

COMPETITION INVESTIGATION PROCEDURES

INTRODUCTION

1. All competition complaints made to the Communications Authority (CA) are dealt with in accordance with section 11A of the Broadcasting (Miscellaneous Provisions) Ordinance (Cap. 391) and sections 13 to 16 of the Broadcasting Ordinance (Cap. 562). The Office of the Communications Authority (OFCA), as the CA's executive arm, will assist the CA in investigating complaints arising from these provisions.

Background

2. The CA procedures in handling competition cases are intended to provide an efficient and effective means of dealing with complaints and investigating issues within the scope of its powers. They also aim to ensure that parties whose interests are likely to be affected by the outcome of the case may be given the opportunity to understand the complaint or issues at hand and have the opportunity to comment.

3. This document summarises the procedures to be followed in dealing with cases of this type and when read in conjunction with the Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance (Competition Guidelines) issued by the CA, will give the industry and all interested parties an understanding of how the CA proposes to apply the relevant legal framework.

4. The CA will adopt a two-stage handling process in dealing with cases. At the first stage – the Preliminary Enquiry stage – it will consider whether there is a case to answer. If the answer is yes, then the complaint will be moved to the Full Investigation stage where further information may need to be gathered and considered to form a final view. This may result in formal action being taken. The procedure is summarised in the flowchart in Annex I.

5. This two-stage approach will increase the speed with which cases are handled, by eliminating at an early stage complaints where there is clearly no case to answer and allowing the CA to concentrate resources on complaints where there is reason to believe there may be concerns.

6. This paper also sets out in Annex II the information that should be submitted with a competition complaint. Although it is not the CA's intention to place the burden of proof solely on complainants it is important that a complainant provides the CA with **sufficient information** upon which it can consider what may be the problem and how it should proceed. Investigations into allegations of anti-competitive conduct impose significant costs on the CA, on the target of the complaint and sometimes on other interested parties who are required by the CA to supply evidence and information. A requirement to provide evidence to back up allegations will enable the CA to identify those complaints that raise real concerns about anti-competitive conduct and allow the CA to target its resources on the most important issues. It is hoped that this document, by increasing awareness of the investigation procedures, will contribute to the expeditious investigation of complaints of anti-competitive conduct.

7. Once the investigation is completed, the CA's decisions - subject to section 27 of the Broadcasting Ordinance concerning the safeguarding of confidential information - will be published together with a statement of reasons.

8. The CA's internal procedures for dealing with competition cases will ensure that the rights and obligations of both the complainant and the party complained against are protected at all stages. These not only cover the procedural requirements set out in the Broadcasting (Miscellaneous Provisions) Ordinance and other relevant legislation but also those rights and obligations arising out of general administrative law.

STATUTORY BASIS OF THE CA's COMPETITION DUTIES

9. The CA's primary functions in relation to competition are set out in sections 13 and 14 of the Broadcasting Ordinance. Section 13 prohibits conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market. Examples include agreements which fix prices, limit production, agree market shares or apply dissimilar conditions in equivalent circumstances. Section 14 prohibits the abuse of a dominant position in a television programme service market. Examples include predatory pricing, discrimination and unfair contract terms.

10. The approach that the CA will take in interpreting the above provisions is set out in the Competition Guidelines. The CA would normally expect to follow the guidelines it has issued and to give reasons if it departs from them. The CA, however, retains the discretion to depart from the guidelines where the circumstances warrant it. The CA in exercising its powers may also take into account recognised principles and practices of competition law as applied in other industries which are subject to similar restraints in Hong Kong (e.g. telecommunications industry) and also in other jurisdictions with general and/or sectoral competition regulation.

THE CA's COMPETITION INVESTIGATION PROCEDURES

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11. An investigation may arise through a complaint or an issue being referred to the CA by another authority or body or may be initiated by the CA itself. The procedure for carrying out the investigations is similar for all types of cases. However the time it will take for a case to be completed will depend on the number of parties involved and its complexity.

