

**CONSUMER COUNCIL
SUBMISSION TO BILLS COMMITTEE ON BROADCASTING BILL**

Introduction

1. The Consumer Council welcomes this opportunity to comment on the proposed Broadcasting Bill.
2. At the outset, the Council wishes to express its general support for the proposed Bill as a vehicle for providing an environment that encourages investment, innovation and technology transfer in the broadcasting industry. In particular, it supports strengthening the ambit of the competitive safeguards found in existing broadcasting licenses. The Government's proposal to adopt broad competition rules in the Bill that address anti-competitive conduct between competitors, and the abuse of dominance, are similar to those found in successful general competition laws of our major trading partners.
3. The Council would like to take this opportunity to put forward a number of specific suggestions which it feels will strengthen the regulatory regime and assist in delivering benefits to Hong Kong consumers and business.

Competition provisions

4. The provisions governing anti-competitive conduct and abuse of dominance appear to be able to adequately address competition issues in the industry. However, the fact remains that while those required to be licensed will be subject to the provisions, participants in other related markets who could have an impact on the competitive environment of licensees, will not be subject to the competition provisions. This could give rise to problems in
 - investigating the conduct of *non licensees* that can exercise market power over licensees; and
 - covering *emerging competition issues*, due to the convergence of other technologies that compete with existing broadcasting networks that are the only ones required to be licensed.

Non licensees

5. The Government has indicated that programme suppliers will no longer be included in the list of disqualified persons. This is notwithstanding the possibility that a programme supplier could also have a business relationship with a dominant television service licensee, and the latter might use its market power to detrimentally affect the position of its competitors. The rationale behind this decision, according to the LegCo briefing paper, is that the competition provisions have now been made more comprehensive and strengthened. Therefore, if a dominant licensee is in a position to misuse its control over programme supply, the competitive safeguards will act to prevent that from occurring.

6. However, sanctions that can be applied by the BA in respect of the competition safeguards only apply against licensees. A programme supplier who is not a licensee but who discriminates against competitors of a dominant television service programme licensee would therefore be outside the reach of the BA's powers to stop the discriminatory practice. Therefore, a potential 'loop hole' exists. This arises because it appears that all a licensee would have to do, if it felt at risk under the competitive safeguards, would be to separate its programming supply operations from the corporate entity that is required to be licensed. In these circumstances a dominant television service licensee, through an arrangement with a programme supplier, would appear to be able to engage in anti-competitive conduct against the dominant licensee's competitors without regard to the BA's powers.

Emerging competition issues

7. The growth of Internet services appear to be rapidly providing a competitive challenge to existing participants in the communications sector. Given that Internet services are communication services, and can be expected to provide substantial competitive rivalry in the demand for broadcasting services in the near future, the Council queries why, if competitive safeguards are necessary for this sector, that safeguards should not be put in place to pre-empt any anti-competitive market structures from emerging.

The need for general laws

8. The anti-competitive conduct provisions in the proposed legislation apply competition law principles that can be found in general competition laws in other advanced economies. Some of those economies also have sector specific competition provisions with licensing provisions. For example, the broadcasting legislation administered in the United States, the United Kingdom, Canada and Australia that licenses market participants in order to provide important safeguards that serve socio-political, as well as competition objectives. However, in those other jurisdictions, general competition law also exists to provide a 'safety net' to catch any anti-competitive conduct that might not fall within the narrow confines of a sector specific licensing regime.
9. The Council submits that the sector specific approach by Government to the application of competitive safeguards in the Hong Kong economy, and its decision not to introduce general competition laws, could lead to regulatory difficulties in the near future. The clear implication from the Government's decision not to have general competition law and to exempt emerging technologies, is that anti-competitive conduct engaged in by market participants that are not required to be licensed, for example a content provider or software developer, will not be subject to scrutiny when engaging in anti-competitive conduct.
10. The danger is that anti-competitive market structures could rapidly evolve in the near future that will go unchecked because there is no competition regulator (neither sector specific nor general competition authority) that will be in a position to quickly and effectively take on the responsibility for ensuring a competitive marketplace.
11. The inevitable consequence of this is that the Government will be reacting to deficiencies in its sector specific regulatory stance as and when problems arise. As a result of the time lags inherent in this approach, there is the possibility that anti-competitive market structures could arise that will become difficult or impossible to

unravel. The solution to this is that the Government either identify the non broadcasting sector in which specific rules should be applied, or, as the Council prefers, that general competition law should be introduced to provide a general competition safety net.

