

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2011 – 2012

(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 aims to promote 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. To supplement the Statement and advise businesses across sectors on the typical types of anti-competitive conduct and activities, COMPAG further published a set of guidelines in 2003.

3. In order to ensure that our competition policy keeps pace with times and continues to serve the public interest and to facilitate a business-friendly environment, COMPAG appointed the Competition Policy Review Committee (“CPRC”) in 2005 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. Following the CPRC’s recommendation, the Government launched in November 2006 a three-month public consultation to gauge public views on the introduction of a cross-sector competition law. The Government further published a consultation paper in May 2008 outlining detailed proposals for a competition law. In both consultation exercises, there was an overwhelming public support for the introduction of a cross-sector competition law into Hong Kong.

5. Backed by wide public support, the Government introduced the Competition Bill (“the Bill”) into the Legislative Council (“LegCo”) on 14 July 2010. LegCo formed a Bills Committee to examine the Bill. A total of 38 meetings and five meetings with deputations were held by the Bills Committee. The Bill was passed by LegCo on 14 June 2012 to become the Competition Ordinance (“the Ordinance”). **Chapter 2** sets out the key elements of the Ordinance.

6. The enactment of the Ordinance is a major milestone in the development of competition policy in Hong Kong, signifying the determination of the Government in maintaining fair and free competition in

the market. The Government will implement the Ordinance in phases so that the public and the business sector can familiarise themselves with the new legal requirements during the transitional period and make necessary adjustments. The Government is now spearheading the establishment of the Competition Commission (“the Commission”) and the Competition Tribunal (“the Tribunal”). During the transitional period, the Commission will prepare guidelines and carry out consultation on the guidelines as well as conduct publicity programmes to promote public understanding and pave the way for the full implementation of the Ordinance. At the same time, the Judiciary will also prepare subsidiary legislation relating to the Tribunal proceedings and make other necessary arrangements to prepare for the full operation of the Tribunal.

7. Prior to full implementation of the Ordinance, COMPAG would continue to review competition-related complaints, and refer complaints to the relevant bureaux and departments for follow-up action in accordance with the established policy. The cases concluded in 2011-12 and the current position of outstanding cases are summarised in **Chapter 3**.

2. Competition Ordinance

8. The Ordinance provides a legal framework that prohibits and deters undertakings in all sectors from engaging in anti-competitive conduct which has 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.

(A) General Prohibitions

9. The Ordinance provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule, the second conduct rule and the merger rule, collectively known as the "competition rules" in the Ordinance). The *first conduct rule* prohibits agreements, concerted practices as well as decisions of an association of undertakings that have the object or effect to prevent, restrict or distort competition in Hong Kong. Four types of conduct, namely price fixing, market allocation, output control and bid-rigging, are defined as serious anti-competitive conduct under the first conduct rule. The *second conduct rule* prohibits an undertaking with a substantial degree of market power to abuse that power by engaging in conduct that has as its object or effect to prevent, restrict or distort competition in Hong Kong. The *merger rule* prohibits mergers or acquisitions (applying only to carrier licences granted under the Telecommunications Ordinance (Cap. 106)) that have, or are likely to have, the effect of substantially lessening competition in Hong Kong.

(B) Institutional Arrangement

10. The Ordinance provides for a judicial enforcement model which separates the powers of investigation, prosecution and adjudication of alleged breaches of competition rules between the Commission and the Tribunal.

Competition Commission

11. The Commission will be established under the Ordinance as an independent statutory body to investigate competition-related complaints, and bring public enforcement action before the Tribunal. The Commission will consist of not less than five and no more than 16 members. The Chief Executive ("CE") shall appoint members to the Commission, including the Chairperson. The Commission will appoint a Chief Executive Officer to lead an executive arm to support the work of the Commission.

12. The Commission is vested with investigatory powers including the power to require production of documents and information and attendance before the Commission to give evidence, power to enter and search premises, etc. The Ordinance also provides for different enforcement options for the Commission to tackle anti-competitive activities of different nature and different degree of severity, such as commitment, infringement notice, warning notice, etc.

