

### Competition concerns regarding joint negotiations in the labour sector

#### 1. Background

- 1.1 In the course of its investigatory work, the Competition Commission (“**Commission**”) has encountered situations where groups or associations of employer undertakings (“**group(s) of employers**”) have engaged in conduct in the context of voluntary negotiations with employees represented by employee bodies<sup>1</sup> (“**joint negotiations**”) which may give rise to competition concerns under the Competition Ordinance (Cap. 619) (“**Ordinance**”).
- 1.2 With this Advisory Bulletin, the Commission aims to increase awareness of how the Ordinance applies to conduct in the context of joint negotiations (section 2 below). Further, this Advisory Bulletin clarifies that the Commission has no current intention to pursue an investigation or enforcement action in respect of conduct in the context of joint negotiations provided that certain conditions are met (section 3 below).
- 1.3 This Advisory Bulletin should be read in conjunction with the Commission’s Guideline on the First Conduct Rule (“**FCR Guideline**”) and the Commission’s previous advisory publications relating to trade associations and employment.<sup>2</sup>

#### 2. Application of the Ordinance to joint negotiations

- 2.1 Joint negotiations refer to negotiations between employee bodies and groups of employers to determine working conditions and the terms of employment. Employee bodies represent the joint interests of employees and may be able to achieve more in negotiations with employers than their members would individually. Joint negotiations can therefore result in improved employment conditions for employees, such as better wages and contractual standards.
- 2.2 In many jurisdictions joint negotiations falls outside the scope of competition law. However, the Ordinance does not contain any specific provisions or exemptions relating to

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<sup>1</sup> This includes trade unions.

<sup>2</sup> Competition Commission Advisory Bulletin, [Competition concerns regarding certain provisions in the Codes of Conduct of the Hong Kong Institute of Architects and the Hong Kong Institute of Planners](#), issued on 28 November 2016 (“**2016 Trade Associations Advisory Bulletin**”); 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 9 April 2018 (“**2018 Employment Advisory Bulletin**”).

joint negotiations. Its conduct rules apply to behaviour engaged in by undertakings, including employers, groups of employers and self-employed individuals, in the context of joint negotiations.

- 2.3 The First Conduct Rule is of particular relevance because the process of joint negotiations and its results may involve agreements or the sharing of competitively sensitive information between competitors in relation to compensation or other employment/engagement conditions on which employers compete<sup>3</sup> (“**relevant employment conditions**”) that may give rise to competition concerns.

#### Undertakings

- 2.4 The conduct rules apply to undertakings, which are entities and natural persons engaged in economic activity. The following guidance on the concept of an undertaking in the labour context may be noted.

#### *Employers*

- 2.5 An employer will be considered to be an undertaking if it is engaged in economic activities. The term economic activity is generally understood to refer to any activity consisting of offering products in a market regardless of whether the activity is intended to earn a profit.<sup>4</sup>

#### *Employees*

- 2.6 The Commission does not consider employees to be undertakings.<sup>5</sup> As such, employees may engage in discussions or arrangements in relation to relevant employment conditions (whether with one or more employer undertakings) without risk of contravening the First Conduct Rule.

#### *Negotiations between employees and a single employer*

- 2.7 An employer and its employees are treated as a single economic unit. As such, negotiations between the employer and its employees over relevant employment conditions would fall outside the First Conduct Rule.<sup>6</sup>

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<sup>3</sup> The employment/engagement conditions (other than compensation) on which employers may compete may vary from industry to industry. Depending on the circumstances, such conditions may include, but are not limited to, leave entitlements, employee benefits, working hours, training and continued education.

<sup>4</sup> FCR Guideline, para. 2.3.

<sup>5</sup> FCR Guideline, para. 2.18.

<sup>6</sup> FCR Guideline, para. 2.18.

*Employee bodies*

- 2.8 Where an employee body represents employees in negotiations with an employer on relevant employment conditions, it is not engaging in economic activity and thus is not an undertaking.<sup>7</sup>

*Self-employed individuals*

- 2.9 Self-employed individuals offering commercial services are generally considered to be undertakings. Under limited circumstances, a self-employed individual may be considered equivalent to an employee for the purposes of the Ordinance.<sup>8</sup>

Conduct

- 2.10 Joint negotiations may involve negotiations between groups of employers and one or more employee bodies, and this includes industry-wide negotiations.
- 2.11 Employer undertakings which compete with each other to hire employees are competitors in the relevant labour market, regardless of whether or not they compete in the provision of the same products or services (i.e. the downstream market).<sup>9</sup>
- 2.12 In the context of joint negotiations, employer undertakings sometimes discuss and/or agree upon certain arrangements concerning relevant employment conditions for their existing or potential employees. This may amount to an agreement or concerted practice between or involving competitors for the purposes of the First Conduct Rule. Similarly, any decisions of groups of employers taken in the context of joint negotiations may amount to a decision of an association of undertakings.
- 2.13 Where those agreements, concerted practices or decisions relate to relevant employment conditions (whether for existing or potential employees or both), this may give rise to competition concerns and be at risk of contravening the First Conduct Rule. Such conduct could harm competition and consumers and negatively impact employees.

