

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2009 – 2010

(English version)

1. Introduction

The Competition Policy Advisory Group (COMPAG), chaired by the Financial Secretary, was established in December 1997 to provide a dedicated forum for examining, reviewing and advising on competition-related issues. COMPAG is committed to promoting the Government's policy on enhancing economic efficiency and the free flow of trade through sustainable competition in Hong Kong, thereby bringing benefits to both the business sector and consumers.

2. In May 1998, COMPAG issued the Statement on Competition Policy (the Statement), which sets out the objective of the Government's competition policy. The Statement laid down the overarching policy framework to promote competition across sectors. In 2003, COMPAG published a set of guidelines to supplement the Statement and to advise businesses on the types of conduct that could be seen as anti-competitive.

3. To ensure that our competition policy is appropriate for Hong Kong and in tandem with latest developments, the Competition Policy Review Committee (CPRC) was appointed by COMPAG in June 2005 to review and to make recommendations on the future direction for competition policy in Hong Kong. In its report submitted to COMPAG in June 2006, CPRC recommended that the Government introduces a new cross-sector competition law.

4. In November 2006, the Government launched a three-month public consultation to gauge public views on the introduction of a cross-sector competition law. Public feedback showed a high level of support, although there were some concerns expressed by the business sector on the potential impact of the new law on business, especially small and medium enterprises (SMEs). In view of these concerns, in May 2008 the Government conducted another round of public consultation on the detailed proposals for the competition law, including key elements such as the regulatory structure, conduct to be prohibited, penalties that would apply for infringing the law, the right to take private legal action, as well as the criteria and mechanisms for granting exemptions and exclusions from the application of the competition law. Over 170 submissions were received. An overwhelming majority expressed general support for the law and the proposed detailed

proposals.

5. Following the 2008 public consultation, the Government prepared the draft competition law, with a view to fulfilling the Government's policy commitment to introduce the Competition Bill within the 2009-2010 legislative session. On 14 July 2010, the Competition Bill was introduced into the Legislative Council. **Chapter 2** sets out the key elements of the Bill.

6. During the year, COMPAG continues to review competition-related complaints with the support of the relevant bureaux or departments. The cases concluded in 2009-2010 and the current positions of outstanding cases are summarised in **Chapter 3**.

2. Key elements of the Competition Bill

7. The Government presented the Competition Bill (the Bill) to the Legislative Council for first and second readings on 14 July 2010. The Bill, being a milestone in Hong Kong's competition policy, is the result of extensive consultation over the years and has been crafted to reflect the aspiration of the society for a cross-sector competition law which takes into account the circumstances of Hong Kong. The full version of the Bill, together with the associated Legislative Council Brief, can be accessed from the website of the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau (<http://www.cedb.gov.hk/citb>).

8. The Bill has the following key elements.

(A) Scope

9. The objective of the Bill is to prohibit and deter 'undertakings' of different sizes in all sectors from adopting abusive or other anti-competitive practices which have the object or effect of preventing, restricting or distorting competition in Hong Kong. An 'undertaking' is defined as any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes a natural person engaged in economic activity. Each conduct of an entity has to be considered on its own merits, to decide whether it amounts to an 'economic activity' and thus falls within the scope of the Bill.

(B) General prohibitions of the new law

10. The Bill sets out the competition rules prohibiting anti-competitive conduct in three major areas, namely agreements, decisions and concerted practices (the first conduct rule); the abuse of a substantial degree of market power in a market (the second conduct rule); and mergers or acquisitions of carrier licensees under the Telecommunications Ordinance that have, or are likely to have the effect of substantially lessening competition in Hong Kong (the merger rule). To enhance the certainty and clarity of the law, the Bill will require the Competition Commission to draw up regulatory guidelines on the interpretation and implementation of the competition rules.

