Hidden costs of Competition Ordinance

Hong Kong's Competition Ordinance has bolstered consumer rights but has had unintended consequences for citizens in land resumption cases, leaving them at risk of being short-changed.

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Sr Alnwick Chan
Executive Director and Head of Valuation and Professional Services of Knight Frank

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In a free market, businesses compete with each other to offer consumers the greatest range of products and choice. Healthy competition is beneficial insofar as it drives efficiency and innovation and directs businesses to meet consumer demand by providing the right products of the best quality at the right price.

This is the ideal in a free market, but is not always the case in the absence of rules that enable a fair and level playing field. As such, many countries, especially in Europe, have enforced competition rules to curb anti-competitive behaviour such as price fixing amongst competitors.

On 14 December 2015, Hong Kong joined the ranks of some 120 countries, including most of its neighbours in Asia, by introducing the Competition Ordinance (Cap.619). The primary purpose was to promote healthy competition and to safeguard a shared value of fair competition by making certain business practices which undermine competition illegal.

The Competition Commission emphasised that its enforcement efforts would focus on cartel conduct and other agreements between competitors that might cause significant harm to competition in Hong Kong, and it referred to the ordinance, which expressly provides that any failure to comply would lead to severe penalties including a company group being fined up to 10 per cent of its annual turnover.

Under the ordinance, three types of anti-competitive behaviour are strictly prohibited. The First Conduct rule prohibits in particular cartel behaviour, which is when competitors engage in conduct such as price fixing, sharing markets or bid rigging. The Second Conduct rule concerns enterprises with substantial degree of market power and prohibits some of their behaviours, such as predatory pricing and anti-competitive tying and bundling. The third Merger Rule simply applies to mergers that can substantially lessen competition. Altogether, these rules are known as the "competition rules".

"The absence of standardised fee structures shifts the risk to the clients, who don't know how much the government is willing to pay for the surveyor's fees."

The introduction of these rules was, for the most part, a welcome move, especially amongst SMEs, who often feel that they are not given a fair chance in the market. International evidence also shows that, for example, in the UK, consumers saved at least £195.1 million (HK$1.98 billion) between 2012 and 2015, according to estimates by the UK Competition and Markets Authority. But for some, the Competition Rules may have inadvertently created some grey areas. In particular, for government land resumption works, where the government exercises its power under various land resumption ordinances to mandatorily acquire land for the public interest. When this happens, displaced tenants, owners, business operators or affected parties are entitled to claim compensation under various ordinances.

"In the old days, when land resumption happened, those affected parties could claim, if not necessarily with success, compensation from the government and the ordinances made provisions for those claimants to seek reimbursement of professional fees from the government," says Sr Alnwick Chan, executive director and head of Valuation and Professional Services of Knight Frank.

With the introduction of Cap.619, the Hong Kong Institute of Surveyors' fee scale was abolished as a point of reference for the government to calculate the level fees that it would reimburse.

Sr Chan says it actually puts affected parties at a significant disadvantage because competition will now be driven by the financial aspect of offers, rather than quality.

"If you are being affected or displaced, whatever you incur to protect your interests should be borne by the resuming authority; that is still the practice, but in the old days, whenever we as surveyors took on such an appointment, we knew roughly what sort of fee level we would get back. Today, with this ordinance and the abolishment of the book, it's a shot in the dark," he said.

"Without the fee scale, we as surveyors don't have anything for our clients to rely on. Sure, we can promote our own fees under the free market, but whether the client can get it back from the government, say in five years' time, is now entirely the client's problem, to put it mildly."

Third-party observers agree.

"The absence of standardised fee structures shifts the risk to the clients, who don't know how much the government will be willing to pay for the surveyor's fees. It also means that if there are any disputes over who bears the cost of the surveyor's fees, any referral to the Lands Tribunal would mean increasing the government's incidental costs," said François Renard, head of Allen & Overy's Greater China Antitrust Practice.

Because of this scenario, many surveying firms are hesitant to take up land resumption works and will only work with long-standing clients they know closely. Sr Chan added that larger or even more reputable firms who are not desperate for business may shun these sorts of jobs, leaving less choice for affected parties. Or, clients will be charged whatever fee a firm wants to charge at the time, and will be simply left to deal with the government at a later date to try and recover charges.

