Policy & Regulatory Training Modules

Reference to COMPETITION: OVERVIEW

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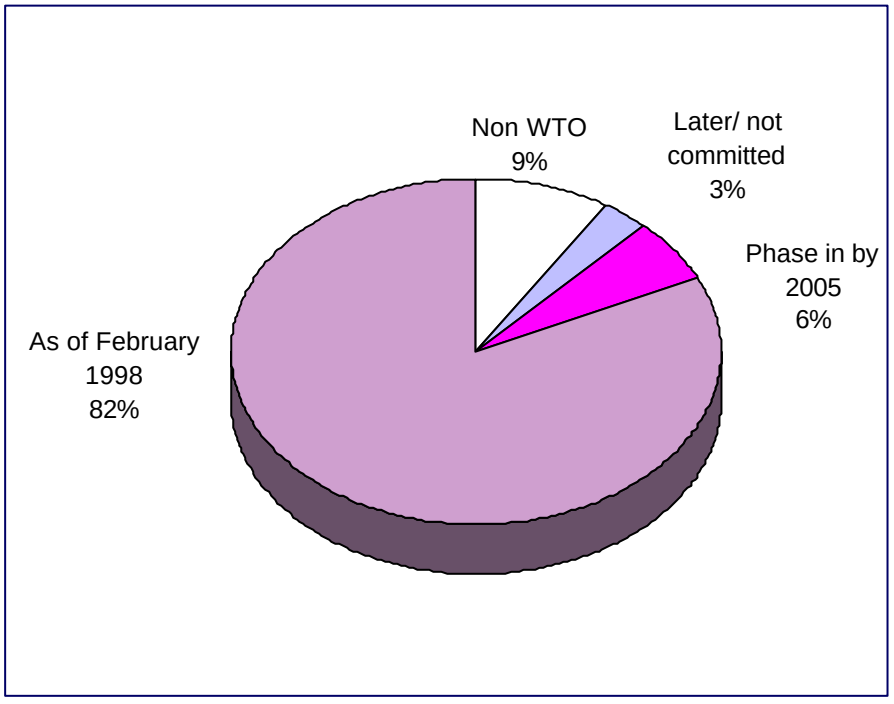
INTRODUCTION

The telecommunication sector is in a process of rapid structural change and dramatic economic growth particularly for the last two decades. The national monopolies, which have dominated the industry in almost all countries until very recently, are now facing competition in many parts of the world. As of 5 February 1998, with the entry into force of the agreements on Basic Telecommunications of the GATS/WTO, the world market measured in revenue terms is subject to open markets for the supply of basic telecommunication services. Diagram 1 well illustrates that governments representing about 82 per cent of world revenue committed to ensure competition as of February 1998 and another 6 per cent have committed to introduce competition on or before 2005. This trend is expected to have significant implications for the way in which the telecommunications industry will be structured and telecommunications services will be provided in the future.

Diagram 1. World telecom revenue covered by Members
with commitments to full competition
Source: ITU, 1996



Competition – or competition safeguards - became more on agenda for regulators worldwide due to the emergence of various convergence such as voice and data transmission, content and delivery, and fixed and mobile telephony across national borders.

Here, the question of not only promoting fair and effective competition but also taking necessary actions against anti-competitive behaviors and abuse of dominant positions is one of the major emerging – if not, growing – concerns for many regulators. It has been well reflected in a speech delivered by the Director General of Office of the Telecommunications Authority (OFTA), Hong Kong, during the Special Session on Telecommunications Services of Council for Trade in Services on 25 June 1999.[1] However, some may also argue that competition can better play at the invisible hands of markets *per se*. In other words, it is the government *per se* who has supported monopolies and erected barriers to competition under the policy of so-called regulations or de-regulation.

Therefore, this paper aims at examining various aspects and implications of competition and its safeguards when regulators introduce or improve their competition policy in their own environment with respect to national rules and regulations. Bearing in mind of different approaches towards the competition policy in each country, measures taken by Office of the Telecommunications Authority in Hong Kong/China will be closely looked at as an example comparing with those by other regulators, if available. It is also necessary to note that this is not a legal text designed for lawyers but an introduction on overall issues of competition for those who intend to know or implement competition safeguards in the ICT sectors.

Q1. What Is Competition ?

Competition is defined as "the process by which economic agents acting independently in a market limit each other's ability to control the conditions prevailing in that market".

Q2. What Is the Major Objective of Competition & Its Policy ?

