

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2006 – 2007

(English version)

1. Introduction

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

2. Since its establishment, COMPAG has worked to ensure that the Government's competition policy can cater for present-day circumstances and meets changing needs. In this connection, in May 1998, the Group issued the Statement on Competition Policy, which sets out the objective of the Government's competition policy, namely –

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

3. To supplement the Statement, in 2003, COMPAG published a set of guidelines aimed at advising businesses as to the types of practice that could be seen as anti-competitive practices.

4. In order to ensure that our competition policy keeps pace with the times and continues both to serve the public interest and to facilitate a business-friendly environment, COMPAG, in June 2005, appointed a Competition Policy Review Committee (CPRC) to review and to make recommendations on the future direction for competition policy in Hong Kong. The CPRC completed its review in June 2006, recommending that a new law with a clearly defined scope be introduced to tackle anti-competitive conduct across all sectors. In November 2006, the Government began public consultation on the way forward for Hong Kong's competition policy. The outcome of this consultation is summarised in **Chapter 2** of this report.

5. COMPAG is charged with fostering competition in both the public and private sectors in Hong Kong. To this end, it seeks to identify areas where competition is being impeded, and also reviews areas in which there is scope for competition to be enhanced. Progress with new initiatives that have been launched in recent years is summarised in **Chapter 3**.

6. A major part of COMPAG's work is reviewing competition-related complaints. The Group initially refers complaints to the relevant bureaux or departments for follow-up action, with a request that complaints be handled promptly and in accordance with established policy. COMPAG keeps track of progress with each complaint until it reaches a conclusion. The cases concluded in 2006-07 and the current positions of outstanding cases are described in **Chapter 4**.

7. From a broader perspective, in order for Hong Kong to maintain our high degree of competitiveness in relation to other major cities, it is important that we show a clear commitment to high standards of market discipline, supported where appropriate by transparent regulatory frameworks. COMPAG will continue to monitor developments in international competition policy and law, and will consider how best to ensure that our own competitive environment is in line with leading international standards. **Chapter 5** briefly reviews recent developments on the international stage.

2. Competition Policy Review

8. In June 2005, COMPAG appointed the Competition Policy Review Committee (CPRC) to review our competition policy, so as to ensure that this policy meets our current needs. In June 2006, the CPRC completed its review and submitted its recommendations to the Government. In its report, the CPRC advised that any new approach to regulation should maintain the current policy objective for competition, and that any new regulatory regime should not be used to introduce competition artificially, but rather to reinforce Hong Kong's pro-enterprise environment.

9. Having reviewed best practice in other jurisdictions and taken account of local stakeholders' concerns, the CPRC concluded that legislative backing is needed for the effective enforcement of Hong Kong's competition policy. The review committee recommended the introduction of a new, cross-sector competition law to provide safeguards against anti-competitive conduct, and that an independent regulatory authority should be established to enforce the new law. It also recommended that before beginning preparation of a new competition law, the Government should consult the public on the issues raised in the CPRC report.

10. Taking account of the review committee's recommendations, in November 2006, the Government launched a three-month public consultation exercise to gauge the views of the community on the relevant issues. From the feedback received during the consultation period, COMPAG noted that **there is majority support in the community for the introduction of a new cross-sector competition law**. For the most part, stakeholders agreed with the broad approach suggested by the CPRC, that is, rather than address market structures, the law should focus on prohibiting conduct that would be likely to lessen competition. There was also general agreement that a breach of the new law should be subject to civil rather than criminal penalties, and that whilst the scope of the law should be wide enough to cover all sectors, there should be room for exemptions from the application of the law where this is in the wider economic or public interest.

11. Public feedback also indicated **general support for strengthening the regulation of competition through the establishment of a Competition**

Commission, as recommended by the CPRC. There was consensus that any future authority should operate in a transparent manner, and that enforcement should be subject to appropriate checks and balances. There was a general preference for the Commission to be overseen by an independent, appointed board. A copy of the report on the public consultation exercise can be viewed at www.cedb.gov.hk/citb/ehtml/pdf/publication/ConsultationReport-eng.pdf.

