CTEA 1/2023

[2024] HKCT 2

**IN THE COMPETITION TRIBUNAL OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**COMPETITION TRIBUNAL ENFORCEMENT ACTION NO 1 OF 2023**

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BETWEEN

COMPETITION COMMISSION Applicant

and

MULTISOFT LIMITED 1st Respondent

MTT GROUP HOLDINGS LIMITED 2nd Respondent

BP ENTERPRISE COMPANY LIMITED 3rd Respondent

NOBLE NURSING HOME COMPANY LIMITED 4th Respondent

KWEK STUDIO LIMITED 5th Respondent

AU YEUNG KIT YEE 6th Respondent  
(trading as YAT YING HONG and in her personal capacity)

FAN SING CHI 7th Respondent

TANG WAI CHUN 8th Respondent

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Before: Hon Harris J, President of the Competition Tribunal in Court

Date of Hearing: 7 June 2024

Date of Judgment: 7 June 2024

Date of Reasons for Judgment: 30 July 2024

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R E A S O N S F O R J U D G M E N T

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**Introduction**

1. Before the Tribunal are four applications:
   1. Three *Kam Kwong* applications by way of summonses dated 19 April 2024, pursuant to *rule 39* of the *Competition Tribunal Rules* (Cap. 619D) (“**CTR**”) and [72] of the *Competition Tribunal Practice Direction No. 1*,for approval to dispose of these proceedings by agreement, respectively between the Commission and:

(a) The 1st Respondent and 2nd Respondent;

(b) The 3rd Respondent and 4th Respondent;

(c) The 5th Respondent and 8th Respondent.

(2) An application by the Commission by way of summons dated 19 April 2024 pursuant to *rule 76* of the *CTR* for an order granting the relief sought in the application against the 6th Respondent and the 7th Respondent (“**CTR 76 Summons**”). The application is supported by the Affirmation of Wong Kam Hung dated 22 January 2024 (“**Wong 1st**”).

1. The Commission and the Respondents (save for the 6th Respondent and the 7th Respondent) have come to agreement on both issues of liability and penalty. Their respective Statements of Agreed Facts are appended to these reasons.
2. The CTR 76 Summons against the 6th Respondent and the 7th Respondent was listed for directions at this hearing. However, before me the Commission argued that, given **(1)** the express statutory powers of the Tribunal to make an order granting the reliefs sought in default of filing of a response, **(2)** the 6th Respondent and the 7th Respondent’s default in filing a response and apparent lack of intention to participate in the proceedings, **(3)** the Commission’s clear case against them, based on the Commission’s pleaded case in its Originating Notice of Application (“**ONA**”), and **(4)** the public interest in effectively allocating the Commission’s and the Tribunal’s time and resources, it is appropriate for the Tribunal to grant the reliefs sought against the 6th Respondent and the 7th Respondent under *rule 76* of the *CTR* in a manner akin to the grant of a default judgment in other civil proceedings in the High Court.
3. The Commission’s case as pleaded in the ONA can be briefly summarised as follows.
4. At all material times ([3], [59]–[76] of ONA):
   1. The 1st Respondent (or “**ML**”) was a wholly owned indirect subsidiary of the 2nd Respondent (or “**MTT**”), the latter of which has been listed on the Hong Kong Stock Exchange since 26 September 2022. The undertaking of which ML and MTT form part is “Multisoft”, which is engaged in the business of providing IT enterprise solutions, specialising in systems, networking, security and cloud services;
   2. The 3rd Respondent (or “**BP**”) and the 4th Respondent (or “**Noble**”) are owned and controlled by the same person, namely the BP/Noble Director. Both are also IT service providers;
   3. The 5th Respondent (or “**KWEK**”) is a company initially set up for developing a mobile application, and had no other business operations until its shareholder director, the 8th Respondent (or “**Koki Tang**”) used it to issue quotations pursuant to the Collusive Conduct described in the ONA;
   4. The 6th Respondent (or “**Agnes Au Yeung**”) is and was at all material times an individual and sole proprietor trading as Yat Ying Hong (or “**Yat Ying**”), and assisted in the running of BP/ Noble’s business;
   5. The 7th Respondent (or “**Joe Fan**”) is and was at all material times the husband of Agnes Au Yeung, and also assisted in the running of Yat Ying and BP/ Noble’s businesses.
5. The Collusive Conduct took place in the context of the Distance Business Programme (“**D-Biz**”), whereby public funds were used to support local enterprises to adopt IT solutions to continue their businesses and services during the COVID-19 epidemic. For funding applications involving a non-subscription based IT solution, the applicant is required to obtain quotations from at least two IT service providers and to select the service provider which had submitted the lowest value conforming quotation to provide the relevant IT solution (“**Two-Quotation Requirement**”).
6. The Commission’s case is that after the parties reached an agreement at or following Agnes Au Yeung’s birthday party in May 2020, each of Multisoft, Yat Ying, KWEK and BP/ Noble (collectively, the “**Subject Undertakings**”) engaged in the Collusive Conduct whereby in order to enable a prospective customer of Yat Ying or BP/ Noble to satisfy the Two-Quotation Requirement when making an application, a second cover bid from one of the other Subject Undertakings was provided. In other words, Yat Ying or BP/ Noble would become the “selected service provider” while Multisoft and KWEK would become the “non-selected service provider”.
7. The Collusive Conduct comprised two batches of applications ([85], [96]–[100] of ONA):
   1. In Batch 1, each of the Subject Undertakings participated in the implementation of the arrangements discussed at or around Agnes Au Yeung’s birthday party such that Multisoft or KWEK would provide a cover bid to pair up with a lower quotation from Yat Ying or BP/ Noble in support of applications by prospective customers identified by Agnes Au Yeung and the BP/ Noble Director for D-Biz funding.
   2. In Batch 2, Yat Ying and BP/ Noble (through Joe Fan and Agnes Au Yeung, sometimes on the BP/ Noble Director’s instruction) **(i)** used KWEK’s headed paper to create cover bids without KWEK’s knowledge or consent, **(ii)** used each other (i.e. Yat Ying or BP or Noble) as cover bids, or **(iii)** reused KWEK’s and Multisoft’s cover bids from the Batch 1 applications for customers without their knowledge or consent.
8. It is not in dispute that in doing so, each of ML, MTT, BP, Noble, KWEK and Agnes Au Yeung (trading as Yat Ying) contravened the First Conduct Rule under *section 6* of the *Competition Ordinance* (Cap. 619) (“**Ordinance**”) by making and/or giving effect to an agreement or engaging in a concerted practice involving price-fixing, customer allocation, bid-rigging and/or information-sharing, with the object of preventing, restricting or distorting competition in Hong Kong.

**Kam Kwong Applications**

1. The *Kam Kwong* procedure explained and adopted by the Tribunal in *Competition Commission v Kam Kwong Engineering Co Ltd and Ors*[[1]](#footnote-1) has been applied on a number of occasions in relation to liability, declarations of contravention, pecuniary penalties and disqualification orders alike to dispose of proceedings by agreement: see for example *Competition Commission v Quadient Technologies Hong Kong Ltd and Ors*[[2]](#footnote-2); *Competition Commission v Quantr Ltd and Ors*[[3]](#footnote-3); *Competition Commission v Nutanix Hong Kong Ltd*[[4]](#footnote-4).
2. The Tribunal must be satisfied that it has the power to make the orders proposed and that the orders are appropriate. Once satisfied, the Tribunal exercises a degree of restraint when scrutinising the proposed settlement terms, particularly when both parties are legally represented and are able to evaluate the desirability of settlement. It will not search out reasons to disagree with an agreement that the Commission, which has expertise in the subject matter of the proceedings, and Respondents consider appropriate: *Quadient* at [40]; *Quantr* at [5(2)] and *Nutanix* at [5]–[6].
3. In deciding whether an agreed order should be granted, the Tribunal treats the consent of the respondent as an admission of all facts necessary to the granting of relief sought against it. The same applies to declarations sought by agreement: *Quantr* at [5(3)].
4. Where a declaration is sought, the court has to be satisfied that: **(i)** the applicant has a real (as opposed to an abstract or hypothetical) interest in the subject matter of the declaration; **(ii)** that he has a real interest in obtaining a declaration against the adverse party; and **(iii)** that the adverse party is a proper contradictor: *Kam Kwong* at [38].
5. As to the amount of penalty:
   1. The Tribunal must have regard to the following mandatory considerations set out in *section 93(2)* of the *Ordinance*, which include:

(a) The nature and extent of the conduct that constitutes the contravention;

(b) The loss or damage, if any, caused by the conduct;

(c) The circumstance in which the conduct took place; and

(d) Whether the person has previously been found by the Tribunal to have contravened the *Ordinance*.

(2) In relation to undertakings which have contravened a competition rule, the Tribunal also adopts a structured methodological approach explained in *Competition Commission v W Hing Construction Company Ltd and Ors*[[5]](#footnote-5)at [46]–[74], which involves four main steps:

(a) **Step 1**: determining the “Base Amount”. This involves identifying the value of the undertaking’s sales directly or indirectly related to the contravention within Hong Kong in the financial year in question (“**VOS**”) and applies a “Gravity Percentage” of 15% to 30% (for “serious anti-competitive conduct” as defined in *section 2(1)* of the *Ordinance*) and multiplied by the number of years of the undertaking’s participation in the contravention;

(b) **Step 2**: making adjustments for aggravating, mitigating and other factors;

(c) **Step 3**: applying the statutory cap, which is 10% of the total turnover of the undertaking in Hong Kong for each year in which the Contravention occurred, up to a maximum of three years;

(d) **Step 4**: applying a cooperation reduction and considering any plea of inability to pay.

1. In line with the above approach of restraint in scrutinising proposed settlement terms, while the Tribunal will assess if the amount of the agreed penalty is “appropriate” having regard to the circumstances of the case and the matters specified in *section 93(2)(a)–(d)* of the *Ordinance*, where the proposed penalty is within a proper range and does not appear to the Tribunal to be manifestly excessive or inadequate, or otherwise contrary to public interest, the Tribunal is unlikely to depart from it, and should not do so merely because the Tribunal might itself have been disposed to select some other figure: *Nutanix*at [6].
2. The agreed draft order submitted to the Tribunal includes the following relief:
   1. A declaration of contravention by the 1st Respondent;
   2. A pecuniary penalty of HK$1,190,000 to be paid by the 1st Respondent;
   3. An order for the 1st Respondent to adopt and to implement, to the reasonable satisfaction of the Commission, an effective competition compliance scheme;
   4. An order for the 1st Respondent to pay its share of the Commission’s investigation costs of HK$155,000;
   5. Payment of the Commission’s costs of and incidental to the application in these proceedings vis-à-vis the 1st Respondent and the 2nd Respondent; and
   6. Stay of these proceedings against the 2nd Respondent, with liberty to restore in the event of any non-compliance with the terms set out in the schedule to the order, i.e. the 2nd Respondent’s guarantee of the 1st Respondent’s monetary liabilities above.
3. In the following paragraphs, I will briefly address the legal basis for the Tribunal to make the orders proposed in (1), (2), (3) and (4) above.

**Declaration of contravention**

1. I accept that it is appropriate for the Tribunal to grant the proposed declaration, because:
   1. There is a significant legal controversy which is being resolved, namely whether the 1st Respondent has contravened the First Conduct Rule;
   2. The Commission, as a regulator tasked with investigating conduct that may contravene the competition rules and enforcing provisions designed to regulate economic activity for the public welfare, has a legitimate interest in the declaration being granted. A declaration will establish the Commission’s claim that the 1st Respondent has contravened the FCR and serves to record the Tribunal’s disapproval of the contravention, which in turn is likely to deter other persons from contravening the *Ordinance*;
   3. The 1st Respondent is a proper contradictor, albeit the declaration is made by consent.

See: *Kam Kwong*at [38]–[39].

**Penalties for the 1st and 2nd Respondents**

1. As to the agreed pecuniary penalty of HK$1,190,000 for the 1st Respondent, which is guaranteed by the 2nd Respondent, this was arrived at as follows:
   1. **Step 1**: In determining the Base Amount:

(a)In accordance with [2.3] of the RPP Policy, the relevant VOS is the value of the undertaking’s sales directly and/or indirectly related to the contravention, and will normally be based on the last full financial year of the undertaking’s participation in the Contravention.

(b) Considering **(i)** the relevant period of the contravention of ML is 9 May 2020 to 19 April 2021 and **(ii)** the 1st Respondent’s financial year running from 1 April to 31 March, there is not a full financial year in which the 1st Respondent participated in the contravention per the RPP Policy: [36(2)] of the 1st Respondent/ the 2nd Respondent Statement. However, since the contravention largely fell within the financial year of 1 April 2020 to 31 March 2021, the Commission has adopted that financial year for the purpose of calculating the VOS. The duration multiplier of one is also used.

(c) The 1st Respondent did not generate any VOS directly from the contravention, since it only provided cover bids. However, the Commission considered there to be VOS indirectly related to the contravention consisting of HK$1,321,791.76 (from bids under D-Biz against other undertakings that are not part of this contravention) and HK$982,392.56 (from businesses outside its awards under D-Biz but in the same markets as those services provided in D-Biz). Thus, the Commission adopted the total of HK$2,304,184.32 as the VOS for the period.

(d) A moderate gravity percentage of 24% has been agreed (i.e. the same percentage adopted for other Respondents in the *Kam Kwong* applications), taking into account various factors set out in [2.6] of the RPP Policy such as **(i)** the serious anti-competitive conduct involved, **(ii)** the lack of evidence that the subject undertakings accounted for a significant proportion of the market or have high combined shares, **(iii)** the subject undertakings’ active contravention of the First Conduct Rule (going beyond mere involvement in the contravention), and **(iv)** the exploitation of public funding.

(e) Therefore, the Step 1 figure is HK$2,304,184.32 x 0.24 x 1 = HK$553,004.24;

(2) **Step 2**: Aggravating and mitigating factors:

(a) There are two aggravating factors relating to the mandatory considerations under *section 93(2)* of the *Ordinance*:

(i) The penalty sought is increased by 50% due to participation of Vincent Wu, who was the 1st Respondent’s director/ senior management;

(ii) An uplift of 25% is also applied for non-compliance with non-collusion clauses (“**NCC**”) which all applicants submitting their quotations and applications for D-Biz were required to sign;

(b) The above increase of 75% raises the penalty figure to HK$967,757.42;

(c) The 1st Respondent and the 2nd Respondent have not been found by the Tribunal to have contravened the *Ordinance* previously;

(d) The turnover of the 1st Respondent during the relevant period was as follows: [36(2)] of the 1st Respondent/ the 2nd Respondent Statement:

|  |  |
| --- | --- |
| **Financial Year** | **Turnover (minus tax)** |
| 1 April 2020 to 31 March 2021 | HK$169,667,681 |
| 1 April 2021 to 31 March 2022 | HK$197,272,214 |

(e) The penalty sought only represents around 0.57% and 0.49% of the 1st Respondent’s turnovers in the above financial years. The Commission, therefore, sought to increase the penalty by 50% to HK$1,451,636.12, to achieve a deterrent effect to promote the effectiveness of the competition regime.