A fundamental aim for competition is to enhance economic efficiency and consumer and economic welfare, although it may vary in each country or region. To achieve this broad aim, many countries particularly in the APEC region endeavor:

- to encourage use of competition principles in addressing market access issues;
- to foster linkages between competition policy and investment policy as well as trade policy;
- to foster linkages between competition principles and liberalization of trade in services;
- to promote the key reinforcing role of domestic deregulation in opening markets and increasing the ability of suppliers to contest them;

[1] The speech delivered by Mr.S.K.Wong, DG of OFTA: http://www.wto.int/wto/services/wong-hk/sld006.htm

- to promote a greater degree of transparency to competition policy;
- to promote the effective administration of competition regimes, including effective enforcement of competition law targeted at anti-competitive business conduct; and
- to encourage the application of competition principles to policy-making

However, as a previous Director General of OFTEL, an independent telecommunications regulator in the UK, argued, competition may not be left to grow by itself in an industry such as telecommunications with such large economies of scale and scope, huge sunk costs, and powerful, entrenched incumbent, although regulatory barriers to entry are lowered – if not, removed – with many companies anxious to compete. Effective competition may need some time to develop particularly in such industries as telecommunications unlike other sectors, although some may raise arguments on competition emerging from Internet and its related markets.

Q3. Is Competition Required In Natural Monopoly[2] ?

In case that a natural monopoly exists, competition may be neither desirable nor feasible. Typically duplication of the assets is regarded as socially wasteful and competition is seen to provide no benefits. Price regulation, accompanied with regulations and licences that prevent or limit entry, would then be required to safeguard consumers.

The natural monopoly was often justified in case of the telecommunications sector until the early 1980s before policies such as liberalization, deregulation or privatization swept across the world. It may be still the case of small countries such as those in the pacific islands.

However, convergence of many kinds such as voice and data transmission, content and delivery, and fixed and mobile telephony together with a variety of value-added services challenges the existence of natural monopoly in today's information and telecommunications (IT) sectors. Therefore, many argue that regulators should not impose on entry barriers unless there are such limits of resources as radio spectrum.

Q4. What Are The Emerging Issues Of Competition?

There are emerging concerns about, if not tension between a *competition policy* approach and a *trade policy* approach to the concepts of *competition* and *market access* especially in the era of new WTO round. There was also the underlying

[2] The term of 'natural monopoly' is defined as "an industry where costs are minimized by relying on a sole supplier; so competition would lead to excess costs".

issue of whether or not competition policy objectives can help inform debate in the trade policy area.

Another important distinction may also be balanced between developed and developing economies especially on the extent to which, and the speed with which, it would be feasible for developing economies to adopt a competition-efficiency-economic welfare paradigm for policy development.

Q5. What Are The Key Competition Principles and Requirements?

The key competition principles combined with requirements can include, but not limited to:

- comprehensiveness of coverage;
- transparency;
- accountability; and
- non-discrimination and competitive neutrality

These core principles permeate the following set of proposed principles and requirements that countries like the APEC economies can pursue:

(1) to foster greater reliance upon well-functioning markets and to that end upon the role of competition:

- in allocating resource, including scarce resources, within and between markets;
- in yielding benefits for consumers and customers; and
- in generating benefits for the economy as a whole.

(2) to adopt, maintain and apply a competition-driven approach to a broad range of policy areas, including trade policies and remedies that impact on markets;

(3) to minimize exceptions from reliance upon well-functioning market mechanisms and the role of competition; and to apply any government intervention in markets that is deemed necessary with the conditions that:

- there is minimum distortion to the competitive process; and
- net welfare gains are clearly and explicitly identifiable.

(4) to ensure competitive neutrality and hence a competitive environment through uniform (non-discriminatory) application of the same competition principles to the different modes of domestic and international supply;

(5) generally to foster an efficiency-based approach to competition recognizing that competition on the basis of economic merit (e.g., lower

costs, competitive prices, improved product/service quality, innovation) is the relevant competition standard for promoting an efficient and welfare enhancing competitive process;

(6) to minimize uncertainty for business and foster confidence in system fairness and predictability by adhering to the following procedures:

(a) transparency of policy foundations and their applications;
(b) consistent application of agreed competition principles and disciplines; and
(c) avoidance of unforeseen or unclear rules and legal/ administrative/ regulatory procedures.