12. If the investigation raises a major issue that would be expected to impact on the industry and/or viewers generally, the CA may also consider conducting a public consultation so that all parties have an opportunity to express their views. These cases will obviously take longer to complete. On the other hand, a complaint concerning the behaviour of a licensee may not require any public consultation in which case it may take less time to complete.

What is Anti-competitive Conduct?

13. One of the CA's roles is to enforce those provisions in the Broadcasting Ordinance which prohibit conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.

14. The CA views a fully competitive market as being one in which no firm is able to act independently of any other firms competing in that market, or a market in which a firm's behaviour is effectively constrained by the threat of entry from firms outside the market. In this situation no firm should be able to raise and sustain its prices above the competitive level or act in such a way that affected competition by foreclosing market entry or competition.

15. Therefore, the CA's assessment of complaints of anti-competitive conduct must focus on identifying the relevant market, identifying the level of competition in that market and then assessing the impact of the conduct on competition.

16. The CA's Competition Guidelines give an extensive, although not exhaustive, account of the type of conduct that may be anti-competitive. This would include conduct such as:

- (a) cross-subsidy;
- (b) predatory pricing; and
- (c) refusal to supply.

17. The provisions in the Broadcasting Ordinance reflect competition provisions in other jurisdictions and put the onus clearly on the licensees to ensure that they do not engage in the types of anti-competitive conduct prohibited by the Ordinance.

Sources of Competition Cases - Complaints

18. Complaints may come from any source but are usually the result of formal contact from a licensee, an affected party or from members of the public. From experience in other markets and other jurisdictions, complaints that are alleged to involve anti-competitive conduct may be found on examination to be no more than commercial disputes between parties that do not contain any anti-competitive conduct. The CA cannot and shall not become involved in resolving disputes of this sort **unless** there is some other statutory basis to do so.

19. The CA will only commence an investigation if the alleged anti-competitive conduct has, or may have, the purpose or effect of preventing, distorting or substantially restricting competition. The requirement to provide substantiating factual evidence to support allegations will enable the CA to more readily identify complaints that raise legitimate competition concerns and not to follow on complaints of a frivolous or vexatious nature that might have the effect of impeding normal competitive business activity. Thus, an inadequate submission may result in a decision by the CA not to commence investigation. The complainant should state its case in full and, in particular, the complaints must be specific. A general allegation that the competition provisions have been breached is likely to be considered inadequate. Allegation must be supported by specific, relevant evidence. Full details of submission requirements are set out in Annex II.

The Two-stage Approach to Investigations

20. Upon receipt of a complaint, the CA will assign a case officer to consider the case. The case officer will acknowledge receipt of the complaint within 3 working days.

Preliminary Enquiry Stage

21. During the Preliminary Enquiry stage, initial consideration is given to determine whether there is a case to answer and whether to proceed to an investigation. If the CA has the jurisdiction to consider the complaint under the existing legal framework, it will take a view on whether there may have been any anti-competitive practice or abuse of dominant position. If it is obvious that the complaint is not within the jurisdiction of the CA or that the complaint does not raise a competition issue, the complainant will be notified and no further action will be taken.

22. The CA, in investigating a case, will put the complaint, usually in its original form, to the party (or parties) complained of. Therefore, it is crucial that in any submission, complainants should identify and place confidential material in a separate annex clearly marked “confidential information” that will not normally be disclosed to the other party. If requested, and where appropriate, the identity of the complainant would be protected. This may be the case, for example, where disclosure could have a material adverse impact on the complainant or non-disclosure is required to obtain otherwise unobtainable information. However, there may be some circumstances where it is not possible to pursue an investigation if a complainant is unwilling to disclose his or her identity.

23. The party complained against would normally be given 14 working days to respond in writing. The CA may, however, allow more time depending on the complexity of the issues, amount of work involved, etc. Oral representations to the CA may be made in addition to written ones.

24. At the end of the Preliminary Enquiry stage, it is the CA’s aim to understand:

- (a) what the complaint is really about, and, in particular, what impact the conduct being complained of may have on competitors and consumers in the relevant market;
- (b) the importance of the complaint, both to the complainant, consumers and the industry as a whole;
- (c) what further information needs to be acquired and from whom; and
- (d) what enforcement powers would be available to stop the conduct.