(3) **Step 3**: the Step 2 figure of HK$1,451,636.12 does not exceed the statutory cap;

(4) **Step 4**: A cooperation discount of 18% is applied, bringing the final figure to HK$1,190,000 (rounded down to the nearest thousand), which is agreed by the 1st Respondent.

**Adoption and implementation of competition compliance scheme**

1. The Tribunal has the broad power to grant an order requiring any person who has contravened or been involved in the contravention to do any act or thing: [1(c)] of Schedule 3 of the *Ordinance*.
2. The adoption and implementation of a competition compliance programme is a common undertaking required from the respondents in a cooperation agreement: [28(e)] of the Commission’s Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (“**Cooperation Policy**”).
3. This is particularly apt in the present proceedings against the 1st Respondent, which is a sizable corporation with resources to educate its directors and employees, ensure compliance with competition law and prevent recurrence of contraventions.

**Payment of investigation costs**

1. This Court has the power to grant an order for payment of the Commission’s investigation costs under *section 96* of the *Ordinance*. The costs of and incidental to the investigation amounts to HK$621,730, consisting of transcription and translation fees and other miscellaneous expenses. The sum of HK$155,000 (rounded down to the nearest thousand) represents the 1st Respondent’s share of such investigation costs: [37] and Annex B of the 1st Respondent/ the 2nd Respondent Statement.

**Penalties for the 3rd and 4th Respondents**

1. The agreed draft order includes the following relief:
   1. A declaration of contravention by the 3rd Respondent and the 4th Respondent;
   2. A pecuniary penalty of HK$90,000 to be paid jointly and severally by the 3rd Respondent and the 4th Respondent;
   3. An order for the 3rd Respondent and the 4th Respondent to adopt and to implement, to the reasonable satisfaction of the Commission, an effective competition compliance scheme;
   4. An order for the 3rd Respondent and the 4th Respondent to jointly and severally pay its share of the Commission’s investigation costs of HK$155,000;
   5. Payment of the Commission’s costs of and incidental to the application in these proceedings vis-à-vis the 3rd Respondent and the 4th Respondent.
2. As to the agreed pecuniary penalty of HK$90,000 jointly and severally payable by the 3rd Respondent and the 4th Respondent, this was arrived at as follows:
   1. **Step 1**: In determining the Base Amount:

(a)The 3rd Respondent and the 4th Respondent did not have any sale of relevant service outside D-Biz. According to the record of the Hong Kong Productivity Council (“**HKPC**”): the 3rd Respondent was at least awarded in a total of 55 D-Biz applications for a total amount of HK$3,649,190 while the 4th Respondent was at least awarded in a total of 19 D-Biz applications for a total amount of HK$1,312,280, i.e. the aggregate relevant VOS for the 3rd Respondent and the 4th Respondent was HK$4,961,470: [34] of the 3rd Respondent/ the 4th Respondent Statement;

(b) A moderate gravity percentage of 24% is adopted (the same percentage adopted for other Respondents in the *Kam Kwong* applications);

(c) Taking into account the total sum of VOS, the duration multiplier is 1;

(d) Thus, the Step 1 figure for the 3rd Respondent and the 4th Respondent is HK$1,190,752.80;

(2) **Step 2**: Aggravating and mitigating factors:

(a) An uplift of 25% is applied for non-compliance with the NCC;

(b) The 3rd Respondent and the 4th Respondent are small businesses controlled by the BP/Noble Director, so no uplift is applied for director/ senior management participation;

(c) The 3rd Respondent and the 4th Respondent have not been found by the Tribunal to have contravened the *Ordinance* previously;

(d) There is no specific or concrete loss or damage from the conduct;

(e) The 3rd Respondent and the 4th Respondent’s respective turnovers in the relevant financial years are as follows: [40(3)] of the 3rd Respondent/ the 4th Respondent Statement:

*The 3rd Respondent (BP)*

|  |  |
| --- | --- |
| **Financial Year** | **Turnover (minus tax)** |
| 1 April 2020 to 31 March 2021 | HK$647,529 |
| 1 April 2021 to 31 March 2022 | HK$338,095 |

*The 4th Respondent (Noble)*

|  |  |
| --- | --- |
| **Financial Year** | **Turnover (minus tax)** |
| 1 January 2020 to 31 December 2020 | HK$0 |
| 1 January 2021 to 31 December 2021 | HK$222,474 |

(f) After applying the uplift of 25%, the proposed penalty of HK$1,488,441 represents over 200% of the turnover of the 3rd Respondent and the 4th Respondent, which far exceeds the statutory cap. As such, it is not necessary to consider any uplift for specific deterrence;

(3) **Step 3**: Applying the statutory cap to the above combined turnover of the 3rd Respondent and the 4th Respondent, the maximum penalty is HK$120,809.80 (i.e. (HK$647,529 + HK$338,095 + HK$0 + HK$222,474) x 10%);

(4) **Step 4**: The Commission recommends the application of a 25% cooperation discount in accordance with [3.5] of the Cooperation Policy, as **(i)** the 3rd Respondent and the 4th Respondent indicated their willingness to cooperate about three weeks after the investigation turned overt when the Commission had already obtained valuable evidence by other means, and **(ii)** the 3rd Respondent and the 4th Respondent had less hands-on involvement in the contravention as the 7th Respondent was entrusted to find other cover bids. After applying the cooperation discount, the proposed penalty is HK$90,000 (rounded down to the nearest thousand), which is agreed by the 3rd Respondent and the 4th Respondent.

**Penalties for the 5th and 8th Respondents**

1. The 5th Respondent/ the 8th Respondent Statements set out the factual basis giving rise to the admission of liability and quantum.
2. The agreed draft order includes the following relief:
   1. A declaration of contravention by the 5th Respondent and the 8th Respondent;
   2. A pecuniary penalty of HK$32,000 to be paid by the 8th Respondent;
   3. An order for the 5th Respondent to adopt and to implement, to the reasonable satisfaction of the Commission, an effective competition compliance scheme;
   4. An order for the 5th Respondent to pay its share of the Commission’s investigation costs of HK$155,000;
   5. An order disqualifying the 8th Respondent from being a director and being concerned or taking part in the promotion, formation or management of a company for two years;
   6. Payment of the Commission’s costs of and incidental to the application in these proceedings vis-à-vis the 5th Respondent and the 8th Respondent.
3. I accept that the 8th Respondent is clearly a person involved in a contravention of a competition rule under *section 91* of the *Ordinance* because:
   1. The 8th Respondent was at all material times (and still is) a shareholder and director of KWEK and the Chief Technology Officer;
   2. The 8th Respondent was the person who directly agreed with Joe Fan to provide cover bids on behalf of KWEK;
   3. The 8th Respondent also personally agreed to accept HK$30,000 from Joe Fan in exchange for KWEK’s provision of cover bids.
4. The 4-step approach in *W Hing Construction* does not apply to individuals. In determining the appropriate pecuniary penalty for individuals, the Commission proposes that a global assessment approach is adopted, that is, the Commission proposes a lump sum figure which is derived primarily from the mandatory considerations set out in *section 93(2)* of the *Ordinance*.
5. In the case of the 8th Respondent, the Commission proposes a lump sum of HK$40,000 (before cooperation discount) having regard to the following factors:
   1. In comparison to the 7th Respondent (Joe Fan) or the 6th Respondent (Agnes Au Yeung), the 8th Respondent was not involved in the instigation of the Collusive Conduct, and was invited by Joe Fan to provide KWEK’s quotations as cover bids;
   2. Regarding the loss or damage caused by the contravention, the only income the 8th Respondent received from the contravention was HK$9,000 from the 7th Respondent (though it was initially agreed that the 7th Respondent would pay HK$30,000). The Commission suggests a lump sum higher than HK$30,000 be adopted to represent a penalty in addition to the disgorgement of unlawful expected gains;
   3. In determining an appropriate proposed lump sum figure, the Commission has considered the available income information of the 8th Respondent. The 8th Respondent’s average monthly income during the relevant period of the contravention (from his unrelated employment at another company) was HK$41,450: [38] of the 5th Respondent/ the 8th Respondent Statement;
   4. The 8th Respondent has not been found by the Tribunal to have contravened the *Ordinance* previously;
   5. Taking into account the above, the Commission considers and I accept that a sum of HK$40,000 would be a reasonable starting point. After applying a cooperation discount of 20%, the Commission recommends a penalty of HK$32,000, which is agreed by the 8th Respondent. I agree.

**Disqualification order**

1. Pursuant to *sections 101 and 102* of the *Ordinance*, the Tribunal may make a disqualification order against a person if: **(1)** it has determined that a company of which the person is a director has contravened a competition rule; and **(2)** it considers that the person’s conduct as a director makes the person unfit to be concerned in the management of a company.
2. The Commission submits that the above criteria have been satisfied. In particular, the 8th Respondent’s lending of assistance to the Collusive Conduct by the 5th Respondent’s provision of cover bids and personal acceptance of monetary reward from the 7th Respondent demonstrate the 8th Respondent’s unfitness to be concerned in the management of a company. This is agreed to by the 8th Respondent and there is no suggestion or evidence that any financial hardship would result therefrom.

**Legal Principles and Rationale**

1. *Rule 76* of the *CTR* provides that:

“(1) If the respondent fails to file a response within the time specified in rule 75, the applicant may apply to the Tribunal for an order granting the relief sought in the application against the respondent.

(2) The Tribunal may make an order granting the relief sought, proceed to hear and determine the application, or give any directions that the Tribunal thinks fit.

(3) If the Tribunal makes an order under subrule (2), the order must be served on the respondent.

(4) The Tribunal may, on the application of the respondent, set aside the order on the terms that the Tribunal thinks just.

(5) An application for the purpose of subrule (4) must be made within 14 days after the day on which the order is served.”

1. The time specified in *rule 75* of the *CTR* for the respondent to file a response is 28 days from the day on which the ONA is served. It is not in dispute that the 6th Respondent and the 7th Respondent have defaulted in filing a response within the time limit required in *rule 75*—in fact they have not filed any response to date despite the lapse of about a year.
2. The Commission submits that *rule 76* envisages the provision to operate like the default judgment procedure:
   1. Thus, [25(c)] of CTPD No. 1 states that “*[a]s there are already provisions in rules 66 and 76 of the Rules on the consequences of failure to file a response, Order 19* [of the Rules of High Court, i.e. Default of Pleadings] *will not apply in such situations…*”;
   2. During the drafting process, attention was given to specify the procedure for setting aside a judgment granted pursuant to *rule 76* when a party fails to file a response.
3. The above indicates an intention to create a specific provision conferring a power on the Tribunal to make a judgment in default of filing of a response coupled with a mechanism for an application for setting it aside. That *rule 76* is intended to operate as a default judgment procedure is also borne out by its wording, when read in conjunction with other provisions of the *Ordinance* and the *CTR*:
   1. *Subrule 76(2)* provides that, in the event of a default in the filing of a response, the Tribunal may make an order granting the relief sought, proceed to hear and determine the application, or give any directions that the Tribunal thinks fit. It follows that the Tribunal is given considerable latitude as to how it may respond, including the option of making an order granting the relief sought instead of proceeding with a full hearing.
   2. Apparently, in recognition of the power of the Tribunal to grant substantive orders on default, the *CTR* has introduced parallel provisions which serve to afford proper procedural safeguards to the defaulting respondent, namely:-

(a) *subrule 76(3)* provides that if the Tribunal makes an order under *subrule 76(2)*, the order must be served on the respondent; and

(b) *subrules 76(4) and (5)* further provide that the Tribunal may, on the application of the respondent (which must be made within 14 days after the date of service of the order), set aside the order on the terms that the Tribunal thinks just.

It is therefore clear that, where an order granting the relief sought by the Commission is made by the Tribunal, the defaulting respondent is not without recourse, and may make an application for the setting aside of such order at which any substantive arguments, whether on merits or otherwise, may be ventilated and determined as may be necessary or appropriate.

(3) The Tribunal’s power to make default judgment and a respondent’s corresponding right to apply for setting aside and appeal a refusal are provided for in the *Ordinance* and the *CTR*:

(a) *Section 155(2)* of the *Ordinance* provides that, despite *section 155(1)* (which requires the grant of leave to appeal for an appeal to the Court of Appeal against any interlocutory decision, determination or order of the Tribunal), the rules of the Tribunal (i.e. *CTR*) may specify to the contrary such that an appeal lies as of right.

(b) In this connection, *subrule 44(1)(a)* of the *CTR* provides that, for the purposes of *section 155(2)* of the *Ordinance*, “*a decision, a determination or an order that determines in a summary way the substantive rights of a party*” constitutes “*interlocutory decisions, determinations or orders against which an appeal lies to the Court of Appeal as of right*”.

(c) Relevantly, *subrule 44(2)(h)* goes on to provide that, without limiting *subrule 44(1)(a)*, “*decisions, determinations or orders that determine in a summary way the substantive rights of a party*” include “*a decision refusing to set aside a judgment in default*”. Plainly, this is a reference to a decision of the Tribunal refusing to set aside an order (described as “*a judgment in default*”) upon the application of a defaulting respondent under *subrules 76(4) and (5)* of the *CTR*, against which an appeal lies to the Court of Appeal as of right.

(4) What is clear from the above is that, under CTR 76:

(a) The Tribunal may make an order granting the relief sought akin to a default judgment;

(b) Such order must be served on the defaulting respondent;

(c) The defaulting respondent may apply for setting aside of the default judgment within 14 days of service of the order;

(d) A decision by the Tribunal refusing to set aside a judgment in default is an order that determines in a summary way the substantive rights of a party, against which an appeal lies to the Court of Appeal as of right.

1. The availability of a “default judgment procedure” is consistent with the observation made in the Report for the Subcommittee to study the Proposed Subsidiary Legislation on the Procedures to be Adopted by the Competition Tribunal, that “*given the commercial nature and the importance of competition cases to the relevant industry or the general public, cases before the Tribunal should be dealt with as expeditiously as is reasonably practicable*”.
2. The Commission argues that relief should be ordered against the 6th Respondent (Agnes Au Yeung trading as Yat Ying and in her personal capacity) and the 7th Respondent (Joe Fan) at this hearing for the following reasons.
3. **First**, in accordance with the order for substituted service dated 17 May 2023, the 6th Respondent and the 7th Respondent have been served with the ONA by way of email on 22 May 2023. As the 6th Respondent and the 7th Respondent failed to file their responses within 28 days i.e. by 19 June 2023 (and the default continues to date for about a year), this triggers the Tribunal’s discretion under *rule 76* to grant the relief sought.
4. **Second**, it is appropriate for relief to be granted at this stage because:
   1. Rule 76 (as substantiated by the legislative intent and the statutory provisions read as a whole) confers unfettered discretion upon the Tribunal to so proceed once the 6th Respondent and the 7th Respondent fail to file a response within the time prescribed under the CTR.
   2. Any directions or adjournment are unlikely to further facilitate disposal of the matter, as the 6th Respondent and the 7th Respondent do not have any intention to contest or participate in these proceedings, despite being given ample opportunity to do so.