(7) to facilitate the competitive process by progressively eliminating – within a reasonable timeframe – government regulations that create or maintain those barriers to market entry that are efficiency-reducing;

(8) to progressively eliminate – within a reasonable timeframe – government regulations, practices and costs that have the effect of impeding the ability of market players, including SMEs, to compete through innovation and efficiency;

(9) to minimize the risk that government efforts to make markets more open and competitive – through deregulation and the lowering or eliminating of other barriers to competition – are replaced or impeded by anti-competitive business conduct;

(10) to design these (selective or comprehensive) competition disciplines on business conduct so that they are, *inter alia*:

- solely and clearly focused on the objective of promoting competition and efficiency, consistent with the protection of clearly defined property rights;
- reliant upon relevant analytical tools for assessing the efficiency and welfare implications of the business conduct in question;
- transparent in respect of substantive provisions, procedures and decision-making in legal, administrative or regulatory regimes;

and, where a comprehensive competition law is considered appropriate, it has the following characteristics:

- minimal exemptions or exceptions by sector or operation (whether government or private, domestic or foreign-owned, or natural or other monopolies), while recognizing that it may well be appropriate for developing economies to progress through transitional stages before adopting such comprehensive competition disciplines;

- non-prescriptive in relation to types of business practices;
- enabling of a diversity of business transactions;
- generally based on a rule of reason approach to the impact of business conduct on competition; and
- prohibitive of specific business conduct (i.e. *per se* prohibitions) only where this is generally judged to be unambiguously harmful to economic efficiency and economic welfare.

(11) to ensure that institutional, administrative or regulatory arrangements for enforcement implementation, *inter alia:*

- provide for clear accountabilities;
- serve public not private interests;
- serve total economic welfare, i.e. not just the welfare of competitors;
- are alert to potential misuse of enforcement procedures;
- serve to encourage self-enforcement;
- are independent of inappropriate government influence;
- adhere to the principle of non-discrimination as between domestic and foreign supplies;
- enable both foreign and domestic complainants to refer complaints to the relevant authorities; and provide for recourse by these complainants to formal appeal procedures;
- provide appropriate administrative and/or investigatory powers;
- provide for robust protection of confidential business information.

(12) to be alert to the potential for and benefits of cooperation among national competition agencies/authorities, including the benefit of avoiding/managing jurisdictional conflict; and to encourage such cooperation as a step towards dealing with cross-border competition issues, with allowance for the level of enforcement experience of the agencies in question;

(13) to deliver in practical terms technical and capacity building assistance as key elements in operationalizing the proposed competition principles in developing economies;

(14) to provide for appropriate transitional features in relation to policies designed to promote the role of competition in efficiently allocating resources[3].

[3] PECC, "Principles for Guiding the Development of a Competition-Driven Policy Framework for APEC Economies," 8 April 1999.

Q6. What Are the Main Objectives of Competition Law?

The major aim for competition is to ultimately enhance consumer welfare. Competition law, which intends to maintain and enhance the competition, is an essential part of the economic constitution of a free market economy. It should, as much as possible, apply to all market transactions and to all entities engaged in commercial transactions irrespective of ownership or legal form. All exceptions to the application of the law should be explicitly identified in pertinent legislation.

Q7. General Competition Law vs. Sector-Specific Competition Law?

There is no a single rule or practice whether to combine or separate between general competition laws covering the overall markets and specific competition laws focusing on the IT sectors.

In some countries like the UK and Germany, there are general competition law such as the Fair Trading Act and the Competition Act, under which telecommunications regulators have a range of powers. Some argue that these powers are not sufficient in themselves to tackle an industry such as telecommunications. Under the UK competition law, until recently there was no system of penalties or retrospective sanctions in the event that the behavior of a dominant player does indeed turn out to be have been anti-competitive and damaging to competitors or consumers.

Korea (Rep. Of) has the Fair Trade Act which aims at encouraging fair and free competition through stimulating creative business activities and protecting consumers as well as promoting a balanced development of the national economy. Whilst, there is neither a specific Act on competition nor administrative authority to oversee or administer any competition rules or regulation in Malaysia. In Hong Kong, there is no such a general competition law although the competition rules and conditions is being adopted in the new Telecommunications (Amendment) Bill 1999 in the middle of 2000.

Q8. Why For A Sector-Specific Competition Authority?

The reasons or objectives of having a sector-specific competition authority or regulator may differ county by country or sector by sector. The major reasons or justification for the authority or regulator among others in the IT sector may include:

- Where there is a market of the size and significance of the telecommunications market, supplied by a vertically integrated, highly dominant company, with large economies of scope and scale and huge sunk costs, the public interest needs to be protected on a full-time basis.

- Regulators in this kind of sector are required to provide protection against the abuse of a dominant position and to promote effective competition. As the competition is increasing, however, so can the major role of regulators be moving gradually away from detailed and prescriptive regulations as contained in individual licences towards the use of general powers to investigate and to stop anti-competitive behavior: i.e., the enforcement of general competition rules.

- Another significant reason for having a sector-specific competition authority or regulator can be to help its domestic industry to overcome barriers to entry in others' markets which are very competitive globally.

- Regulators should also be able to balance between detailed regulation of the dominant operator and relatively light-handed oversight of new entrants in the dynamic IT markets.

