

## **Bills Committee on Broadcasting Bill**

### **Competition Provisions in Relation to Artiste Contracts**

#### **Purpose**

This paper elaborates on the proposed exemption of “restrictions on any person using or exploiting his artistic talent or ability” from the application of the clause on prohibition of anti-competitive conduct, i.e., Clause 13(1), of the Broadcasting Bill (the Bill).

#### **Competition Provisions**

2. The purpose of the competition provisions in the Bill is to ensure fair competition in the television broadcasting industry. There are two main competition provisions in the Bill. The first provision, i.e., Clause 13(1), prohibits a licensee from engaging in conduct which has the purpose or effect of preventing or substantially restricting competition in a television programme service market. The second competition provision, i.e., Clause 14(1), prohibits a licensee in a dominant position in a television programme service market from abusing its position.

#### **Artiste Contracts**

3. It is a commonly accepted practice in the television broadcasting industry that television broadcasters enter into exclusive contracts with individual artistes. There are, however, concerns that artistes may be unreasonably restrained by their contract terms and this in turn may have implications on competition in the television programme service market.

4. Usually, competition law is not the vehicle to deal with unreasonable restrictions imposed on artistes by their contract terms. The most common way to deal with issues of restrains on artistes is through the “restraint of trade doctrine”<sup>1</sup>. Even in other jurisdictions where there is long history of competition law, it is extremely unlikely that an artiste will

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<sup>1</sup> The doctrine of restraint of trade has two aspects –

a) the common law jurisdiction to declare a contract unenforceable as a restraint of trade; and  
b) the equitable jurisdiction to grant relief in certain circumstances against unfair and unconscionable bargains.

rely on competition law to avoid unreasonable provisions in his or her contract. It is because such conduct will infringe competition law only if it has as its object or effect the prevention or substantial restriction of competition in a television programme service market. Individual contracts with artistes are extremely unlikely, if not impossible, to have an appreciable effect on competition in a relevant market. It is, however, more likely that competition could be affected where a dominant licensee imposes unreasonable terms on artistes. Such behaviour could constitute an abuse of a dominant position.

### **Proposed Exemption**

5. To reflect the industry practice, we have proposed that the competition clause dealing with anti-competitive conduct “shall not operate to prevent any restriction imposed on any person from using or exploiting his artistic talent or ability”. (Clause 13(5)(b) of the Bill refers.) Our policy intention is to give recognition to the fact that contracts between broadcasters and artistes are commercial arrangements, which should not be made subject to the competition provision. This will also re-assure those who are already in exclusive contracts that the Bill will not make such exclusive contracts illegal. For example, a singer with an exclusive contract to sing for Television Station A could be precluded by the terms of the contract from singing for anyone else for the duration of the contract. Such restrictions are normally acceptable and could be justified in terms of the investment made by the Station in developing and promoting the artiste’s work.

6. However, there are also safeguards to ensure that broadcasters could not make use of this exemption to impose restrictions which are totally unrelated to the artistes’ talents or ability. For example, a prohibition of an artiste from accepting an award by an independent body because a competing station will broadcast the award presentation ceremony should not be covered by this exemption. Another example of what may be excluded from the exemption is the prohibitions in contracts preventing artistes from being interviewed by other competing television stations. It should nevertheless be noted that, under such circumstances, the prohibitions will be caught by Clause 13(1) of the Bill only if they have the purpose or effect of preventing competition in the relevant market.

7. It should also be noted that the proposed exemption only applies in relation to prohibition on anti-competitive conduct as provided for in Clause 13. It does not give an exemption from the prohibition on abuse of dominance as provided for in Clause 14. A licensee who is dominant in a relevant market has the obligation to ensure that its behaviour does not constitute an abuse of its position. It is therefore the obligation of the licensee to ensure that the terms that it “imposes” on artistes are not abusive. The BA in forming an opinion as to whether a dominant licensee has abused its dominant position by imposing terms or conditions which are harsh or unrelated to the subject of the artistes’ contracts will need to consider all relevant factors on a case by case basis, taking into account the effect of such conditions on competition in a relevant market.

### **Agency Contracts**

8. There are concerns that licensees could easily avoid the competition provisions by requiring artistes to enter into exclusive contracts with specific agents who in turn would impose unreasonable restrictions on artistes. As explained in paragraph 4 above, the issue of restrictions imposed on artistes contracts is more an issue for contract law than for competition law. Nonetheless, for the reasons set out below, the use of “agents” as a means to bypass the competition provisions is unlikely to succeed -

- (a) if the agent is a subsidiary company of the licensee, then the actions of the two can be treated as that of the licensee;
- (b) if the agent is a company not associated with the licensee and provided that the conduct, which is a result of an agreement (whether written or oral) or understanding between the licensee and the agent, has an effect on competition in a relevant market, then the conduct concerned will be caught by Clause 13; and
- (c) if the licensee is dominant in a relevant market and it requires artistes to enter into contracts with a specific agent because, say, it has prior arrangement with it, and such arrangement which has the purpose or effect of preventing or substantially restricting competition, the licensee may be in breach of Clause 14.

9. Any agreement or understanding between licensees and agents which has the purpose or effect of preventing or substantially restricting competition in a television programme service market will normally be caught by the competition provisions of the Bill. The conduct of an agent will not be caught if it is totally independent of a licensee. Under this scenario, it would be difficult to see why an agent acting independently from a licensee would wish to impose restrictive terms on artistes the purpose of which is to benefit the licensee.

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