

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report



2003 – 2004

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1. Introduction

Competition is alive and keen in Hong Kong. To ensure that Hong Kong continues to be an open, externally oriented economy with a pro-competition environment, the Government practices no restrictive measures and maintains no economic, structural or strategic barriers to market entry. Hong Kong has an accessible and contestable market, which allows all businesses, foreign or local, big or small, to compete on a level playing field with minimal government intervention. The objective of the Government's competition policy is to enhance economic efficiency and free trade, to the benefit of consumers.

The Competition Policy Advisory Group (COMPAG), the Government's high level forum dedicated to examining, reviewing and advising on competition issues, is committed to nurturing, maintaining and promoting competition in Hong Kong.

COMPAG's work from April 2003 to March 2004 is set out in this report. In September 2003, COMPAG took a further step to proactively promote competition among the private business in Hong Kong by promulgating a set of guidelines which seek to maintain a competitive environment and define and tackle anti-competitive practices. The guidelines not only provide the business sector with objective pointers, benchmarks and principles to assess Hong Kong's overall competitive environment as well as define and tackle anti-competitive practices, they also set out the appeals mechanism for dealing with competition-related complaints. The private sector was involved in developing the guidelines and COMPAG has since been working together with the business sector with a view to establishing sector-specific codes of conduct or self-regulation mechanism based on the guidelines for voluntary compliance by the trade concerned. The guidelines, the full text of which is at **Annex III**, have been uploaded to the COMPAG website (www.compag.gov.hk) for public information.

Chapter 2 of the report highlights the Government's new initiatives in 2003-04 in promoting competition in various sectors. These initiatives include Government's efforts to promote competition through improving the market environment, reducing bureaucracy and, where appropriate, introducing new policy measures. The new tendering arrangements for petrol filling station sites introduced since June 2003, for example, have led to two new entrants in the retail fuel market. Updates on previous initiatives are provided in Chapter 3.

In 2003-04, COMPAG continued to keep track of, and tender advice on, investigations and follow-up actions on cases of anti-competitive practices. Chapter 4 contains summaries of these cases. The Government takes all such cases seriously. COMPAG, through its Secretariat, ensures that all bureaux and departments handle the complaints promptly, properly and in accordance with established policy, guidelines and procedures. All cases with systemic implications are reviewed by COMPAG.

COMPAG opines that to nurture a pro-competition culture in the community, work should begin with students and youth. To this end, a publicity programme to raise awareness and promote competition concepts in schools was developed and taken forward in 2003-04, details of which are discussed in Chapter 5. Major competition-related developments on the international front are set out in Chapter 6.

2. New Initiatives

Initiative 1: Competition in the fuel supply market New tendering arrangements for petrol filling stations

To facilitate new entrants and enhance competition in the retail fuel market, the Government has since July 2000, put up existing petrol filling station (PFS) sites for tender upon lease expiry instead of automatically renewing the tenancy. To further promote competition, the Government has, in June 2003, introduced new tendering arrangements for PFS sites.

Hitherto, PFS sites have been put up for tender one by one, with the site offered for tender in a particular exercise awarded before the tender invitation period for the next tender exercise closes. Tenderers who wish to acquire multiple sites can bid for each and every available site in successive tender exercises. This arrangement does not, however, provide certainty to tenderers who are successful in obtaining one site in a particular tender exercise that they will be successful in subsequent tenders. This uncertainty in acquiring a "commercially viable mass" of PFS, thereby achieving economy of scale, is perceived as a potential drawback which discourages newcomers from entering the fuel supply market.

To enable new market players to acquire a "commercially viable mass" sites to achieve economies of scale, the Government has, since June 2003, offered PFS sites for tender in batches of five sites. Tenderers were permitted to submit a "super bid" for all five sites or submit separate bids for individual sites. Maximizing total revenue from the tender exercise remains the overall objective in the award of the PFS sites. Hence, the tender price of a 'super bid', if any, will be compared with the aggregate of the tender prices of individual bids to be accepted for each of the sites. If the latter turns out to be higher than that of the 'super bid', the PFS sites will be awarded to the successful individual bids. That is to say, 'super bids' will not take precedence over individual bids.

15 PFS sites were put out for tender in three batches (each consisting of 5 sites) in June 2003, October 2003 and February 2004. Two new players, Sinopec (Hong Kong) Limited [Parent Company Name: China Petroleum & Chemical Corporation] and Chinaoil (Hong Kong) Corporation Limited [Parent Company Name: Petrochina International Company Limited], have successfully entered the market by securing all five PFS sites in the batch included in the tenders held in October 2003 and February 2004 respectively.

The Government will conduct a review later this year of the new tendering arrangements, which would include, inter alia, responses from existing and new market players, the impact on pump prices etc.

Initiative 2: Open Bond System (OBS)

Liquor and tobacco are dutiable goods in Hong Kong and are required to be stored in licensed warehouses until duty is paid or duty liability is acquitted (such as on export or being exempted from duty). Previously, the licensed warehouses were managed under a closed bond system, in which warehouse operators were required to employ Customs officers to station at the warehouses as bond officers to supervise the physical movement of the dutiable goods and bond operations (such as sampling, destruction, denaturing, repacking and remarking, etc.). Depending on the size of the warehouse, the monthly expenditure incurred by a warehouse operator on the employment of bond officers ranged from \$60,000 to \$330,000. In addition, vaning (the loading of dutiable goods into a cargo container for export) and devanning (the unloading of imported dutiable goods from a cargo container) of dutiable goods were carried out under the supervision of Customs officers with the staff cost of the Customs officers borne by the traders. The need to bear such costs was believed to be a barrier to entry into this trade.

In order to facilitate the trade, a new Open Bond System (OBS) was introduced on 1 April 2003 upon the enactment of the Dutiable Commodities (Amendment) Ordinance. Under the OBS, the requirement for Customs attendance at licensed warehouses has been removed. Instead, warehouse operators are held responsible for ensuring the safekeeping and accurate reporting of the dutiable goods in their warehouses through a regime of self-regulation. On the other hand, Customs officers are deployed to supervise the vaning and devanning of dutiable goods and bond operations on a selective basis through the application of risk management techniques at no charge to the traders. Among other things, the introduction of the OBS has helped reduce the operating cost of the traders and, to a certain extent, open up competition in the trade. Following the introduction of the OBS, the warehouse licences issued by Customs & Excise Department increased from 47 in 2002 to 52 in 2003.

Initiative 3: Review of criteria and processes for admission to lists of contractors maintained by the Housing Authority

The Housing Authority maintains lists of contractors for providing services to build, maintain and manage public housing estates and ancillary facilities. For admission to the lists, contractors must meet specified criteria on technical expertise and financial capability. To facilitate admission to various lists and promote competition, the Housing Authority has:

- (a) simplified the technical requirements for admission to the lists, in the light of changes in the market and end-user requirements. The new criteria came into effect in January 2004;
- (b) promulgated in January 2004 a new Business Guide consolidating the admission criteria for all individual lists to ensure transparency and consistency across different lists; and
- (c) launched a web-based Counterparty Management Information System (COMIS) in July 2003 to enable convenient updates of information, facilitate on-line enquiry from contractors and increase transparency of the admission criteria and listing system.

