

Legislative Council Panel on Information Technology and Broadcasting

Response of the Broadcasting Authority to the Submissions on the Draft Competition Guidelines

Purpose

This paper sets out the response of the Broadcasting Authority (BA) to the submissions on the Draft Competition Investigation Procedures (Investigation Procedures) and the Draft Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance (Competition Guidelines).

Background

2. At the meeting of the Legislative Council Panel on Information Technology and Broadcasting on 2 November 2000, Members were briefed on the major features of the Draft Investigation Procedures and the Draft Competition Guidelines, which were issued by the BA on 15 September 2000 for a six-week public consultation. At the end of the consultation period, a total of 11 submissions were received. They include submissions from nine licensees and two organisations. The respondents generally consider that the draft guidelines are useful and sensible, and would help create a competitive environment for the broadcasting industry. A summary of the submissions and the BA's response is at [Annex](#).

Major Comments on Competition Investigation Procedures

Response Time

3. Paragraph 29 of the Draft Investigation Procedures provides that the party complained against will normally be given 7 working days to respond in writing unless the urgency of the case or the nature of the reply justifies a shorter period. Some respondents considered the 7-day period too short because competition complaints often raise complex

issues and preparation of a response would require a great deal of investigation and research.

4. The BA is obliged to allow sufficient time for response in accordance with the Broadcasting Ordinance (BO)¹. The appropriate length of the response period would naturally depend on the circumstances of each case. The 7-day period set out in paragraph 29 of the Draft Investigation Procedures is given only as an indication of the period normally allowed for licensees to respond, having regard to the BA's target to complete the Preliminary Enquiry Stage within 30 to 60 working days. To address the concern of the respondents, the BA has agreed to lengthen this indicative period to 14 days.

Preliminary Enquiry Stage

5. Paragraph 25 provides that where it is evident that a full investigation is justified, the preparation of a Preliminary Enquiry Report may be bypassed in order to avoid delay. There is a suggestion that a Preliminary Enquiry Report should be prepared in all cases, not just cases that are to be closed without further investigation. The BA agrees with the proposal.

Representations to the BA

6. Two respondents considered that the parties concerned should be allowed to make oral representations to the BA. The Draft Investigation Procedures do not preclude the making of oral representations. To put matters beyond doubt, the BA has decided to make it clear in the Investigation Procedures that oral representations, in addition to written ones, may be made to the BA.

¹ Section 2(11) of the BO provides that the BA, in exercising its powers under the BO, shall act reasonably and having regard to relevant considerations.

Draft Final Report

7. Paragraph 37 of the Draft Investigation Procedures provides that a draft final report may be supplied by the BA to the parties to the complaint at the Final Assessment Stage. Some respondents suggested that the draft final report should set out any recommended sanctions and/or remedies to be implemented and that the concerned parties should be given an opportunity to make final representations on it.

8. It is indeed the BA's intention to include the recommended sanctions and/or remedies in the draft final report and to allow the parties concerned to make final representations on it. To provide more transparency and reassurance to the licensees, the BA has decided to amend paragraph 37 of the Investigation Procedures to make the intention clear.

Other views

9. Other views and comments on the Draft Investigation Procedures and the BA's response to them are summarized at Annex. These comments are either requests for clarification or are outside the scope of the guidelines. They therefore do not warrant any changes to the draft guidelines.

Major Comments on the Draft Competition Guidelines

Exemptions

10. Two respondents suggested the BA should specify the grounds upon which exemption would be granted and the procedure for granting such exemptions. One other respondent asked why exclusive agreements with third parties were not exempted from the application of the competition provisions.

11. The BO provides that the BA may grant exemption only on a ground prescribed by regulation, which is a subsidiary legislation subject to negative vetting by the Legislative Council. The BA is of the view that the exemption ground should be formulated in the light of BA's experience in enforcing competition provisions. As regards exclusive agreements with third parties, all arrangements are subject to the competition provisions and as such it is for the parties concerned to ensure that they comply with the BO. Not all exclusive supply agreements are anti-competitive but care is required in drafting and entering such agreements to ensure compliance with the law.

