

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2013 – 2014

(English version)

1. Introduction

The Competition Policy Advisory Group (“COMPAG”) was established under the chairmanship of the Financial Secretary in December 1997 to provide a dedicated forum for examining, reviewing and advising on competition-related issues. COMPAG aims to promote the Government’s policy on enhancing economic efficiency and the free flow of trade through sustainable competition in Hong Kong, thereby bringing benefits to both the business sector and consumers.

2. In May 1998, COMPAG issued the Statement on Competition Policy (“the Statement”), setting out the objective of the Government’s competition policy. To supplement the Statement and advise businesses across sectors on the typical types of anti-competitive conduct and activities, COMPAG further published a set of guidelines in 2003.

3. In 2005, COMPAG appointed the Competition Policy Review Committee (“CPRC”) to review, and make recommendations on the future direction for competition policy in Hong Kong. In its report submitted to COMPAG in June 2006, CPRC recommended that a new cross-sector competition law be introduced.

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

5. Backed by wide public support, the Government introduced the Competition Bill (“the Bill”) into the Legislative Council (“LegCo”) on 14 July 2010. The Bill was passed by LegCo on 14 June 2012 to become the Competition Ordinance (“the Ordinance”).

6. The enactment of the Ordinance is a milestone in the development of competition policy in Hong Kong, signifying the determination of the Government in maintaining fair and free competition in the market. The Government is working closely with the Competition Commission (“Commission”) and the Judiciary with a view to bringing the Ordinance into full operation. **Chapter 2** of this report gives a brief introduction of the Ordinance and sets out the latest developments on the implementation of the Ordinance.

7. Prior to full commencement of the Ordinance, COMPAG would continue to review competition-related complaints, and refer complaints to the relevant bureaux and departments for follow-up action in accordance

with the established policy. The cases concluded in 2013-14 and the current position of outstanding cases are summarised in **Chapter 3**.

2. Competition Ordinance

8. The Ordinance provides a legal framework that prohibits and deters undertakings in all sectors from engaging in anti-competitive conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. An 'undertaking' is defined as any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes a natural person engaged in economic activity.

9. The Ordinance has three limbs of prohibition against anti-competitive conduct which are described as the first conduct rule, the second conduct rule and the merger rule and, collectively known as the "competition rules" in the Ordinance. The *first conduct rule* prohibits agreements, concerted practices as well as decisions of an association of undertakings that have the object or effect to prevent, restrict or distort competition in Hong Kong. The *second conduct rule* prohibits an undertaking with a substantial degree of market power to abuse that power by engaging in conduct that has as its object or effect to prevent, restrict or distort competition in Hong Kong. The *merger rule* prohibits mergers or acquisitions (applying only to carrier licences granted under the Telecommunications Ordinance (Cap. 106)) that have, or are likely to have, the effect of substantially lessening competition in Hong Kong.

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

11. The Tribunal is set up within the Judiciary as a superior court of record that has primary jurisdiction to hear and adjudicate on competition cases brought by the Commission, follow-on private actions, alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance ("CFI") as well as reviews of certain determinations of the Commission. Every judge of the CFI will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. On the recommendations of the Judicial Officers Recommendation Commission, two members of the Tribunal were appointed by the CE as the President and Deputy President of the Tribunal respectively.

12. To reconcile the Ordinance with the existing competition regulatory framework in the broadcasting and telecommunications sectors,

the Ordinance provides that the Communications Authority (“CA”) will have concurrent jurisdiction with the Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in the broadcasting and telecommunications sectors.

13. The Government will implement the Ordinance in phases. The Competition Ordinance (Commencement) Notice 2012 brought into operation provisions relating to the establishment of the Commission, the short title and commencement, interpretation, and the issue of guidelines by the Commission on 18 January 2013, as well as provisions relating to the establishment of the Tribunal and part of the provisions relating to its operation on 1 August 2013.