(a) In addition to duly serving the ONA on the 6th Respondent and the 7th Respondent, the Commission also served on the 6th Respondent and the 7th Respondent the orders from the first CMC and sent various emails and letters between April and May 2024, including the most recent reminder on 6 May 2024 regarding the CTR 76 Summons and the present hearing.

(b) None of these were returned undelivered, and the Commission never received any response.

(3) The Commission’s case against the Respondents, including the 6th Respondent and the 7th Respondent, is clear. This is also reflected in the other Respondents’ readiness to admit liability and consent to the disposal of proceedings.

(4) Insofar as the Tribunal is willing to dispose of the proceedings between the Commission and the other Respondents by consent, it would not be an effective use of the Commission’s and judicial resources to direct the Commission to continue with a full hearing against the 6th Respondent and the 7th Respondent alone, still less to insist that the Commission produce further evidence to prove its case against the 6th Respondent and the 7th Respondent. The Commission emphasises the importance of having cases before the Tribunal dealt with as expeditiously as is reasonably practicable.

(5) The 6thRespondent and the 7th Respondent may apply to set aside the order made by the Tribunal pursuant to *subrules 76(4) and (5)* of the *CTR* if they so wish, and an appeal lies against any subsequent decision by the Tribunal refusing to set aside a judgment in default to the Court of Appeal as of right. These already afford adequate procedural safeguards and protection to the 6thRespondent and the 7th Respondent, insofar as they wish to take part in the proceedings subsequently.

1. **Third**, there are presently sufficient particulars pleaded in the ONA to support the reliefs sought by the Commission against the 6thRespondent and the 7th Respondent in the draft order, which comprise:
   1. Declarations of contraventions of the Ordinance as against the 6th Respondent and the 7th Respondent;
   2. Pecuniary penalties of HK$242,000 and HK$160,000 for the 6th Respondent and the 7th Respondent respectively;
   3. An order for the 6th Respondent as an undertaking to adopt and implement an effective competition compliance programme;
   4. An order for the 6th Respondent to pay its share of the Commission’s investigation costs;
   5. Payment of the Commission’s costs of and incidental to the application in these proceedings vis-à-vis the 6th Respondent and the 7th Respondent.
2. In terms of liability, the Commission emphasises that:
   1. It was at the birthday party held by Agnes Au Yeung and Joe Fan for Agnes Au Yeung in early May 2020 that the Respondents (save for KWEK and Koki Tang, who participated later) agreed to engage in the Collusive Conduct;
   2. After the birthday gathering, Agnes Au Yeung instructed Joe Fan to contact and coordinate with Vincent Wu on Yat Ying and BP/Noble’s behalf to arrange for Multisoft to provide cover bids for Yat Ying and BP/Noble;
   3. In or around the period between 14 May and 24 May 2020, Agnes Au Yeung, Joe Fan and Koki Tang liaised for KWEK (through Koki Tang) to provide cover bids for Yat Ying and BP/Noble. Joe Fan even agreed to pay Koki Tang HK$30,000 for her provision of cover bids.
   4. The Collusive Conduct clearly involved price fixing, customer allocation, bid-rigging and the exchange of competitively sensitive information between undertakings in contravention of *section 6* of the *Ordinance*.
3. I accept that both the 6th Respondent (Agnes Au Yeung in her personal capacity) and the 7th Respondent (Joe Fan) were persons involved in a contravention of a competition rule under *section 91* of the *Ordinance*, because:
   1. Agnes Au Yeung is the sole proprietor of Yat Ying;
   2. Agnes Au Yeung and Joe Fan were the individuals instigating and directly agreeing with other Respondents to implement the Collusive Conduct;
   3. Joe Fan was also a primary cartelist who liaised and coordinated the Collusive Conduct, and even prepared and forged the quotations in question.
4. In terms of penalty, applying the 4-step approach set out in *W Hing Construction*,the Commission proposes, and I agree, the figure of HK$242,000 for the 6th Respondent and HK$160,000 for the 7th Respondent.
5. For the 6th Respondent:
   1. **Step 1**:In determining the Base Amount:

(a) The VOS is taken from the total amount of funding approved from D-Biz, i.e. HK$8,006,455;

(b) A moderate gravity percentage of 24% is adopted (i.e. the same percentage adopted for other Respondents in the *Kam Kwong* applications);

(c) As the VOS is the result of adding up all approved D-Biz fundings from all financial years in the relevant period, the duration multiplier of 1 is applied;

(d) Therefore, the Base Amount is HK$1,921,549.20;

(2) **Step 2**:As to aggravating and mitigating factors:

(a) Due to non-compliance with the NCC, the Commission seeks an uplift of 25% which is the same as the uplift applied to the other Respondents in the *Kam Kwong* applications;

(b) Yat Ying is a small business run by Agnes Au Yeung as the sole proprietor, so the Commission consider it unnecessary to impose an uplift for director/senior management participation;

(c) Based on the information available, the Commission does not see any applicable mitigating factors;

(d) Therefore, the Step 2 figure is HK$1,921,549.20 x 1.25 = HK$2,401,936.50;

(3) The 6th Respondent has not been found by the Tribunal to have contravened the *Ordinance* previously, and there is no specific or concrete loss or damage from the conduct;

(4) The 6th Respondent had provided a financial statement stating its turnover and profits as follows, which appears to be false and misleading when compared to the information provided by the HKPC;

|  |  |  |
| --- | --- | --- |
| **Financial Year** | **Turnover (minus tax)** | **Profit (loss)** |
| 1 April 2020 to 31 March 2021 | HK$108,216 | HK$108,216 |
| 1 April 2021 to 31 March 2022 | HK$556,911.40 | (HK$31,986.66) |

(5) Instead, the Commission adopted the figures provided by the HKPC for the total amount of funding actually released by D-Biz to Yat Ying during the relevant period as proxy for Yat Ying’s annual turnover, because: **(i)** Yat Ying did not have any VOS or business outside its awards under D-Biz, and **(ii)** HKPC is an independent source of information whose figures will likely be more reliable;

|  |  |
| --- | --- |
| **Financial Year** | **Turnover (funding released)** |
| 1 April 2020 to 31 March 2021 | HK$1,485,696 |
| 1 April 2021 to 31 March 2022 | HK$940,934 |
| **Total**: HK$2,426,630 | |

(6) The proposed penalty significantly exceeds the statutory cap under Step 3, so it is not necessary to consider any uplift for specific deterrence;

(7) **Step 3**: applying the statutory cap of 10% to the combined turnover, the Step 3 figure is HK$242,663;

(8) **Step 4**: There is no cooperation discount. There is also no evidence suggesting any basis to claim a reduction for inability to pay. The Step 4 figure is therefore HK$242,000 (rounding down to the nearest thousand from HK$242,663).

1. Similar to the case of the 8th Respondent, the Commission proposes, and I agree, that a lump sum penalty of HK$160,000 for the 7th Respondent is appropriate considering the following factors:
   1. In terms of the nature and extent of the subject conduct, the 7th Respondent played a key role in the subject contravention and was the main cartelist who instigated and facilitated the implementation of the anti-competitive conduct in question, by acting as the point of liaison between the Respondents. In addition, there is evidence supporting that the quotations of the 3rd Respondent to the 6th Respondent were all prepared by the 7th Respondent who also forged the signatures of the 8th Respondent to issue at least 102 set of the 5th Respondent’s quotations as cover bids;
   2. Even though the 7th Respondent appeared to have used his personal bank account to receive HK$890,199.60 from Yat Ying’s customers who successfully applied for and received D-Biz Funding, the adoption of that figure as lump sum penalty would appear to be too high compared to the penalties proposed for/ agreed by other Respondents;
   3. The 7th Respondent has not been found by the Tribunal to have contravened the Ordinance previously;
   4. The lump sum to be paid by The 7th Respondent should be higher than the lump sum for another involved individual, the 8th Respondent, to reflect the primary/ secondary cartelist distinction. By way of comparison, the 8th Respondent was only invited by the 7th Respondent to provide the 5th Respondent’s quotations as cover bids, but the 7th Respondent participated throughout the whole period of the contravention and acted for multiple parties, preparing and forging quotations;
   5. Taking the above into consideration, the Commission proposes to use the recommended penalty for the 8th Respondent before cooperation discount (HK$40,000) as a starting point to determine the appropriate recommended penalty for the 7th Respondent. The Commission proposes to multiply the recommended penalty for the 8th Respondent before cooperation discount by 4 because the 7th Respondent acted for 4 subject companies (i.e. the 3rd Respondent to the 6th Respondent) in the contravention, the Commission proposes the penalty of HK$160,000 for the 7th Respondent.

**Disposition**

1. I will make the following orders:
   1. In relation to the 1st and 2nd Respondents:

(a) there be a declaration pursuant to *section 94(1)* of, and *section 1(a)* of Schedule 3 to, the *Competition Ordinance* (Cap. 619) (“**Ordinance**”) that the 1st Respondent has contravened the First Conduct Rule under *section 6* of the *Ordinance*;

(b) there be an order under *section 93(1)* of the *Ordinance* that the 1st Respondent shall pay to the Government a pecuniary penalty in the sum of HK$1,190,000 within 14 days from the date of the Judgment, and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment;

(c) there be an order pursuant to *section 94(1)* of, and *section 1(c)* of Schedule 3 to, the *Ordinance* requiring the 1st Respondent to adopt and to implement, to the reasonable satisfaction of the Applicant, an effective competition compliance programme;

(d) there be an order under *section 96(1)* of the *Ordinance* that the 1st Respondent shall, within 14 days from the date of the Judgment, pay to the Government an amount in the sum of HK$155,000, being the 1st Respondent’s share of the Applicant’s reasonably incurred costs of and incidental to the Applicant’s investigation into matters relating to the 1st Respondent’s contravention of the First Conduct Rule, and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment;

(e) there be an order that the 1st Respondent shall pay the Applicant’s costs of and incidental to the application in these proceedings as against the 1st and 2nd Respondents up to the date of the Judgment (including this application and reserved costs, if any), to be taxed if not agreed; and

(f) all further proceedings in this action relating to the Applicant’s claims against the 2nd Respondent as set out in paragraph 122(1) of the Originating Notice of Application, be stayed upon the terms set out in the schedule to the draft order with liberty to apply as to carrying such terms into effect. For the avoidance of doubt, there be also a liberty to restore the stayed proceedings in the event of any non-compliance of the terms as set out in the schedule to the draft order.

(2) In relation to the 3rd and 4th Respondents:

(a) there be a declaration pursuant to *section 94(1)* of, and *section 1(a)* of *Schedule 3* to, the *Competition Ordinance* (Cap. 619) (“**Ordinance**”) that each of the 3rd and 4th Respondents has contravened the First Conduct Rule under *section 6* of the *Ordinance*;

(b) there be an order under *section 93(1)* of the *Ordinance* that each of the 3rd and 4th Respondents shall jointly and severally pay to the Government a pecuniary penalty in the sum of HK$90,000 within 14 days from the date of the Judgment, and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment;

(c) there be an order pursuant to *section 94(1)* of, and/or *section 1(c)* of *Schedule 3* to, the *Ordinance* requiring each of the 3rd and 4th Respondents to adopt and to implement, to the reasonable satisfaction of the Applicant, an effective competition compliance programme;

(d) there be an order under *section 96(1)* of the *Ordinance* that the 3rd and 4th Respondents shall jointly and severally pay to the Government an amount in the sum of HK$155,000, being the 3rd and 4th Respondents’ share of the Applicant’s reasonably incurred costs of and incidental to the Applicant’s investigation into matters relating to the 3rd and 4th Respondents’ contravention of the First Conduct Rule, and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment; and

(e) there be an order that the 3rd and 4th Respondents shall jointly and severally pay the Applicant’s costs (limited to the 3rd and 4th Respondents’ part) of and incidental to the these proceedings up to the date of the Judgment (including this application and reserved costs, if any), to be taxed if not agreed.

(3) In relation to the 5th and 8th Respondents:

(a) there be a declaration pursuant to *section 94(1)* of, and *section 1(a)* of *Schedule 3* to, the *Competition Ordinance* (Cap. 619) (“**Ordinance**”) that the 5th Respondent has contravened the First Conduct Rule under *section 6* of the *Ordinance*;

(b) there be an order pursuant to *section 94(1)* of, and *section 1(c)* of *Schedule 3* to, the *Ordinance* requiring the 5th Respondent to adopt and to implement, to the reasonable satisfaction of the Applicant, an effective competition compliance programme;

(c) there be an order under *section 96(1)* of the *Ordinance* that the 5th Respondent shall pay to the Government a total amount in the sum of HK$155,000, being the 5th Respondent’s share of the Applicant’s reasonably incurred costs of and incidental to the Applicant’s investigation into matters relating to the 5th Respondent’s contravention of the First Conduct Rule, such sum being payable in 24 monthly instalments of HK$6,458.33 for the 1st to 23rd instalments and HK$6,458.41 for the 24th instalment on the 1st working day on every calendar month from the date of the Judgment, and the 5th Respondent shall provide documentary evidence of each monthly payment to the Applicant within 7 days from the date of payment;

(d) there be a declaration pursuant to *section 94(1)* of the *Ordinance* that the 8th Respondent has been involved in the contravention of the First Conduct Rule by the 5th Respondent;

(e) there be an order under *section 93(1)* of the *Ordinance* that the 8th Respondent shall pay to the Government a pecuniary penalty in the sum of HK$32,000 within 14 days from the date of the Judgment, and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment;

(f) there be an order under *section 101* of the *Ordinance* that the 8th Respondent may not, without the leave of the Tribunal, (a) be, or continue to be, a director of a company and (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for a period of 2 years from the date of the Judgment; and

(g) there be an order that the 5th and 8th Respondents shall jointly and severally pay the Applicant’s costs of and incidental to the application in these proceedings (including this application and reserved costs), agreed in the sum of HK$405,000, such sum being payable in 24 equal monthly instalments of HK$16,875 on the 1st working day on every calendar month from the date of the Judgment.

