

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

1. The Consumer Council is pleased to provide Members of the Legislative Council with a supplementary submission following the meeting on the Bill on 31 March 2000. The two questions that were raised on which Honourable Members invited further views were as follows:
 - (a) The impact of new technology, and whether such activities or the conduct of the operators should be regulated.
 - (b) The prohibition of cross ownership between different license categories to address issues of market power.

The impact of new technology

2. The provision of information/entertainment through new technology other than current broadcasting technology, e.g. through the Internet, is not a matter that can be ignored or put aside for further consideration. It should be noted that the Consumer Council's concern in this submission is not the regulation of content but the issue of ensuring there are adequate competitive safeguards. Competition works within economic markets. Clearly, markets are not a phenomenon that can be arbitrarily constructed through licensing legislation. They are a function of the creative endeavors of entrepreneurs, and the patterns of purchasing behavior by consumers. They are constantly evolving and require a regulatory framework that is equally flexible.
3. The Council pointed to the problem of loopholes which the Government's sector specific approach to competitive safeguards brings, in its first submission at paragraphs 5 to 7. The first problem was difficulties in addressing the actions of non licensees that may have an effect on the relevant market or markets covered by sector specific licenses. The second was emerging competition issues; i.e. where other forms of electronic entertainment/information media (such as the Internet) will compete with the services offered under narrow licensing regimes.
4. The Government needs to address the issue of loopholes and safety nets, and the question of how the abuse of dominance can be addressed across all the markets operating in the industry. General competition law, administered by a specialist competition authority that is not fettered by licensing jurisdictional constraints, would be the optimal solution.
5. However, given the Government's stated position on this issue, the Council proposes widening the ambit of the prohibited anti-competitive conduct in the Broadcasting Ordinance to include conduct taking place in markets within the context of 'electronically delivered entertainment and/or information services'. This is a logical arrangement as consumers are able to access entertainment programs from the Internet. The widening of the jurisdiction of the Broadcasting Ordinance to other related sectors would demonstrate the Government's commitment to providing competitive safeguards in this rapidly changing industry.

6. In this scenario, while only licensees would be under the licensing scrutiny of the BA and be subject to its licensing sanctions, other non licensees would be prohibited by law from engaging in the stated anti-competitive conduct. They would therefore be subject to civil action, i.e. the seeking of injunctions and other orders similar to those applying to licensees, brought by either the BA or a private party in a court of law.
7. In addition, now that the BA will be vested with enhanced powers to address anti-competitive conduct, some thought needs to be given as to the most efficient means of meeting the resource needs for undertaking complicated competition analysis. There are currently two regulators; i.e. the Broadcasting Authority, and the Office of the Telecommunications Authority examining competition issues in related industries. There are also the resources within the Information Technology and Broadcasting Bureau. Given the synergies between the telecommunications and broadcasting sectors, particularly the use of similar technologies by market players, it would seem preferable that competition investigation and analysis expertise be pooled together and used in carrying out similar work in the area of electronically delivered entertainment/information. We leave this to the Government, to find the best mode of operation in this respect.

Prohibition on cross ownership

8. A dominant player holding terrestrial, satellite and pay television licenses could be in a position where it could, if it chooses, exercise control over air time for artistes and advertising, and exercise power in buying programmes, while stifling independent production. Its substantial programme purchasing power could give them the ability to deny competitors access to content through buying up programme broadcasting rights, with no intention of actually broadcasting them. These forms of control are in direct conflict with the open sky objective of the Government's Television Policy. If unchecked, it may reduce the potential for investment and innovation in the broadcasting industry, eventually limiting programming choice for the public. In TVB's application, it was stated that the ultimate target is on the provision of 40 channels, including 6 for its self-produced programmes. In view of the capacity restraint over hybrid fibre coaxial cable network, the grant of a pay television licence to the TVB Group warrants careful consideration.
9. The notion of prohibiting entry by a dominant free to air player into another television segment is similar to a policy used in the United States up until recent years where free to air networks were prevented from entering the 'cable television' segment of the industry. It was not until the growth of market power by the pay television companies (following an increase in demand for their services and a change in the nature of programming) which challenged the dominance of the free to air networks, that this policy was changed. There is also a precedent in the local telecommunications industry where Fixed Telephone Network Service Providers were granted an exclusive period of licence in order for them to develop capacity to counter the monopoly endowments of Hong Kong Telecom.
10. Since the Government has lifted the unqualified person prohibition against TVB, and the Group has, through its subsidiary Galaxy Satellite Television Limited, submitted an application for a pay television licence, the case before Honourable Members and the Government is not whether there should be a prohibition against TVB's application. Under these circumstances, the issue before the Government is what criteria should apply in granting a licence to one party or another. The Council urges

the Government to bear in mind its objective of ensuring market competitiveness and consider, in vetting the various applications, the impact of the conglomeration of power by one party, on competition in the market.

11. It needs to be recognized however, that the absence of general competition laws preventing anti-competitive mergers or acquisitions means that Government decisions on who might be granted a license, in the interests of protecting competition, could be circumvented.

Consumer Council
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