- It is of importance to abandon restrictions on the number of operators as resources (e.g., radio spectrum) allowed, avoid over-elaborate licensing procedures for the vast majority of service providers and minor operators, and make public available to the regulatory procedures and decisions based on transparency.

- Specific knowledge and expertise to deal with specific sectors like the IT is also required particularly for such areas as **interconnection** among various competitors and **spectrum management or co-ordination**.

- Efficient and speedy executions by sector-specific authority or regulator may be critical in the very fast moving, developing, innovating and converging IT sectors.

Q9. What Are The Major Roles for Telecommunications Regulators For Competition?

In an industry such as telecommunications like in the UK, that came from an uncompetitive starting point, it may need sharper prior controls to prevent dominant operators from indulging an anti-competitive behavior. This was recognized by Parliament in 1984, when OFTEL was given an additional range of powers under the Telecommunications Act. Powers, which include the obtaining of information and the enforcement of licence conditions, many of which deal directly with anti-competitive behaviors. A previous Director General of OFTEL argues that an independent telecommunications regulator is needed with strong and clear powers to promote and police competition.

Whilst, general competition law in the US or Australia is prohibitive and allows of fierce sanctions. Thus, telecommunications regulators have and need fewer additional powers and can be less specific in licence conditions.

In case of Hong Kong, both OFTA and Broadcasting Authority (BA) are empowered to prevent anti competitive behaviors in their respective areas: e.g., telecommunications markets relating to facilities and broadcasting markets to content. It may envision that there will be some overlap between their respective jurisdictions, given that both content and the facilities to deliver that content are necessary to compete in the communications market. Therefore, close co-ordination between the two regulators may be required to resolve issues that inter-related across the regulatory boundaries, although they operate under different statutory regimes with difficulties in compromise between the two.

Q10. What Are The Major Barriers To Effective Competition?

Three major types of barriers among others can be recognized in the telecommunications markets:

Dominance advantages:

It relates to the incumbent operator's market position arising from its former situation as a publicly or state owned utility like telecommunications or statutory monopoly. They include its vertically integrated structure and its scope to frustrate competition as a dominant player. These problems often need to be handled through sector-specific powers as well as through general competition law.

To avoid such dominant advantages by the incumbent operator, the key principle of non-discrimination through appropriate pricing, technical and quality of service[4] as well as interconnection[5] charges should be ensured. Regulators may also need to provide a framework of financial reporting and transparency to reveal any incidences of unfair subsidy o cross-subsidy.

In case of Hong Kong, Cable & Wireless HKT, as the incumbent operator of the local fixed line market, was regarded as the dominant operator in the local FTNS operator when the market was opened up in July 1995. However, the recent acquisition of the HKT by Pacific Century Cyber Works, a new-borne internet group without much in the way of revenues or customers, may draw regulator's attention searching for a new paradigm of assessing competition behaviors in the emergence of various convergence across the IT sectors.

Control Advantages:

These advantages arise from the incumbent operator's ownership of information and technical systems such as accounting rates and numbering. For instance, certain numbers (e.g., 0800) and short access code numbers can be highly valuable, commercially confidential, information. Thus, the OFTEL transferred responsibility for administration of the numbering scheme from the incumbent operator (BT) to the OFTEL. In addition, number portability which is the ability of a customer to keep their number when changing operator is regarded a major disincentive for customers to change networks. In this regard, such regulators like OFTEL began to implement the number portability.

Under the Telephone Ordinance, OFTA was charged with the responsibility of managing the telecommunications numbering plan in Hong Kong. For instance, OFTA issued the "Code of Practice Relating to the Use of Numbers and Codes in Hong Kong Numbers and Codes in Hong Kong Numbering Plan" setting out the principles for network operators and paging services operators in assigning telecommunications numbers and/or codes to customers. The inter-operator number portability of the fixed line services was also implemented by the fixed telecommunication network services (FTNS) operators through call-forwarding in mid-1995 when the FTNS market was liberalized and as from 31 December 1996, by using the intelligent network and database technique. The number portability between mobile operators was introduced on 1 March 1999, as well.

Structural Advantages:

These arise from scale and scope of the incumbent, which covers network ubiquity and customer advantages in terms of brand awareness and price leadership. This issue can be tackled, first, through time-limited entry assistance to new competitors, regulators may grant discounted interconnection charges to new entrants as kind of short-term entry assistance. Second, priority can be given to new companies other than the dominant or existing ones, particularly when relating to the allocation of scarce radio spectrum for new services.

