

COMPLAINT AGAINST THE ADMINISTRATION

Case No. OCAC 784/95

Lack of consultation on the introduction of the Trade Effluent Surcharge scheme to the restaurant trade

The Government announced the introduction of a public charging scheme for sewage services in September 1993. Following the introduction of the Sewage Services Ordinance, restaurant operators, among others, are required to pay charges for sewage services which are the total of a Sewage Charge (SC) and a Trade Effluent Surcharge (TES) starting from 1 April 1995. In May/June 1995, a restaurant trade association (Association) complained against the Administration for -

- (a) lack of adequate consultation with the restaurant trade and failing to provide channels for restaurant operators to reflect their views before effecting the TES scheme;
- (b) failing to provide the restaurant trade with sufficient guidelines and measures to reduce the strength of pollutant in discharge;
- (c) failing to provide details concerning the basis for and calculation methods in determining the TES for the restaurant trade;
- (d) inadequate samples used in determining the strength of effluent and the rate of TES for restaurants;
- (e) not having all samples collected from the outlets of grease trap facilities in restaurants, thus resulting in an unreliable assessment of pollutants from restaurant effluent;
- (f) being unfair to apply the 80% reduction factor in calculating the TES for the restaurant trade; and
- (g) not providing a collective appeal channel.

2. On complaint point (a), this Office notes that the restaurant trade is one of the hard-hit groups under the new charging scheme. There are two million sewage service users who pay the SC, only 13,000 are subject to the TES. Of these 13,000 TES accounts, about 8,000 are restaurants, which represent more than 60% of the TES payers. More importantly, more than 44% of the total revenue from sewage charges is from restaurants. It is however clear that the Administration was aware of the impact to the trade from the beginning. In September 1993, it

has been brought to its attention that a large number of restaurateurs were trade effluent producers. In its paper dated 11 November 1993 on sewage charges submitted to the Legislative Council (LegCo), the Administration already acknowledged that restaurants accounted for about 9% of total water consumption and more than 40% of consumption by all commercial accounts.

3. Unfortunately, in the consultation exercise by the Administration, the restaurant trade was not in any way approached, though various political parties, district boards, advisory bodies and industrial organizations were given opportunity to reflect their views in the process. Moreover, it is observed that the information provided in the relevant leaflet and Announcements of Public Interest, which were the main sources of information available to ordinary restaurant operators, did not in any way mention the likely impact of the TES to the restaurant business. Not until the TES was effected in April 1995, the majority restaurant operators could not figure out the cost impact onto them in concrete terms. In the circumstances, this Office considers that the consultation conducted by the Administration was incomplete, if not unrepresentative.

4. Restaurant operators do have a good ground to feel aggrieved, though this Office acknowledges that there was a very tight implementation timetable for introducing the charging scheme. The Planning, Environment and Lands Branch (PELB), as the policy branch steering the charging proposal, took charge of the consultation process with other advisory groups and trade/industrial organizations, but left the restaurant trade unrepresented in any of its consultation drives. This Office considers complaint point (a) substantiated.

5. On complaint point (b), the Administration noted that the TES aimed to provide a correct signal to polluters and enable them to make a judgement on whether it would be more economical for them to install their own facilities for waste minimisation and pre-treatment at source. This Office hence considers that the key issue is whether major TES payers like restaurant operators had actually been made fully aware of the relation between the cost impact of the TES and benefits brought about by the preventive measures like cleaner technology, better housekeeping, new treatment facilities, etc.

6. In connection with the charging proposal, the Industry Department (ID) had close contacts with many industrial organizations/industrialists and provided the latter with substantive assistance all along. The Environmental Protection Department (EPD) also made visits to dischargers to advise them on the ways to treat their effluent. Unfortunately, as a matter of fact, the restaurant trade had not been approached by ID and EPD at all. The Administration contended that a booklet entitled "Grease Traps for Restaurants and Food Processors" outlining some effective practices to reduce pollutants in kitchen wastewater was distributed to restaurants in 1993. There was however no mentioning of the imposition of a surcharge on restaurants' pollutant at that time.

7. Clearly, the restaurant trade was not provided with timely guidance to adopt appropriate preventive measures to minimise the quantity/strength of pollutant in their discharge, thus reducing the amount of TES payable. In the circumstances, complaint point (b) is substantiated.

