Establishment of a Communications Authority for Hong Kong

Comments on the Competition Provisions

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Introduction

The CITB Consultation paper (March 2006) on the establishment of a new Communications Authority (CA) for Hong Kong is to be welcomed. The proposed merger of the existing Telecommunications and the Broadcasting Authorities, whereby the two administrative units would be amalgamated but the underlying substantive legislation, save for the competition provisions, would remain in force pending a further process of consolidation is more problematic. This response considers these matters primarily from the competition policy perspective.

The Case for Change

Over the last 15 years, the technical and economic changes seen in this fast-moving high technology sector have been dramatic but existing Hong Kong regulatory arrangements are still predicated on an obsolete and artificial bifurcation between broadcasting and telecommunications.

The Consultation paper makes a convincing case that the old dividing lines between these two sectors are fast dissolving and the new environment creates four separate but related areas of regulatory concern, namely:

- technical standards/bandwidth allocation;
- media content;
- plurality of ownership/free speech and
- competition enhancement.

There appears a to be a clear case for reshaping the existing regulatory arrangements but the current government proposal is not an optimal solution to the need for Hong Kong to establish a 'one-stop shop' for the increasingly convergent communications industry.

This submission is limited to comment on the competition aspects of the proposed regulatory regime, though competition matters inevitably touch upon content issues and plurality of ownership concerns, especially in relation to merger and acquisition activity and consequently they will be discussed tangentially.

The Existing Proposal

Amalgamating the regulatory units is both necessary and appropriate but leaving the new CA to administer two sets of often conflicting substantive rules is, at best, a temporary expedient that is obviously flawed. Further, the legislative effort to create a new CA might exhaust the enthusiasm of government to speedily proceed with the necessary stage two of the plan – the consolidation of the conflicting substantial rules. It is likely that if the two-stage approach is adopted, a substantial delay will occur between the fusion of the administrative units and the underlying legislation, so ensuring that the CA is hobbled with an unsatisfactory remit for several years. Worse, this scheme does nothing to expeditiously address the root of the

problem, which is the divergent substantive legislative regimes in this fast converging sector. As a result, economic and technical reality may leave Hong Kong's legal regime far behind its regional competitors.

Further, the current review of RTHK should also be included as part of a comprehensive review of the regulation of the communications sector. The future mandate of RTHK will have an important impact on the communications landscape in Hong Kong and whatever is ultimately decided, the resultant entity will have an effect on spectrum allocation, content requirement and the competitive position of players in the communications market.

Finally, the intersection of content and competition policy is also germane and is not addressed by the consultation paper. The current requirement that terrestrial free-to-air networks must carry a certain number of hours of RTHK content should be expanded to other carriers who have market dominance and are vertically integrated. This would provide numerous business opportunities for independent content producers and would foster the development of a vibrant and diverse Hong Kong creative media industry, introduce more competition into the content production sector and at the same time protect freedom of speech.

Recommendation

The legislative window created by the proposed reform should not be squandered and the need for comprehensive reform should not be fudged; if this opportunity missed, the existing unsatisfactory state of affairs will be prolonged indefinitely. The future position of RTHK must also be factored into such a comprehensive legislative scheme. Provision should be made to require dominant vertically integrated networks to take a percentage of independently produced content.

Competition Issues – mergers and acquisitions and articulation with general competition law.

There is a particularly acute problem in relation to the competition provisions of the existing Ordinances. The BO and TO have different substantive coverage, different definitions, different substantive rules, different procedures, and different appeal routes; this is obviously grossly unsatisfactory, both from a theoretical and practical perspective.

The consultation paper makes the sensible proposition that, as part of the stage 1 consolidation, and in addition to creating the new CA, the initial reform ordinance will seek to streamline and align the substantive competition provisions currently found in the BO and TO; this is clearly to be welcomed.

But there appears to be a glaring omission in the current proposal for initial legislative consolidation of the competition provisions, namely, what will be the position regarding mergers and acquisitions, both within the telecommunications and broadcasting sectors (as currently defined) and in relation to telecommunication/broadcasting mergers in the future?

This is particularly germane given the rash of consolidation in the mobile telecom market and the clear desire of network operators to secure content producers, so as to offer more marketable 'products' for 3G mobile devices and in relation to internet broad band service providers. The existing merger rules in telecommunications and those in broadcasting are completely incongruent and the consultation papers makes no mention of this vital issue.

Obviously, it will be highly unsatisfactory if the anti-competitive 'behavior' provisions are aligned but the respective merger rules are left in their current state, despite the partial

legislative overlap found in the 'deeming' provision in s.2 of the Telecommunications Ordinance. Government must not duck the merger issue. The importance of dealing with mergers and cross ownership is particularly important in Hong Kong given that many telecommunications, and some media content firms, are connected to one or other of Hong Kongs major conglomerates; this adds a further complicating factor to this problematic area. If it is urgent and necessary to combine the competition provisions, then the same logic applies forcefully to the merger rules too.

