

Decision of the Competition Commission

CCM/DS/0038

Confidential

**Possible collusive agreements by the members of
the Customs House Brokers Association.**

20 February 2020

Competition Commission

Decision of the Competition Commission (the 'Commission') on the investigation into the potential collusive agreements by members of the Customs House Brokers Association (CHBA)

THE COMMISSION –

Mr A. Mariette	-	Vice-Chairperson
Mrs M. Rajabally	-	Commissioner,
Mr. C. Seebaluck	-	Commissioner,
Mrs. V. Bikhoo	-	Commissioner,

Having regard to the Competition Act 2007,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to a report of the Executive Director of the Commission dated 10 June 2019 on the investigation into potential collusive agreements by members of the Customs House Brokers Association (CHBA).

We, Commissioners, decide as follows:

Introduction

- 1.0 Prior to 29 June 2017, the Association of Customs House Brokers (CHBA) had published on its website the Standard Trading Conditions (STC) which "govern the business practices of Customs House Brokers". The STC contains clauses, among others, setting the rate for Disbursement Fee at 2.5% on the total amount of disbursement + VAT, Interest for late payments at 1% monthly on amount due post-invoicing date and setting the limitation of liabilities of custom brokers at Rs 25,000.
- 2.0 The Executive Director of the Commission (the 'Executive Director') on the 29 June 2017 opened an investigation under section 51 of the Competition Act ('the Act') into a possible restrictive business practice by members of CHBA. The investigation was centred around the question of whether CHBA has breached section 41 of the Competition Act 2007.
- 3.0 On 10 June 2019, the Executive Director submitted his report (the 'Report') on the investigation (INV039) to the Commission for its determination.

The law

- 4.0 It is imperative, for an infringement under section 41 of the Act, to prove that members of CHBA have agreed to charge their respective clients at such rate as regards disbursement fee and interest, and to set the quantum as to liability of its members for any type of claim. It must also be proved that the agreement

as regards disbursement fee and interest, and to set the quantum as to liability of its members for any type of claim. It must also be proved that the agreement between members of CHBA “*significantly prevents, restricts or distorts competition*”. These are the required elements of infringement under section 41 of the Act which is reproduced below:-

4.1 “Horizontal agreements

- (1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if –
- (a) it exists between enterprises that supply goods or services of the same description, or acquire goods or services of the same description;
 - (b) it has the object or effect of, in any way –
 - (i) fixing the selling or purchasing prices of goods or services;
 - (ii) sharing markets or sources of the supply of the goods or services; or
 - (iii) restricting the supply of the goods or services to, or the acquisition of them from, any person; and
 - (c) significantly prevents, restricts or distorts competition.
- (2) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void”.

(underlining is ours)

5.0 Similarly, it is the Executive Director’s view that the elements of an infringement under section 41 of the Act are:-

- 5.1 an agreement between enterprises or a decision by an association of enterprises;
- 5.2 the enterprises supply services of the same description the horizontal aspect of the agreement;
- 5.3 whether agreement aims at fixing the selling price of the ‘service’ offered by members of CHBA; and
- 5.4 whether the agreement significantly prevents, restricts or distorts competition.

6.0 Under section 59 of the Act, the Commission “may, in relation to a restrictive agreement falling within the scope of section 41, in addition to, or instead of,

giving a direction, make an order imposing a financial penalty on the enterprise” but such penalty shall only be imposed if “it is satisfied that the breach of the prohibition was committed intentionally or negligently”.

Facts

- 7.0 CHBA is a registered trade association to the Registrar of Associations since August 1976. Its members (46 in numbers as at financial year ending June 2017) are licensed customs house brokers operating in Mauritius. The main object of CHBA is to “create and promote a better understanding among Customs House Brokers themselves and between itself and Customs authorities or any other official Authority and private company”.
- 8.0 It is the Executive Director’s contention that certain conditions set in the STC, as appeared on the website of CHBA, may be contrary to section 41 of the Act, the more so:-
- 8.1 the disbursement fee is fixed at 2.5% on the total amount of disbursement + VAT (that is 2.5% on the value of the payment made by a member of CHBA on behalf of a client for the purpose of clearing his consignment);
- 8.2 interest on late payments is fixed at 1% monthly on amount which becomes due 14 days after the invoice date or as otherwise agreed; and
- 8.3 agreeing to limit the quantum as regards liability of its members, in any circumstances, to Rs 25,000.
- 9.0 According to the Executive Director, acting upon various documents, there is evidence to suggest that section 41 of the Act may have been, additionally, breached in that “members of the CHBA may have established a minimum pricing policy for services provided by its members in relation to the supply of customs brokering and related services”.
- 10.0 In or about mid-April 2019, the website of CHBA, www.customshousebrokers.com, has been deactivated following the launch of the investigation by the Competition Commission to remove the impugned minimum pricing policy instructions.
- 11.0 It is the contention of the CHBA that the STC was made “null and void” after the provisions of the Customs Act 2005 had come into force but it remained on its website until 04 July 2017 by mere inadvertence.

