

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2008 – 2009

(English version)

1. Introduction

The Competition Policy Advisory Group (COMPAG) chaired by the Financial Secretary, was established in December 1997 to provide a dedicated forum for examining, reviewing and advising on competition-related issues. COMPAG aims to promote competition as part of a pro-enterprise, pro-market business environment in Hong Kong.

2. Since its establishment, COMPAG has worked to ensure that the Government's competition policy is appropriate for Hong Kong and can enable Hong Kong to maintain its competitive edge. In May 1998, the Group issued the Statement on Competition Policy (the Statement), which sets out the objective of the Government's competition policy, in the following terms –

“to enhance economic efficiency and the free flow of trade, thereby also benefiting consumer welfare.”

3. In 2003, COMPAG published a set of guidelines to supplement the Statement and to advise businesses on the types of conduct that could be seen as anti-competitive.

4. In order to ensure that our competition policy keeps pace with times and continues both to serve the public interest and to facilitate a business-friendly environment, COMPAG appointed the Competition Policy Review Committee (CPRC) in June 2005. The role of the Committee was to review and to make recommendations on the future direction for competition policy in Hong Kong. The CPRC completed its review and published a report in June 2006, recommending that the Government introduces a cross-sector competition law to be enforced by an independent Competition Commission.

5. In November 2006, the Government launched a three-month public consultation on the way forward for Hong Kong's competition policy. Public feedback showed a high level of support for the introduction of a cross-sector competition law, although some stakeholders in the business sector expressed concern that the new law might adversely affect normal business operations, in particular those of small and medium enterprises. To address these concerns, in May 2008 we published a consultation paper

outlining detailed proposals for a competition law. The results of the two public consultations are summarised in **Chapter 2** of this report.

6. We have been working hard towards the introduction of a cross-sector competition law in the 2009-10 legislative year. We have worked closely with various bureaux and departments to address comments received during last year's public consultation exercise and resolve a number of technical, legal and policy issues in the Competition Bill. **Chapter 3** provides an update on progress with the preparation of the Competition Bill.

7. During the year, COMPAG continues its major task which is, to review competition-related complaints. COMPAG refers complaints to the relevant bureaux or departments for prompt follow-up action in accordance with established policy and keeps track of progress with each complaint until it reaches a conclusion. The cases concluded in 2008-09 and the current positions of outstanding cases are summarised in **Chapter 4**.

8. We are committed to maintaining our high degree of competitiveness in relation to other major economies based on high standards of market disciplines supported where appropriate by transparent regulatory frameworks. In this regard, COMPAG continues to monitor developments in international competition policy and law. **Chapter 5** briefly reviews recent developments on the international stage.

2. Competition Policy Review

9. In June 2005, COMPAG appointed the Competition Policy Review Committee (CPRC) to review the composition and functions of COMPAG and to make recommendations on the future direction for our competition policy. In June 2006, the CPRC completed its review and submitted its recommendations to the Government. Having reviewed best practice in other jurisdictions and taken account of local stakeholders' concerns, the CPRC concluded that legislative backing is needed for the effective enforcement of Hong Kong's competition policy. The Review Committee recommended the introduction of a new, cross-sector competition law to tackle anti-competitive conduct in all economic sectors, and the establishment of an independent regulatory authority to enforce the new law.

10. Taking account of CPRC's recommendations, the Government launched a three-month public consultation exercise in November 2006, to gauge the views of the community on the relevant issues. From the feedback received during the consultation period, COMPAG noted that there is majority community support for the introduction of a new cross-sector competition law. There was also general support for strengthening the regulation of competition through the establishment of a Competition Commission, as recommended by the CPRC. A copy of the outcome report on the public consultation exercise can be viewed at – www.cedb.gov.hk/citb/ehtml/pdf/publication/ConsultationReport-eng.pdf

11. In May 2008, the Government launched a three-month public consultation on the proposed key elements that would form the basis for the competition law with a view to addressing the concerns of some stakeholders on the adverse impact of the new law to normal business operations, particularly those of small and medium enterprises. Over 170 written submissions were received from individuals and business organizations, which indicated general support for the proposals in the consultation document, save for some concerns regarding certain specific proposals such as the institutional arrangements for enforcing the new law, the clarity of the conduct rules, and the exemption and exclusion mechanisms etc. The Government has analyzed the views received and compiled a report on the feedback, which can be viewed at – www.cedb.gov.hk/citb/ehtml/pdf/publication/Consultation_Report_30_9.pdf

3. Progress on the preparation of the Competition Bill

12. Following the three-month public consultation on the 'Detailed Proposals for a Competition Law', we have worked hard to prepare the Competition Bill in consultation with relevant bureaux and departments. In the light of the feedback received from the public consultation, we intend to improve some of the original proposals.

