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Competition Compliance Programmes – Note by Hong Kong, China

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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Hong Kong, China

1. Introduction

1. The Hong Kong Competition Commission (**HKCC**) has placed significant emphasis on active promotion of competition compliance since its establishment in 2013. In building and sustaining a robust competition regime, the HKCC considers advocacy and enforcement to have a critical and mutually reinforcing role. Enforcement is crucial to deter anti-competitive conduct, and advocacy is necessary to create a culture of competition law compliance within the business community.

2. This paper sets out the HKCC's experience in promoting and incentivizing competition compliance.

- Part A describes the HKCC's advocacy efforts. This encompasses guidance to businesses to understand how competition law applies to their industry; the use of multi-channel advertising campaigns targeted at the general public; and the development of a training program to enhance the capability of local law firms to advise on competition law and implement competition compliance programmes.
- Part B describes the HKCC's policies designed to increase the adoption of competition compliance programmes. This encompasses two key elements. First, imposing a requirement to implement a compliance programme on leniency applicants, as well as those cooperating with a HKCC investigation. Second, the possibility that a company's compliance activities will be taken into account as a mitigating factor when the Commission considers the penalty to recommend to the Competition Tribunal.
- Part C discusses a number of HKCC's enforcement cases where the implementation of a competition compliance programme was one of the outcomes. Of particular note is the acceptance of commitments which require parties to enhance competition compliance including the appointment of an "Independent Compliance Advisor".

2. Part A –Competition compliance through advocacy

2.1. Advocacy to equip the business community

3. Cross sector competition law in Hong Kong, China is enacted by the Competition Ordinance (**Ordinance**). The Ordinance was brought into full effect in December 2015. but the HKCC's advocacy efforts started two years earlier.

4. The HKCC initiated a compliance project shortly after it was created to educate trade and professional associations to encourage compliance with the Ordinance.¹ Alongside this the HKCC reviewed provisions in trade/professional association rules to identify provisions that had the potential to restrict competition, for example, fee-scales or pricing restrictions. This resulted in several problematic provisions being removed in

¹ This included, for example creation of a thematic brochure : "The Competition Ordinance and Trade Associations" (June 2015)
(https://www.compcomm.hk/en/media/reports_publications/files/CC_TA_Brochure_Eng.pdf)

advance of the law coming into full force. It also gave the HKCC an opportunity to explain to these organizations the implications of competition law.

5. The HKCC's engagement with the business community continues. The HKCC provides regular seminars (now online) to different associations and individual businesses to explain the basic principles of competition and competition law. The focus of these sessions is the "Four Don'ts" – (1) Don't fix prices, (2) Don't restrict output, (3) Don't share markets, (4) Don't engage in bid rigging. This is supplemented by written material and educational videos.² The HKCC publishes and distributes a Compliance Toolkit for SMEs³ and six more detailed guidelines setting out the HKCC's approach to applying the Ordinance and investigating possible contraventions.⁴

2.2. Advocacy to equip the public

6. The HKCC appreciates that it is important not just for the business community to understand the basic principles of competition law, but that the public needs to be engaged as well. Victims of anticompetitive conduct should know when they are being taken advantage of and the ability to make a complaint to the HKCC. In addition, companies should be aware that they will suffer significant reputational harm if found to have engaged in anti-competitive conduct.

7. The HKCC has adopted a multi-pronged approach comprised of initiatives on different outdoor and online platforms. This includes television and radio advertising using popular local actors,⁵ display advertising (including on Hong Kong's iconic trams and underground train stations), and social media.⁶

2.3. Advocacy to equip the legal community

8. Given the young age of the competition law regime in the city, the HKCC recognized there to be a shortage of competition law expertise and experience within Hong Kong's legal community, outside of a handful of international law firms. Keen that advice and assistance on competition law compliance should be made available to the broader business community, the HKCC organised a training series in October 2020 dedicated to lawyers and in-house counsels in Hong Kong who are not competition law specialists. This 4-day training programme, with 8 sessions covering not just competition law knowledge but also the HKCC's investigative processes and various enforcement policies, was attended by over 170 lawyers from local law firms and companies, some of which with little or no experience in advising on competition matters.