In case of Hong Kong, interconnection is left to commercial negotiation among the FTNS operators as far as possible. However, if the negotiation runs into difficulties or public interest otherwise dictates, OFTA is empowered under the Telecommunication Ordinance to intervene. Thus, OFTA has issued a series of statements on interconnection and related competition issues, outlining the principles that the Authority would apply to the various aspects of the interconnection of FTNS sectors. Guidance notes have also been issued to assist the FTNS operators in such negotiations.

Q11. Will It Be De-regulating or Re-regulating The Privatized IT Markets?

One may argue whether such detailed or ever-expanding list of regulatory measures or tools to tackle various barriers to entry or competition are for de-regulating or re-regulating the liberalized and privatized IT industries.

Regulators like OFTEL seem to recognize that detailed regulation normally applying to the dominant operator can and is being progressively lifted once effective competition is in pace although it is rather difficult in identifying the right time.

Q12. How To Ensure Competition ?

The ways to ensure competition may vary by country, region, or the relevant organizations, particularly depending on the sectors:

Practice Under the GATS/WTO

In accordance with the Reference Paper [6] supplemented to the Basic Telecommunications agreements on the GATS/WTO, there are two major ways of ensuring competitive safeguards in the liberalized and competitive telecommunications markets:

(1) Prevention of **anti-competitive practices** in telecommunications. Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

(2) **A competitive safeguard,** to which the anti-competitive practices referred, shall include in particular:

- Engaging in anti-competitive cross-subsidization;
- Using information obtained from competitors with anti-competitive results; &
- Not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

Practice Within APEC Economies

There are no binding rules to ensure competition within the APEC Economies, but suggestions including prevention of **abuse of dominant position;** prohibition

[6] WTO, The Reference Paper: http://www.wto.int/wto/services/tel23.htm

of **restrictive agreements;** prohibition of **concentration through mergers and acquisitions;** prohibition of **unfair competition**[7]**.**

Practice in Hong Kong

There are no general competition laws applicable to the industry in Hong Kong. However, competition and fair trading rules, which are now part of licensing conditions in the telecommunications sector, will be included in the Telecommunication Ordinance when the Telecommunication (Amendment) Bill 1999 is passed by the Legislative Council in 2000. OFTA will ensure competition through at large two major rules indicated in the 1999 Bill. One is prohibition of **anti-competitive practice**; the other is a prohibition of **abuse of dominant-position**. There are also rules for **misleading or deceptive conduct** and **non-discrimination** respectively**.** If a case of violating or breaching competitive practices is found, there will be also penalty schemes imposed with different scales.

Q13. How To Define 'Anti-Competitive Practice'?

Anti-competitive practice by the 1999 Bill in Hong Kong means "a licensee who engages in conduct which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market". It will take into account behaviors of licensees in particular:

- agreements to fix the price in a telecommunications market;
- an action preventing or restricting the supply of goods or services to competitors;
- agreements between licensees to share any telecommunications market between them on agreed geographic or customer lines; and
- the conditions of relevant licences.

Examples of specific behaviors include:

- enters into an agreement, arrangement or understanding that has the purpose or effect of anti-competitive practice;
- without the prior written authorization of OFTA, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person; and
- gives an undue preference to, or receives an unfair advantage from, an associated person if, in the opinion of OFTA, a competitor could be placed

[7] PriceWaterHouseCoopers, "APEC Competition Law Study", April 1999.

at a significant disadvantage, or competition would be prevented or substantially restricted.

A case for the anti-competitive practice handled by OFTA can be found in "The simultaneous price changes of mobile telephone operators".[8]

Q14. How To Define 'Abuse Of Position' ?

Abuse of position by the 1999 Bill in Hong Kong means "a licensee who is in a dominant position is deemed to have abused its position if, in the opinion of OFTA, the licensee has engaged in conduct, which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market."

Q15. How To Define 'The Dominance' ?

In the general industry, it is rather unlikely to have dominant companies. Whilst, there is normally the dominant player in telecommunications industry or sector in most countries due to its history with a monopoly by the government or its equivalents. For instance, BT in the UK is still the only operator with a national network active in all sectors of the market despite hundreds of new licensees after liberalizing and privatizing the market.

The term of 'dominance' in case of OFTA (Hong Kong) can be taken into account by matters including, but not limited to:

- the market share of the licensee;
- the licensee's power to make pricing and other decisions;
- any barriers to entry to competitors into the relevant telecommunications market;
- the degree of product differentiation and sale promotion; and
- such other relevant matters as may be stipulated in guidelines concerning the test of dominance issued by OFTA in consultation with the licensees in the relevant telecommunications market

[8] Refer to Summary of Case in Competition Bulletin, OFTA web site: http://www.ofta.gov.hk and OFTA, P 030 (00), "Report on the investigation by the Telecommunications Authority into the simultaneous price changes of mobile telephone operators", 20 January 2000.

Q16. How To Define 'The Abuse of Dominant Position' ?

