

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2012 – 2013

(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 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 2005, COMPAG appointed 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. Following the CPRC’s recommendation, the Government launched in November 2006 a public consultation on the introduction of a cross-sector competition law, and in May 2008 a further public consultation on the detailed proposals for a competition law.

5. Backed by wide public support, the Government introduced the Competition Bill (“the Bill”) into the Legislative Council (“LegCo”) on 14 July 2010. The Bill was passed by LegCo on 14 June 2012 to become the Competition Ordinance (“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 is working closely with the newly-established Competition Commission (“Commission”) and the Judiciary with a view to bringing the Ordinance into full operation. **Chapter 2** of this report gives a brief introduction of the Ordinance and sets out the latest developments on the implementation of the Ordinance.

7. Prior to full commencement 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 2012-13 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.

9. The Ordinance has three limbs of prohibition against anti-competitive conduct which are described as the first conduct rule, the second conduct rule and the merger rule and, 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. 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.

10. On institutional arrangements, the Commission is established under the Ordinance as an independent statutory body to investigate competition-related complaints, and bring public enforcement action before the Competition Tribunal (“Tribunal”). The Commission shall consist of not less than five and no more than 16 members. The Chief Executive (“CE”) shall appoint members to the Commission, including the Chairperson¹. The Commission will appoint a Chief Executive Officer to lead an executive arm to support the work of the Commission.

11. The Tribunal is 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,

¹ The appointments of Members of the Commission by the Chief Executive took effect on 1 May 2013. The inaugural Commission consists of 14 Members (including the Chairperson the Honourable Ms Anna Wu) drawn widely from different sectors of the community who will hold office for a period of three years.

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.²

12. To reconcile the Ordinance with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the Ordinance provides that the Communications Authority (“CA”) 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.

13. The Government will implement the Ordinance in phases. To this end, LegCo passed in January 2013 the Competition Ordinance (Commencement) Notice 2012. Provisions relating to the establishment of the Commission, the short title and commencement, interpretation, and the issue of guidelines by the Commission commenced on 18 January 2013. Provisions relating to the establishment of the Tribunal and part of the provisions relating to its operation commenced on 1 August 2013.

14. Appointments of Members and Chairperson to the Commission have been made by the Government which took effect in May 2013. Since then, the Commission has set up its internal procedures and its financial and administrative systems, as well as started to recruit the Chief Executive Officer and other staff members. It is expected that staff members will gradually report duty in the first or second quarter of 2014.

15. One of the major tasks of the Commission during the initial period is the preparation of regulatory guidelines. The Commission has initiated the preparatory work on the drafting of guidelines, including the engagement of consultants for legal and other expert services. The Commission has also started to gradually establish contact with competition authorities of other jurisdictions, international resource networks and various experts in the field, so as to learn from their experience and expertise. The Commission also plans to reach out to members of the public of all sectors in 2014 to discuss the guidelines and other work relating to the implementation of the Ordinance.

16. The Government has also been working closely with the Judiciary since the enactment of the Ordinance to prepare for the establishment of the Tribunal and related matters. The Judiciary is formulating Tribunal Rules relating to the operation and proceedings of the Tribunal (the Tribunal Rules

² The Judiciary announced in July 2013 the appointment of the Honourable Mr Justice Godfrey Lam Wan-ho as the President, Competition Tribunal and the Honourable Madam Justice Queeny Au-Yeung Kwai-yue as the Deputy President, Competition Tribunal, each for a term of three years with effect from 1 August, 2013.

are subsidiary legislation) and the President's directions, as well as making other necessary administrative arrangements to prepare for the full operation of the Tribunal.

17. The Government will bring the Ordinance into full operation when all relevant preparatory work in respect of the Commission and the Tribunal is completed. During this transitional period, the public and the business sector can familiarise themselves with the new legal requirements and make necessary adjustments to their business operations.

3. Cases Reviewed by COMPAG

18. 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) Abuse of Dominant Market Position

Case 1: Anti-competitive practices engaged by Television Broadcasts Limited ("TVB") (under appeal)

19. In December 2009, the former Broadcasting Authority ("BA") received a complaint from Asia Television Limited ("ATV") claiming that certain clauses in the contracts between TVB and its artistes and singers, as well as certain informal policies and practices pursued by TVB, violated the competition provisions of the Broadcasting Ordinance (Cap. 562) ("BO"). The former BA has also received a number of complaints from members of the public in relation to unfair restrictions imposed on artistes by TVB.

20. In August 2010, the former BA completed its preliminary inquiry into the complaint case and decided to launch a full investigation into some of the contractual clauses and policies alleged in ATV's complaint. In September 2013, CA (the successor of BA) completed its investigation and concluded that some of allegations were substantiated, including the inclusion of harsh and unreasonable terms in exclusive contracts with occasional use artistes and singers³, the prohibition of the use of original voices and attendance in promotional activities of other TV stations by occasional use artistes, and the prevention of the use of Cantonese in the programmes of other TV stations in Hong Kong by contracted artistes. CA has found TVB to have abused its dominant position by engaging in anti-competitive practices in contravention of sections 13 and 14 of the BO. CA has imposed a financial penalty of \$900,000 on TVB, and directed TVB to forthwith bring an end to the infringement concerned and refrain from repeating or engaging in any act or conduct which has an equivalent purpose or effect to the infringing clauses and policies. CA will monitor the implementation of the remedial measures by TVB in accordance with CA's direction.