(4) In relation to the 6th and 7th Respondents:

(a) there be a declaration pursuant to *section 94(1)* of, and *section 1(a)* of *Schedule 3* to, the *Competition Ordinance* (Cap. 619) (“**Ordinance**”) that the 6th Respondent (trading as YAT YING HONG) as an undertaking has contravened the First Conduct Rule under *section 6* of the *Ordinance*;

(b) there be a declaration pursuant to *section 94(1)* of the *Ordinance* that the 6th Respondent in her personal capacity has been involved in a contravention of the First Conduct Rule within the meaning of *section 91* of the *Ordinance*;

(c) there be an order pursuant to *section 93(1)* of the *Ordinance* that the 6th Respondent as an undertaking shall pay to the Government a pecuniary penalty in the sum of HK$242,000 within 28 days from 30 July 2024 and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment;

(d) there be an order pursuant to section 94(1) of, and *section 1(c)* of *Schedule 3* to, the *Ordinance* requiring the 6th Respondent as an undertaking to adopt and to implement, to the reasonable satisfaction of the Applicant, an effective competition compliance programme;

(e) there be an order pursuant to *section 96(1)* of the *Ordinance* that the 6th Respondent as an undertaking shall, within 28 days from 30 July 2024 pay to the Government an amount of HK$155,000, being the Applicant’s reasonably incurred costs of and incidental to the Applicant’s investigation into matters relating to the 6th Respondent’s contravention of the First Conduct Rule and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment;

(f) there be a declaration pursuant to *section 94(1)* of the *Ordinance* that the 7th Respondent has been involved in a contravention of the First Conduct Rule within the meaning of *section 91* of the *Ordinance*;

(g) there be an order pursuant to *section 93(1)* of the *Ordinance* that the 7th Respondent shall pay to the Government a pecuniary penalty in the sum of HK$160,000 within 28 days from 30 July 2024 and provide documentary evidence of such payment to the Applicant within 7 days from the date of payment; and

(h) there be an order that the 6th and 7th Respondents shall jointly and severally pay the Applicant’s costs of and incidental to these proceedings, to be taxed if not agreed.

(Jonathan Harris)

President of the Competition Tribunal

Mr Jenkin Suen SC and Ms Tinny Chan, instructed by MinterEllison LLP, for the Applicant

Ms Annie Lai, instructed by Mandy Wan & Co, for the 3rd and 4th Respondents

Mr Lam Chi Yau, of C Y Lam & Co, for the 5th and 8th Respondents

The attendance of Pauline Wong & Co, for the 1st and 2nd Respondents, was excused

The 6th Respondent was not represented and did not appear

The 7th Respondent was not represented and did not appear

**STATEMENT OF AGREED FACTS BETWEEN THE**

**COMPETITION COMMISSION (“COMMISSION”) AND THE 1ST AND 2ND RESPONDENTS**

*(Prepared pursuant to Rule 39 of the Competition Tribunal Rules, Cap. 619D (“****CTR****”) and*

*Paragraph 72 of the Competition Tribunal Practice Direction 1 (“****CTPD1****”))*

**PART A — INTRODUCTION**

1. On 22 March 2023, the Commission issued proceedings pursuant to sections 92(1), 94(1), 96(1) and 101(1) of the Competition Ordinance, Cap. 619 (“**Ordinance**”) before the Competition Tribunal (“**Tribunal**”) against, amongst others, Multisoft Limited (“**ML**”) and MTT Group Holdings Limited (“**MTT**”), being the 1st and 2nd Respondents in these proceedings respectively.
2. The Commission sought, as against each of ML and MTT:

(1) a declaration pursuant to section 94(1) of, and section 1(a) of Schedule 3 to, the Ordinance that each of ML and MTT has contravened the First Conduct Rule (“**FCR**”) under section 6 of the Ordinance;

(2) an order under section 93(1) of the Ordinance that each of ML and MTT shall jointly and severally pay to the Government a pecuniary penalty in such amount as the Tribunal considers appropriate;

(3) an order pursuant to section 94(1) of, and/or section 1(c) of Schedule 3 to, the Ordinance requiring each of ML and MTT to adopt and to implement, to the reasonable satisfaction of the Commission, an effective competition compliance programme in such time period and manner as the Tribunal shall determine;

(4) an order under section 96(1) of the Ordinance that each of ML and MTT shall jointly and severally pay to the Government an amount equal to the reasonably incurred costs of and incidental to the Commission’s investigation into its conduct or affairs, to be assessed;

(5) an order that each of ML and MTT shall jointly and severally pay the Commission’s costs of and incidental to the application in these proceedings; and

(6) such further or other relief as the Tribunal considers appropriate.

3. Subject to the approval of the Tribunal, the Commission and each of ML and MTT agree to (1) enter judgment on liability and consequential orders in favour of the Commission against ML alone, and (2) stay the portion of the proceedings against MTT upon terms set out in the schedule to the draft consent order, by way of the summary procedure as provided for in Rule 39 of the CTR and §72 of the CTPD1. The procedure as envisaged by the parties is that sanctioned by the High Court of England and Wales in the case of **Re Carecraft Construction Co Ltd** [1994] 1 WLR 172 and clarified by the Court of Appeal of England and Wales in **Secretary of State for Trade and Industry v Rogers** [1996] 1 WLR 1569, and as adopted in Hong Kong for proceedings under section 214 of the Securities and Futures Ordinance (Cap. 571) and section 168H of the former Companies Ordinance (Cap. 32). Further, the procedure was endorsed by the Honourable Mr Justice Jonathan Harris in the case of **Competition Commission v Kam Kwong Engineering Co Ltd** [2020] 4 HKLRD 61 as a *“readymade blueprint for disposing of proceedings under the Ordinance”* (at §17) and by the Honourable Madam Justice Linda Chan in her judgment handed down on 3 November 2020 (**Competition Commission v. Quantr Limited and Others** [2020] HKCT 10). Additionally, the same procedure was adopted by the Honourable Mr Justice Godfrey Lam (as he then was) in his judgment handed down on 16 December 2020 in relation to the penalty proceedings in **Competition Commission v. Nutanix Hong Kong Limited and Others** [2020] HKCT 11.

4. This Statement of Agreed Facts (“**Statement**”) is submitted pursuant to Rule 39 of the CTR and §72 of the CTPD1. The Tribunal is asked to make the orders sought in the draft consent order on the basis of the facts set out in this Statement.

5. For the purpose of resolving these proceedings summarily, by reference to the facts as set out in Part B below, the Commission contends and each of ML and MTT admits that between early May 2020 until at least 19 April 2021, ML has contravened the FCR by having made and given effect to an agreement and engaged in a concerted practice involving price fixing, customer allocation, bid-rigging and the exchange of competitively sensitive information with three other undertakings[[6]](#footnote-6), namely (1) BP/Noble (consisting of BP Enterprise Company Limited (“**BP**”) and Noble Nursing Home Company Limited (“**Noble**”), being the 3rd and 4th Respondents in these proceedings respectively); (2) KWEK Studio Limited (“**KWEK**”), being the 5th Respondent in these proceedings; and (3) Au Yeung Kit Yee, also known as Agnes Au Yeung (“**Agnes Au Yeung**”) (trading as Yat Ying Hong (“**Yat Ying**”)), being the 6th Respondent in these proceedings, in relation to the supply of quotations for the provision of IT services under the Distance Business Programme (“**D-Biz**”) (“**Subject Arrangement**”). The Subject Arrangement contravened section 6 of the Ordinance, as more particularly described in paragraphs 26 to 34 below (“**Contravention**”).

6. The facts as set out in this Statement are agreed by the Commission and each of ML and MTT. This Statement is filed before the Tribunal to support the joint application by the Commission and ML and MTT for the orders sought in the draft consent order submitted as part of the application to be made under Rule 39 of the CTR (“**Joint Application**”).

7. If the Tribunal for whatever reason is of the view that these proceedings shall not be dealt with by way of the Joint Application, no admission or concession by either the Commission or ML or MTT regarding liability to a pecuniary penalty (save and except the matters set out in paragraphs 36 to 37 below) shall be referred to or relied upon by either the Commission or ML or MTT at any adjourned or subsequent hearing or in any other proceedings without the prior written consent of both the Commission and each of ML and MTT.

8. The Commission and each of ML and MTT accept and acknowledge that none of the admissions made by ML or MTT in this Statement shall be binding on any other Respondents in these proceedings.

9. The Commission reserves the right to refer to this Statement for all purposes connected with or ancillary to these proceedings.

**PART B – UNDISPUTED FACTS RELEVANT TO LIABILITY**

**B1. ML and the relevant employees**

10. ML is and was at all material times a limited liability company incorporated under the laws of Hong Kong. Its current sole shareholder is Multisoft Holding Limited, which is a company incorporated in the British Virgin Islands. Multisoft Holding Limited is 100% owned by MTT.

11. ML was at all relevant times, and is, engaged in economic activity, namely the business of providing IT enterprise solutions, specialising in systems, networking, security and cloud services. ML participated in D-Biz as an IT service provider. From 17 December 2013 to 1 February 2021, the late WU Wai Hung, also known as Vincent Wu (“**Vincent Wu**”), was a director of ML. His last position, and his position at all material times, was sales director, responsible for the divisions consisting of sales, marketing and business development. He passed away in early 2021. In January 2021, Vincent Wu’s position as sales director for ML was taken up by another director of ML who had previously been, and was at all material times, the designated person responsible for signing NCCs for ML under the D-Biz scheme.

12. The employees reporting to Vincent Wu at all material times included one who had joined ML, on 16 January 2018, as a product executive (“**the Relevant ML Employee**”). On 1 April 2019, the Relevant ML Employee was promoted to product manager in ML’s business development team. That remained his position at all material times. In that role, his duties included product planning, benchmarking and feasibility studies, product definition, product development, project management and ensure customer satisfaction. His employment contract for that position also required him to perform *“any other functions as may be assigned by the management from time to time”*. In October 2021, he was dismissed by ML, after the Commission conducted searches of ML’s premises as part of its investigation of the Contravention.

13. At the material times, ML actively sought business opportunities under D-Biz and was enrolled to D-Biz’s IT Service Providers Reference List (“**Reference List**”) for 5 out of the 12 designated categories of IT solutions mentioned in paragraph 16 below. However, businesses applying for D-Biz funding were allowed to choose other IT service providers than those set out in the Reference List. In fact, none of the other parties involved in the Subject Arrangement, i.e. BP, Noble, KWEK and Yat Ying, were enrolled to the Reference List but they were still eligible to participate in D-Biz by providing quotations to D-Biz applicants, just as ML was.

14. Prior to the launch of the D-Biz scheme, Vincent Wu and the Relevant ML Employee were already acquainted with BP and Noble’s joint director (“**BP/Noble Director**”), KWEK’s shareholder and director Tang Wai Chun, also known as Koki Tang (“**Koki Tang**”, being the 8th Respondent in these proceedings), Yat Ying’s owner Agnes Au Yueng as well as her husband, Fan Sing Chi, also known as Joe Fan (“**Joe Fan**”, being the 7th Respondent in these proceedings).

**B2. The D-Biz scheme**

15. On 20 April 2020, the Innovation and Technology Commission (“**ITC**”) launched the D-Biz funding scheme, using public funds from the Government’s anti-epidemic fund to support local enterprises to adopt IT solutions to continue their businesses and services during the COVID-19 epidemic. The Hong Kong Productivity Council (“**HKPC**”) was appointed as the secretariat of D-Biz and was responsible for conducting eligibility checking and preliminary screening on the applications. Once screened, eligible applications were submitted to the Distance Business Programme Vetting Committee (“**Committee**”), chaired by the Commissioner for Innovation and Technology, for consideration.

16. D-Biz covered twelve IT solution categories relating to distance business, namely:

(1) online business;

(2) online order taking and delivery, and smart self-service systems;

(3) online customer services and engagement;

(4) digital customer experience enhancement;

(5) digital payment/mobile point of sale;

(6) online/cloud-based financial management systems;

(7) online/cloud-based human resources management systems;

(8) remote document management, cloud storage and remote access services;

(9) virtual meeting and conference tools;

(10) virtual team management and communications;

(11) cybersecurity solutions; and

(12) other online/custom-built/cloud-based business support systems.

17. D-Biz opened for applications between 18 May and 31 October 2020. At the initial stage of the scheme, each applicant was permitted to submit only one application adopting no more than three IT solutions within the designated twelve categories as set out above. On 16 August 2020, the ITC introduced enhancement measures pursuant to which each applicant was permitted to submit a second application from 31 August 2020 onwards for another three IT solutions which were different from the approved categories in any application which the applicant had made in the initial stage of the D-Biz scheme. Following these enhancement measures, each applicant was therefore permitted to submit two applications for six IT solutions in total. The funding ceiling for each IT solution was HK$100,000 and the aggregate funding ceiling granted to each applicant was HK$300,000.

18. For each application for funding, the applicant was required to obtain written price quotation(s) from IT service provider(s), which set out in detail the project duration, scope of work, deliverables, and breakdown of cost items such as the software expenses, hardware expenses and IT service charges. In addition, the applicant was required to obtain from each person submitting a quotation a signed ‘probity and non-collusive quotation / tendering certificate’ (“**NCC**”) as part of their quotation submission. The NCC contains representations by the person submitting the quotation that: the quotation/bid was genuinely and independently prepared, with an intention to win and to implement the relevant project when awarded; and, in preparing the quotation/bid, no agreement, understanding or communication regarding competitively sensitive information such as price or bidding intention was made with another competing bidder.

19. The number of price quotations which an applicant needed to obtain was dependent on whether the application involved (i) a subscription-based IT solution or (ii) a system integrator/non-subscription-based IT solution. In the former case, the applicant was only required to obtain one quotation. Conversely, in the latter case, the applicant was required to obtain quotations from at least two IT service providers, otherwise full justifications had to be provided. As between the two quotations, unless otherwise justified by the applicant and agreed by the Government or the HKPC, it was stipulated that the service provider submitting the lowest conforming quotation was to be selected by the applicant to provide the relevant IT solution (“**Two-Quotation Requirement**”). The Subject Applications (as defined at paragraph 25 below) concerned in this case all initially sought funding for non-subscription-based IT solutions and were thus required to meet the Two-Quotation Requirement.

20. Each D-Biz application was done online through D-Biz’s website. As part of the application process, applicants were required:

(1) to submit supporting documents including copies of the quotations obtained for each of the IT solutions (both the quotation which had been selected and the quotation(s) which had not been selected) as well as the NCCs signed by each IT service provider which had provided a quotation; and

(2) to assign an authorised person to represent the applicant fully in respect of the application and act as the main contact point between the applicant and the HKPC; that authorized person had to be conversant with the operation and business processes of the applicant.

21. Applications that the HKPC assessed as being eligible were submitted to the Committee for approval. It was also possible for the level of funding to be adjusted with reference to the project cost such that the HKPC would only approve a reduced scope for the IT solution by comparison with the scope which had been applied for.

22. An initial payment of 30% of the approved funding amount was payable to a designated bank account of the applicant. The selected service provider could then start to implement the IT solution(s) for the applicant.

23. Within two months after the completion of the IT solution(s), the applicant was required to submit among other things, a final project report indicating a summary of project expenditures and project deliverables, and an audited statement of income and expenditure covering the whole project period from an independent auditor to the HKPC, if the total approved funding exceeded HK$30,000.

24. Upon project completion and upon the HKPC’s acceptance of the final project report together with supporting documents, the final payment (i.e., the remaining 70% of the approved funding amount) was then released to the applicant.