Investigation and findings

- 12.0 Pursuant to section 51 of the Act, the Executive Director proceeded to investigate (INV039) whether the reported conduct of CHBA may amount to an infringement of section 41 of the Act.

- 13.0 The Executive Director submitted his Report on the matter to the Commission on 10th June 2019. The Report contains the findings of the Executive Director and his recommendations.
- 14.0 The Executive Director concluded that section 41 of the Act has been breached as follows:-
- 14.1 the agreement by way of STC fixing the disbursement fee at 2.5% is evidence of an understanding among members of CHBA and this amounts to an agreement for price fixing;
 - 14.2 the agreement by way of STC fixing the interest rate at 1% monthly for late payments amounts to an agreement for price fixing; and
 - 14.3 the minimum pricing policy document which contains fees for specific services offered by members of CHBA and which was submitted to the Independent Commission Against Corruption (ICAC) during a workshop held on 12 May 2005 is also evidence of price fixing (Refer to statement by President at the CHBA's Annual General Assembly of 5th March 2010).
- 15.0 The fourth competition concern which is in respect of limiting the liability of members at Rs 25,000 cannot, according to the Executive Director, amount to an infringement of section 41 of the Act.

Undertakings

- 16.0 Undertakings have been offered by CHBA on 20 February 2019. The CHBA has undertaken to:-
- 16.1 clearly and unequivocally inform all its members, in writing, that any clause of the STC, as it has previously published, in relation to prices, price levels, or components thereof or quantity of supply, in particular clauses relating to a fixing of a disbursement fee in 'Fees and Disbursement' section, fixing the quantum as regards financial liability of its members towards their clients in section relating to 'Duties and Responsibilities of the Broker' are null and void;
 - 16.2 inform its members that any previous pricing policy discussed at its level, communicated and disseminated to them is null and void as members remain free to apply their own prices, terms and conditions of service in their commercial dealings with customers;
 - 16.3 not to hold any discussions with its members or facilitate discussion among them for establishing prices or fees for their services delivered in the course of their commercial activities;
 - 16.4 ensure that these undertakings are disseminated to and understood by all existing and prospective members;

- 16.5 refrain from discussing, at any of its meetings, issues relating to fixing or agreeing of prices for services offered by its members;
- 16.6 ensure that its members, in no circumstances, collect, exchange or disclose competitively sensitive information, between themselves, as regards prices, price lists and price changes;
- 16.7 ensure that all its members take necessary measures to disseminate these undertakings to their respective officers, employees, agents or *préposés* for compliance purposes; and
- 16.8 adhere to established international norms and comply with the provisions of competition law in the following terms:-
 - 16.8.1 “Customs House Brokers Association policy strictly prohibits any discussion or other communication the purpose or effect of which is to set prices, allocate markets or customers, engage in tying arrangements or refrain from purchasing any goods or services from any particular supplier or vendor”.
- 16.9 to submit a written report to the Commission, within 6 months of the date on which the Commissioners accept its undertakings, which will contain the steps taken by itself and its Members to comply with the undertakings and amendments brought to its rules, codes, decisions, policies and publications.
- 17.0 At its Annual General Meeting held on 21 March 2019, eighteen (18) members of CHBA ratified and signed their collective decision made at CHBA Special Meeting held on 06 June 2018 and hence the undertakings became binding on them, individually.
- 18.0 As regards members of CHBA who have not signed the undertakings, the Executive Director has proposed to deal with them as he may deem necessary.

Executive Director's recommendations

- 19.0 The Executive Director has submitted that the impugned agreements as referred to in paragraphs 14.1 to 14.3, though in breach of section 41 of the Act, “are less serious as they were set in a period at which the Act was not promulgated and there is no evidence of their implementation after the Act came into force”.
- 20.0 Undertakings offered by the CHBA which were signed by some of its members, according to the Executive Director, address the competition concerns raised in that they ensure the impugned agreements have ceased to exist.
- 21.0 The Executive Director is also of the view that the effect of the said agreements on competition “seems to be less serious” and as such, directions instead financial penalties would be more appropriate in the circumstances.

Determination

22.0. We have scrutinised the whole of the evidence gathered by the Executive Director during the investigation and we have duly considered the following circumstances:-

22.1 At the Annual General Meeting held on 05 March 2010, the then President of the CHBA reminded members of the “creation” of the STC despite the Act had already come into operation in November 2009. According to the CHBA, the STC have remained on its website by mere “inadvertence” and was removed from the website only on the 04 July 2017 after it was served with a notice of investigation by the Executive Director on 29 June 2017. We note the STC remained on the said website for more than seven (7) years and it could have been consulted by any person for information purposes regarding prices for services offered by customs brokers.

