



18 November 2010

Bills Committee on Competition Bill
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road
Central, Hong Kong

(By Email: hysiu@legco.gov.hk)

Dear Sir / Madam,

HAFFA Views on Competition Bill (“Bill”)

In response to your invitation for views submission, the Executive Committee of Hongkong Association of Freight Forwarding & Logistics (HAFFA) has duly discussed the matter. Please find below our comments or enquiries for your kind consideration and clarification.

1. Back in August 2008, we have submitted a letter following the consultation on Competition Policy. However, except an acknowledgment letter, no official feedback to the enquiries was received from the Government since then. In this connection, we would like to re-submit the attached letter in which the views and enquiries are still outstanding for your kind clarification.
2. According to the Bill, it is a statutory requirement for the Competition Commission to draw up regulatory guidelines on the interpretation of the conduct rules and implementation of block exemption in consultation with persons as it considers appropriate. As the Association needs to evaluate whether its various activities have infringed the law or which activities should be applied for block exemption, it is important for us to know when the above consultation will be carry out and when the regulatory guidelines will be available. If there is anything we can assist the Commission in respect of the consultation, please let us know.
3. In accordance with the second conduct rule under the Bill, an undertaking that has a “substantial degree of market power” in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. How to define market? And please issue regulatory guidelines on how to quantify “substantial degree of market power” and “abuse that power”?
4. When the guideline is disseminated to the public, a reasonable transitional period for the implementation of the Competition Law is required to facilitate the industry adapting to the statutory requirement.

5. In regard to the institutional framework, please clarify which party will be responsible for the actions below:
- a/ receipt of complaints;
 - b/ conducting investigation;
 - c/ bringing proceedings to the Tribunal; and
 - d/ adjudicating the cases

It is of our view that there is a need for check and balance to ensure that the Competition Authority powers are not abused.

6. Under the proceedings, which party should bear the burden of proof, plaintiff or defendant?
7. Administrated by International Air Transport Association (IATA), a global trade organization of Air Transport, Cargo Account Settlement Systems (CASS) is a system of billing and settling of accounts between airlines and freight forwarders.
CASS Website: http://www.iata.org/worldwide/north_asia/hong_kong_china/cass.htm

So far there are 30 major airlines participates in CASS Hong Kong (Export), all forwarders having air freight business transaction with it shall settle payment via CASS by cheque without other alternative channel and to abided by its rules. Please advise if this act is in violation of the conduct rules stipulated in the Bill. Besides, HAFFA, under IATA Agent Liaison Working Group, was invited to discuss issues related to CASS sales, marketing or financial matters (e.g. to set credit period and bank guarantee level). After the Hong Kong competition law comes into effect, will such discussion be in violation of the law?

Should you require further information or clarification, please feel free to contact the undersigned or Ms. Angie Lim at 2796 3121.

Thank you for your attention and we look forward to receiving your feedback.

With best regards,

A handwritten signature in black ink, appearing to be "Alice Lui", written over a vertical line that extends down the page.

Alice Lui
Director

Cc: HAFFA Executive Committee



21 August 2008

Ms. Lai Wai Ming, Linda, JP
Deputy Secretary for Commerce & Economic Development
(Commerce and Industry)
Commerce and Economic Development Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong

By fax (2840 1621) & by post

Dear Ms. Lai,

Competition Ordinance

1. I am directed by the Executive Committee of Hong Kong Association of Freight Forwarding and Logistics Limited (“HAFFA”) to write to you in relation to the captioned matter.
2. HAFFA is a trade association of Hong Kong freight forwarding and logistics operators engaged in international transportation of goods and other logistics services. It is a non-profit making organization, and its predecessor, the Association of Hong Kong Air Freight Forwarding Agents, was founded back in 1966.
3. HAFFA supports the principle of competition and has followed the developments relating to the proposed cross-sector Competition Ordinance (the “proposed Ordinance”). The Consultation Paper published by Government in May 2008 has been perused.
4. The purpose of this letter is to enquire with you about Government’s competition policy under the proposed Ordinance in relation to trade associations. This aspect does not seem to have been addressed in the Consultation Paper.

