

國際唱片業協會〔香港會〕有限公司的信頭  
Letterhead of INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC  
INDUSTRY [HONG KONG GROUP] LIMITED

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An Open Letter to all Legislative Council Members of the Bills Committee on Broadcasting Bill

Dear Honourable Member of the Bills Committee on Broadcasting Bill,

IFPI Hong Kong Group (IFPI HKG) has submitted two papers regarding our views on the Broadcasting Bill. After attending a few of the meetings of the Committee, IFPI HKG notes alarmingly that the anti-competition clauses which were supposed to balance the effects of removing “programme suppliers” as “disqualified persons” under the existing Broadcasting Ordinance will not achieve their intended effects.

The reason being that the Administration has reiterated that the current Bill will only regulate anti-competition behaviours within the television service market. It follows that the “guidelines” to be promulgated under Clause 14(3)(d) will also leave out “programme suppliers” in its coverage. It is a serious policy regression as the Bill and the “guidelines” will provide no alternative redress to the abuses of licensees in the market of “programme suppliers”.

In order to provide remedies to the above mentioned problems, we strongly recommend the Bills Committee to seriously reconsider our two main points:

- To expand Clauses 13, 14 and the “Guidelines” stipulated by Clause 14(3)(d) to cover “programme suppliers”.
- To repeal Clause 13(5)(b)

The exemption in Clause 13(5)(b) is too broad and so unusual that IFPI HKG cannot find compatible provision in other jurisdictions. It exempts a licensee from restricting talents to enter into other agreements with sectors outside the broadcasting service market that may involve “artistic talent or ability”. Such restrictive clause, which is exempted by Clause 13(5)(b) and leaving no address to companies outside of the broadcasting service market, is unreasonable and in itself extremely anti-competitive in an increasingly converged media market. We therefore strongly recommend the Committee to either repeal Clause 13(5)(b) or to restrict its scope within the broadcasting service market.

IFPI HKG’s detailed proposals to amend the Bill are attached in the ANNEX for your easy reference. We once again call upon your honourable self to reconsider our views so that the rightful interests of other sectors will not be disregarded.

With kindest regards,

Ricky Fung  
CEO, IFPI Hong Kong Group

## ANNEX 1

### Proposed amendments

#### Clause 13

##### **Existing wordings**

(1) Subject to subsections (4) and (5), a licensee shall not engaged in conduct which, in the opinion of the Broadcasting Authority, has the purpose or effect of preventing or substantially restricting competition in a television programme service market.

(2) The Broadcasting Authority may consider conduct to fall within subsection (1) as including, but not limited to -

(a) direct or indirect agreement to fix the price in a television programme service market;

(b) conduct preventing or restricting the supply of goods or services to competitors;

(c) - (f) NO SUGGESTION REGARDING THESE SUBSECTIONS

(3) Subject to subsection (4), a provision in an agreement is void in so far as it provides for or permits, whether directly or indirectly, conduct which contravenes subsection (1).

##### **Proposed amendments**

(1) Subject to subsections (4) and (5), a licensee shall not engage in conduct which, in the opinion of the Broadcasting Authority has the purpose or effect of preventing, distorting or restricting competition –

(a) in a television programme service market, or

(b) *in a market of programme suppliers.*

AND TO INSERT THE FOLLOWING CLAUSE TO DEFINE “PROGRAMME SUPPLIERS” –

“programme supplier” means a person or company which supplies material for broadcasting by a licensee.

(2) The Broadcasting Authority may consider conduct to fall within subsection (1) as including, but not limited to –

(a) direct or indirect agreement to fix the price or *any other trading conditions* in a television programme service market *and/or a market of programme suppliers.*

(b) conduct preventing or restricting the supply of goods or services to competitors *in a television programmes service market and/or a market of programme suppliers*

(3) Subject to subsection (4), *any* agreement or *decision* is void in so far as it provides for or permits. whether directly or indirectly, conduct which contravenes subsection (1).

- (4) The Broadcasting Authority may –
- (a) on an application made to it in the specified form by a licensee;
  - (b) on a prescribed ground; and
  - (a) by notice in writing served on the licensee,

exempt conduct specified in the application from subsection (1) subject to such conditions as the Broadcasting Authority thinks fit specified in the notice.

