

競爭政策諮詢委員會工作報告

COMPAG

Competition Policy Advisory Group Report

2007 – 2008

(English version)

1. Introduction

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

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

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

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

4. In order to ensure that our competition policy keeps pace with the times and continues both to serve the public interest and to facilitate a business-friendly environment, in June 2005, COMPAG appointed the Competition Policy Review Committee (CPRC). The role of the committee was to review and to make recommendations on the future direction for competition policy in Hong Kong. The CPRC completed its review in June 2006, and published a report recommending that a competition law be introduced to tackle anti-competitive conduct across all sectors.

5. In November 2006, the Government launched a three-month public consultation on the way forward for Hong Kong's competition policy. Feedback from the public showed that there was a significant amount of support for the introduction of a cross-sector competition law and the establishment of a Competition Commission. However, despite the general public support for such a law, some stakeholders in the business sector expressed concern that the new law may adversely affect normal business

operations, in particular those of small and medium enterprises. To address these concerns, in May 2008 we published a consultation paper outlining detailed proposals for a competition law. The result of the consultation and an update on progress with the preparation of the Competition Bill are summarised in **Chapter 2** of this report.

6. COMPAG seeks to foster competition in both the public and private sectors in Hong Kong. To this end, it aims 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**.

7. A key area 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 2007-08 and the current positions of outstanding cases are summarised in **Chapter 4**.

8. In order for Hong Kong to maintain our high degree of competitiveness in relation to other major economies, 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

9. 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. 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.

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**. There was also general support for strengthening the regulation of competition through the establishment of a Competition Commission, as recommended by the CPRC. A copy of the outcome report on the public consultation exercise can be viewed at www.cedb.gov.hk/citb/ehtml/pdf/publication/ConsultationReport-eng.pdf.

11. In view of the wide support for new legislation, the Government has started work on the design of the law. Nonetheless, with a view to addressing the concerns of some stakeholders that the new law may adversely affect normal business operations, in particular those of small and medium enterprises, in May 2008 the Government published for comment the proposed major provisions that the competition law might contain, and invited submissions before 5 August¹.

¹ The consultation period ended on 5 August 2008. We have received over 170 written submissions from individuals and business organizations. We have analyzed the views received and compiled a report on the feedback, which has been uploaded to the following website of the Commerce and Economic Development Bureau for reference by the public – http://www.cedb.gov.hk/citb/ehtml/pdf/publication/Consultation_Report_30_9.pdf

12. Taking into account the views submitted by the public on the proposed provisions for the competition law, the Government is now preparing the draft legislation, and aims to introduce the Competition Bill into the Legislative Council in the 2008-2009 legislative session.

3. Progress with Previous Initiatives

13. This chapter gives a brief update on progress with initiatives that have been outlined in previous COMPAG annual reports.

1) Measures to prevent possible unfair competition at auctions of Lunar New Year Fair stalls

14. 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 an auction, no one shall interfere with the bids of other persons or cause other persons to surrender their bids for a certain pitch. To prevent bid-rigging during an auction, the auction notice also stipulates that it is an offence under Section 7 of the Prevention of Bribery Ordinance (Cap. 201) to offer, solicit or accept an advantage as an inducement to or reward for refraining from bidding at an auction. Further, anyone who commits fraud at an auction is liable to criminal prosecution. Notices are displayed at FEHD district offices, auction venues and on the FEHD website. FEHD staff and police officers are responsible for maintaining order during auctions. Prior notice is given to auction participants that staff will take video recordings to deter misconduct. FEHD also uses identification boards to help auction staff identify bidders. FEHD will keep these arrangements under review and introduce further improvements as necessary.

2) Future regulatory arrangements for the electricity supply sector

15. The Government signed post-2008 Scheme of Control Agreements (SCAs) with each of the two power companies in January 2008. The Government will prepare for the opening up of the electricity market, including the formulation of a new market mechanism and the associated regulatory framework, in the next regulatory period (from 2008 to 2018). The Government will consult the public when a concrete proposal is available.

4. Cases Reviewed by COMPAG

16. 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 (not substantiated)

17. 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.

18. Having checked the allegations made in the complaint against the available information, Highways considered that there was no firm evidence corroborating the allegation. However, the possibility of collusion between the approved suppliers cannot be entirely ruled out. As to the binding of tenderers into pre-bid agreements for the supply of materials, Highways have reviewed the need for undertakings that bind the tenderer and the supplier, and have decided to dispense with these in future term contracts. This would help eliminate the possibility of suppliers binding tenderers into

pre-bid agreements for the supply of bituminous materials. However, Highways will still require the submission of the sub-contractor's warranty after the award of the contract to the successful tenderer.