(C) Institutional framework

11. The Bill provides for a judicial enforcement model. An independent statutory Competition Commission (the Commission) will be established to investigate and bring public enforcement action in respect of anti-competitive conduct. It will also be vested with the powers to accept commitment from, or issue an infringement notice bearing a sum of payment up to \$10 million to, a person to take or refrain from taking certain actions to address the Commission's concerns about a possible contravention of the rules in exchange for cessation of investigation and/or proceedings against the person. The Commission will be led by a chairperson and comprise not less than five members (including the chairperson) appointed by the Chief Executive.

12. A Competition Tribunal (Tribunal) will be set up within the Judiciary as a superior court of record to hear and adjudicate on competition cases brought by the Commission and private actions, and is empowered to apply a full range of remedies for contravention of a competition rule, including pecuniary penalties not exceeding 10% of the turnover (including global turnover) for the year in which the contravention occurs; award of damages to aggrieved parties; interim injunction orders; termination or variation of an agreement, etc. The Tribunal may also review certain determinations of the Commission. Every judge of the Court of First Instance will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. The Chief Executive will, on the recommendations of the Judicial Officers Recommendation Commission, appoint one of the members of the Tribunal to be the President of the Tribunal.

13. To reconcile the Bill with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the Bill provides that the Broadcasting Authority (BA) and the Telecommunications Authority will have concurrent jurisdiction with the Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in the broadcasting and telecommunications sectors, while their existing adjudicative function will be transferred to the Tribunal.

(D) Private action

14. In addition to public enforcement by the Commission, the Bill also

provides for private actions which could either follow on from a determination of the court, or could be stand-alone actions seeking a judgment on particular conduct and remedies.

(E) Exclusions and exemptions

15. Following international best practices, the Commission is empowered to decide whether or not an agreement or conduct is excluded or exempt from the conduct rules on grounds that the agreement enhances overall economic efficiency; the undertaking concerned is entrusted with the operation of services of general economic interest; or the agreement is made to comply with a legal requirement. The Chief Executive in Council (CE in Council) is also empowered to make orders to exempt agreements or conduct if there are exceptional and compelling reasons of public policy to do so, or if exemptions are required to avoid a conflict with international obligations.

(F) Application to the Government and statutory bodies

16. As activities of the public sector are almost invariably non-economic in nature falling outside the scope of the Bill, the Bill will not bind the Government. Certain parts of the Bill (i.e. Part 2 (Conduct Rules), Part 4 (Enforcement powers of the Commission), Part 6 (Enforcement before Tribunal) and Schedule 7 (Mergers) will not apply to statutory bodies or their specified activities, unless the CE in Council determines otherwise by way of regulations. The determinations will be made having regard to the following criteria set out in the Bill –

- (a) the statutory body is engaging in an economic activity in direct competition with another undertaking;
- (b) the economic activity of the statutory body is affecting the economic efficiency of a specific market;
- (c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and
- (d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

3. Cases Reviewed by COMPAG

17. The following cases of alleged anti-competitive conduct were brought to the attention of COMPAG during the period under review. We have attempted to classify them, where possible, in accordance with the types of anti-competitive conduct identified in the COMPAG guidelines. We have also indicated the extent to which the complaints were found by COMPAG to be substantiated following investigation by the relevant bureau or department.

A) Collusion, Price-fixing and Market Allocation

Case 1: Alleged anti-competitive conduct of approved suppliers of bituminous materials (not substantiated)

18. In January 2010, the COMPAG Secretariat received a complaint from a member of the public alleging that four approved suppliers of bituminous materials had engaged in anti-competitive conduct. The complainant alleged that –

- (a) the four approved suppliers lodged unreasonable complaints to government departments with a view to restricting competition from another approved supplier of bituminous materials;
- (b) other suppliers of bituminous materials were unable to enter into the market of supplying bituminous materials for public works in Hong Kong; and
- (c) the four approved suppliers had engaged in market allocation and price fixing.