Competition Tribunal

13. The Tribunal will be set up within the Judiciary as a superior court of record that has primary jurisdiction to hear and adjudicate on competition cases brought by the Commission, follow-on private actions, alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance ("CFI") as well as reviews of certain determinations of the Commission. Every judge of the CFI will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. The CE shall, on the recommendations of the Judicial Officers Recommendation Commission, appoint two of the members of the Tribunal to be its President and Deputy President respectively for a term of at least three years, but not more than five years.

14. The Tribunal is empowered to apply a full range of remedies for contravention of a competition rule. These remedies include pecuniary penalties; award of damages to aggrieved parties; termination or variation of an agreement or merger; and disqualification orders against directors and others who have contributed to the contravention of the competition rule.

Concurrent jurisdiction

15. To reconcile the Ordinance with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the Ordinance provides that the Communications 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.

(C) Follow-on Private Actions

16. In addition to public enforcement through the Commission, the Ordinance also provides the legal framework for follow-on private actions to be brought in the Tribunal by persons who have suffered loss or damage as a result of anti-competitive conduct that has been determined by the courts as a

contravention of a conduct rule, or a contravention of a conduct rule that has been admitted by a person in a commitment accepted by the Commission.

(D) Exemptions and Exclusions

17. Schedule 1 to the Ordinance provides for the circumstances under which the conduct rules do not apply. These include an agreement that enhances overall economic efficiency; an agreement / conduct to the extent that it is made / engaged in for the purpose of complying with a legal requirement, as well as an undertaking entrusted by the Government with the operation of services of general economic interest in so far as the conduct rules would obstruct the performance of the particular tasks assigned to it. Schedule 1 to the Ordinance also sets out the respective thresholds for agreements and conduct of lesser significance, below which the concerned agreements and conduct would not be regulated by the Ordinance.

18. Similar to the arrangements in other jurisdictions with competition law, the Commission is empowered to issue block exemption orders to exempt certain categories of agreements that meet the criteria in Schedule 1 to the Ordinance regarding agreements enhancing overall economic efficiency. The CE in Council is also empowered to make orders to exempt agreements or conducts if there are exceptional and compelling reasons of public policy to do so, or if the exemptions are required to avoid a conflict with international obligations.

19. As activities of the public sector are almost invariably non-economic in nature falling outside the scope of the Ordinance, the Ordinance will not bind the Government. Certain parts of the Ordinance, i.e. Part 2 and Schedule 7 (relating to the competition rules), and Parts 4 and 6 (relating to enforcement by the Commission and the Tribunal), would not apply to statutory bodies unless the CE in Council determines otherwise by way of regulations. The CE in Council is also empowered to disapply by way of a regulation the abovementioned parts of the Ordinance to a person specified or a person to the extent that the person is engaged in an activity specified in the regulation.

3. Cases Reviewed by COMPAG

20. 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: Alleged anti-competitive conduct of a trade association of the medical profession (not substantiated)

21. 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 trade union for doctors, claimed that the alleged decision of a trade association of the private hospital sector (“the Association”) not to grant admission privilege to medical doctors subscribing to professional indemnity other than that offered by a service provider designated by the Association is anti-competitive.

22. The case was referred to the Food and Health Bureau (“FHB”), which subsequently invited the Department of Health (“DoH”) to conduct an investigation into the case. FHB and DoH found that -

- (a) the decision of the Association did not have any legally binding effects on its members. In any case, other than suggesting the coverage of professional indemnity required for admission privilege (that it should be occurrence-based with no limit on coverage), the Association did not prescribe any insurance product or nominate any insurance agent which doctors must subscribe in order to obtain admission privilege, nor is the Association a supplier or business agent of any professional indemnity scheme;
- (b) the decision of the Association would unlikely limit the competition amongst doctors for admission privilege or impair the provision of services to patients using private hospital services, since a high percentage of doctors have already subscribed to professional indemnity with no limit and offered on events occurring basis; and

- (c) the decision of the Association would unlikely pose barriers to entry to insurance companies to provide professional indemnity of similar coverage, since the Association had neither prescribed any insurance product nor nominated any insurance agent which doctors must subscribe.