8. On complaint points (c) and (f), this Office notes that it was stated in the public consultation paper - "Supplementary Note on TES" presented to the LegCo in September 1993, a formula for calculating the TES was clearly shown and it was estimated that the TES would be \$1 per kg Chemical Oxygen Demand (COD). At that time the implementation details had not been finalised. The Administration emphasised that the structure of the charging scheme would be clear and understandable to all payers and that industry and trade would be briefed on the detailed arrangements in early 1994. There is no evidence that specific details pertinent to the determination of the TES for restaurateurs was publicised as pledged. It was not until January 1995 that the Administration stated in its paper to the Advisory Council on the Environment (ACE) the presence of: (a) a difference in charging rates according to the location of the establishment - within and outside a Water Control Zone (WCZ) under the Water Pollution Control Ordinance (WPCO) and (b) a 80% discharge factor for some specified trades/industries.

9. PELB's records show that the cost for treating per unit of pollutants is the same, regardless the location of the dischargers. The average COD value of the restaurant trade is assessed at 3,600 mg/l. Nevertheless, it is stipulated that the TES rate for restaurants located in a WCZ is \$3.78/cu.m. and \$9.12/cu.m. in a non-WCZ. Such disparity is because discharges in a WCZ are subject to a 2,000 mg/l COD licensing limit under the WPCO. So far there was no publicity programme initiated to explain why the WCZ licensing requirement is linked to the TES rates.

10. On the subject of discharge factor, PELB did all along responded positively to views collected by ID from different industries, including the beverage manufacturers. Yet the restaurant trade was not given the same opportunity to reflect their views on this. There was no file record with regard to this decision process and this Office is not provided with any information as regards the basis on which the discharge factor for the restaurant trade should be on par with the one for other specified trades/industries like dyeing and bottling industries.

11. This Office does not intend to comment on the appropriateness of the charging level and the 80% discharge factor imposed on the restaurant trade. Nonetheless, the prevailing charging formula in use is far more complex and technical than the one originally publicised in September 1993. PELB, as the policy branch on the subject, did owe an explanation to the public, in particular to those affected parties like the restaurant trade, regarding the rationale and methods pertinent to the calculation of the charging rates. This Office is hence of the view that complaint points (c) and (f) are substantiated.

12. On complaint points (d) and (e), the Administration noted that the standard effluent strength measured of restaurants in COD was determined on the basis of the North and South Kowloon Grease and Oil Study (GOS) conducted in 1991, as well as EPD monitoring data obtained under the WPCO. Also, data from a study of Chinese restaurants in Sydney was used for the purpose of comparison. This Office was not provided with further details regarding the GOS and the relative significance of EPD monitoring data.

13. It is however noted that there were only 31 sampled establishments to represent five categories of restaurants, i.e. Chinese restaurants, Other (non-Chinese) restaurants, fast food, bars and catering (others). Also, the results showed that the quality of sampled wastewater was

variable. In this respect, even the Consultants employed by the Administration for the data collection and the development of TES charging mechanism did highlight that the GOS was not sufficiently comprehensive for the translation of cost to charges. EPD also reflected on record that the sampling of discharges in order to establish the TES was a much more complicated process than taking samples for WPCO enforcement purpose. Furthermore, there is no concrete evidence to support that the estimated COD value for restaurants in Hong Kong should be similar to those data in the study on Chinese restaurants in Sydney. In the circumstances, this Office notes that the Administration should have, from the beginning, provided the restaurant trade with sound justifications to support the use of such a sampling programme and recorded data for assessing the effluent characteristics of 8,000 restaurants scattered over the territory.

14. Concerning the grease traps facilities which are installed in restaurants to fulfil the licensing requirement by the two municipal councils, the Administration noted that it was in general not possible to obtain access to the outlet pipe of an underfloor grease trap for direct sampling. By far, the small undersink grease traps had little effect in lowering the COD value. Meanwhile, the large underfloor grease traps, though were found to be more effective in reducing the amount of grease passed to the public sewers, were not very common in practice and when they exist, they are found to be poorly maintained. Notably, the Administration, having known that the long-standing malfunctioning of these grease traps, did not discuss the problem with the municipal councils and give a forewarning to restaurateurs, nor conferred with the restaurant trade the proper way forward to facilitate assessment of the average COD load of restaurants.

15. This Office considers that in the context of sample collection, whether or not the grease traps were effective should not be regarded as a responsibility on the part of restaurateurs. Should there be practical difficulties to access the outlet points for sample collection, the restaurant trade should have been given the relevant explanation. Meanwhile, the adopted sampling procedures should have been well justified in the course of assessment. PELB, as the subject policy branch, and EPD, as the expert department on the subject, were in the best position to advise on the matter. In view of the above, this Office considers that complaint points (d) and (e) are substantiated.

16. On complaint point (g), this Office acknowledges that an individual appeal system is a world wide practice. Because of the variation in operation and housekeeping practices between restaurants, it seems appropriate to provide an individual appeal system which takes account of this situation.