Initiative 4: Review of the Information Technology Professional Services Arrangement (ITPSA)

The Information Technology Services Department (ITSD) has implemented the ITPSA since June 2002 to increase the competition in the bulk supply of IT professional services to Government departments. As a result, the number of contractors participating in the supply of these services has increased from 2 to 12, 5 of which being small and medium enterprises (SMEs).

The ITPSA is due for expiry by the end of 2004. As part of the ITPSA review, the ITSD plans to consult the industry in mid-2004 with a view to identifying ways to further increase the participation of the ITPSA by suppliers, particularly by SMEs, as well as encouraging more competition in a cost-effective manner.

3. Progress of Previous Initiatives

Over the years, COMPAG has examined and monitored the progress of a large number of new initiatives targetted at promoting competition in various sectors, many of which have already been successfully implemented. This Chapter highlights those initiatives which have seen new developments in their implementation in 2003-04.

Initiatives	Progress
Energy	
(1) Explore the feasibility of increasing competition in the electricity supply sector	<p>The findings of the technical study on increasing interconnection between the two power companies will be considered, together with related legal, business, investment, financial, liability and regulatory issues, as part of the on-going electricity market review.</p> <p>The present Scheme of Control on each of the two power companies in Hong Kong will expire in 2008. The Government plans to consult the public on possible options for the development of the post-2008 electricity market with a view to mapping out, in good time, the broad direction for the development of the future electricity market in Hong Kong.</p>
Legal	
(2) Relax the restrictions on solicitors in terms of the right of audience in the higher courts	The Department of Justice is consulting the Bar Association and the Law Society on the proposal.

Initiatives	Progress
Import and Export Trade	
(3) Remove restrictions on the alcoholic strength of Chinese - type spirits	The Dutiable Commodities (Amendment) Regulation 2003 pertaining to the removal of the restrictions on the alcoholic strength of Chinese-type spirits and introduction of the requirement for clear labeling of alcoholic strength was passed by the Legislative Council on 9 July 2003 and came into operation on 1 December 2003.
(4) Liberalize parallel importation of computer programs	The Bill introduced into the Legislative Council on 19 December 2001 was passed in July 2003 and became the Copyright (Amendment) Ordinance 2003 ("amendment Ordinance"). The amendment Ordinance took effect from 28 November 2003. With effect from the same date, the restriction on parallel importation under the Copyright Ordinance no longer applies to computer software products. However, the restriction continues to apply when the principal attraction of a computer software product is musical sound or visual recordings, movies, television dramas, e-books, or a combination of them.

Initiatives	Progress
(5) Engage more front-end electronic data interchange (EDI) service providers	The Commerce, Industry and Technology Bureau (CITB) has introduced competition in the provision of front-end electronic services for certain trade-related official documents. Two service providers, Global e-Trading Services Limited and Tradelink Electronic Commerce Limited, provide the electronic services on a non-exclusive basis from 1 January 2004.
Telecommunication and Broadcasting	
(6) Introduce broadcasting satellite services (BSS)	The then Information Technology and Broadcasting Bureau issued a guidance note in December 2001 for those interested in leasing transponders for the provision of BSS. A satellite carrying four BSS transponders was launched in April 2003. The BSS facility provider was required by its licence to make available the transponders in a non-discriminatory manner.
(7) Regulate set-top boxes	The Office of the Telecommunications Authority aimed to conduct a consultation on the policy, technical and regulatory issues relating to set-top boxes immediately after the Government had finalized the policy decisions on digital terrestrial broadcasting to ensure that set-top boxes would not impede competition in a digital environment.

Initiatives	Progress
(8) Regulation of mergers and acquisitions in the telecommunications market	<p>In July 2003, the Telecommunications (Amendment) Ordinance 2003 was enacted. Under the Ordinance there is an <i>ex post</i> regulatory regime whereby the Telecommunications Authority is empowered to regulate completed mergers and acquisitions which have, or are likely to have, the effect of substantially lessening competition in a telecommunications market. There is also a channel for seeking the Telecommunications Authority's prior consent on a voluntary basis. The Ordinance will come into effect on a date to be specified by the Secretary for Commerce, Industry and Technology after the Telecommunications Authority has published the relevant guidelines for enforcing the Ordinance.</p>

Initiatives	Progress
Financial Services	
(9) Review of the retail payment systems in Hong Kong	The HKMA continued to implement the recommendations of the 2001 comprehensive review of retail payment systems in Hong Kong, which examined the accessibility, costs, pricing, efficiency, competition and risks associated with such systems. It was working with representatives of credit cards, debit cards and multi-purpose stored value cards to develop appropriate codes of practices to enhance sectoral efficiency and transparency.
(10) Remove restrictions on the issue of new trading rights of the Stock Exchange of Hong Kong Limited (SEHK) and the Hong Kong Futures Exchange Limited (HKFE)	The moratorium on the issue of new trading rights of SEHK and HKFE was removed on 6 March 2002. The lower limit on the price of new trading rights was also removed on 6 March 2004. There is currently no restriction on the issue of new trading rights of SEHK and HKFE.
Others	
(11) Opening up the dangerous goods vehicular ferry service	The Transport Department (TD) conducted an open tender exercise in March 2003 for selection of suitable ferry operators to provide ferry services for dangerous goods vehicles. The Hongkong & Yaumati Ferry Co. Ltd. (HYF) was selected to operate the services commencing January 2004.

Initiatives	Progress
<p>(12) Release of technical information in the Operation and Maintenance (O&M) manuals by lift manufacturers</p>	<p>In March 2004, the Electrical and Mechanical Services Department (EMSD), after consultation with the industry, launched the “Guidelines on Operation and Maintenance Manuals” which set out the information to be provided by lift manufacturers/ contractors for new installation and modification projects. The Guidelines were also uploaded to the EMSD homepage for the reference of interested parties and the general public. In addition, an Owners’ Guidebook providing building owners with general information and related technical issues for lift maintenance was launched in late February 2004. Four talks jointly organized by the Home Affairs Department and EMSD for promulgating the Owners’ Guidebook and explaining its contents were successfully held in early March 2004.</p>

4. Cases Reviewed by COMPAG

I. Competition-related complaints

Case 1: Alleged barrier to entry to the sand market under the Sand Ordinance

A member of the public wrote to the Secretary for Economic Development and Labour in May 2003 alleging that the Sand Ordinance created barrier for entry into the sand import market in Hong Kong.

The Sand Ordinance (Cap. 147) was enacted in 1935 primarily to protect Hong Kong's beaches by deterring unauthorized removal of sand through regulating the removal and transportation of sand within Hong Kong. The Ordinance also covers imports of sand into Hong Kong and provides that any person who wishes to import sand into Hong Kong would need to obtain a Sand Removal Permit from the Director of Civil Engineering. There is no restriction on who could import sand and the quantity of sand that could be imported into Hong Kong. Information on the application for a Sand Removal Permit is provided on the website of the Civil Engineering Department

The Civil Engineering Department has issued 685 permits to 47 different companies for importation of sand in the last two years. Among the applicants were sand import agents and engineering companies working on reclamation projects in Hong Kong.

The importation of sand into Hong Kong is carried out in a transparent and fair manner. All importers, existing or new, receive equal treatment for the granting of Sand Removal Permits. There is no evidence of any company having abused its dominant market position, limited market accessibility and contestability, thus giving rise to economic inefficiency or obstruction of free trade in the sand import market. The COMPAG Secretariat has replied to the complainant accordingly.