19. The case was referred to the Development Bureau (DevB) for investigation. DevB undertook the investigation with the assistance of Highways Department (HyD) and Lands Department (LandsD). Given the limited information provided in the complaint, HyD requested the complainant to provide further information but to no avail. Having examined the allegations made in the complaint on the basis of the available

information, DevB found no firm evidence substantiating the allegations. Findings of DevB's investigation are as follows:

- (a) Since the complainant did not provide further information, the allegation of unreasonable complaints lodged by the four approved suppliers to government departments was examined based on the information provided by HyD and LandsD. Having reviewed all available information including the judicial review applications mentioned by the complainant in his complaint, DevB considered that there was no firm evidence substantiating the allegation.
- (b) In regard to the allegation that other suppliers of bituminous materials were unable to enter into the local market, DevB has adopted a long-established, fair and transparent mechanism to manage public works contractors. There are two approved lists of public works contractors, namely the List of Approved Contractors for Public Works and the List of Approved Suppliers of Materials and Specialist Contractors for Public Works. Applicants are required to meet the financial, technical and management criteria for admission onto the approved lists for the purpose of carrying out government contracts. As a matter of fact, another approved supplier was admitted onto the List of Approved Suppliers of Materials and Specialist Contractors for Public Works in the category of "Supply of Bituminous Pavement Materials and Construction of Special Bituminous Surfacing" in March 2007. DevB thus considered the allegation not substantiated.
- (c) Having conducted a geographical analysis of the approved suppliers of bituminous materials engaged in HyD's maintenance contracts over the past nine years and a comparison between the wholesale price of bituminous materials and the prices of supplying and laying bituminous materials in HyD's maintenance contracts over the past few years, DevB considered that there was no firm evidence substantiating the allegation of market allocation and price fixing.

20. COMPAG reviewed the above findings and accepted DevB's conclusion that **the complaint was not substantiated**. Notwithstanding, COMPAG noted that the conclusion was premised on lack of conclusive

evidence that might be attributed to the lack of investigative powers. Hence, COMPAG directed DevB to advise the four approved suppliers being alleged of anti-competitive behaviour of the prohibitions, as well as the investigatory and prosecutorial powers of the Competition Commission under the Competition Bill introduced into the Legislative Council in July 2010, and to encourage voluntary compliance with the Government's competition policy.

Case 2: Alleged anti-competitive conduct in the tourism sector (under investigation)

21. In August 2010, the COMPAG Secretariat received a competition-related complaint concerning the tourism sector. The complainant, who worked for a travel agent, alleged that a member-based tourism association that specialised in one regional market engaged in anti-competitive conduct in collaboration with other players in the trade.

22. The case was referred to the Tourism Commission for investigation. Outcomes of the investigation will be considered by COMPAG in due course.

B) Abuse of Dominant Market Position

Case 3: Alleged anti-competitive conduct in relation to the service termination practices of a Pay TV licensee (under investigation)

23. Section 13(1) of the Broadcasting Ordinance ("BO") (Cap. 562) prohibits a television programme service licensee from engaging in conduct which, in the opinion of the BA, has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market. Section 14(1) of the BO prohibits a television programme service licensee in a dominant position in a television programme service market from abusing its position. Section 11A(1) of the Broadcasting Authority Ordinance ("BAO") (Cap. 391) provides that a person may make a complaint in writing to the BA that a licensee has contravened section 13(1) or 14(1) of the BO.

24. In May 2008, the BA received a complaint from a domestic pay TV licensee ("Licensee A") against another domestic pay TV licensee

("Licensee B"). It was alleged that Licensee B's practices, which prevented its subscribers from terminating their service arrangements and transferring to other pay TV services had the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market, in breach of sections 13 and/or 14 of the BO. The BA had processed the complaint in accordance with the BAO and the established procedures.

25. In October 2008, the BA completed its preliminary enquiry into the case and decided that Licensee B had not contravened sections 13 and /or 14 of the BO. In November, Licensee A appealed against the decision of the BA. The appeal is being processed in accordance with the procedures laid down under the BO.

