

COMPETITION ORDINANCE

Managing risks in the private education sector

May 2016

Hong Kong Competition Ordinance in full force

The Competition Ordinance came into force on 14 December 2015. The ordinance, enforced by the Competition Commission ("the Commission"), prohibits restrictions on competition in Hong Kong through the two rules of conduct:

- (1) The **First Conduct Rule** prohibits businesses from making agreements with one another or acting in concert to harm competition. For example, it prevents competitors from colluding on prices and output, and sharing certain information.
- (2) The **Second Conduct Rule** prohibits businesses with substantial market power from abusing that power by engaging in activities that harm competition. For example, it prevents competitors from engaging in predatory behaviour such as pricing below cost, anti-competitive tying and bundling, and squeezing margins to restrict or distort competition in Hong Kong.

The Commission, through the Competition Tribunal, has the power to prosecute and impose fines of up to 10 percent of local turnover for companies found to have infringed on these Conduct Rules. In addition, the Competition Tribunal also possesses broad powers to disqualify and imprison directors, and impose other penalties on individuals who have been found to infringe on the Conduct Rules.

The Competition Ordinance is comprehensive, covering all sectors of the economy, and applies to nearly all companies including trade associations in Hong Kong. The Commission may assess and investigate these companies and trade associations based on complaints made by the public, the Commission's own research and intelligence gathering, or referrals by other government authorities.

Implications for the private education sector

Schools often collaborate through associations, or informally at occasional gatherings of administrators. Competition investigators understand that in some instances, such collaboration and information exchange (e.g. the sharing of best teaching practices) can enhance the education sector and benefit students. However, when interactions among competitors show evidence of joint decision-making and ultimately harm price competition or the quality and innovation of education services, the Commission is likely to raise red flags. Such anti-competitive practices may take many forms such as jointly:

- Establishing salaries and tuition fees
- Agreeing on the number of new students that schools will enrol
- Setting financial aid criteria, awards and packages
- Developing enrolment application fees and protocols.

Education administrators are urged to understand the implications of sharing information on practices, and should be vigilant that its purpose, timing and level of confidentiality may raise anti-competitive concerns.

Hong Kong's Competition Ordinance is founded on the basis of competition law from the EU, UK and Australian competition jurisdictions. The Commission is now undertaking certain reviews, and has clearly stated that it will focus on precedents from these markets. The following highlights recent case examples from these markets:

Competition cases in the private education sector

Fee-fixing cartel of British high schools	The UK Office of Fair Trading alleged that 50 independent boarding schools in the UK were anti-competitive as they engaged in the “regular and systematic” exchange of confidential information during their future fee setting processes.
Price-fixing cartel by driving schools	The Austrian Cartel Court identified five driving schools who set identical prices for the most popular driving courses. Those driving schools acted as a cartel and breached the Austrian Cartel Act.
Cartel complaint against tertiary admission centres	The Australian National University (ANU) recently lodged a complaint with the Australian Competition and Consumer Commission (ACCC), alleging anti-competitive behaviour within the state-based university admissions centre, which had rejected its application for membership in three states – Western Australia, South Australia and Queensland. ANU alleges this has made it difficult for students to access information about ANU and apply to the university. The case is ongoing.

KPMG China’s Competition Services

KPMG China uses principle economic and econometric techniques which are widely accepted by competition regulators to evaluate cases of monopolisation, abuse of market power, market manipulation and price-fixing. We support our clients by analysing a range of economic issues, from market definition and entry conditions, to single and coordinated firm conduct, all of which are grounded in modern industrial organisation theory and industry expertise.

Our multidisciplinary team comprises economists, statisticians and regulatory specialists who have held key positions within competition commissions and regulatory bodies. We have achieved favourable outcomes for some of the most high-profile competition cases. Clients value our objectivity and rigorous analyses. We understand the stakes involved in competition matters and aim to provide unbiased, clear and robust findings.

Business compliance assessment

Issue	KPMG services
We understand the Competition Ordinance and the implications it has on your business practices. Our team will assist you in complying with the Ordinance and help mitigate the risks of enquiries and challenges by the Commission.	<ul style="list-style-type: none"> - Assess the business impact of competition law for your company - Review business operating practices and contracts, and identify any risks that may initiate a competition challenge - Recommend solutions to mitigate the risk of enquiries and/or challenges

Investigation and enquiry response

Issue	KPMG services
If the Commission launches an enquiry and/or challenge on your business, we apply economically robust techniques that are understood and accepted by the investigators. We will analyse the competitive environment and support you in crafting a defence strategy that is clear, unbiased and aims to achieve a favourable outcome.	<ul style="list-style-type: none"> - Conduct a formal economic assessment of: <ul style="list-style-type: none"> - Market size and participants - Market power and concentration - Benchmark prices and small but significant and non-transitory increases in price (SSNIP) size - Capacity and output - Demand substitution factors - Historical and analogous events

Expert witness testimony

Issue

In cases where competition challenges escalate to hearings in the Competition Tribunal or to a court trial, our network of distinguished expert witnesses from academia, industry and government can provide you with focused subject knowledge to advocate and support your case.

KPMG services

- Create expert rebuttal reports
- Testify on the economic merits of allegations
- Estimate damages

e-Discovery and forensic technology services

Issue

Evidence and data are critical components of the discovery process in competition proceedings. We employ proprietary e-discovery and forensic software to filter and extract relevant evidence to support your defence.

KPMG services

- Conduct forensic and statistical analyses on sales transaction data, customers, price lists, sales agreements and vendor contracts, among others

Selected case studies

Case 1

Corporate readiness assessment for a major Hong Kong retailer

Our economists advised on a company's business practices in relation to its pricing, distribution and sourcing strategy, and also reviewed the client's market position on products that may be considered to be enjoying "a substantial degree of market power". Potential challenges by the Competition Commission were identified and a suite of recommendations made to mitigate these risks.

Case 2

Analysis of alleged abuse of market power

Our economists provided economic advice to a pharmaceuticals firm in the context of an abuse of dominance investigation.

Our role involved analysing market definition issues, and producing a report on the impact of the alleged anti-competitive practices on the client's financial performance and on government healthcare costs. We provided economic advice on the client's response to the regulator's challenge.

Case 3

Analysis of alleged price-fixing among major international airlines

Our economists provided economic and statistical analyses to support a number of North American and European airlines in the context of a price-fixing cartel case brought by competition regulators in several jurisdictions.

We defined the relevant product and geographic market, and analysed the impact of alleged anti-competitive practices relating to the fuel surcharges that were applied to passenger airline tickets.

Contact us

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