Case 2: Possible conflict of interest of Hong Kong Productivity Council (HKPC) between its role as the implementation agent of the CMM Assessment Grant scheme and its involvement in pursuing CMM consultancy

A consultancy firm verbally alleged that HKPC, being the implementation agent of the CMM Assessment Grant scheme, would create unfair competition with private CMM consultancy firms if it would also provide CMM consultancy service to successful applicants.

CMM is a model developed by the Software Engineering Institute of Carnegie Mellon University to improve software development process. Compared with other economies, the adoption of CMM is slow in Hong Kong. The Innovation and Technology Fund, administered by the Innovation and Technology Commission (ITC), has recently approved a CMM Assessment Grant to assist local Independent Software Vendors in adopting CMM so as to improve their software development process and enhance their competitiveness in the global market. The successful applicant will receive funding support for hiring CMM consultants up to 50% of the consultancy costs or HK\$300,000, whichever is the less.

HKPC provides secretariat support and is responsible for the overall administration of the CMM Assessment Grant. Although HKPC is competent in providing CMM consultancy service, ITC considers that this should not create conflict of interest or unfair competition with private CMM consultancy firms -

- (a) Sufficient safeguards have been built in the system of CMM Assessment Grant to avoid potential conflict of interests. These safeguards include :
 - (i) All applications are considered by a Vetting Committee consisting of representatives from the IT sector, academia and Government. HKPC does not have a vote on the approval or otherwise of the applications;
 - (ii) Members of the Committee who are directly or indirectly related to an application are required to refrain from discussion of that application;
 - (iii) An applicant is required not to identify a consultancy firm at the time of application. Whichever the consultancy firm eventually is has no bearing on the approval or otherwise of the application; and

- (iv) A successful applicant is required to select a consultancy firm in a fair manner with at least three quotations.
- (b) HKPC has adopted the following rules to avoid unfair competition with CMM consultancy firms :
 - (i) HKPC will not proactively bid for any CMM consultancy project with successful applicants;
 - (ii) If approached by successful applicants for provision of consultancy work, HKPC will refer them to CMM consultancy firms;
 - (iii) HKPC will enter into subcontracting arrangement only if approached by local CMM consultancy firms engaged by successful applicants; and
 - (iv) If approached by overseas CMM consultancy firms for subcontracting work, HKPC will refer them to local CMM consultancy firms first. Only when the overseas firms fail in their attempt to partner with local consultants will HKPC partner with overseas consultants.

In fact, HKPC has not provided any CMM consultancy service to any successful applicants thus far.

Upon receipt of the above complaint, HKPC and ITC have invited all CMM consultancy firms including the complainant to a meeting to explain to them HKPC's role and the above safeguards. The complainant and the other attendants were satisfied with the current arrangements.

Case 3: Complaints against "anti-competitive" regulatory arrangements in the insurance industry

A member of the public wrote to the COMPAG Secretariat in May 2003 complaining that under the existing regulatory arrangements for the insurance industry, he could not take out life insurance on line from overseas insurance companies direct and had to go through the agents in Hong Kong. He considered such arrangements anti competitive, having similar effect as a cartel and a price fixing arrangement.

The Financial Services and the Treasury Bureau (FSTB) has advised that Hong Kong is one of the most open insurance markets in the world. Any insurer meeting the regulatory requirements may seek an authorization from the Insurance Authority (IA) and set up business here. The principal function of the IA is to regulate and supervise the insurance industry for the promotion of the general stability of the insurance industry and for the protection of existing and potential policyholders. As at 30 April 2003, there were 191 authorized insurers in Hong Kong. Among them, 46 were long term insurers, 126 were general insurers and 19 were composite insurers.

In Hong Kong, the distribution channel of insurance products is a commercial decision of the relevant insurers. FSTB understands that some insurers authorised in Hong Kong do offer their products, including life insurance, through the internet. FSTB considers the existing regulatory arrangements for the insurance industry appropriate and has replied to the complainant accordingly.

Case 4 : Alleged discriminatory offer of promotional service plan to customers by a fixed telephone line operator

The complaint was lodged with the TA in February 2003. A fixed telephone line operator (the operator) published a notice in the Gazette on 24 January 2003 offering a promotional service plan to residential customers who subscribed during 24 January to 6 February 2003.

The complainant alleged that when he made a call to the operator's hotline on 27 January 2003 to register for the offer, the hotline staff affirmed that no such offer had been notified, and that when he made another enquiry on 28 January 2003, the hotline staff claimed that the offer would only be available to a selected group of customers. The complainant submitted a CD recording the latter conversation to the TA. The recorded conversation suggested that the offer was only made available to selected customers. The practice was contrary to the operator's proposal approved by the TA.

The operator explained that –

- All hotline staff were instructed to transfer all incoming calls inquiring about the offer to a dedicated team specially briefed and trained on the offer. If the hotline staff were unable to transfer such inquiries to the dedicated team, they were instructed to take down the customer's name and contact phone number for the dedicated team to follow up.
- The officer who handled the complainant's inquiry on 28 January 2003 was responsible for marketing products and promotions; however, she was also trained as a relief hotline staff and was assigned to help handle incoming calls between 2pm and 5pm on 28 January 2003, as the traffic was particularly busy at that time. In relation to the taped conversation, this officer had tried at least 2 times to transfer the call to the dedicated team and asked the complainant 4 times if she could take down his contact phone number so that a more informed officer could call him back with the details he requested. Due to her inexperience, this officer felt pressured by the complainant into not following the correct procedure and directly answering his questions regarding the offer, and in her haste, gave him incorrect details.

- After learning about the complaint, the operator had further reinforced strict compliance by all hotline staff and some new standard procedures had been developed in respect of all new marketing programs.

The operator selected customers via "procured" software which generated a call list through a "Prediction" Model designed to generate a list of customers who are more receptive to the promotion offer.

The TA noted that although the officer concerned did tell the complainant that the offer would only be available to selected customers, she did not reject the complainant's service request but asked the complainant to leave his telephone number for subsequent follow-up. As the complainant did not leave his telephone number, the TA was not certain whether the complainant's service request would be rejected on the ground that the complainant was not one of the selected customers for the offer.

The TA looked into the operator's marketing program overviews of the offer and the related training materials and instruction, and did not find from these materials that the offer was only offered to selected customers. The TA also looked into the number and distribution of the customers who subscribed to the offer. The relevant data did not suggest that the offer was only made to those called by the operator's marketing staff or that those being called were restricted to selected districts. Further, the TA did not receive any other complaint of a similar nature on the offer.

The TA accepted the operator's explanation that the complaint was an isolated case due to the inexperience of the officer concerned, and did not consider that the operator was in breach of its FTNS Licence which required it to comply with a customer request for a published service. The operator was reminded that it should ensure that its front line staff were able to give accurate information about its published tariffs. The case was considered closed.

Case 5: Removal of Ocean Park from the standard itinerary by 18 inbound travel agents

The Consumer Council wrote to the Commissioner for Tourism in July 2003 concerning a collective decision by 18 Hong Kong inbound travel agents, who compete with each other for the supply of package tours to Mainland tourists, not to include Ocean Park (OP) in their fixed itinerary but make it an optional tour. The Council considered that there was prima facie evidence of the 18 inbound travel agents having engaged in a restrictive business practice.