25. This process may involve exchanges of correspondence or meetings with the complainant and/or the subject of the complaint and/or other interested or potentially interested parties as well as reference to precedents in previous investigations.

Preliminary Enquiry Report

26. Where it is immediately evident from the information available that a Full Investigation is justified, the CA will be informed in a Preliminary Enquiry Report that the case will proceed directly to the Full Investigation stage. Full investigation may proceed in parallel with the Preliminary Enquiry stage to ensure that cases which clearly merit a full investigation are not delayed.

27. Alternatively, if it is not immediately evident that a Full Investigation is justified, a Preliminary Enquiry Report summarising the issue(s), evidence, preliminary analysis and recommendations will be prepared for consideration at a CA meeting. If, after the initial analysis, the CA considers that there is no case to answer or that the matter being investigated has no substantial effect on competition, or both, it will close the case and send a letter explaining the reasons for the decision to the parties involved. On the other hand, the CA may decide to proceed to the Full Investigation stage based on the findings of the Preliminary Enquiry Report.

28. The Preliminary Enquiry stage begins on the day a complete submission (including receipt of all necessary information) is received by the CA or OFCA. The CA's target is to complete this stage within 60 working days of receiving all necessary information. However, the duration of the Preliminary Enquiry stage will depend on factors such as the complexity of each case, the requirement for further information gathering and the CA's existing caseload. If the CA needs more than 60 working days to complete this stage, it would be prepared to explain why.

Full Investigation Stage

29. If the CA decides to proceed to the Full Investigation stage, it will inform the complainant and the licensee being complained against and explain why the subject merits a full investigation. During the Full Investigation stage, the CA will use the information gathered in the Preliminary Enquiry stage and, if necessary, collect and consider the further information to form a judgement on whether the conduct being investigated has, or may have, the purpose or effect of preventing, distorting or substantially restricting competition in the relevant television programme service market (as defined in the manner set out in the Competition Guidelines).

30. To make a sound judgement, the CA needs to answer the following questions:

- (a) what is the relevant market?
- (b) what is the competitive situation in that market (i.e. is the target of the complaint able to act independently of other players)?
- (c) what are the practical effects of the conduct being complained of?
- (d) what remedies would be appropriate if the complaint is substantiated?

31. Requests for information would not only be directed at the licensee which is the subject of the complaint. The CA may also seek information from the complainant, other market players, customers and research sources.

Information Requirements

32. The CA relies on accurate information, provided in a timely manner, to carry out efficient investigations into complaints. In the market, time is of the essence. Therefore, where the case timetable demands it, the CA may set challenging deadlines for responses to information requests. Delays on the provision of information can have a significant impact on overall timescales and can significantly disadvantage one or more of the parties involved. The CA therefore expects licensees to respond to information requests to strict deadlines.

33. The CA will generally use its powers contained in sections 24, 25 and 26 of the Broadcasting Ordinance to collect information it needs to pursue investigations. Under these sections, the CA has the power to seek information from licensees and third parties, or carry out an investigation in respect of a licensee (in extreme cases, to enter premises and seize evidence with a warrant issued by a magistrate) where the CA suspects a breach of one or more of the competition provisions. The relevant information required from licensees (and others) will be identified prior to or during the Preliminary Enquiry and Full Investigation stages, and deadlines will be set for the provision of information to the CA. The request for information will be sent to relevant parties, seeking the information by a specified date, and citing statutory powers to obtain information where these exist. Respondents should be aware of the CA's intention to make full use of all the information available to it in any investigation. The CA also expects to publish in its statement of reasons such information as is material to the conclusion of its investigation. This will be subject to appropriate excision of information for confidentiality reasons under section 27 of the Ordinance.

34. In addition to the information submitted by the licensees and third parties, the CA may engage experts such as economists to provide evidence for establishing the facts and give opinions. The CA may also commission its own research and surveys relating to the matter being investigated. Again, the CA would usually publish the results of these surveys, either via a press release or on its website.