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

B) Abuse of dominant market position

Case 2: Anti-competitive conduct by a supermarket (not established)

20. 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.

21. COMPAG referred the case to the then Commerce, Industry and Technology Bureau (which has become the Commerce and Economic Development Bureau after re-organisation on 1 July 2007), which commissioned the Consumer Council ("the Council") to investigate the complaint. The Council examined the complaint with reference to its previous studies on the supermarket sector, relevant overseas experience and the guidelines set out in the Government's Statement on Competition Policy. However, the Council encountered difficulties in examining the complaint thoroughly due to the limited information provided by the Supplier. Furthermore, it could not interview the Supermarket to assess the reason behind the practices without exposing the complainant's identity. As a result, the Council was unable to approach the supermarket for verification of the allegations made by the complainant. No evidence was found that the Supermarket placed impediments on the complainant, which could prevent it from supplying to other outlets, or for the purpose of substantially lessening

competition. It could not be concluded that the Supermarket's behaviour amounted to anti-competitive conduct that has the effect of limiting market accessibility or contestability and impairing economic efficiency.

22. In view of the findings, the COMPAG decided that the complaint that the Supermarket had engaged in **anti-competitive conduct was not established**. Nevertheless, the concerns of the Supplier will be taken into account in the Government's review of the competition policy.

Case 3: Anti-competitive conduct in the provision of marine pilotage services in Hong Kong (not substantiated)

23. In October 2005, the Financial Secretary's Private Office (FSPO) received an anonymous complaint against the Hong Kong Pilots Association Limited (HKPAL). FSPO referred the complaint to the then Economic Development and Labour Bureau. The investigation of the complaint was later taken over by the Transport and Housing Bureau (THB) upon the re-organisation of the Government Secretariat on 1 July 2007.

24. The complaint mainly comprised the following allegations –

- (a) the Marine Department (MD) grants exclusivity to the HKPAL in the provision of pilotage services, and maintains a close relationship with the HKPAL;
- (b) the HKPAL uses its monopoly status to charge high pilotage dues and provide services of poor quality, knowing that outsiders have no access to the market; and
- (c) through its subsidiary, Po Kee Marine Services Company (Po Kee), the HKPAL monopolises the provision of mooring services at buoys and wharves.

25. The THB looked into these allegations and found that –

- (a) in the interests of safety and with reference to international practice, pilotage services in Hong Kong should remain regulated by the MD;

- (b) the HKPAL does not have exclusivity for the provision of pilotage services in Hong Kong, and there is no restriction on licensed pilots forming their own associations to provide similar services;
- (c) when the Pilotage Authority (i.e., the Director of Marine) determines the level of pilotage dues in consultation with the Pilotage Advisory Committee, the interests of the shipping industry (i.e. the customers) are well represented;
- (d) the HKPAL's customers are under no obligation to use Po Kee as there are other launch companies and mooring service providers in the market.

26. Based on the above findings, COMPAG concluded that there is a **lack of clear evidence to substantiate a complaint of anti-competitive conduct against the HKPAL**. Nevertheless, the THB would review the current regulatory regime with the aim of clearing any misconception that exclusivity is granted to the HKPAL, and would explore alternative routes for potential apprentice pilots to join the industry as a long term measure.

Case 4: Provision of services at Hung Hom Public Funeral Parlour (not substantiated)

27. In November 2006, the Food and Environmental Hygiene Department (FEHD) awarded a contract for "The Grant of a Right to Provide Services at Hung Hom Public Funeral Parlour" to the Universal Funeral Parlour (Universal). Following the award of the contract to Universal, a number of newspaper articles carried comments alleging that this would lead to a monopoly in the market and hence to higher prices for the rental of funeral service halls.

28. In view of the above concerns, the Food and Health Bureau (FHB) assessed the extent to which the award of the contract to Universal might affect competition in this sector, and found that –

- (a) with the availability of five funeral halls in Hong Kong operated by service providers other than Universal, Universal faces competition and does not have a monopoly; and

- (b) the operator of the Hung Hom Public Funeral Parlour is required under contract to provide services at reasonable standards commensurate with the level of charges, and to provide low-cost funeral services to underprivileged individuals introduced by the Social Welfare Department or other relevant agencies. The Government is empowered to remove an operator who is in material breach or has repeatedly breached this undertaking or has failed to rectify a breach which is capable of being remedied within reasonable time.