12. Based on the views expressed during the public consultation, the Government has begun work on the drafting of a Competition Bill. At the same time, noting that some respondents have expressed concerns that such a law could lead to higher business costs and potentially time-consuming litigation, when taking forward the new competition law, the Government will continue to engage the public in order to enhance their understanding of its application.

13. In order to make good progress with the preparation of this complex and wide-ranging legislation, in June 2007, the Government appointed Arculli, Fong & Ng with Gilbert+Tobin, to provide expert services in relation to the preparation of a competition law for Hong Kong. The consultant will provide expert input on issues relating to the drafting of competition law, with reference to regulatory frameworks in other jurisdictions.

3. Progress of Previous Initiatives

14. This chapter gives a brief update on progress with initiatives aimed at promoting competition that have been outlined in previous COMPAG annual reports.

1) Preparation of an Accounting Separation Manual for Television Programme Service Licensees

15. In August 2006, the Broadcasting Authority (BA) promulgated an accounting manual in consultation with the industry and the Hong Kong Institute of Certified Public Accountants in order to help television programme service licensees comply with the accounting separation provisions under section 17 of the Broadcasting Ordinance (Cap.562). The manual gives guidance to television programme service licensees who also hold telecommunications licences under the Telecommunications Ordinance (Cap.106) on how to facilitate the separation of accounts for their television broadcasting and telecommunications business so as to provide transparency in their operations and guard against anti-competitive practices such as cross-subsidisation and discriminatory pricing.

2) Measures to Prevent Possible Unfair Competition in Auctions of Lunar New Year Fair Stalls

16. To maintain order and to help prevent unfair competition at auctions for Lunar New Year Fair stalls, the Food and Environmental Hygiene Department (FEHD) has stipulated in the relevant auction notice that during the auction, no one shall interfere with the bids of other persons or cause other persons to surrender their bids for a certain pitch. Notices are displayed at FEHD district offices, auction venues and on the FEHD website. Staff of FEHD and police officers maintain order during open auctions, and FEHD take video recordings to deter misconduct, after giving a prior announcement of this arrangement to all the participants at the auctions. Floor staff also use identification boards to help recognition of bidders by auction staff on the stage. FEHD will keep the auction arrangements under review and introduce further improvements as necessary.

3) Future regulatory requirements for the electricity supply sector

17. In 2006, the Government completed two rounds of public consultation on the future regulatory regime for the electricity supply sector, including the issue of how competition in this sector might be enhanced. The Government is discussing with the two power companies the post-2008 regulatory arrangements for the electricity market. On the issue of competition, the Government has announced plans to open up the electricity market further from as early as 2018 if the requisite market conditions are present, and will carry out the necessary preparations during the next regulatory period.

4. Cases Reviewed by COMPAG

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

A) Price-fixing

Case 1: Supply of Bituminous Materials for Highways Department Maintenance Term Contracts (under investigation)

19. In December 2006, the Highways Department (Highways) received an anonymous written complaint alleging collusion among the four approved suppliers of bituminous materials, in respect of two Highways maintenance term contracts that were at the time open to tender. The complainant alleged that two of the approved suppliers had been “designated” as the suppliers for the two maintenance contracts. Each “designated” supplier would offer bituminous materials to potential tenderers for the respective contract at a reasonable price (albeit at a price higher than the current market level), whereas the other three suppliers would either decline to offer materials, or would offer materials at a price 10% higher than that of the “designated” supplier. The complainant further requested Highways to delete a requirement that tenderers should submit a letter of undertaking from an approved supplier of bituminous materials, so as to avoid “tying” tenderers to certain suppliers.

20. Highways has investigated the complaint and will report back to COMPAG within 2007.

B) Abuse of Dominant Market Position

Case 2: Anti-competitive Practices by Supermarket Chains (not substantiated)

21. In May 2006, the Legislative Council (LegCo) Panel on Commerce and Industry discussed the regulatory arrangements for the import of rice and the reserve stock requirement under the Rice Control Scheme (RCS). At the meeting, an industry representative remarked that rice traders were aggrieved that supermarket chains had engaged in anti-competitive practices, such as selling rice below cost but added that they had no evidence that unfair conditions were imposed.