² HKCC's most recent educational videos are recorded by a local business school academic providing explainers on key provisions of the Ordinance.

https://www.compcomm.hk/en/media/advertisements/tv_video.html

³ HKCC's SME Compliance Toolkit:

https://www.compcomm.hk/en/media/press/files/CC_SME_Compliance_Toolkit_Eng.pdf

⁴ Guideline on the First Conduct Rule, Guideline on the Second Conduct Rule, Guideline on the Merger Rule, Guideline on Complaints, Guideline on Investigations and Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders

⁵ See for example the "[It's My Call](#)" series of adverts and the "[Conspiracy of Love](#)" film trailer.

⁶ The HKCC's strength in competition advocacy is reflected in being three times winner of the ICN and World Bank Group Competition Advocacy contest.

9. In providing this training the HKCC was able to draw on the expertise of lawyers in international law firms with established competition practices. This was particularly valuable in a session specifically dedicated to advising clients on compliance programs. The HKCC considered that having contributions from the private practice in this training was beneficial as it introduced business perspectives and actual experience in advising clients of the need to implement compliance programs and on the actual design of them.

10. One of the overall goal is to ensure that tools and templates provided by the HKCC on compliance can be properly adapted for use in specific business contexts by companies' trusted advisors. It is important that informed competition law advice is not exclusively available to large companies who procure their legal advice from international law firms.

2.4. Impact of advocacy initiatives on compliance

11. As a result of the HKCC's outreach and advocacy efforts, concrete changes in business practices and culture have been observed in Hong Kong. Upon the full implementation of the Ordinance, there were noticeable price drops in sneakers, electronic goods and other retail items which may have been due to the realisation by some retailers that resale price maintenance may contravene the law. Various trades and businesses, including SMEs, have taken steps to review their trade practices with a view to comply, while many trade associations have changed their behaviour upon HKCC's compliance project. In addition the HKCC's first case in the Competition Tribunal was initiated following a seminar attendee realizing that her organisation might have been the victim of anticompetitive conduct.⁷

3. Part B – Competition compliance through enforcement policies

12. To complement the educational effect of its active advocacy work, the HKCC has incorporated compliance oriented requirements and incentives into its various enforcement policies, from leniency to cooperation and settlement, to the calculation methodologies of the HKCC's recommended fines to the Competition Tribunal.

3.1. Policies that require the introduction of a compliance programme

13. One distinctive feature of the HKCC's leniency policy for undertakings is the express requirement for the leniency applicant to “[...] **continue with, or adopt and implement, at its own cost, a corporate compliance programme to the reasonable satisfaction of the [HKCC]**”.⁸

14. The HKCC's cooperation and settlement policy imposes a similar requirement on undertakings cooperating with the HKCC.⁹

⁷ See *Competition Commission v Nutanix & Ors* [2019] HKCT 2 (CTEA 1/2017) (https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=121925&currpage=T)

⁸ See paragraph 2.15(f) of the HKCC's “Leniency Policy for Undertakings Engaged in Cartel Conduct” (April 2020) (https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Undertakings_E.pdf). In broad terms the leniency policy grants immunity from enforcement proceedings for the first cartel member who reports the cartel to the Commission and cooperates in the bringing of proceedings against other parties to the cartel.

⁹ See paragraph 2.8(e) of the HKCC's “Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct” (June 2019)

15. The HKCC does not consider that the requirement to implement a satisfactory compliance programme acts as a disincentive for companies considering seeking leniency or to cooperate with an investigation. First, putting in place such a programme should be considered a benefit to the organisations rather than a cost. Second, that the adoption of a compliance programme is consistent with other requirements of leniency/cooperation discount such as bringing its cartel conduct to an end and providing full and genuine cooperation.

16. The HKCC is developing its expertise in assessing competition compliance programmes. This has included holding discussions with experts, for example officials from other competition authorities which credit compliance programmes. The HKCC considers any assessment needs to be done on a case-by-case basis. What is “sufficient” for a small company may be inadequate for a larger one. The HKCC hopes in due course to be able to provide more guidance on its approach to assessing compliance programmes.