The Tourism Commission (TC) requested the Travel Industry Council of Hong Kong (TIC), a self-regulatory body of the travel trade industry, to look into the case. The TIC confirmed that the group did remove the OP from their standard itinerary. The travel agents concerned said that they felt they had to do something to remain cost competitive in the market in the light of impact of SARS on the travel industry. As a result of the TIC intervention, the travel agents concerned have reinstated OP as a standard item in their itineraries.

The TC considers that the inbound tour market in Hong Kong is highly open and competitive and any anti-competitive practice cannot be sustained. According to the trade, there are over 350 active travel agents involved in the inbound travel businesses offering a wide variety of itineraries for consumers. Many itineraries include OP as a standard item. The TC believes that the impact of the action by the group of 18 inbound travel agents on market efficiency and free trade has not been significant. More importantly, the action taken by the TIC has demonstrated to those involved and the travel trade as a whole that such action is not acceptable.

Nevertheless, the present case highlights the need to heighten awareness of fair competition among members of the travel trade. In addition to its general Code of Conduct which uphold the spirit of fair trading, the TIC has reminded members of the Government's "Statement of Competition Policy" and will continue to require members to be mindful of anti-competitive practices and draw their attention to the "Guidelines for Maintaining a Competitive Environment and Defining and Tackling Anti-Competitive Practices".

Case 6: Alleged predatory pricing of “Sha La La” Calling Card

The Telecommunications Authority (TA) received a complaint in February 2003 against PCCW IMS Limited about its “Sha La La” pre-paid phone card service. The complainant alleged that PCCW IMS had engaged in predatory pricing by setting the charges for outgoing calls to the Philippines at an unreasonably low level: a level even lower than the sum of the delivery fee charged by the Philippines operator, the local access charge and the universal service contribution.

The TA has completed investigation of the case and concluded that the complaint was not substantiated. The TA finds that the wholesale rates paid by PCCW-IMS for the delivery of calls to the Philippines is commensurate with those charged to other operators. There is also no evidence supporting the allegation against PCCW-IMS for having engaged in predatory pricing or anti-competitive conduct.

The TA does not consider PCCW-IMS to have the ability to act without significant competitive restraints from its competitors and customers -

- (a) There is very low barrier to entry to the external telecommunications (ETS) market:
 - ✧ no limit on the number of ETS licences;
 - ✧ provision of ETS is not a capital-intensive business. Many options are available to ETS operators on an equal basis for the onward delivery of ETS traffic to overseas;
 - ✧ ETS products are generally undifferentiated; and
 - ✧ ETS users are price-sensitive and have low customer loyalty. Existing operators can hardly enjoy any significant advantage over new entrants.

- (b) The ETS market is highly competitive:
 - ✧ over 200 licensed operators; and
 - ✧ frequent entrance to and exit from the market: in 2002, 57 new ETS licences were issued whereas 47 ETS licences were not renewed or cancelled.

The TA does not consider the prices of the “Sha La La” prepaid phone service to be anti-competitive –

(a) PCCW IMS’s prices were generally in line with market levels:

- ✧ in January 2003 when PCCW-IMS entered into the market, the prices of the “Sha La La” prepaid phone service were not substantially different from the market prices;
- ✧ in February 2003, the wholesale rates for the delivery of calls to the Philippines were increased and other ETS operators increased their prices immediately. PCCW-IMS did not follow suit and the prices of the “Sha La La” prepaid phone card service became substantially lower than market prices; and
- ✧ PCCW-IMS increased its prices in March, April and June 2003, which brought the prices of the “Sha La La” prepaid phone card service to the market levels.

(b) PCCW IMS’s contribution margins are generally positive:

- ✧ The TA compared the effective prices of PCCW-IMS (including relevant surcharges) for the period between 1 January and 18 June 2003 with the relevant variable costs for the provision of the “Sha La La” prepaid phone card service. The TA observed that the contribution margins of PCCW-IMS services were positive, except for certain categories of calls having negative contribution margins for a short period of time; and
- ✧ negative contribution margin is not necessarily an indication of anti-competitive practices. In a competitive market, it is not uncommon for market players to price below costs to secure market share, establish a brand or increase customer awareness of new product etc. The most important consideration is whether the pricing strategy has the purpose or effect of preventing or substantially restricting competition. In the present case, the TA has not found any evidence indicating that the prices of the “Sha La La” prepaid phone card service at below relevant variable costs were implemented with the purpose or effect of preventing or substantially restricting competition in the ETS market.

Case 7: Tender conditions for procurement of medicine by Government Logistics Department and Hospital Authority

A local medicine dealer (the complainant) lodged a complaint with the COMPAG Secretariat through the office of a Legislative Councillor in early 2003 :

- (a) alleging that the Government's tender conditions for procurement of medicine which required tenderers to submit marketing authorization of the medicine issued by the national control authority of an International Conference of Harmonization (ICH)¹ member country or China or Australia (the marketing authorization requirement) were unfair;
- (b) questioned why the certification of quality standard issued by the Governments of many Asian countries including Singapore, South Korea and Indonesia was not recognized; and
- (c) alleged that since the unfair tender conditions had prevented the participation of many medicine suppliers, the Government had been purchasing medicine at above market prices.

The Complainant had separately filed a bid challenge under the Agreement on Government Procurement of the World Trade Organization (WTO GPA) against the Government on the same issue.

A public tender for the supply of nifedipine sustained-release tablet for the Department of Health (DH) and the Hospital Authority (HA) was gazetted on 8 November 2002. The Complainant was informed in February 2003 that its bid (despite offering the lowest price) was unsuccessful. The Complainant then lodged a bid challenge to the Review Body on Bid Challenge (the Review Body) established under Article XX of the WTO GPA, and alleged, inter alia, that the marketing authorization requirement was discriminatory.

A Panel comprising the Deputy Chairman and two Members of the Review Body (the Review Panel) was set up to consider the bid challenge and a hearing was held in August 2003. The Review Panel reached a decision in September 2003. It accepted the Government's reasons for rejecting the Complainant's bid and dismissed the challenge on the following ground :

¹ The following are currently ICH member countries - Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Sweden, U.K. and U.S.A.

- (a) As the standards promulgated by the ICH are an international standard, the Government's requirement that the pharmaceutical product offered (namely the nifedipine sustained-release tablet) must meet the ICH standards is not in breach of the provision of GPA VI. 2(b) which stipulates that technical specification shall be "based on international standards, where such exists; otherwise, on national technical regulations, recognized national standards, or building codes"; and
- (b) since any drug manufacturer in any country may apply to the national control authorities of any ICH member country for the issue of marketing authorization, the Government's requirement for marketing authorization issued by the national control authority of an ICH member country as proof that the products offered meet the ICH standards is not discriminatory.

In the light of the complaint, the Government Logistics Department (GLD) and DH reviewed and revised the relevant clause in the Conditions of Tender for the procurement of pharmaceutical products in May 2003 to draw the attention of potential suppliers that drug manufacturers in any country may produce marketing authorization from any member countries of ICH, China, Australia or Canada².

DH has reiterated that marketing authorization issued by the national control authority of any country would be acceptable if, at the invitation of such national control authority, DH could study and verify that the scientific and technical requirements and control systems adopted by the authority complied with ICH standards.

The decision of the Review Panel, an independent assessment forum under the WTO GPA, suggests that competition in the pharmaceutical sector had not been prevented or lessened because the Government's tender specifications were based on international standards and its requirement for marketing authorization was non-discriminatory. Members considered that the competition aspect of the complaint was not substantiated and that the case be dismissed.