³ Occasional use artistes and singers refer to artistes and singers who were engaged by TVB on a non-full-time basis through certain types of contracts.

21. In October 2013, TVB lodged an appeal with the Chief Executive in Council (“CE in C”) against the CA’s decision. CE in C is currently processing the appeal. In December 2013, TVB applied for judicial review on the CA’s decision. The CA will handle the judicial review according to established procedures.

Case 2: Alleged anti-competitive conduct of the Hong Kong Trade Development Council (“TDC”) in the exhibition industry (under investigation)

22. 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.

23. The COMPAG Secretariat has conducted an investigation into this complaint case. The processing of the case was put on hold in light of the complainant’s requests for further clarifications on certain procedural matters. Having considered the complainant’s request and taking into account all relevant circumstances of the case, COMPAG has appointed an officer to review the investigation report prepared by the COMPAG secretariat. The appointed officer is now reviewing the investigation report and will report his findings to COMPAG upon completion of the review.

Case 3: Alleged anti-competitive conduct by a domestic pay TV licensee (under investigation)

24. In June 2012, a domestic free TV licensee (“Licensee A”) lodged a complaint with CA alleging that a domestic pay TV licensee’s (“Licensee B”) proposed sub-licensing arrangement for its exclusive broadcasting rights to important sports events contravened section 13 and / or section 14 of the BO. Licensee A alleged that Licensee B, 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 A, such conduct on the part of Licensee B would force Licensee A to purchase a product that it did not want to acquire (i.e. the package of TV commercials and promotional materials of Licensee B and the commentary surrounding the coverage) together with the product it did want (i.e. the programme feeds of the important sports events). Licensee A alleged that such a conduct of bundling of broadcasting rights with other contents on the part of Licensee B was anti-competitive under the

BO.

25. A preliminary enquiry into the matter was initiated. Licensee B has given its comments on the allegations in the complaint. CA will continue to process the case in accordance with established procedures.

B) Collusion and Price-fixing

Case 4: Alleged anti-competitive conduct of a market management company and some food stalls at Yat Tung Market (not substantiated)

26. 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 freshwater fish stalls by the market management company as well as the monopolistic position of a bakery alleged to be closely connected with the market management company.

27. The case was referred to the Food and Health Bureau ("FHB"), which subsequently invited the Food and Environmental Hygiene Department ("FEHD") to conduct an investigation into the case. FHB and FEHD found that -

- (a) there was no evidence suggesting a case of price-fixing between different operators since only one operator was involved in running the four pork retailers;
- (b) there was no conclusive evidence to substantiate the allegation that the freshwater fish stall operators in Yat Tung Market must acquire their supplies from the source designated by the market management company; and
- (c) there were three competitors to the bakery at Yat Tung Market (the operator of the subject bakery had opened another bakery in the same market under a different shopsign) which were all within walking distance from Yat Tung Market. There was no evidence suggesting that the two bakeries had engaged in anti-competitive practices that have adversely affected market accessibility and contestability.

28. COMPAG reviewed the findings and accepted the conclusion made by FHB and FEHD that the complaint could not be substantiated. FHB has informed the complainant of the outcome.

C) Government Policies and Practices

Case 5: Alleged anti-competitive conduct in relation to the provision of residents' service by non-franchised buses ("RS") for a residential development (not substantiated)

29. In April 2013, the COMPAG Secretariat received complaints alleging that the Transport Department ("TD") acted against the Government's competition policy with respect to the provision of RS for a residential development and to the fare increase of the RS routes concerned.

30. The case was referred to the Transport and Housing Bureau ("THB") for an investigation. Findings are -

- (a) the residential development is situated in a private lot owned by the developer. According to the Deed of Mutual Covenant ("DMC") entered into between the developer and flat owners for this development, the management company has the power to, amongst other things, limit the number and type of vehicles within the lot, and to impose conditions on the use of the transport facilities. Any transport service operator wishing to serve the residential development would thus need to have consent of the management company for vehicle access and use of the transport facilities. The DMC is a private contract between the developer and flat owners. The transport authority is not party to it;
- (b) the RS routes serving the residential development concerned were approved and regulated by TD according to the established legal and administrative procedure applicable to all RS in Hong Kong. TD does not forbid other operator(s) to provide RS for this residential development and would treat all applications received equally. Yet, it is a requirement in the DMC mentioned in (a) above that any RS operator for this residential development would need to have consent of the management company; and
- (c) the fare level for all RS in Hong Kong is not regulated by the law nor subject to approval by TD. An RS operator only has to register with TD any adjusted fare at least 14 days in advance of any changes. This was duly done for the fare increase concerned and the RS operator provided evidence that the fare increase had the majority support of the owners' committee.

31. Based on the above findings, TD has not acted in an anti-competitive manner in relation to the provision of RS for the residential development as well as to the fare increase of the RS routes concerned. COMPAG accepted THB's conclusion and the complainants have been informed of the outcome.

Case 6: Alleged anti-competitive conduct of the Leisure and Cultural Services Department ("LCSD") in a restricted tender exercise for granting permit to operate a cafeteria at the Museum of Coastal Defence ("MCD") (under investigation)

32. In July 2013, the COMPAG Secretariat received a complaint by the then operator of the cafeteria at MCD about a restricted tender exercise conducted by LCSD for the operation of the cafeteria at MCD. For that tender exercise, only non-governmental organisations have been invited to submit tender proposals.

33. The case has been referred to the Home Affairs Bureau ("HAB"). The investigation is underway. HAB will report the findings to COMPAG upon completion of the investigation.