In case of OFTA, the abuse of dominant position can be defined as the following types of behaviors, but not limited to:

- predatory pricing;
- price discrimination, except to the extent that the discrimination only makes reasonable allowance for differences in the costs or likely costs of supplying telecommunications networks, systems, installations, customer equipment or services;
- making conclusion of contracts subject to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the contract;
- arrangements requiring a person seeking the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service either from the licensee providing the service or from another person; and
- discrimination in supply of services to competitors.

Q17. How To Ensure 'Misleading or Deceptive Conduct' ?

In case of Hong Kong, the 1999 Bill also ensures by adopting a rule that "a licensee shall not engage in conduct which, in the opinion of OFTA, is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including promoting, marketing or advertising the network, system, installation, customer equipment or service." OFTA may also issue guidelines for the conduct, as appropriate.

Q18. How To Ensure 'Non-discrimination' ?

In case of Hong Kong, the 1999 Bill intends to ensure non-discriminatory behaviors by adopting rules:

- a licensee who is in a dominant position in a telecommunications market shall not discriminate between persons who acquire the services in the market on charges or the conditions of supply; and
- an exclusive licensee or a carrier licensee shall not discriminate between a person who lawfully acquires and uses telecommunications networks, systems, installations, customer equipment or services to provide services to the public and any other person who is not providing a service to the public.

OFTA will prohibit discrimination (e.g., charges and performance characteristics), which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.

Q19. Should Mergers and Acquisitions Be Regulated ?

Mergers and Acquisitions (M&A) become a growing trend in the IT sectors even across national borders. Here, a question arises whether to regulate such M&A ? A competition statute's merger provisions should be permissive. In particular, there is no need for systematic review and approval of all mergers. Mergers should be allowed unless the competition authorities can prove that they will significantly limit competition. Requiring notification of all mergers would unduly burden the authorities and impose unrealistic costs and delays on the merging parties. Only large mergers, which are most likely to pose a threat to competition, should be subject to pre-merger notification requirements.

The same competition test should be applicable to all mergers, whether or not notification is required. The competition office should thus have the power to order the dissolution of smaller, not notified mergers. To eliminate the uncertainty of possible dissolution, merging firms should be permitted to make voluntary notifications.

Q20. Should Rights To Appeal Be Allowed ?

Operators, the dominant operator in particular, may argue that regulators cannot be prosecutor, judge and jury at the same time.

In case of the UK, thus, any operator who objects to a licence modification may appeal to the MMC. All decisions made by OFTEL are subject to review by the courts, if an operator feels the decisions unreasonable.

Q21. How To Implement Competition Investigation Procedure ?

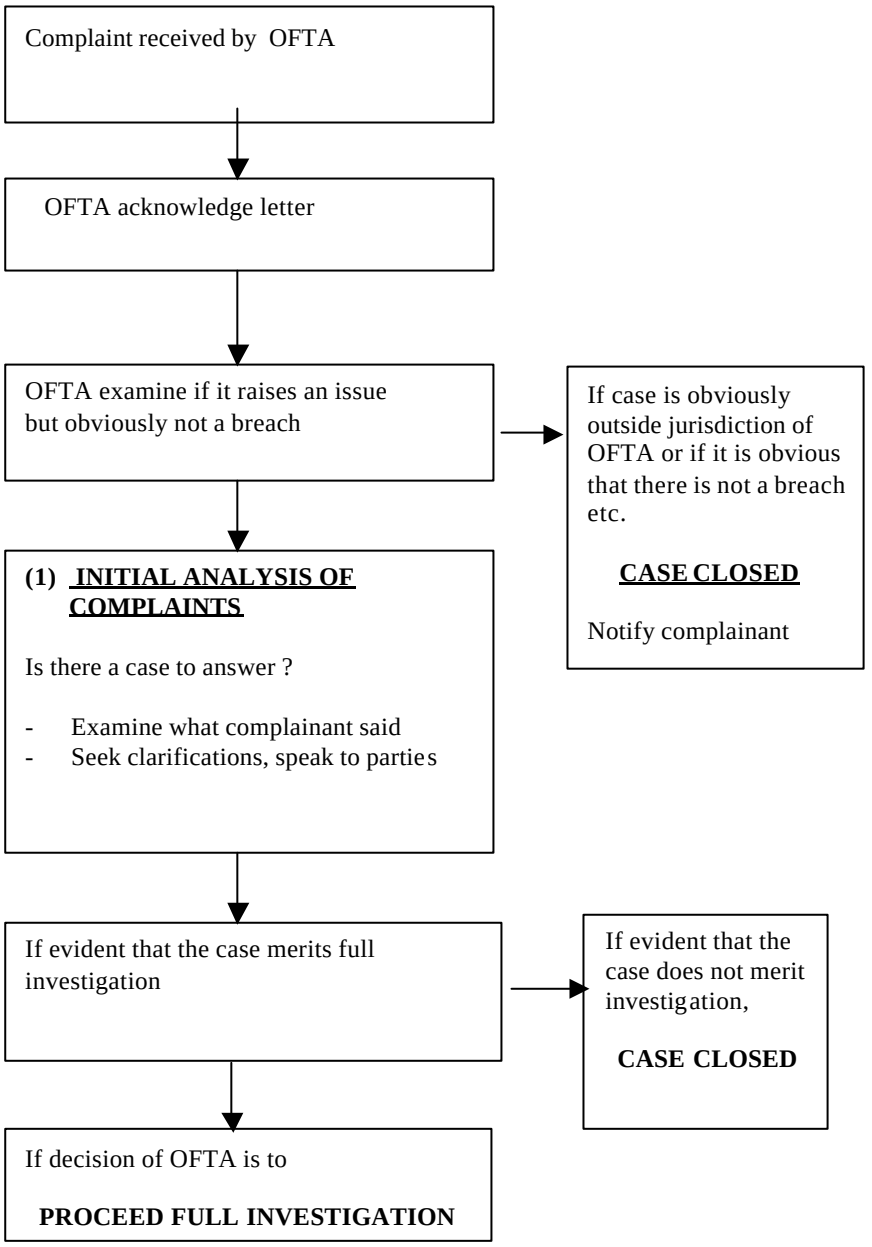
In case of Hong Kong, the 1999 Bill requires OFTA to ensure competition through various rules mentioned above. Procedures adopted for investigating competition cases are intended to provide an efficient and effective means of dealing with complaints and investigating issues within the scope of regulator’s powers and in compliance with its statutory duties. It will be also of significance for OFTA to implement its enforcement role in a transparent and accountable manner.

