



SUBMISSION BY HONG KONG CABLE TELEVISION LIMITED
to THE BILL COMMITTEE on BROADCASTING BILL OF THE
LEGISLATIVE COUNCIL

Foreword

HK Cable appreciates the time and effort that the Government has spent on drafting the Broadcasting Bill. While most of the policy decisions arrived at after the 1998 Review have been correctly included in the Bill, certain sections of the Bill may need clarifications and revisions. In particular, HK Cable doubts the effectiveness of the Bill against anti-competitive practices and abuse of dominance.

This submission comprises two parts: Part I sets out the major concerns of HK Cable and Part II lists HK Cable's comments on some other individual provisions. The numbers in square brackets refer to the section numbers in the Bill.

HK Cable hopes this submission will help to conclude a correct, clear and concise Broadcasting Ordinance.

Part I

1. Competition and Dominance

- (a) HK Cable supports the promotion of competition and control of abuse of dominance in the broadcasting market. Nevertheless the Bill, as it stands, is not adequate to ensure a level playing field for the industry.
- (b) Disqualification of Licensees in Different Categories

Competition cannot ensue without the control of the abuse of dominance. There are concerns that certain parts of the Bill can be interpreted to suggest that the power of the dominant television broadcaster may well be extended to the detriment of competition in the market.

An example of this is as follows: [s.4(1)(b), Schedule 1] provides that a non-domestic TV program service licensee is not a disqualified person in relation to a domestic pay TV program service licence.

This could be taken to mean that Galaxy Satellite Broadcasting Limited (a relating company of TVB which is deemed to be a non-domestic TV program service licensee under [s.2(4), Schedule 8]) can hold an additional domestic pay TV program service licence. This would imply that the TVB Group, the dominant broadcaster, may be able to hold a domestic free TV program service licence, a non-domestic TV program service licence and a domestic-pay TV program service licence. If this were the case they would virtually control the entire TV market of Hong Kong.

The provision in [s.4(1)(b), Schedule 1] could damage the promotion of competition. The provision should either be deleted or amended to make clear that the provision applies ONLY if the licensee is not otherwise disqualified.

- (c) Relevant market

A further point is that competition theory makes clear that dominance can occur only in a relevant market, where relevant market has a specific meaning. Defining the relevant market can be one of the most difficult and controversial aspects when dealing with competition issues. The Bill only lightly touches on this point. It is important not to assume that a programme service market is itself a relevant market, in other words the domestic free television market is not necessarily a relevant market. Because of its particular importance HK Cable recommends that the term 'relevant market' is clearly defined in the Bill in accordance with the specific meaning in competition theory.

(d) Exclusive Artiste Contracts

The Bill says, exclusively engaging artistes is not anti-competitive [s.13(1) & s.13(5)].

HK Cable does not in principle have difficulty with the use of exclusive contracts for the employment of artistes. However, there is a potential problem that exclusive contracts can be used as a means to restrict the freedom of movement of artistes unfairly. For example, it is an abuse of artistes' freedom of employment if they are not able to move between stations (and work exclusively for one station at a time). Any broadcaster which refuses to re-employ an artiste who was previously employed on an exclusive basis because he has worked for another broadcaster, would be guilty of anti-competitive behaviour. This is not easy to prove but in a flexible employment market place there should be evidence of artistes moving between stations. The lack of movement would be prima facie evidence that anti-competitive behaviour was taking place which could be investigated by the Authority.

There is clearly a fine line to be drawn between the fair use of exclusive contracts and abuse of such contracts. HK Cable considers that exclusive employment contracts should not be given a blanket exclusion from anti-competitive legislation which would enable potential abuse of the contracts to be investigated by the BA and appropriate action taken. With a lack of sufficient quality artistes, TV stations other than the dominant station have great difficulty in making successful productions.

Artistic life is short. Artistes need to grasp maximum opportunities to fully exploit their talents within the limited time. Abuse of exclusive engagement makes this difficult and thus is unfair to artistes.

(e) Exclusive Programme Contracts

Television broadcasters world-wide differentiate their services by the use of exclusive programs. However, the Bill in [s.13(2)(b)] considers the acquiring and exercising of program rights on an exclusive basis to be anti-competitive.

Program exclusivity is common everywhere in the world. Without exclusivity the same program may appear on all TV stations at the same time (remember the simulcast of the Taiwan drama "Justice Pao" by TVB & ATV in 1994). Ultimately, viewers are deprived of choice.

The existing problem in the market is not on the exclusivity itself but whether a TV station has impeded competition by acquiring programs simply to prevent access to the programs by other broadcasters. This can be determined fairly objectively - If a TV station has acquired a program exclusively but fails to telecast it within a reasonable time (say within 2 years of signing the license or production of the program), then it means the TV station does not need the program. Such acquisition can therefore be regarded as anti-competitive.

