

2ND SUBMISSION BY HONG KONG CABLE TELEVISION LIMITED
TO THE BILL COMMITTEE ON BROADCASTING BILL
OF THE LEGISLATIVE COUNCIL

1. This paper elaborates HK Cable's submission of March 2000 on the provisions prohibiting anti-competitive practices and abuse of dominance under the Broadcasting Bill.

2. TVB's Unique Market Position and Distortion of Playing Field

When considering whether TVB should be allowed to hold more than one domestic licence, it is necessary to remember how it achieved its current position in the market:

- i) it was the first TV station to be awarded a terrestrial free-to-air licence,
- ii) competition in the market has been restricted because of limited spectrum enabling TVB to achieve an unusually high market share, and
- iii) using its market share and the power of the television medium, TVB has achieved a market position that others are unable to challenge.

TVB's market position has therefore been achieved because it was the beneficiary of a privileged licensing arrangement. The introduction of competition in the deregulated marketplace can only be achieved effectively if the market power of TVB is controlled.

Spectrum limitations have caused (and will continue to cause) structural problems in the Hong Kong television market. It should be remembered that because of the continued lack of spectrum availability, the market will continue to be distorted and TVB will continue to benefit from its privileged use of the UHF spectrum. Even in the future when analogue transmissions are phased out and it becomes possible to award additional domestic free licences, it will be necessary to control TVB's activities until the marketplace is re-balanced and other players are able to compete on equal terms with them.

The granting of any other licence to the TVB Group would weaken the ability of rivals to compete in the marketplace resulting in the stifling of innovations and lack of investments. It would ultimately be to the detriment of viewers.

3. One Licence per Operator

An underlying principle of Government policy has been “one licence per operator”. This policy has ensured a plurality of voice whilst maximising competition in a very limited market. It also minimised any conflict of interest and avoided editorial uniformity. The principle was embodied in the previous Television Ordinance as a “disqualified persons” provision. It is included in the current Bill’s “disqualified persons” provisions (Schedule 1. s4(1)(a)&(b)), except for non-domestic licensees who are not disqualified in relation to a domestic pay licensee.

HK Cable strongly recommends that the policy is maintained at least until the market distortion caused by the RF spectrum limitations (and their consequential effects) have been rectified and licensees are able to compete on an equal basis with TVB.

4. Potential Loophole

The exception referred to in the previous section concerning non-domestic licensees introduces a potential loophole which may undermine the principle and allow the TVB Group to hold three out of the four TV program service licences. This would enhance TVB’s dominance to the detriment of the consumers and competition in the market. It could potentially enable the TVB Group to exert its market power in virtually the entire television market in Hong Kong. It is strongly recommended that the loophole is closed.

5. Complaints of Anti-competitive Practices and Abuse of Dominance

There have been complaints that some TVB Group practices are anti-competitive and that it abuses its dominance. Examples of such complaints as raised by ATV and IFPI respectively are attached.

HK Cable has itself experienced significant hindrances when inviting record companies to air their local music videos and karaoke productions on its channels, inviting local artistes to appear on its channels, acquiring programs especially for their first telecast right and inviting advertisers to put their ads. on its channels in addition to other stations.

HK Cable anticipates that similar complaints will proliferate if TVB Group is allowed to extend its powers to the domestic pay TV sector.

6. Is there One or Two Markets?

TVB Group has argued that domestic free TV and domestic pay TV are two different markets and, being dominant in the domestic free TV sector does not necessarily mean that it will be dominant in the domestic pay TV sector.

HK Cable believes the evidence is clear that there is only one market NOT two. A market is defined by reference to “substitutability”. This means does one product substitute for another? In the television market when viewers subscribe to pay TV, their viewing hours do not increase. They watch pay TV when they would have otherwise watched free TV. In other words one product substitutes for the other. Therefore the relevant market is the single television market not free TV or pay TV separately.

Additionally all operators --- TVB, ATV, HK Cable, iTV and Star TV (when received in Hong Kong) --- are competing with each other for the same viewers, artistes and other personnel, programs and facilities. They do not operate in separate or discrete markets.

Various instances indicate that TVB Group have in the past accepted there is only one TV market in Hong Kong:

- In its response to 1998 Review of Television Policy, TVB said it supported the abolition of royalties because ‘exclusive market franchise no longer exists with the introduction of satellite TV and subscription services in the past years’. In other words, TVB considers, amongst others, HK Cable, Star TV and iTV as its competitors in the same market.
- In its standard artiste contracts, TVB often restricts its artistes from appearing not only on the other free TV but also pay TVs and satellite TVs in Hong Kong. Again, this indicates TVB has treated the pay TVs and satellite TVs as their competitors in the same market. Otherwise, no such restrictions would be necessary.

7. Separate Management

TVB Group has further argued that its domestic free TV arm and domestic pay TV arm would be separately managed such that there would be no monopoly by a single entity.