Other views

12. Other views on the Draft Competition Guidelines and the BA's response and clarification are at Annex.

Promulgation of the Competition Guidelines

13. Having carefully considered all the submissions received during the consultation period, the BA has reviewed and revised the Investigation Procedures and the Competition Guidelines which are available for downloading at BA's website at www.hkba.org.hk. Pursuant to section 4(2)(c) of the BO, we are making arrangement for these two sets of guidelines to be promulgated by notice in the Gazette. Arrangement is also being made for the competition provisions in the BO to come into operation by notice in the Gazette pursuant to section 1(3) of the BO.

Television and Entertainment Licensing Authority

6 February, 2001

Summary of Submissions on Draft Competition Guidelines

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
<i>General Comment</i>			
1.		Respondents generally welcome the procedures and the guidelines proposed by the BA. One considers the drafts useful and reassuring. Another finds the procedures clear and sensible and believes that the guidelines will help to create a healthy competitive environment within the Hong Kong broadcasting industry. Some believe that the guidelines will assist businesses in their commercial decision making.	Noted.
		<i>Competition Procedures</i>	<i>Investigation</i>
2.	Response Time (para. 29)	The period of 7 days for the complained party to give response should be extended. Some respondents suggest the period to be extended to 2 weeks, 21 working days, or one month for the complained party to give response.	The BA is required to act reasonably under section 2(11) of BO. It would allow sufficient time for response as warranted by circumstances. The BA may allow more time depending on the complexity of the issues, amount of work involved, etc. However, to address the respondents' concern, the BA agrees to lengthen the response time to 14 days.
3.	Civil Remedy	A complainant should be able to seek relief against the licensee in accordance with section 15(2) of BO if the BA decides that it has no jurisdiction over the case at the Preliminary Enquiry Stage.	The civil remedy under section 15(2) is not available if there is no breach of section 13(1) or 14(1). In any event the expression "no jurisdiction" means the subject of a complaint is outside the ambit of the BO and therefore it could not be the subject of section 15(2).

