

**The Legislative Council
Bills Committee on Broadcasting Bill**

Competition Provisions

Purpose

This paper elaborates on the competition provisions in the Broadcasting Bill (the Bill).

Background

2. At the Bills Committee meetings held on 11 and 20 April and 6 May 2000, Members asked the Administration to provide further information regarding the following issues concerning the competition provisions -

- (a) a comparison between the existing competition clauses in the broadcasting licences and the proposed competition provisions in the Bill;
- (b) whether the anti-competitive conduct of a subsidiary of a licensee will be caught by the competition provisions;
- (c) the response to the issues relating to “co-dependent relationship”, “distortion of playing field” etc. with reference to the examples quoted in the submission of IFPI;
- (d) the grounds in overseas jurisdictions for exemption from the prohibition of anti-competitive conduct;
- (e) whether it constitutes an anti-competitive conduct for a television programme service licensee not to broadcast a programme after acquiring an exclusive right of the programme; and
- (f) the response to the drafting points raised by the deputations.

Comparison between existing and proposed provisions

3. At present, all broadcasting licences contain a free competition clause prohibiting a licensee from entering into any agreement or arrangement which will restrict competition in relation to the establishment, provision or operation of any broadcasting service, etc. The following trade practices are exempted from the application of the free competition clause -

- (a) restrictions on any programme acquired or produced by a licensee;
- (b) restrictions on supplying any proprietary decoder; and
- (c) restrictions on any person using or exploiting his artistic talent or ability.

4. We have now proposed to strengthen and widen the scope of the competition safeguards in the Bill. In addition to a provision prohibiting a licensee from engaging in conduct which has the purpose or effect of substantially restricting competition in a television programme service market, we have proposed another provision prohibiting a licensee in a dominant position from abusing its position. We have also proposed to narrow down the exemptions in paragraph 3 above to the following -

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

Conduct of the subsidiary of a licensee

5. We have made reference to a number of court cases in the European Union which has competition laws similar to our competition provisions in the Bill. (A summary of the court cases is at [Annex](#).) These cases indicate that if a company and its subsidiary form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, then the parent company and the subsidiary cannot be considered as separate entities for the

purpose of the competition laws. In other words, the conduct of the subsidiary can be considered as that of the parent company. However, to put this matter beyond doubt, we will consider whether there is a need to amend Clauses 13 and 14 to this effect.

“Co-dependent” market

6. IFPI expressed the concern that the proposed competition provisions of the Bill might not be able to deal with the anti-competitive conduct in a “co-dependent” market engaged by a dominant licensee. For example, the dominant licensee may give more “air-time” or more favourable trading terms to its affiliate company in another market, thus affecting competition in that market.

7. The competition provisions in the Bill deal with behaviour that has an effect on competition in a television programme service market. It would be outside the jurisdiction of the Broadcasting Authority if the behaviour does not have any effect on the television market. However, it should be noted that certain types of behaviour, particularly those in a market related to the television market, might have a knock-on effect on the television market. In such circumstances, the behaviour may be caught by the competition provisions. Take for example, a dominant licensee has signed exclusive contracts with almost all the popular singers in Hong Kong. There is a condition in the contracts stipulating that all videography (e.g. CDs, VCDs, MTV) produced by any producers for the singers cannot appear on any other media except on the dominant licensee’s station. Such conduct may be caught by the Bill as it might have an adverse effect on competition in the relevant television programme service market. The unavailability of the programme material, for example, to other licensees may result in them being unable to compete in the relevant television market.

Grounds for exemption

8. Under the competition law of the European Union, “agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and which does not impose restrictions which are not indispensable to the attainment of these objectives” are exempted. If and when the Broadcasting Authority considers it necessary, it will work out details of the “prescribed grounds” for exemption having regard to the experience in overseas

jurisdictions. Such grounds will be prescribed by regulation made by the Chief Executive in Council pursuant to Clause 41(f) of the Bill as subsidiary legislation.

Programmes not broadcast

9. The acquisition of programmes which are not later broadcast is unlikely to be anti-competitive unless it can be demonstrated that -

- (a) the licensee concerned acquires extensively such programmes of similar nature leaving others with no choice;
- (b) the purpose of such acquisition is to prevent others from broadcasting the programmes acquired; and
- (c) the acquisition has the purpose or effect of preventing or substantially restricting competition in a television market.

