

競爭政策諮詢委員會工作報告

# COMPAG

Competition Policy Advisory Group Report



2004 – 2005

(English version)

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# 1. Introduction

The Competition Policy Advisory Group (COMPAG) chaired by the Financial Secretary is a high-level forum charged with the responsibility to examine, review and advise on competition-related issues that have policy or systemic implications. The terms of reference and membership of COMPAG are at **Annex I**.

COMPAG has, since its establishment in December 1997, examined about 100 complaint cases and over 70 initiatives adopted by the respective bureaux and departments to promote competition. Details of all these cases and initiatives are contained in the COMPAG's annual reports, which are available at the COMPAG website ([www.compag.gov.hk](http://www.compag.gov.hk)). This report covers the period from 1 April 2004 to 31 March 2005.

While COMPAG has been operating effectively, to ensure that the Government's competition policy caters for present day's circumstances and meets the needs of time to enable Hong Kong to maintain its competitive edge, COMPAG has appointed a Competition Policy Review Committee to review the existing competition policy and the composition, terms of reference and operations of COMPAG. Details of this Committee, as well as the Government's other new initiatives in 2004-05 in promoting competition are set out in Chapter 2 of the report. Updates on previous initiatives are provided in Chapter 3.

It has been an important part of the COMPAG's work to tender advice to bureaux and departments on investigations and follow-up actions regarding complaints of anti-competitive practices. COMPAG, through its Secretariat, ensures that all bureaux and departments handle the complaints promptly, properly and in accordance with established policy, guidelines and procedures. In addition to keeping track of complaint cases, COMPAG will also initiate studies on competition-related issues with systemic implications. The complaints and issues reviewed by COMPAG in 2004-05 are summarized in Chapter 4.

COMPAG considers that promoting and ensuring fair competition is not just a government matter. The community, in particular the business sector, also has an important role to play. To this end, COMPAG has, in 2004-05, adopted a series of measures to nurture a pro-competition culture in the community and to involve the community in the implementation of the Government's competition policy. Details of these initiatives are set out in Chapter 5. Chapter 6 highlights the major developments in 2004-05 with regard to competition policy on the international front.

## 2. New Initiatives

### Initiative 1: Establishment of the Competition Policy Review Committee

Fair competition is the cornerstone to Hong Kong's economic development and pivotal to its prosperity and success. To ensure that the Government's competition policy caters for present day's circumstances and meets the needs of time to enable Hong Kong to maintain its competitive edge, the Government announced on 1 June 2005 the appointment of a Competition Policy Review Committee (the Committee) by COMPAG to review the existing competition policy and the composition, terms of reference and operations of COMPAG.

The appointment of the Committee is an initiative announced by the Financial Secretary in his 2005-06 Budget Speech. The Committee is chaired by a non-official, with members drawn from different sectors of the community, as well as representatives from bureaux and departments with responsibility for competition-related matters. Membership of the Committee is at **Annex II**.

The Committee is expected to complete its review in 12 months' time and the Government will inform the Legislative Council and the public of the outcome of the review.

## **Initiative 2: Consultancy study on the auto-fuel retail market in Hong Kong**

To enhance competition in the local auto-fuel retail market, the Government has –

- (a) since July 2000, put up existing petrol filling station (PFS) sites for tender upon lease expiry instead of automatically renewing the tenancy; and
- (b) since June 2003, put up PFS sites for tender in batches and allow tenderers to submit a single bid for all the sites or separate bids for individual sites included in a tender, to facilitate new market players in acquiring a “commercially viable mass” sites to achieve economies of scale. Two new players have successfully entered the market under the new tendering arrangements.

Further to the above, COMPAG has decided to commission an independent consultant to assess the competition situation in the auto-fuel retail market in Hong Kong, and examine whether the oil companies involved might have engaged in any anti-competitive practices. The study will look into the structure, operating costs and retail pricing, etc. of the local auto-fuel retail market and make reference to the competition laws in other economies such as the United States, European Union and Australia, and the experience and measures adopted by these economies in tackling anti-competitive behaviour of oil companies. The consultant will also make recommendations on whether measures including legislation might be required to ensure fair competition in the auto-fuel retail market in Hong Kong.

The study is expected to be completed around end 2005. The Government will inform the Legislative Council and the public of the findings of the study.

### **Initiative 3: New requirements for leases of communications network area within a residential property**

The communications network area (CNA) is designated as part of the common areas under the Deed of Mutual Covenant (DMC) for installation of telecommunications network system in a residential development. Through a lease of CNA, the developer of a property development grants to a lessee the right to install, use and operate telecommunications network system in the CNA.

There have been concerns about the CNA lease restricting property owners' choice of telecommunications services. In considering the Banyan Garden case (Case 3 in Chapter 4 of this report), COMPAG was of the view that where building management services were provided by the real estate developer or management company before an Owners' Corporation could be formed, the real estate developer or management company should not enter into excessively long service contracts to deprive owners of the option to vary the type or choice of service later.

In view of the above, the Legal Advisory and Conveyancing Office (LACO) of the Lands Department plans to impose new requirements when giving approval for the sale of uncompleted residential properties, including –

- (a) the term of the CNA lease, if any, should be terminable after the first three years by the Owners Committee or Owners Corporation, if formed; and
- (b) the sales brochures of the properties should include –
  - (i) a description of the services to be provided under the CNA lease;
  - (ii) a clear definition and identification of the portions of the development affected by the CNA lease; and
  - (iii) the amount of monthly fee payable by the owner of each unit of the development for the services provided under the CNA lease, if known.

LACO plans to implement the new requirements within 2005 after consultation with parties concerned.

### 3. Progress of Previous Initiatives

Over the years, COMPAG has examined and monitored the progress of a large number of new initiatives targeted at promoting competition in various sectors, and many of which have already been successfully implemented. This Chapter highlights those initiatives which have new developments in their implementation in 2004-05.

Initiatives	Progress
<b>Energy</b>	
(1) Future regulating requirement for electricity supply sector	The Scheme of Control Agreements between the Government and the two power companies will expire in 2008. The Government launched the first of a two-stage public consultation on 31 January 2005 to seek the public's views on the future regulating regime. The three-month consultation period ended on 30 April 2005. The Government would consider the views collected, and map out the framework for development of the post-2008 electricity market for the second stage of public consultation to be conducted in the latter half of 2005.
<b>Financial Services</b>	
(2) Review of the retail payment systems in Hong Kong	The Hong Kong Monetary Authority (HKMA) continued to implement the recommendations contained in the comprehensive review of retail payment systems in Hong Kong which was completed by HKMA itself in 2001. The review examined and provided recommendations on accessibility, costs, pricing, efficiency, competition and risks associated with such systems. HKMA is working with representatives of credit cards, debit cards and multi-purpose

<b>Initiatives</b>	<b>Progress</b>
	stored value cards companies to develop appropriate codes of practices to enhance sectoral efficiency and transparency.
<b>Information Technology Services</b>	
(3) Review of the Information Technology Professional Services Arrangement (ITPSA)	In May 2004, the then Information Technology Services Department (renamed the Office of the Government Chief Information Officer (OGCIO) after merging with the IT-related divisions of the Communications and Technology Branch of the Commerce, Industry and Technology Bureau in July 2004) consulted the IT industry and Government departments on ways to improve the existing arrangements for the bulk supply of IT professional services to Government departments under the ITPSA. Having regard to the feedback received, the OGCIO would replace the ITPSA upon its expiry in December 2005 by an enhanced arrangement, the Standing Offer Agreements for Quality Professional Services. Under the new arrangement, the number of contractors participating in government IT projects would increase from the existing 23 up to 44.
<b>Legal</b>	
(4) Relax the restrictions on solicitors with regard to their right to present their clients' cases in the higher courts	In June 2004, the Chief Justice announced the establishment of a Working Party, chaired by Mr Justice Bokhary, to study the issue. The solicitors and barristers members of the Working Party would prepare draft papers setting

Initiatives	Progress
	<p>out their proposed scheme for the extension of the solicitors' right to present their clients' cases to higher courts for the Working Party's consideration.</p> <p>The Working Party is working on a consultation paper on the matter which is expected to be ready by the latter half of 2005.</p>
<b>Telecommunication and Broadcasting</b>	
(5) Introduce broadcasting satellite services (BSS)	BSS was successfully introduced in December 2004. As a result, a total of 32 television programme channels are now available for reception in Hong Kong on a subscription basis by means of BSS.
(6) Regulate set-top boxes	The Government announced in July 2004 the framework for implementing digital terrestrial television (DTT) in Hong Kong. The two terrestrial television broadcasters (Asia Television Limited and Television Broadcasts Limited) are required to launch DTT by 2007, and the DTT technical standard will be decided in late 2006/early 2007. To ensure a smooth analogue-to-digital transition, the Government will collaborate with the industry and community to promote DTT and tackle relevant issues including set-top box issues.
(7) Regulation of mergers and acquisitions in the telecommunications	In July 2003, the Telecommunications (Amendment) Ordinance 2003 was enacted.