14. One of the major tasks leading to the full commencement of the Ordinance is for the Commission to prepare guidelines on the Ordinance. To this end, the Commission published a set of draft guidelines for public consultation in October 2014. The draft guidelines set out how the Commission will interpret and give effect to the competition rules; how complaints are to be made; procedures for investigation; and procedures for application for exclusions and exemptions. As required under the Ordinance, the Commission will consult LegCo on the draft guidelines before issuing or making any amendments to them.

15. The Government has also been working closely with the Judiciary since the enactment of the Ordinance to prepare for the establishment of the Tribunal and related matters. The Judiciary is formulating Tribunal Rules relating to the operation and proceedings of the Tribunal (the Tribunal Rules are subsidiary legislation) and the President’s directions, as well as making other necessary administrative arrangements to prepare for the full operation of the Tribunal.

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

3. Cases Reviewed by COMPAG

17. The following cases of alleged anti-competitive conduct were brought to the attention of COMPAG during the period under review. We have attempted to classify them, where possible, in accordance with the types of anti-competitive conduct identified in the COMPAG guidelines. We have also indicated the extent to which the complaints were found by COMPAG to be substantiated following investigation by the relevant bureau or department.

A) Abuse of Dominant Market Position

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

18. In December 2009, the former Broadcasting Authority ("BA") received a complaint from Asia Television Limited ("ATV") claiming that certain clauses in the contracts between TVB and its artistes and singers, as well as certain informal policies and practices pursued by TVB, violated the competition provisions of the Broadcasting Ordinance (Cap. 562) ("BO").

19. In September 2013, CA (the successor of BA) completed its investigation and concluded that some of the allegations were substantiated, including the inclusion of harsh and unreasonable terms in exclusive contracts with occasional use artistes and singers¹, the prohibition of the use of original voices and attendance in promotional activities of other TV stations by occasional use artistes, and the prevention of the use of Cantonese in the programmes of other TV stations in Hong Kong by contracted artistes. CA has found TVB to have abused its dominant position by engaging in anti-competitive practices in contravention of sections 13 and 14 of the BO. CA has imposed a financial penalty of \$900,000 on TVB, and directed TVB to forthwith bring an end to the infringement concerned and refrain from repeating or engaging in any act or conduct which has an equivalent purpose or effect to the infringing clauses and policies.

20. In October 2013, TVB lodged an appeal with the Chief Executive in Council ("CE in C") against the CA's decision. In December 2013, TVB applied for judicial review of the appeal mechanism to the CE in C under the BO and the CA's decision on the investigation. Both the appeal and the judicial review are being processed according to established procedures.

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

Case 2: Alleged anti-competitive conduct of the Hong Kong Trade Development Council ("TDC") in the exhibition industry (not substantiated)

21. In November 2009, a private organiser of trade fairs made a complaint to the COMPAG Secretariat, alleging TDC's anti-competitive behaviour when seeking to develop its exhibition business. The complainant considered that the growing market share of TDC in the exhibition industry had been due to the unfair advantages of TDC as a statutory public body with funding and policy support from the Government and TDC's exercise of dominant control over a major exhibition venue to crowd out private organisers of trade shows.

22. The COMPAG Secretariat conducted an investigation into this complaint case. Having considered the complainant's request and taking into account all relevant circumstances of the case, COMPAG appointed an officer to review the investigation report prepared by the COMPAG Secretariat to ensure impartiality. The appointed officer had reviewed the investigation report and reported his findings to COMPAG.

