

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2022

(English version)

1. Introduction

Background

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 aimed 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 consumers and the business sector.

2. 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.

3. Backed by wide public support received in two public consultation exercises conducted in 2006 and 2008, the Government introduced the Competition Bill into the Legislative Council in July 2010. The Bill was passed in June 2012 and became the Competition Ordinance (Cap. 619) (“the Ordinance”), which fully commenced operation on 14 December 2015.

Interface between Competition Authorities and COMPAG upon Commencement of the Competition Ordinance

4. The Ordinance provides a legal framework that prohibits and deters undertakings¹ in different sectors from engaging in conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong.

5. The Ordinance is enforced by two independent statutory authorities, i.e. the Competition Commission (“the Commission”), and the Communications Authority which has concurrent jurisdiction with the Commission where the broadcasting and telecommunications sectors are concerned. Complaints on anti-competitive conduct relating to the Ordinance are handled by the two authorities.

6. COMPAG, on the other hand, handles complaints on –

- (a) anti-competitive conduct against government entities and bodies or persons that are not subject to the competition rules and enforcement provisions of the Ordinance; and
- (b) non-compliance with conditions and limitations imposed by the Chief Executive in Council (“CE-in-C”) on agreements, conduct and mergers exempted by CE-in-C under the Ordinance².

¹ 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.

² Under the Ordinance, CE-in-C may exempt agreements, conduct and mergers from the application of certain provisions of the Ordinance on public policy grounds or to avoid conflict with international obligations, subject to conditions or limitations that CE-in-C considers appropriate.

2. Work of COMPAG in 2022

7. In 2022, COMPAG handled 15 cases with details as follows –

(A) Cases concerning Government Policies and Practices

Cases 1-2: Complaints about the Transport Department's issuance of licences for non-franchised buses to provide residents' services and student services (cases closed)

8. There are two cases concerning respectively the provision of residents' services ("RS") and student services ("SS") by non-franchised buses ("NFBs").

9. In the first case, the complainant was concerned about reduction in the number of operators providing RS for a residential development, alleging that the Transport Department ("TD")'s refusal to issue new Passenger Service Licences ("PSLs") had exacerbated the problem of oligopoly in the market.

10. In the second case, the complainant was concerned about the limited number of PSLs issued by TD for SS, resulting in the market being almost dominated by a certain operator.

11. The then Transport and Housing Bureau ("THB") (now re-organised as the Transport and Logistics Bureau ("TLB")) conducted an investigation into the two cases. COMPAG considered the complainants' competition concerns raised, and also the then THB's findings and assessment as follows –

- (a) TD issued PSLs to 70 new operators of RS or SS between 2017 and 2021, and it was factually incorrect to say that TD had refused to issue new PSLs and grant RS or SS endorsements;
- (b) the licencing requirements of NFBs were clear and accessible to the general public (including any potential service providers, as well as the user groups such as housing estates and schools), in order not to deter any potential service providers from entering the markets or any user groups from choosing new service providers. Information on how to apply for PSLs and RS or SS endorsements, conditions of operation, obligations of the service providers, etc. was available on TD's website;
- (c) the same set of licencing requirements was applicable to all existing and potential service providers, and there was also no barrier per se for any new operators to apply to provide RS or SS; and
- (d) the provision of RS and SS was market driven, and it was up to the user groups to invite and select their preferred operators, be they existing

ones in the market or new ones. TD, as the approval authority, did not take part in the negotiations between the operators and user groups on details of the service proposals.

12. Taking into account the facts of the two cases and the then THB's assessment, COMPAG concluded that TD's NFB licencing regime did not give rise to impact on competition, and the complaints were therefore found unsubstantiated.

Case 3: Complaint about the monopolisation of the training market for the Mandatory Competence Test of the Motorcycle Driving Test as a result of TD and the Lands Department's tendering of designated driving school sites (case closed)

13. The complainant alleged that a particular company and its subsidiaries had monopolised the market for providing training for the Mandatory Competence Test ("MCT") of the Motorcycle Driving Test, as a result of TD and the Lands Department ("LandsD")'s decision to award the tenancies of all designated driving school ("DDS") sites to that company or its subsidiaries. The complainant also alleged that the company had since then been engaged in certain malpractices in relation to the MCT training.

14. The then THB (now re-organised as TLB) provided information about the case. COMPAG noted that while previous tender exercises for DDS sites had been conducted in an open, fair and transparent manner under a well-established competitive bidding approach that assessed conforming tenders based on rental proposals, TD conducted a review in consultation with the Commission and put in place enhancements with a view to enhancing competition amongst tenderers. For example, the enhancements included adopting a new marking scheme with due consideration of both technical and rental proposals of tenderers; adding assessment in respect of the level of MCT training course fee to the marking scheme for encouraging price competition; and removing the minimum requirement on tenderers' experiences for encouraging participation of new market entrants.