² Certification issued by China, Australia and Canada is also recognized because the Department of Health has, at the invitation of the national control authorities of China, Australia and Canada, carefully studied the quality requirements, specifications, and control systems of the relevant authorities in both places and is satisfied that their standards are equivalent to the standards applied by the ICH.

Case 8 : Alleged predatory pricing of “Business IDD Global Fixed Fee Plan”

The TA received a complaint in May 2003 against PCCW-HKT Telephone Limited about its Business IDD Global Fixed Fee Plan and Business IDD Fixed Fee Plan. The complainant alleged that the Business IDD Global Fixed Fee Plan offered very low IDD tariffs to selected business customers who were committed to a minimum monthly traffic volume. The complainant claimed that PCCW-HKT was a dominant operator in the IDD market, and that the low tariffs under the Business IDD Global Fixed Fee Plan and Business IDD Fixed Fee Plan constituted “predatory pricing”.

The Telecommunications Authority (“TA”) conducted an investigation into the complaint to determine -

- (a) whether PCCW-HKTC had engaged in predatory pricing in breach of section 7L of the Telecommunications Ordinance; and
- (b) whether PCCW-HKTC had engaged in conduct which had the purpose or effect of preventing or substantially restricting competition in the telecommunications market in breach of section 7K of the Telecommunications Ordinance.

The TA concluded that there was no evidence showing that PCCW-HKTC had engaged in predatory pricing or conduct having the purpose or effect of preventing or substantially restricting competition in the telecommunications market. The TA’s conclusion was based on the following considerations -

(a) Very low barriers to entry

The TA considered that there were very low barriers to entry in the external telecommunications (ETS) market as

- ✧ licence was granted subject to minimal requirements;
- ✧ no limit was imposed on the number of licencees;
- ✧ the ETS was not a capital-intensive business and could be operated in different scales;
- ✧ ETS products were generally undifferentiated;
- ✧ customer loyalty was low and users were price-sensitive; and

- ✧ statistics had shown that entry to and exit from the ETS market was common and frequent: 68 and 57 new licences were issued in 2001 and 2002 respectively and 47 licences were either unrenewed or cancelled each year in 2001 and 2002

The TA was of the view that there was no scope for PCCW-HKTC to engage in predatory pricing or conduct which had the purpose or effect of preventing or substantially restricting competition in the ETS market. Even if PCCW-HKTC could successfully drive all its competitors out of the market, it was unlikely that it could charge excessive fees afterwards. The TA had noted that many operators offer very low fees for the ETS market at levels similar to those charged by PCCW-HKTC under the two plans in question.

(b) Non-dominant market position:

The TA considered that PCCW-HKTC was not a dominant operator in the ETS market because

- ✧ the TA had examined the market share of all outgoing ETS traffic from Hong Kong during the period January – June 2003 and found that PCCW-HKTC did not have substantial share in the ETS market;
- ✧ PCCW-HKTC was not able to act without significant competitive restraint from its competitors and customers; and
- ✧ The TA had not found any substantial change in the distribution of market shares after PCCW-HKTC had launched the two plans in question.

Case 9: Exclusive television broadcasting rights for a sports event

A complainant wrote to the Broadcasting Authority in May 2003 alleging that a television programme service licensee had acquired the exclusive television broadcasting rights (covering both pay and free terrestrial TV) for a sports event and that this conduct had the purpose and effect of preventing, distorting and restricting competition in the television programme service market in Hong Kong, contrary to section 13 of the Broadcasting Ordinance (Cap. 562). The Broadcasting Authority was conducting a preliminary inquiry into the case according to its investigation procedures.

Case 10: Suspension of Wholesale Business by Poultry Wholesalers on 1 July 2003

A Legislative Councillor wrote to the Financial Secretary in July 2003 requesting COMPAG to examine the operation of the poultry market and consider whether the suspension of business by poultry wholesalers at the Cheung Sha Wan Poultry Market on 1 July 2003 involved any anti-competitive practices. The complaint was referred to the Health, Welfare and Food Bureau (HWFB) for investigation.

The HWFB looked into the operating environment of the live poultry wholesale market and concluded that there was no anti-competitive practice in the live poultry trade. For the suspension of business on 1 July 2003, there was also no indication of concerted anti-competitive practice on the part of the wholesalers involved. Hong Kong's live poultry wholesalers are free to place orders directly with the export companies and local farms having regard to the actual market situation. Any attempt to deliberately reduce the supply of live chickens from the Mainland for the purpose of manipulating the wholesale prices will not be sustainable for the following reasons -

- (a) There are about 70 wholesalers trading Mainland chickens in the wholesale market. According to observation of the trade operation, the wholesale prices of live chickens set by these wholesalers are different and vary in accordance with the market demand. It is doubtful if collusive actions amongst such a large group of operators can be sustainable.
- (b) There is competition between local and Mainland chicken farms. If there is a shortage in the supply of Mainland chickens, local farmers and wholesalers trading local chickens can adjust their supply to absorb the unmet consumer demand. Wholesalers trading Mainland chickens will risk losing their market share.
- (c) Frozen and chilled chickens can serve as close substitutes for live chickens in the consumer market. Although consumers still prefer freshly slaughtered chickens, they have the choice of turning to chilled and frozen chickens or even other meat if there is any unreasonable increase in the price of live chickens.

There had been allegation that live poultry wholesalers acted collusively on 1 July 2003 to inflate the wholesale prices of live chickens, which in turn were passed on to consumers. However, HWFB did not have evidence to substantiate this allegation. Chicken prices are determined by market forces. HWFB were not aware of any complaint against an upsurge in the retail prices of live chickens after the incident.

COMPAG accepted HWFB's report and agreed to its findings. The Government therefore did not consider it necessary to take any further action with regard to the incident. COMPAG considered that the incident involved communications problem between the wholesalers and Guangnam Holdings (GH), which coordinated the supply of live poultry from the Mainland. The wholesalers hoped that GH could reflect the market situation in Hong Kong to the Mainland more responsively. In this regard, the Government would continue to facilitate communications among participants in the supply chain of live poultry for better use of market forces and enhanced operational efficiency of the trade.

Case 11: Anti-competitive practices by the Cyberport Coordinator

A complainant alleged that the Cyberport Coordinator had given preferential treatment to Cyberport tenants in the procurement of goods and services for the Cyberport and favoured Cyberport tenants by providing them with generous concessions such as fitting out loans, rent free period and waiver of management fees etc. which were contrary to market practice. The complaint was referred to the Commerce, Industry and Technology Bureau (CITB) in August 2003 for consideration.

The CITB concluded that the allegations were unfounded -

(a) Favouritism to Cyberport tenants in the procurement of goods and services for the Cyberport

- ✧ The procurement of goods and services for the Cyberport was governed by clear procedures. Qualified service providers were invited to submit tenders or proposals respectively through an “open tender” process or a “request for proposal” process.
- ✧ Selection was made on a competitive basis with regard to a range of relevant criteria including technical competency, corporate capability, track record, project management ability and cost. Whether or not the service providers were Cyberport tenants was not a factor for consideration.