It is appreciated that the merger provisions are highly contentious – note the opposition of many in the telecommunications sector to the original legislative provisions on mergers and acquisitions. But with an amalgamated communications regime, the problem will become even more acute given the prohibition of cross media ownership rules that preserve plurality of ownership, not on economic grounds but on political ones, namely the paramount need to maintain free speech. Merger of content providers with network owners and the handing of exclusivity to a single distributor of, say news or Canto pop music, would have implications not only from the economic perspective of creating or maintaining a position of dominance in the Hong Kong market but also may have political implications too, in that free speech might be undermined if a dominant player exercised excessive control of content as well as distribution.

A second substantial issue has also arisen recently, namely the probable enactment of a general competition law for Hong Kong. The Competition Policy Review Committee is due to publish its report in July 2006. Press leaks have suggested that the government will accept the rumored central recommendation, namely that Hong Kong should proceed to legislate a general competition law swiftly – perhaps even prior to the September 2008 Legislative Council elections.

This will inevitably affect several issues relating to competition enforcement in the communications sector.

Firstly, how will the substantive competition provisions and procedures in the communications sector align and articulate with the general competition law ?

Secondly, will the CA continue to autonomously administer the competition provisions for the communications sector?

Thirdly, how will competition cases that involve cross sector issues, that is, ones that involve communications and some other economic sector, be investigated and adjudicated?

Fourthly, how will appeals be dealt with from the decisions in such cross sector investigations?

These matters are clearly of crucial importance in making a policy decision to reform the existing competition provisions. It appears inappropriate to simply proceed to amalgamate the BA and TA without a clear decision being taken in respect of these vital questions.

At present, it might be premature to attempt to answer these questions, but as a government pronouncement on policy change toward the enactment of a general competition law appears to be immanent, any decision with regard to the communications sector must fully take into account such a major reform of the enactment of a general competition law for Hong Kong.

Consequently, these wider policy issues must be considered carefully before any decision is reached on competition policy matters in the communications sector; it would be the height of folly to deal with the competition provisions pertinent to the communications sector in isolation from the wider economy.

Recommendations

1. The substantive competition law provisions in the communications sector should be aligned as suggested in paragraph 33 of the consultation paper, save that it is necessary to ensure that the private right of action for damages in s.15 (2) BO should be included in the consolidated provisions and the deceptive and misleading conduct provision in s.7M TO should apply to all communications markets. But if enactment of a general competition ordinance is decided upon by the government, the general provisions should also apply to the communications sector unless there is a very strong case for separate and distinct pro-competition rules.

2. The rules on mergers and acquisitions in the communications sectors must, as a matter of priority, be included in the initial stage of the reform process; it is clearly undesirable (and probably unworkable) to leave the existing legislative provisions untouched once the new CA is created. This will not be an easy task given the complexities and political sensitivities involved but it must be tackled without delay. However, given the poor drafting of s.7P of the TO, this provision should not be the basis of the merger regime. A new, simpler and clearer provision is needed but the substantial lessening of competition test remains appropriate.

3. The investigation and enforcement of the communication sector substantive competition rules should also follow the proposals in the consultation paper. However, if the government proceeds with a general competition law, then given Hong Kong's limited competition enforcement experience and the scarcity of appropriately qualified professionals in the field, the creation of two competition authorities would not amount to a best use of available human or other resources. It would also be difficult to achieve critical mass, an appropriate through-put of cases or to achieve desirable economies of scale unless the competition functions of the proposed CA and the new general competition authority were merged. In the event of a decision to enact a general competition law, the OFTA competition branch should form the nucleus of the new competition authority. Competition infractions in the communications sector should be treated in the same way as any other competition violation and investigated and sanctioned by this single entity. The CA would continue to regulate technical and content matters.

4. The appeal process should be also consolidated into a single route as proposed in the consultation paper with the same caveat as in the preceding paragraph, namely that if a general competition ordinance is proposed, appeals in the communications sector would be dealt with in way as all other appeals, namely through a general appeal tribunal, rather than to an enhanced Telecommunications Appeal Board. Appeal to an administrative body such as the Executive Council, as under the current arrangements for broadcasting, rather than to an independent judicial body, is inappropriate. It weakens the doctrine of separation of powers and rule of law. In any event, the Executive Council does not have the appropriate technical expertise in competition matters to be a competent appeal tribunal; the logic that holds good for investigation and enforcement of competition infractions also pertains to the appellate process.

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