13. On the institutional arrangement for the competition regulatory regime, we are considering changing the original civil administration model for the enforcement of the Competition Bill to a judicial model, under which the Competition Commission would only investigate and prosecute the cases while the Competition Tribunal will be established as a new special court within the Judiciary to hear and adjudicate on all cases of the competition law and to hear private rights of action in all sectors.

14. To improve the clarity of the law, we would supplement the provisions on general prohibition against anti-competitive conduct with a non-exhaustive list of examples of such conduct and make it a statutory requirement for the Commission to draw up regulatory guidelines on interpretation and implementation of the law in consultation with the public.

15. Our latest plan for exemptions and exclusions is that the Competition Bill should not apply to government activities and will not apply to statutory bodies unless otherwise specified by listing the 'non-exempted' statutory bodies in a Schedule to be subject to vetting by the Legislative Council. We are discussing with bureaux and departments on the exemption arrangements for statutory bodies within their purview.

16. We presented these changes to the Legislative Council Panel on Economic Development at its meeting on 16 December 2008 and 30 March 2009. We are working to introduce the Competition Bill into the Legislative Council in the 2009-10 legislative year.

4. Cases Reviewed by COMPAG

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

A) Price-fixing

Case 1: Introduction of Emergency Bunker Surcharge by Shipping Lines (not substantiated)

18. In June 2008, an industry association sent the COMPAG Secretariat its press release and circular to members complaining about the collection of an Emergency Bunker Surcharge ("EBS") with respect to Taiwan-Hong Kong/South China trade by eight shipping lines. According to the association, these eight shipping lines together accounted for almost 100% of the Taiwan-Hong Kong/South China service. The association alleged that the imposition of the EBS was a collective act of the eight shipping lines and was an anti-competitive agreement.

19. The case was referred to the Transport and Housing Bureau (THB) for investigation, which found, amongst other things, that -

- (a) all the eight shipping lines did not admit that there was any prior discussion and there is no conclusive evidence that could prove otherwise; and
- (b) five out of the eight shipping lines withdrew the EBS before its launch or changed their targeted payees from Hong Kong consignees to the party responsible for freight. This materially changes the EBS proposal. Also the three remaining shipping lines subsequently withdrew the EBS and some, as THB gathered through industry association contact, even refunded the EBS collected.

20. In the light of the above assessment, COMPAG considered that **the complaint was not substantiated.**

B) Unfair or Discriminatory Standards

Case 2: Alleged anti-competitive conduct in the Catering Industry (not substantiated)

21. The COMPAG Secretariat received a complaint from an operator of coffee shops in Hong Kong in December 2008 about the potential anti-competitive conduct by a local fast food chain. The complainant alleged that the fast food chain had exerted pressure on its joint venture partner to stop the supply of a particular brand of coffee beans to one of the outlets of the complainant, with a view to disrupting the complainant's normal business operation.

22. The complaint was referred to the Food and Health Bureau (FHB) for investigation. FHB concluded that -

- (a) there was no evidence indicating that the fast food chain had exerted pressure to its partner (the coffee bean supplier) to stop the supply of coffee beans to the complainant;
- (b) the coffee bean supplier and its agent have acted in accordance with the contract with the complainant; and
- (c) the decision of not supplying coffee beans to the complainant for one of its outlets appeared to be a commercial dispute between the complainant and the coffee bean supplier. Such decision is outside the remit of the Guidelines. Furthermore, the practice of not supplying coffee beans to the outlets outside their contract can hardly be treated as 'anti-competitive conduct'.