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
4.	<u>Preliminary Enquiry Stage</u>		
4.1	Scope of Investigation (para. 21)	Investigation procedures should apply to investigation into possible breaches of the BO or of licences.	As the guidelines under concern cover only competition provisions, the investigation procedures under the guidelines cover only breaches of the competition provisions of the BO.
4.2	Close of a Case (para. 24)	Where there is no case to answer or the matter in question has no appreciable effect on competition, the case should be closed.	Agreed.
4.3	Preliminary Enquiry Report (para. 25)	A Preliminary Enquiry Report should be prepared in all cases, not just cases that are to be closed without further investigation.	Agreed. The BA will make it clear that for those case where it is evident from the information available that a full investigation is justified, the BA should be informed in a Preliminary Enquiry Report that the case will proceed directly to the Full Investigation Stage and full investigation may proceed in parallel.
4.4	Availability of Preliminary Enquiry Report (para. 24)	The Preliminary Enquiry Report should be made available to the complainant and licensee in the case of a decision of no further action.	The Preliminary Enquiry Report is of relevance only where the complaint is dismissed at that stage or it is outside the jurisdiction of the BA. At that stage, save in exceptional cases, the only party that would be involved would be the complainant and thus it may not be appropriate to make the case public. If, however, the issues raised are of more general concern, the BA will consider whether it would be appropriate to make the report public. In any case, where the BA closes a case, it will send a letter to the parties involved explaining the reasons for the decision. Under section 2(11) of the BO, the BA is required to provide reasons in writing for its decision.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
4.5	Criteria for Conducting Full Investigation (para. 24)	Criteria for deciding when a case should proceed directly to full investigation should be set out.	Cases in which a prima facie breach can be established will merit full investigation. Each case will be examined individually.
5.	Importance of Complaint (para. 22)	It is not clear whether the BA will pursue or give a complaint a lower priority if the BA does not consider the complaint sufficiently important.	This sub-paragraph means that BA may prioritize complaint cases depending on the impact or significance of individual cases on the market and / or the complainant.
6.	<u>Confidentiality</u>		
6.1	Identity of Complainant (para. 28)	The identity of the complainant should be made known unless there are justifications for the BA to decide otherwise.	The complainant should indicate whether he wishes to keep his identity confidential. Confidential information will be treated according to section 27 of BO.
6.2	Confidentiality of Complaint (para. 23)	For confidentiality reasons, complaints should not be discussed with other interested parties at the preliminary stage. Discussions with the complainant and the subject of the complaint should be held separately.	Confidential information will be treated in accordance with section 27 of BO. Discussions with the complainant and the subject of complaint will usually be held separately but the BA should have the discretion to have a meeting with both parties present if it considers it appropriate.
6.3	Copying the Complaint (para. 28)	The complaint should not be put in its original form to the party complained of. The BA should summarize the facts and the issues.	The complainant should indicate whether he wishes to keep any part of his complaint confidential. Copying the complaint speeds up the process as it ensures that the views of the complainant have been put fairly to the other side. If the BA considers that the complaint is not suitable for disclosure, it will consider summarizing it, or presenting it in an appropriate form, so as to be fair to all parties concerned.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
6.4	Seeking Information (para. 31)	Due regard should be given to confidentiality when the BA is seeking information from third parties.	Confidential information will be treated in accordance with section 27 of BO.
6.5	Surveys and Research (para. 34)	Results of surveys commissioned by the BA relating to the matter being investigated should not be made public until BA's final decision has been reached because such publication may have an adverse effect on the licensee's image.	The publication of surveys will be considered taking into account, among other things, the impact that such publication may have.
7.	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.	The consultation is not on the decision that the BA should take. Such consultation is intended, for example to gather consumers' attitude or preference towards the future development of a market, etc. This is a common practice in other jurisdictions.
8.	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.	Sufficient information is required for the expeditious processing of a complaint. The BA has already made it clear that what is set out is the optimum for expeditious investigation, and that it is not the BA's intention to place the burden of proof on the complainant.