Initiatives	Progress
market	<p>Under the Ordinance, the Telecommunications Authority is empowered to regulate completed mergers and acquisitions which have, or are likely to have, the effect of substantially lessening competition in a telecommunications market. There is also a channel for seeking the Telecommunications Authority's prior consent on a voluntary basis. Subsequent to its enactment, the Ordinance came into effect on 9 July 2004.</p>
Others	
8) Release of technical information in the Operation and Maintenance (O&M) manuals by lift manufacturers	<p>In March 2004, the Electrical and Mechanical Services Department (EMSD), after consultation with the industry, launched the "Guidelines on Operation and Maintenance Manuals" (the Guidelines) which set out the information to be provided by lift manufacturers/ contractors for installation of lifts or when major alterations are made. The Guidelines have been uploaded to the EMSD homepage for reference of interested parties and the general public. Since the launch of the Guidelines, there is no reported case of lift contractor not being able to undertake lift maintenance due to lack of technical information or failure to obtain the information. EMSD would continue to review implementation of the Guidelines with the industry and refinement would be made where appropriate.</p> <p>In addition, a Lift Owners' Guidebook (the Guidebook) providing building owners with</p>

Initiatives	Progress
	<p>general information and related technical issues for lift operation and maintenance was launched in late February 2004. Six talks jointly organized by the Home Affairs Department, EMSD and the trade association for promulgating the Guidebook and explaining its contents were held between April to August 2004 which attracted the attendance of over 600 people. EMSD would review the Guidebook and launch the updated version when available.</p>

## 4. Cases Reviewed by COMPAG

### I. Competition-related complaints

#### ***Case 1: Complaint against PCCW-HKT about the provision of unauthorized discounts for its Citinet service***

A complaint was lodged with the Telecommunications Authority (TA) in August 2003 alleging that PCCW-HKT had breached its licence by offering unauthorised discounts to clients of its Citinet service (a fixed telecommunication network service). The TA completed investigation of the case in November 2004 and concluded that the complaint was not substantiated.

The complainant alleged that a leaflet of the PCCW-HKT's Citinet service (the "Leaflet") offered four types of discounts to users of the Citinet service, of which three were unauthorised discounts.

The TA found that two of the three discounts in question were in accordance with the tariffs approved by the TA and published in Gazette. As regards the third type of discount, the TA was not able to relate it to any approved discount. PCCW-HKT explained that it did not give any such discount to its customers and the discount was provided by a sales agency in the form of rebate and only 10 customers signed up through this sales agency. Moreover, the leaflet was issued by this sales agency without the prior approval or knowledge of PCCW-HKT. PCCW-HKT also claimed that it was not affiliated with this sales agency and did not give any subsidies to this sales agency.

The TA requested PCCW-HKT to provide documentary evidence, such as copy of the bills it had sent to these 10 customers to support its claims. Based on the billing records submitted by PCCW-HKT, it was able to clearly show in four cases that PCCW-HKT billed customers the amount approved by the TA. In the remaining six cases, the figures in the billing records were not straightforward given that the customers also used other services from PCCW-HKT.

The TA noted that the promotion in question was carried out more than a year ago. Given the lapse of time, some billing information was no longer available. Having regard to this and the fact that PCCW-HKT was able to produce billing records which proved without doubt that PCCW-HKT had billed four out of the ten customers the approved amount, the TA considered that, on the balance of probabilities, PCCW-HKT had not provided unauthorized discounts. Hence, the TA did not consider the complaint established.

***Case 2: Complaint against a provider of maintenance services for satellite TV reception facilities***

The Owners' Committee (OC) of a private residential estate wrote to the COMPAG Secretary in December 2003 alleging that the agreement between the developer and a provider of maintenance services for satellite TV reception facilities which leased the communications network area in the estate to this service provider at an annual rental of \$1 up to the year of 2047 was against the principle of fair competition. The communications network area was designated as part of the common areas in the Deed of Mutual Covenant for installation of satellite TV reception facilities and communications network of the estate. The OC considered that the aforementioned lease deprived owners of their choice of maintenance service providers for satellite TV reception facilities.

Having considered the complaint, the TA advised that the complaint mainly arose from the disagreement between the OC and the service provider concerned with regard to the charges for maintenance services for the satellite TV reception facilities in the estate. The disagreement was settled in January 2004 and the service contract between the service provider concerned and the OC had been renewed. The TA explained its views in March 2004 to the Chairman of the OC who agreed to close the case.

**Case 3: Provision of telecommunications services at Banyan Garden estate**

The TA had received complaints from a number of residents and telecom service providers in late 2003 concerning the provision of basic telephone and broadband internet access services by Hutchison Global Communications Limited, Hutchison Multimedia Services Ltd and PowerCom Network Hong Kong Limited at various residential estates. Residents living at the concerned housing estates were liable to pay for the services of these companies, via the building management fee, regardless of whether the residents used the services or not.

The TA completed its investigation into the first complaint case, the Banyan Garden case, and announced its findings on 11 August 2004, which outlined the analytical approach adopted by TA to assessing the legality of such cases.

The TA's investigation focused on whether there had been breaches of -

- (a) Section 7K(3)(c) of the Telecommunications Ordinance (TO), which states that a licensee shall not give an undue preference to, or receives an unfair advantage from, an associated person if, in the opinion of the TA, a competitor could be placed at a significant disadvantage, or competition would be prevented or substantially restricted; and
- (b) Section 19B of the TO, which states that a term in a lease agreement, deed of mutual covenant or commercial contract that, in all the circumstances of the case, unreasonably restricts the right of a resident or occupier, or deprives a resident or occupier of the right, to have access to the public telecommunications services of his choice is void to the extent only that it imposes such restriction.

The TA was unable to conclude that any of the three licensees had contravened section 7K(3)(c) because -

- ✧ the three licensees had no apparent knowledge that they were being advantaged, and had either acted competitively for the right to be selected or were recommended by an unrelated third party – hence it could not be proved that they had knowingly received an “unfair advantage” from their associate; and
- ✧ the TA did not find any evidence that the three licensees had sought the advantages in question or received them in the knowledge that they were advantages.

In relation to section 19B, the TA concluded that it would be up to the individual who was affected by the arrangement to go to court and seek a declaration of nullity pursuant to this section, and that the TA was unable to take direct action under this provision.

Having considered the TA's report, COMPAG was of the view that –

- the issues identified in the Banyan Garden case concerned the availability of advance, comprehensive and comprehensible information on the types of services included in the management fee prior to the sale or occupation of the building;
- where building management services were provided by the real estate developer or management company before an Owners' Corporation (OC) could be formed, the real estate developer or management company should not enter into excessively long service contracts to deprive owners of the option to vary the type or choice of service later. The tenders should also be competitive, open and transparent;
- a comprehensive competition law was not the answer to resolving the issues identified; and
- the Banyan Garden case highlighted the need for promoting the awareness of anti-competitive practices and pro-competition principles in the property development and building management sectors.

To follow up on COMPAG's deliberations, the Legal Advisory and Conveyancing Office of the Lands Department (LACO) would, with regard to leases of communications network area (CNA) within a residential property, impose new requirements when giving approval for the sale of uncompleted residential properties (please see p.6 for details). Meanwhile, Home Affairs Department (HAD) would introduce further amendments to the BMO in the 2004-05 legislative session. One of the proposed amendments was to amend section 20A of the Buildings Management Ordinance (BMO) to tighten the procurement procedures of an OC. LACO would also incorporate a new requirement in the DMC Guidelines along the lines of the new section 20A of the BMO

On the promotion of awareness of anti-competitive practices and pro-competition principles, the Housing, Planning and Lands Bureau had drawn to the attention of the Real Estate Developers Association of Hong Kong the Guidelines to maintain a competitive environment and define and tackle anti-competitive practices (the Guidelines) issued by COMPAG in September 2003, encouraging the Association to promote adherence to the Guidelines by its members and to develop a code of conduct for the sector on the basis of the Guidelines. As regards the property management sector, HAD had written to the Hong Kong Association of

Property Management Companies Limited to encourage the Association to promote among its member companies adherence to the Guidelines and incorporate principles of the Guidelines into the existing Code of Conduct of the Association.

