

The Legislative Council
Panel on Information Technology and Broadcasting

Summary of Submissions on Draft Competition Guidelines

At the end of the consultation period, a total of 9 submissions on the draft Competition Guidelines were received. A summary of these submissions is given below.

<u>Subject</u>	<u>Comments</u>
1. Asia Television Limited (ATV)	
<i>Competition Investigation Procedures</i>	
Response Time (para. 29)	The period for the complained party to give response should be extended from 7 working days to 4 weeks.
2. Cable & Wireless HKT VOD (PCCW)	
<i>General</i>	
Overall Comment	By making BA procedures and views more transparent, the guidelines would assist businesses in their commercial decision-making.
Consistency between Telecommunications & Broadcasting	The procedures & views in the guidelines should be consistent with those adopted by TA in the light of convergence of technologies. TA should issue competition guidelines similar to BA's guidelines
<i>Competition Investigation Procedures</i>	
Preliminary Enquiry (para. 21)	Investigation procedures should apply to investigation into other possible breaches of the BO or of licences.

<u>Subject</u>	<u>Comments</u>
Importance of Complaint (para. 22)	Paragraph 22 (b) states that it is BA's aim to understand the importance of complaint. Does this mean that if the BA does not consider the complaint sufficiently important, it will not pursue it or will give it a lower priority?
Confidentiality (para. 23)	For confidentiality reasons, complaints should not be discussed with other interested parties at the preliminary stage (paragraph 23).
Preliminary Enquiry Report (paras. 24 & 25)	Where there is no case to answer or the matter in question has no appreciable effect on competition, the case should be closed. A preliminary report should be prepared in all cases, not just cases that are to be closed without further investigation.
Confidentiality of Complaint (para. 28)	The complaint should not be put in its original form to the party complained of. The BA should summarize the facts.
Response Time (para. 29)	BA should allow 14 days instead of 7 working days for response.
Confidential Information (para. 31)	Due regard should be given to confidentiality when the BA is seeking information from third parties.
Public Consultation (para. 33)	No form of public consultation exercise is appropriate in the investigation of complaints. This investigation process should be fully within the competence of the BA and no public consultation is necessary.
Role of TELA (para. 38)	TELA should only attend a meeting where the BA has delegated power to it.
Investigation Steps (paras. 33-38)	Not clear whether the processes set out under 'Information Requirements', 'Meeting', 'Competition Analysis' and 'Final Assessment' are all to take place within the Investigation stage.
Sanctions (para. 41)	BA should clarify the criteria used in assessing the severity and nature of any breach.
	<i>Guidelines to the Application of Competition Provisions</i>
Overseas Precedent Cases	It would be helpful if the BA indicates in the guidelines whether and if so to what extent precedents from overseas jurisdictions will be used as a guide in applying the competition provisions.

<u>Subject</u>	<u>Comments</u>
Intra-group Agreements (para. 8)	It would be helpful to clarify whether and if so, the extent to which, intra-group agreements could be caught by the prohibition.
Indirect Agreement (para. 9)	It would be helpful to state whether the concept of 'indirect agreement' is equivalent to the concept of 'concerted practice'.
Exemption (para. 12)	The BA has power to exempt agreements from prohibition. The TA should be given similar power.
Stages of Competition Analysis (paras. 21, 22 & 26)	The 3 stages of analysis do not reflect the competition provisions of BO. The reference to market power in stage 2 should be replaced by 'dominance'.
Economic Characteristics (para. 23)	The economic characteristics referred to in paragraph 23 are not unique to television broadcasting but are common to network industries.
Dominant Position (para. 57)	It is not clear whether there is a presumption of non-dominance below 40%. It is also not clear how the concept of combined market share will apply where the parties are in different markets.
Exclusionary Behaviour (paras. 70-80)	Paragraphs 70-80 give examples of exclusionary behaviour. They should also be presented as examples of abuse of dominant position.
Buyer Power (paras. 81 & 82)	Paragraphs 81 & 82 should mention that a business can have a dominant position in the purchase of a particular product or service and abuse that position vis-a-vis a supplier.
Vertical Agreements (para. 85)	It should be clarified whether vertical agreements and restraints will be given more lenient treatment.

3. Consumer Council

General Opinion

Overall Comment	Consumer Council welcomes the procedures and the guidelines suggested by the BA.
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<u>Subject</u>	<u>Comments</u>
	<i>Competition Investigation Procedures</i>
Monitoring and Compliance (para. 42)	BA's monitoring of the relevant market or licensee is supported.
Complaints outside BA's Jurisdiction	BA's procedures should indicate that where a complaint is not within BA's jurisdiction, it will be referred to the appropriate enforcement agency and complainant will be informed of the appropriate body to be approached.
Provision of Evidence (Annex II)	The list of information to be supplied may discourage a complainant and would favour large corporations with ample financial resources to recruit consultants and lawyers to draft complaint submissions. However, the Council is pleased to note that the BA clearly indicates that it is not its intention to place the burden of proof on the complainant.
	<i>Guidelines to the Application of Competition Provisions</i>
General Exemptions	Since the exemption on the imposition of restrictions in artiste's contracts has now been changed to a wide-ranging discretionary provision, some indications should be given as to the conditions under which exemptions will be granted. For this purpose, EC Treaty Article 81(3) deserves the BA's consideration.
Transitional Period Exemptions	The council finds the transitional period of two years acceptable on the understanding that it only applies to conduct falling within section 13 but not section 14.
4. Elmsdale Ltd./Yes Television	
General Opinion	The drafts are both useful and reassuring. Looking forward to their early adoption by the BA.

