

**For discussion
on 2 December 2013**

**Legislative Council
Panel on Information Technology and Broadcasting**

**Complaint Against Television Broadcasts Limited's
Violations of the Competition Provisions of
the Broadcasting Ordinance**

Purpose

The Communications Authority (formerly the Broadcasting Authority, collectively referred to as the “Authority” hereinafter) has completed its investigation into the complaint lodged by Asia Television Limited (“ATV”) against the violations of the competition provisions of the Broadcasting Ordinance (Cap. 562) (“the Ordinance”) by Television Broadcasts Limited (“TVB”), and published the investigation report on 19 September 2013¹. This paper briefs Members on the findings of the investigation and the remedies imposed by the Authority on TVB.

Background

2. Section 13 of the Ordinance prohibits a licensee from engaging in conduct which, in the opinion of the Authority, has the purpose or effect of preventing, distorting or substantially restricting competition in a television (“TV”) programme service² market. Section 14 prohibits a licensee in a dominant position from abusing that position by engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market.

¹ The investigation report is available on the Authority’s website (www.coms-auth.hk).

² TV programme service is defined in section 2 of the Ordinance as the provision of a service that includes TV programmes for transmission by telecommunications that are readily accessible to the general public or to persons having equipment appropriate for receiving that service.

3. On 30 June 2009, ATV complained at a special meeting of the Panel on Information Technology and Broadcasting of the Legislative Council that certain clauses in TVB's contracts with its artistes and singers and certain informal policies and practices pursued by TVB violated sections 13 and 14 of the Ordinance, and submitted a formal complaint to the Authority on 10 December 2009.

4. After preliminary investigation, the Authority decided on 28 August 2010 to launch a full investigation into some of the contractual clauses and policies alleged in the ATV's complaint. In the course of the investigation, the Authority collected information from TVB and other licensees, and held interviews with record companies and singers to analyse whether the allegations were substantiated.

5. The investigation was complicated and protracted, involving a number of legal and procedural fairness issues. The Authority completed its investigation in December 2011 and invited TVB to make representations on the Authority's draft investigation report. After seven rounds of written representations submitted by TVB, the Authority issued to TVB in January 2013 a revised draft investigation report and invited its representations. Following four more rounds of written representations and a round of oral representations by TVB on the revised draft investigation report, and two more rounds of written representations by TVB on the specific issue of the definition of the upstream market and the assessment of market power in August 2013, the Authority was able to finalise its investigation report for publication.

6. On 19 September 2013, the Authority published the investigation report, and concluded that the following four allegations were substantiated –

- (a) exclusive occasional use artiste and singer³ contracts with harsh and unreasonable terms;

³ For singer contracts, singers are engaged on a show-by-show basis. TVB and the singers agree that the singers will appear in TVB's shows if the need arises at agree-upon rates

- (b) artistes on serial-based⁴ and one-show contracts⁵ with TVB were prohibited from having their original voices when performing in other TV stations' programmes (no original voice policy);
- (c) artistes on serial-based and one-show contracts with TVB were prohibited from attending promotional activities of the productions of other TV stations which also featured the artistes concerned (no promotion policy); and
- (d) artistes on contracts with TVB were prevented from speaking Cantonese in the programmes of other TV stations in Hong Kong (no Cantonese policy).

Results of the Investigation

Supply and demand of artistes

7. All of the main local TV broadcasters (including pay TV broadcasters) show a range of general entertainment channels and some genre- or demographic-specific channels which broadcast self-produced programming aimed at the Cantonese-speaking Hong Kong market. The most popular programmes in Hong Kong are general entertainment (such as drama, comedy, lifestyle, game show, etc.) programmes and of these, drama and comedy are the most important drivers of ratings and therefore advertising revenue. Both types of programmes, by their nature, require input from artistes. Artistes are therefore a necessary input for general entertainment shows.

8. The evidence reviewed by the Authority indicated that during 2007 – 2010, TVB contracted with a significant proportion of all the artistes on contract with the main Hong Kong broadcasters.

⁴ Serial-based contracts refer to contracts between TVB and its artistes in which the parties agree to a rate for a drama series of varying lengths.