Exemptions from competition provisions

12. The Government proposes, in sub clause 13 (5), to exempt certain restrictions imposed by licensees from the ambit of conduct prohibited as anti-competitive, i.e.

(a) a restriction on the inclusion in a television programme service of a television programme produced by the licensee of the service; or

(b) a restriction on any person from using or exploiting his artistic talent or ability.

13. It is noted that pursuant to sub clause 13 (6) the Government may, by notice in the Gazette, amend sub clause (5). The Council assumes that this is to cover any unintended consequences of the reach of the exemptions subsequent to any problems that might arise. However, the Council suggests that in the interests of clarity and thereby avoiding possible future problems for both consumers and for business, that the Government:

- defines what is meant by the term 'produced'; and
- considers whether some safeguards be introduced to limiting the reach of the exemptions as far as artistes' contracts are concerned.

'Produced'

14. The Council notes that the acquisition of programming has been specifically excluded from the reach of the exemptions but that production of programming remains. The Council accepts that the exemption of programme restrictions could be necessary to ensure satisfactory returns on investment for costly programme production. However, it is not clear whether the exemptions might still apply in circumstances where programming rights are merely 'acquired' by a licensee for content, such as major sporting events, but where there is a form of nominal production which thereby exempts the programming arrangements from the competitive safeguards.

15. Without clarity as to the reach of the exemptions, some programme restrictions might be unintentionally exempted from the competitive safeguards, notwithstanding that there is only token 'production' by the licensees. The result could be that competition in the relevant market has subsequently been detrimentally affected by programme distribution restrictions that are not intended to be exempted. The Council suggests that because the term 'production' encompasses a range of actions, that can vary from being 'inconsequential', to 'wholly produced', the term 'produced' should be expressed in more detail to clarify the extent to which investment in production should come within the exemptions. As an example, the exemption could be expressed to only apply to a television programme wholly produced by the licensee of the service or at the very least substantially produced.

Artiste contracts

16. A contract between a licensee and an artiste that restricts the artiste from using or exploiting artistic talent or ability is potentially subject to challenge, for example under a reasonableness test pursuant to the common law doctrine of restraint of trade. The Council understands that apart from exclusively tying artistes to a licensee for a particular period of time, other restrictions are those that limit artistes from working with a licensee's competitors for a set period of time after termination of a service contract. The Government proposes to exempt artiste restrictions from the competition provisions that are to be enforced by the BA. In these circumstances, an artiste who wishes to challenge a contractual restriction would not be able to seek the BA's intervention through the competition provisions in the proposed broadcasting legislation, and would be left with common law rights of redress.
17. The Government might wish to consider whether, in the interests of providing a degree of protection to artistes, it should use the license conditions as a means to limit the extent of control that licensees can attempt to exert over artistes. The Council acknowledges that the manner in which this can be achieved is difficult. For example, a blanket prohibition against licensees restraining free movement of artistes to competitors, after the contract has expired, could be defeated by the licensee building in to the period of the contract, what is commonly known as 'gardening leave'. In other words that for period of time at the end of the contract terms, the artiste's services would not be utilized by the licensee. In these circumstances, prohibiting a licensee from inserting a clause into a contract restraining free movement after the contract expires for a period of time might not serve its intended purpose. However, if the Government is minded to attempt some protection for artistes, it could consider limiting the maximum period of time allowed for a licensee to bind an artiste to a contract. Limiting the total period of the contract to a short period of time could thereby make it impractical for a licensee to use 'gardening leave' as a means of restraining an artiste from immediately moving to a competitor.