9.	<u>Representations</u>		
9.1	Oral Representations (para. 29)	The respondent should be given the opportunity to make oral representation to the BA if the respondent so desires and to engage outside consultants to make representations on its behalf at any meeting.	The BA has no objection to receiving oral representations in addition to written representations from licensees or representatives of the licensees. The procedures as drafted do not preclude this. The BA agrees to make it clear in the guidelines that oral representation may be made.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
9.2	Final Representations (para. 37)	A licensee should be allowed to make a final representation which includes written and oral representations on the draft final report. The final representations made by a licensee at the draft 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 decision is made by the BA.	The licensee has the opportunity to make a final representation whether written or oral, at the stage of the draft final report. It is the usual practice to attach the licensee's representation to the report to the BA for its consideration.
9.3	Draft Final Report (para. 37)	The draft final 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 draft final report.	The BA intends to include the recommended sanctions and/or remedies in the draft final report. As regards the period allowed for the making of representations, the BA is obliged to act reasonably under section 2(11) of BO. The length of time allowed for comments will depend on whether the parties have seen details of the analysis before, the complexity of the case, etc. This will have to be considered on a case-by-case basis. However, to provide more transparency and reassurance to the licensees, the BA agrees to amend para. 37 to make it clear that the parties will normally be given a reasonable period of time to make final representations, having regard to the complexity of the issues, amount of work involved, etc.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
10.	<u>Final Assessment</u>		
10.1	Re-opening an Investigation	The BA should re-open investigations if there has been a material change in circumstance, or if materially incomplete, misleading or false information has been provided.	Where it can be demonstrated that materially is incomplete or misleading or that false information has been provided, the BA will re-open the case as well as consider whether the party responsible for supplying such information has contravened the BO in this respect, i.e., failing to comply with the request to supply information. Change of circumstances by itself, however, may not justify reopening a case as the investigation looks at the market at a given point in time. Revisiting an issue say six months later because the circumstances have changed may be futile as the complaint may no longer be of any concern. A complainant can of course file a new complaint that is strengthened because of the change of circumstances.
10.2	Inspection of BA Files	If requested, the BA should give the parties an opportunity to inspect the BA files except those that contain confidential information.	The BA will, subject to confidentiality considerations, disclose all such material that is necessary to the parties so that they can deal with the issues fairly and effectively.
11.	Role of TELA (para. 38)	TELA should only attend a meeting where the BA has delegated power to it. 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.	Unless otherwise provided in the Broadcasting Authority Ordinance, the BA may delegate any of its power and functions to TELA. TELA, being the executive arm of the BA, investigates complaints on behalf of the BA and the final decisions rest with the BA.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
12.	Investigation Steps (paras. 33-38)	It is 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.	The process usually takes place within the investigation stage, but there may be times when some of them may be conducted in the preliminary stage also.
13.	Sanctions (para. 41)	BA should clarify the criteria used in assessing the severity and nature of any breach.	The BA, in assessing the severity of a breach, will take into account all relevant factors including, for example, the effect of the conduct on competition, the length of time that this has been going on, whether the party has co-operated in the investigation, whether the breach was terminated early on, etc.
14.	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.	It is the standing practice of the BA to refer cases outside its purview to the appropriate enforcement agency, subject to the consent of the complainant. No need to include this in the guidelines.
15.	<u>Appeal Mechanism</u>		
15.1	Appeal against a Decision of No Further Action (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.	The BO establishes a system of checks and balances to ensure that the rights of all parties are protected. The fact that a decision will be made by the BA (an independent statutory body comprising mainly non-official members drawn from a cross-section of the community), the availability of an appeal channel to the CE in C and the route of judicial review ensure that those aggrieved by a decision can have a fair and effective means to challenge it.