⁵ One-show contracts refer to contracts between TVB and its artistes in which the artistes are only signed for a minimum one-show commitment. TVB and the artistes agree that they will appear in TVB's shows if the need arises at agreed-upon rates.

Information gathered from record companies also suggested that approximately 90% of singers entered into contracts with TVB. Apart from full-time contracts, TVB entered into three types of occasional use contracts with artistes and singers, including one-show contracts, serial-based contracts and singer contracts. The Authority's investigation focused on occasional use contracts and excluded the full-time contracts, as it considered that exclusive clauses in full-time contracts appeared to be proportionate, given that artistes on such contracts were fully engaged by TVB and were remunerated with a fixed salary amongst other benefits.

Relevant markets and assessment of market power

9. On the basis of the analytical framework set out in the Competition Investigation Procedures and the Guidelines to Application of the Competition Provisions of the Broadcasting Ordinance, the Authority found that there were two relevant economic markets: all TV viewing market and TV advertising market.

10. In the all TV viewing market, TVB had a persistent market share of above 60% between 2006 and 2010. Its market share was significantly larger than that of its competitors. As the barriers to entry to the TV market were high and the countervailing buyer and supplier power was weak, the Authority concluded that TVB possessed a dominant position in the all TV viewing market.

11. In the TV advertising market, TVB's market share was persistently between 56% and 59% from 2006 to 2009. In 2010, TVB's market share dropped to 47%. However, this fall was largely explained by a surge of advertising revenue for Hong Kong Cable Television Limited ("Cable TV"), which could be attributed to one-off events such as FIFA World Cup and the Asian Games. The Authority was of the view that TVB's market shares from 2006 to 2009 were more indicative of TVB's genuine presence in the market. Taking into account other factors such as entry barriers, substantial sunk costs, brand loyalty and low countervailing buyer power, the Authority concluded that TVB also possessed a dominant position in the TV advertising market.

TVB's conduct

Exclusive contracts

12. In the one-show and serial-based contracts, TVB inserted provisions that required the artiste either to obtain consent from TVB before engaging in outside work, or to be totally exclusive to TVB during the contractual period subject to TVB consenting otherwise. A small number of one-show contracts required the artistes concerned to notify TVB prior to undertaking outside work. As for singers, they were either required to obtain consent from TVB before engaging in outside work or give TVB prior notification before engaging in outside work. In addition, all occasional use contracts contained a clause that TVB was not under an obligation to use the contracted artistes.

13. The data provided by TVB suggested that there were a significant number of artistes under one-show, serial-based and singer contracts who were not fully engaged by TVB during the contractual period and were fully capable of rendering their services to rival local TV stations, yet were still subject to the exclusivity terms. Even though it is theoretically possible for TVB artistes and singers to obtain consent from TVB or give TVB prior notice to appear on rival local stations, in reality, the consent clauses in the artiste and singer contracts imposed de facto exclusivity. As regards those contracts which only required singers to give TVB prior notice, the evidence reviewed by the Authority suggested that the notice requirement functioned as de facto exclusivity. For example, between 2007 and 2010, TVB approved very few applications from artistes for performing outside work and none of the applications approved by TVB involved artistes working for TVB's rival TV stations in Hong Kong. In addition, TVB only received very few notifications from singers to appear on other TV stations.

14. The clauses artificially impaired rivals' ability to produce high-quality TV productions to compete with TVB and also raised rivals' costs by making it more expensive for them to produce or acquire TV programmes featuring artistes. When these clauses were used in conjunction with the no-obligation-to-use clause, they allowed TVB to

warehouse artistes at minimal cost. TVB did not provide any reasonable objective justifications for these clauses. The Authority was of the view that the “exclusive clauses” had the purpose and effect of foreclosing rival’s access to artistes and singers.

No original voice and no promotion policies

15. The no original voice and no promotion policies were encapsulated in a significant proportion of TVB’s one-show contracts and serial-based contracts. The Authority was of the view that the likely objective economic purpose of these policies was to impair rivals’ ability to compete with TVB and to raise their costs.