15. As the matter under complaint had been overtaken by subsequent developments, no further follow-up by COMPAG was necessary. For the part of the complaint concerning the company's alleged malpractices, the COMPAG Secretariat has referred the matter to the Commission for consideration.

Case 4: Complaint about the booking of diving pools managed by the Leisure and Cultural Services Department (case closed)

16. The complainant alleged that the Leisure and Cultural Services Department ("LCSD") had rejected his organisation's application for using

LCSD's diving pools given that it could not produce a valid diving instructor certificate issued or recognised by the Hong Kong Underwater Association ("HKUA"). The complainant considered LCSD's arrangement unfair to diving instructors not recognised by HKUA.

17. The Culture, Sports and Tourism Bureau ("CSTB") conducted an investigation into the case. COMPAG considered the complainant's competition concerns raised, and also CSTB's findings and assessment as follows -

- (a) the requirement of having a diving instructor who possessed a valid instructor qualification either issued or recognised by HKUA was transparently spelt out in LCSD's application form for using its diving pools, and well justified by LCSD to protect users' safety during their participation in diving;
- (b) HKUA, being recognised as the local governing body for underwater sports, was deemed a competent and appropriate local authority to monitor the quality and conduct of individual diving instructors under its auspices. If there were no local authority to do so, the safety of training activities would be significantly compromised;
- (c) apart from training diving instructors and issuing qualifications itself, HKUA also recognised diving instructors possessing qualifications of other training organisations that could meet the training standards commensurate with those set by the international federation of scuba diving. The recognition procedures required applicants to have a valid diving certificate recommended and endorsed by an affiliated dive club of HKUA to ensure that such instructors were active in the field and possessed relevant skills and that they conducted themselves in a manner expected of a diving professional as recognised by the respective affiliated dive clubs, and such requirement was transparent; and
- (d) there was no quota set on the number of instructors that could be recognised by HKUA, and there was no barrier per se for those who would like to apply for such recognition.

18. Taking into account the facts of the case and CSTB's assessment, COMPAG concluded that LCSD's practice of relying on the expert knowledge of HKUA to ensure the qualifications of diving instructors was reasonable, and the complaint was therefore found unsubstantiated. Nevertheless, COMPAG considered that the recognition mechanism being reliant on endorsement by affiliated dive clubs might give rise to competition concerns, and that there might be a need for HKUA to set out guidelines for its affiliated dive clubs to follow in order to ensure that the endorsement process would not create any unintended barrier of entry. The COMPAG Secretariat has relayed

COMPAG's observations to CSTB and requested CSTB to report back to COMPAG after working with HKUA.

Case 5: Complaint about the Environmental Protection Department's measures regarding treatment and recycling of waste electrical and electronic equipment (case closed)

19. The complainant alleged that the Environmental Protection Department ("EPD") had been providing special subsidies to a waste treatment company, but not other companies or individuals in the same recycling trade in Hong Kong. The complainant opined that such an arrangement was unfair, and that EPD should either cease the special subsidies for the company or grant the same to all market players in the trade.

20. EPD provided information about the case. COMPAG noted that the aforementioned company was the operator of a government waste treatment facility, and that an open tender exercise had been conducted before the contract was awarded to the company. COMPAG also noted that EPD did not provide special subsidies to the company, and that capital costs and operation fees of the facility were provided to the company in accordance with the contract awarded under the open tender exercise.

21. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

Case 6: Complaint about Architectural Services Department's requirement in the use of tactile warning markers (case closed)

22. The complainant alleged that although there were three types of tactile warning markers that could be used in barrier-free facilities in Hong Kong, the Architectural Services Department ("ArchSD") designated only one particular type of tactile warning marker for use in all of its projects. The complainant further alleged that since there was only one supplier that could meet the specifications of that particular type of tactile warning marker, he was forced to purchase the product from the sole supplier in order to take on ArchSD's projects.

23. ArchSD provided information about the case. COMPAG noted that ArchSD's specifications of tactile warning markers were based on objective criteria having regard to the functions to be served, and that the department did not mandate the use of any one particular type of tactile warning markers in its projects.

24. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

Case 7: Complaint about EPD's "EV-Charging at Home Subsidy Scheme" (case closed)

25. The complainant alleged that EPD had guided Owners' Corporations and property management companies of private residential buildings to shortlist 14 firms on ArchSD's consultants list for taking forward installation works under the "EV-charging at Home Subsidy Scheme ("EHSS")". The complainant considered the arrangement unfair.