25. The Subject Arrangement concerns 189 applications under D-Biz (“**Subject Applications**”), details of which are provided in Annex A to this Statement. However, for the purpose of the Joint Application and as agreed among the Commission, ML and MTT, out of the Subject Applications, only 51 applications were affected by ML’s involvement in the Subject Arrangement, i.e., the applications as enumerated as item nos. 1 to 51 in Annex A to this Statement.

**B3. ML’s participation in the Subject Arrangement**

26. In early May 2020 (after the announcement of D-Biz on 20 April 2020 but before its commencement on 18 May 2020), Agnes Au Yeung and Joe Fan held a birthday gathering to celebrate Agnes Au Yeung’s birthday. Vincent Wu and the BP/Noble Director were among those invited to attend the gathering.

27. During that gathering, Vincent Wu discussed with Agnes Au Yeung and the BP/Noble Director the fact that they were both interested in participating in D-Biz as IT service providers. Agnes Au Yeung and the BP/Noble Director told Vincent Wu that they both had potential customers, but each had found it difficult to obtain a second quotation from another IT service provider for the purpose of enabling their prospective customers to comply with the Two-Quotation Requirement. Vincent Wu said that he would help by using ML to issue second quotations as cover bids for the quotations to be submitted by Yat Ying or BP/Noble, in order to enable Agnes Au Yeung’s and the BP/Noble Director’s prospective customers to purportedly comply with the Two-Quotation Requirement when applying for funding under D-Biz.

28. At or shortly after that gathering, it was the consensus and/or common understanding of Vincent Wu, Agnes Au Yeung and the BP/Noble Director that Yat Ying and BP/Noble would determine their respective quotation prices for each of their prospective customers after seeing the prices of ML’s quotations for the same customers.

29. Further, it was their consensus and/or common understanding that the two quotations submitted for each IT solution would be priced so that the lowest bid would be the one submitted by Yat Ying or BP/Noble, and Yat Ying or BP/Noble would therefore become the selected service provider for the relevant IT solution. In this way, the contract to provide IT services to each prospective customer (and the associated D-Biz funding) would be allocated to the firm operated by the individual who had originally found the customer in question, i.e., the customers found by Agnes Au Yeung would be allocated to Yat Ying; and the customers found by the BP/Noble Director would be allocated to either BP or Noble.

30. After the birthday gathering, Agnes Au Yeung and the BP/Noble Director each instructed Joe Fan to contact Vincent Wu on both Yat Ying’s and BP/Noble’s behalf to arrange for ML to provide quotations for use in D-Biz applications by Yat Ying’s and BP/Noble’s prospective customers in order purportedly to satisfy the Two-Quotation Requirement. Accordingly, shortly after the birthday gathering and before the commencement of D-Biz on 18 May 2020, Joe Fan called Vincent Wu to obtain ML’s quotations. In the telephone conversation, Vincent Wu asked Joe Fan to contact the Relevant ML Employee directly to follow-up on this matter. Separately, Vincent Wu also instructed the Relevant ML Employee to issue ML’s quotations to the customers which Joe Fan would identify.

31. In or around the period between 18 May 2020 and 1 June 2020, Yat Ying and BP/Noble (both through Joe Fan) and ML (through Vincent Wu and the Relevant ML Employee) further coordinated to effect the provision of 56 quotations from ML to prospective customers of Yat Ying or BP/Noble in support of their applications for D-Biz funding. Without being exhaustive:

(1) In or around the period between 18 and 21 May 2020, Joe Fan communicated with the Relevant ML Employee and, separately, Vincent Wu, regarding the customers to which Yat Ying and BP/Noble were proposing to submit quotations to provide IT solutions under the D-Biz scheme.

(2) In or around the period between 20 and 22 May 2020, the Relevant ML Employee reported to Vincent Wu on Joe Fan’s requests and sought Vincent Wu’s instructions on how to respond.

(3) In or around the period between 22 and 25 May 2020, Vincent Wu instructed the Relevant ML Employee to notify Joe Fan that requests for a quotation (“**RFQs**”) should come directly from customers so that they looked non-collusive. Joe Fan then created and sent 59 RFQs purportedly from prospective customers (using Gmail and Yahoo email accounts which Joe Fan had also created) to the Relevant ML Employee’s work email address.

(4) In or around the morning of 26 May 2020, the Relevant ML Employee asked ML’s responsible director to sign one NCC for one of the customers provided by Joe Fan, explaining that the quotation was prepared on instructions from Vincent Wu. The Relevant ML Employee applied the signing page of that NCC to the other quotations.

(5) In or around the period between 26 May and 1 June 2020, the Relevant ML Employee responded to 56 of the 59 RFQs using his work email account. The first three quotations issued by the Relevant ML Employee in this way were quoted at ML’s standard price for designated category 1 IT solutions, but the Relevant ML Employee subsequently revised those three quotation prices upwards to HK$99,000 and sent all of the other quotations priced at HK$99,000. Joe Fan had asked the Relevant ML Employee to effect this price increase after Joe Fan had reviewed the first three quotations at the lower price.

32. ML only provided quotations for IT solutions in designated category 1, so Joe Fan separately obtained cover bids for the other categories from KWEK through Koki Tang. Being a co-shareholder of KWEK, the Relevant ML Employee was aware of this.

33. As a result of ML’s participation in the Subject Arrangement, there was no genuine competition between the IT service providers providing quotations in the 51 applications for D-Biz funding enumerated at nos. 1 to 51 of Annex A to this Statement. On the contrary, the intended winner (i.e., the service provider to be selected to provide the relevant IT services to be funded by the D-Biz scheme) had been pre-determined pursuant to the Subject Arrangement. The HKPC was led to approve D-Biz funding under the false impression that the relevant applications had been made following a competitive selection process in compliance with the Two-Quotation Requirement. Further, the prospective customers, in whose name the relevant applications were made, had not been informed of the Subject Arrangement (including in particular that one of the two IT service providers submitting quotations would only submit a cover bid rather than competing to win).

**B5. Particulars of the Contravention**

34. It is the Commission’s case (which is not disputed by ML and MTT) that the Subject Arrangement insofar as ML is concerned was agreed and given effect to in accordance with the events set out below:

(1) In early May 2020, Vincent Wu made the Subject Arrangement with Agnes Au Yeung and the BP/Noble Director that he would use ML to issue second quotations as cover bids for the quotations to be submitted by Yat Ying or BP/Noble, in order to enable Agnes Au Yeung’s and the BP/Noble Director’s prospective customers to purportedly comply with the Two-Quotation Requirement when applying for funding under D-Biz, and to enable Yat Ying and BP/Noble to become the selected service provider for customers found by Agnes Au Yeung and the BP/Noble Director respectively.

(2) Under Vincent Wu’s direct instruction and supervision, the Relevant ML Employee implemented the Subject Arrangement by issuing 56 cover bid quotations in ML’s name. Consequently, ML lost all the applications in which its quotations were paired up against Yat Ying or BP/Noble’s, enabling them to become the selected IT service providers in successful applications that resulted in the relevant customer executing a funding agreement with HKPC.

(3) Through the actions of Vincent Wu and the Relevant ML Employee, ML participated in the Subject Arrangement which led HKPC to approve D-Biz funding under the false impression that the relevant applications had been made following a competitive selection process in compliance with the Two-Quotation Requirement.

(4) For ML’s part, its participation in the Subject Arrangement and therefore its Contravention of the FCR started from the May 2020 gathering among Vincent Wu, the BP/Noble Director, Agnes Au Yeung and Joe Fan, and continued to at least 19 April 2021, being the date when the last of the contracts for D-Biz funding relating to the affected applications (i.e., the Subject Applications enumerated at nos. 1 to 51 of Annex A to this Statement) was signed.

**B6. Admission of ML’s liability by ML and MTT**

35. By reason of the matters set out herein, each of ML and MTT admits the following:

(1) ML, Agnes Au Yeung trading as Yat Ying, BP/Noble and KWEK, as separate undertakings involved in providing IT solutions to other businesses in Hong Kong, entered into the Subject Arrangement;

(2) the object of the Subject Arrangement was to prevent, restrict, or distort competition in Hong Kong between IT service providers bidding to provide IT solutions to prospective customers applying for funding under the D-Biz scheme by fixing prices, allocating customers, rigging bids and/or sharing information in respect of the submission of quotations to prospective customers applying for D-Biz funding;

(3) Vincent Wu and the Relevant ML Employee (both as employees of ML) participated in the formation and implementation of the portion of the Subject Arrangement involving ML (i.e., in respect of the Subject Applications enumerated at nos. 1 to 51 of Annex A to this Statement), and the conduct of each of them is attributable to ML. It is not alleged that MTT had actual knowledge of Vincent Wu and the Relevant ML Employee's participation in the Subject Arrangement;

(4) the Subject Arrangement constitutes price-fixing, customer allocation, bid-rigging and/or the exchange of competitively sensitive information among competitors, in contravention of the FCR under section 6(1) of the Ordinance; and

(5) such conduct constitutes “serious anti-competitive conduct” within the meaning of section 2(1) of the Ordinance.

**PART C – UNDISPUTED FACTS ON THE CALCULATION OF RECOMMENDED PECUNIARY PENALTY FOR BP/NOBLE AND THE INVESTIGATION COSTS OF THE COMMISSION**

36. For the purposes of assessing the amount of recommended pecuniary penalty under section 93 of the Ordinance, each of ML and MTT admits the following:

(1) The financial year of ML starts from 1 April and ends on 31 March of a calendar year.

(2) According to the definition of “turnover” under section 2 of the Competition (Turnover) Regulation (Cap. 619C), the turnover of ML for each of its financial years ending on 31 March 2021 and 31 March 2022 was HK$169,667,681 and HK$197,272,214 respectively.

37. As to the Commission’s costs of and incidental to its investigation into this matter, the Commission has incurred such costs in the sum of HK$621,730 (see Annex B), of which HK$155,000 (rounding down to the nearest thousand) represents the 1st Respondent’s share of such investigation costs.

Dated this day of 2024.

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| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **MINTERELLISON LLP**  Solicitors for the Applicant | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **PAULINE WONG & CO**  Solicitors for the 1st and 2nd Respondents |

**STATEMENT OF AGREED FACTS BETWEEN THE**

**COMPETITION COMMISSION (“COMMISSION”) AND THE 3RD AND 4TH RESPONDENTS**

*(Prepared pursuant to Rule 39 of the Competition Tribunal Rules, Cap. 619D (“****CTR****”) and*

*Paragraph 72 of the Competition Tribunal Practice Direction 1 (“****CTPD1****”))*

**PART A — INTRODUCTION**

1. On 22 March 2023, the Commission issued proceedings pursuant to sections 92(1), 94(1), 96(1) and 101(1) of the Competition Ordinance, Cap. 619 (“**Ordinance**”) before the Competition Tribunal (“**Tribunal**”) against, amongst others, BP Enterprise Company Limited (“**BP**”) and Noble Nursing Home Company Limited (“**Noble**”), being the 3rd and the 4th Respondents in these proceedings respectively.

2. The Commission seeks, as against each of BP and Noble:

(1) a declaration pursuant to section 94(1) of, and section 1(a) of Schedule 3 to, the Ordinance that each of BP and Noble has contravened the First Conduct Rule (“**FCR**”) under section 6 of the Ordinance;

(2) an order under section 93(1) of the Ordinance that each of BP and Noble shall jointly and severally pay to the Government a pecuniary penalty in such amount as the Tribunal considers appropriate;

(3) an order pursuant to section 94(1) of, and/or section 1(c) of Schedule 3 to, the Ordinance requiring each of BP and Noble to adopt and to implement, to the reasonable satisfaction of the Commission, an effective competition compliance programme in such time period and manner as the Tribunal shall determine;

(4) an order under section 96(1) of the Ordinance that each of BP and Noble shall jointly and severally pay to the Government an amount equal to the reasonably incurred costs of and incidental to the Commission’s investigation into its conduct or affairs, to be assessed;

(5) an order that each of BP and Noble shall jointly and severally pay the Commission’s costs of and incidental to the application in these proceedings; and

(6) such further or other relief as the Tribunal considers appropriate.

3. Subject to the approval of the Tribunal, the Commission and each of BP and Noble agree to enter judgment on liability and penalty in favour of the Commission against BP and Noble by way of the summary procedure as provided for in Rule 39 of the CTR and §72 of the CTPD1. The procedure as envisaged by the parties is that sanctioned by the High Court of England and Wales in the case of **Re Carecraft Construction Co Ltd** [1994] 1 WLR 172 and clarified by the Court of Appeal of England and Wales in **Secretary of State for Trade and Industry v Rogers** [1996] 1 WLR 1569, and as adopted in Hong Kong for proceedings under section 214 of the Securities and Futures Ordinance (Cap. 571) and section 168H of the former Companies Ordinance (Cap. 32). Further, the procedure was endorsed by the Honourable Mr. Justice Jonathan Harris in the case of **Competition Commission v Kam Kwong Engineering Co Ltd** [2020] 4 HKLRD 61 as a *“readymade blueprint for disposing of proceedings under the Ordinance”* (at §17) and by the Honourable Madam Justice Linda Chan in her judgment handed down on 3 November 2020 (**Competition Commission v. Quantr Limited and Others** [2020] HKCT 10). Additionally, the same procedure was adopted by the Honourable Mr. Justice Godfrey Lam (as he then was) in his judgment handed down on 16 December 2020 in relation to the penalty proceedings in **Competition Commission v. Nutanix Hong Kong Limited and Others** [2020] HKCT 11.

4. This Statement of Agreed Facts (“**Statement**”) is submitted pursuant to Rule 39 of the CTR and §72 of the CTPD1. The Tribunal is asked to make the orders sought in paragraph 2 above on the basis of the facts set out in this Statement.

5. For the purpose of resolving these proceedings summarily, by reference to the facts as set out in Part B below, the Commission contends and each of BP and Noble admits that between early May 2020 until at least 2 September 2021, BP and Noble have contravened the FCR by having made and given effect to an agreement and/or engaged in a concerted practice involving price fixing, customer allocation, bid-rigging and/or the exchange of competitively sensitive information with three other undertakings[[7]](#footnote-7), namely (1) Multisoft (consisting of Multisoft Limited (“**ML**”) and its parent company MTT Group Holdings Limited (“**MTT**”), being the 1st and 2nd Respondents in these proceedings respectively); (2) KWEK Studio Limited (“**KWEK**”), being the 5th Respondent in these proceedings; and (3) Au Yeung Kit Yee, also known as Agnes Au Yeung (“**Agnes Au Yeung**”) (trading as Yat Ying Hong (“**Yat Ying**”)), being the 6th Respondent in these proceedings, in relation to the supply of quotations for the provision of IT services under the Distance Business Programme (“**D-Biz**”) (“**Subject Arrangement**”). The Subject Arrangement contravened section 6 of the Ordinance, as more particularly described in paragraph 35 to 38 below (“**Contravention**”).