23. COMPAG considered the information provided by the complainant as well as the outcomes of the investigation and review and found that –

- (a) while COMPAG acknowledged that TDC was one of the major players in the exhibition services sector, there was no conclusive evidence to suggest that TDC had a dominant market position;
- (b) this notwithstanding, COMPAG had examined the complainant's complaints to see if the alleged conduct was anti-competitive in nature should it be engaged by an undertaking with a dominant market position;
- (c) on the alleged abuse of TDC's control over the use of the Hong Kong Convention and Exhibition Centre ("HKCEC"), it was noted that the booking decisions of HKCEC were made by the Hong Kong Convention and Exhibition Centre (Management) Limited ("HML") in accordance with a set of Booking Protocol which was available in the public domain. The practice of giving priority to recurring exhibitions adopted by the HML was a common practice adopted also by the AsiaWorld Expo and many other overseas venue operators. There was no evidence to suggest that TDC had interfered with the decision process of HML with a view to securing prime time slots at HKCEC for trade fairs of TDC;
- (d) there was no evidence to suggest that TDC had obtained insider

information from the Government in order to facilitate its organisation of the Wine Fair in 2008;

- (e) on the alleged copying of the complainant's trade fair by TDC, COMPAG considered that there was insufficient evidence to conclude that TDC had copied ideas of the complainant. In any event, from a competition perspective, the act of following competitors' strategies was not per se an abuse of market power, unless it was coupled with other exclusionary behaviour for the purpose of foreclosing a market. In the particular case quoted by the complainant, COMPAG was not aware of any evidence pointing to other behaviour on the part of TDC that would give rise to competition concern; and
- (f) on the complaints against TDC acting outside its mandate and providing little support to the exhibition services sector in Hong Kong, COMPAG was of the view that the complaints were more related to the issue as to whether TDC had suitably discharged its statutory functions. COMPAG did not find any evidence pointing to any specific anti-competitive practices that had been adopted by TDC in relation to the complaints. COMPAG had suggested the Commerce and Economic Development Bureau to encourage TDC to continue and step up its efforts in the promotion and dissemination of information of Hong Kong's trade fairs organised by other private exhibition organisers in order to promote competition within the sector.

24. The complainant was informed of the investigation results.

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

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

Licensee A alleged that such a conduct of bundling of broadcasting rights with other contents on the part of Licensee B was anti-competitive under the BO.

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

B) Government Policies and Practices

Case 4: Alleged anti-competitive conduct of the Leisure and Cultural Services Department ("LCSD") in a restricted tender exercise for granting permit to operate a cafeteria at the Museum of Coastal Defence ("MCD") (not substantiated)

27. In July 2013, the COMPAG Secretariat received a complaint by the then operator of the cafeteria at MCD about a restricted tender exercise conducted by LCSD for the operation of the cafeteria at MCD. The complainant alleged that the tender exercise involved anti-competitive conduct as only non-governmental organisations were invited to submit tender proposals.

28. The case was referred to the Home Affairs Bureau ("HAB") for investigation. The investigation showed that in supporting the policy to assist persons with disabilities (PWDs) to attain employment, LCSD conducted a restricted tender exercise to invite non-government organisations ("NGOs") recognized by the Social Welfare Department as providing vocational rehabilitation services to PWDs to submit tender proposals for the operation of the MCD cafeteria. Such an arrangement to enhance PWDs' employment opportunities and abilities to facilitate their integration into the community did not constitute anti-competitive conduct. Having reviewed the investigation report of the case, COMPAG accepted the findings submitted by HAB and considered the complaint unsubstantiated.

29. Findings of the investigation also revealed that the tender exercise on the operation of MCD cafeteria was conducted in accordance with the restricted tendering procedures as stipulated in the Government's Stores and Procurement Regulations. LCSD undertook that if there would be a change in arrangement to award contracts through restricted tendering in future, the new tendering procedures would be completed and the relevant arrangements would be publicised as early as possible before expiry of the prevailing contract.

30. The complainant was informed of the investigation results.

C) Unfair or Discriminatory Standards

Case 5: Alleged anti-competitive conduct of the Hong Kong Taekwondo Association ("HKTA") (under investigation)

31. In April 2014, the COMPAG Secretariat received a complaint by a local Taekwondo school alleging that the HKTA's current practice of admitting new members was anti-competitive.

32. The case has been referred to the Home Affairs Bureau ("HAB"). HAB has made preliminary enquiries with the parties concerned. Some parties have given their feedback. HAB will update COMPAG further upon receipt of all the feedback.