Case 4: Alleged anti-competitive practices engaged by a domestic free TV licensee (under investigation)

26. In December 2009, the BA received a complaint from a domestic free TV licensee (Licensee A) claiming that another domestic free TV licensee (Licensee B) had been abusing its dominant position by allegedly engaging in various practices purported to be anti-competitive. The alleged practices included imposing unfair restrictions on artistes and offering a higher discount to advertisers who undertook not to place advertisements in Licensee A. The BA also received a number of general complaints from members of the public in relation to unfair restrictions imposed on artistes by Licensee B.

27. The BA is processing the complaints in accordance with the BAO and the established procedures and has sought further information from both licensees. The BA is reviewing the information received with the assistance of external consultants to consider if there are sufficient grounds to initiate an investigation.

Case 5: Alleged anti-competitive conduct of Hong Kong Trade Development Council (TDC) in the exhibition industry (under investigation)

28. In November 2009, a private trade organiser made a complaint to the COMPAG Secretariat about TDC's engagement in anti-competitive

behaviour when seeking to develop its exhibition business. The complainant further considers that the growing market share of TDC has been due to –

- (a) unfair advantages of TDC, including its statutory powers, public funding and policy support from the Government and insider information from the Government; and
- (b) abuse of dominant market power, including copying trade shows of private organisers.

29. The case is under discussion with the complainant. Outcomes of the investigation will be considered by COMPAG in due course.

Case 6: Alleged anti-competitive conduct of an owners' corporation (under investigation)

30. In May 2010, COMPAG Secretariat received a complaint from a resident of a property in Happy Valley. The complainant alleged that his owners' corporation (OC) was engaging in anti-competitive behaviour by tying the property's security and guarding services with cleaning and garbage disposal services, which were provided by the same property management company (PMC) or companies under the management of a single PMC. The complaint has been referred to the Home Affairs Department for investigation, the results of which would be submitted to COMPAG in due course.

C) Government Policies and Practices

Case 7: Complaint about EMSD's mishandling of tender relating to the implementation of Automatic Vehicle Clearance Support System at Land Boundary Control Points for the Customs and Excise Department (not substantiated)

31. In June 2009, the Electrical and Mechanical Services Department (EMSD) invited tenders for the "Supply and Installation of an Automatic Vehicle Clearance Support System at Land Boundary Control Points" for the Customs and Excise Department. Four tender proposals were received. After assessment, the contract was awarded in August 2009 to a tenderer

whose tender had obtained the highest combined price and technical score.

32. In September 2009, a complaint addressed to the Director of Electrical and Mechanical Services (DEMS) and the COMPAG Secretariat was received. The complainant was one of the tenderers for the subject tender. The complainant alleges that:

- (a) the tendering exercise was an unfair competition as some tender information might not have been properly disclosed to all tenderers and there were serious ambiguities in the tender documents;
- (b) there was maladministration of tender evaluation as EMSD might not have taken into consideration the pre-tender estimate/prevailing market price in assessing the tender price, and DEMS had not exercised his right to reject a tender with an unreasonably low price; and
- (c) the successful tenderer was practising predatory pricing to oust competitors.

33. COMPAG Secretariat referred the complaint to the Development Bureau (DevB) for investigation. DevB's investigation revealed that:

- (a) there was no evidence of unfair competition in the subject tendering exercise. All tenderers had been provided with the same information for tendering purposes and the tender documents were in order. All changes in the tender requirements during the tender period had been communicated to all tenderers through the issue of tender addendum;
- (b) there was no evidence of maladministration of tender evaluation. In assessing the tenders, EMSD had made reference to the pre-tender estimate and prevailing market price and was convinced that the awarded tender price was not unreasonably low; and
- (c) there was also no evidence that the successful tenderer was practising predatory pricing to oust competitors. By offering a special discount, the successful tenderer was competing on price. The act was neither predatory nor anti-competitive in nature.

34. Based on the above findings, COMPAG endorsed the conclusion of DevB that **the allegations of the complainant were unsubstantiated.**