6. The facts as set out in this Statement are agreed by the Commission and each of BP and Noble. This Statement is filed before the Tribunal to support the joint application by the Commission and BP and Noble for the orders sought in paragraph 2 above to be made under Rule 39 of the CTR (“**Joint Application**”).

7. If the Tribunal for whatever reason is of the view that these proceedings shall not be dealt with by way of the Joint Application, no admission or concession by either the Commission or BP or Noble regarding liability to a pecuniary penalty (save and except the matters set out in paragraphs 40 to 41 below) shall be referred to or relied upon by either the Commission or BP or Noble at any adjourned or subsequent hearing or in any other proceedings without the prior written consent of both the Commission and each of BP and Noble.

8. This Statement is signed and filed solely for the purpose of the Joint Application and for no other purposes. Accordingly, this Statement itself shall not be used by either the Commission or each of BP and Noble for purposes other than these proceedings and any proceedings ancillary thereto.

9. For the avoidance of doubt, this Statement is signed between the Commission on the one hand and BP and Noble on the other hand. Nothing contained in this Statement shall be considered to be binding on the individual director(s) of BP and Noble in their personal capacities in any event.

10. The Commission reserves the right to refer to this Statement for all purposes connected with or ancillary to these proceedings.

**PART B – UNDISPUTED FACTS RELEVANT TO LIABILITY**

**B1. The relevant parties**

11. BP is and was at all material times a limited liability company incorporated under the laws of Hong Kong. BP was initially set up on 11 June 2019, for developing an online shopping platform. Accordingly, BP established an online platform named ‘FanSung Market’ to sell food, gift sets and anti-pandemic products. However, in late 2020, FanSung Market was closed down because the profit of BP’s online shopping business was unsatisfactory. Apart from the foregoing, BP had no other business except as an IT service provider to participate in D-Biz.

12. Noble is and was at all material times a limited liability company incorporated under the laws of Hong. Noble was initially set up, on 27 July 2018, for developing nursing services for the elderly but was unsuccessful because no suitable place was found to set up an elderly care centre. Apart from the foregoing, Noble had no other business until it was used as an IT service provider to participate in D-Biz.

13. At all material times, the “**BP/Noble Director**” is and was the sole shareholder of both BP and Noble, the sole director of BP, and also a director of Noble. In this statement, the undertaking of which BP and Noble form a part is referred to as “**BP/Noble**”. Agnes Au Yeung and Fan Sing Chi, also known as Joe Fan (“**Joe Fan**”), assisted in handling BP’s and Noble’s affairs (whether as representatives and/or agents), including the setting up of the FanSung Market and the quotations submitted by BP and Noble in support of applications for D-Biz funding by prospective customers.

14. ML is and was at all material times a limited liability company incorporated under the laws of Hong Kong. Its current sole shareholder is Multisoft Holding Limited, which is a company incorporated in the British Virgin Islands. Multisoft Holding Limited is 100% owned by MTT. ML was at all relevant times, and is, engaged in the business of providing IT enterprise solutions, specialising in systems, networking, security and cloud services. ML participated in D-Biz as an IT service provider. At all material times until 1 February 2021, the late Wu Wai Hung, also known as Vincent Wu (“**Vincent Wu**”), was sales director of ML, responsible for ML’s sales, marketing and business development divisions. The employees reporting to Vincent Wu at all material times included a former product manager (“**the Relevant ML Employee**”).

15. KWEK was at all material times (and still is) a limited liability company incorporated in Hong Kong. Tang Wai Chun, also known as Koki Tang (“**Koki Tang**”), is and was at all material times (and still is) a shareholder and a director of KWEK.

16. Yat Ying was at all material times (and still is) a sole proprietorship which is an unincorporated entity owned by Agnes since 10 January 2016. Yat Ying also participated in D-Biz as an IT service provider. Agnes Au Yeung is responsible for decisions regarding Yat Ying’s business, including determining Yat Ying’s bid prices for quotations to prospective customers applying for D-Biz funding. At all material times, she also participated in preparing quotations for prospective customers of BP/Noble applying for D-Biz funding. At all material times, Joe Fan was the husband of Agnes Au Yeung. He has no formal employment contract with Yat Ying, but he also participated in preparing quotations for prospective customers of BP/Noble applying for D-Biz funding, and in delivering IT solutions to Yat Ying’s and BP/Noble’s respective customers.

**B2. The D-Biz scheme**

17. On 20 April 2020, the Innovation and Technology Commission (“**ITC**”) launched the D-Biz funding scheme, using public funds from the Government’s anti-epidemic fund to support local enterprises to adopt IT solutions to continue their businesses and services during the COVID-19 epidemic. The Hong Kong Productivity Council (“**HKPC**”) was appointed as the secretariat of D-Biz and was responsible for conducting eligibility checking and preliminary screening on the applications. Once screened, eligible applications were submitted to the Distance Business Programme Vetting Committee (“**Committee**”), chaired by the Commissioner for Innovation and Technology, for consideration.

18. D-Biz covered twelve IT solution categories relating to distance business, namely:

(1) online business;

(2) online order taking and delivery, and smart self-service systems;

(3) online customer services and engagement;

(4) digital customer experience enhancement;

(5) digital payment/mobile point of sale;

(6) online/cloud-based financial management systems;

(7) online/cloud-based human resources management systems;

(8) remote document management, cloud storage and remote access services;

(9) virtual meeting and conference tools;

(10) virtual team management and communications;

(11) cybersecurity solutions; and

(12) other online/custom-built/cloud-based business support systems.

19. D-Biz opened for applications between 18 May and 31 October 2020. At the initial stage of the scheme, each applicant was permitted to submit only one application adopting no more than three IT solutions within the designated twelve categories as set out above. On 16 August 2020, the ITC introduced enhancement measures pursuant to which each applicant was permitted to submit a second application from 31 August 2020 onwards for another three IT solutions which were different from the approved categories in any application which the applicant had made in the initial stage of the D-Biz scheme. Following these enhancement measures, each applicant was therefore permitted to submit two applications for six IT solutions in total. The funding ceiling for each IT solution was HK$100,000 and the aggregate funding ceiling granted to each applicant was HK$300,000.

20. For each application for funding, the applicant was required to obtain written price quotation(s) from IT service provider(s), which set out in detail the project duration, scope of work, deliverables, and breakdown of cost items such as the software expenses, hardware expenses and IT service charges. In addition, the applicant was required to obtain from each person submitting a quotation a signed ‘probity and non-collusive quotation / tendering certificate’ (“**NCC**”) as part of their quotation submission. The NCC contains representations by the person submitting the quotation that: the quotation/bid was genuinely and independently prepared, with an intention to win and to implement the relevant project when awarded; and, in preparing the quotation/bid, no agreement, understanding or communication regarding competitively sensitive information such as price or bidding intention was made with another competing bidder.

21. The number of price quotations which an applicant needed to obtain was dependent on whether the application involved (i) a subscription-based IT solution or (ii) a system integrator/non-subscription-based IT solution. In the former case, the applicant was only required to obtain one quotation. Conversely, in the latter case, the applicant was required to obtain quotations from at least two IT service providers, otherwise full justifications had to be provided. As between the two quotations, unless otherwise justified by the applicant and agreed by the Government or the HKPC, it was stipulated that the service provider submitting the lowest conforming quotation was to be selected by the applicant to provide the relevant IT solution (“**Two-Quotation Requirement**”). The Subject Applications (as defined at paragraph 27 below) concerned in this case all initially sought funding for non-subscription-based IT solutions and were thus required to meet the Two-Quotation Requirement.

22. Each D-Biz application was done online through D-Biz’s website. As part of the application process, applicants were required:

(1) to submit supporting documents including copies of the quotations obtained for each of the IT solutions (both the quotation which had been selected and the quotation(s) which had not been selected) as well as the NCCs signed by each IT service provider which had provided a quotation; and

(2) to assign an authorised person to represent the applicant fully in respect of the application and act as the main contact point between the applicant and the HKPC; that authorized person had to be conversant with the operation and business processes of the applicant.

23. Applications that the HKPC assessed as being eligible were submitted to the Committee for approval. It was also possible for the level of funding to be adjusted with reference to the project cost such that the HKPC would only approve a reduced scope for the IT solution by comparison with the scope which had been applied for.

24. An initial payment of 30% of the approved funding amount was payable to a designated bank account of the applicant. The selected service provider could then start to implement the IT solution(s) for the applicant.

25. Within two months after the completion of the IT solution(s), the applicant was required to submit among other things, a final project report indicating a summary of project expenditures and project deliverables, and an audited statement of income and expenditure covering the whole project period from an independent auditor to the HKPC, if the total approved funding exceeded HK$30,000.

26. Upon project completion and upon the HKPC’s acceptance of the final project report together with supporting documents, the final payment (i.e., the remaining 70% of the approved funding amount) was then released to the applicant.

27. The Subject Arrangement concerns 189 applications under D-Biz (“**Subject Applications**”), details of which are provided in Annex A to this Statement.

**B3. Background to the relevant conduct**

28. In around 2002, Vincent Wu, Agnes Au Yeung and the BP/Noble Director met at a church and became friends. Joe Fan joined their friendship group after marrying Agnes Au Yeung in 2015. The three, and later four, individuals attended gatherings held by each other from time to time.

29. Between 2017 and 2020, the BP/Noble Director lent a sum of money to Agnes Au Yeung and Joe Fan for their business operations. As at May 2020, the loan had not been repaid. As a way to thank the BP/Noble Director, Agnes Au Yeung and Joe Fan helped the BP/Noble Director with various issues including the operation of BP and Noble since 2018, without any compensation. Neither Agnes Au Yeung nor Joe Fan formally held any position in BP or Noble.

30. Between 1 July 2019 and 30 June 2020, BP/Noble and Yat Ying shared the same office located at Flat G, 9th Floor, Mai Luen Industrial Building, 23-31 Kung Yip Street, Kwai Chung, New Territories, Hong Kong. BP/Noble rented the said office as BP’s registered office on 1 July 2019, and shared it with Agnes Au Yeung and Joe Fan for them to use in running Yat Ying’s business, until after the lease of the shared office expired on 30 June 2020.

31. When developing the FanSung Market for BP in 2019, BP/Noble was assisted by Agnes Au Yeung and Joe Fan. BP/Noble also consulted Vincent Wu on some technical issues, who then introduced the Relevant ML Employee to them. In turn, the Relevant ML Employee introduced Koki Tang to BP/Noble, Agnes Au Yeung and Joe Fan; and it was Koki Tang who developed the FanSung Market platform on a freelance basis.

32. Following the announcement of the D-Biz programme in late April 2020, Agnes Au Yeung and BP/Noble each found prospective customers to whom they could each provide IT solutions for online business operations through Yat Ying and BP respectively. Since there was market information at the initial stage of D-Biz suggesting that there would be a limit on the number of applications in which each IT service provider could participate, both BP and Noble were used as IT service providers to increase the overall number of participating applications.

33. With Joe Fan’s effort, and by referrals from friends, BP/Noble had prospective customers interested in applying for D-Biz funding. Agnes Au Yeung and Joe Fan ultimately submitted 74 Subject Applications for D-Biz funding on behalf of BP/Noble customers (marked as customers of the BP/Noble Director in Annex A to this Statement). In parallel, Agnes Au Yeung succeeded in obtaining expressions of interest from prospective customers of Yat Ying, and ultimately submitted 115 Subject Applications for D-Biz funding on their behalf (marked as customers of Agnes Au Yeung in Annex A to this Statement).

34. In total, 189 Subject Applications were thus made to seek funding for non-subscription-based IT solutions, of which 167 Subject Applications were approved for funding. The last of the D-Biz funding contracts was signed on 2 September 2021. Applications from 37 customers of BP/Noble were approved and they entered into D-biz funding agreement with the HKPC. Many have received the 30% initial payment and have paid the same to BP/Noble; the residual funding remains unpaid pending completion of the underlying IT services and administrative steps described above. The total amount of D-biz funding approved for customers of BP/Noble is $4,961,470.

**B4. The Subject Arrangement**

35. In order to enable the proposed customers of BP/Noble and Yat Ying to appear to satisfy the Two-Quotation Requirement while ensuring that BP/Noble or Yat Ying respectively would win the business by offering the lowest quotes, it was agreed that (1) BP/Noble and Yat Ying were to obtain cover bids from ML and KWEK through their relationship with Vincent Wu and Koki Tang (see Annex A items 1-51), and (2) later, BP/Noble and Yat Ying would provide cover bids for each other (see Annex A items 52-189).[[8]](#footnote-8) Such cover bids were to be priced slightly higher than the bids provided respectively by the intended winner to succeed.

36. As between the intended winners BP/Noble and Yat Ying, customers would be allocated according to who found them, i.e., the customers found by BP/Noble would generally be allocated to either BP or Noble, while the customers found by Agnes Au Yeung would be allocated to Yat Ying. Joe Fan and Agnes Au Yeung were the main implementers of the Subject Arrangement.

37. As a result of the Subject Arrangement, there was no genuine competition between the relevant two IT service providers (as the case may be) from which quotations were sought to support each of the Subject Applications for D-Biz funding. On the contrary, for each Subject Application, the intended winner (i.e., the service provider to be selected to provide the relevant IT services to be funded by the D-Biz scheme) had been pre-determined pursuant to the Subject Arrangement. The HKPC was led to approve D-Biz funding – in the case of BP/Noble’s customers, a total amount of $4,961,470 – under the false impression that the Subject Applications had been made following a competitive selection process in compliance with the Two-Quotation Requirement.

**B5. Particulars of the Contravention**

38. It is the Commission’s case (which is not disputed by BP and Noble) that the Subject Arrangement insofar as BP/Noble is concerned was agreed and given effect to in accordance with the events set out below:

(1) In early May 2020 (after the announcement of D-Biz on 20 April 2020 but before its commencement on 18 May 2020), Agnes Au Yeung and Joe Fan held a birthday gathering to celebrate Agnes Au Yeung’s birthday. Vincent Wu and the BP/Noble Director were among those invited to attend the gathering.

(2) During that gathering, Agnes Au Yeung and the BP/Noble Director told Vincent Wu that they both had potential customers, but each had found it difficult to obtain a quotation from another IT service provider for the purpose of enabling their prospective customers to comply with the Two-Quotation Requirement. Vincent Wu said that he would help by using ML to issue cover bids for Yat Ying or BP/Noble in order to enable Yat Ying's or BP/Noble's prospective customers, respectively to comply with the Two-Quotation Requirement when applying for funding under D-Biz.

(3) It was the consensus and/or common understanding of Vincent Wu, Joe Fan, Agnes Au Yeung and BP/Noble that Yat Ying and BP/Noble would determine their respective quotation prices for each of their prospective customers after seeing the prices of ML’s quotations for the same customers. Further, it was their consensus and/or common understanding that the two quotations submitted for each IT solution would be priced so that the lowest bid would be the one submitted by Yat Ying or BP/Noble, and Yat Ying or BP/Noble would therefore become the selected service provider for their respective customers.