Service provision requirements

18. Sub clause 17(2) provides the BA with discretion to grant an exemption to the requirement for a domestic free television service or domestic pay television programme service licensee to provide universal television service throughout Hong Kong. The Council suggests that the Government consider including in the Bill, provisions requiring that general public consultation should be held to provide an opportunity for concerned parties and the public to voice their opinion on the exemption, before it is provided.

Financial Penalty

19. The Bill provides for the imposition by the BA of a financial penalty against licensees for contravening various license conditions. The Council considers that the imposition of financial penalties should take into account whatever pecuniary benefits are derived by the licensee, in order to have a deterrent effect.
20. At the very least, the Council believes that penalties in the broadcasting legislation, particularly those directed at anti-competitive conduct, should be aligned with those in the Telecommunications Amendment Bill. That legislation proposes to cap the maximum fine in relation to a company's operative income at 10% of revenue. The

Council also suggests the Government should consider providing an avenue for the BA to direct that compensation be paid to aggrieved persons

21. The Council supports the provisions in Clause 29 providing for orders as to correction or apology in a form approved by the BA. In other words, the BA may direct the content, frequency and broadcasting hours of such apologies or corrections as it thinks fit. This includes an announcement by the licensee that the correction or apology is being made in pursuant to the direction of the BA.

Exercise of control

22. The Council notes that the provisions in the Bill defining the exercise of 'control' in various circumstances centre around that of voting control, whether or not the means by which the control is exercised is based on legal or equitable rights. The concept of corporate control is a complex issue, and might not be limited to that of exercising voting control, or the appointment of directors. For example, control over the selection or provision of any programs to be broadcast by a licensee (whether as part of a contractual right or otherwise) might also constitute effective control over a licensee.
23. This points to the problem noted earlier in this submission where a dominant television licensee could conceivably construct a corporate relationship or affinity with a non licensed programme supplier, leaving the way open to restrict the availability of programming material to competitors of the dominant licensee.
24. The Council suggests the Government examine whether the provisions should be expanded to include a wider range of measures that can be used to identify circumstances where another party, who would fall within the definition of a disqualified person, could still exercise control over a licensee¹.

Misleading and deceptive conduct

25. There are currently safeguards administered by the Television and Entertainment Licensing Authority against the dissemination of misleading advertising in the electronic media. However, as distinct from this form of advertising, there is nothing to address possible misleading and deceptive sales tactics by employees and agents of service providers. This could become an area of concern as more subscription services emerge in the markets.
26. While Hong Kong does currently have general prohibitions against misleading advertising under the Trade Descriptions Ordinance, this legislation applies only to goods, and not to services. Accordingly, any misrepresentations by sales agents in marketing the services of licensees, that are not made through the electronic media, but are made in pamphlets, or verbally by the sales agents, are outside the bounds of any current regime.
27. The Council suggests that in the interests of providing safeguards for consumers, and to protect the interests of ethical service providers whose competitive position

¹ An example of a wider interpretation of control in these circumstances can be found in Schedule 1 to the *Australian Broadcasting Services Act 1992*.

may be detrimentally affected by unfair sales tactics of competitors, certain prohibitions against misleading and deceptive conduct be introduced. These could, for example, take the form of a Code of Practice (similar to guidelines issued by the Telecommunications Authority) requiring licensees, and by implication their servants or agents, to abide by certain principles when marketing their services to the public. An example of appropriate principles could be as follows.

'When marketing the services of a licensee to the public, the licensee, his employees or agents must not engage in misleading or deceptive conduct. In particular:

- (a) The licensee must not misrepresent the price for any services, the standard or quality of any services, nor any affiliation or relationship of the licensee with another party.
- (b) Any predictions or statements as to the future availability of the licensees' services should be correct and capable of substantiation at the time of making the predictions or statements.
- (c) Comparative advertising must compare 'like with like' and be capable of substantiation.
- (d) The use of superlatives should be avoided unless substantiated by facts.
- (e) Technical jargon and technology comparisons should be used with care. Inappropriate use of jargon and comparisons can be counter productive in that it tends to confuse and mislead the consumers rather than explain the merits of the products or services.
- (f) The identity of the product/service provider should be clearly indicated in all promotional materials that consumers have no doubt which company is providing what products and services.'

Consumer Council
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