For affected parties such as a small grocery shop in Shanghai Street, Sr Chan says: "You are essentially saying: 'good luck! I'm happy to work for you, you pay x amount of dollars first, and probably in five years' time you might get something back from the government'. This is sort of the dilemma that we have been trying to put to the government, and it doesn't live up to the spirit of the ordinance to protect those parties who will be affected by these resumption exercises".

In response, government letters to the industry say it will be reasonable and fair when distributing compensation and bearing the cost of professional services fees to surveyors. But Sr Chan questions this assurance, mainly because the level of professional fees to be reimbursed used to be provided for in writing as a guide before the adoption of the ordinances, and without such written commitment, he wonders what benchmark the government is working off. On top of this, rates do gradually become out dated and precedents take time and money to become established.

As several large-scale land resumption activities are set to take place in the New Territories, how is the industry going to respond to the demand?

While it remains unclear how the government will dish out compensation and pay for professional fees. Renard says that, as with any other sector, the introduction of Cap.619 means that the surveying industry will just have to find new ways to compete. Sr Chan suggests introducing hourly rates and for each firm to establish its own market rates, while Renard advises that any rate would need to be established in compliance with the ordinance and that it would be a good time for everyone to get their houses in order by setting up proper antitrust compliance programmes for employees.

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"Companies should review the behaviour of their business people and their contractual relationship, they should launch regular internal antitrust audits – like they would do for complying with financial or accounting rules – and yes, they will sometimes have to change their ways of doing business when setting up their rates. But all these actions should be proportionate and solution-oriented; a successful compliance programme is not a long list of don'ts," he says.

This is particularly important because the Competition Commission has already been investigating several conducts, and has even brought two cases to the Competition Tribunal (the *Nutanix* case and in August a new case against 10 renovation companies). The Commission has been very active during the first 18 months since the entry into force of the Ordinance.

"It has been more active than many other young authorities," says Renard.

At the end of the day, under this new order of no fee scales, Renard believes that "the biggest challenge for a company willing to respect competition rules is when some competitors do not 'play by the rules'. These players are of course at risk, but the companies which are willing to comply, will not be excused because their competitors breach the Ordinance."

The article is published courtesy of Classified Post.

「缺乏標準的收費架構，客戶便要面對不明朗因素，原因是他們不知道政府願意向測量師支付多少費用。」

《競爭條例》的隱藏成本

香港《競爭條例》雖保障消費者權益，但亦為收地帶來意想不到的後果，受影響的人士可能無法收回全部費用。

Kit M Yip

自由市場容許企業互相競爭，為消費者帶來更多產品和選擇。良性競爭能夠提升效率和推動創新，企業能以合適的價錢提供最優質的產品，滿足客戶需求。

這是理想中的自由市場，但若然缺乏規則，無法打造公平的營商環境，自由市場就不能行之有效。有見及此，不少國家如歐洲各國都制定了競爭法，從而遏止合謀定價等反競爭行為。

香港仿傚其他120多個國家，包括鄰近多個亞洲國家，於2015年12月14日實施《競爭條例》（香港法例第619章）。立法旨在促進良性競爭，並維護公平競爭這個共同信念，將某些阻礙公平競爭的商業手法列作違法行為。

競爭事務委員會強調，執法工作只會集中於同業聯盟操守和其他可能損害香港競爭環境的競爭者協定，違例者將被嚴懲，如違例的公司集團須繳交年收入一成的罰款。

《競爭條例》嚴禁三種類別的反競爭行為。「第一行為守則」針對同業聯盟的行為，即市場競爭者參與合謀定價、瓜分市場或圍標等串通行為。「第二行為守則」針對擁有相當程度市場權勢的企業，禁止其作出掠奪性定價、反競爭捆綁銷售及搭售等行為。第三「合併守則」只適用於有可能大幅削弱競爭的合併。以上三種守則合稱「競爭守則」。

市場普遍歡迎引入這些守則，有感缺乏公平競爭機會的中小企更是大力支持實施有關守則。國際數據亦顯示有關規定有助各方受惠。根據英國的競爭及市場管理局估計，消費者在2012年至2015年間節省了最少1.951億元英鎊（19.8億港元）。但競爭守則亦可能在無意中為部分人士製造灰色地帶。以政府收地為例，各項收地條例賦予政府權力，以保障公眾利益之名，強制收回若干土地。在這種情況下，被迫遷的住戶、業主、商戶或受影響人士便有資格根據各項條例申領賠償。