(4) The BP/Noble Director was not personally involved in the communications with ML and/or KWEK in obtaining the cover bids for BP/Noble. Shortly after the birthday gathering and before the commencement of the D-Biz scheme, Joe Fan told BP/Noble that Vincent Wu had asked the Relevant ML Employee to help to prepare ML’s quotations as cover bids and that he had provided BP/Noble’s customer list to the Relevant ML Employee for that purpose. Joe Fan also informed BP/Noble of the fact that he had liaised with Koki Tang to obtain more cover bids from KWEK, and provided Koki Tang with BP/Noble’s customer list for that purpose.

(5) BP/Noble (and/or Agnes Au Yeung and/or Joe Fan) determined the price for the relevant quotations from BP/Noble, after she found out – either directly or through Joe Fan – ML’s and KWEK’s cover bid prices for the same customer. Since the D-Biz scheme required the applicant for D-Biz funding to pick the lowest quotation, quotations from BP/Noble were priced lower than what ML and KWEK had bid for the same IT solution in order to make sure BP/Noble would become (or otherwise maximize the chance of BP/Noble becoming) the selected IT service provider for the relevant Subject Application pursuant to the Two-Quotation Requirement.

Joe Fan and Agnes Au Yeung participated on behalf of BP/Noble in the Subject Arrangement. Accordingly, Joe Fan and/or Agnes Au Yeung: prepared BP/Noble’s quotations and NCCs with the electronic signatures and BP/Noble’s company chops, which were kept by them; submitted the relevant documentation in support of the Subject Applications by BP/Noble’s prospective customers through the D-Biz website on behalf of BP/Noble’s customers; attended to the relevant customer’s execution of funding agreement with HKPC.

(6) Further, Joe Fan and Agnes Au Yeung allocated ML’s and KWEK’s cover bids to accompany BP/Noble’s quotations as they saw fit, as long as the customer allocation principle described in paragraph 36 above was followed.

(7) Furthermore, in respect of some Subject Applications (and, in particular, Subject Applications prepared after the ITC announced the enhancement measures allowing the submission of second D-Biz applications), it was agreed that Joe Fan and Agnes Au Yeung could also use BP/Noble to provide cover bids for Yat Ying, and vice versa. In respect of later Subject Applications, Agnes Au Yeung, Joe Fan and the BP/Noble Director did not approach Vincent Wu or Koki Tang to seek new cover bids from Multisoft or KWEK.

(8) The Subject Arrangement commenced in early May 2020, and continued until at least 2 September 2021, being the date when the last of the contracts for D-Biz funding relating to the Subject Applications was signed.

**B6. Admission of liability by BP and Noble**

39. By reason of the matters set out herein, each of BP and Noble admits the following:

(1) ML, Agnes Au Yeung trading as Yat Ying, BP/Noble and KWEK, as separate undertakings involved in providing IT solutions to other businesses in Hong Kong, entered into the Subject Arrangement;

(2) the object of the Subject Arrangement was to prevent, restrict, or distort competition in Hong Kong between IT service providers bidding to provide IT solutions to prospective customers applying for funding under the D-Biz scheme by fixing prices, allocating customers, rigging bids and/or sharing information in respect of the submission of quotations to prospective customers applying for D-Biz funding;

(3) each of the BP/Noble Director (as employee, representative and/or agent for BP/Noble), Joe Fan (whether as representative and/or agent for BP/Noble) and Agnes Au Yeung (whether as representative and/or agent for BP/Noble) participated in the formation and implementation of the Subject Arrangement, and the conduct of each of them is attributable to BP/Noble;

(4) the Subject Arrangement constitutes price-fixing, customer allocation, bid-rigging and/or the exchange of competitively sensitive information among competitors, in contravention of the FCR under section 6(1) of the Ordinance;

(5) such conduct constitutes “serious anti-competitive conduct” within the meaning of section 2(1) of the Ordinance; and

(6) BP and Noble as the same undertaking are jointly and severally liable for the Contravention.

**PART C – UNDISPUTED FACTS ON THE CALCULATION OF RECOMMENDED PECUNIARY PENALTY FOR BP/NOBLE AND THE INVESTIGATION COSTS OF THE COMMISSION**

40. For the purposes of assessing the amount of recommended pecuniary penalty under section 93 of the Ordinance, each of BP and Noble admits the following:

(1) The financial year of BP starts from 1 April and ends on 31 March of a calendar year.

(2) The financial year of Noble starts from 1 January and ends on 31 December of a calendar year.

(3) According to the definition of “turnover” under section 2 of the Competition (Turnover) Regulation (Cap. 619C):

(a) the turnover of BP for each of its financial years ending on 31 March 2021 and 31 March 2022 was HK$647,529 and HK$338,095 respectively;

(b) the turnover of Noble for each of its financial years ending on 31 December 2020 and 31 December 2021 was HK$0 and HK$222,474 respectively.

41. As to the Commission’s costs of and incidental to its investigation into this matter, the Commission has incurred such costs in the sum of HK$621,730 (see Annex B), of which HK$155,000 (rounding down to the nearest thousand) represents the 3rd and 4th Respondents’ share of such investigation costs.

Dated this day of 2023.

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| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **MINTERELLISON LLP**  Solicitors for the Applicant | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **MANDY WAN & CO.**  Solicitors for the 3rd and 4th Respondents |

**STATEMENT OF AGREED FACTS BETWEEN THE**

**COMPETITION COMMISSION (“COMMISSION”) AND THE 5TH AND 8TH RESPONDENTS**

*(Prepared pursuant to Rule 39 of the Competition Tribunal Rules, Cap. 619D (“****CTR****”) and*

*Paragraph 72 of the Competition Tribunal Practice Direction 1 (“****CTPD1****”))*

**PART A — INTRODUCTION**

1. On 22 March 2023, the Commission issued proceedings pursuant to sections 92(1), 94(1), 96(1) and 101(1) of the Competition Ordinance, Cap. 619 (“**Ordinance**”) before the Competition Tribunal (“**Tribunal**”) against, amongst others, KWEK Studio Limited (“**KWEK**”) and its shareholder/director, Tang Wai Chun, also known as Koki Tang (“**Koki Tang**”), being the 5th and the 8th Respondents in these proceedings respectively.

2. As against KWEK, the Commission seeks:

(1) a declaration pursuant to section 94(1) of, and section 1(a) of Schedule 3 to, the Ordinance that KWEK has contravened the First Conduct Rule (“**FCR**”) under section 6 of the Ordinance;

(2) an order pursuant to section 94(1) of, and section 1(c) of Schedule 3 to, the Ordinance requiring it to adopt and to implement, to the reasonable satisfaction of the Commission, an effective competition compliance programme in such time period and manner as the Tribunal shall determine;

(3) an order under section 96(1) of the Ordinance that it shall pay to the Government an amount equal to the reasonably incurred costs of and incidental to the Commission’s investigation into its conduct or affairs, to be assessed;

(4) an order that it shall pay the Commission’s costs of and incidental to the application in these proceedings, to be assessed; and

(5) such further or other relief as the Tribunal considers appropriate.

3. As against Koki Tang, the Commission seeks:

(1) a declaration pursuant to section 94(1) that he has been involved in a contravention of the FCR;

(2) an order under section 93(1) of the Ordinance that he shall pay to the Government a pecuniary penalty in such amount as the Tribunal considers appropriate;

(3) a disqualification order under section 101 of the Ordinance;

(4) an order that he shall pay the Commission’s costs of and incidental to the application in these proceedings, to be assessed; and

(5) such further or other relief as the Tribunal considers appropriate.

4. Subject to the approval of the Tribunal, the Commission and each of KWEK and Koki Tang agree to enter judgment on liability and consequential orders in favour of the Commission against them by way of the summary procedure as provided for in Rule 39 of the CTR and §72 of the CTPD1. The procedure as envisaged by the parties is that sanctioned by the High Court of England and Wales in the case of **Re Carecraft Construction Co Ltd** [1994] 1 WLR 172 and clarified by the Court of Appeal of England and Wales in **Secretary of State for Trade and Industry v Rogers** [1996] 1 WLR 1569, and as adopted in Hong Kong for proceedings under section 214 of the Securities and Futures Ordinance (Cap. 571) and section 168H of the former Companies Ordinance (Cap. 32). Further, the procedure was endorsed by the Honourable Mr. Justice Jonathan Harris in the case of **Competition Commission v Kam Kwong Engineering Co Ltd** [2020] 4 HKLRD 61 as a *“readymade blueprint for disposing of proceedings under the Ordinance”* (at §17) and by the Honourable Madam Justice Linda Chan in her judgment handed down on 3 November 2020 (**Competition Commission v. Quantr Limited and Others** [2020] HKCT 10). Additionally, the same procedure was adopted by the Honourable Mr. Justice Godfrey Lam (as he then was) in his judgment handed down on 16 December 2020 in relation to the penalty proceedings in **Competition Commission v. Nutanix Hong Kong Limited and Others** [2020] HKCT 11.

5. This Statement of Agreed Facts (“**Statement**”) is submitted pursuant to Rule 39 of the CTR and §72 of the CTPD1. The Tribunal is asked to make the orders sought in paragraphs 2 and 3 above on the basis of the facts set out in this Statement.

6. For the purpose of resolving these proceedings summarily, by reference to the facts as set out in Part B below, the Commission contends and each of KWEK and Koki Tang admits that between early May 2020 until at least 19 April 2021, KWEK has contravened the FCR by having made and given effect to an agreement and engaged in a concerted practice involving price fixing, customer allocation, bid-rigging and the exchange of competitively sensitive information with three other undertakings , namely (1) Multisoft (consisting of Multisoft Limited (“**ML**”) and its parent company MTT Group Holdings Limited (“**MTT**”), being the 1st and 2nd Respondents in these proceedings respectively); (2) BP/Noble (consisting of BP Enterprise Company Limited (“**BP**”) and Noble Nursing Home Company Limited (“**Noble**”), being the 3rd and 4th Respondents in these proceedings); and (3) Au Yeung Kit Yee, also known as Agnes Au Yeung (“**Agnes Au Yeung**”) (trading as Yat Ying Hong (“**Yat Ying**”)), being the 6th Respondent in these proceedings, in relation to the supply of quotations for the provision of IT services under the Distance Business Programme (“**D-Biz**”) (“**Subject Arrangement**”), and that Koki Tang has been involved in the above contravention. The Subject Arrangement contravened section 6 of the Ordinance, as more particularly described in paragraph 28 to 36 below (“**Contravention**”).

7. The facts as set out in this Statement are agreed by the Commission and each of KWEK and Koki Tang. This Statement is filed before the Tribunal to support the joint application by the Commission and KWEK and Koki Tang for the orders sought in paragraphs 2 and 3 above to be made under Rule 39 of the CTR (“**Joint Application**”).

8. If the Tribunal for whatever reason is of the view that these proceedings shall not be dealt with by way of the Joint Application, no admission or concession by either the Commission or KWEK or Koki Tang regarding their liabilities (save and except the matters set out in paragraphs 38 to 39 below) shall be referred to or relied upon by either the Commission or KWEK or Koki Tang at any adjourned or subsequent hearing or in any other proceedings without the prior written consent of both the Commission and each of KWEK and Koki Tang.

9. The Commission and each of KWEK and Koki Tang accept and acknowledge that none of the admissions made by KWEK or Koki Tang in this Statement shall be binding on any other Respondents in these proceedings.

10. The Commission reserves the right to refer to this Statement for all purposes connected with or ancillary to these proceedings.

**PART B – UNDISPUTED FACTS RELEVANT TO LIABILITY**

**B1. The relevant parties**

11. KWEK was at all material times (and still is) a limited liability company incorporated in Hong Kong. KWEK was initially set up for developing a mobile application, but this was ultimately unsuccessful. Apart from the foregoing, KWEK had no other business operations until Koki Tang used it to issue quotations for applicants for D-Biz funding pursuant to the Subject Arrangement as more particularly described in Section B4 below. Accordingly, KWEK was at all relevant times, and is, engaged in economic activity.

12. Koki Tang was at all material times (and still is) a shareholder and a director of KWEK. He also holds and at the relevant times held the position of Chief Technology Officer.

13. ML is and was at all material times a limited liability company incorporated under the laws of Hong Kong. Its current sole shareholder is Multisoft Holding Limited, which is a company incorporated in the British Virgin Islands. Multisoft Holding Limited is 100% owned by MTT. ML was at all relevant times, and is, engaged in the business of providing IT enterprise solutions, specialising in systems, networking, security and cloud services.

14. Each of BP and Noble is and was at all material times a limited liability company incorporated under the laws of Hong Kong; at all material times, BP and Noble have been owned and controlled by the same person, namely, the “**BP/Noble Director**”.

15. Yat Ying was at all material times (and still is) a sole proprietorship owned by Agnes Au Yeung. Agnes Au Yeung – in consultation with her husband Fan Sing Chi, also known as Joe Fan (“**Joe Fan**”) – is and was at all material times primarily responsible for decisions regarding Yat Ying’s business.

**B2. The D-Biz scheme**

16. On 20 April 2020, the Innovation and Technology Commission (“**ITC**”) launched the D-Biz funding scheme, using public funds from the Government’s anti-epidemic fund to support local enterprises to adopt IT solutions to continue their businesses and services during the COVID-19 epidemic. The Hong Kong Productivity Council (“**HKPC**”) was appointed as the secretariat of D-Biz and was responsible for conducting eligibility checking and preliminary screening on the applications. Once screened, eligible applications were submitted to the Distance Business Programme Vetting Committee (“**Committee**”), chaired by the Commissioner for Innovation and Technology, for consideration.

17. D-Biz covered twelve IT solution categories relating to distance business, namely:

(1) online business;

(2) online order taking and delivery, and smart self-service systems;

(3) online customer services and engagement;

(4) digital customer experience enhancement;

(5) digital payment/mobile point of sale;

(6) online/cloud-based financial management systems;

(7) online/cloud-based human resources management systems;

(8) remote document management, cloud storage and remote access services;

(9) virtual meeting and conference tools;

(10) virtual team management and communications;

(11) cybersecurity solutions; and

(12) other online/custom-built/cloud-based business support systems.

18. D-Biz opened for applications between 18 May and 31 October 2020. At the initial stage of the scheme, each applicant was permitted to submit only one application adopting no more than three IT solutions within the designated twelve categories as set out above. On 16 August 2020, the ITC introduced enhancement measures pursuant to which each applicant was permitted to submit a second application from 31 August 2020 onwards for another three IT solutions which were different from the approved categories in any application which the applicant had made in the initial stage of the D-Biz scheme. Following these enhancement measures, each applicant was therefore permitted to submit two applications for six IT solutions in total. The funding ceiling for each IT solution was HK$100,000 and the aggregate funding ceiling granted to each applicant was HK$300,000.