22.2 Moreover, the same President posted a message on the website of CHBA (which still appeared thereat on 04 April 2019) by stating “*My pious wish is that all my colleagues and friends, as professionals, can earn an honest and decent living with pride without being tempted to get involved in malpractices. To this effect, we have set up a minimum price policy for our professional services. I strongly advise all my colleagues to adhere to these principles and guidelines religiously*” (underlining is ours). Here, we find it is unnecessary to discuss on the issue of whether this message of the President was made on a personal capacity or on behalf of CHBA so that it will have a binding effect on CHBA. It is our view that the statement made by the President of CHBA is crystal clear, unambiguous and conclusive evidence of setting the minimum prices for the services offered by its Members.

22.3 Be that as it may, we find, as rightly pointed out by the Executive Director, that the decision to set the STC is a decision of an association of enterprises and as such, a decision between Members of the CHBA.

23.0 As regards the averments of the Executive Director that there is no evidence to suggest that the agreements for price fixing were implemented after the Act came in force, all we can say is that we, after careful examination of the materials before us, are unable to reach a different conclusion.

24.0 We note that the website of CHBA which contained the “message” and/or “speech” of the President of CHBA, STC and price list no longer exists and has not been replaced.

Decision

25.0 The Commission therefore decides as follows:

25.1 We have considered the various concerns raised by the Executive Director in his Report which also contains his findings and

recommendations. In view of the probative value of evidence tendered by the Executive Director, we are of the considered view that such evidence is sufficient to establish that members of CHBA have breached section 41 of the Act.

25.2 We have further considered the exceptional circumstances surrounding the breach on the part of CHBA members, in particular the timing of the STC and the minimum pricing policy; the absence of evidence of active implementation thereof post coming of the Act; and consequently, their less serious effect upon competition and consumers.

25.3 We are of considered view that in this particular case, directions instead of an order imposing a financial penalty are more appropriate.

23.4 We therefore direct members of the CHBA, pursuant to section 58 of the Act to terminate the impugned agreements, viz., the restrictive clauses in the STC and minimum price list, with immediate effect.

23.5 In our view, the Undertakings voluntarily submitted by the CHBA on behalf of its members contains measures which serve the purpose of ensuring firstly, that CHBA members cease to be a party to the impugned agreements; and secondly, that the CHBA itself, as an association of enterprises, does not facilitate restrictive agreement(s) on the part of, or contracts and communications by its members. We therefore further direct CHBA members and Office bearers of the CHBA, pursuant to section 58(1) of the Act, to implement and give immediate effect to each of the measures stated at Section C of their Undertakings dated 20th February 2019.

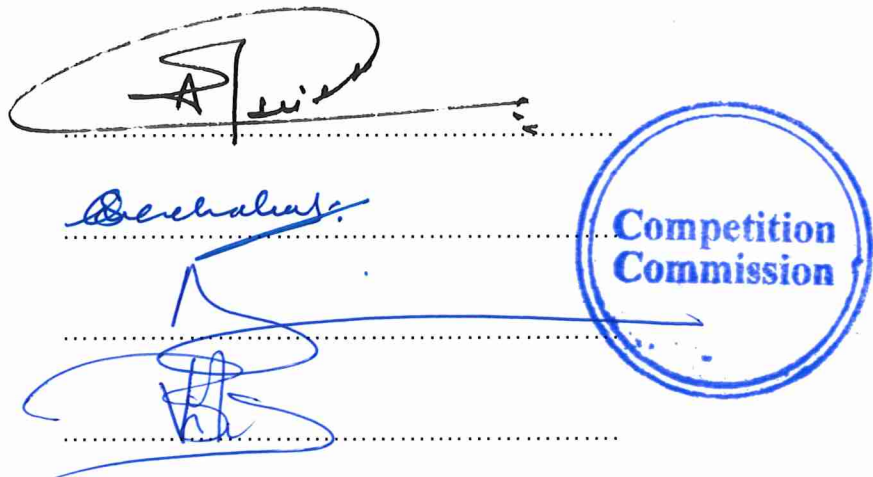
23.6 The CHBA shall submit a report to the Commission within six months of the date of this Decision and as per the terms of the undertaking offered under paragraph 16.9 above.

Mr A. Mariette
(Vice-Chairperson)

Mr. C. Seebaluck
(Commissioner)

Mrs. M. B. Rajabally
(Commissioner)

Mrs. V. Bikhoo
(Commissioner)



The image shows four handwritten signatures in black ink, each written over a horizontal dotted line. The signatures are: 1. A stylized signature starting with 'A'. 2. A signature that appears to be 'Seebaluck'. 3. A signature that appears to be 'Rajabally'. 4. A signature that appears to be 'Bikhoo'. To the right of these signatures is a large blue circular stamp with the words 'Competition Commission' written inside in blue capital letters.

20 February 2020