

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2010 – 2011
(English version)

1. Introduction

The Competition Policy Advisory Group (“COMPAG”) was established under the chairmanship of the Financial Secretary 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”), setting out the objective of the Government’s competition policy. The Statement lays down the overarching policy framework to promote competition across sectors. In 2003, COMPAG published a set of guidelines to supplement the Statement, and advise businesses on the types of conduct that could be seen as anti-competitive.

3. Noting the continuing interest in the community in the issue of whether or not a competition law should be introduced into Hong Kong, COMPAG appointed in June 2005 the Competition Policy Review Committee (“CPRC”) to review, and make recommendations on the future direction for competition policy in Hong Kong. In its report submitted to COMPAG in June 2006, CPRC recommended that a new cross-sector competition law be introduced.

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 the business community was concerned about the potential impact of the new law on business operations, especially those of small and medium enterprises (“SMEs”). In view of these concerns, the Government conducted in May 2008 another round of public consultation on the detailed proposals for the competition law. An overwhelming majority expressed general support for the law and the detailed proposals in the consultation paper.

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 (“the Bill”) within the

2009-2010 legislative session. On 14 July 2010, the Bill was introduced into the Legislative Council. **Chapter 2** sets out the progress of the Bill.

6. COMPAG seeks to foster competition in both the public and private sectors in Hong Kong. To this end, it aims to identify areas where competition is being impeded, and also reviews areas in which there is scope for competition to be enhanced. A new pro-competition initiative that has been taken in the year 2010-11 is outlined in **Chapter 3** of this report.

7. During the year, COMPAG continues to review competition-related complaints, and refer complaints to the relevant bureaux or departments for follow-up action in accordance with established policy. The cases concluded in 2010-2011 and the current positions of outstanding cases are summarised in **Chapter 4**.

2. Update on the Progress of the Competition Bill

8. In July 2010, the Government introduced the Bill into the Legislative Council ("LegCo"). The Bill aims to deter and prohibit undertakings in all sectors from carrying out abusive or other anti-competitive conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. The full version of the Bill 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>).

9. While there is broad consensus and wide support within the community that a cross-sector competition law should be introduced, a number of concerns have been raised by the stakeholders, in particular the business sector, over some of the provisions of the Bill. These concerns centered around the following main areas –

- (a) the general prohibition for anti-competitive agreements, i.e. the first conduct rule in the Bill, is difficult for businesses, especially SMEs, to understand and comply with;
- (b) the "de minimis" arrangements, which provide for exclusion of agreements below certain thresholds on the grounds that such agreements do not normally have an appreciable impact on competition, should be laid down in the law to give more certainty for SMEs;
- (c) the cap on pecuniary penalty at 10% of the global turnover of the infringing undertaking for each year in which the contravention has occurred is too severe;
- (d) large companies may use the standalone right of private action to harass SMEs;
- (e) the payment requirement of infringement notice that may be imposed by the Competition Commission may place a significant burden on SMEs; and

- (f) the application of the first conduct rule (in respect of anti-competitive agreements) and the second conduct rule (in respect of abuse of a substantial degree of market power) to merger activities in the non-telecommunications sectors runs contrary to the stated policy that these merger activities themselves will not be regulated under the Bill.

10. The Government accepted that there was a need to address these issues raised by the Bills Committee and the business community about the potential implications of the Bill, particularly on SMEs. Taking into account the concerns of the business community in general and those of SMEs, the general public aspiration for an effective cross-sector competition law and the actual circumstances of Hong Kong, the Government proposed in October 2011 to the Bills Committee the following amendments to the Bill -

- (a) differentiating between hardcore and non-hardcore anti-competitive agreements, and adopting a lighter enforcement approach for the latter. Hardcore anti-competitive agreements include those relating to price-fixing, bid-rigging, market allocation and output control;
- (b) setting out the “de minimis” arrangements in the Bill;
- (c) revising the cap on pecuniary penalty to 10% of the local turnover of the infringing undertaking for up to three years;
- (d) removing the right to take standalone private action under the Bill; and
- (e) removing the payment requirement of infringement notice;
- (f) carving out merger activities from the application of the conduct rules to give effect to the Government’s stated policy intent of not introducing cross-sector merger regulation at this stage, except for the telecommunications sector.

11. The Government will continue to work closely with LegCo on its scrutiny of the Bill, and will strive to have the Bill enacted within the 2011-12 legislative session.

3. New Initiative

12. COMPAG has noted the following initiative aimed at enhancing competition and eliminating anti-competitive behaviour that has been taken by the Telecommunications Authority ("TA") during the period under review.

Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance

13. To ensure fair and effective competition in Hong Kong's fully liberalised telecommunications market, the TA published the "Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance" in December 2010 after three rounds of public consultation. The competition provisions covered are section 7K on anti-competitive practices, section 7L on abuse of a dominant position and section 7N on non-discrimination under the Telecommunications Ordinance ("TO") (Cap. 106). The Guidelines explain how the TA is likely to interpret and apply the competition provisions, and elaborate on the types of conduct that are prohibited under the provisions, with a view to ensuring a level playing field such that big and small players in the market will compete fairly on the basis of efficiency.

14. After the commencement of the cross-sector competition law, sections 7K, 7L and 7N of the TO will be repealed. The TA will share concurrent jurisdiction with the Competition Commission to be established. These competition provisions under the TO will nevertheless continue to be applicable to prohibited conduct which has taken place before the commencement of the competition law, even if the investigation may have been initiated after that.

4. Cases Reviewed by COMPAG

15. 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) Joint Boycotts

Case 1: Anti-competitive conduct in the tourism sector (not established)

16. 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 ("the Association") specialising in one regional market engaged in anti-competitive conduct. Specifically, the complainant alleged that -

- (a) the Association cancelled the travel agent's membership following a change in the travel agent's directorship. The Association asked the travel agent to pay a fee for re-admission, which was refused by the travel agent concerned;
- (b) the Association told shops specialising in receiving tourists from that regional market that Association members would cease patronising a shop if it received tours arranged by the travel agent concerned; and
- (c) the Association informed its members that they should not employ any tourist guides who worked for the travel agent concerned.

17. The case was referred to the Tourism Commission ("TC") for investigation. The TC approached the complainant for an interview on the details of the case but the complainant declined to provide further information. The complainant also expressly requested TC to refrain from

approaching the Association or other parties to obtain information, notwithstanding that the complainant had been assured that the investigation would be conducted in confidence, and his identity and that of his company would not be disclosed without his prior consent. The TC explained to the complainant that without further information or response from the Association, it would be difficult for the Commission to investigate the case. The complainant confirmed his understanding on this point.

18. According to the Government's *Statement on Competition Policy*, the determining factor of whether a business is anti-competitive is whether, through abusing its dominant market position, its practice is limiting market accessibility or contestability and impairing economic efficiency or free trade to the detriment of the overall interest of Hong Kong. In order to ascertain whether the allegations are factually accurate and the case is substantiated, it is necessary to obtain detailed information on the circumstances surrounding the Association's handling of the travel agent's membership, and the implications of the cancellation of membership for the travel agent. With the very limited information provided by the complainant, the TC was unable to verify the allegations made by the complainant. There was also no information available from public sources that could help the TC to verify the allegations. Based on the limited information available, the complaint could not be substantiated.

19. COMPAG accepted the TC's conclusion that **the complaint could not be established due to insufficient information**. The TC has informed the complainant of the outcome.

Case 2: Alleged anti-competitive conduct of a trade association of the medical profession (under investigation)

20. In October 2011, the COMPAG Secretariat received a competition-related complaint concerning the medical sector referred by the Consumer Council. The complainant, which is a professional body in the medical field, alleged that the practice of a trade association of the medical profession ("the Association") of not granting admission privilege to medical doctors subscribing to professional indemnity other than that offered by a service provider designated by the Association is anti-competitive.

21. The case has been referred to the Food and Health Bureau ("FHB") which will submit a report to COMPAG upon completion of its investigation.

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)

22. 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 Broadcasting Authority ("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.

23. 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, thus breaching sections 13 and/or 14 of the BO. The BA processed the complaint in accordance with the BAO and the established procedures.

24. 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 2008, Licensee A lodged an appeal 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)

25. In December 2009, the BA received a complaint from a domestic free TV licensee ("Licensee C") claiming that another domestic free TV licensee ("Licensee D") 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 C. The BA also received a number of complaints from members of the public in relation to unfair restrictions imposed on artistes by Licensee D.

26. In August 2010, the BA completed its preliminary inquiry into the complaint case. Taking into account the findings of the preliminary inquiry and the advice of independent consultants, the BA decided that a full investigation into the complaint case should be conducted and further information would need to be gathered from both licensees and other relevant parties before BA took a decision. The full investigation of the case is in progress.

Case 5: Alleged anti-competitive conduct of a telecommunications company (under investigation)

27. In June 2008, a telecommunications company ("Licensee E") complained to the TA, alleging the increase in fixed-mobile interconnection charge tariff by 25% from 4.36 cents per minute to 5.45 cents per minute, effective during the period from June 2008 to April 2009, by another telecommunications company ("Licensee F") was anti-competitive and contravened sections 7K, L and N (the competition provisions) of the Telecommunications Ordinance ("TO") (Cap. 106). The investigation lasted over two years (during 2008 to 2010), involving analysis of economic evidence and submissions from the two telecommunications companies concerned and some other mobile network operators.

