

Consumer Council's Submission to LegCo Panel on Information Technology and Broadcasting

Introduction

1. The Consumer Council welcomes the invitation by the LegCo Panel on Information Technology and Broadcasting to comment on the 'Draft Competition Investigation Procedures and Draft Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance'.

BA's Competition Investigation Procedures

Monitoring behavior

2. Para.42 of the Draft Investigation Procedures raises the issue of behaviour that has been investigated by the Broadcasting Authority (BA) but there is no clear view of its effect on competition in the relevant market at the time. It is noted that the BA states it will monitor the relevant market or licensee at regular intervals if there is a concern that the alleged behavior may have an effect in the future. The Council welcomes this procedure as recognition that certain practices may need to be examined over time, in order to assess their anti-competitive effect, and that the party or parties engaged in the practice need to be put on notice.

Jurisdictional loopholes

3. With reference to the two-stage approach (the preliminary enquiry stage and the full investigation stage) as illustrated at annex I of the Procedures, the Council notes that at the initial stage of the investigation the BA will decide whether the case is within its jurisdiction. The Council has raised concerns in previous submissions in relation to the telecommunications and broadcasting industry that the Government's sector specific approach to competition oversight could lead to the existence of loopholes due to the absence of general competition law oversight which would act as a 'safety net'.

4. The Council suggests that the BA should include within its procedures a clear indication of what it intends to do if an allegation of anti-competitive conduct arises and the matter falls outside the BA's jurisdiction. Such a procedure is necessary to facilitate an expeditious resolution of the allegation. The Government's Statement on Competition Policy issued in May 1998 states, at paragraph 13, that:

"Alleged restrictive practices in the public and private sectors may be referred to the concerned policy bureau or government department for consideration. Separately, the Competition Policy Advisory Group (COMPAG) Secretariat will keep track of all referrals and bring these to the attention of COMPAG should there be substantial policy or systemic implications."

5. Accordingly, the Council believes there should be a clear indication in the BA's procedures indicating that when an allegation is not considered within the BA's jurisdiction, the allegation will be referred to the appropriate government bureau or department required to examine the matter. It is important that complainants are given some indication that the allegation will nevertheless be pursued, and will be informed of the appropriate body they should approach when the BA decides the allegation is not within its jurisdiction. Without knowing what area outside the BA's jurisdiction an allegation might involve, it will be difficult for the BA to draw up an exhaustive list of bureaux or departments that complainants may need to approach. Nevertheless, at the very least, complainants should be informed that

the matter will be referred to COMPAG for its information. In those circumstances, it is assumed that the COMPAG Secretariat will be aware of the relevant bureau or department responsible for examining the allegation, and make the necessary referral.

Provision of evidence

6. The Council understands that the BA takes the view that it is the responsibility of the complainant to state its case in full, identifying clearly the competition grounds for the complaint. However, the Council considers that the list of other information 'encouraged' to be supplied (the annex II) may pose as obstacles to a complainant.

7. From the Council's experience in dealing with competition complaint cases, it is difficult for some complainants to provide information relating to the definition of the relevant market, the level of competition and possible remedies, as sought in the guidelines. The provision of this information would favour large corporations with ample financial resources to recruit consultants and lawyers to draft their complaint submissions. The Council is pleased to note therefore that the BA clearly indicates it is not its intention to place the burden of proof on the complainant (para.6 p.3). This is particularly important, given that placing too high a burden on complainants to answer questions might discourage the lodgment of complaints.

BA's Competition Guidelines

8. With reference to BA's competition guidelines, the Council notes that the analytical framework on how to interpret and apply the provisions in the law, follow recognised antitrust investigation principles. Accordingly the Council welcomes the BA's approach to investigations. However, the Council has queries on how the exemption provisions (para.11 and 13 p.22 of the Guidelines) will be applied by the BA.

General Exemptions

9. The current Ordinance provides that the prohibition against conduct falling under Sub-section 13(1) shall not apply to:

- (a) any restriction imposed on the inclusion in a television programme service of a television programme produced wholly or substantially by the licensee of the service; or
- (b) any prescribed restriction.

10. The inclusion of the wording 'wholly or substantially' in Sub-section 13(4)(a) follows a previous Council recommendation to amend the exemption provisions in the draft Bill, to avoid creating a loophole. Accordingly, the Council welcomes the amendment.

11. The original Sub-section 13(4)(b) of the draft bill also included an exemption on the imposition of restrictions in artiste's contracts. This has now been changed to a wide-ranging discretionary provision that allows the BA to prescribe certain conduct as exempt.

12. The Council is of the view that some indication should be given as to the conditions under which exemptions will be granted, similar to the conditions that need to be met in other jurisdictions where anti-competitive conduct may be exempted.

13. As an example, the Council would draw the BA's attention to the European Community (EC) Treaty Article 81 3 which provides exceptions to prohibitions against competitor agreements, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. The EC prohibition is similar to the relevant prohibition against anti-competitive agreements in Sub-section 13 (1) of the Broadcasting Ordinance.

14. The relevant provision in the EC Treaty provides that the prohibitions against anti-competitive agreements can (with some minor qualifications) be declared inapplicable, if the agreements:

'contribute to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.

15. The exemption provisions under the European Treaty Articles do not apply to conduct that is an abuse of a dominant position; which is also the case with relevant provisions in the Broadcasting Ordinance.

16. The Council recommends that the BA takes a similar position to that in Article 81 of the EC Treaty Articles in regard to setting the limits to which exemptions will be granted by way of the "prescribed restriction" in section 13(4)(b) of the Broadcasting Ordinance.

Transitional Period Exemptions

17. It is noted that the BA has suggested that an exception to the application of the Section 13 provisions (competitor agreements etc.) should apply to an agreement lawfully entered into before 28 January 2000 for a transitional period of 2 years (para. 13 p.23 refers).

18. The Council considers the transitional period acceptable on the understanding that it only applies to conduct falling within Section 13, and not the prohibitions against abuse of dominant position found in Section 14.

Consumer Council
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