As a result of investigations based on the procedures illustrated in the Diagram 2, OFTA may issue directions to deal with any anti-competitive practices identified.

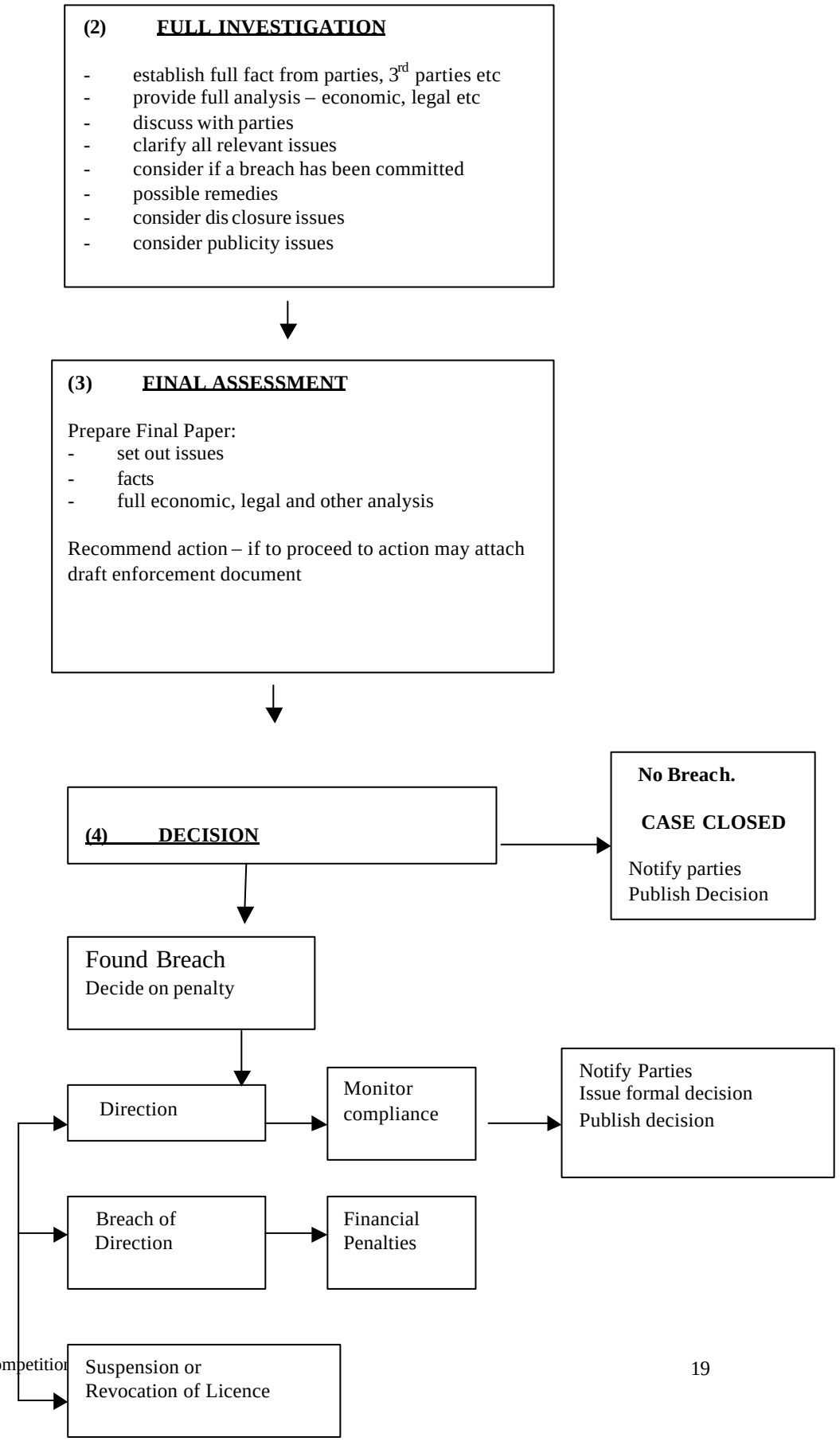
They can have a range of sanctions available to it, including financial penalties and revocation of a licence, as appropriate.