26. EPD provided information about the case. COMPAG noted that the qualification requirements of consultants to be engaged by EHSS applicants was specified in EPD's Guidance on Preparation of Specifications for Employment of Consultants and Contractors from Installation Works under the EHSS ("the Guidance"), which was devised in consultation with various stakeholders, and that the Guidance did not specify that the consultants must be on ArchSD's list. COMPAG also noted that EPD had never advised any EHSS applicants to shortlist only firms on ArchSD's consultants list.

27. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

Case 8: Complaint about EPD's procurement of recycling-related services (case closed)

28. The complainant made two allegations about EPD's procurement of different recycling-related services. Firstly, he considered it unreasonable that EPD had awarded the contracts for the management of recycling bins in all four geographical regions in Hong Kong to a single company. Secondly, he considered it unfair that EPD, when procuring for services under a Pilot Programme on Smart Recycling System, had delayed the procurement process due to technical problems.

29. EPD provided information about the case. With regard to the first allegation, COMPAG noted that EPD's procurement of services had gone through an open tender process with the marking scheme made known to all tenderers, and that the bids for the four service contracts were assessed separately for each of the four geographical regions. As the first allegation contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

30. With regard to the second allegation, there were two phases of the Pilot Programme on Smart Recycling System, with the first phase being

invitations for both developing a computer system of smart recycling and providing physical smart recycling gift redemption machines, and the second phase being invitations for providing more physical machines that operated on the basis of the computer system developed in the first phase. COMPAG noted that after completion of the first phase, EPD intended to promote competition in the second phase by inviting also non-system operators to submit quotations for supplying the physical machines. COMPAG also noted that EPD had taken some time to engage the Hong Kong Productivity Council to develop a common platform for allowing any non-system operators to connect their machines via the common platform to the system, and that EPD in the end received a total of nine tenders, all of which demonstrated their abilities to connect to the common platform. As the matter under complaint had been overtaken by subsequent developments, no further follow-up by COMPAG was necessary.

Case 9: Complaint about the Food and Environmental Hygiene Department's public toilet design consultancy services (case closed)

31. The complainant alleged that a non-governmental organisation, with the Government as its largest source of funding, had "won" a contract for providing public toilet design consultancy services to the Food and Environmental Hygiene Department ("FEHD"). The complainant claimed that due to the availability of government subsidy/funding for the organisation, the organisation was able to offer below-market rates to bid for the contract and thus competed unfairly with private firms.

32. FEHD provided information about the case. COMPAG noted that the organisation did not receive recurrent funding from the Government to support its operations, but only project-based funding which were open to all eligible parties, including private firms, and could not be used to cross-subsidise other projects.

33. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

Case 10: Complaint about FEHD's requirement on installation of memorial plaques in public columbaria (case closed)

34. The complainant alleged that FEHD required successful niche applicants to engage only FEHD-registered contractors for installing memorial plaques in public columbaria, and that the quotations obtained from various contractors increased drastically within a short period of time. The complainant considered that FEHD's requirement could result in price-fixing amongst contractors.

35. FEHD provided information about the case. COMPAG noted that FEHD had introduced a registration system for contractors with the aim of establishing a uniform standard of workmanship and work practices for maintaining consistency and solemnity of public columbaria, and that similar registration systems were implemented in major private cemeteries and proven to be effective and widely accepted by the public and funeral trade. COMPAG also noted that FEHD's registration system was open to all interested mason and marble contractors, and that the criteria to be met were objective and transparent.

36. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

Case 11: Complaint about the Government Logistics Department's Purchasing Card Programme (case closed)

37. The complainant alleged that while the Government Logistics Department ("GLD") had engaged two service providers to operate the Purchasing Card Programme, the two service providers eventually engaged the same subcontractor to perform merchant-related services after one subcontractor had ceased its business in Hong Kong. The complainant considered the subcontractor's services unsatisfactory and that GLD should engage more service providers to enhance competition.

38. GLD provided information about the case. COMPAG noted that the engagement of the same subcontractor by the two service providers was due to the other subcontractor's cessation of business in Hong Kong, rather than any decision or action on GLD's part. COMPAG also noted that under GLD's existing contracts with the two service providers, there were no restrictions on the number of subcontractors a service provider might engage, and likewise the number of service providers a subcontractor might work for.

39. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

Case 12: Complaint about LandsD's prolonged renewal of a Short Term Tenancy site (case closed)

40. The complainant alleged that LandsD had continuously renewed the Short Term Tenancy ("STT") of a dangerous goods storage site, hence depriving the right of other market players to use the site.

41. LandsD provided information about the case. COMPAG noted that periodic reviews had been conducted on the way forward of the subject site, and that the District Land Conference had decided to re-tender the site after

taking into account factors such as market demand and alternative use of the site.

