

競爭政策諮詢委員會工作報告

**COMPAG**

**Competition Policy Advisory Group Report**

**2014 – 2015**

**(English version)**

## 1. Introduction

The Competition Policy Advisory Group (“COMPAG”) 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 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. Since the enactment of the Ordinance, the Government had worked closely with the Competition Commission (“Commission”) and the Judiciary to complete all necessary preparatory work so as to bring the Ordinance into full operation. Upon completion of the preparatory work, the Ordinance fully commenced on 14 December 2015. **Chapter 2** of this report gives a brief introduction of the Ordinance.

7. Prior to full commencement of the Ordinance, COMPAG continued to review competition-related complaints, and referred complaints to the relevant bureaux and departments for follow-up action in accordance with the established policy. The cases concluded in 2014-15 and the current position of outstanding cases are summarised in **Chapter 3**.

8. Upon full commencement of the Ordinance, competition-related complaints are handled by the Commission and the Communications Authority ("CA") as the statutory authorities to enforce the competition rules. COMPAG will only receive competition-related complaints concerning entities which do not come under the regulation of the competition rules of the Ordinance. Examples include complaints against government entities, most of the statutory bodies, and any other entities or agreement and conduct which have been exempt from the application of the competition rules.

## 2. Competition Ordinance

9. 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.

10. 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, 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.

11. On institutional arrangements, the Commission is established under the Ordinance as an independent statutory body to investigate competition-related complaints, and bring enforcement action before the Competition Tribunal (“Tribunal”). The Commission has 14 Members (including the Chairperson), all appointed by the Chief Executive (“CE”). An executive arm led by a Chief Executive Officer provides support to the work of the Commission.

12. 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. On the recommendations of the Judicial Officers Recommendation Commission, two members of the Tribunal were appointed by the CE as the President and Deputy President of the Tribunal respectively.

13. To reconcile the Ordinance with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the Ordinance provides that the CA has concurrent jurisdiction with the Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in the broadcasting and telecommunications sectors. The Commission and the CA have signed a Memorandum of Understanding for the purpose of co-ordinating the performance of their functions under the Ordinance.

14. Since the Ordinance was enacted in June 2012, it had been implemented by phases to allow time for the completion of all necessary preparatory tasks, and to enable the public and the business sector to make use of the transitional period to familiarise themselves with the new legal requirements and make necessary adjustments to their business practices. As all of the major tasks necessary to prepare for the full implementation of the Ordinance had been completed, the Ordinance was brought into full operation on 14 December 2015.

### 3. 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 bureaux or departments.

#### A) Abuse of Dominant Market Position

*Case 1: Alleged anti-competitive conduct involving trade mark procedures by Television Broadcasts Limited (case completed)*

16. On 12 June 2014, Hong Kong Television Network Limited ("HKTVN"), a potential new entrant to the domestic free television programme service market, lodged a complaint with the CA alleging that Television Broadcasts Limited ("TVB"), a domestic free television programme service licensee, had engaged in conduct which had the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market contrary to section 13 (prohibition of anti-competitive conduct) and/or section 14 (prohibition of abuse of dominance) of the Broadcasting Ordinance (Cap. 562) ("BO"). HKTVN claimed that TVB had abused, and continued to abuse trade mark law and procedures as part of a concerted campaign to prevent HKTVN from obtaining a television programme service licence, and thereby to further strengthen TVB's position in the Hong Kong television programme service market. HKTVN alleged that TVB had done this by seeking pre-emptively to register and appropriate HKTVN's trade marks in Hong Kong and by opposing HKTVN's applications to register its trade marks in Hong Kong.

17. The complaint was processed by the CA in accordance with the established procedures for handling competition complaints under the BO. Having considered the findings of the Preliminary Enquiry conducted by the Office of the Communications Authority and its assessment on both the “object” and “effect” limbs under the competition provisions, the CA concluded that there was no case for TVB to answer and the matter being complained of had no substantial effect on competition, and hence the case was closed at the Preliminary Enquiry stage without proceeding to the Full Investigation stage. The decision made by the CA on 15 August 2015 in respect of the outcome of the Preliminary Enquiry was published on 29 September 2015 at the CA’s website which can be accessed at: [http://www.coms-auth.hk/en/policies\\_regulations/ca\\_decisions/index\\_yr\\_all-ca\\_87-sb\\_all-p\\_1.html](http://www.coms-auth.hk/en/policies_regulations/ca_decisions/index_yr_all-ca_87-sb_all-p_1.html).

18. Amongst the reasoning of the CA’s decision, the CA considered that on the “object” limb, the evidence (including TVB’s prior use of the relevant trade names) tended to show that TVB acted reasonably with a view to asserting one’s legal rights. On the “effect” limb, it was not for the CA to seek to prejudge the merits of the proceedings before the Trade Marks Registry, pending which HKTVN could continue to use the disputed trademarks and it had actually done so. There was insufficient evidence showing that a delay in resolving the proceedings in the Trade Marks Registry would produce material foreclosure effects on HKTVN’s entry.