- (5) Subsection (1) shall not operate to prevent any restriction imposed on -

Note: IFPI HKG does not agree with this extensive discretion power entrusted to the Broadcasting Authority in exempting a licensee from subsection (1). In order to maintain an acceptable level of transparency and accountability, IFPI HKG suggests the following points to be incorporated in the Bill:

- The Broadcasting Authority should, either in the form of Guidelines or a Schedule of the Bill, spell out with a high degree of clarity on grounds that a licensee may be exempted from subsection (1);
- Any such application for exemption made by a licensee (in particularly a licensee of DFTPS) should be publicized. A procedure to hear other licensees' and the applying licensee's trading partners' objections, if any, to the application should be incorporated in a Guideline or a Schedule.
- The Broadcasting Authority should determine, in accordance to proper guidelines, firstly, whether the exemption, if granted, may affect the interests of any objecting parties or put them in a competitive disadvantage position with the licensee. If the answer is affirmative, the Broadcasting Authority should consider their views before reaching a decision to exemption in accordance to subsection (4).
- An administrative procedure for appeal should be established for an applying licensee and the objecting parties on a decision made by the Broadcasting Authority in accordance to subsection (4).
- Finally, if an exemption is granted, the Broadcasting Authority should be empowered to cancel it if there has been a material change of circumstance. IFPI HKG suggests that a subsection similar to Section 5 of the UK Competition Act 1998 should be inserted in clause 13.

Note: To repeal Section 13(5)(b).

- (a) the inclusion in a television programme service of a television programme produced by the licensee of the service; or
- (b) any person from using or exploiting his artistic talent or ability.

#### Clause 14

- |                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(1) A licensee in a dominant position in a television program should not abuse its position.</p>                                                                                                                                           | <p><i>(1) Any conduct on a part of one or more licensees which amounts to the abuse of dominant position in a television programme service market and/or a market of programme suppliers</i></p>                                                                |
| <p>(2) A licensee is in a dominant position when, In the opinion of the Broadcasting Authority, it is able to act without significant competitive restraint from its competitors and customers.</p>                                           | <p><i>(2) A licensee is in a dominant position when, in the opinion of the Broadcasting Authority, it is able to act without significant competitive restraint from its competitors, customers and trading partners in a markey of programme suppliers.</i></p> |
| <p>(3) In considering whether a licensee is dominant, the Broadcasting Authority shall have regard to relevant matters including, but not limited to -</p>                                                                                    | <p><i>(3) In considering whether a licensee is dominant. the Broadcasting Authority shall have regard to relevant matters including, but not limited to -</i></p>                                                                                               |
| <p>(a) the market share of the licensee;</p>                                                                                                                                                                                                  | <p><i>(a) the market share of the licensee;</i></p>                                                                                                                                                                                                             |
| <p>(b) the licensee’s power to make pricing and other decisions;</p>                                                                                                                                                                          | <p><i>(b) the licensee’s power to make pricing and other decisions, Including but not limiting to any other trading conditions in a television programme service market and/or a market of programme suppliers.</i></p>                                         |
| <p>(c) any barriers to entry to competitors into the relevant television programme service market;</p>                                                                                                                                        | <p><i>(c) any barriers to entry to competitors into the relevant television programme service market;</i></p>                                                                                                                                                   |
| <p>(d) such other relevant matters as may be stipulated in guidelines concerning the test of dominance issued under Section 4 by the Broadcasting Authority in consultation with the licensees in the relevant television service market.</p> | <p><i>(d) [See Notes below]</i></p>                                                                                                                                                                                                                             |

Note:IFPI HKG agrees that the Broadcasting Authority should maintain the flexibility in introducing new criteria in considering whether a licensee is a dominant player in the relevant service market. In other such guidelines and the provision itself, IFPI HKG would like to pointedly

urge the Government to consider the following:

- As mentioned above, a dominant licensee, in particular of DFTPS, enjoys enormous competitive advantages not only over competitors in its own relevant television service market, its influences can spread to other television service markets as well as “market of programme suppliers”. This fact must be considered as “relevant issue” in determining whether a licensee is dominant.
- IFPI HKG does not agree that consultation process for the drafting of the guidelines concerning the test of dominance should be restricted to “licensees in the relevant television service market”. We urge the Government to extend its scope of consultation to other sectors as well as reputable and independent experts on competition laws and policies.

(4) A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Broadcasting Authority, the licensee has engaged in conduct which has the purpose or effect of preventing or substantially restricting competition in a television programme service market.

(4) A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Broadcasting Authority, the licensee has engaged in conduct which has the purpose or effect of preventing or substantially restricting competition in a television programme service market *and/or a market of programme suppliers*.