Meetings

35. If the CA considers it necessary to seek clarification from complainants, parties complained against or others, it would usually do so in writing. If, in addition to the written clarification, a meeting is considered necessary such a meeting would be arranged and one or more members of the CA and/or OFCA, together with other such staff and advisers that the CA may consider necessary may be present at the meeting.

Competition Analysis

36. Once all the requisite information and responses to the consultation have been collected, a more detailed competition analysis, following the economic framework described in the Competition Guidelines and taking account of all relevant issues, will be undertaken.

Final Assessment

37. Following the various stages set out above, and once the questions in paragraph 30 have been answered, the provisional findings on the complaint containing a detailed assessment of the issues and the recommended action to take will be prepared for the CA's consideration. If the CA considers the provisional findings to be in order, a copy of the provisional findings will be sent to the parties to the complaint that the CA considers necessary and final representations will be invited. The parties will normally be given a reasonable period of time, which will depend on the complexity of the issues, amount of work involved, etc. to make final representations. Any such representations will be taken into account, if relevant, when the CA prepares its final report. Once the final report is prepared, the CA will not discuss it with any of the parties nor will it entertain applications for further discussions unless the party can produce **new** evidence which is relevant to the outcome of the case.

Decision Making

38. Decisions on all competition cases will be taken by the CA. The detailed assessment of the case will be forwarded to each member for his or her consideration and for discussion. Where time is of the essence, an urgent meeting of the CA may be convened.

STATEMENT OF REASONS AND REMEDIES

Statement of Reasons

39. The CA will publish a statement of reasons for its decision whatever the course of action is chosen. The decision and the statement will be provided as soon as possible after a decision is reached. Normally, the decision will not be announced before the statement is published. The statement will be given to the parties involved and placed on the CA's website.

Remedies

40. Where the CA has concluded that there exists anti-competitive conduct that requires remedial action, the CA will, in announcing its decision and statement of reasons, publish details of the sanctions and remedies to be implemented and the timescale for so doing.

Sanctions

41. Depending on the nature and severity of the breach, there are various sanctions that the CA may impose on a licensee following a finding that the licensee has breached the competition provisions of the Broadcasting Ordinance: -

- (a) Warning or Serious Warning. The licensee is warned or seriously warned to observe more carefully the relevant provisions.
- (b) Direction. A direction requiring a licensee to cease and desist from the action prohibited by section 13(1) or 14(1) of the Ordinance and to take such steps as the CA may require it to ensure compliance with its obligations (Section 16 of the Ordinance). This would be the normal course of action where the CA is satisfied that there has been a non-trivial breach of the Ordinance. In addition, the CA may, pursuant to section 30 of the Ordinance, direct the licensee to include in its licensed service a correction or apology.
- (c) Financial Penalty. A financial penalty may be imposed on the licensee under section 28 of the Ordinance. Section 28(3) states that on the first occasion a penalty is imposed, the penalty shall not exceed \$200,000; on the second occasion, the penalty shall not exceed \$400,000; and for any subsequent occasion on which the penalty is imposed, the penalty shall not exceed \$1,000,000. Where the CA considers that such a penalty is inadequate, section 28(4) of the Ordinance enables the CA to make an application to the Court of First Instance, which may impose, upon the licensee who has committed the breach, a penalty of a sum not exceeding 10% of the turnover of the licensee in the relevant television programme service market in the period of the breach, or \$2,000,000, whichever is the higher.
- (d) Suspension or Revocation of Licence. In very serious cases, the CA may suspend a licence or conduct an inquiry and – depending on the type of licence – make a recommendation to the Chief Executive in Council or itself may revoke a licence (Sections 31 and 32 of the Ordinance).

42. Lack of cooperation, delay in providing information and continuation of conduct by the licensee(s) ultimately found to be in breach one or more of the competition provisions are factors which the CA would take into account in setting the level of sanctions under the Ordinance and in deciding whether to seek a higher penalty by application to the Court of First Instance pursuant to section 28(4) of the Ordinance whereby more realistic sanctions are potentially available.