萊坊執行董事兼估價及地產拓展顧問部主管陳致馨測量師表示：「即使結果不一定會成功，但過往受收地計劃影響的人士仍可以向政府申領賠償，而若干條例訂明申領人可向政府申請發還專業費用。」

隨著香港法例第619章生效，香港測量師學會原有的專業服務收費指引已失效，政府原本可參考這套指引，用來計算應發還費用的水平。

陳致馨表示，現時競爭集中在服務的費用，而非服務的質素，變相加重受影響人士的負擔。

他指出：「如果你受（收地計劃）影響或被迫遷，所有涉及保障個人利益的開支理應由收地當局負責，這是目前的做法。過往我們測量師接下這類工作時，大概已預算可取回的收費水平。但如今引入了這條條例，加上過往的收費指引已失效，一切便都像摸黑進行一樣。」

「缺乏收費指引，我們身為測量師便無法為客戶提供有用的參考資料。我們當然可以在自由市場下自訂費用，但客戶能否在事後向政府取回有關款項，便是『貴客自理』了。」

第三方觀察者也同意說法。

安理國際律師事務所大中華反壟斷部主管 François Renard 表示：「缺乏標準的收費架構，等同將風險轉嫁到客戶身上，他們不知道政府願意向測量師支付多少費用。若測量師費用引發爭議，如哪一方須負責支付費用，而事情最後轉交至土地審裁處，這樣只會增加政府的相關開支。」

基於這個情況，很多測量師行對於承辦收地工作也有所猶豫，寧願為熟悉的長期客戶提供服務。陳致馨補充指，很多大型或知名的測量師行，只要不是急於找生意，可能會拒絕這類工作，變相令受影響人士的選擇更少。客戶亦可能任由測量師行收費，再自行與政府商討並嘗試收回有關支出。

例如受收地影響的上海街小雜貨店，陳致馨表示：「你基本上是在對店主說『祝你好運！很高興為你效勞，請先支付這個數目，然後可能在五年後，你便可以向政府取回部分款項。』我們一直嘗試向政府說明這種兩難局面，而且這也不符合條例的立法原意，無法保障受收樓程序影響的人士。」

政府在覆函中表示，將會合理公平地發放賠償，並承擔測量師提供專業服務費用的開支。但陳致馨對政府的說法有所質疑。在條例實施以前，有關方面都會以書面指引方式列明可退還專業費用的水平。在欠缺書面承諾下，他質疑政府會根據哪一套基準去計算費用。此外，收費亦無法跟上市場指標，即使要建立先例亦需時間和金錢。

新界將有多項大型收地活動，業界該如何應對？

雖然現時尚未清楚政府將如何分配賠償和支付專業費用，但 Renard 認為測量業和其他行業一樣，在第619章正式實施後，需要建立新的競爭模式。陳致馨建議引入按時收費，容許每家測量師行自行制訂本身的收費；而 Renard 則提醒業界，任何收費均需符合條例規定，各測量師行亦可乘機整頓業務，為員工設立合適的反壟斷計劃。

他表示：「各測量師行應審視旗下業務人員的行為和與他們的合約關係，並定期審視公司內部的反壟斷情況，就像應付金融或會計規則一樣。測量師行在制訂收費時，或者需要改變經營方式。這類行動要按比例進行，而且要以解決問題為原則；成功的合規計劃並非一份冗長清單，逐項列出不要做什麼事。」

這點不容小覷，競爭事務委員會已就業界的操守問題展開調查，並把兩宗個案提交至競爭事務審裁處（Nutanix 個案和早前涉及10間裝修公司的個案）。競爭事務委員會在條例生效的18個月來一直非常活躍。

Renard 說：「競爭事務委員會比其他新成立的政府部門更活躍」。

說到底，在這個不設收費尺度的新秩序下，Renard 相信「對於一家願意遵守競爭守則的公司來說，最大的挑戰來自一些不『按規則辦事』的競爭者。這些競爭者當然要承擔風險，但當有人違反守則時，樂意遵循守則的公司亦不能獨善其身。」

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