**Case 4: Tender for the provision of electronic imaging and uploading of building plans and documents by the Buildings Department**

Three companies, which failed in an open tender of the Buildings Department (BD) for the provision of electronic imaging and uploading of building plans and documents onto the existing computerized Building Records Management System (BRMS), wrote to the COMPAG Secretary in April 2004 querying the results and procedures of the tender. In particular –

- (a) Briefing: they queried why BD did not issue record of the briefing for potential tenderers;
- (b) Demonstration: they considered that two hours were not enough for them to carry out the demonstration and this had hindered their performance during the demonstration. In addition, they queried why colour scanning was not required during the demonstration; and
- (c) Assessment criteria: they requested the Government to clarify the assessment criteria and enhance the transparency of the tender process. They would also like to know their scores and the reasons for their failure.

BD advised that the purpose of the tender was to select a contractor to convert building records (e.g. building plans) kept by BD from paper or microfilm format into electronic images, and to upload the converted images onto the BRMS for storage and retrieval. The tender was gazetted on 2 and 9 January 2004 and submissions from seven companies were received.

The ‘briefing’ mentioned by the complainants was in fact a visit to the BD’s office for the potential tenderers to familiarize them with the scope of service to be provided (e.g. the types, quality and quantity of building plans to be scanned) before they actually submitted the tender. During the familiarization visit, BD had not provided information other than that stated in the tender document. BD did not consider it necessary to provide any minutes for the familiarization visit.

The purpose of the demonstration was to enable BD to assess the competence of a tenderer in carrying out the conversion work. To ensure fairness, two hours and the same or similar set of drawings, documents and microfilms were given to the tenderers for the demonstration. BD considered that two hours were sufficient for the purpose. In fact, several tenderers including one of the complainants had passed the evaluation on demonstration. Colour scanning service was not mandatory because it was not essential.

The assessment mechanism, marking scheme and the assessment criteria of the demonstration were provided in the Tender Document. All the unsuccessful tenderers were invited to attend debriefing sessions on 6 May 2004 to provide them with feedback on the strengths and weaknesses of their tenders. They were informed of the awarded contract sum, and their marks in individual aspects as compared with those of the highest scorer. Unsuccessful tenderers who did not attend the debriefing were informed of the same in writing. Hence, BD considered that the tender procedures and arrangements had not caused any hindrance to competition.

The COMPAG Secretariat replied to the three companies in July 2004 clarifying the tender procedures and arrangements as stated above. The case was considered closed.

**Case 5: Complaint about the provision of security services at the Hong Kong International Airport (HKIA)**

A provider of ground support services at the HKIA complained to the COMPAG Secretary in early 2004 about the provision of security services in the restricted area in the HKIA by Aviation Security Company Limited (AVSECO)<sup>Note</sup> -

- AVSECO's charges were too high and did not commensurate with the quality of services provided;
- the Airport Authority (AA) was in a monopolistic position to provide security services at the HKIA. Such services should be thrown open to competition; and
- AA had rejected the complainant's request to engage an outside security company to perform access control at its premises which were located in the restricted area in the HKIA.

The Security Bureau (SB) advised that to ensure consistency and integrity of security control and a high standard of aviation security at the HKIA, it was Government's established policy that access control to the restricted areas of the HKIA, among other aviation security related functions, was to be provided by AVSECO. On the other hand, operators at the HKIA had the choice of employing other security companies to perform security functions unrelated to aviation security.

SB further advised that AVSECO provided high standard staff training and quality control programmes, and recruited staff with relatively higher educational level. These costs had to be reflected in AVSECO's charges. AVSECO's policy had been to set its charging rate at a reasonable and cost-recovery level. AVSECO constantly monitored the efficiency and cost-effectiveness of its operations. It had made and would continue to make efforts on cost-saving initiatives.

The COMPAG Secretary had replied to the complainant accordingly and the latter had not pursued further.

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<sup>Note</sup> AVESCO is a subsidiary company of the Airport Authority (AA), jointly owned by AA and the Government.

**Case 6: *Alleged anti-competitive incidents in the provision of Government Electronic Trading Services (GETS)***

GETS refers to the front-end electronic data interchange services for submitting trade-related official documents such as electronic manifest (except road mode) and import and export declaration to the Government. Prior to 2004, GETS was provided by one service provider (SP) under an exclusive franchise which expired on 31 December 2003. From January 2004, the original SP continued to provide the full range of GETS and a new SP, appointed pursuant to a tender exercise conducted by Government in 2002, began providing GETS for two trade documents, namely, Import and Export Declaration and Dutiable Commodities Permit.

The new SP complained to the Commerce, Industry and Technology Bureau (CITB) on 4 June 2004 that the original SP had engaged in anti-competitive practices such as cross-subsidization, dumping, misrepresentation, defamatory action, and use of exclusivity clauses. In the same month, the original SP complained to CITB that the new SP had participated in arrangements that prevented, restricted, discouraged or restrained competition, such as releasing false information and causing undue disturbance to the customers of the original SP.

The new SP further complained to COMPAG Secretary in March 2005 alleging that the original SP had engaged in unfair practices such as solicitation of tenderers' withdrawal after tender submission during the 2002 tender exercise, selective pricing, misrepresentation, and use of exclusivity clauses.

CITB was looking into these complaints.

**Case 7: *Complaint against tendering arrangement for tuck-shop services in seven government secondary schools***

The Ombudsman referred to Education and Manpower Bureau (EMB) in July 2004 a complaint against the tendering arrangement for tuck-shop services in seven government secondary schools. The complainant alleged that only the English version of the tender documents was provided in the aforesaid tender exercise and as such, tenderers who did not know English would be prevented from participating in the tender.

EMB advised that the seven schools had strictly followed the government guidelines on tendering. In the present case, the Gazette Tender Notice and tender page for the Internet were provided in both English and Chinese. Although the schools only issued the English version of the tender documents, the briefing session for tenderers was conducted in Cantonese.

Upon the completion of case enquiries, the Ombudsman concluded in September 2004 that EMB had acted in accordance with the prevailing government requirements in conducting the above tendering exercise. However, with the increasing emphasis on bilingualism, EMB should arrange bilingual tender documents and might specify that the English version would prevail in case of dispute.

In response to the Ombudsman's comments, EMB reviewed the relevant guidelines and undertook to provide the Chinese translation version of the tender documents as far as practicable.

**Case 8: Tender of catering service in facilities under LCSD's purview**

An incumbent operator of a restaurant at a sports centre operated by the Leisure and Cultural Services Department (LCSD) wrote separately to the LCSD and the COMPAG Secretariat in August 2004 alleging that the LCSD's decision to let out the catering service at the sports centre in question through restricted tender for subvented Non-governmental Organizations (NGOs) was against the principle of fair competition -

- (a) LCSD's decision put the interest of people of disability (PWD) before the overall interest of Hong Kong;
- (b) the decision of restricted tendering was reached without full and open consultation with the affected parties;
- (c) it was very unfair to the incumbent operator to deprive its chance of re-tendering, taking into account its investment in the restaurant and the losses during the SARS period;
- (d) the goal of promoting employment of PWD could be achieved by making employment of PWD as a special condition in an open tender. The incumbent operator was already employing PWD in the restaurant.

LCSD advised that it had 103 venues for the operation of catering services. Except 10 venues, all catering outlets were let out by open tender.

A scheme to let out refreshment outlets to NGOs providing rehabilitation services to PWD by means of restricted tender was launched in 1995. As a start, four catering outlets were included under the scheme. Six other outlets were added upon the request of Social Welfare Department (SWD) in 2002.

LCSD and SWD advised that the purpose of letting out the refreshment outlets to NGOs providing rehabilitation services through restricted tender was to assist them in setting up social firms which served the dual purpose of creating employment opportunities for PWD and training up disabled persons with lower work ability for open employment. Allocation by open tender could not fully achieve these objectives -

- ◆ Firstly, special knowledge was required to train and assist different categories of PWD such as autism, mentally handicapped, mental illness, hearing impairment, etc. Very often, modification and purchase of special equipment, technical aids and adaptation of premises were required to help PWD in their job and maximize their efficiency and productivity. Private operators might not have all the

necessary knowledge and skills to provide rehabilitation services to the PWD;

- ◆ Secondly, professional staff such as job counsellors and social workers of NGOs would keep track of the progress of individual disabled employees and render them support and assistance as appropriate. Private operators might not be able to offer such programme to their disabled employees; and
- ◆ Lastly, PWD were susceptible to exploitation, discrimination and marginalization. As all the NGOs on the list were subject to monitoring of SWD, the quality of their rehabilitation services could thus be guaranteed.