17. Finally, as noted in paragraph 8 (above) the HKCC is also taking steps to ensure that companies, including SMEs, have access to affordable legal advice to help them develop satisfactory compliance programmes.

3.2. Incentives to companies to put in place competition compliance programmes

18. In recommending fines to the Competition Tribunal, the HKCC takes companies’ efforts on compliance into account and has made this clear in its recently published Policy on Recommended Pecuniary Penalties (**RPP Policy**).¹⁰

19. According to the RPP Policy, the HKCC takes a 4-step approach in calculating recommended fines:

- Step 1 – Determining the base amount
- Step 2 – Making adjustments for aggravating, mitigating and other factors
- Step 3 – Applying the statutory cap
- Step 4 – Applying any cooperation reduction

20. The HKCC takes into account an undertaking’s compliance programme as a mitigating factor under Step 2. Specifically, it is stated in the RPP Policy that the HKCC would consider compliance activities as mitigating steps if an undertaking demonstrates:

*“a clear and unambiguous commitment to competition law compliance throughout the organisation and that steps were taken, appropriate to the size of the business, to achieve this.”*¹¹

21. This mitigating factor has yet to be applied to a specific case. Nonetheless, the HKCC considers any reduction likely to be modest.

(https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Cooperation_Policy_Eng.pdf). In broad terms, the cooperation and settlement policy provides incentives to cooperate with the Commission, for example reductions in the penalty the Commission would otherwise recommend, for undertakings who are unable to benefit from immunity under the leniency policy.

¹⁰ The HKCC’s “Policy on Recommended Pecuniary Penalties” (June 2020)

(https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Policy_on_Recommended_Pecuniary_Penalties_Eng.pdf)

¹¹ See Footnote 13 of the RPP Policy

22. The assessment of this factor will, in part, draw on the HKCC experience developed from assessing the sufficiency of compliance programmes put in place by leniency applicants and cooperators (see paragraph 15 above). As with that assessment, whether a clear and unambiguous commitment to competition law compliance is demonstrated will be considered on a case-by-case basis. Having an “on the paper” compliance programme which is not reflected in how the organisation acts will not, for example, be sufficient.

23. The HKCC is aware of the debate around crediting compliance programmes. It recognizes that companies should be incentivised to implement effective compliance programmes because they can prevent their staff’s participation in anticompetitive conduct or at the very least enable them to detect it or quickly identify it and take advantage of leniency/cooperation. The HKCC also recognizes the potential incentive problems stemming from a perception that compliance programs that have failed to prevent a contravention may be credited. However, given the relative novelty of competition law in Hong Kong, the HKCC is persuaded that crediting genuine and proportionate compliance programmes provides an additional incentive for companies to adopt such programmes. The benefits of more companies evaluating their compliance and, hopefully, taking steps to bring themselves in compliance with the law appears to the HKCC to outweigh the possible negative “cost” of crediting pre-existing compliance programmes.

4. Part C – Competition compliance through enforcement

24. Competition compliance requires active enforcement. In prioritising its cases the HKCC takes into account the importance of encouraging wider compliance.¹² In addition, the HKCC also utilises the enforcement tools available to require the adoption of compliance programmes in appropriate cases.

4.1. Enforcement in the IT sector

25. In January 2020, the HKCC took enforcement action against two IT companies that had engaged in an anti-competitive exchange of commercially sensitive price information, which the HKCC concluded amounted to price fixing. The case related to a single incident and a tender of relatively modest amounts, which led the HKCC to consider that it was appropriate to resolve the matter by way of Infringement Notices,¹³ requiring the IT companies to admit a contravention and to take steps to strengthen their competition compliance programs (as opposed to initiating proceedings before the Tribunal for pecuniary penalty).

26. One of the IT companies accepted the Infringement Notice issued to it and made a commitment to comply with the requirements therein which included the adoption and implementation, at its own cost, an effective competition compliance program. As noted above, the HKCC considers that an effective compliance program should be tailored to the specific business. Given the relatively small size of this IT company’s Hong Kong

¹² See paragraph 3.4 of the HKCC’s Enforcement Policy (www.compcomm.hk/en/legislation_guidance/policy_doc/files/Enforcement_Policy_Eng.pdf).