(b) Favouritism to tenants by providing generous concessions contrary to market practice

- ✧ The concessions made were in line with market practice.
- ✧ Fitting-out loans were mainly provided in exceptional circumstances to small and medium enterprises. Similarly, more favourable terms were offered to start-up companies leasing less than 1,000 sq. ft. of office space.
- ✧ Contrary to what the complainant had alleged, office tenants were required to pay full management fees and other charges.

Case 12: Unfair competition in the market for the supply of equipment for the visually impaired

The Hong Kong Society for the Blind (HKSB) is a non-profit organization providing rehabilitation services for the visually impaired. It operates eleven service units funded by government subvention and a Technical and Advisory Service Centre (TASC) on a self-financing basis. TASC acts as the agent/authorized dealer of a number of brands of adaptive equipment for the visually impaired and provides support services to the visually impaired free of charge (e.g. in the choice and use of adaptive devices).

The complainant, referred to the COMPAG Secretary by the Consumer Council in September 2003, was of the view that he had faced unfair competition from HKSB in the supply of equipment for the visually-impaired. He alleged that HKSB -

- ✧ being a non-profit organization receiving government subvention, should not engage in profit-making activities;
- ✧ had used donations from fund-raising activities to purchase adaptive equipments to meet sales quota;
- ✧ had made use of the IT Thematic Training Programme funded by the Lotteries Fund to market the adaptive equipment to meet sales quota; and
- ✧ had made use of government subvention to subsidize the operation of TASC.

The Health, Welfare and Food Bureau (HWFB) had scrutinized HKSB's audited reports and fund-raising records, and examined the course content and attendance record of and customer feedback to the IT Thematic Training Programme. HWFB concluded that the complaint against HKSB was unsubstantiated because -

- ✧ no fund-raising activity had been held for the TASC and there was no evidence suggesting that donations or government subvention for HKSB had been used to subsidize the operation of TASC; and
- ✧ the course content of the IT Thematic Training Programme was approved by Social Welfare Department and the software used for demonstration in the training was readily available in the market and widely used by the public and among the visually impaired. There was no evidence suggesting that HKSB had manipulated the course content to serve a particular commercial interest.

HWFB pointed out that sale of adaptive equipment by HKSB for the visually impaired was not an activity subvented by the Government and that it was not appropriate for the Government to intervene in the self-financing activities of subvented organizations.

Case 13: Tendering of commercial premises by the Housing Authority

A member of the public wrote to the COMPAG Secretary in October 2003 complaining that she was deprived of the opportunity to bid for a vacant shop in a shopping centre of the Housing Authority (HA) because the Housing Department (HD) had leased the shop to a selected tenant through negotiation. The complainant considered that HD's practice of leasing vacant shops through negotiation with selected tenants instead of through open tender was against the principle of fair competition.

The HD had advised that open tender and restricted tender were the two major means to lease the HA's commercial premises. The leasing of shops through negotiation as described by the complainant was in fact a restricted tender under which the HD would work out a list of potential tenants meeting certain criteria and invite them to bid for the premises concerned. The general guidelines for using restricted tender are -

- (i) letting of major premises such as department stores or restaurants which will 'anchor' a shopping centre and where emphasis on quality and continuity is of particular importance;
- (ii) the premises have failed to attract bids by open tender;
- (iii) facilitating expansion by "medium-sized" tenants with a high standard of performance; or
- (iv) facilitating new retail operation by a company with demonstrated performance in non-retail fields.

The ultimate objective is to achieve a reasonable mix of tenants (i.e. corporations and individual of the HD owners) while giving opportunities for small businesses to compete and develop. The shop identified by the complainant was leased through restricted tender because it fell into the situations described. The HD had explained the various leasing arrangements to the complainant and the latter was satisfied.

Case 14: Complaints against PCCW-HKTC for offering unauthorized discounts and bundling of services and customer equipment

The licence of PCCW-HKT Telephone Limited (“PCCW-HKTC”) prohibits the licensee from offering any discount to its published tariffs for a particular telecommunications service provided under the licence if the licensee is in a dominant position in the relevant market. Section 7L of the Telecommunications Ordinance prohibits abuse of the dominant position.

The Telecommunications Authority (“TA”) had, since August 2002, received 42 similar complaints alleging that PCCW-HKTC had offered unauthorized discounts on business fixed-line services and bundled these services with other services and customer equipment. The complainants considered that such activities were anti-competitive and abuses of PCCW-HKTC’s dominant position in the business fixed-line market.

The TA was conducting an investigation with a view to examining whether PCCW-HKTC’s conduct has breached its licence or section 7L of the Telecommunications Ordinance.

Case 15: Exclusive broadcasting rights in Hong Kong for the matches of a European soccer league

The Broadcasting Authority received a complaint in September 2003 alleging that the conduct of a television programme service licensee in acquiring exclusive television broadcasting rights (covering both pay and free terrestrial TV) in Hong Kong for the matches of a European soccer league prevents, distorts and restricts competition in the television programme services market in Hong Kong and was in contravention of section 13 of the Broadcasting Ordinance (Cap. 562). The Broadcasting Authority was conducting a preliminary inquiry into the case in accordance with its investigation procedures.

Case 16: Complaints against Hutchison Global Communications Limited and PowerCom Network Hong Kong Limited concerning provision of telecommunications services to various residential estates

The Telecommunications Authority (TA) had received complaints from residents and telecom service providers in October 2003 concerning the provision of basic telephone and/or broadband internet access services (the Services) by Hutchison Global Communications Limited (HGC) and/or PowerCom Network Hong Kong Limited (Powercom) to various residential estates.

According to the complainants, all residents concerned were liable to pay for the Services, via the building management fee collected by the property management companies for these residential estates which are associated to HGC and/or PowerCom. If a resident chose another operator or did not use the Services, the management company would not refund or deduct any part of the management fees paid by that resident.

S.7K of the Telecommunications Ordinance prohibits a licensee from engaging in conduct which has the purpose or effect of preventing or substantially restricting competition. In addition, S.19B of the Ordinance provides that a term in a lease agreement, deed of mutual covenant or commercial contract that unreasonably restricts the right of a resident or occupier, or deprives a resident or occupier of the right, to have access to the public telecommunications services of his choice is void.

The TA was conducting an investigation into whether the conducts of HGC and PowerCom have constituted a breach of S.7K and/or S.19B of the Telecommunications Ordinance.

Case 17: Complaints against PCCW-HKT Telephone Limited (PCCW-HKTC) and PCCW IMS Limited (IMS) for squeezing the profit margin of residential broadband internet service

The TA received a complaint from the industry in November 2003 that PCCW-HKTC and IMS were engaged in margin squeezing in the residential broadband internet market.

The complainant alleged that, over the past 2 years, IMS had dropped the prices for residential broadband internet services, namely 3Mbps Asymmetric Digital Subscriber Line Internet Service, by around 50%, from \$328 to \$165 for service with field visit and from \$298 to \$148 for service without field visit. During the same period, the PCCW-HKTC's prices for wholesale broadband conveyance services, namely Cell Relay Service Customer Access Service C, used by other internet services providers to provide residential broadband internet services had only dropped by 12%, from \$183 to \$158 for service with field visit, and from \$133 to \$118 for service without field visit. The complainant alleged that the discrepancies in price drop had significantly squeezed the profit margin of internet services providers which depended on PCCW-HKTC's wholesale broadband conveyance service.

The TA was conducting an investigation into whether the conduct of PCCW-HKTC and IMS has breached section 7L of the Telecommunications Ordinance, which prohibits abuse of dominant position.