As far as the present case was concerned, LCSD advised that there was no provision under the tenancy agreement for the contractor to ask for an extension of the current contract or for the Government to advise the current contractor on any change in the subsequent tendering exercise. Nevertheless, LCSD agreed that it would be more desirable if it had made prior consultation with affected parties, or made known the change well in advance. In this regard, LCSD decided to let out the next contract of the restaurant in question by open tender. SWD would widely promulgate the policy for offering restricted tender to NGOs while the LCSD would inform any affected incumbent caterers well in advance in future.

COMPAG accepted the report from the LCSD and SWD and agreed that the next contract of the restaurant in question should be let out by open tender. LCSD replied to the complainant accordingly and the case was considered closed.

**Case 9: Complaint against the introduction of short-haul cross-boundary coach services to Huanggang**

An alliance of taxi and minibus operators (the Alliance) wrote to the Government in August 2004 alleging that the Government's decision to approve six cross-boundary coach services to terminate at the Huanggang Control Point (HCP) would create unfair competition to their operation and affect their business. They questioned why the operators of these six routes were not selected by open tender.

The Environment, Transport and Works Bureau (ETWB) advised that cross-boundary coaches were operated under a quota system which was jointly administered by the Hong Kong and Mainland authorities. Under the system, coach quotas were only issued to eligible Hong Kong-Mainland joint venture companies. ETWB also advised that cross-boundary coaches and domestic public transport performed different roles in serving cross-boundary travellers. The former offered point-to-point cross-boundary services while the latter provided connecting services for travellers to take the East Rail Lo Wu service and the Lok Ma Chau-Huanggang Shuttle Bus to cross the boundary.

Since mid 2003, cross-boundary coach operators had been extensively overrunning their quotas and operating unauthorised services between various locations in Hong Kong and the HCP. This had seriously affected cross-boundary traffic and the operation of the control points on both sides. ETWB considered that while it was necessary to eradicate the overruns, the proven public demand for short-haul cross-boundary coach services had to be suitably met. Hence the ETWB decided jointly with the Mainland authorities to take a "two-pronged" approach to tackle the problem –

- (a) enhanced enforcement actions against unauthorized operations; and
- (b) approved six regulated cross-boundary coach routes between various locations in Hong Kong and the HCP to suitably meet the needs of cross-boundary travelers. These routes commenced operation on 16 August 2004. They were operated partly with existing quotas and partly with new quotas issued by the Hong Kong and Mainland authorities, which was necessary to enable the operators to provide a reasonable level of service.

The six cross-boundary coach routes were approved for operation by existing coach operators holding Lok Ma Chau quotas as the scheme was intended to regulate the existing coach operations via the Lok Ma Chau Control Point. An open tender exercise was not conducted because the operators had to have valid quotas allocated by the Hong Kong and

Mainland authorities and contribute some of them for operation of the regulated coach services. Nevertheless, all existing coach operators with valid Lok Ma Chau quotas were invited to take part in the allocation process.

The ETWB replied to the Alliance to explain the Government's position on the matter and the case was considered closed.

**Case 10: Complaints from private driving instructors about Government practices favouring driving schools**

A group of Private Driving Instructors (PDIs) wrote to the Environment, Transport and Works Bureau (ETWB) in September 2004 complaining that -

- The practice of separating driving school students from PDI students in conducting the written test was unfair. They suspected that the questions given to the driving school students were easier;
- PDI students had to wait longer than driving school students for most types of driving tests (e.g. private car and light goods vehicle, etc.); and
- Driving schools were allowed to place promotional pamphlets at Transport Department (TD)'s licensing offices while PDIs were not.

The ETWB advised that –

- the Government adopted a two-pronged approach on driver training, i.e., allowing the establishment of off-street driving schools and maintaining a sufficient supply of PDIs to meet the demand for on-street driving instructions. PDIs took up approximately 70% of the market and the driving schools the other 30%;
- written tests were computerized and questions were drawn randomly by computer to ensure fairness. The purpose of separating PDI students from driving school students in arranging written tests was to facilitate TD's management of learner drivers' records. Having considered the PDIs' concern, TD started to arrange driving school students to take written tests with PDI students in the same room in December 2004.
- waiting times for PDI students and driving school students were different because the former took their driving tests at TD's on-street examination sites and the latter at the campuses of driving schools. The difference in waiting time was due to differences in the number of candidates in the two categories. TD would review the deployment of driving examiners to school and non-school test centres regularly according to the demand and driving test waiting time of different vehicle classes; and
- as there were around 1 000 PDIs, it was not possible to allow each PDI to place his publicity materials at TD's licensing offices. Nevertheless, Driving Instructors' Association were allowed to place their publicity pamphlets which contained information of individual

PDI members at TD' s licensing offices.

The TD had a meeting with the complainants to explain the Government's position on the matters, and the case was considered closed.

**Case 11: *Complaint against abuse of dominant market position by the organizer of the Hong Kong Jewellery and Watch Fair 2004***

A group of the non-official contractors appointed by some exhibitors which participated in the Hong Kong Jewellery and Watch Fair 2004 (HKJWF) lodged a complaint with the COMPAG Secretariat in September 2004 against the abuse of dominant market position by the organizer of the HKJWF. They complained that the organizer had imposed a set of new requirements for them such as restriction of access to exhibition halls, requirement of security check and payment of deposits. They alleged that these new requirements had restricted the opportunities for the non-official contractors to enter into the market and to compete, increased the investment costs of entry into the market, distorted normal operation of the exhibition industry and constituted a barrier to free trade. The Commerce, Industry and Technology Bureau was looking into the complaint.

**Case 12: Complaint against an alleged restrictive practice of the Hong Kong Institute of Certified Public Accountants**

A complainant lodged a complaint with the COMPAG Secretariat in September 2004 alleging that the Hong Kong Institute of Certified Public Accountants (HKICPA) had refused his application for (a) membership admission; and (b) issue of a practising certificate (PC), by virtue of his membership with an overseas accountancy body. Instead, he was required by the HKICPA to pass an Aptitude Test in respect of his seeking for admission as a member of the HKICPA, and to pass the PC Examinations in respect of his application for the issue of a PC. He claimed that HKICPA's treatment to him was anti-competitive.

The Financial Services and the Treasury Bureau (FSTB) had advised that

- (a) the HKICPA was Hong Kong's statutory licensing body for accountants. Members admitted to the HKICPA were registered as certified public accountants (CPAs) under the Professional Accountants Ordinance (PAO, Cap. 50). The HKICPA had a duty under the PAO to ensure that applicants meet the requisite requirements before they were admitted into the Institute. The PAO empowered the Council of the HKICPA to grant full or partial exemption to members of an overseas accountancy body from the prescribed professional examination requirement. As in December 2004, there were 14 such overseas bodies.
- (b) the rationale for the Aptitude Test was to ensure that the prospective members had a required level of understanding of local tax and law. Nevertheless, waiver of the Aptitude Test requirement was afforded to applicants holding membership of certain overseas accountancy bodies. In view of the complaint, FSTB had invited the HKICPA to consider reviewing the matter with a view to achieving a greater degree of consistency in the treatment of the Aptitude Test afforded to different classes of applicants; and
- (c) the PC Examinations requirement applied consistently to all CPAs admitted to the HKICPA by virtue of their membership of any of the recognized overseas accountancy bodies. As a quality safeguard, it was not unreasonable for the HKICPA to keep the conduct of the PC Examinations in itself.

COMPAG agreed with the FSTB's assessment and noted the follow-up actions to be taken by the HKICPA. The COMPAG Secretary replied to the complainant accordingly.

**Case 13: *Complaint against a property management company restricting the use of car washing service by property owners***

A complainant wrote to the COMPAG Secretariat in December 2004 alleging that the management company of a residential development had prohibited workers of car washing companies from entering the development unless they belonged to the company designated by the management company or they had obtained prior approval of the management company. The complainant alleged that the designated car washing company was associated with the management company, and that such arrangements were against fair competition. The Home Affairs Department was looking into the case.