In our view it is unrealistic to expect two arms of the same entity will operate entirely independently without concerted actions or tacit agreements. It is impossible for the

regulatory authority to scrutinize if the two arms have operated entirely independently on every transaction. The only reliable way to avoid monopoly by one entity is to restrict the entity to operate by one arm only.

Part of the problem can be seen by looking at the prevailing licence of Galaxy Satellite Broadcasting Limited, the satellite TV arm of TVB Group. The licence prohibits any person from exercising control of both TVB and Galaxy (s.27.6) and requires the principal officers of Galaxy to be different and independent from those principal officers of TVB (s.27.7). Nevertheless, the latest annual return of Galaxy filed with the Companies Registry reveals that the directors of Galaxy include Shaw Run Run, Page Louis Rajkumar and Cheung Leung, Bernard. Its company secretary is Ho Ting Kwan. All these persons are at the same time exercising control of TVB in their capacities as the shareholders, directors and/ or otherwise principal officers of TVB!

8. What About if they Screen Different Programmes?

Her Honorable Legislative Councillor Ms Emily Lau asked in the Bill Committee meeting on 31 May 2000 whether TVB Group should be granted a domestic pay TV program service licence if it undertakes to provide programmes different from its existing free channels.

As discussed earlier in section 2 there are long standing structural problems with the Hong Kong television market relating to spectrum availability and the consequential development of the industry. These structural problems distort the market to the benefit of TVB and until they are resolved, and competition becomes more equitable, the influence of TVB should not be increased by granting further licences. Introducing rules relating to programme differentiation does not resolve the issue. Without resolving the structural issues viewer choices will be restricted and survival of other TV operators will be in jeopardy. It will also have a knock-on effect with industries working closely with the television industry e.g. music publishers and record companies, the working opportunities of artistes and other personnel, the choices of advertisers to air their messages, the profits and choices of program suppliers, the editorial plurality, the diversity and growth of local culture.

In fact, it is doubtful how different the programs on the two arms of TVB Group will be. Mr. Ho Ting Kwan of TVB said frankly in the Meeting that if the two arms are to telecast a football match, probably the pay TV arm will telecast the whole match while the free TV arm will telecast the highlights only. Can these be regarded as ‘different programmes’? Our answer is ‘no’! Given its large programme archive, TVB Group can make easy profits by re-packaging its archival materials and present them on a new channel. This tactic is being adopted by the Galaxy Xin He Channel and may be similarly applied to its pay TV channel, if licensed.

If TVB Group has domestic free, domestic pay and non-domestic TV program service licenses, it will have advantages over other TV operators in acquiring programs. By acquiring the exclusive free TV, pay TV and satellite TV rights of any programs, TVB Group effectively excludes other TV operators any access to such programs. Such unfairness will extend to Internet operators with the development of its Internet business by TVB Group.

9. Availability of Guidelines

The competition and dominance provisions, as drafted, are general principles only. They are not comprehensive and practical enough for implementation. HK Cable understands that it is the Government's intention to elaborate such provisions in guidelines issued by the Broadcasting Authority. It is also the Government's intention, as stipulated in the Legco Brief dated 28 January 2000, that such guidelines will be finalized by the time the Bill is passed. Unfortunately the devil is often in the detail and until the detail is known the regulatory regime will be unclear and the meaning of legislation uncertain.

HK Cable therefore recommends that draft guidelines are made available for consultation prior to Legco's approval of the Bill.

10. Broadcasting Authority Composition

HK Cable reiterates its suggestion that widening of the BA's powers and responsibilities should lead to a review of BA membership and the giving 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.

Hong Kong Cable Television Limited
April 2000

Attachment

Extract from the ATV's Comments on the Consultation Paper of the 1998 Review of Television Policy

2.2 ATV fully supports the spirit of these proposals but worries about their effectiveness when substantive measures are formulated and implemented. In fact, provisions against anti-competition are laid in the existing television licences. Yet, anti-competition practices are still common in the industry. The following are some examples: -

- Dominant player often uses its financial strength and audience shares to induce or force advertisers to put their advertisements on its channels but not others (a recent example being the advertising of the "CENTRAL" magazine).
- Dominant player acquires the exclusive telecasting right of more than necessary imported programmes so as to prevent other television stations from using them (e.g. TVB has acquired the exclusivity of BBC's documentary of "Mao Ze-dong" and CCTV's drama of "Shui-hu Zhuan" for years but has never telecast them).
- Dominant player also engages exclusively more than necessary artistes, particularly singers, so as not to allow other telecasters to use them.
- When other telecasters have created successful programmes with new concepts/ideas, dominant player may use its financial strength to duplicate a programme of same nature so as to make viewers get tired of programme of such nature. This practice discourages creativity and deprives viewers of their right of choice.