29. Having regard to the above findings, FHB considered that awarding Universal the contract to manage the Hung Hom Public Funeral Parlour has not given Universal a dominant position in the market which in turn might create the potential for monopoly pricing, predatory pricing or other anti-competitive conduct. COMPAG agreed and concluded that **the complaint was not substantiated**.

Case 5: Complaint from Hong Kong Shippers Council: Depot Management Fee (under investigation)

30. In February and March 2008, the Hong Kong Shippers Council (HKSC) wrote to the Hong Kong Container Depot & Repairer Association Limited (HKCDRA) regarding the imposition of a Depot Management fee, alleging that members of the HKCDRA have collectively introduced a new Depot Management fee of \$10 which would take effect from 16 March 2008. The HKSC argues that the new fee is monopolistic in nature and thus anti-competitive.

31. The complaint has been referred to the Transport and Housing Bureau who will submit a report to COMPAG upon completion of its investigation.

Case 6: Alleged anti-competitive conduct in relation to the service termination practices of a Pay TV licensee (under investigation)

32. In May 2008, the Broadcasting Authority (BA) received a complaint from a domestic pay TV programme service licensee (Licensee A) against another pay TV licensee (Licensee B). It was alleged that Licensee B's

practices, which prevented its subscribers from terminating their service arrangements and transferring to other pay TV services had the purpose or effect of preventing, distorting or substantially restricting competition in the pay television programme service market, in breach of sections 13 and/or 14 of the Broadcasting Ordinance (BO) (Cap. 562).

33. The Television and Entertainment Licensing Authority has sought legal advice and the Department of Justice has confirmed that the complaint falls within the ambit of the BO. The BA has commenced an investigation into the case in accordance with the "Complaint Investigation Procedures" promulgated by the BA in May 2007.

C) Government Policies and Practices

Case 7: Tender relating to the Implementation of the Extension of the Automated Passenger Clearance System for the Immigration Department (under investigation)

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

35. In December 2006, restricted tenders for the "Design, Supply, Delivery, Installation, Commissioning, Maintenance of Hardware, Software and Related Services for the Implementation of the Extension of APCS (APCS II) for ImmD" (Tender B) were invited from the two existing contractors for reasons of system compatibility and interchangeability with the approval of Director of Government Logistics after getting the confirmation from the Department of Justice that Article XV.1 (d) of WTO GPA might be invoked to conduct limited tendering procedure based on the justifications given by the

Director of Immigration. By the tender closing date, only one offer was received. The contract was later awarded to the only tenderer on the recommendation of CTB in August 2007.

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

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

37. The complaint has been referred to the Government Logistics Department and ImmD for investigation. The Treasury Branch of the Financial Services and the Treasury Bureau will report the findings to COMPAG within 2008.

5. Interface with International Organisations

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

38. The principal forum in which APEC economies discuss competition policy and deregulation issues is the Competition Policy and Deregulation Group (CPDG). CPDG also promotes discussion on practical ways to take forward the APEC Principles to Enhance Competition and Regulatory Reform.²

39. 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 in 2005 with the Organisation for Economic Co-operation and Development (OECD), which is a tool through which APEC economies can “self-assess” their respective regulatory reform efforts. To further the work already done on regulatory reform, Peru organised a seminar on “Best Practices in Regulation and Promotion of Efficiency in Transport Infrastructure Facilities” in August 2008. This Seminar aims to facilitate information sharing on regulatory and competition policy experiences in transport infrastructure among APEC member economies. To share HKC’s successful experience in port regulatory policy and efficiency, two professors from the Hong Kong Polytechnic University were nominated to the Seminar as speakers.

40. At the invitation of the CPDG, three officials from HKC attended the 3rd APEC Training Course on Competition Policy held in August 2007 in Singapore. The course was co-organised by the Competition Commission of Singapore and the Japan Fair Trade Commission.

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

² The Group met in Lima, Peru in August 2008.

2) World Trade Organization (WTO)

42. 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 pursued in any specific WTO forum.

3) International Monetary Fund (IMF)

43. In its Staff Report for the 2007 IMF Article IV Consultation for Hong Kong, the IMF emphasized that the Hong Kong SAR's traditional strengths – flexible markets and sound governance – should be safeguarded and strengthened. In this context, the IMF welcomed the proposed general competition law.