**Case 14: Complaint against the anti-competitive practices of airlines and hotels**

A travel agent wrote to the COMPAG Secretariat in December 2004 alleging that –

- (a) Hotels had, through the provision of gifts or other incentives, turned customers of travel agents into their own corporate accounts. Once these customers had become their corporate clients, hotels would not accept bookings from travel agents for them. Such practices distorted the normal operation of the market; and
- (b) Airlines had engaged in price-fixing which aimed at restricting competition by –
  - (i) offering low rates for air tickets through their own websites; and
  - (ii) prohibiting travel agents from marketing certain products and services of the airlines on the travel agents' websites without their prior agreement.

The complainant opined that such practices of hotels and airlines had adversely affected the business of travel agents and were against the principle of fair competition. The complainant further suggested that COMPAG should consider introducing a comprehensive competition law in Hong Kong to deal with the matter.

The Tourism Commission (TC) and the Economic Development Branch (EDB) of the Economic Development and Labour Bureau had looked into the case and considered the complaint not substantiated –

*Hotels*

- ◆ The hotel market in Hong Kong was highly competitive with a large number of players. As at end 2004, there were 101 hotels in Hong Kong.
- ◆ It was a common practice for hotels worldwide to market their rooms through various channels, such as travel agents, airlines, credit card companies and direct sale to individual customers. It was also common for hotels to provide incentives to corporate accounts or individual customers through loyalty programmes to compete for customers. Since hotel rooms were private assets, hotel management had the right to decide how to market their rooms and to exercise full discretion in accepting or otherwise certain bookings including those from travel agents.

- ◆ Consumers were free to make their room reservation through different means. Neither the TC nor the Travel Industry Council of Hong Kong had received any complaint from consumers about having difficulty in making hotel room reservation through travel agents because of the “corporate account” programmes.

#### *Airlines*

- ◆ As with other products and services, it had become a common practice for airlines worldwide to market and sell their products and services through the Internet. Internet ticketing provided an additional avenue for customers to purchase air tickets. Internet ticketing also reduced transaction costs, which could be translated into lower air fares for consumers. It would be a commercial decision for airlines to decide whether to offer discounted fares for Internet sales as part of their marketing strategy.
- ◆ With regard to the allegation that airlines had engaged in anti-competitive behaviour by prohibiting travel agents from marketing certain products and services of the airlines on the travel agents’ websites without the airlines’ prior agreement, the EDB regarded this as a condition/term in the agency agreement between the airline and the travel agent concerned. The EDB had noted that, as a general practice, in the US and Europe where competition laws were in place, it was an accepted practice for airlines to prohibit publishing by third parties of information and materials on their websites for commercial use.

#### *Competition law*

- ◆ As the practices of hotels and airlines in question were not anti-competitive and in fact commonly adopted in economies with or without competition law, there was no justification for introducing competition law in Hong Kong to deal with them.

COMPAG agreed to the findings of the TC and the EDB, and the COMPAG Secretariat had replied to the complainant accordingly.

## II. Studies initiated by COMPAG

### ***Case 15: Alleged collusive price fixing in the noodle trade***

The HK & Kowloon Vermicelli & Noodle Manufacturing Industry Merchants' General Association (the Association) and 19 suppliers put up a joint announcement in some local newspapers on 6 April 2004 to inform the public that with immediate effect, the wholesale and retail prices of various dried and wet noodle products would be raised by 10 - 20%. The joint announcement had given rise to concern about possible price-fixing collusion in the noodle trade. COMPAG asked CITB to investigate the matter.

CITB met with the Association in May 2004 to inquire into the circumstances leading to the joint announcement. The Association explained to CITB that the joint announcement mainly aimed at informing the trade and their customers (both restaurants and the general public) about the rising import prices of raw materials and appealing to fellow manufacturers to raise their prices by 10 - 20%. They emphasized that the joint announcement was no more than an appeal and compliance was not mandatory.

CITB had looked at the Composite Consumer Price Index for "other cereals and cereal preparations" compiled by the Census and Statistics Department, which showed the movement in the retail prices of products such as noodles, spaghetti and macaroni, as well as instant cereals (including instant noodles) and flour. In April 2004, the CPI for these products rose slightly by 1.5% over the previous month. The index remained constant in May and fell by 1.3% in June. The retail prices of this category of products had thus been stable. CITB doubted whether the attempt was successful as there was no evidence that the joint announcement had led to a visible increase in the retail prices of noodle products.

CITB considered that the Association's attempt had not substantially undermined consumers' benefit or economic efficiency of the market. It had not adversely affected the accessibility and contestability of the noodle market. As there were no barriers to entry in the noodle trade, any collusive behaviour by existing manufacturers would not be successful. CITB explained the Government's competition policy to the Association, and urged the Association to refrain from engaging in price fixing and other anti-competitive behaviour in future.

### ***Case 16: Competition in the pork market***

As follow up to a report on competition situation in the pork market released by COMPAG in December 2002, COMPAG requested the Health, Welfare and Food Bureau (HWFB) and the Food and Environmental Hygiene Department (FEHD) to provide an update of the competition situation in May 2004. COMPAG in July 2004 further requested HWFB to provide an account on the shortage of pork supply happened in that month, which led to the increase in the price of pork and the temporary suspension of pig trading at the Sheung Shui Slaughterhouse (SSSH) as reported by the media.

The HWFB advised that there were three types of pork available in the market with different market shares in 2003: pork from freshly slaughtered pigs (48.11%), chilled pork (2.42%) and frozen pork (49.47%).

Although live pigs from the Mainland contributed to about 80.7% of the total number of live pigs consumed in Hong Kong in the past 3 years, pork from freshly slaughtered pigs only accounted for 48.11% of the total pork consumption in 2003. As such, live pigs from the Mainland only accounted for 38.83% of the total pork consumption in 2003. Consumers therefore had the choice of turning to other sources for pork if the price of fresh pork from Mainland pigs became excessively high. In fact, many consumer groups including restaurants, Siu Mei (燒味) shops, younger families and families with westernized eating habits had turned to frozen or chilled pork in recent years. The market share of fresh pork had decreased from about 70% in 1994 to 48.11% in 2003, whereas the market share of chilled and frozen pork had increased from about 30% in 1994 to 51.89% in 2003.

HWFB further advised that there was no restriction on the origin of live pigs supplied to the Hong Kong market. The Government maintained a level playing field for all importers of live pigs by requiring all imported pigs to meet only the necessary health standards and sanitary requirements which were equally applicable to local pigs. There was also no restriction on the quantity of imported live pigs and live pigs supplied by local farms. Imported live pigs and local ones were free to compete for a bigger share in the local market. Similarly, there was no restriction on the origin of chilled and frozen pork, subject to the necessary health standards and sanitary requirements.

While Ng Fung Hong (NFH) (五豐行) was the sole agent for the supply of imported live pigs from the Mainland, it still faced competition from local pig farmers and traders in chilled and frozen pork in the larger pork market, as Mainland live pigs were not the sole source of pork for local consumers.

As regards the temporary suspension of wholesale trading of live pigs in SSSH on the afternoon of 7 July 2004, HWFB found that some pig buyers refused to take part in the auction alleging that a shortage of supply of Mainland live pigs at SSSH had led to a sharp increase in the auction price. According to NFH, the auction price rose by about 20% soon after the commencement of the auction. NFH held an emergency meeting with the buyers' representatives and explained to them that the shortage was due to a decrease in production volume by Mainland farms where it regularly procured live pigs. Trading was resumed in the evening after NFH promised to source live pigs from some more registered farms in the Mainland so as to ensure a steady supply.

HWFB had compared the quantity of live pigs imported from the Mainland on 7 July 2004 and also during the 15 days before and after 7 July 2004, and found that there was no evidence of any major variation in the quantity of supply. The number of imported live pigs that arrived at SSSH on 7 July 2004 was 3,282, which was smaller than the average daily figure of 3,478 for the 31-day period by about 5.6%. The drop was relatively mild as the fluctuation in the quantity of live pigs supply going through the SSSH during the 31-day period ranged from -7.6% to +11.6% and there were four other days in which the decreases in supply were greater than 5.6%. During the same period of time, the overall quantity of supply of Mainland live pigs in Hong Kong (i.e. total quantity of live pigs going through the SSSH and the Tsuen Wan Slaughterhouse) varied by about -9.2% to +13.3%, but for most of the time (22 days) the variation was less than  $\pm 5\%$ .

The quantity of supply of live pigs imported from the Mainland was fairly steady in the preceding few months. The daily average figure increased by 0.95% and 3.37% from April to May and from May to June respectively but decreased by 3.51% from June to July. The daily average supply of live pigs in July 2004 was 6,049, of which 5,088 were imported from the Mainland.