23. COMPAG reviewed the findings and accepted the FHB and DoH's conclusion that the complaint could not be substantiated because there was insufficient evidence to suggest that there was an appreciable adverse impact on competition in the private hospital market. However, COMPAG considered that while there was no indication that individual hospital was bound by the decision of the Association, the Association should, as a good practice, refrain from engaging in arrangements that might cause adverse effect on competition in the private hospital market. COMPAG directed FHB and DoH to advise the Association of its findings, and to encourage the Association to ensure that its conduct is in compliance with the enacted Competition Ordinance.

B) Abuse of Dominant Market Position

Case 2: Alleged anti-competitive conduct in relation to the service termination practices of a Pay TV licensee (not substantiated)

24. 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 Communications Authority ("CA")¹, 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 (Miscellaneous Provisions) Ordinance (Cap. 391)² provides that a person may make a complaint in writing to the CA that a licensee has contravened section 13(1) or 14(1) of the BO.

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

¹ Pursuant to the Communications Authority Ordinance (Cap.616), which has come into operation since 1 April 2012, all the functions conferred on the former Broadcasting Authority under, amongst others, the Broadcasting Authority Ordinance (Cap.391), which has been amended also on 1 April 2012 as the Broadcasting (Miscellaneous Provisions) Ordinance (Cap.391), are conferred on the CA, the unified regulatory body for the broadcasting and telecommunications sectors.

² Formerly Broadcasting Authority Ordinance (Cap.391). See footnote 1.

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 former BA has processed the complaint in accordance with Cap. 391 (which was formerly known as the Broadcasting Authority Ordinance) and the established procedures.

26. In October 2008, the former 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 to the CE in Council against the decision of the former BA. The appeal was processed in accordance with the procedures laid down under the BO. In January 2012, the CE in Council decided that the decision of the BA made in October 2008 to reject the competition complaint lodged by Licensee A against Licensee B be confirmed and Licensee A's appeal be rejected.

Case 3: Alleged anti-competitive practices engaged by a domestic free TV licensee (under investigation)

27. In December 2009, the former 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 with Licensee C. The former BA also received a number of complaints from members of the public in relation to unfair restrictions imposed on artistes by Licensee D.

28. In August 2010, the former 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 former 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 the former BA took a decision. The full investigation of the case is in progress.

*Case 4: Alleged anti-competitive conduct of a telecommunications company
(not substantiated)*

29. In June 2008, a telecommunications company (“Licensee E”) complained to the former Telecommunications Authority (“TA”)³, 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.

30. In November 2010, the former TA completed the investigation and concluded that the complaint was not established. In mid-November 2010, Licensee E lodged an appeal (“Appeal E”) against the former 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 former TA’s decision of no breach, Licensee F also lodged an appeal (“Appeal F”) to the Appeal Board, objecting to the part of the former TA’s findings and opinions in such areas as market definition, dominance of Licensee F in the relevant market and the pricing assessment.

31. Having considered submissions from Licensees E and F, the Chairman of the Appeal Board dismissed Appeal F in April 2011 on the ground that Licensee F was not a “person aggrieved” within section 32N(1) of the TO for the purposes of lodging an appeal to the Appeal Board.

32. In Appeal E, among various preliminary issues, the Chairman granted leave in April 2011 to Licensee F to intervene and to raise the issue of dominance. In response, the former TA sought leave to state a case to the Court of Appeal relating to the scope of Licensee F’s intervention, but the application was refused by the Chairman in May 2011. Pursuant to Order 61 rule 2 of the Hong Kong Civil Procedure Rules, the former TA applied to the Court of Appeal in June 2011 for an order requiring the Appeal Board to state the above case. In February 2012, the Court of Appeal heard and dismissed the former TA’s application. Subsequently in March 2012, the parties concerned, having agreed to settle the case out of court and with mutual

³ Pursuant to the Communications Authority Ordinance (Cap. 616) which came into operation on 1 April 2012, all functions conferred on the Telecommunications Authority under, amongst others, the Telecommunications Ordinance (Cap. 106) are conferred on the Communications Authority, the unified regulatory body for the broadcasting and telecommunications sectors.

consent, sought the Chairman's agreement for the withdrawal of Appeal E. The Chairman approved the withdrawal of Appeal E in April 2012.

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

33. 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.