HK Cable therefore submits that acquisition of exclusive program rights should not generally be considered anti-competitive (indeed it is at the very heart of competition between the broadcasters).

(f) Broadcasting Authority Composition and Resources

The Bill gives the Broadcasting Authority wide powers to investigate, determine, and penalize anti-competitive practices [s.13, s.14, s.15, s.24 and s.25].

Competition is a specialized issue requiring appropriate expertise, substantial time and effort of work. In countries like the US and UK with competitive television markets, in addition to any explicit industry legislation concerning competition issues, there exists extensive general competitive legislation and corresponding regulatory bodies which are also involved in regulating competition in the television industry. Competition in these jurisdictions is therefore controlled by extensive legislation with full-time and well-sourced specialist competition agencies.

In the telecommunications sector in Hong Kong, competition issues are handled by the Telecommunications Authority, who is full-time and has considerable expert support services from OFTA.

The Bill proposes that the Broadcasting Authority - which is composed of part-time members drawn mainly from the general commercial and education sectors - will regulate competition in the broadcasting industry. Bearing in mind that the BA's primary function in the past has been to regulate television programme contents, it is unreasonable to simply vest them with the 'anti-competitive powers' and expect they can exercise these powers competently and effectively.

HK Cable believes that the widening of the BA's powers and responsibilities should lead to a review of BA membership and the resourcing of appropriate support to enable the Authority to fulfill its new role. This should include the possible appointment of a full-time BA Chairman (to complement the full-time TA). Without competent and effective implementation, the competition safeguards will simply exist in a vacuum.

2. Disqualified Persons

The Bill has removed 'dominant FTNS licensee' and 'program suppliers' from the list of disqualified persons because the Government believes the competition provisions are good enough safeguards against abuse of dominance.

As argued previously, the competition provisions proposed are new and untested and their effectiveness is unknown. The 1998 Review of the Broadcasting Environment clearly indicated a potential concern regarding the

abuse of dominance involving the dominant FTNS licensee and the supply of programmes by the dominant television broadcaster. This is made clear because the restrictions were included as policy decisions. HK Cable submits the policy decisions were correct and should be retained in legislation.

3. Carriage Licence

The Government's policy is to replace the single broadcast licensing regime by one with separate licensing for carriage and content. The Bill details the terms of the content licences but no information whatsoever has been given regarding the complementary carriage licences.

With the ever increasing pace of convergence of broadcasting, telecommunications and the Internet, the lack of information concerning the carriage licences is extremely concerning. With convergence television and telecommunications are becoming inextricably linked and inter-related. It is therefore not possible to comprehensively judge the effect of the current Bill without knowing the proposed changes to the corresponding telecommunications legislation and regulation.

If each of the broadcasting services has a different carriage licence, the regulatory regime will become more complicated than it is now. There will be an increased number of licences and there will be inter-relationship issues between carriage and content licences. New carriage licences may also introduce distortions in the marketplace that have not previously existed. Until the licensing detail is known it is not possible to make informed judgements.

HK Cable recommends that legislators inquire further of Government regarding its proposals for the associated carriage licence to enable a complete and comprehensive understanding of the proposed legislation.

4. Licensing Criteria and Process

The licensing criteria and process for different categories of broadcasting services have not been specified in the Bill. HK Cable believes they will most probably be set out in guidelines prepared by the Broadcasting Authority.

HK Cable submits this is not a satisfactory practice in an open market. A free market cannot operate effectively, if the rules and regulations are not stable and in the public domain, with closely-argued evaluations and reasons given for decisions by an accountable regulator. To ensure a more stable regulatory and investment environment, HK Cable urges the Government to set out clearly the said licensing criteria and process in the legislation.

Part II

1. In the definition of "non-domestic television program service", it includes '*service which is neither intended nor available for the public in Hong Kong*'. [s.2(1)]

There is a logical problem - if the service is not available in Hong Kong, how can the local legislation govern it? Besides, whether the service is intended for Hong Kong reception is immaterial. The determining factor remains as 'it is available in Hong Kong but not primarily targeting it'.

2. The definition of "newspaper" should include paper in printed form, electronic form and any other forms. This avoids omission of newspaper available only on the Internet. [s.2(1)]
3. In the definition of "television program service", the Bill provides '[it]...*means the provision of a service that includes television programs for transmission by telecommunications that are readily accessible to, or made available to, the general public in or outside Hong Kong...*' [s.2(1)]

It is not understood why the underlined words are necessary. It would be clearer to define it as "... *the provision of a service that includes television programs for transmission by telecommunications that are readily accessible to, or made available to, the general public in Hong Kong, whether the service is primarily targeting Hong Kong or not*".

4. [s.6 & s.7] penalize a person who, in the course of trade or business, imports, manufactures, sells, offers for sale or lets for hire an unauthorised decoder.