NFH explained that the increase in price reflected increases in procurement, feed and transportation costs. This seemed to tally with HWFB's observation in the costs of pig feeds in Hong Kong, which had increased by over 30% since the beginning of 2004. On the other hand, the auction price of imported live pigs remained fairly stable since April 2004. It only increased by about 2.2% between April and July 2004.

Based on the above findings, HWFB considered and COMPAG agreed that there was as much competition in the local pork market as the Government could foster. It was not necessary for the Government to take any action to intervene in the operation of market forces.

### ***Case 17: Review of the live chicken wholesale trade***

In response to the strike organized by the live chicken wholesale trade in March 2004 and to outline measures to prevent possible collusive anti-competition action among wholesalers, the Health, Welfare and Food Bureau (HWFB) had, upon the COMPAG's request, conducted a review of the live chicken wholesale trade in mid 2004.

On 30 January 2004, the import of live chickens from the Mainland was temporarily suspended in view of the H5N1 avian influenza outbreaks in the Mainland. The wholesalers, retailers and transporters felt aggrieved with the suspension as they believed that Mainland farms registered for supplying live poultry to Hong Kong were free from the disease. To express their dissatisfaction, the three wholesale trade associations, together with the Hong Kong Poultry Wholesalers and Retailers Association (whose members were actually all retailers), and the Kowloon Poultry Transporter and Poulterer Association representing the transporters, staged a territory wide strike at both wholesale and retail levels on 10 March. The original intention was to continue with the strike until 24 March to press for early resumption of importation. As a result, local farms were also prevented from selling their stock through the wholesale market.

In view of the hygienic and financial concerns of stocking over-sized chickens in local farms for a pro-longed period, Agriculture, Fisheries and Conservation Department (AFCD) coordinated with local farmers and individual wholesalers with the intention of resuming the sale of local chickens on 18 March. Nevertheless, the initiative was foiled by all three wholesaler associations refusing to supply their cages and no chicken was delivered to the wholesale market for sale that morning.

In the morning of 19 March, AFCD leased 200 cages from a chicken farmer and successfully sent 500 chickens to two retail outlets at Aberdeen and Yuen Long respectively to break the embargo. In the afternoon, the wholesalers, retailers and transporters called off their strike and resumed trading immediately.

Wholesalers played a central role in the distribution chain. On the one hand, their control on chicken cages provided them a convenient tool to stop any chicken distribution; on the other hand, wholesalers were not a closely knitted group and competition among them had always been keen. HWFB considered that the abundant availability of cheap close substitutes like chilled or frozen chickens and chicken parts served to restrain any collusive attempt by wholesalers to manipulate wholesale prices.

The HWFB also considered that there were sufficient differences in business interests among wholesalers to prevent them from acting in a collusive anti-competition manner for a prolonged period. Wholesale prices in general also fluctuated in accordance with supply and demand.

To prevent wholesalers from using their cages to embargo trade in future, AFCD had stocked 5,000 cages itself for contingency use. These cages could sustain a daily transportation capacity of moving 30 000 chickens from farms to markets while allowing sufficient time for empty cages to cycle back for disinfection. AFCD could, if necessary, readily bypass striking wholesalers by authorizing direct sale of chickens from local farms to retail outlets using these cages.

***Case 18: Increase in charges by laundry shops***

On 5 November 2004, the Laundry Association of Hong Kong Limited (the Association) placed an advertisement in various local newspapers calling on laundry shops to raise their charges by 10%. The Association stated that the increase was necessary as the high oil prices had significantly increased their costs of operation relating to the use of industrial diesel and automotive diesel, as well as plastic hangers and bags. The advertisement had aroused concern about anti-competitive practices by the Association.

Price adjustment in response to increase in costs could be a normal business practice. Nevertheless, by calling on members to increase charges by a uniform rate (i.e. 10%), the Association had engaged in practice which, pursuant to the Guidelines to maintain a competitive environment and define and tackle anti-competitive practices (the Guidelines) issued by COMPAG in September 2003, smacked of behaviour that distorted normal operation of the market. As directed by COMPAG, the COMAPG Secretariat wrote to the Association in December 2004 explaining to it the situation and urging it to refrain from engaging in any anti-competitive practices in future. The COMPAG Secretariat had also provided a copy of the Guidelines to the Association for reference.

## 5. Publicity and Training

COMPAG is aware that promoting and ensuring fair competition is not just a government matter. The community, in particular the business sector, also has an important role to play. To this end, COMPAG, to supplement the Statement on Competition Policy (vide **Annex III**) issued in 1998, –

- promulgated in September 2003 the *Guidelines to maintain a competitive environment and define and tackle anti-competitive practices* (the Guidelines) (vide **Annex IV**), to encourage self-regulation;
- launched in June 2004 an interactive game targeted at senior primary (Primary 4 to Primary 6) and junior secondary (Form 1 to Form 3) school students through the website of the Hong Kong Education City (HKEC) to nurture awareness and promote understanding of anti-competitive practices among students and the youth through games; and
- in collaboration with the Education and Manpower Bureau (EMB), since September 2004, integrated competition concepts into the Integrated Humanities curriculum of senior secondary school.

In 2004-05, the COMPAG Secretariat had contacted the respective trade and industry organisations to introduce the Guidelines and to follow up with them regarding their plans in promoting the Guidelines among their members. These organisations in general supported the Guidelines, and some of them had promoted the Guidelines to their members through newsletters and encouraged their members to comply with the Guidelines. The Hong Kong Retail Management Association had also developed a code of conduct for the supermarket sector on the basis of the Guidelines.

To further the efforts in promoting competition concepts at schools and among the youths, the COMPAG Secretariat organized, in 2004-05, three briefings for primary school principals and teachers, and teachers of the Economics and the Integrated Humanities (IH) courses on the Government's competition policy and competition concepts. The general feedback had been positive -

- Primary schools principals and teachers agreed that to nurture a pro-competition culture in our community, work should start at primary schools and that the interactive game on the HKEC's website was a useful tool in introducing competition concepts for primary schools students.

- Preliminary feedbacks from teachers of IH course also indicated that the subject of competition had aroused considerable interest among students and that the cases provided in the reference materials had prompted active discussion by students.

The COMPAG Secretariat would continue to follow up with the EMB and schools to obtain further feedback on the effectiveness of the work to promote competition concepts in schools.

## **6. Developments in the International Scene**

In 2004-05, interactions between trade and competition policies continued to attract discussions in major international fora such as the World Trade Organisation (WTO) and the Asia-Pacific Economic Co-operation (APEC).

On the WTO front, subsequent to a series of informal consultations and discussions in the first half of 2004, the General Council decided, as set out in the Decision on Doha Work Programme adopted on 1 August 2004, that interaction between trade and competition policy would not form part of the Doha Work Programme and therefore no work towards negotiations would take place within the WTO during the Doha Round of multilateral trade negotiations. We would continue to monitor closely the developments on the discussions on trade and competition policy in the WTO to safeguard our interests.

As regards APEC, discussions on competition policy mainly focused on collaborative efforts with the Organisation for Economic Co-operation and Development (OECD), including refining the APEC-OECD Integrated Checklist on Regulatory Reform (the Checklist), which provided a voluntary tool to assist member economies in formulating regulatory policy by highlighting the key issues that should be attended to in the process. Hong Kong, China (HKC) supported the initiatives and the endorsement of the Checklist by the APEC Ministers Responsible for Trade to be expected in June 2005. Separately, HKC had updated its Individual Action Plan to report, inter alia, further liberalisation in the telecommunications sector and adoption of new tendering arrangement for petrol filling station sites to facilitate new entrants to the fuel market.

Apart from contributing to the work of major international fora, HKC had continued to promote the understanding by international community of our competition policy.

## **Competition Policy Advisory Group Terms of Reference and Membership**

COMPAG was set up under the chairmanship of the Financial Secretary in December 1997 to review competition issues that have substantial policy or systemic implications. Its terms of reference and membership are set out below -

### **Terms of Reference**

- (a) To agree and promulgate a policy statement on the promotion of competition in Hong Kong.
- (b) To identify areas in the economy, particularly within the existing government framework, that may not be fully compatible with the promotion of competition and economic efficiency, and review scope for refinement.
- (c) To consider and review initiatives from bureaux and departments, or others as appropriate, on how to promote competition in Hong Kong.
- (d) To consider competition-related matters which may have a bearing on government policy.