¹³ Pursuant to section 67(2) of the Ordinance, the HKCC may, instead of bringing proceedings in the Competition Tribunal against a person, issue an Infringement Notice to that person (including natural and legal persons). By issuing an Infringement Notice the HKCC offers not to bring proceedings on condition that the person makes a commitment to comply with the requirements of the notice. This may include to refrain from any specified conduct, or to take any specified action, and/or to admit a contravention of the relevant conduct rule.

operations, the HKCC considered an effective competition compliance program appropriate to its size and functions to include features such as (i) circulation of the Infringement Notice and the HKCC’s training materials to its staff and authorised resellers, (ii) the adoption of a competition compliance policy, in the form of a written statement signed by its directors, indicating their personal commitment to compliance with competition law and that competition law compliance is the responsibility of all staff and a key requirement of its resellers, (iii) attendance of the HKCC’s training sessions by its staff and authorised resellers.

27. The other IT company, however, did not agree to make a commitment to comply with similar requirements, resulting in the HKCC commencing proceedings against it and its director in the Competition Tribunal, seeking remedies which included declarations that this IT company contravened the First Conduct Rule and that its director was a person involved in the contravention, a pecuniary penalty on the company, a director disqualification order against the director, and an order that the IT company adopt certain compliance measures.

28. In November 2020, the Competition Tribunal granted orders sought jointly by the HKCC and the IT company (which had then decided to settle the case), which included the staying of the proceedings on condition that the IT company adopted particular compliance measures.¹⁴ This marks the first instance where the Tribunal has granted an order relating to the adoption of compliance measures, and the measures in question were consistent with those that had been sought by the HKCC in its initial Infringement Notice approach (which was accepted by the other IT company in this case). This is important in that it minimises any potential incentives to “wait out the HKCC” and to refuse to accept compliance related requirements in an Infringement Notice, with the hope that the Competition Tribunal would not make any such orders.

4.2. Enforcement against facilitators of anticompetitive conduct

29. In February 2021 the HKCC issued infringement notices to six hotel groups and a tour counter operator in respect of their facilitation of a cartel arrangement between two competing travel service providers.¹⁵ The seven parties were required to make commitments which included an obligation to take concrete measures to enhance competition compliance.

30. As part of the commitments, five of the hotel groups were required to appoint an “Independent Compliance Advisor” (ICA) at its own cost. The ICA will conduct a compliance review and seek to identify the internal inadequacies of the operations which gave rise to the relevant contravention, and to provide advice and propose rectifying measures to minimise their risk of engaging in similar anti-competitive conduct in future. The ICA is required to produce a written Compliance Report to the HKCC setting out its findings and recommendations from the review, as well as two annual reports setting out the status of the implementation of the recommendations. The remaining two parties have committed to a specific set of compliance oriented measures that are appropriate to their size and business circumstances.

¹⁴ *Competition Commission v. Quantr Limited and Cheung Man Kit*, [2020] HKCT 10

¹⁵ See

https://www.compcomm.hk/en/media/press/files/EN_PR_Infringement_Notices_Tourist_Attraction_Tickets.pdf

31. In requiring the appointment of an ICA the HKCC took into account, amongst other considerations, the size and complexity of the organisations.

5. Looking forward

32. As is apparent from the above, the HKCC plays an active role in preventing contraventions of the Ordinance by taking a robust and comprehensive approach to promoting competition compliance.

33. Going forward, the HKCC will continue its active advocacy efforts with general educational campaigns and targeted thematic follow-ups to significant enforcement outcomes. Consistent with its focus on assisting SMEs to comply with the Ordinance and harnessing its experience with compliance requirements in the enforcement context, the HKCC has indicated that it may, at the appropriate time, consider providing further guidance in this area.

34. The HKCC will also continue to make full use of the compliance related requirements and incentives contained in its enforcement policies and actively pursue their effective implementation in its enforcement outcomes and proceedings before the Tribunal.