<u>Subject</u>	<u>Comments</u>
5. Hong Kong Cable Television Limited (HKCTV)	
<i>General</i>	
Overall Comment	The procedures are generally clear and sensible. The guidelines explain at some length the different aspects of competition theory as it applies to broadcasting. Overall the guidelines should help to create a healthy competitive environment within the Hong Kong broadcasting industry.
<i>Competition Investigation Procedures</i>	
BA's Discretion (para. 10)	It is not conducive to a stable regulatory climate to allow the BA to retain the discretion to depart from the guidelines as it thinks fit.
Identity of Complainant (para. 28)	The identity of the complainant should be made known unless there are justifications for the BA to decide otherwise.
Response Time (para. 29)	The party complained against should be allowed one month instead of 7 working days to respond.
Final Representations (para. 37)	A licensee should be allowed to make a final representation direct to the BA once the final report is completed or the final representations made by a licensee at the preliminary report stage should be included in full in the final report. This will ensure that the licensee's views are taken fully into account before a decisions is made by the BA.
<i>Guidelines to the Application of the Competition Provisions</i>	
Definition of Relevant Market	The relevant markets should be defined as widely as possible.
Overseas Precedents	Overseas examples should be omitted so as to ensure an objective and independent analysis of the Hong Kong situation.
<i>Others</i>	
Others	The 'firewall' safeguards relating to TVB/Galaxy should undergo a public consultation and should be reviewed on an annual basis for the first five years of operation and as required thereafter.

<u>Subject</u>	<u>Comments</u>
6. Hong Kong Network TV Ltd. (NETV)	
General Opinion	It is crucial for BA to maintain an effective system to closely monitor the licensees and to prevent abuse of dominant positions.
7. International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI)	
<i>Competition Investigation Procedures</i>	
Investigation Power of TELA	TELA's role in competition enforcement should be clarified and the circumstances in which cases may or may not be delegated to TELA spelt out.
Appeal Mechanism (paras 21-26)	A separate procedure should be set up to allow appeal against a decision of no further action (or to launch a full investigation). Appeal hearings should include meetings with the complainant and the licensee complained against.
Preliminary Enquiry (paras 24-26)	The preliminary enquiry report should be made available to the complainant and licensee in the case of a decision of no further action. A complainant should be able to seek relief against the licensee in accordance to section 15(2) of BO if the BA decides that it has no jurisdiction over the case during the Preliminary Enquiry stage.
Composition of the BA	BA should include full-time members who are competent legal experts and professionals from related sectors.
<i>Guidelines to the Application of Competition Provisions</i>	
Exemptions (paras. 11-14)	BA should set out grounds upon which it will grant exemption from the prohibition immediately. Applications for exemption should be made public and a procedure to hear other licensees' objection should be incorporated. BA should consider whether the granting of exemption may affect the interest of any objecting parties. An administrative procedure for appeal against BA's decision should be established. BA should be empowered to withdraw an exemption if there has been a material change of circumstance.

Subject

Comments

BO Government should take a cross-sector approach in view of the converging media environment. Government should consider a legislative framework that will prevent a dominant licensee from exercising its market power to related or co-dependent industry.

8. Pacific Digital Media (HK) Ltd.

Competition Investigation Procedures

Preliminary Enquiry Report (paras. 25 & 26)	Criteria for deciding when a case should proceed directly to full investigation should be set out.
Response Time (para. 29)	The time for response should be extended from 7 working days to 21 working days.
Information Requirements (para. 34)	Results of surveys should not be made public until BA's final decision has been reached.

9. Television Broadcasts Limited (TVB)

Competition Investigation Procedures

Appeal Mechanism	A separate and independent appeal board on competition provisions, similar to that under the Telecommunication Ordinance, should be established.
Response Time (para. 29)	BA should give at least 21 working day instead of 7 days for the respondent to respond in writing.
Oral Representations (para. 35)	The respondent should be given the opportunity to make oral representations to the BA if the respondent so desires and to engage outside consultants to make representations on its behalf.
Final Assessment (para. 37)	The preliminary draft report should include any recommended sanctions and/or remedies to be implemented. At least 21 working days should be allowed for the licensees to make representations on the preliminary draft report.