

Corporate Commercial Client Alert

Competition

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Hong Kong Competition Commission publishes Advisory Bulletin on employers' joint negotiations with employee bodies

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On August 29, 2022, the Hong Kong Competition Commission (“**HKCC**”) published an Advisory Bulletin regarding the sharing of competitively sensitive information on employees' employment conditions (such as future wages) among employers in the context of “joint negotiations” (“**Joint Negotiation Advisory Bulletin**”).

A joint negotiation involves multiple employers jointly negotiating as a group with an employee body (e.g., a labor union) to determine employment conditions such as future wage rates or other employment conditions. To facilitate the joint negotiation, the employers would often need to exchange competitively sensitive information among themselves. This may involve, for example, discussing or agreeing to a certain target wage rate to propose to the employee body during the joint negotiation.

As a matter of competition law, employers who compete with each other to hire employees are considered competitors in the relevant labor market (regardless of whether or not they are rivals in the market for the products or services they offer in their respective downstream market). Hence, the sharing of competitively sensitive information regarding employment conditions (such as future wage rates) among employers could be in contravention of the competition law, as the HKCC clearly articulated in an earlier Advisory Bulletin issued on April 9, 2018.¹

However, the HKCC also recognises the purpose of joint negotiations and the potential benefits they may have on improving the employment conditions for workers. As such, in this latest Advisory Bulletin (i.e., the Joint Negotiation Advisory Bulletin), the HKCC outlines a set of guidance on the circumstances under which the exchange of information on employment conditions among employers may be justified in the context of joint negotiations.

Exchange of competitively sensitive information among employers and issuance of future compensation recommendations by an employer group may be justifiable under certain conditions

Notably, the Joint Negotiation Advisory Bulletin clarifies that under certain conditions, the following two specific types of conduct among groups of employers (“**potentially justifiable conduct**”) in the context of joint negotiations may be justifiable under the competition law:

- (i) Issuance of compensation recommendations (including recommendations of specific percentage increases or decreases of compensation) to members of the employer group which incorporate the results of a joint negotiation with an employee body; and

¹ Hong Kong Competition Commission Advisory Bulletin, “*Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment*”, issued on April 9, 2018. Please refer to Deacons' Client Alert on the HKCC's 2018 Advisory Bulletin: <https://www.deacons.com/2018/04/18/competition-law-concerns-in-the-employment-marketplace/>

- (ii) The sharing of information on the employers' respective expectations regarding future compensation in preparation for, or during the course of joint negotiation.

Although outside of the joint negotiation context, a group of employers engaging in either of the above two types of conduct would likely be at risk of contravening the competition law, the Joint Negotiation Advisory Bulletin outlines the following conditions under which the conduct may be deemed justifiable:

- a) There is a need for the relevant group of employers to negotiate jointly with an employee body given the industry characteristics;
- b) The employment conditions would have been worse if the employers were not able to negotiate jointly with the employee body (i.e., the conduct is aimed at improving employment conditions); and
- c) An employee body is a genuine participant in the joint negotiation process.

To mitigate the risk that the potentially justifiable conduct (set out above) may contravene the competition law, the HKCC advises that the group of employers should use an independent third party to collect the information on their respective expectations or intentions regarding the relevant employment conditions (such as future wage rates) from individual members; the independent third party should then aggregate and anonymise the collected data before the information is shared among the members of the employer group.

Conclusion

The Joint Negotiation Advisory Bulletin clarifies that the exchange of information regarding employment conditions among employers, and the issuance of recommendations on specific employment terms in the context of joint negotiations are **not** the HKCC's current enforcement priorities. Further, the HKCC also clarifies that **it has no current intention to pursue an investigation or enforcement action regarding these two types of conduct by an employer group, *provided*** that the purpose of the conduct is to improve or maintain the relevant employment conditions for workers, and that the employee body is a genuine participant in the joint negotiation process. However, any exchange of information regarding employment conditions outside of the above scope should be dealt with caution.

Want to know more?

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