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15.2	Establishment of an Independent Appeal Board (para. 44)	A separate and independent appeal board on competition provisions, similar to that under the Telecommunications Ordinance, should be established.	Telecommunications Authority (TA) and the BA are not strictly comparable. The TA is a public officer who is also the statutory authority on telecommunications whereas the BA is an independent statutory body comprising non-official members drawn from a cross section of the community. The BA considers it appropriate that the CE in C remains as the appeal channel for BA's decisions.
16.	BA's Discretion to Depart from Guidelines (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.	Paragraph 10 provides expressly that the BA would normally follow the guidelines and would give reasons if it departs from it. The discretion would be exercised reasonably as is required under section 2(11) of BO. In any event, it would be against the well-established principle of administrative law if BA were not given any discretion. Any authorities exercising their judgment must not fetter their discretion in a way that does not allow them to deal with individual cases on their own merits. In all cases, the BA will have to give reasons for departing from the guidelines.
17.	Monitoring and Compliance (para. 42)	Paragraph 42 which provides that the BA will monitor the relevant market or licensee at regular intervals if there is a concern that the alleged behaviour may have an effect in the future is welcomed.	Noted.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
		<i>Guidelines to the Application of Competition Provisions</i>	
18.	<u>Exemptions</u> (paras. 11-14)		
18.1		Since the exemption on the imposition of restrictions in artistes' 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.	Exemption grounds will be formulated in the light of BA's experience in enforcing competition provisions. They must be prescribed by regulation made by CE in C. Such regulation is subsidiary legislation subject to negative vetting of the Legislative Council.
18.2		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 licensee's 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.	BA may in the notice granting exemption specify the time limit of the exemption and the conditions under which it can withdraw the exemption.
18.3		As most television programmes or channels are licensed under exclusive supply arrangements, they should not be caught by anti-competitive conduct provisions.	All arrangements are subject to the competition provisions and as such it is for the parties to exclusive arrangements to ensure that they comply with the BO or that an exemption is sought from the BA. Not all exclusive supply agreements are anti-competitive but care is required in drafting and entering such agreements to ensure compliance with the law.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
18.4	Transitional Period Exemptions	The transitional period of 2 years is acceptable on the understanding that it only applies to conduct falling within section 13 but not section 14.	Section 4(2) of Schedule 8 of BO provides expressly that the transitional exemption relates only to section 13 of the BO.
19.	Anti-competitive Conduct (para.7)	The guidelines should state clearly that omitting or refusing to do an act also amount to relevant anti-competitive conduct. Also, anti-competitive conduct may exist between licensees and their associated or related companies or between licensees and third parties.	It is correct that refusal or omission can also constitute an "act" for the purposes of the ordinance. The example of refusal to supply is already provided as an example of anti-competitive behaviour in the existing guidelines. Anti-competitive conduct may exist as between associated or related companies but there may be cases where these may have to be treated as one entity and be subject to the abuse of dominance provisions.
20.	<u>Definition of Relevant Market</u>		
20.1		The relevant markets should be defined as widely as possible.	Each case must be looked at on its own merit. If a market is defined narrowly, it can stifle competition. If it is defined too widely, it will allow anti-competitive conduct to continue.
20.2		Further expansion on the part "Market Definition" is necessary, particularly in relation to demand-side substitution. The guidelines must spell out the evidence on which BA will rely and the evidence to be examined on price elasticities. Chains of substitution must be taken into account when defining markets.	The BA will take into account competition analysis used in overseas jurisdictions with long experience in enforcing competition law. These guidelines are not exhaustive. The points made about price elasticity, chain of substitution etc are correct and will be used in those cases where appropriate as tools to define the relevant market.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
21.	Demand-side Substitution (paras. 34-40)	The demand side test should not focus on whether it is possible for consumers to substitute other services or products but whether consumers would switch to demand-side substitutes.	By its nature demand side substitution looks at the possible options open to consumers. Before considering if a consumer WOULD switch to another product one must look at whether it is even POSSIBLE to do so. It is only at that stage that one can consider if customers WOULD switch.
22.	Supply-side Substitution (paras. 43-44)	The BA must also consider the speed of supply-side substitution.	Yes, the speed of supply – side substitution is relevant and it will depend on the market under consideration.
23.	Geographic Markets (para.45)	The presence of infra-structural bottleneck such as in-building wiring may restrict the geographical market to a part of Hong Kong.	This is something that will have to be looked at when the case arises. It is a possible scenario.
24.	Absolute Advantages (para. 65)	Companies may not have equal access to important assets or rights e.g. talents or programming. Other factors such as copyright, intellectual property rights are also relevant as is access to distribution infrastructure.	Agreed. These are factors that may be looked at in a case. The BA has made it clear that the guidelines do not set out an exhaustive list of all relevant issues.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
25.	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.	Intra-group agreements will have to be looked at on a case by case basis and in the light of section 15(1) of the BO. It may not be appropriate to apply the same approach as other jurisdictions where the behavior of the companies in a group are treated as one company bearing in mind that under the BO, the sanctions apply to the licensee. Therefore to ensure that licensees do not avoid their obligations it may be appropriate in some cases to treat them as having entered an agreement with another related company which may fall under sections 13 and 14. The purpose of the law is to catch anti-competitive behavior in any form if it has an effect on competition in a television programme service market.
26.	Indirect Agreement (para. 9)	It would be helpful to state whether the concept of 'indirect agreement' is equivalent to the concept of 'concerted practice'.	Although an indirect agreement may include "concerted practice" it has a wider meaning.
27.	Exemption by the TA (para. 12)	The BA has power to exempt agreements from prohibition. The TA should be given similar power.	The comment will be passed to the TA.
28.	Stages of Competition Analysis (paras. 21 & 26)	The reference to market power in stage 2 should be replaced by 'dominance'.	"Market power" looks at not only dominance but also the "power" of two parties entering into an agreement, etc. It is appropriate that a more generic term (i.e. Market Power) is used at this stage.
29.	Economic Characteristics (para. 23)	The economic characteristics referred to in paragraph 23 are not unique to television broadcasting but are common to network industries.	Accepted. The word "unique" will be replaced with "special".