*Case 2: Anti-competitive practices engaged by TVB (under appeal and judicial review)*

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 BO.

20. In September 2013, the CA (the successor of BA) completed its investigation and concluded that some of the allegations were substantiated, including the inclusion of harsh and unreasonable terms in exclusive contracts with occasional use artistes and singers<sup>1</sup>, 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. The 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. The 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.

21. In October 2013, TVB lodged an appeal with the Chief Executive in Council ("CE in C") against the CA's decision. In December 2013, TVB applied for judicial review of the appeal mechanism to the CE in C under the BO and the CA's decision on the investigation. The Court of First Instance heard TVB's judicial review application on 6 to 9 October 2015 and reserved its decision after the hearing<sup>2</sup>.

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

22. In June 2012, a domestic free TV licensee ("Licensee A") lodged a complaint with the 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, promotional materials and the commentary of Licensee B surrounding the important sports events) 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.

---

<sup>1</sup> Occasional use artistes and singers refers to artistes and singers who were engaged by TVB on a non-full-time basis through certain types of contracts.

<sup>2</sup> The Court of First Instance ruled on 29 January 2016 which quashed CA's decision.



23. A preliminary enquiry into the matter was initiated. Licensee B had given its comments on the allegations in the complaint. The CA would continue to process the case in accordance with established procedures.

## **B) Unfair or Discriminatory Standards**

### *Case 4: Alleged anti-competitive conduct of the Hong Kong Taekwondo Association ("HKTA") (not established)*

24. In April 2014, the COMPAG Secretariat received a complaint by a local Taekwondo school alleging that the HKTA's current practice of admitting new members was anti-competitive. It alleged that HKTA was unwilling to admit new members so as to exclude others from sharing HKTA's exclusive privilege in (a) receiving government subsidy; (b) priority use of government facilities; and (c) nomination of entries to international Taekwondo competitions.

25. The case was referred to the Home Affairs Bureau ("HAB") for investigation. COMPAG considered the information provided by the complainant as well as the outcomes of the investigation and review and found that –

- (a) sport organisations recognised as "national sports associations" ("NSA"), which include HKTA, have autonomy in keeping sport standards in accordance with the international federations of their respective sports;
- (b) the government subvention and priority use of Leisure and Cultural Services Department ("LCSD") sport facilities (in terms of allowing NSAs to book 12 months in advance, while non-NSAs can only book 3 months in advance) are commensurate with the responsibility of the NSAs to promote their respective sports in the community. Upon receiving government subsidy, HKTA has the duty and responsibility to implement sustainable sports development programmes in a fair and transparent manner according to established rules, including those laid down by the relevant international sport federation, made known to the public and charging at an acceptable and affordable level. All NSAs are non-profit organisations, i.e., the organisation's revenue cannot be distributed to members and members also do not have any claim upon the organisation's assets;

- (c) for nominating entries to international competitions, such as the Olympic and Asian Games, NSAs are obliged to act according to the selection procedures laid down by the respective international sport federations. It is not uncommon for people to take part in international events organised by non-international federation bodies all over the world, as well as inter-club and inter-school competitions. HKTA only has that exclusive role for events sanctioned by the international sport federation for which players have to follow the established rules and regulations; and
- (d) HKTA had made the membership admission requirements and procedures available in the public domain. In the past three years, HKTA admitted two new clubs as members and declined four applications. There was no conclusive evidence showing that HKTA had been barring new membership unreasonably. The market of Taekwondo training is basically open, and students are free to choose the masters that suit their needs. Whether a master is attractive to new students usually depend on a wide range of factors such as entry fees of the course, the teaching style, skill level and reputation of the individual master; as well as the location of the training venue.

26. However, COMPAG also noted that –

- (a) it is not conclusive regarding if the HKTA membership was a relevant or significant factor affecting competition in the Taekwondo training market, due to the lack of relevant market data;
- (b) HKTA, when rejecting applications for membership, did not provide reasons for the rejection;
- (c) HKTA may reject a membership application without going through an assessment process which is based on pre-determined objective criteria or a scoring system, and its decision cannot be appealed to non-HKTA experts; and
- (d) In the process of the investigation, LCSD had advised HKTA that it should notify unsuccessful applicants of the reasons so as to improve transparency and fairness of the application process.

27. Having reviewed the investigation report of the case and the supplementary information provided, COMPAG considered it difficult to assess with certainty if the HKTA membership was a relevant or significant factor affecting competition in the Taekwondo training market, due to the lack of relevant market data. The complaint was considered not established. However, if the membership of HKTA does impact on the economic activity of a specific market, HKTA's membership admission practice is not totally free of competition risk. COMPAG requested the relevant government bureau and department to consider encouraging the sport associations to get familiar with the Ordinance, and to review how the membership admission arrangement of recognised sport organisations can be improved to ensure due process and objective admission criteria so as to prevent abuse.

28. The complainant will be informed of the investigation results.