28. In November 2010, the TA completed the investigation into the case and concluded that complaint was not established. In mid-November 2010, Licensee E lodged an appeal against the TA's decision to the Telecommunications (Competition Provisions) Appeal Board ("Appeal Board") in accordance with section 32N of the TO. Separately, despite not disputing the TA's decision of no breach, Licensee F has also lodged an

appeal to the Appeal Board, objecting to the part of the TA's findings and opinions in such areas as market definition, dominance of Licensee F in the market and pricing assessment. The appeal proceedings are ongoing.

Case 6: Alleged anti-competitive conduct of the Hong Kong Trade Development Council (TDC) in the exhibition industry (under investigation)

29. In November 2009, a private organiser of trade fairs made a complaint to the COMPAG Secretariat, alleging TDC's anti-competitive behaviour when seeking to develop its exhibition business. The complainant considered that the growing market share of TDC in the exhibition industry had been due to the unfair advantages of TDC as a statutory public body with funding and policy support from the Government and TDC's exercise of dominant control over major exhibition venue to crowd out private organisers of trade shows.

30. Having agreed with the complainant on certain procedural matters, the COMPAG Secretariat has initiated investigation into the case, and will submit a report to COMPAG upon completion of the investigation.

Case 7: Alleged anti-competitive conduct of an owners' corporation of a housing estate (not substantiated)

31. In May 2010, COMPAG Secretariat received a complaint from a resident of a housing estate in Happy Valley. The complainant alleged that the decision of the owners' corporation ("OC") of his housing estate to "tie" the building management services and the cleaning and garbage disposal services was anti-competitive, and deprived him of a choice of not subscribing to the centralized garbage disposal service of the estate. The complaint was referred to the Home Affairs Department ("HAD") for investigation. Having looked into the case and the nature of the property management industry, HAD considered that the allegations against the OC was not substantiated. Findings of the HAD's investigation are as follows -

- (a) the OC was not the provider of the garbage disposal services and the building management services and cannot "tie" the sale of the services as such. It was indeed the decision of the OC,

through the passing of resolution at an Extraordinary General Meeting ("EGM") by a majority vote of the OC, to engage a property management company ("PMC") to provide the building management services and to hire and supervise, on behalf of the OC, another entity to provide cleaning and garbage disposal services. There was also no information suggesting that the PMC selected by the OC offered the provision of the two services in the form of a tie;

- (b) the property management industry is multi-faceted and it is not uncommon to see a PMC providing and/or overseeing an array of services, such as security and guarding services, cleaning and rubbish disposal, financial and accounting services, management of swimming pools and other recreational facilities. Such services may be provided by a PMC or by different companies under the management of the PMC. In fact, the OC's decision could be justified by the pro-competitive benefits arising from the arrangement. First of all, it would be more cost-effective for the OC to hire the garbage disposal services for all the owners, rather than for each owner to hire their own services. Furthermore, the garbage disposal and cleaning services were not solely for individual flats, but also for the common area of the housing estate, which was under the shared responsibility of all owners; and
- (c) as regards the complainant's argument that the owners did not have a choice not to subscribe to the garbage disposal services chosen by the OC, this is more a building management issue but not one of competition concern. HAD noted that a resolution was passed by a majority of owners at the EGM. Should the owners consider the arrangement unsatisfactory, the owners could have voted against the relevant resolution. Owners could also have requested for another owners' meeting to discuss the matter, so as to suggest alternatives, if 5% of the owners so requested. Given that no such actions had been taken, HAD considered that the resolution had reflected the intention of the majority of owners to hire the PMC concerned to provide the building management services and to hire and

supervise, on behalf of the OC, another entity to provide the garbage disposal and cleaning services.

32. Based on the above findings, COMPAG endorsed HAD's conclusion that **the allegations of the complainant were unsubstantiated**. HAD has informed the complainant of the outcome of investigation.

C) Prevention or Restriction of Supply of Goods to Competitors

Case 8: Alleged anti-competitive conduct of some supermarket chains and retail chain stores (under investigation)

33. In November 2011, the COMPAG Secretariat received two complaints each from a Legislative Council Member, alleging the following practices of some supermarket chains and retail chain stores with market power were anti-competitive -

- (i) supermarket chains were alleged to have pressured a soft drinks supplier not to supply soft drinks products to a local retailer who had refused to comply with the recommended price for a particular soft drinks product set by the supplier;
- (ii) a supermarket chain was alleged to have pressured a supplier not to supply instant noodles of a particular brand to a local retailer if the retailer refused to comply with the recommended price for the product set by the supplier; and
- (iii) some retail chain stores were alleged to have pressured a supplier of electrical appliances to request a local retailer to which the supplier supplied products to increase the price of some of the electrical appliances to the recommended prices set by the supplier.

34. The case has been referred to the Commerce and Economic Development Bureau which will submit a report to COMPAG upon completion of its investigation.