19. For each application for funding, the applicant was required to obtain written price quotation(s) from IT service provider(s), which set out in detail the project duration, scope of work, deliverables, and breakdown of cost items such as the software expenses, hardware expenses and IT service charges. In addition, the applicant was required to obtain from each person submitting a quotation a signed ‘probity and non-collusive quotation / tendering certificate’ (“**NCC**”) as part of their quotation submission. The NCC contains representations by the person submitting the quotation that: the quotation/bid was genuinely and independently prepared, with an intention to win and to implement the relevant project when awarded; and, in preparing the quotation/bid, no agreement, understanding or communication regarding competitively sensitive information such as price or bidding intention was made with another competing bidder.

20. The number of price quotations which an applicant needed to obtain was dependent on whether the application involved (i) a subscription-based IT solution or (ii) a system integrator/non-subscription-based IT solution. In the former case, the applicant was only required to obtain one quotation. Conversely, in the latter case, the applicant was required to obtain quotations from at least two IT service providers, otherwise full justifications had to be provided. As between the two quotations, unless otherwise justified by the applicant and agreed by the Government or the HKPC, it was stipulated that the service provider submitting the lowest conforming quotation was to be selected by the applicant to provide the relevant IT solution (“**Two-Quotation Requirement**”). The Subject Applications (as defined at paragraph 26 below) concerned in this case all initially sought funding for non-subscription-based IT solutions and were thus required to meet the Two-Quotation Requirement.

21. Each D-Biz application was done online through D-Biz’s website. As part of the application process, applicants were required:

(1) to submit supporting documents including copies of the quotations obtained for each of the IT solutions (both the quotation which had been selected and the quotation(s) which had not been selected) as well as the NCCs signed by each IT service provider which had provided a quotation; and

(2) to assign an authorised person to represent the applicant fully in respect of the application and act as the main contact point between the applicant and the HKPC; that authorized person had to be conversant with the operation and business processes of the applicant.

22. Applications that the HKPC assessed as being eligible were submitted to the Committee for approval. It was also possible for the level of funding to be adjusted with reference to the project cost such that the HKPC would only approve a reduced scope for the IT solution by comparison with the scope which had been applied for.

23. An initial payment of 30% of the approved funding amount was payable to a designated bank account of the applicant. The selected service provider could then start to implement the IT solution(s) for the applicant.

24. Within two months after the completion of the IT solution(s), the applicant was required to submit among other things, a final project report indicating a summary of project expenditures and project deliverables, and an audited statement of income and expenditure covering the whole project period from an independent auditor to the HKPC, if the total approved funding exceeded HK$30,000.

25. Upon project completion and upon the HKPC’s acceptance of the final project report together with supporting documents, the final payment (i.e., the remaining 70% of the approved funding amount) was then released to the applicant.

26. The Subject Arrangement concerns 189 applications under D-Biz (“**Subject Applications**”), details of which are provided in Annex A to this Statement. However, for the purpose of the Joint Application and as agreed among the Commission, KWEK and Koki Tang, out of the Subject Applications, only 51 applications were affected by KWEK’s involvement in the Subject Arrangement with knowledge and consent of KWEK and Koki Tang, i.e., the applications as enumerated as item nos. 1 to 51 in Annex A to this Statement.

**B3. Background to the relevant conduct**

27. In 2019, Agnes Au Yeung and Joe Fan assisted BP in establishing an online platform named ‘FanSung Market’, and engaged Koki Tang as a free-lance programmer in his personal capacity (“**BP Project**”). Through the BP project, the BP/Noble Director, Agnes Au Yeung and Joe Fan became acquainted with Koki Tang. Joe Fan was the contact person with Koki Tang, and they frequently communicated with each other through WhatsApp. In Koki Tang’s mobile phone, Joe Fan’s WhatsApp contact name is recorded as “Joe@Fansung”.

**B4. KWEK and Koki Tang’s participation in the Subject Arrangement**

28. As the BP Project continued into 2020, it overlapped with the ITC’s launch of D-Biz. On 10 May 2020, Joe Fan raised the topic of D-Biz with Koki Tang for the first time, indicating that he was going to participate in the programme, although he did not mention that he was proposing to do so on BP/Noble and/or Yat Ying’s behalf (as the case may be). On 15 May 2020, after confirming Koki Tang owned a company (i.e., KWEK), Joe Fan asked whether Koki Tang was willing to “help make quotations” (“幫手報價” in original Chinese text). Joe Fan explained that he had found dozens of potential customers who were interested in applying D-Biz funding, and that to do so they would have to satisfy the Two-Quotation Requirement; in order to ensure these customers would be won by him (whether on behalf of BP/Noble and/or Yat Ying, as the case may be), cover bids rather than genuinely competing second quotations were needed from a friendly firm.

29. Koki Tang agreed to help provide cover bids in KWEK’s name. In consideration, Joe Fan agreed to allocate some of the projects to KWEK either by letting KWEK become the winning IT service provider, or by arranging for the intended winner(s) to subcontract the projects to KWEK. Joe Fan stated that he would complete all the relevant paperwork and logistics in relation to the D-Biz applications, and that Koki Tang only needed to sign the quotations and NCCs on behalf of KWEK. After reaching that agreement, Koki Tang fetched KWEK’s company chop from another shareholder on or around 15 May 2020 in anticipation that he would need to stamp the chop when signing those documents.

30. On 21 May 2020, Koki Tang sent to Joe Fan via WhatsApp KWEK’s blank quotation form in editable Microsoft Excel format, among other company and personal details of KWEK and himself, to facilitate Joe Fan’s preparation of the necessary documents. In doing so, Koki Tang allowed Joe Fan to fill in KWEK’s quotation forms with whatever prices that Joe Fan deemed convenient to implement their agreement. Joe Fan proposed that he and Koki Tang should arrange to meet the following evening in order to sign and stamp KWEK’s company chop on the relevant documents.

31. On 22 May 2020, Koki Tang and Joe Fan arranged to meet in Sai Kung. Koki Tang did not sign all of the documents on the spot as there were so many; he took them home and spotted some errors which he asked Joe Fan to correct in the early morning of 23 May 2020. Around the same time, Koki Tang became concerned about the large number of cover bids being requested (60 as he mentioned in one of the audio messages to Joe Fan) and the risk of being caught contravening the Ordinance. The two renegotiated on 24 May 2020 and as a result, Joe Fan agreed to pay Koki Tang HK$500 for each cover bid – totalling HK$30,000 (i.e., HK$500 x 60) – in addition to the allocation of projects to KWEK as previously agreed. Out of the total compensation of HK$30,000, Joe Fan would first pay a 30% deposit upon Koki Tang signing the documents, with the remaining to be paid later.

32. On the evening of 24 May 2020, Koki Tang visited Joe Fan at Flat G, 9th Floor, Mai Luen Industrial Building, 23-31 Kung Yip Street, Kwai Chung, New Territories, which was the office shared by Yat Ying and BP/Noble at that time, and signed all the documents Joe Fan prepared without looking into any details. Because the signature pages of NCCs were identical, they agreed to reproduce one signed page to save time. On 28 May 2020, Joe Fan paid the agreed 30% deposit (i.e., HK$9,000) together with some outstanding payments from the BP Project to Koki Tang.

33. In the following weeks, Joe Fan used KWEK’s quotations and NCCs to pair up with BP/Noble’s and Yat Ying’s in various D-Biz applications which he submitted to the HKPC on behalf of the relevant potential customers. Initially, Joe Fan did arrange KWEK to be the lower, winning bidder in 12 applications in which KWEK was paired up with Yat Ying. However, by the time Joe Fan informed Koki Tang in early August 2020 that some of the customers would be allocated to KWEK and that KWEK would receive around HK$430,000 as a result, Koki Tang declined to engage further with Joe Fan because Koki Tang no longer considered Joe Fan to be credible and did not want to continue working with Joe Fan anymore. This was because Joe Fan had consistently failed to pay the much smaller sum remaining (i.e., the 70% or HK$21,000) from what had been agreed for KWEK to provide the cover bids despite receiving many reminders from Koki Tang over the intervening weeks.

34. Though Koki Tang was not directly involved in the steps that were carried out from June 2020 onwards, he was aware of Joe Fan’s overall plan and the objective of coordinating between the relevant undertakings to provide two quotations to applicants for D-Biz funding in order for the Subject Applications purportedly to comply with the Two-Quotation Requirement, rather than competing with each other as intended by the Two Quotation Requirement. Further, Koki Tang also knew how Joe Fan was going to make use of the quotations he provided in KWEK’s name. For those applications in which KWEK’s quotations were used (i.e., those enumerated at nos. 1 to 51 of Annex A), KWEK was a party to a price fixing, market sharing and bid rigging agreement and concerted practice together with the other relevant undertakings. Further, Koki Tang was directly and knowingly concerned in and party to the making and giving effect of such agreement and engaging in such concerted practice.

35. As a result of KWEK’s participation in the Subject Arrangement, there was no genuine competition between the IT service providers providing quotations in the 51 applications for D-Biz funding enumerated at nos. 1 to 51 of Annex A to this Statement. On the contrary, the intended winner (i.e., the service provider to be selected to provide the relevant IT services to be funded by the D-Biz scheme) had been pre-determined pursuant to the Subject Arrangement. The HKPC was led to approve D-Biz funding under the false impression that the relevant applications had been made following a competitive selection process in compliance with the Two-Quotation Requirement. Further, the prospective customers, in whose name the relevant applications were made, had not been informed of the Subject Arrangement (including in particular that one of the two IT service providers submitting quotations would only submit a cover bid rather than competing to win).

**B5. Particulars of the Contravention**

36. It is the Commission’s case (which is not disputed by KWEK and Koki Tang) that the Subject Arrangement insofar as KWEK is concerned was agreed and given effect to in accordance with the events set out below:

(1) On 15 May 2020, Koki Tang agreed to help provide cover bids in KWEK’s name to assist Joe Fan to prepare applications for D-Biz funding purportedly to satisfy the Two-Quotation Requirement. In return, Joe Fan agreed to allocate some of the projects to KWEK either by letting KWEK become the winning IT service provider, or by arranging for the intended winner(s) to subcontract the projects to KWEK. Later, on 24 May 2020, it was further agreed that Joe Fan would pay Koki Tang HK$500 for each of 60 cover bids provided by KWEK.

(2) On 21 May 2020, Koki Tang provided KWEK’s blank quotation form in editable Microsoft Excel format to Joe Fan for the latter to input whatever quotation prices that he considered appropriate to implement their agreement. Then, on 22 and 24 May 2020, Koki Tang met with Joe Fan twice, eventually signing all the documents Joe Fan prepared, including NCCs and quotations to be issued in KWEK’s name but with prices determined by Joe Fan.

(3) Koki Tang allowed Joe Fan to take away and use KWEK’s quotations and NCCs to pair up with quotations provided by other IT service providers as part of the Subject Arrangement to restrict, distort or prevent competition vis-à-vis potential customers applying for D-Biz funding, so that the participating IT service providers were able to circumvent the Two-Quotation Requirement without having to bid with competitive prices. The facts that KWEK ultimately did not provide services to any of the proposed customers and that Koki Tang only received HK$9,000 in reward for the part he played do not detract from this conclusion.

(4) For KWEK’s part, its participation in the Subject Arrangement and therefore its Contravention of the FCR started on 15 May 2020, and continued to at least 19 April 2021, being the date when the last of the contracts for D-Biz funding relating to the affected applications (i.e., the Subject Applications enumerated at nos. 1 to 51 of Annex A to this Statement) was signed.

(5) Koki Tang was directly and individually concerned in and party to, and therefore involved in, the Contravention by KWEK.

**B6. Admission of liability by KWEK and Koki Tang**

37. By reason of the matters set out herein, each of KWEK and Koki Tang admits the following:

(1) ML, Agnes Au Yeung trading as Yat Ying, BP/Noble and KWEK, as separate undertakings involved in providing IT solutions to other businesses in Hong Kong, entered into the Subject Arrangement;

(2) the object of the Subject Arrangement was to prevent, restrict, or distort competition in Hong Kong between IT service providers bidding to provide IT solutions to prospective customers applying for funding under the D-Biz scheme by fixing prices, allocating customers, rigging bids and sharing information in respect of the submission of quotations to prospective customers applying for D-Biz funding;

(3) Koki Tang (as employee, representative and agent for KWEK) and Joe Fan (whether as representative and agent for BP/Noble or Yat Ying) participated in the formation and implementation of the portion of the Subject Arrangement involving KWEK (i.e., in respect of the Subject Applications enumerated at nos. 1 to 51 of Annex A to this Statement), and Koki Tang’s conduct is attributable to KWEK;

(4) the Subject Arrangement constitutes price-fixing, customer allocation, bid-rigging and the exchange of competitively sensitive information among competitors, in contravention of the FCR under section 6(1) of the Ordinance;

(5) the Contravention constitutes “serious anti-competitive conduct” within the meaning of section 2(1) of the Ordinance; and

(6) due to his being directly and knowingly concerned in and party to the Subject Arrangement, Koki Tang is “a person involved in a contravention of a competition rule” within the meaning of section 91(d) of the Ordinance.

**PART C – UNDISPUTED FACTS ON THE CALCULATION OF RECOMMENDED PECUNIARY PENALTY FOR BP/NOBLE AND THE INVESTIGATION COSTS OF THE COMMISSION**

38. For the purposes of assessing the amount of recommended pecuniary penalty against Koki Tang under section 93 of the Ordinance, Koki Tang does not dispute that he personally received HK$9,000 for KWEK’s participation in the Subject Arrangement and that his average monthly income during the relevant period of the Contravention (i.e., from 15 May 2020 to at least 19 April 2021) is HK$41,450.

39. As to the Commission’s costs of and incidental to its investigation into this matter, the Commission has incurred such costs in the sum of HK$621,730(see Annex B), of which HK$155,000 (rounding down to the nearest thousand) represents the 5th Respondent’s share of such investigation costs.

Dated this day of 2024.

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| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **MINTERELLISON LLP**  Solicitors for the Applicant | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **C Y LAM & CO.**  Solicitors for the 5th and 8th Respondents |

1. [2020] 4 HKLRD 61. [↑](#footnote-ref-1)
2. [2023] 3 HKLRD 374. [↑](#footnote-ref-2)
3. [2020] 5 HKLRD 528. [↑](#footnote-ref-3)
4. [2020] HKCT 11. [↑](#footnote-ref-4)
5. [2020] 2 HKLRD 1229. [↑](#footnote-ref-5)
6. “Undertaking” is defined in section 2(1) of the Ordinance to mean 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. [↑](#footnote-ref-6)
7. “Undertaking” is defined in section 2(1) of the Ordinance to mean 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. [↑](#footnote-ref-7)
8. That said, in some of those later Subject Applications, Agnes Au Yeung and Joe Fan used KWEK’s headed paper to create cover bids to pair up with lower quotations from Yat Ying or BP/Noble (as appropriate), but they did so without KWEK’s knowledge or consent. [↑](#footnote-ref-8)