Case 18: Complaint against a provider of maintenance services for satellite TV reception facilities

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

Providers of maintenance services for satellite TV reception facilities are licensed by the TA under the Telecommunications Ordinance. The TA was looking into this case.

Case 19: The Levying of Loading Bay Handling Charge (LBHC) by Certain Cold Stores

A Legislative Councillor expressed concern to the Financial Secretary in January 2004 about six cold stores raising rental charges and imposing LBHC at the same time. The Councillor requested that the case should be followed up by the Competition Policy Advisory Group (COMPAG). The COMPAG Secretariat referred the case to the Economic Development and Labour Bureau (EDLB) for investigation.

EDLB, as directed by COMPAG, had looked into the matters and submitted a report to COMPAG. The report set out the market structure and operation of the cold stores trade, including the number, capacity and geographical distribution of cold stores; their market shares and power to make pricing and other decisions; the degree of product differentiation and sales promotion; any barrier to entry as imposed by LBHC; and whether there had been any predatory pricing and price discrimination etc.

It was found that –

- (a) apart from the LBHC imposed by the seven (not six) cold stores, none of the remaining 22 cold stores, including the other ten in Kwai Chung and two in Shatin, introduced similar charges;
- (b) the seven cold stores had adopted different rates for the LBHC (i.e. HK\$10 for Shatin Cold Storage 1 and 2 and HK\$20 for the other five cold stores) and informed their clients on different dates; and
- (c) depending on the volume of business and past dealings, competitive rate of rental charges are offered to different clients by different cold stores. The rental charges were also adjusted at different times.

The report concluded that the seven cold stores which imposed LBHC had not engaged in anti-competitive practices and there was no evidence to substantiate the allegation that the levying of the LBHC was a result of collusion between the cold stores. The imposition of LBHC was a commercial decision and the disputes should be resolved by the parties concerned, although EDLB would continue to play a mediator role. COMPAG accepted EDLB's report and agreed to its conclusion.

II. Non competition-related complaints

Case 20: Complaints against franchised bus companies colluding to abuse their franchises

The complainant wrote to the COMPAG Secretariat in May 2003 alleging that the three franchised bus companies colluded to abuse their franchises and imposed commercials on passengers, causing discomfort and mental stress.

The Environment, Transport and Works Bureau (ETWB) looked into the complaint and advised that the complaint was against the provision of audio-visual broadcasting service on board of buses by the three franchised bus companies, which in its view was not competition-related. ETWB advised that the introduction of audio-visual broadcasting on buses was an initiative of the franchised bus companies to provide infotainment programmes to passengers as their continued efforts to enhance their passenger services. In considering such initiative of the bus companies, Transport Department ("TD") had taken into account relevant considerations, e.g. the results of the passenger opinion surveys conducted by TD and the bus companies which indicated that the majority of interviewees considered the broadcasting acceptable, and the consideration of potential benefits of research on the possible application of GPS in bus operation. Hence, the introduction of audio-visual broadcasting services did not have the purpose or effect of reducing competition among the three franchised bus companies.

It was noted that the three franchised bus companies commissioned the provision of audio-visual broadcasting service at different times (November 2000 for KMB, January 2001 for Citybus and October 2001 for NWFB), and their scale of service provision and implementation programmes were different. There was no evidence suggesting co-ordination/"collusion" among the three franchised bus companies on the provision of such service.

With a view to balancing the interests of different groups of passengers, TD maintained discussion with the bus companies on the regulation of broadcasting volume and the following arrangements had been put in place:

- (a) the volume of broadcasting was reduced to a level close to that of the ambient noise of a bus;
- (b) compressor was used to ensure that the variations in pitch were within a narrow range;

- (c) a quiet zone was designated at the back portion of the lower deck of the bus where the speakers are turned off; and
- (d) only one speaker was to be turned on at the lower deck.

III. Studies initiated by COMPAG

Case 21: Competition in the asphalt market

Members discussed the report in the 20 June 2003 issue of the Hong Kong Economic Times on the judicial review (JR) application filed by four asphalt companies against the Town Planning Board (TPB)'s decision on 4 April 2003 to approve an application under section 16 of the Town Planning Ordinance (TPO) for a temporary asphalt production plant at a site zoned "Agriculture" at Man Kam To Road, Sha Ling. Members were concerned that the action of the asphalt companies smacked of anti-competitive collusive action and requested that the Environment, Transport and Works Bureau (ETWB) conduct a study on the competition aspect of the asphalt supply market

Asphalt is mainly used for road works in Hong Kong. The major raw materials used for the production of asphalt include bitumen, aggregates and additives. Bitumen is a petroleum by-product manufactured by the refinery processes, and Shell Hong Kong Limited was the sole supplier of bitumen for road works in Hong Kong. Aggregates are usually obtained from quarries in Hong Kong or the Mainland, whilst additives are proprietary products purchased by the asphalt suppliers from relevant sources.

Asphalt is manufactured by mixing aggregates with bitumen and additives to specified proportions at a high temperature around 165°C. Asphalt is then transported to site in well-insulated dump trucks and must be placed within a few hours before the asphalt drops in temperature and hardens.

The local industry consumed about 1 million tonnes of asphalt each year, and most of it was used for public road works. There are currently four suppliers approved by the ETWB to supply asphalt for public work, and each has a varying market share.

The asphalt market is not closed: suppliers are free to enter or leave the market as they wish. The Government imposes no regulatory obstacles to market entry other than administrative measures necessary to safeguard the quality of asphalt produced, and to ensure that the relevant environmental and public safety requirements are met. An asphalt supplier has to be included in the ETWB list of "Approved Suppliers of Materials and Specialist Contractors for Public Works" under the category of "Supply of Bituminous Pavement Materials and Construction of Special Bituminous Surfacing" in order to supply asphalt for public works. The application procedures and information to be

submitted are described in detail in the Contractor Management Handbook available at the ETWB website.

Demand and price trends

The annual demand for asphalt in Hong Kong remained fairly stable over the last 3 years (2000-2002), increasing slightly from about 1.11 million tonnes in 2000 to about 1.27 million tonnes in 2002. The demand in 2003 was estimated to be around 1.2 million tonnes.

In order to gain an indication of the price trends, ETWB randomly selected nine major road works contracts awarded between 2000 and 2002 for analysis. The analysis focused on the trend of tendered rates for laying asphalt including both the material and labour costs. Between 2000 and 2002, the relevant tender rates dropped by about 5% on average, reflecting possibly lower labour costs. During the same period, the price of aggregates remained fairly stable, while the price of bitumen rose by about 30% between end-2001 and early 2003 due to higher oil prices.

Competition in the asphalt supply market

Based on its study of the asphalt market and the demand and pricing trends of asphalt, ETWB could not find any evidence of anti-competitive practices in the asphalt supply market. Apart from government regulations intended to safeguard the quality of asphalt produced and to ensure compliance with relevant environmental and public safety requirements, there was no barrier to market entry. The varying market shares among the suppliers indicate competition did exist. There was also a range of asphalt prices (depending on mix requirements and quantities ordered), and the increased price of bitumen, which should theoretically affect the price of asphalt, was not reflected in the tender price for road works contracts. There had not been any complaint from the government road works contractors of restrictive practices such as price-fixing, bid-rigging or market allocation etc. by the asphalt suppliers.