22. The then Commerce, Industry and Technology Bureau (CITB) and the Trade and Industry Department met industry representatives to gather information on the allegation. The CITB also conducted a review to ascertain whether supermarket chains had sold rice below cost with a view to driving out competition, or had suppressed the retail price of rice to the extent that customer welfare and choices might be jeopardised. The CITB found no conclusive evidence of such conduct.

23. Furthermore, the CITB noted that –

- (a) prices at supermarkets appeared to be on a downward trend since 2001;
- (b) import prices had increased in 2003 and 2004; and
- (c) the number of registered rice stockholders increased from 52 at the end of 2002 to 94 at the end of 2005.

This information suggests that more choices and lower prices resulted from increased competition in the rice market.

24. In light of the above findings, COMPAG agreed that the suggestion of **anti-competitive practices by supermarket chains in the retail distribution of rice was not substantiated.**

Case 3: Predatory Pricing by Airlines (not substantiated)

25. In July 2006, COMPAG received a complaint from the “Concern Group of Travel Industry in Hong Kong” (CGTI), which alleged that airlines had engaged in predatory pricing with the aim of restricting competition by –

- (a) offering air tickets through their own websites at lower prices than they offered to their designated travel agents;
- (b) introducing “air-ticket & hotel” packages with a view to providing greater discounts to customers;
- (c) providing booking services and special discounts to customers; and
- (d) prohibiting travel agents from marketing on their websites other airlines’ products and services.

26. The then Economic Development and Labour Bureau (EDLB) reviewed the complaint, noting that a similar complaint¹ lodged with COMPAG in December 2004 had not been substantiated for the following reasons -

- (a) internet ticketing provides an additional avenue for customers to purchase air tickets and reduces transaction costs, which can translate into lower air fares for consumers; and
- (b) the fact that an airline may prohibit a travel agent from marketing certain products and services of the airline on the travel agent’s website is a commercial matter between the airline and the travel agent concerned.

The EDLB considered that CGTI had not provided any new evidence to substantiate claims that the direct sale of air tickets and related products from airlines to consumers amounts to predatory pricing. The EDLB further

¹ The complaint lodged with COMPAG in December 2004 alleging, amongst other things, that airlines had engaged in price-fixing aimed at restricting competition by offering lower rates for air tickets and tour packages through their own websites and prohibiting travel agents from marketing certain products and services of the airlines on the travel agents’ websites.

observed that existence of more diverse products in the travel market can enhance consumer choice.

27. In view of the advice from the EDLB, COMPAG concluded that **the complaint was not substantiated**.

Case 4: Anti-competitive Behaviour by a Supermarket (under investigation)

28. In August 2006, a supplier ("the Supplier") lodged a complaint that a supermarket ("the Supermarket") had engaged in anti-competitive conduct. Specifically, the Supplier claimed that –

- (a) the Supermarket had unilaterally raised the retail price of the Supplier's products above an agreed level; and
- (b) after displaying the Supplier's products for only a few months, the Supermarket had removed them from its shelves upon the launch of similar products under its own brand name, despite the Supermarket's earlier indication that the fee paid by the Supplier covered a one-year period.

29. COMPAG referred the case to the CITB which subsequently commissioned the Consumer Council to follow up in view of the latter's experience in reviewing the relevant market practices. COMPAG would review the Council's findings within 2007.

Case 5: Unfair Practices by Banks (not substantiated)

30. In January 2007, the Hong Kong Association of Online Brokers (HKAOB) wrote to the Securities and Futures Commission (SFC) to complain about alleged unfair practices by banks regarding the provision of financing during Initial Public Offerings (IPO). Specifically, the HKAOB complained that some banks discriminate against brokers by –

- (a) refusing to quote interest rates to brokers on the first day of an IPO;
- (b) quoting rates that are higher than those offered to the banks' own retail clients;

- (c) refusing to provide IPO financing to brokers.