Monitoring and Compliance

43. In certain investigations, the conduct being complained of has no clear impact on competition in the relevant market at that time, but there may be a concern that it may have an effect in the future. In this case the CA will close the investigation, but may monitor the relevant market or licensee at regular intervals.

44. Furthermore, where the CA has taken formal action against a licensee, it would monitor the licensee's compliance with the requirements of the enforcement action or until it is satisfied that the problem has ceased.

Appeal

45. A licensee who is aggrieved by the decision of the CA may appeal by way of petition to the Chief Executive in Council in accordance with section 34 of the Broadcasting Ordinance.

Timescales

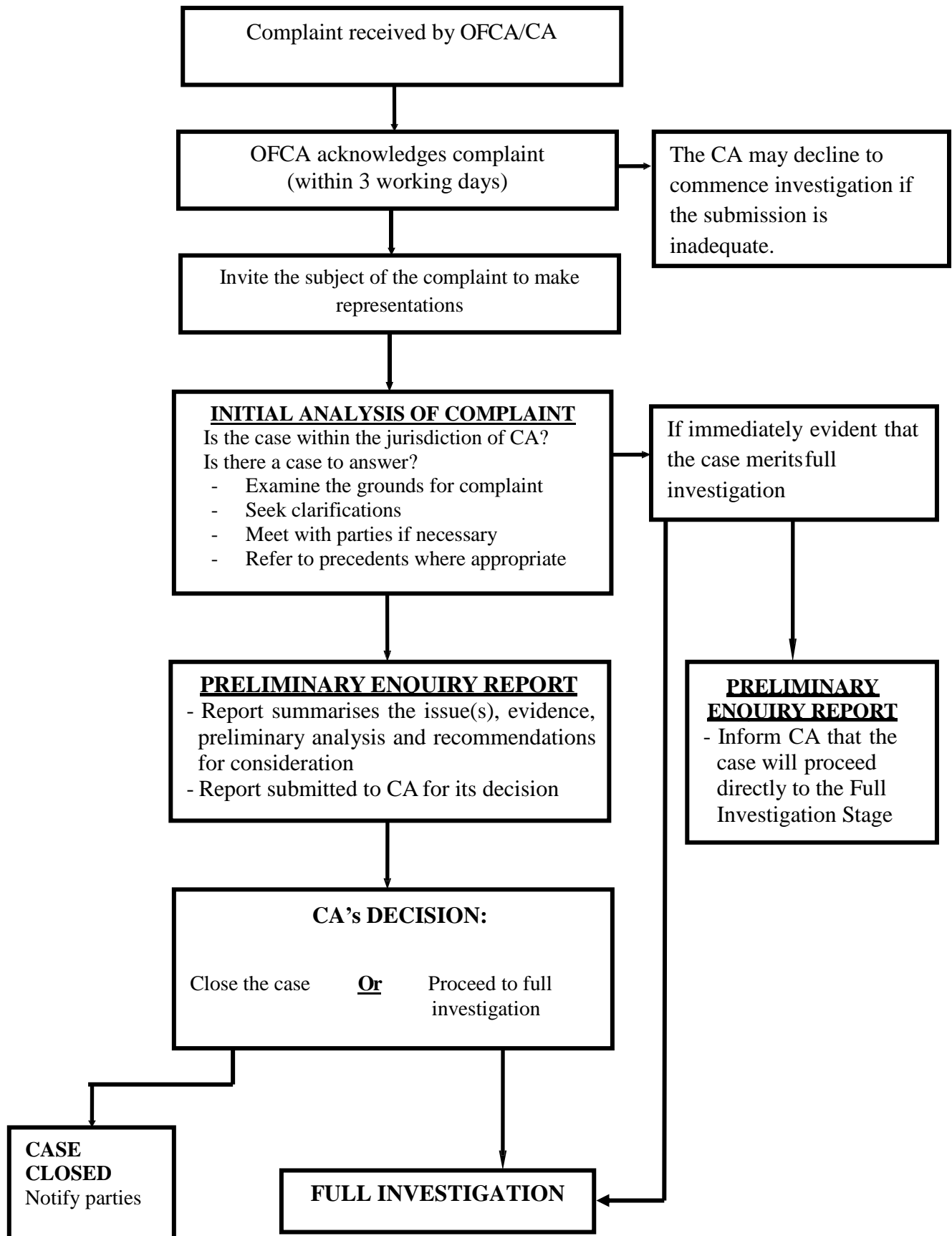
46. The CA, depending on the complexity of the case, will aim to complete full investigations within 12 months of receiving a complaint, including the Preliminary Enquiry stage. The target timescales set out in these guidelines are indicative and will be kept under review. They do not constitute a binding commitment on the CA although the CA would be prepared to explain any delays in the event that they occur. Further, if the CA finds that a case merits urgent action, the CA will take all steps to expedite the process so as to provide an effective remedy to a justified complaint. The aim of the CA will always be to complete investigations speedily and effectively without compromising the quality of the investigation or the rights of the parties to the case.