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30.	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.	If market share is consistently below 40%, there will be a presumption of non-dominance. The concept of combined market shares where it relates to different markets is more relevant in the test of dominance. However, it should be kept in mind that these figures are for indication purposes only and other parameters may override any such presumption.
31.	Barriers to Entry (paras. 63-69)	The BA should take into consideration links between related companies that could constitute barriers to entry. (eg. access to bottleneck facilities being blocked or interconnection offered on unfavourable terms).	The issue of related companies is already provided for by section 15(1) as well as by the provisions on anti-competitive conduct.
32.	Exclusionary Behaviour	Paragraphs 70-80 give examples of exclusionary behaviour. They should also be presented as examples of abuse of dominant position.	It is correct that these can also be examples of abuse of dominance. However, there is a limit to the examples that can be given under any heading.
33.	Abuse of Market Power	Paragraphs 71-84 should be placed under Stage 3 instead of Stage 2. The Guidelines should also add that charging excessively high prices and charging discriminatory prices or other terms would amount to abuse of dominance/anti-competitive conduct.	Paragraphs 71-84 are examples of abuse of market power and could be in either part. It is correct that charging excessively high prices and in some cases discriminatory pricing or terms can constitute abuse of dominance and/or anti-competitive conduct.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
		Abuse does not have to take place in the market in which the licensee is dominant or possesses market power. The effect could be felt in another market.	It is correct that the abuse may not take place in a market that the licensee is dominant. If an abuse of a dominant position in another market has an appreciable effect on competition in a television programme service market, then it may have committed a breach.
34.	Refusal to Supply (para. 79)	This provision should include access to essential facilities such as access to wiring or intellectual property rights.	If it can be established that wiring or intellectual property rights are essential facilities in a specific case and the refusal to supply is for anti-competitive reasons, then it can constitute an abuse of a dominant position.
35.	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 the position vis-a-vis a supplier.	It is correct that there have been some cases where the abuse of dominance could be manifested in terms of the purchasing power of the party. However, the guidelines already make it clear that the BA is concerned with the effect of the behaviour which could include the cases mentioned.
36.	Vertical Agreements (para. 85)	It should be clarified whether vertical agreements and restraints will be given more lenient treatment.	Vertical agreements will be considered like any other case. Whether they should be treated more leniently will be examined on a case by case basis, taking into account the effect that they may have on competition.
37.	Assessment of Agreements & Conduct (paras. 85-92)	Section 13(1) of the BO refers to "substantial restriction of competition" while the Guidelines refer to "appreciable effect". Does the BA consider these concepts the same?	Yes, the two concepts have a similar meaning.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
38.	List of Anti-competitive Conduct	The Guidelines should make it clear that the list in section 13(2) of the BO is a non-exhaustive illustrative list. Also, the Guidelines should state the BA's view of whether the examples set out in section 13(2) of the BO are likely to be caught by the prohibition set out in section 13(1) of the BO.	The Guidelines have made it clear that they do not provide an exhaustive list of all types of behaviour that may be prohibited etc. It would be impossible to do so. Obviously the examples in section 13(2) are likely to be caught by 13(1) but again they can only be assessed on a case by case basis.
39.	List of Abusive Conduct	The Guidelines need to make it clear that the list of conduct stated in section 14(5) of the BO is not exhaustive.	Section 14(5) of the BO already clearly states "... including, but not limited to". Paragraph 91 of the Guidelines also explains that these are no more than examples and are not exhaustive.
<i>Others</i>			
40.	Overseas Precedents	A respondent suggests that overseas examples in the guidelines should be omitted so as to ensure an objective and independent analysis of the Hong Kong situation. Another respondent considers that it will 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.	As there is no precedent of competition cases in the broadcasting sector of Hong Kong, overseas examples are useful in illustrating the points. These may be substituted over time with cases dealt with by the BA.
41.	Telecommunications & Broadcasting	The procedures and 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.	The market is not yet fully convergent and the TA and BA are separate statutory authorities. Nonetheless, the comments will be referred to TA for his consideration.

<u>Item</u>	<u>Subject</u>	<u>Submissions</u>	<u>BA's Response</u>
		<p>As a refusal to grant building access may affect competition in the television market, the BA needs to give guidance as to interrelationship between the competition provisions of the BO and the competition provisions of the TO.</p>	<p>Where appropriate, and within the existing legal parameters, the BA will involve OFTA in its complaint investigation.</p>
42.	Inadequacy of Broadcasting Ordinance	<p>Government should take a cross-sector approach in view of the converging media environment. It should consider a legislative framework that will prevent a dominant licensee from exercising its market power to related or co-dependent industry.</p>	<p>The BA does not have jurisdiction to deal with behaviour which does not have any effect on the television market. However, if the behaviour of a licensee has a direct or indirect effect on a television programme service market, it may be caught by the competition provisions.</p>
43.	Firewall Safeguards	<p>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.</p>	<p>The safeguards have already been incorporated into the respective licence conditions of the two licensees concerned. In addition to the firewall, the licensees will have to comply with the competition provisions in the BO.</p>
44.	Composition of the BA	<p>BA should include full-time members who are competent legal experts and professionals from related sectors.</p>	<p>The BA can seek expert advice to assist it in discharging competition duties as it sees fit.</p>