31. The HKAOB considered such conduct to be anti-competitive in that it diverts retail clients away from stockbrokers, and that it also distorts the market by driving up interest rates – particularly when there is great demand for an IPO – resulting in fewer applications for shares. The HKAOB alleged that some brokers have seen clients abandon IPO subscriptions because of the banks’ practices.

32. The SFC consulted the Hong Kong Monetary Authority (HKMA), and based on the Authority’s response, concluded that the complaint by the HKAOB did not raise any concerns regarding anti-competitive conduct by banks. In February 2007, the SFC replied to the HKAOB accordingly.

33. In view of the findings of the HKMA, COMPAG decided that the complaint of anti-competitive conduct by banks in the provision of IPO financing **was unsubstantiated**.

Case 6: Anti-Competitive Conduct in GETS Market (not substantiated)

34. In 2005, Global e-Trading Services Limited (Ge-TS) lodged three complaints against Tradelink Electronic Commerce Limited (Tradelink), alleging that the latter engaged in anti-competitive conduct in the Government Electronic Trading Services (GETS) market. The outcome of the investigation into two of these complaints was reported to COMPAG in 2006 and reported on in the previous COMPAG Annual Report.

35. The third complaint alleged that Tradelink sought to maintain its dominant share in the GETS market by offering selective discounts and exclusive contracts to its customers. The then Commerce, Industry and Technology Bureau (CITB) commissioned the Competition Affairs Branch of the Office of the Telecommunications Authority (OFTA) to conduct a competition impact analysis to assess the impact of the alleged anti-competition pricing policy of Tradelink in the GETS market.

36. OFTA found no evidence of a pricing-below-cost strategy by Tradelink. It noted that the discounts offered could benefit consumers and

could be viewed as a natural consequence of an intensification of competition. Furthermore, OFTA found no evidence that Tradelink's exclusive contracts had an overwhelming freezing effect on fresh entry or the sustainability of existing entry into the GETS market. Having regard to the outcome of the analysis and general principles of fair competition, OFTA concluded that there was no firm evidence to substantiate the allegation.

37. CITB accepted OFTA's conclusions and undertook to consider the need for additional measures to further promote fair and healthy competition in the GETS market in the context of a review that was then underway. The review formed part of the process for determining the mode of service delivery in the GETS market after expiry of the current services contracts.

38. CITB has informed the service providers concerned of the above findings.

C) Joint Boycott

Case 7: Wedding Expo Organisers (not substantiated)

39. In February 2006, a Taiwan-based wedding photography company registered in Hong Kong made a complaint to the COMPAG Secretariat that two wedding expo organizers had refused to allow it to participate in exhibitions held at the Hong Kong Convention and Exhibition Centre (HKCEC) in 2005 and early 2006 under pressure from other wedding photography companies. It also alleged that the organisers had restricted participating companies from promoting wedding photography services offered in Taiwan and the Mainland.

40. CITB investigated these complaints, but found **no conclusive evidence that the conduct of the two wedding expo organizers amounted to anti-competitive behaviour** that had the effect of limiting access to and contestability in the wedding services market. It further noted that the complainant had participated in wedding expos in late 2006.

41. However, CITB considered that the criteria used by the two wedding expo organisers in selecting exhibitors lacked transparency, and drew their attention to the Statement on Competition Policy.

D) Government Policies and Practices

Case 8: Single Tender for Artificial Turf (not substantiated)

42. In April 2006, the Architectural Services Department (ArchSD) received a complaint from an artificial turf supplier, Sports Technology International (Asia) Ltd. alleging that a decision by the department to use a single-tender approach to letting contracts for the supply and installation of “third generation” artificial turf for a particular project was anti-competitive.

