MDA should give fuller picture

By Burton Ong
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DECISIONS issued by industry regulators responsible for promoting competition in specific sectors of Singapore’s economy in recent years have never been particularly illuminating.

Apart from short press statements outlining the substance of their final decisions, these regulators have not made public complete grounds for their rejection of allegations that market incumbents in the telecommunications and media industries have engaged in anti-competitive behaviour.

Neither have they disclosed the legal analysis which they have employed in each case to arrive at their final decisions, often citing reasons of “commercial sensitivity”, thereby making it difficult for the public to scrutinise the soundness of these decisions.

A recent example of this is the MDA’s decision to allow the incumbent pay-TV service provider, a monopolist, to continue striking exclusive arrangements with cable television channels. The move was in response to a complaint from a potential new market entrant alleging that such practices made it more difficult for it to enter the pay-TV market because it would not have access to popular channels that customers would want to subscribe to.

Under the Media Market Code of Conduct (MMCC), which sets out the legal framework for regulating competition in the various segments of the media industry, Paragraph 7.5.6 prohibits “agreements with providers of Ancillary Media Services which substantially foreclose access to an input, or a channel of distribution, where this would prevent, restrict or distort competition in any Mass Media Services Market”.

Whether or not a foreclosure is “substantial” or not depends on the percentage of the market foreclosed, the duration of the agreement, whether the agreement has a “legitimate business purpose” other than foreclosing competitors’ access to business inputs, and whether competitors have access to comparable inputs from other suppliers.

Conspicuously absent from this list of considerations is the degree of market dominance possessed by the media service provider engaged in such exclusivity arrangements with providers of these business inputs. A monopolist would be in a much stronger position to lock in upstream suppliers with exclusivity arrangements, and make it more difficult for would-be competitors to gain access to these inputs, compared to a market player with a lesser degree of market power.

Without publishing a full report of its decision, the MDA offered a number of less than convincing reasons for its unpopular decision to allow the incumbent to continue making exclusivity arrangements with various unnamed channels — though speculation has been rife that they include ESPN, the Discovery family of channels and HBO.

Firstly, would-be market entrants were said to be able to secure alternative content (other than these channels) for themselves. Secondly, the duration of these contractual exclusivity arrangements was said to be too short to act as effective barriers to market entry. Thirdly, the scope of these exclusion arrangements was limited to the cable-TV platform, allowing other operators to gain access to these channels if they utilised other broadcast methods such as the Internet.

It is true that alternative content is available — there are probably hundreds of channels from around the world which other pay-TV operators could have access to, but the real question which needs to be answered is whether these other channels are real substitutes for the "key content" in respect of which the incumbent has obtained exclusive broadcast rights. No cable-TV subscriber is likely to view a cable channel specialising in non-English arthouse films as a substitute for blockbuster-driven HBO.

Neither is a cable channel focused on US college football and baseball games going to be treated as an effective substitute for ESPN.

An even more fundamental question appears to have been glossed over: Before determining whether or not the exclusivity arrangement substantially forecloses the market, how is the relevant market defined to begin with?

There are at least two possible markets which ought to have been investigated — those pay-TV customers who sign up primarily for single channels, and those who sign up for a suite of channels. Even though the incumbent pay-TV operator is a monopolist in both these markets, the substantiality of the foreclosure effects may differ in each case and warrant a more finely tuned response from the competition regulator.

Even if the duration of the exclusivity arrangements is viewed as relatively short, such potential competitive

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