Note

47. Details of the relevant legal requirements that the CA must follow, the procedures concerning these sanctions and the right of appeal to the Chief Executive in Council can be found in the relevant ordinances and interested parties should always consult these. These guidelines or other guidelines that the CA may issue in respect of the competition provisions of the Broadcasting Ordinance are simply a summary in a non-legal language of the law and/or of internal practices and are always subordinate to the legislation and its interpretation by the courts.

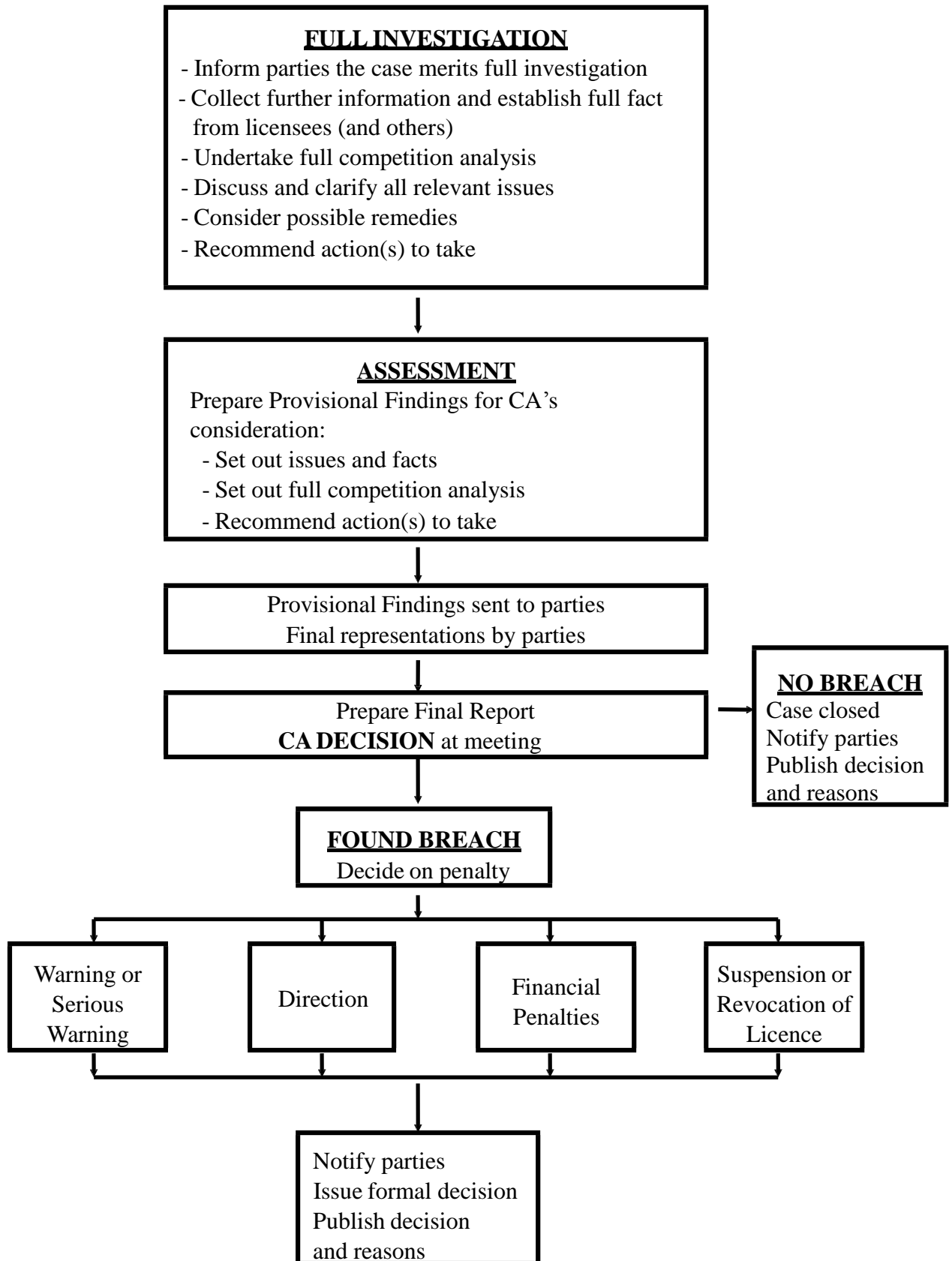
Preliminary Enquiry Stage

Complete within 60 working days of receiving all necessary information



Full Investigation Stage

Complete within 12 months of receiving a complaint (including the Preliminary Enquiry stage)



INFORMATION TO BE SUPPLIED BY COMPLAINANTS

It is not the CA's intention to place the burden of proof on the complainant. However, in the CA's experience of casework, the complainant's supply of all available information and ongoing support can be crucial to the expeditious pursuit of a complaint by enabling it to make well-informed initial decisions as to what the focus of the investigation should be.

By answering the questions set out below, you will be providing us with the information required to commence the investigation. An inadequate submission may result in a decision by the CA not to commence investigation.

The CA, in investigating a complaint case, will normally put the complaint, usually in its original form, to the party (parties) complained of. If your submission contains confidential information, you should identify and place them in a separate annex clearly marked "confidential information", and provide a separate non-confidential version which can be copied to the target of the complaint.

Information to be Supplied**1 Who is complaining - contact point.**

Please provide us with your full name, job title, address, telephone, fax number and e-mail address. We will be using these to keep in touch with you whilst investigating the complaint.

2. Whom are you complaining about?

