



Hong Kong Cable Television Limited Response to Draft Competition Guidelines

Introduction

Hong Kong Cable welcomes the opportunity to respond to the draft Competition Investigation Procedures and Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance.

Generally we found the procedures clear and sensible. The guidelines explained at some length the different aspects of competition theory as it applies to broadcasting. Overall we thought the guidelines should help to create a healthy competitive environment within the Hong Kong broadcasting industry.

We have a few comments as follows.

Draft Competition Investigation Procedures

Statutory Basis of the BA Competition Duties

In paragraph 10 the paper says “the BA, however, retains the discretion to depart from the guidelines. The BA in exercising its powers may also take into account recognised principles and practices of competition law as applied in other industries and also in other jurisdictions”. The wording of the paragraph implies that the BA intends to make up the rules as they go along and departs from the Guidelines as it thinks fit.

The Broadcasting Ordinance requires the BA (s4) to issue guidelines indicating the manner in which it proposes to form an opinion with regard to its duties under section 13 (prohibition of anti-competitive conduct) and section 14 (prohibition of abuse of dominance). We believe it is inappropriate to issue guidelines as required under the Ordinance only for the BA to ignore or to over-ride them. We do not consider that this would be conducive to a stable regulatory climate. The BA has a statutory duty to issue guidelines, it should do so and abide by them. If the guidelines prove to be inadequate then they should be amended.

Identity of Complainant

The existing wording (paragraph 28) suggests that although disclosure of the complainant is preferred, the complainant has the option of remaining anonymous. We consider the identity of the complainant should be made known unless there are justifications for the BA to specifically agree otherwise.



Response Time

Paragraph 29 allows the party complained against only 7 working days to respond. Given the complexities of competition issues and the importance of the determination by BA, the party complained against will need to study carefully the situations giving rise to the complaint and seek advice from professionals (e.g. lawyers, accountants, economists and market analysts) before the response can be made. Seven working days are too short and should be extended to, at least, one month.

Final Representations

The draft says that parties involved in any investigation will be allowed a final opportunity to make representations on the preliminary report. Any such representations will be taken into account in the final report. Once the final report has been prepared the BA will not entertain any further discussion unless a party can provide new evidence (paragraph 37). There is a separate procedure for an appeal to the Chief Executive in Council (paragraph 44).

We are concerned that licensees will not be allowed to make representations (as distinct from appeal) to the BA once the final report is completed. The final representations of licensees will be included in the final report by the case officer. In effect this probably means the case officer summarising the licensees' submissions.

We suggest that either:

- i) a licensee is allowed to make a final representation direct to the BA once the final report is complete, or
- ii) the final representation made by a licensee (at the preliminary report stage) are included in full in the final report if requested by the licensee.

We believe such an approach will provide an opportunity for a licensee to make representations directly to the BA prior to a decision being made. This will ensure that the licensee's views are taken fully into account and may help to avoid unnecessary appeals.



Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance

Definition of Relevant Market

Market definition has long been viewed as the most important step in establishing dominance. The guidelines explain at some length the need to defining a relevant market and the use of demand-side and supply-side substitutability in this process. The guidelines could perhaps make more clear the difficulty of determining what the relevant market should be and the fact that there is no absolute answer. In any investigation the relevant market, as eventually defined, is in fact a balanced judgement of the reporting officer. It is an opinion, a subjective judgement and not an absolute!

One of the greatest difficulties facing an investigation is to determine how wide, or narrow, a market should be defined. Competition and substitution do not cease at the outer boundaries of the market. Competition is a matter of degree. There is always the temptation to define a market too narrowly leading to multiple sub-markets. It is wrong to put markets and sub-markets on the same footing. Too narrow a description of the market will create the appearance of more market power than in fact exists.

Too narrow a description of the market will also run the risk of over-regulation, which would not only increase the administrative cost of regulation but in fact contradicts the Government's general policy of light-handed approach to regulation.

We consider that the guidelines should acknowledge these difficulties and specifically recommend that relevant markets should be defined as widely as possible, consistent with the evidence. In other words that in any consideration of the boundaries of a relevant market the balance of doubt should be in favour of defining the market widely rather than narrowly.

Examples from other Jurisdictions used in the Guidelines

Throughout the report a number of examples from other jurisdictions (usually the UK) are used to illustrate the points being made. Whilst we agree that they are not intended to pre-empt the findings of any investigation, they could prove to be unhelpful in the Hong Kong context. A specific example can be seen in paragraph 37 which refers to an investigation of BSkyB in the UK where the relevant market was found to be pay TV with free-to-air seen as complementary to pay TV. (We note that in paragraph 40 the guidelines make clear that market definition will depend on the circumstances in Hong Kong.) It is most likely that at some time the relationship between the pay TV and free-to-air markets in



Hong Kong will arise. Quoting the UK example in the guidelines may be unhelpful in ensuring an objective and independent analysis of the Hong Kong situation.

There are a number of other instances in the guidelines where overseas examples are quoted, see paragraphs 38, 39, 41, 80 and 86. We suggest that these examples could usefully be omitted without in any way altering the meaning of the guidelines and at the same time avoiding creating any hostages to fortune.

Other Competition Issue: TVB/Galaxy Firewall

Hong Kong Cable, as well as some other members of the industry and legislators, have expressed grave concerns about granting the TVB Group an additional domestic pay television programme service licence. Hong Kong Cable is pleased that the Government acknowledges the genuine risk of unfair competition and dominance by the TVB Group and has proposed a “firewall” to address these concerns. As an existing broadcast licensee, Hong Kong Cable will be profoundly affected by the effectiveness, or otherwise, of the firewall safeguards.

Hong Kong Cable considers the firewall a competition issue and should therefore undergo a public consultation process, as the Draft Competition Guidelines do. At the very least, a workshop with participation of industry members should be held so that opinions from the profession could be gathered to make the firewall really work.

Furthermore, Hong Kong Cable also recommends that the safeguards should be reviewed (and amended if required) on an annual basis for the first 5 years of operation and as required thereafter. Although this may seem onerous, it is essential because the establishment of the firewall is unprecedented, its effectiveness is unknown and the TVB Group has a dominant position in the TV industry. A close review will ensure that the safeguards can be promptly strengthened or modified, where they are proved to be inadequate or redundant.

Hong Kong Cable Television Limited
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