43. The then Environment, Transport and Works Bureau (ETWB) reviewed the complaint and found that –

- (a) there was a genuine and urgent need to use “third generation” artificial turf for the project. As advised by the Leisure and Cultural Services Department, this is the only type of artificial turf that meets the performance standards of the international football authority, the Federation Internationale de Football Association (FIFA). The product offers a surface similar to that of natural grass, but at a much lower maintenance cost. It can be used intensively all year round even during bad weather, and pitches that have this surface can therefore be made available for a far greater number of sessions than natural grass pitches, thereby helping to meet the considerable public demand for the booking of soccer pitches.
- (b) at the time of the contract tender, only one company had registered the relevant patents in Hong Kong for the “third generation” artificial turf. Although the infringement of a registered patent is primarily the liability of a manufacturer of a product or a contractor undertaking relevant works, the Government should not risk being held liable by conducting an open tender exercise to procure the product with prior knowledge of the potential for infringement; and
- (c) the Government should respect the protection afforded to registered patents. At the same time the standing procurement procedures for adopting the single-tender approach should be adhered to. ArchSD had complied with the relevant procedures in respect of the

single-tender approach as stipulated in the Stores and Procurement Regulations 315 and 325.

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

Case 9: Monopoly in the Delivery of Letters (not substantiated)

45. In September 2006, the Hong Kong Direct Marketers Association (the Complainant) wrote to InvestHK with a complaint that the monopoly market position of Hongkong Post (HKP) allowed it to refuse to offer new services, for example: postal codes, changes to address files, Chinese-English-Chinese Address Verification and lifestyle/database profiling, to customers. The Complainant also observed that some overseas jurisdictions are liberalising their postal markets.

46. COMPAG noted that HKP would consider the merits of introducing a new service on an individual basis. Its statutory monopoly on letter delivery had no bearing on decisions as to whether to provide new services and this was not therefore a competition issue.

47. In its deliberations COMPAG considered whether the statutory monopoly enjoyed by HKP is consistent with the Government Statement on Competition Policy, in particular whether the monopoly is justifiable on public policy grounds, bearing in mind considerations such as service reliability and social service commitments. COMPAG has also reviewed whether the monopoly impairs economic efficiency or free trade.

48. COMPAG also noted that HKP is part of the international postal network and has an obligation to deliver all postal items coming to Hong Kong as well as despatch world-wide postal items leaving Hong Kong. The monopoly on letter delivery allows HKP to serve the community cost-effectively, as it prevents the most profitable delivery routes being “cherry-picked” by private operators.

49. COMPAG further noted that the Government had taken a liberal view towards the enforcement of HKP’s monopoly. For example, private operators have long been providing local and international courier services to

meet market demand, generating competition for some postal services.

50. In conclusion, COMPAG decided that the structure of Hong Kong's postal services market is in principle consistent with Government's Statement on Competition Policy. Nonetheless, Economic Development and Labour Bureau (after July 2007, the Commerce and Economic Development Bureau) and HKP will keep the scope of the HKP monopoly under review.

Case 10: Subventions for Performing Arts Groups (pending policy review)

51. This case involved a complaint from the Executive Director of Spring-Time Stage Productions Limited that the government subvention policy for the performing arts sector resulted in unfair competition. Specifically, he questioned the Government's criteria for the selection of performing groups to be funded, the amount of support given to the selected groups, the small number of groups supported and the alleged anti-competitive conduct of subvented groups (such as below market pricing).

52. In February 2007, the Chairman of the Funding Committee for the Performing Arts - a committee appointed by the Secretary for Home Affairs - to advise the Government on funding policy for performing arts groups, together with representatives of the Home Affairs Bureau (HAB) met the Complainant. The Complainant confirmed that he was not opposed to a subvention and subsidy system for performing arts groups, but was dissatisfied with the prevailing assessment and implementation arrangements. He considered that the current subvention policy had inadvertently created unfair competition amongst different performing groups. While he was not opposed to subvention as a matter of policy, he held the view that more support should be channelled towards the nurturing of young and budding artists and art groups and that there should also be differentiation by art form. He held the view that if there was already support in the market for a particular art form, subvention from the Government for that particular art form should stop.