23. In the light of the above observations, COMPAG considered that **the complaint was not substantiated.**

C) Abuse of dominant market position

Case 3: Complaint from Hong Kong Shippers Council: Depot Management Fee (substantiated)

24. In February and March 2008, the Hong Kong Shippers Council (HKSC) copied the COMPAG Secretariat its letters to the Hong Kong Container Depot & Repairer Association Limited (HKCDRA) regarding the imposition of a Depot Management fee, alleging that members of the HKCDRA have collectively introduced a new Depot Management fee of \$10 which would take effect from 16 March 2008. The HKSC argues that the new fee is monopolistic in nature and thus anti-competitive. By way of background, it is a common industry practice that shipping lines provide shippers with empty containers as part of their freight service; and the latter group (or truckers engaged by them) would pick up or drop off empty containers at depots designated by shipping lines.

25. The case was referred to the Transport and Housing Bureau (THB) for investigation, which found, amongst other things, that –

- (a) the notice issued by the HKCDRA in February 2008 was an announcement that all of its members would impose DMF at a uniform rate effective from the same date which suggested collective pricing decision;
- (b) no specific improvement measures were proposed by HKCDRA nor observed by the industry although HKCDRA claimed that the imposition of the DMF was for the provision of better and more efficient service; and
- (c) HKCDRA members accounted for a large market share of off-terminal depot service. Truckers/shippers had to pick up or drop off empty containers at depots designated by shipping lines. They did not have the option to switch to other depots even if they considered DMF unreasonable.

In the light of the above assessment, COMPAG considered that HKCDRA members had practised price-fixing. Following COMPAG's instruction, THB has written to HKCDRA to inform them that the collective act of its members to impose DMF was anti-competitive, and urged them to cancel the charge. Separately, THB has also written to HKSC suggesting that its members stipulate clearly in their contracts with shipping lines (or their

agents) any specific freight-related charges, as well as to the Hong Kong Liner Shipping Association (which represents the majority of shipping lines calling at Hong Kong Port) urging its member liners to clarify with their agents the charges that they would impose on shippers or truckers.

Case 4: Alleged anti-competitive conduct in relation to the service termination practices of a Pay TV licensee (under investigation)

26. In May 2008, the Broadcasting Authority (BA) forwarded the COMPAG Secretariat a complaint from a domestic pay TV programme service licensee (Licensee A) against another pay TV licensee (Licensee B). It was alleged that Licensee B's practices, which prevented its subscribers from terminating their service arrangements and transferring to other pay TV services had the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market, in breach of sections 13 and/or 14 of the Broadcasting Ordinance (BO) (Cap. 562). BA subsequently took up the investigation of the case.

27. In October 2008, the BA completed its preliminary enquiry into the case and decided that Licensee B has not contravened sections 13 and / or 14 of the BO. In November, Licensee A appealed against the decision of the BA. The appeal is being processed in accordance with the established procedures under the BO. This development was subsequently reported to COMPAG.

Case 5: Complaint about the Trade Practices of an Internet Auction Service Provider (not substantiated)

28. In March 2009, a trade association submitted a complaint letter to the Secretariat of COMPAG, making a number of allegations against an Internet auction service provider's services.

29. The association claimed that the service provider monopolized the on-line auction platform in Hong Kong and imposed unfair policies on its clients which the trade association alleged were detrimental to Hong Kong's fair and free trade. The association's main complaint related to the service provider's abuse of their dominant market position to unilaterally impose conditions restricting the display of sellers' contact information on the

website.

30. The complaint was referred to the Office of the Government Chief Information Officer (OGCIO) for investigation from the perspective of IT development and the Government's competition policy. OGCIO considered that while it was possible that the service provider was in a dominant position in the market for the provision of on-line auction services in Hong Kong, there was however no objective evidence indicating that the service provider's terms and conditions on display of contact details amounted to an abuse of market power, or reduced competition in the market for on-line auction services.

31. COMPAG reviewed the above findings and accepted OGCIO's conclusion that **the complaint was not substantiated**. COMPAG further observed that such behaviour might be caught under the future Competition Law that would seek to address the abuse of substantial market power of an undertaking with an object or effect of prohibiting, restricting or distorting competition. In November 2009, OGCIO informed the complainant about the outcome of the investigation and observations of COMPAG.

Case 6: Alleged Anti-Competition Behaviour in the Government Electronic Trading Services (GETS) Market (not substantiated)

32. Commerce and Economic Development Bureau (CEDB) forwarded the COMPAG Secretariat a complaint in January 2009 from a group of complainants, alleging that Tradelink Electronic Commerce Limited ("Tradelink"), one of the two GETS service providers (SP), had been operating below costs.