Diagram 2: Procedures Adopted for Investigating Competition

Stage I



Stage II


(2) FULL INVESTIGATION
- establish full fact from parties, 3rd parties etc
- provide full analysis – economic, legal etc
- discuss with parties
- clarify all relevant issues
- consider if a breach has been committed
- possible remedies
- consider dis closure issues
- consider publicity issues
(3) FINAL ASSESSMENT
Prepare Final Paper:
- set out issues
- facts
- full economic, legal and other analysis
Recommend action – if to proceed to action may attach draft enforcement document
(4) DECISION
No Breach.
CASE CLOSED
Notify parties
Publish Decision
Found Breach
Decide on penalty
Direction
Monitor compliance
Notify Parties
Issue formal decision
Publish decision
Breach of Direction
Financial Penalties
Suspension or Revocation of Licence

Q22. Who To Initiate Complaints ?

It depends on the nature of interests. For instance, it can be initiated by regulators like OFTA should public interests be at the risk out of competition. However, it is normally initiated by customers, operators, or any relevant interest groups[9].

Q23. How To Analyze Competition ?

As telecommunications markets are ever fast evolving with various forms of convergence in technologies and services across sectors, regulators face more challenges – if not, difficulties – to carry out analyses on competition behaviors. The analyses are conducted by two stage processes:

(1) **Defining the relevant market**:

Regulators must first define the relevant market or different types of licences subject to individual country's own definition or classification. For instance, the dominant position in one market (e.g., national, fixed, voice etc.) does not mean that it will also be dominant in other market (e.g., international, mobile, data etc.) depending on the market definition in each country. However, it should not also overlook the emerging trends of convergence in many kinds (e.g., telecommunications and broadcasting; voice and data; delivery means and content and so on) which may require close coordination with the relevant agencies in general market rather than telecommunications specific one.

(2) **Assessing effects on competition**:

Regulators also must assess various effects on competition, which include:

- Market shares over time;
- Position and number of competitors;
- Entry barriers;
- Pricing and profitability;
- Excess capacity and so forth.

Q24. How To Enforce When Breach Was Found ?

Questions of who brings such actions of enforcement and how much penalties will be imposed on vary by country or case of investigation.

[9] Link to OFTA web site for Competition Bulletin: http://www.ofta.gov.hk/index_eng1.html

As illustrated by Diagram 1 in Hong Kong, OFTA impose either penalties when having found breach after the investigation procedure. Or, they can either suspend or revoke licence as appropriate.

In case of the USA, it is generally the duty of the attorneys under the direction of the Attorney General to institute proceedings to prevent and restrain violations in accordance with the Sherman Act.

It is the Director General of OFTEL, the UK, who is empowered to enforce licence conditions in the telecommunications industry in accordance with the Telecommunications Act (1984) and may fax penalty, as appropriate, on the responsible sector like telecommunications.

In case of the European Communities, it is the European Commission who may impose the relevant range of fines in the breach of the anti-competition rules of the Treaty of Rome.

CONCLUSION

How to introduce and ensure effective and fair competition is a challenge for regulators worldwide. However, there is no single rule or means to answer the question. This paper is only demonstrating a couple of examples, especially focusing on the case of OFTA (Hong Kong) due to limits of access to the relevant information, so that any governments or regulators can refer to in accordance with their own national circumstances.