53. As pointed out by HAB, subvention for the performing arts sector serves the policy objective of making the arts more accessible to the public, and encouraging wider public participation in and appreciation of the arts. Furthermore, the present subvention arrangement will be reviewed by the

Funding Committee for the Performing Arts, which is expected to develop new funding assessment criteria, conduct the necessary assessments and disburse subventions under the new funding model from 2009 onwards to ensure a level playing field in this sector.

54. HAB will inform COMPAG of the outcome of the Funding Committee's review.

Case 11: Government's Investment in Digital Trade and Transportation Network Limited (not substantiated)

55. Global e-Trading Services Limited (Ge-TS) lodged two complaints to the COMPAG Secretariat in January and February 2006 respectively. The complaints mainly comprised the following allegations –

- (a) the selection process by which the Government chose Tradelink to develop and operate the Digital Trade and Transportation Network (DTTN) system was unfair and lacked transparency;
- (b) the Government's equity investment in Digital Trade and Transportation Network Limited (DTTNCo) would deliver a message to the market that the Government was biased towards DTTNCo, which would discourage investment from the private sector in developing DTTN systems; and
- (c) Tradelink used the Government's investment in DTTNCo as a marketing tool to create a competitive advantage for its own business.

56. The then Economic Development and Labour Bureau looked into the these allegations and found that –

- (a) the selection process through which the Government selected Tradelink to develop and operate the DTTN system was fair;
- (b) the Government's decision to invest in DTTNCo was made in response to industry demand for a neutral and non-exclusive platform underpinned by government participation in the

shareholding and corporate governance of the company. The investment was supported by the Hong Kong Logistics Development Council and endorsed by the Finance Committee of the Legislative Council; and

- (c) there was no evidence to support the allegation against Tradelink's use of the Government investment in DTTNCo as a marketing tool.

57. Based on these findings, COMPAG concluded that **none of the three allegations was substantiated.**

5. Interface with International Organisations

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

58. The principal forum in which APEC economies discuss competition policy and deregulation issues is the Competition Policy and Deregulation Group (CPDG). The Group, which also promotes discussion on practical ways to take forward the APEC Principles to Enhance Competition and Regulatory Reform met in Canberra, Australia in January 2007.

59. In addition to annual meetings, the CPDG organises programmes in collaboration with other APEC groups and international organisations to encourage APEC economies to exchange views and strengthen capacity building in areas relating to competition policy and deregulation. These programmes include the APEC-OECD Integrated Checklist on Regulatory Reform (the Checklist) compiled jointly with the Organisation for Economic Co-operation and Development (OECD), which is a tool through which APEC economies can “self-assess” their respective regulatory reform efforts. Since July 2006, the CPDG has adopted this as an item on its Collective Action Plan. Making use of the Checklist, Hong Kong, China (HKC) conducted a self-assessment on issues relating to competition policy and market openness, and submitted a paper to the APEC Economic Committee in September 2006.

60. At the invitation of the CPDG, two officials from HKC attended the 2nd APEC Training Course on Competition Policy held in August 2006 in Bangkok, Thailand. The course was co-organised by the Department of Internal Trade of Thailand and the Japan Fair Trade Commission.

61. APEC is currently developing a model measure on competition policy as a non-binding reference for APEC economies when discussing or negotiating regional trade and free trade agreements. HKC has contributed to this process.

2) World Trade Organization (WTO)

62. In the course of the fifth Trade Policy Review on HKC conducted in Geneva in December 2006, competition policy was one of the areas that

attracted comment from WTO members. The HKC delegation informed Members that a review of the competition policy framework was in progress. Members noted that a public consultation exercise was being conducted, and that upon completion of the exercise, the Hong Kong SAR Government would draw up proposals on the way forward. The issue of competition is not currently being actively pursued in any specific WTO forum.

3) International Monetary Fund (IMF)

63. In its Staff Report for the 2006 IMF Article IV Consultation for Hong Kong, the IMF noted that the Hong Kong SAR Government was appropriately focusing on safeguarding Hong Kong's traditional strengths – flexible markets and strong institutions – which underline the economy's competitiveness. In this regard, the IMF welcomed the possible introduction of a competition law that would reinforce these traditional strengths.