16. TVB had significant market power in the relevant markets. The no original voice and no promotion policies affected a significant number of those artistes who appeared in the most popular Hong Kong TV programmes in 2010⁶ and who therefore could reasonably be deemed to be most attractive. The evidence reviewed by the Authority indicated that where rivals wished to broadcast programmes which featured a TVB contracted artiste, they would face higher costs (due to the necessary dubbing). Dubbing an artiste’s voice was also likely to reduce the perceived quality and attractiveness of the programming. In addition, it seemed likely that where rivals wished to broadcast programmes which featured a TVB contracted artiste, they would be constrained in their promotional activities. Both requirements could therefore reduce viewership and hence advertising revenues. There was no acceptable objective justification offered by TVB for these policies. As such, the Authority concluded that these two policies had the purpose and effect of preventing, distorting or substantially restricting competition.

No Cantonese policy

17. While the no Cantonese policy was not explicitly imposed through a contractual clause, the Authority was of the opinion that the

⁶ The Authority analysed data on TV ratings by looking at the top 50 TV programmes in 2010, based on four weeks evenly spread throughout the year which were not affected by either major sporting events or public holidays.

amount of evidence examined by the Authority (including records of artistes' interviews on Cable TV and evidence submitted by other licensees, singers and record companies) showed that it was actively practised amongst singers as a result of TVB's policy. This policy affected a very large proportion of singers and some proportion of artistes. The likely plausible objective economic purpose of this policy was to impair rivals' ability to compete with TVB. None of the reasons offered by TVB could objectively justify the policy. The no Cantonese policy had both the capability of reducing the quality of interviews with singers on rival TV stations and making it more difficult for viewers to understand, thus impairing rivals' ability to compete with TVB. The Authority concluded that this policy had the purpose and effect of preventing, distorting or substantially restricting competition.

Decision of the Authority

18. After a careful analysis of the available evidence and taking into account TVB's representations, the Authority found the following conducts of TVB violated sections 13 and 14 of the Ordinance –

- (a) prohibiting artistes or singers who have existing serial-based, one-show, or singer contracts with TVB from, or requiring such artistes or singers to seek consent from or notify TVB for, appearing on or providing services to other TV stations in Hong Kong;
- (b) prohibiting artistes who have existing serial-based or one-show contracts with TVB from, or requiring such artistes to seek consent from TVB for, appearing on other TV stations in their original voices or attending promotional activities of other TV stations for TV programmes and drama productions featuring these artistes; and
- (c) requiring, formally or informally, its singers and artistes to refrain from speaking Cantonese on other TV stations in Hong Kong.

19. The Authority decided –
- (a) to impose a fine of \$900,000 on TVB;
 - (b) to direct TVB under section 16 of the Ordinance to forthwith bring to an end the above infringement, and refrain from repeating or engaging in any act or conduct which has an equivalent purpose or effect to the infringing clauses and policies;
 - (c) that TVB should communicate within three months to all artistes and singers who have current serial-based, one-show or singer contracts with TVB that TVB would abandon the infringing contractual clauses and policies; and issue a public statement within two weeks explaining and declaring that TVB would not require singers and artistes which it engages to refrain from speaking Cantonese on other TV stations in Hong Kong; and
 - (d) that TVB should provide a full written report to the Authority within four months describing the steps taken by TVB to comply with the Authority's direction.
20. In relation to the above remedial actions, the Authority also made clear that –
- (a) the decision did not apply to full-time contracts of employment concluded between artistes and TVB but this fact should not be taken as indicating that the Authority either approves or disapproves of such agreements or has formed any views about the consistency of such agreements with the relevant law; and
 - (b) for the future conduct of TVB, it would be for TVB, taking into account the principles set out in the decision

to decide for itself how it should propose to ensure compliance with the relevant laws. The Authority reserves all rights in this respect.

Actions by TVB

21. On 3 October 2013, TVB issued a public statement confirming that it will not forbid artistes or singers on contract with TVB to speak Cantonese when they appear in programmes of other TV stations in future. They are also free to use language of their choices according to individual circumstances when they appear on other TV stations. TVB also paid the penalty of \$900,000 on 18 October 2013. We will monitor closely TVB's observance of the Authority's other directions.

22. Separately, on 17 October 2013, TVB lodged a statutory appeal by way of petition to the Chief Executive in Council against the Authority's decision on the investigation, and the appeal will be handled in accordance with the established procedures.

Office of the Communications Authority
November 2013