33. GETS refers to the front-end service through which the trading community submits trade-related documents to the Government electronically. Currently, the two SPs are appointed by the Government through service contracts. To cater for the needs of traders who lack the IT capability to make direct electronic submissions, SPs are required to provide services converting traders' paper submissions into electronic ones for onward transmission to the Government. The SPs may provide such services by setting up their own service centres and/or partnering with other operators. The complainants are operators which used to partner with the said SP in the provision of GETS paper conversion services.

34. Upon cessation of their partnership, the complainants claimed that the SP concerned had reduced the prices for paper conversion services for trade declarations, one of the six trade-related documents under GETS, twice during the period of 8 December 2008 to 18 December 2008 to force the complainants to offer similar price cuts. The reduced rates were said to have remained in effect until 28 February 2009.

35. CEDB has sought assistance from experts on competition in the Office of the Telecommunications Authority to look into the allegations. Having regard to the market share of Tradelink and other existing operators (including the Government Approved Certification Organisations, banks and the Hong Kong Post), the nature of the services in question, the ease with which other competitors could enter the market, and all relevant facts of the case, CEDB considered that Tradelink's price cuts during the said period were not anti-competitive. COMPAG accepted the findings and concluded that **the complaint was unsubstantiated**. CEDB has informed the parties concerned of the outcome.

D) Government Policies and Practices

Case 7: Tender relating to the Implementation of the Extension of the Automated Passenger Clearance System for the Immigration Department (not substantiated)

36. In November 2005, tenders were invited for the "Design, Supply, Delivery, Installation, Commissioning, Maintenance of Hardware, Software and Related Services for the Implementation of the Automated Passenger Clearance System (APCS) and Automated Vehicle Clearance System at New Control Points for the Immigration Department (ImmD)" (Tender A) to implement the clearance systems at new control points. Three tender proposals were received by the Government Logistics Department (GLD). After tender assessment and seeking legal advice, a recommendation was made by GLD to the Central Tender Board (CTB) to cancel the tender exercise for APCS on the grounds of public interest under Article XIII.4(b) of the Agreement on Government Procurement of the World Trade Organization (WTO GPA). In July 2006, approval was given by CTB to cancel the tender exercise.

37. In December 2006, restricted tenders for the “Design, Supply, Delivery, Installation, Commissioning, Maintenance of Hardware, Software and Related Services for the Implementation of the Extension of APCS (APCSII) for ImmD” (Tender B) were invited from the two existing contractors for reasons of system compatibility and interchangeability with the approval of Director of Government Logistics after getting the confirmation from the Department of Justice that Article XV.1(d) of WTO GPA might be invoked to conduct limited tendering procedure based on the justifications given by the Director of Immigration. By the tender closing date, only one offer was received. The contract was later awarded to the only tenderer on the recommendation of CTB in August 2007.

38. In October 2007, a complaint addressed to CTB against the approval and award of Tender B was received and was subsequently forwarded to the COMPAG Secretariat. The complainant was one of the tenderers for Tender A. The complainant alleges that -

- (a) by not providing the available and relevant documentation, software modules and source codes owned by the Government to tenderers/suppliers and explicitly requiring the tenderers/suppliers to interface with the control point systems then in operation, Tender B issued in December 2006 had been deliberately made restricted and limited to the existing contractors while the complainant and other potential suppliers were totally denied the opportunity; and
- (b) Tender B is in serious violation of paragraph 1 of Article XV of WTO GPA and the Government’s procurement policy of providing equal opportunities for suppliers to participate or compete in Government procurement. The tendering process was not open, fair, competitive and transparent. Favours were given to the invited suppliers and there was discrimination against the complainant and other suppliers.

39. COMPAG Secretariat referred the complaint to GLD and ImmD for joint investigation. GLD and ImmD considered that if APCSII were to be implemented by a new vendor riding on the systems then in operation, the

equipment and services of APCSII would not be compatible with the systems. Even if work was undertaken to adapt APCSII and the systems, it was anticipated that disproportionate expenses would be involved. Also, such an approach would give rise to system compatibility issues since the stability and performance of the systems would be affected by system upgrading and adaptation. Moreover, it might lead to contractual problems with the two existing contractors in terms of the responsibility to maintain the performance and integrity of the systems. Last but not the least, if APCSII were to be implemented by a new vendor, ImmD would have to procure equipment and services not meeting the requirements of interchangeability with the system or equipment already in operation. A restricted tender arrangement was therefore considered justified.