5. Publicity and Training

Publicity

Promoting public and international understanding of the Government's competition policy is an important area of COMPAG's work. COMPAG makes extensive use of its website (www.compag.gov.hk), launched since October 2002, to disseminate information on its work and other competition-related issues. Apart from reference materials such as the *Statement on Competition Policy*, the *Guidelines to maintain a competitive environment and define and tackle anti-competitive practices*, and the annual reports of COMPAG, which are available on the website, the public may make use of the site to make enquiries or file competition-related complaints.

In 2003-04, COMPAG worked on a publicity programme to promote competition concepts in schools and among the youth as a continuing effort to nurture a pro-competition culture in the community. An interactive game targeted at senior primary (Primary 4 to Primary 6) and junior secondary (Form 1 to Form 3) school students would be launched in 2004-05 to introduce competition concepts by means of a game. In collaboration with the Education and Manpower Bureau, competition concepts would also be integrated into the Integrated Humanities curriculum of senior secondary school in 2004-05.

Training

Bureaux and departments have the responsibility to oversee market competition in their respective portfolio, initiate remedial measures on anti-competitive conduct, and promote competition in the respective sectors. COMPAG is aware that public officers need to be apprised and reminded of the basic concepts and principles of the Government's competition policy. Private sector employees should also have an opportunity to be exposed to competition concepts and to learn about the Government's approach to competition. In collaboration with the Civil Service Training and Development Institute, the COMPAG Secretariat provided briefing on competition policy to civil servants and private sector employees in October 2003 and March 2004.

In 2003-04, officers from relevant bureaux and departments attended a workshop organized by the Asia Pacific Economic Co-operation to share with the international community Hong Kong's experience in promoting competition.

6. Developments in the International Scene

In 2003-04, interactions between trade and competition policies continued to attract discussions in major international fora such as the World Trade Organization (WTO) and the Asia-Pacific Economic Cooperation (APEC).

On the WTO front, the fifth Ministerial Conference (MC) was held from 10 to 14 September 2003 in Cancun, Mexico. WTO Members held different views on whether negotiations should be launched on Singapore issues³, including trade and competition policy, under the Doha Development Agenda. As the discussions failed to reach a conclusion, Ministers only instructed officials to continue working on outstanding issues and convene a meeting of the General Council at Senior Officials level to discuss the way forward. At that General Council meeting in December 2003, Members agreed to put aside trade and competition policy for further reflection. Hong Kong, China (HKC) did and will continue to participate actively and constructively in the negotiation process with a view to achieving an outcome to the benefit of our economy.

On the APEC front, in accordance with the strengthened APEC peer review mechanism adopted in 2002, an APEC Review Team consisting of a Moderator and a Discussant and assisted by an Expert who provided analytical and technical support conducted a field study in Hong Kong for the purpose of a Peer Review on HKC's Individual Action Plan (IAP) in 2003-04. In the questionnaire for the Peer Review, some APEC Members had raised questions about HKC's sector-specific approach to competition. During the Expert's visit to Hong Kong in July 2003, the COMPAG Secretariat explained in detail the Government's sector-specific approach to competition and highlighted the work done by COMPAG in promoting competition, including the preparation of the *Guidelines to maintain a competitive environment and define and tackle anti-competitive practices*.

The Expert was supportive of HKC's market-oriented and sector-specific approach. He agreed that this approach was effective and had much merit, given the increasing divergence between sectors, their structures and their needs, in the modern economy. Presenting his Study Report at the Peer Review Session held in Phuket, Thailand on 21 August 2003, the Expert expressed his support to HKC's sector-specific approach and set out in detail the rationale behind HKC's competition policy, drawing

³ The Singapore issues are trade and competition policy, trade and investment, transparency in government procurement and trade facilitation.

attention to the competition policy guidelines, which were subsequently promulgated by COMPAG in September 2003.

Competition Policy Advisory Group Terms of Reference and Membership

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

Terms of Reference

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

Membership

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

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

Statement on Competition Policy

Introduction

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

Objective

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

Pro-competition Principles

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

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

Restrictive Practices

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

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

Approach

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

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

9. For Hong Kong, a small and externally-oriented economy which is already highly competitive, the Government sees no need to enact an all-embracing competition law. To maintain overall consistency in the application of the competition policy, we provide a comprehensive, transparent and over-arching competition policy framework through this Policy Statement and reinforce this with sector-specific measures not limited to laws.
10. In the Hong Kong environment, the Government is promoting economic efficiency and free trade through competition by –
 - a. raising public awareness of the importance of competition for the enhancement of economic efficiency and free trade;
 - b. identifying, on a sectoral basis, obstacles and constraints imposed by the Government and other public sector entities which limit market accessibility and contestability and compromise economic efficiency and free trade to the detriment of the overall interest of Hong Kong, and removing them through voluntary, administrative, legislative, etc., measures as appropriate;
 - c. initiating pro-competition measures, on a sectoral basis, in the Government and public sector through administrative, legislative, etc., measures as appropriate;
 - d. encouraging the private sector to embrace competition and its stated objective of enhancing economic efficiency and free trade through voluntary action;
 - e. supporting the Consumer Council's work in drawing up codes of practice that promote competition and its stated objective of enhancing economic efficiency and free trade;
 - f. working together with the Consumer Council to encourage the private sector to adopt pro-competition measures, such as self-regulatory regimes that preserve and enhance free competition; and to monitor and review business practices in sectors prone to anti-competition behaviour;
 - g. establishing a central repository of competition-related concerns and complaints to facilitate the identification of possible deficiencies and areas for improvement; and

- h. providing a dedicated forum under the Financial Secretary (already established and known as the Competition Policy Advisory Group or "COMPAG" in short) to review policy issues related to competition.

Implementation

11. The Government is committed to pro-actively nurture and sustain competition for the purpose of enhancing economic efficiency and free trade. COMPAG will invite all government entities to adhere to the Statement, propose initiatives for furthering the policy objective, examine the impact of all new proposals on competition and, where appropriate, bring this to the attention of the Executive Council and the Legislature. They are also expected to ensure that all statutory bodies under their charge pay heed to the Statement as well.
12. The Government calls upon all businesses to cease existing, and refrain from introducing, restrictive practices that impair economic efficiency or free trade on a voluntary basis. Where justified, the Government will take administrative or legal steps as appropriate to remove such practices if necessary.
13. Alleged restrictive practices in the public and private sectors may be referred to the concerned policy bureau or government department for consideration. Separately, the COMPAG Secretariat will keep track of all referrals and bring these to the attention of COMPAG should there be substantial policy or systemic implications.

Competition Policy Advisory Group
May 1998

Annex III

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

Introduction

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

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

Guidelines

1st Pointer: Assessing the overall competitive environment

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

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

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

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

2nd Pointer: Measuring the effects of restrictive practices on the market

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

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

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

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

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

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

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

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

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

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

3rd Pointer: Specific activities that restrict competition

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

Anti-competitive practices

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

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

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

Abuse of market position

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

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

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

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

[§] Certain bid rigging activities, as far as public bodies are concerned, are criminal offences under the Prevention of Bribery Ordinance.

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

Mechanism for initiating action against anti-competitive practices and appeal

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

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

13. The following mechanism deals with action against anti-competitive practices and appeals against such actions^{††}:

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

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

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

the attention of COMPAG should there be substantial policy or systemic implications;

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

COMPAG Secretariat
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