group memberships, especially those attended by senior members of the HR team. Charters of formal associations need to be examined for compliance and modified, if necessary. Networking groups also need to agree on a list of topics that are 'off limits' in light of the CO.

Review internal wage-determination policies
The CO does **not** apply to collective bargaining between an employer and a group of employees. However, any union / association that represents employees of more than one employer and which negotiates with more than one employer on wages and other employment terms, could be considered anti-competitive. Unlike some other jurisdictions with anti-competitive laws, the HK CO has not issued a blanket exemption for collective bargaining agreements. Firms need to obtain legal advice on any collective bargaining agreements and make alternative arrangements where the current ones may not be permitted. Also, any wages / commission rates, etc. that are set with reference to an 'industry norm' need to be audited to ensure that the method used to determine the industry norm did not involve anti-competitive activity.

Agreements which restrict hiring
Agreements that restrict hiring from a particular competitor or a group of competitors (e.g., no-poaching agreements) are considered anti-competitive, except when arising out of an M&A transaction and are only in force for a finite period. If such agreements are already in place, firms would need to terminate them in light of the new regulations.

Training and policy formulation
Firms will need to invest heavily in training their HR teams on the implementation of the CO. It is important for HR professionals to be able to:

- Identify sensitive information
- Guard against providing sensitive information to competitors
- Recuse themselves from discussions where competitors may be disclosing sensitive information
- Neither confirm nor deny 'market information' from unauthorized, non-public sources
- Use reliable, third-party sources when referencing market information in documents

The CO is clear that disclosure of competitive information does not have to be in written form or in an official setting – it can be in a social context, over drinks, in an elevator or even over instant messaging services. In addition to price-related information, quantity-related information like hiring strategies or headcount growth plans could also be classified as sensitive information.

Firms should also consider putting in place formal policies and guidelines that are specifically targeted at compliance with the Competition Ordinance.

In Conclusion

The Competition Commission has publicly stated that it will make every effort to partner with trade associations and industry bodies to assist in compliance. The Commission will also inform organizations if they are under investigation and rapid corrective action on the part of the organization will be viewed in a favorable light.

This is the first time that legislation like this will be enacted in Hong Kong and the CO is expected to radically change the way that business is conducted within the Special Administrative Region. As implementation of the CO proceeds, it is expected that the Competition Commission will issue further guidelines and clarifications on the CO. It is important that firms take immediate steps to ensure that they comply with the CO, as non-compliance could result in penalties for individuals and organizations as well as significant reputational damage that could have far-reaching repercussions for the firm.

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