34. The COMPAG Secretariat has conducted an investigation into this complaint case. The complainant is now seeking further clarifications on certain procedural matters. The processing of the case is thus put on hold for the time being.

Case 6: Alleged anti-competitive conduct by a domestic pay TV licensee (under investigation)

35. In June 2012, a domestic free TV licensee ("Licensee G") lodged a complaint with the CA alleging that a domestic pay TV licensee's ("Licensee H") proposed sub-licensing arrangement for its exclusive broadcasting rights to important sports events contravened sections 13 and/or 14 of the BO. Licensee G alleged that Licensee H, instead of offering to sub-license only the retransmission rights to free-to-air operators, bundled those rights with its own commentary, advertising, editing and other promotional content in its offer. According to Licensee G, such conduct on the part of Licensee H would force Licensee G to purchase a product that it did not want to acquire (i.e. the package of TV commercials and promotional materials of Licensee H and the commentary surrounding the coverage) together with the product it did want (i.e. the programme feeds of the important sports events). Licensee G alleged that such a conduct of bundling of broadcasting rights with other contents on the part of Licensee H was anti-competitive under the BO.

36. The CA is processing the complaint in accordance with the established procedures.

C) Prevention or Restriction of Supply of Goods to Competitors

Case 7: Alleged anti-competitive conduct of some supermarket chains and retail chain stores (not established)

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

(a) 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;

(b) 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

(c) 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.

38. The case was referred to the Commerce and Economic Development Bureau ("CEDB") for an investigation. The three complaints were reported by LegCo Members but not the stakeholders themselves. CEDB had contacted the latter to see if they were willing to provide information to facilitate the investigation. Only the local retailer of the soft drink case was willing to provide information while the local retailer of the instant noodles case replied that they would not provide information to facilitate the investigation. Also, there was insufficient information to ascertain the identity of the electric appliance shop.

39. As such, CEDB was only able to initiate an investigation into the soft drink case. CEDB had already informed the concerned LegCo member, of the closure of the cases of instant noodles and electric appliance due to insufficient information.

40. CEDB had subsequently commissioned the Consumer Council to conduct an investigation into the soft drink case in view of the latter's experience in monitoring the supermarket and retail sectors. The Consumer Council had met with the owner of the local retailer shop and examined the

complaint with reference to its previous studies on the supermarket and retail chain sectors, relevant overseas experience and the guidelines set out in the Government's *Statement on Competition Policy*.

41. The investigation revealed that in the absence of investigative power, the Consumer Council was unable to verify the facts to ascertain whether there was evidence to substantiate the allegation in the soft drink case. Based on the above, the complaint cannot be established due to insufficient information and evidence. COMPAG accepted the conclusion made by CEDB and the Consumer Council, and CEDB had informed the complainants of the outcome.

D) Collusion and Price-fixing

Case 8: Alleged anti-competitive conduct of a market management company and some food stalls at Yat Tung Market (under investigation)

42. In May 2012, the COMPAG Secretariat received a competition-related complaint alleging that the practice of a market management company and some food stalls at Yat Tung Market was anti-competitive. Allegations include price fixing by four pork retailers, vertical constraints on a fish stall by the market management company as well as the monopolistic position of a bakery at Yat Tung Market, which is alleged to be closely connected with the market management company.

43. The case has been referred to FHB, which subsequently invited the Food and Environmental Hygiene Department ("FEHD") to conduct an investigation into the case. FEHD has collected some data for examining the case. FHB will report the findings to COMPAG upon completion of the investigation.

E) No Further Competition-related Follow Up Action was Considered Necessary

Case 9: Complaint on alleged anti-competitive conduct from a weight-bridge service provider

44. In November 2011, the COMPAG Secretariat received a complaint from a weight-bridge service provider. According to the complainant, there had been "unreasonable" complaints made to the Lands Department ("LandsD") against the use of a site for the provision of weigh-bridge service under short term tenancy. The complainant alleged that those complaints

were made with a view to reducing the supply of land for weigh-bridge services, thus restricting competition amongst weigh-bridge service providers.

45. Having consulted the Transport and Housing Bureau and LandsD, COMPAG considered that there was no evidence suggesting any competition concern in the case. COMPAG was therefore of the view that no further investigation into the case was considered necessary.