40. Based on the above findings, COMPAG supported the conclusion of GLD and ImmD that **the allegations of the complainant were unfounded** and CTB was informed accordingly in August 2008. CTB issued a reply to the complainant in August 2008.

5. Interface with International Organisations

1) Asia-Pacific Economic Co-operation (APEC)

41. The Competition Policy and Law Group (CPLG) (formerly known as Competition Policy and Deregulation Group and was renamed to CPLG in 2008) is the principal forum in which APEC economies discuss competition laws and policies issues. CPLG works to promote an understanding of regional competition laws and policies, to examine the impact on trade and investment flows, and to identify areas for technical cooperation and capacity building among member economies.

42. In addition to its annual meetings¹, the CPLG organises programmes in collaboration with other APEC groups and international organisations to encourage APEC economies to exchange views and strengthen capacity building in areas relating to competition laws and policies. These programmes include the APEC-OECD Integrated Checklist on Regulatory Reform (the Checklist) compiled jointly in 2005 with the Organisation for Economic Co-operation and Development (OECD), which is a tool through which APEC economies can “self-assess” their respective regulatory reform efforts. To further the work already done on regulatory reform, Peru organised a seminar on “Best Practices in Regulation and Promotion of Efficiency in Transport Infrastructure Facilities” in August 2008. This Seminar aims to facilitate information sharing on regulatory and competition policy experiences in transport infrastructure among APEC member economies. To share Hong Kong, China (HKC)’s successful experience in port regulatory policy and efficiency, two professors from the Hong Kong Polytechnic University were nominated to the Seminar as speakers.

43. Since 2005, training courses addressing selected aspects of competition policy are run on an annual basis. These training courses aimed at contributing towards the “APEC Principles to Enhance Competition and Regulatory Reform”. They provide technical cooperation and assistance focused on building capacity, especially in developing economies.

44. Besides CPLG, the Economic Committee (EC) to which the CPLG reports to, is another body in APEC actively involved in competition policy

¹ The Group met in Singapore in February 2009.

issues. Under the EC, a Friends of the Chair (FotC) Group on Competition Policy was established in 2007. It contributes to drawing up the Forward Work Programme on competition policy for Leaders' Agenda to Implement Structural Reform (LAISR), which outlines work that aims to:

- increase awareness of the importance of competition policy to economic growth;
- instill knowledge on the practical elements of introducing a sound competition regime, including aspects of institutional arrangements, implementing competition law and enforcement systems; and
- provide practical guidance on how governments can facilitate competitive markets in key infrastructure sectors, such as transport, electricity and telecommunications.

45. The FotC mechanism is designed to ensure the work programme of the EC reflects the priorities of member economies and guides the work of it through till 2010.

46. At the 2008 Meeting of APEC Ministers Responsible for Trade, Ministers endorsed the model measures on Competition Policy in which HKC has contributed to the formulation process of the model measures.

47. At the 2008 Concluding Senior Officials' Meeting, the EC Chair presented the APEC Economic Policy Report 2008 with the theme of competition policy. The report shared lessons about how APEC economies have adopted and enforced competition policy, highlighted achievements and activities by APEC in competition policy, and helped formulate the focus of future competition policy work.

2) World Trade Organization (WTO)

48. The issue of trade and competition policy has not been pursued in the WTO in the past few years.

49. In the course of the fifth WTO Trade Policy Review on HKC in December 2006, the HKC delegation informed WTO Members that a review of the competition policy framework was in progress. Members noted that, upon completion of a public consultation exercise, the Hong Kong SAR Government would draw up proposals on the way forward.

3) International Monetary Fund (IMF)

50. In its Staff Report for the 2008 IMF Article IV Consultation for Hong Kong, the IMF noted that the Hong Kong SAR had continuously been able to innovate in various areas of the services industry, steadily raising productivity as a result. In addition, the IMF considered that the recent progress in moving towards the adoption of a new competition law that was in line with international best practice would help enhance Hong Kong's competitiveness.