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<sup>7</sup> FCR Guideline, para. 2.19.

<sup>8</sup> FCR Guideline, paras. 2.20-2.21.

<sup>9</sup> 2018 Employment Advisory Bulletin, para 2.3. The Commission may choose to prioritise a matter if the undertakings are also competitors or potential competitors in the downstream market.

- 2.14 In the course of its investigatory work, the Commission has encountered conduct by undertakings in the context of joint negotiations that may give rise to concerns under the Ordinance, such as:
- (i) members of groups of employers sharing competitively sensitive information as regards relevant employment conditions with each other when preparing for, or conducting, industry-wide joint negotiations through their employers' association; and
  - (ii) groups of employers issuing compensation recommendations to their members after engaging in an industry-wide joint negotiation process with employee bodies.
- 2.15 Where members of groups of employers share information amongst themselves about their intentions as regards relevant employment conditions, this may be considered a concerted practice with the object of harming competition in contravention of the First Conduct Rule.<sup>10</sup>
- 2.16 However, the risk of such a contravention may be mitigated where the group of employers uses an independent third party to collect the information on intentions as regards relevant employment conditions from individual members, and that third party then aggregates and anonymises the data before it is shared among the members of the group of employers.
- 2.17 Furthermore, to the extent that members of groups of employers are competitors for the same labour, compensation recommendations can be considered akin to recommended fee scales, albeit applying to inputs rather than outputs.
- 2.18 Recommended fee scales and “reference” prices of trade and professional associations are decisions of associations of undertakings which the Commission would likely consider as having the object of harming competition.<sup>11</sup> A recommended compensation announcement by a group of employers could thus be considered an anti-competitive decision by its members in contravention of the First Conduct Rule. For the avoidance of doubt, a recommendation to increase or decrease compensation by a certain percentage, without fixing the level of the compensation itself, would also be considered to be anti-competitive.

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<sup>10</sup> FCR Guideline, paras. 6.10 and 6.18, and 2018 Employment Advisory Bulletin, paras. 3.4-3.5.

<sup>11</sup> FCR Guideline, para. 2.36.

### 3. Commission's enforcement priorities regarding joint negotiations

- 3.1 Under its Enforcement Policy, the Commission generally intends to direct its resources to the investigation and enforcement of matters that provide the greatest overall benefit to competition and consumers in Hong Kong.<sup>12</sup> The Commission believes that its enforcement function should target anti-competitive conduct that is clearly harmful to competition and consumers.<sup>13</sup>
- 3.2 Having regard to the above, the Commission has no current intention to pursue an investigation or enforcement action in respect of conduct<sup>14</sup> by undertakings in the context of joint negotiations provided that the need for relevant employers to negotiate jointly with employee bodies is justified given the industry characteristics and:
- (i) the conduct is, both in nature and purpose, aimed at improving relevant employment conditions;<sup>15</sup> and
  - (ii) an employee body is a genuine participant in the joint negotiation process.
- 3.3 The Commission considers that paragraph 3.2 would apply to:
- (i) compensation recommendations, including recommendations to increase or decrease compensation by a particular percentage, which incorporate the results of joint negotiations with employee bodies and are issued by groups of employers to their members; or
  - (ii) sharing of expectations about future compensation between employers in preparation for, or in the course of, joint negotiations, if necessary for that purpose and where possible complying with the process described in paragraph 2.16 above.
- 3.4 The Commission reserves its right to revisit its position on enforcement intentions with respect to joint negotiations as set out in paragraph 3.2.

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<sup>12</sup> Enforcement Policy, para. 3.2.

<sup>13</sup> Enforcement Policy, para. 3.4.

<sup>14</sup> For these purposes, conduct refers to making or giving effect to an agreement, engaging in a concerted practice or, as a member of an association of undertakings, giving effect to a decision of an association of undertakings.

<sup>15</sup> "improving relevant employment conditions" in this context means relative to the situation had the employers not negotiated jointly. In certain circumstances maintaining the existing conditions may amount to an improvement if, absent joint negotiation, such conditions would have deteriorated.

#### 4. Further actions

- 4.1 Any conduct that is not in accordance with the conditions mentioned in paragraph 3.2 above and gives rise to competition concerns may be subject to an investigation or enforcement action by the Commission. The Commission encourages employers and groups of employers to actively review their approach to joint negotiations in accordance with the guidance provided in this Advisory Bulletin to ensure compliance with the Ordinance.
- 4.2 Parties with information about anti-competitive behaviour by undertakings in the context of joint negotiations are encouraged to report this by contacting the Commission by telephone (3462 2118), email ([complaints@compcomm.hk](mailto:complaints@compcomm.hk)), post (Competition Commission, 19/F, South Island Place, 8 Wong Chuk Hang Road, Wong Chuk Hang, Hong Kong), completing an [online form](#) on the Commission's website or visiting the Commission's office in person (by appointment only). Where parties believe they may have contravened the Ordinance, they may benefit from lenient treatment if they come forward and cooperate with the Commission in its investigations.