42. As the matter under complaint had been overtaken by subsequent developments, no further follow-up by COMPAG was necessary.

Case 13: Complaint about Batch VI of the Revitalising Historic Building Through Partnership Scheme administered by the Commissioner of Heritage's Office (case closed)

43. The complainant alleged that the successful non-profit-making organisation ("NPO") applicant under Batch VI of the Revitalising Historic Building Through Partnership Scheme ("the Scheme") was closely related to the Chairperson of the Advisory Committee on Built Heritage Conservation ("the Advisory Committee"), who was responsible for assessing applications under the Scheme. The complainant opined that the "competition" amongst NPO applicants was not real, open and fair.

44. The Commissioner of Heritage's Office ("CHO") provided information about the case. COMPAG noted that CHO had promulgated a Guide, which set out, amongst others, requirements of the selection process, assessment criteria and the interest declaration arrangement of the Advisory Committee, and that all relevant requirements, including the interest declaration arrangement, were confirmed by CHO to be implemented properly for Batch VI of the Scheme.

45. As the case contained no clear and identifiable subject matter directly relating to competition, COMPAG decided that no investigation be undertaken.

(B) Cases concerning Entities not subject to the Competition Rules and Enforcement Provisions of the Competition Ordinance

Case 14: Complaint about the Airport Authority's restriction on the provision of in-flight catering services for private jets (case closed)

46. The complainant alleged that the Airport Authority ("AA") only allowed three approved catering companies to provide in-flight catering services to private jets and access the Hong Kong Business Aviation Centre ("HKBAC") where private jets were parked and serviced, and that other caterers could not access or make deliveries to HKBAC, whether landside or airside. The complainant considered that AA's restriction had denied smaller caterers the opportunity to enter the private jet catering market.

47. TLB conducted an investigation into the case. COMPAG considered the complainant's competition concerns raised, and also TLB's findings and assessment as follows –

- (a) in-flight catering services at the Hong Kong International Airport ("HKIA") were operated through franchises. Food production facilities directly connected to the airside were surer to offer smooth and speedy delivery of in-flight food to aircraft, which was essential from the perspectives of food safety and aviation security. Due to limited land resources and operational constraints at HKIA, AA had to set a ceiling of only three franchisees for in-flight catering services;
- (b) HKBAC, which provided services to private jets, had no food production facilities and had to rely on caterers to provide in-flight catering services to private jets. Apart from the three franchisees among which HKBAC was free to choose, HKBAC could also engage non-franchisees under specific conditions and that such flexibility was already provided in the agreement between AA and HKBAC;
- (c) the specific conditions to be met by non-franchisees were the same stringent requirements applicable to franchisees, which were meant to ensure that food safety and aviation security would not be compromised, but not to deter competition or create hurdles to any possible new entrants;
- (d) in any case, HKBAC had been satisfied with the three franchisees' services so far, and therefore had not come across situations that required procuring in-flight catering services from other non-franchisees; and
- (e) going forward, for the long-term development of HKIA, space had been reserved on the newly reclaimed land of the Three Runway System for

the introduction of a new in-flight catering franchisee when it was considered necessary.

48. Taking into account the facts of the case and TLB's assessment, COMPAG concluded that given HKBAC's discretion to engage franchisees or non-franchisees was a matter of its own commercial consideration, the complaint was found unsubstantiated. Nevertheless, as a related matter, COMPAG was concerned about the renewal of franchise agreements with the three existing franchisees in 2013 without an open tender exercise, although it noted that AA had done so upon completing a holistic review in consultation with an external legal consultant and with its Board's approval. COMPAG advised that the Commission should be consulted in relation to such a decision in future, and that there might also be a need for AA to set out more clearly in future the considerations from competition perspective when setting the ceiling on the number of franchisees and length of franchise period. The COMPAG Secretariat has relayed COMPAG's observations to TLB and requested TLB to report back to COMPAG after working with AA.

Case 15: Complaint about the Hong Kong Science and Technology Parks Corporation's lease of land to data centre operators (under processing)

49. The complainant alleged that the Hong Kong Science and Technology Parks Corporation had leased land to data centre operators at a rental level far below market rates, failed to enforce the lease restrictions that prohibited data centre operator lessees from subletting the leased premises, and allowed transfer of ownership of data centre operator lessees to third-party providers. The complainant considered that these would give undue advantages to existing data centre operator lessees and distort competition in the industry.

50. According to the Innovation, Technology and Industry Bureau ("ITIB"), the matters under complaint were subject to an on-going judicial review ("JR") in 2022. The COMPAG Secretariat has requested ITIB to provide information on the case to COMPAG for consideration after the conclusion of the JR case.

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