Please provide details of the licensee that you are complaining about. If you know of individuals involved in the case that might be of assistance, please supply details of their names.

3. Are you prepared to be identified and disclosed as the complainant?

Please tell us if there are any reasons why you should not be identified as the complainant to the subject of your complaint. We prefer, where possible, to identify the complainant. However, we understand that there may be cases where doing so may not be appropriate. If there are valid reasons why you are asking not to be identified, we will consider whether it is possible to investigate the complaint without disclosing your identity. Where that is not possible, we will let you know and we will discuss with you the implications of your request.

4. Who is the customer/ third party?

Where the complaint involves a third party, for example, your customer or the customer of the licensee complained about, please supply details of this party.

5. Are you prepared for us to contact the customer/ third party?

Please tell us if you are happy for us to contact this customer/ third party and whether we can disclose your identity as our source of information. Our aim is to avoid contacting third parties save where it is crucial for our investigation or where we need to clarify information or to verify facts.

6. Can we disclose the name of the customer/ third party to the licensee that the complaint is being made against?

Please let us know whether we can disclose to the company, which is the subject of the complaint, the identity of this customer/ third party. Please keep in mind that this information may be crucial to narrow the investigation or even to commence one as the subject of the complaint will need to know the nature of the allegations.

7. Contact point with customer / third party.

Please supply us with the full name, job title, address, telephone and fax number of the contact point of the customer/third party. We will only use this if it is important that we have direct contact with the customer.

8. Is the customer aware that the complaint has been filed?

Please let us know if the customer is aware of the fact that this complaint has been filed.