17. In the present case, restaurateurs felt aggrieved because they were dissatisfied with the assessed COD load set down by the Administration. This complaint point would have been avoided if they had been consulted in the deliberation process. In effect, the Administration has been open to suggestion of a collective appeal by restaurant operators. Since June 1995, the Administration did discuss with the restaurant trade representatives with a view to reassessing the average COD load. A sampling programme was then worked out and 80 restaurants were chosen for testing. On this basis, there is no indication that the Administration declined to provide a channel for the restaurateurs to pursue their appeal. This Office therefore considers complaint point (g) unsubstantiated.

18. In conclusion, since the crux of the present complaint is on the lack of adequate and timely consultation, this Office concludes that overall this complaint is **substantiated**.

19. People would feel aggrieved if there is deficiency in the implementation brought about by lack of consultation for a charging proposal. Taking a balanced view of the citizen-government relationship, the overriding values that should be brought into consideration are (community) participation, openness or transparency (concerning information) and fairness (of process). Although there is no stipulated requirements for consultation to be conducted, it is the normal practice of an open government to provide proper channels of consultation with members of the community directly affected by its new measures. In the present case, it was deemed essential that the Administration should approach and identify those hard-hit categories of TES payers like the restaurant trade and provide them with the relevant information from the outset. Certainly, communication between the parties concerned would engender empathy and enhance understanding.

20. This Office therefore recommends that -

- (a) when the Administration intends to introduce changes to the charging schemes, adequate and timely consultation with the affected parties should be conducted;
- (b) before such new charging schemes are to be effected, the Administration should provide more implementation details to keep those affected better informed which in a way would help in addressing some of their concerns;
- (c) the Administration should discuss with the restaurant trade and take an active role in resolving the matter within a mutually agreed time-frame; and
- (d) the Administration should confer with the municipal councils on its views regarding the effectiveness of grease traps with a view to taking positive steps to improve the situation.

21. The Secretary for Planning, Environment and Lands (SPEL) disagreed with the basic premise which he labelled as the “impacts approach”: that in the course of commissioning a consultation exercise, the group to be most affected by the introduction of the programme concerned, should be identified and consulted. SPEL opined that since the levy of the TES was a result of a legislative process, it was not inappropriate for the Administration to make wide publicity of the new scheme and to adopt a consultation process which let everyone who had questions raise them. It was the traders who ignored the forewarning and did not raise questions. SPEL also emphasised the inherent difficulty in defining the “most affected” group; the Association not being the only rightful representative of the restaurant trade; and the restaurant trade being fractious without clear leadership. Some of the blame should therefore lie with the trade itself.

22. As regards the recommendations, SPEL considered that those in paragraphs 20(a) and (b) are contingent upon the introduction of changes to the scheme and as such there could not be a definite time frame for their implementation but the Administration was shortly to conduct a review of the TES scheme. For recommendation in paragraph 20(c), there were still intractable

problems with the survey for which the Association remained unwilling to propose workable solutions to resolve the issues involved. Whilst the recommendation in paragraph 20(d) was acknowledged, it was considered irrelevant to the matter of whether restaurants were being fairly charged for treating their sewage effluent.

23. SPEL however agreed that with the benefit of hindsight, more consultation would reduce friction and resentment. He also agreed that the parties involved should try and resolve the issues but the Association had yet to make some workable proposals to that effect. He concluded that it “takes two to tango”.

24. As a final remark, this Office would reiterate that from the view point of administrative fairness, the government should take the initiative in consulting those affected, particularly those who are not well aware of such changes and their implications. It should be noted that the restaurant trade is one of the hard-hit groups under the TES. It is rightful of them to expect that they would be consulted and fully apprised of the workings of the charging scheme affecting them. Putting the onus on the affected restaurant operators to make out themselves and to seek for a channel to redress their worries and concerns is not a good practice to be encouraged by an open and transparent government. Difficulties in identifying a core and central representative body, and the fact that the other trades are taking more initiatives in making their views known are no excuses for not consulting the restaurant trade. On SPEL’s reluctance to accept the “impacts approach”, he fails to explain why some of the trades/industries were consulted while the restaurant trade has not been specifically sought out for consultation.

25. In the present case, the Administration did not explain to TES payers the relationship between the functioning of the grease traps and the amount of TES payable, let alone that the Administration had forewarned restaurant operators that many of their treating facilities were not properly functioning at all. Although this is not a specific complaint point, it is the duty of this Office to draw to the attention of the Administration on improvements required from findings of its investigation.

26. Having studied SPEL’s comments carefully in details, this Office fails to see that there is any new evidence to change the conclusions and recommendations of the present investigation. SPEL is recommended to implement the recommendations as soon as practicable.