

資訊科技及廣播局的信頭

**Letterhead of INFORMATION TECHNOLOGY AND BROADCASTING BUREAU**

本局檔號 OUR REF : ITBB(CR) 9/19/1 (00) Pt. 10 By Fax : 2877 5029  
來函檔號 YOUR REF : LS/B/31/99-00  
電 話 TEL. NO. : 2189 2236  
傳 真 FAXLINE : 2511 1458/2136 8983  
電子郵件 E-mail Address : eddiemak@itbb.gcn.gov.hk

23 May 2000

Connie Fung  
Assistant Legal Adviser  
Legislative Council Secretariat  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Dear Connie,

**Broadcasting Bill**

Thank you for your letter of 3 May. Our response to your comments regarding the competition provisions in the Bill are set out below, please.

**Action of the subsidiary of a licensee**

Our competition consultant agrees that the purpose of the veil of incorporation is to protect the shareholders and limit their liability. However, there have been cases where the courts have “ignored” the existence of separate companies and considered them as a single entity. The following two cases may serve as examples -

*Firestone Type and Rubber Co V Lewellin (1957)* where the court held that the subsidiary was acting as the agent of its holding company, even though there was no explicit agreement between them. In this case, an American company carrying on business through a wholly-owned subsidiary in the UK was held to be liable for the UK tax. The effect of this decision is that transactions by a subsidiary can be treated as the

actions of its holding company, making the latter liable for the debts incurred.

In the case of *Gilford Motor Co V Horne (1933)*, the court decided that the company concerned was merely a facade set up to allow its owner to carry on business in defiance of a restraint of trade clause in his agreement with his former employers.

Our competition consultant has also advised that competition law, in general, is aimed to deal with the market behaviour of the players. It is the “purpose or effect” of the behaviour that is prohibited and not the means by which this is achieved. This approach is well established in other jurisdictions with history in competition law.

Nonetheless, in order to put things beyond doubt, we will propose a Committee Stage Amendment to make it clear that the conduct of the subsidiary of a licensee would be regarded as that of the licensee for the purpose of Clauses 13 & 14 of the Bill.

### **Absence of written evidence**

Our competition consultant has advised that the absence of written evidence in competition cases (e.g. cartel) is not uncommon. In most cases, where action is taken by the regulatory authority concerning agreements, this would be based on the evidence as a whole. A recent example in Hong Kong has been the decision of the Telecommunications Authority in respect of the “agreement” between mobile telephony licensees in reaching an understating to vary their prices at the same time. No written agreement existed in that case. The European Commission and the European Court of Justice had also dealt with cases where there was no written agreement between parties concerned. Such cases include:-

Decision 69/243/EEC and Case 48/69 ICI v Commission [1972] -Dyestuffs

Case Suker Unie V Commission [1975] - Sugar

Case Musique Diffusion Francaise v Commission [1983] -Pioneer

Case Petrofina v Commission [1991]

As can be seen from the above cases, where there is no written agreement, it is open to the regulatory authority to draw appropriate inferences from the behaviour of the parties concerned. The existence of a written agreement would make a case easier to deal with. However, the absence of a written agreement simply means that investigation work will be made more complex and the regulatory authority has to rely on putting the relevant evidence together.

### **Others**

As regards your comments concerning the creation of a right for a person aggrieved by a breach of the competition provisions to seek civil remedies, the qualification of the wording “production” for the purpose of Clause 13(5)(a) of the Bill and the appeal mechanism in relation to the competition provisions, our response has been set out in the “Administration’s Response to the Outstanding Issues Raised by Members and Deputations” attached to my letter dated 23 May 2000 addressed to the Clerk to Bills Committee, please.

Please let me know if you need any further information.

Yours sincerely,

(Eddie Mak)

for Secretary for Information Technology and Broadcasting