Given that there is a growing trend for people to buy and bring in unauthorised decoders from Shenzhen, HK Cable submits persons engaging such illegal activities for personal use should be similarly penalized.

5. [s.13(2)] regards '*direct or indirect agreements to fix the price in a television program service market*' as anti-competitive.

Literally, this can cover the agreements between a TV program service licensee and its subscribers. This should not be the intent of the legislation. It will be clearer to put it as '*direct or indirect agreements or concerted actions between licensees to fix price in a television program service market.*'

6. Pursuant to [s.26(2)(b)], the Broadcasting Authority may disclose a licensee's data, book, document or record etc. in connection with civil proceedings to which the Broadcasting Authority is a party.

This may give the Broadcasting Authority an unfair advantage which it is not entitled to under the existing civil procedural laws. Civil litigants are not required to furnish each other with privileged information (e.g. communications with own lawyers). The draft provision is too wide and should be made subject to the prevailing civil procedural laws.

Same comment applies to [s.15(6)(b)(iii), s.15(6)(c)(ii), s.29(6)(b)(iii) & s.29(6)(c)(ii) of Schedule 1].

7. The Broadcasting Authority may impose a new sanction, namely requiring a licensee to include an apology in its TV program service [s.29].

The Bill does not specify under what circumstances such sanction will be imposed. Certainly, such sanction is not appropriate for minor breach (e.g. late filing of annual returns with the Broadcasting Authority) or if there is a potential litigation arising from the licensee's breach of the prescribed provision (Otherwise, the apology may be used in court as evidence against the licensee).

HK Cable submits the existing sanction options are sufficient for regulating the industry. There is no need to add the apology sanction.

8. In [Schedule 1], [Schedule 4] and the main body of the Bill [i.e. s.2(1)], the definition of 'licence' is different. It is interesting that same word in the same legislation has different meanings in different parts. If a reader of the disqualification provisions in [Part 2, Schedule 1] has overlooked the definition in [Part 1, Schedule 1], he may be misled to the belief that the disqualification provisions similarly apply to non-domestic TV program service licence and other licensable TV program service licence.

HK Cable suggests words like 'Applicable to domestic free and domestic pay TV program service licences only' should be included in the heading of each part of [Schedule 1].

9. Overall structure of the Bill

The provisions in the Bill are more convoluted than those in the Television Ordinance. It is not entirely 'technology-neutral' as claimed. Noticeable examples can be found in [Schedule 3]. Any simplification appears to have been achieved by simply moving complex sections from the main text to Schedules!

Though the Government's consultation paper said all relevant provisions governing TV program services and other broadcasting services under the existing Television Ordinance, Telecommunications Ordinance and Broadcasting Authority Ordinance would be consolidated in the Bill, radio broadcasting services are still governed by the Telecommunications Ordinance and the Broadcasting Authority Ordinance as before. Contrary to their expectation, all TV program service operators still need to refer to the 3 ordinances (rather than one consolidated ordinance) in their daily operations.

HK Cable recommends that Legislators encourage the introduction of more simplified provisions and a more comprehensive legislation.

Hong Kong Cable Television Limited.
March, 2000

Summary of Part I (p.2-4)

| Submission | Details in paragraph ... |
|--|--------------------------|
| Controlling abuse of dominance and taking out the exception in [s.4(1)(b), Schedule 1] | 1(b) |
| Defining 'relevant market' in accordance with the specific meaning in the competition theory | 1(c) |
| No blanket exclusion from anti-competitive provisions for exclusive artiste engagements | 1(d) |
| Acquisition of exclusive program rights should not be generally regarded as anti-competitive | 1(e) |
| Ensuring the regulatory authority has competence and adequate support for implementing the competition and dominance provisions | 1(f) |
| 'Dominant FTNS licensee' and 'program supplier' should be included in the list of disqualified persons in accordance with the early policy decisions | 2 |
| Specifying what type of carriage licence is deemed to have been granted to HK Cable under the Telecommunications Ordinance | 3 |
| Setting out the licensing criteria and process for different categories of broadcasting services | 4 |

Summary of Part II (p.5-7)

| Submission | Details in paragraph ... |
|--|--------------------------|
| Re-defining 'non-domestic television program service' | 1 |
| The definition of 'newspaper' should include newspaper distributed on the Internet | 2 |
| Re-defining 'television program service' | 3 |
| Importation of unauthorised decoders <u>for personal use</u> should also be penalized | 4 |
| Re-drafting [s.13(2)] as ' <i>direct or indirect <u>agreements or concerted actions between licensees</u> to fix price in a television program service market.</i> ' | 5 |
| Broadcasting Authority's rights to disclose licensees' information should be subject to the prevailing civil procedural rules | 6 |
| Taking out the sanction of apology | 7 |
| Simplifying the provisions and making them more comprehensible | 8 & 9 |