Drafting aspects

10. The following drafting proposals have been put forth by some of the deputations to the Bills Committee -

- (a) IFPI has proposed that Clause 13(1) should be amended to the effect that a licensee shall not engage in conduct which in the opinion of the Broadcasting Authority, has the purpose or effect of preventing, *distorting* or substantially restricting competition in a television programme service market (proposed amendment highlighted);
- (b) Consumer Council has proposed that Clause 13(5)(a) should be amended to the effect that only those programme *wholly or substantially* produced by a licensee for inclusion in its television programme service should be exempted (proposed amendment highlighted);
- (c) Cable & Wireless HKT VOD Ltd has proposed that the protection of rights under the Copyright and Trademark Ordinances should also be exempted from the application of Clause 13; and

- (d) Cable & Wireless HKT VOD Ltd has proposed to delete Clause 13(6) with the effect that any amendments to the exemption list under Clause 13(5) would need to be made by primary legislation.

11. We are considering the above drafting proposals and will respond as soon as possible as to whether these proposals are agreeable.

Information Technology and Broadcasting Bureau
9 May 2000

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Summary of court cases in the European Union (EU)

In the *Hydrothem v Androli Case*, the European Court of Justice (ECJ) held that a man, the company and the partnership that he controlled were one undertaking. In the same case the Advocate General in summarising the position taken by the court in the past went on to say the following (emphasis added):

“ On the other hand, it must be recognized that in Community competition law, as the decisions of the Court demonstrate, an economic, and not a purely legal, approach is necessary. For example, in the judgements in Cases 48/69 and 52/69 (Imperial Chemical Industries Ltd, v Commission (Case 48/69) [1972] ECR 619, and JR Geigy AG v Commission (Case 52/69) [1972] ECR 787) it was pointed out that it had to be presumed that a parent company and its subsidiary formed a single economic unit in so far as the subsidiary did not decide independently its own conduct on the market but carried out in all material respects the instructions given to it by the parent company (if the parent company held the majority of the shares or had complete control of the subsidiary). The Court reached a similar conclusion where a subsidiary was not economically independent (Case 22/71, Beguelin v SAGL), where one undertaking controlled another, indicating concerted action on the market and joint responsibility for their conduct towards other undertakings (Cases 6 and 7/73, Istituto Chemioterapico and Commercial Solvents v Commission, [1974] ECR 223) and where the relationship between parent company and subsidiary was seen to be a mere internal allocation of tasks to which Article 85 of the EEC Treaty did not apply (Case 15/74 Centrafarm v Sterling Drug Inc, [1974] ECR 1147).

Accordingly, it is quite obvious that such an approach must be right in the case of Regulation No 67/67 as well, since we are dealing with competition law. It therefore seems logical to apply the regulation to agreements in which several legally independent persons are involved on one side, if they act as a single entity for the purposes of the agreement because they are closely linked to one another and no competition exists between them, only an internal allocation of functions whereby one participant produces goods and another supplies them (broadly in the way in which this appears to be done in this case, namely that the

participating limited partnerships are wholly dependent for capital and management on a natural person who is also party to the agreement).”

In the *Viho Case (Case 73/95)*, the Court again held that the prohibition in Article 81(1) (similar to Clause 13 of the Broadcasting Bill on anti-competitive agreements) does not apply where a company and its subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market and the parent company follows a policy of dividing national markets between those subsidiaries which may produce effects capable of affecting the competitive position of third parties. Such unilateral conduct may, however, fall under Article 82 that prohibits the abuse of a dominant position if the conditions for its application are fulfilled.

In the *BPB Industries Case (Case T 65/89)*, the Commission imposed a fine on a wholly-owned subsidiary in respect of the activities in the UK but in respect of the activities in Northern Ireland the fine was imposed on the parent company. The court approved the apportionment of the fines – although it had stated that the total amount could be imposed on the parent as it was a single economic entity. However, it also stated that it was appropriate to apportion part of the liability to the parent company in relation to the behaviour of the subsidiary for the UK market in that although for the Northern Ireland market it kept itself regularly informed of the activities of the subsidiary, it had shown no such interest for the UK activities.

Other EU cases on the point include:

Imperial Chemical Industries Ltd, v Commission (Case 48/69)

JR Geigy AG v Commission (Case 52/69) and

Beguelin v SAGL (Case 22/71).