### **Membership**

- Chairman – Financial Secretary
- Members – Secretary for Commerce, Industry and Technology
  - Secretary for Financial Services and the Treasury
  - Secretary for Economic Development and Labour
  - Permanent Secretary for Commerce, Industry and Technology (Commerce and Industry)
  - Permanent Secretary for Financial Services and the Treasury (Treasury)

- Permanent Secretary for Economic Development and Labour (Economic Development)
  - Director-General of Trade and Industry
  - Government Economist
  - Consumer Council
- Secretary – Principal Assistant Secretary for Economic Development and Labour (Economic Development)
- Observers – On a need basis

## Membership of the Competition Policy Review Committee

### Chairman

Mr Christopher CHENG, GBS, JP

### Members

Mr Andrew BRANDLER

Prof Andrew CHAN

Prof CHAN Ka-keung

Dr William FUNG, JP

Mr John GRIFFITHS, SC, CMG, QC

Mr Peter HUNG

Mr IP Kwok-him, GBS, JP

Mr Larry KWOK, JP

Mr Frederick LAM, JP

The Hon Andrew LEUNG, SBS, JP

The Hon SIN Chung-kai, JP

### *Representatives from the following bureaux and departments :*

Economic Development and Labour Bureau  
(Economic Development Branch)

Commerce, Industry and Technology Bureau  
(Commerce and Industry Branch)

The Telecommunications Authority

The Government Economist

Secretary

Principal Assistant Secretary for Economic Development  
and Labour (Economic Development)

# Statement on Competition Policy

## Introduction

1. This Statement sets out the objective of the Government of the Hong Kong Special Administrative Region's competition policy and offers some specific pointers to facilitate compliance with the policy.

## Objective

2. The objective of the Government's competition policy is to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare. The Government is committed to competition as a means to achieving the said objective, and not as an end in itself.
3. The Government considers competition is best nurtured and sustained by allowing the free play of market forces and keeping intervention to the minimum. We will not interfere with market forces simply on the basis of the number of operators, scale of operations, or normal commercial constraints faced by new entrants. We will take action only when market imperfections or distortions limit market accessibility or market contestability, and impair economic efficiency or free trade, to the detriment of the overall interest of Hong Kong. We will strike the right balance between competition policy considerations on the one hand, and other policy considerations such as prudential supervision, service reliability, social service commitments, safety, etc., on the other.

## Pro-competition Principles

4. All government entities, and public- and private-sector bodies are encouraged to adhere to the following pro-competition principles for the purpose of enhancing economic efficiency and free trade –
  - a. maximizing reliance on, and minimizing interference with, market mechanism;
  - b. maintaining a level-playing field;

- c. minimizing uncertainty and fostering confidence in system fairness and predictability by –
  - i. consistent application of policies;
  - ii. transparent and accountable operations; and
  - iii. adherence to equitable and non-discriminatory standards and practices.

### **Restrictive Practices**

- 5. The Government recognizes that not all practices that limit market accessibility or contestability impair economic efficiency or free trade. Only those that do, and are not in the overall interest of Hong Kong, should be attended to. The determination of whether a practice is restrictive, detrimental to economic efficiency or free trade, and against the overall interest of Hong Kong must be made in the light of the actual situation. The intended purpose and effects of the practice in question, and the relevant market or economic conditions, etc., must all be taken into account.
- 6. As each practice must be examined on its own, it is difficult and misleading to generalize. For illustrative purpose only, some business practices which may warrant more thorough examination are set out below –
  - a. price-fixing\* intended to distort the normal operation of the market, increase the cost for purchasers, and have the effect of impairing economic efficiency or free trade;
  - b. bid-rigging\*, market allocation\*, sales and production quotas\* intended to distort the normal operation of the market, increase the cost for and reduce the choice and availability to purchasers, and have the effect of impairing economic efficiency or free trade;
  - c. joint boycotts\* intended to distort the normal operation of the market, deprive supply or choice to the targets of the boycott, and have the effect of impairing economic efficiency or free trade; and
  - d. unfair or discriminatory standards\* among members of a trade or professional body intended to deny newcomers a chance to enter or contest in the market, and have the effect of impairing economic efficiency or free trade.

7. The Government further recognizes that scale of operation or share of the market per se does not determine whether a business is anti-competitive or not. The determining factor is whether a business, through abusing its dominant market position, is limiting market accessibility and contestability and giving rise to economic inefficiency or obstruction of free trade to the detriment of the overall interest of Hong Kong. Each case has to be examined on its own. For illustrative purpose only, some examples that may involve an abuse of market position are set out below-
  - a. predatory behaviour such as selling below cost for the purpose of driving out competition followed by substantial price increases in an area of economic activity where there are constraints to market accessibility and contestability;
  - b. setting retail price minimums for products or services where there are no ready substitutes; and
  - c. conditioning the supply of specified products or services to the purchase of other specified products or services or to the acceptance of certain restrictions other than to achieve assurance of quality, safety, adequate service or other justified purposes.

### **Approach**

8. There is no international standard or consensus on what is the best approach to achieve competition in order to enhance economic efficiency and free flow of trade. Some economies have competition laws which differ widely in scope of control, enforcement mechanisms and remedies available. Other economies shun the legislative route. The choice is heavily influenced by the characteristics, development history and socio-economic background of an economy.

\* These are various forms of horizontal restraints among competitors typically for the purpose of raising or fixing prices (so-called "price-fixing"), compressing bid prices ("bid-rigging"), allocating specific customers or sales territories to particular firms and not competing over the territory or customers of other firms ("market allocation"), setting quotas on the supply of certain goods or services in order to push prices up ("sales and production quotas"), and not dealing with firms that supply other firms in their market ("collective boycotts").

9. For Hong Kong, a small and externally-oriented economy which is already highly competitive, the Government sees no need to enact an all-embracing competition law. To maintain overall consistency in the application of the competition policy, we provide a comprehensive, transparent and over-arching competition policy framework through this Policy Statement and reinforce this with sector-specific measures not limited to laws.

10. In the Hong Kong environment, the Government is promoting economic efficiency and free trade through competition by –
  - a. raising public awareness of the importance of competition for the enhancement of economic efficiency and free trade;
  - b. identifying, on a sectoral basis, obstacles and constraints imposed by the Government and other public sector entities which limit market accessibility and contestability and compromise economic efficiency and free trade to the detriment of the overall interest of Hong Kong, and removing them through voluntary, administrative, legislative, etc., measures as appropriate;
  - c. initiating pro-competition measures, on a sectoral basis, in the Government and public sector through administrative, legislative, etc., measures as appropriate;
  - d. encouraging the private sector to embrace competition and its stated objective of enhancing economic efficiency and free trade through voluntary action;
  - e. supporting the Consumer Council's work in drawing up codes of practice that promote competition and its stated objective of enhancing economic efficiency and free trade;
  - f. working together with the Consumer Council to encourage the private sector to adopt pro-competition measures, such as self-regulatory regimes that preserve and enhance free competition; and to monitor and review business practices in sectors prone to anti-competition behaviour;
  - g. establishing a central repository of competition-related concerns and complaints to facilitate the identification of possible deficiencies and areas for improvement; and
  - h. providing a dedicated forum under the Financial Secretary (already established and known as the Competition Policy Advisory Group or "COMPAG" in short) to review policy issues related to competition.

### **Implementation**

11. The Government is committed to pro-actively nurture and sustain competition for the purpose of enhancing economic efficiency and free trade. COMPAG will invite all government entities to adhere to

the Statement, propose initiatives for furthering the policy objective, examine the impact of all new proposals on competition and, where appropriate, bring this to the attention of the Executive Council and the Legislature. They are also expected to ensure that all statutory bodies under their charge pay heed to the Statement as well.

12. The Government calls upon all businesses to cease existing, and refrain from introducing, restrictive practices that impair economic efficiency or free trade on a voluntary basis. Where justified, the Government will take administrative or legal steps as appropriate to remove such practices if necessary.
13. Alleged restrictive practices in the public and private sectors may be referred to the concerned policy bureau or government department for consideration. Separately, the COMPAG Secretariat will keep track of all referrals and bring these to the attention of COMPAG should there be substantial policy or systemic implications.

## **Guidelines to maintain a competitive environment and define and tackle anti-competitive practices**

### **Introduction**

The ***Statement on Competition Policy*** (“the policy statement”) promulgates the Government’s sector-specific approach to competition. It stipulates, inter alia, that the determining factor of whether a business is anti-competitive is not the scale of operation or share of the market per se but whether a business or practice is limiting market accessibility or contestability and impairing economic efficiency or free trade to the detriment of the overall interest of Hong Kong. To facilitate implementation of this policy statement, the following guidelines (with specific pointers) are developed to –

- (a) assess Hong Kong’s overall competitive environment;
- (b) define and tackle anti-competitive practices; and
- (c) ensure consistent application of our competition policy across sectors.