Applicability

5. We understand that prohibitions under the proposed Ordinance are intended to apply to “undertakings” (which may be defined as individuals, companies or other

entities engaging in “economic activities”¹). Further, there will be 2 prohibitions: first, a general prohibition on “agreements” and “concerted practices” between “undertakings” that have the purpose or effect of substantially lessening competition (“1st Prohibition”)², and secondly a general prohibition on an “undertaking” that has a substantial degree of market power from abusing that power with the purpose or effect of substantially lessening competition (“2nd Prohibition”)³.

6. In relation to the above we would like to seek guidance and clarifications as hereinafter mentioned.

7. “Undertakings”. The Consultation Paper emphasizes that the Prohibitions will apply to an undertaking “*only when it engages in economic activities*”⁴. It would appear to us that “economic activities” refers to economic trading in the sense of offering goods and/or services to the market, although profit motive may not be conclusive or relevant. The question, however, is: would general association work (such as administrative, secretarial, co-ordination duties, research, collection or dissimulation of information, and making recommendations to members) which do not involve trading activities in the market fall within the meaning of the term?

8. “Agreements” and “Concerted Practices”. The 1st Prohibition refers to “agreements” and “concerted practices”. Conceivably, members who enter into an anti-competitive “agreement” through an association may be subject to sanction. But, would the association itself be implicated? Where an association is an independent legal entity, it would appear conceptually not possible for it to enter into agreements or engage in concerted practices *with itself*. Naturally, the association is capable of so doing with other entities (whether members or others). Nevertheless, what we contemplate here are decisions or resolutions or (industrial) recommendations and the like which are made by the association independently and not in conjunction with others.

9. “Substantial Market Power”. The 2nd Prohibition refers to “market power” of an “undertaking”⁵. Could this prohibition be applicable to an association where the

¹ Consultation Paper Proposal 23

² Consultation Paper Proposal 24

³ Consultation Paper Proposal 27

⁴ Consultation Paper Para 3 on Page 23

⁵ Consultation Paper Proposal 27

association is not itself engaged in economic trading in the market? If the answer is positive, does it mean that the “market share” or “market power” of individual members would be aggregated and made attributable to the association?

Standardization

10. Standardization is another area which the Consultation Paper does not seem to have addressed, and about which HAFFA also wishes to seek Government’s views and guidance. In raising this we have in mind matters such as standards of cargo handling, standards of security/safety checks, standards of training and standard trading conditions. HAFFA does develop or promulgate such standards on the basis that members are free to adopt or adapt them or use alternative procedures or conditions.

11. There ought to be little argument that standardization of the types mentioned above can contribute to economic efficiency, economy of scale and transparency and is thus beneficial to the economy. Yet, in theory standardization may have an impact on competition. Presumably, it is in such situations where exemption or block exemption becomes relevant.

12. The types of standards mentioned above are quite common among international forwarders organizations. For example, almost all freight forwarders associations around the world publish their own standard trading conditions (including those in Singapore and the UK). And so does HAFFA. The Consultation Paper mentions that the “*Commission may issue a block exemption in respect of a category of agreement that is likely to yield economic benefit that outweighs any anti-competitive harm*”⁶. HAFFA wishes to seek guidance as to what Government envisages in this respect; such as the type of agreements / standards that may be exempted and the criteria therefor.

13. A related question is whether it is intended that the concept of fair or reasonable contract terms would form a part of the Competition Ordinance in Hong Kong. It is understood that at present such matters are dealt with by statutes such as the Control of Exemption Clauses Ordinance and common law rules or principles. From the Consultation Paper there seems to be no indication that the HK Competition Law intends to make inroads in this area. Is this observation correct?

⁶ Consultation Paper Chapter I Section VII para 47 on page 12



14. We thank you for your kind attention. We trust you will appreciate that the primary reason for seeking the guidance and clarifications above mentioned is to enable HAFFA to look forward and formulate the role it will play in the industry when the proposed Ordinance becomes law.

15. We understand that the public consultation for the proposed Ordinance has ended in early August and the comments collected are being reviewed. To facilitate the formulation of our way forward, we would highly appreciate it if you could let us have your response (albeit initial) as soon as convenient and by 04 September 2008. Should you require further information or clarification, please feel free to contact the undersigned or Ms. Angie Lim at 2796 3121.

We look forward to hearing from you.

Yours faithfully,



Alice Lui
Director
HAFFA

Cc: HAFFA Executive Committee