## Questions and Answers

**Question 1:** I work for a company which is a member of an employers' association. At a recent meeting, the representative of another company shared with me that they are intending to lower compensation for their IT employees by 10%. He asked me whether we would consider doing the same for our IT employees and mentioned that this would not be an issue under the Ordinance because our companies are not competitors (our companies are active in entirely different sectors) and are both members of the same employers' association. Can I have this conversation with him?

**Answer 1:** Even if your respective companies are not competitors in the downstream market, you are competitors on the market for the procurement of labour. You should therefore not make any agreements or share any competitively sensitive information, such as the actual or intended level of compensation for employees. Being a member of the same employers' association does not exempt undertakings from the application of the Ordinance. In this scenario, you should inform the representative of the company that you do not want to receive, and will not be sharing, competitively sensitive information as this may be a contravention of the Ordinance, and consider contacting the Commission.

**Question 2:** I am self-employed and work as a freelancer for different clients. I am a member of an association which represents self-employed individuals in my field and negotiates on conditions of engagement. Does the Ordinance apply to me and the association?

**Answer 2:** In general, self-employed individuals are considered undertakings and thus the Ordinance applies. Associations of self-employed individuals are considered associations of undertakings. In some limited cases self-employed individuals will be considered as employees, and thus outside the scope of the Ordinance.

**Question 3:** I work for a company which is a member of an association that represents employers of a certain profession. Every year the association conducts a survey among its members on their intended compensation and compensation adjustments for the upcoming year. Following the survey, the association holds a meeting with its members to decide on the level of compensation increases for the profession. This facilitates subsequent discussions of the association with the employee bodies for the purpose of joint negotiations. Based on the consensus reached between the association and employee bodies on an increase of compensation, the association issues compensation recommendations to its members, including the company I work for. Does this cause any issues under the Ordinance?

**Answer 3:** Through the survey conducted by the association, members are exchanging their future intentions regarding compensation increases for employees privately amongst each other. As the members of the association are competitors for the labour of the professionals concerned, this may amount to an exchange of competitively sensitive information between competitors, which is considered to contravene the First Conduct Rule. The risk of such a contravention may be mitigated where the group of employers uses an independent third party to collect the information on intentions as regards employee compensation from individual members, and that third party then

aggregates and anonymises the data before it is shared among the members of the group of employers.

Likewise, the association's compensation recommendations can be considered akin to recommended fee schedules, but applying to inputs rather than outputs. Recommended fee scales and "reference" prices of trade and professional associations are decisions of associations of undertakings which the Commission would likely consider as having the object of harming competition. The association's compensation survey and recommended compensation announcements to its members could thus be considered anti-competitive decisions by members of an association in contravention of the First Conduct Rule.

However, as the sharing of expectations about future compensation between employers takes place in preparation for industry-wide joint negotiations and the compensation recommendations issued by the association to its members incorporate the results of joint negotiations with employee bodies, the Commission has no current intention to pursue an investigation or enforcement action in respect of such conduct provided that the conditions in paragraph 3.2 above are satisfied.

**Question 4:** I am a HR manager and the company I work for is a member of an association of employers. There is an upcoming survey for members to share their organisation's work arrangements for staff members during tropical cyclones, rainstorm warnings and extreme weather conditions. My company has been asked to participate. Will our participation raise issues under the Ordinance?

**Answer 4:** Through the survey conducted by the association, members are exchanging information regarding their organisation's internal procedures and policies. However, an organisation's work arrangements for staff members during tropical cyclones, rainstorm warnings and extreme weather conditions would not be considered competitively sensitive information in relation to employment/engagement conditions on which employers compete. As such, it would not fall into the category of "relevant employment conditions" identified as giving rise to competition concerns in this Advisory Bulletin. In addition, the exchange of such information has the potential to improve public safety and the safety of employees. On both bases your company's participation in this survey is unlikely to raise issues under the Ordinance.

**Question 5:** My company is considering becoming a member of a particular association of employers. I met with the membership committee last week to learn more about the association and the benefits of membership. During the meeting the representatives explained that the association published compensation recommendations on an annual basis which members were encouraged to follow. I understand that there is no employee body in this particular sector and that the compensation recommendations are discussed and arrived at during a meeting attended by members only. Does this cause any issues under the Ordinance?

**Answer 5:** The association's compensation recommendations can be considered akin to recommended fee schedules, but applying to inputs rather than outputs. Recommended fee scales and "reference" prices of trade and professional associations are decisions of associations of



undertakings which the Commission would likely consider as having the object of harming competition. The association's compensation survey and recommended compensation announcements to its members could thus be considered anti-competitive decisions by members of an association in contravention of the First Conduct Rule.

In this instance, the sharing of expectations about future compensation between employers is not undertaken in the context of industry-wide joint negotiations and the compensation recommendations issued by the association to its members do not incorporate the results of joint negotiations with employee bodies. As the conditions in paragraph 3.2 above are not satisfied, such conduct would be considered as having the object of harming competition in contravention of the First Conduct Rule. The Commission would take the appropriate enforcement action in accordance with the Ordinance.

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