9. Set out the facts on which the complaint is based in as much detail as possible.

Please explain in as much detail as is necessary the factual basis of your complaint giving all relevant information, referring to appropriate material and giving details of any individuals involved in the case.

10. Provide copies of supporting documents e.g. contracts, tenders, correspondence etc.

Most disputes involve either a contract entered into previously or failed attempts to resolve problems. In most cases there will have been some correspondence or documents that have been exchanged between the parties. Any such material **must** be included with your letter. It helps us establish the relevant fact far more quickly and we can target our investigation more effectively.

11. What is the legal basis of your complaint?

Please identify what in your view is the basis of the complaint, i.e. which provision of the Broadcasting Ordinance you believe to have been breached. Although the investigation will not necessarily be limited to those areas that you raise, and, where appropriate, the CA will consider all relevant legal instruments, it helps us focus our initial analysis if we have your views on the relevant instrument.

12. How urgent is it - give reasons e.g. contract not signed yet, tendering process in hand, contract concluded etc.

Like all other organisations with finite resources, we are faced with the task of deciding which case should be given priority. In some cases, the urgency may not be obvious to us.

It is for this reason that it is crucial that you set out in your complaint to us whether this is an urgent case or a routine one. Those that will normally be given priority are those cases that can (i) have an immediate effect on a transaction; (ii) affect the provision of service; or (iii) cause irreparable damage to the complainant or the relevant customers if not dealt with quickly.

13. Consider and, if possible, answer questions relating to the definition of the relevant market. In any case please try to answer the questions concerning the effects on your business/competition.

Questions relating to market definition

- a) What do you consider to be the relevant market? How does this market operate? Do any other market definitions suggest themselves?
- b) What function does the product fulfil?
- c) Who are the target customers for the relevant products? What features are important to the customer?
- d) Are there any close substitutes of the product in question - how would customers react if the product went up in price i.e. what other products could they switch to?
- e) Would there be costs involved in switching to alternative products e.g. is equipment dedicated? Is there any evidence of customers switching between products?
- f) Does the product share a common technology or common facilities with any other products?
- g) Are there any firms that are in a position to switch existing capacity to supply this product? Would it be feasible for them to do this?
- h) What is the relevant geographical scope of the market for the supply of this product e.g. district, regional (i.e. Hong Kong), national (i.e. Peoples' Republic of China) or even international (e.g. Asia-Pacific)?

Questions relating to the level of competition in the relevant market

- a) What are the approximate relevant turnovers of the parties to the complaint? Annual reports are an obvious source of information.
- b) What is the approximate total size of the market - in value and volume terms (e.g. number of viewers)?
- c) Which other firms compete in this market? What are their market shares? How have these moved over the last 3 to 5 years?
- d) Is there any up-stream, down-stream or horizontal relationship (e.g. legal or otherwise) between the companies involved?
- e) How do firms compete in this market? e.g. on price, on quality/service. How is competition organised – e.g. are there formal tendering processes? Do customers have a degree of buyer power?
- f) How do the prices charged by different companies differ? What do we know about the price history of this market e.g. are prices on a downward or upward trend?
- g) Are economies of scale or scope important in this market?
- h) Are there any significant first mover advantages in this market?
- i) Are there any significant barriers to entry into this market? What problems might a new entrant face (e.g. are there large fixed costs which must be incurred; are any key elements/processes protected by intellectual property rights such as patents, licences)?

Questions relating to the effect on competition of the conduct being complained of

- a) What is the effect on the business of the complainant? e.g. loss of market share, loss of revenues.
- b) What is the effect on customers, suppliers etc.?

Questions relating to possible remedies

- a) What remedial action is sought? – the complainant will often be better placed than the CA to know what changes would best deal with the matter concerned;
- b) Have there been previous cases of the same or similar type?

14. ALL complainants should also send supporting evidence, such as contracts, correspondence etc.

Submissions of Complaints

Complaints concerning competition issues should be sent to the following officer:–

Title: Director-General of Communications,
Office of the Communications Authority

Tel. No.: 2594 5721

Fax No.: 2507 2219

E-mail: webmaster@ofca.gov.hk