### **Guidelines**

#### ***1<sup>st</sup> Pointer: Assessing the overall competitive environment***

2. This pointer assesses whether the economy is competitive. By meeting certain criteria, the overall business environment of Hong Kong would be deemed conducive to competition and free trade. The essential elements to assess the overall competitive environment are:

- (a) a stable and effective political environment;
- (b) a regime based on the rule of law;
- (c) a free and open macroeconomic environment;
- (d) abundant market opportunities;
- (e) positive policy towards private enterprise and competition;
- (f) positive policy towards foreign investment;
- (g) no foreign trade and exchange controls;

- (h) a transparent investment and tax regime;
- (i) easy access to financing;
- (j) a sophisticated labour market;
- (k) transparent and fair labour and immigration policies;
- (l) a strong physical infrastructure; and
- (m) free flow of information.

3. The key to competitiveness in a market is the high degree of easiness of entry and exit. When entry and exit barriers virtually do not exist, the incumbent firms will maintain prices close to the competition level. While competition could still exist and may even be intense with few participants in the market, the prevalence of numerous small and medium enterprises could be an illustration of the pro-competition attributes of the business environment in Hong Kong.

**2<sup>nd</sup> Pointer: Measuring the effects of restrictive practices on the market**

4. This pointer measures the **effects** of restrictive practices on the market to show whether the practices require Government action. A three-step broad economic test is provided under the policy statement as the means to determine whether the Government will take action against market conduct:

- (a) **Step 1** – when such market conduct limits market accessibility;
- (b) **Step 2** – impair economic efficiency or free trade; and
- (c) **Step 3** – to the detriment of the overall interest of Hong Kong.

5. For **Steps 1 & 2** of the test, the following factors can be used to determine whether competition in particular sectors has been, or likely to be, prevented or lessened substantially –

- (a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the existing market participants;
- (b) the extent to which acceptable substitutes for products/services supplied by the existing market participants are or are likely to be available;

- (c) restrictive government measures, including
  - (i) cumbersome government or public sector systems or measures;
  - (ii) tariff and non-tariff barriers to international trade by governments; and
  - (iii) government's regulatory control over entry;
- (d) any barriers to entry into a market, including
  - (i) **economic barriers** such as the (investment) cost of entry;
  - (ii) **structural barriers** such as sunk costs that reduce the ability to exit, the need to achieve economies of scale, the need to overcome brand loyalty of existing products; and
  - (iii) **strategic barriers** such as behaviour of incumbents that pose a credible threat to successful entry, the pre-emption of facilities by which an incumbent over-invests in capacity in order to threaten a price war if entry actually occurs, and the artificial creation of new brands and products in order to limit the possibility of imitation;
- (e) the extent to which effective competition remains or would remain in a market that is or would be affected by actions or proposed actions by existing or potential market participants;
- (f) any likelihood that actions or proposed actions by existing or potential market participants will or would result in the removal of a vigorous and effective competitor;
- (g) the nature and extent of change and innovation in a relevant market; and
- (h) any other factor that is relevant to competition in a market that is or would be affected by actions or proposed actions by existing or potential market participants.

6. There are circumstances where free competition may not be practicable or may not be the best solution, such as in situations where:

- (a) one firm can produce at lower average costs than could more than one;
- (b) there is a need for prudent supervision;

- (c) there is a need to protect the long-term interest of consumers; or
- (d) there is a need to provide incentives for innovation.

7. In the cases mentioned in paragraph 6, a qualitative assessment of the balance between a justified monopolistic situation on the one hand and the benefits of quality services and fair prices on the other is required. This would apply to **Step 3** of the test, which aims to determine market conducts that may be to the detriment of the overall interest of Hong Kong. The following public policy considerations are relevant:

- (a) the need for prudential supervision in the sector;
- (b) the need to maintain service reliability;
- (c) the need to meet social service commitments;
- (d) safety needs; and
- (e) other public interest considerations.

***3<sup>rd</sup> Pointer: Specific activities that restrict competition***

8. This pointer helps detect specific instances of anti-competitive practices and abuse of market position.

Anti-competitive practices

9. The following is a non-exhaustive list of examples of **anti-competitive practices**:

- (a) price-fixing intended to distort the normal operation of the market, increase the cost for purchasers, and have the effect of impairing economic efficiency or free trade;
- (b) actions preventing or restricting the supply of goods or services to competitors, and have the effect of impairing economic efficiency or free trade;
- (c) agreements to share any market sector between participants on agreed geographic or customer lines, and have the effect of impairing economic efficiency or free trade;

- (d) unfair or discriminatory standards among members of a trade or professional body intended to deny newcomers a chance to enter or contest in the market, and have the effect of impairing economic efficiency or free trade;
- (e) joint boycotts intended to distort the normal operation of the market, deprive supply or choice to the targets of the boycott, and have the effect of impairing economic efficiency or free trade; and
- (f) bid-rigging,<sup>1</sup> market allocation, sales and production quotas intended to distort the normal operation of the market, increase the cost for and reduce the choice and availability to purchasers, and have the effect of impairing economic efficiency or free trade.

#### Abuse of market position

10. Generally speaking, in considering whether a company is **dominant**, the Government shall take into account relevant matters including, but not limited to –

- (a) the market share of the company;
- (b) the company's power to make pricing and other decisions;
- (c) any barriers to entry to competitors into the relevant market; and
- (d) the degree of product differentiation and sales promotion.

11. A company who is in a dominant position would be deemed to have **abused** its position if it has engaged in a conduct which has the purpose or effect of preventing or substantially restricting competition in a market. As illustrative examples, the conducts to be taken into account in considering an **abuse of dominant market position** include:

- (a) predatory pricing – a deliberate strategy, usually by a dominant firm, to drive competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output. Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits;
- (b) setting retail price minimums for products or services where there are no ready substitutes;

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<sup>1</sup> Certain bid rigging activities, as far as public bodies are concerned, are criminal offences under the Prevention of Bribery Ordinance.

- (c) price discrimination, except to the extent that the discrimination only makes reasonable allowance for differences in the costs or likely costs of supplying the goods or services;
- (d) conditioning the supply of specified products or services to the purchase of other specified products or services or to the acceptance of certain restrictions other than to achieve assurance of quality, safety, adequate service or other justified purposes;<sup>2</sup> and
- (e) making conclusion of contracts subject to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the contract.

### **Mechanism for initiating action against anti-competitive practices and appeal**

12. As mentioned in the policy statement, the Government is committed to pro-actively nurture and sustain competition for the purpose of enhancing economic efficiency and free trade. The Competition Policy Advisory Group (COMPAG) chaired by the Financial Secretary –

- (a) directs **all government entities (including all statutory bodies)** to adhere to the policy statement and the above guidelines; and
- (b) calls upon **all businesses** to abide by the policy statement and this set of guidelines and cease existing, and refrain from introducing, restrictive practices that impair economic efficiency or free trade.

13. The following mechanism deals with action against anti-competitive practices and appeals against such actions<sup>3</sup>:

- (a) **complaints** – alleged restrictive practices in the public and private sectors may be referred to the concerned policy bureau or government department for consideration. Separately, the COMPAG Secretariat will keep track of all referrals and bring these to the attention of COMPAG should there be substantial policy or systemic implications;

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<sup>2</sup> It is necessary to take into account the commercial practice of “cross-selling”, particularly when in the form of bundled products/services which are typically offered to increase the attractiveness of the individual products/services. Very often these service/product packages address customers’ preferences as well as lower the cost of servicing to the benefit of the customers.

<sup>3</sup> The mechanism for complaints against restrictive practices and appeals in this set of guidelines is in reference to the work of the COMPAG in general. It shall be without prejudice to the action of statutory bodies like the Telecommunications Authority and the Broadcasting Authority which work to sector-specific competition laws.

- (b) **initiating action** – where justified, the Government will take administrative or legal steps as appropriate to remove anti-competitive practices if necessary; and
- (c) **appeals** – all parties subject to action against anti-competitive practices by the Government may appeal to the COMPAG for review of the action concerned;
- (d) Bureaux/departments are expected to implement the recommendations of the COMPAG. In general, the implementation of recommendations by the COMPAG is subject to judicial review or appeal mechanisms built into certain specific laws (e.g. Administrative Appeal Board Ordinance and applicable laws regulating specific sectors).

COMPAG Secretariat  
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