Paper No. CB(2)1743/99-00(02)

Bills Committee on Broadcasting Bill

Response to submissions on the competition provisions in the Broadcasting Bill

Purpose

This paper sets out the Administration's response to the submissions regarding the competition provisions in the Broadcasting Bill (the Bill).

Background

2. In the paper entitled "Competition provisions in relation to artiste contracts" issued on 17 April 2000, we have already commented on the proposed exemption in relation to artiste contracts from the application of the clause on prohibition of anti-competitive conduct. The following paragraphs set out the Administration's response to other major comments raised by the deputations on the competition provisions. As regards those comments concerning the drafting aspects of the competition provisions, we propose that they should be dealt with during the stage of clause-by-clause examination.

General Views

3. We are encouraged that all the submissions regarding competition issues were supportive of our proposal to incorporate competition provisions in the Bill. It is generally agreed that the proposed competition provisions will promote fair competition in the television programme service market, and will provide a level-playing field for both incumbent licensees and new comers. For example, the Consumer Council commented that "the competition provisions are similar to those found in successful general competition laws of our major trading partners", and agreed that "the provisions governing anti-competitive conduct and abuse

of dominance appear to be able to adequately address competition issues in the industry".

Scope

4. There were suggestions that the Government should introduce a general competition law to deal with anti-competitive conduct. We should like to point out that it is the Government's established policy to adopt a sector-specific approach for the promotion of competition in Hong Kong. This approach allows flexible, specific and effective means to regulate anti-competitive behaviour in different markets. Our proposal to incorporate competition provisions in the Bill is in line with this policy, and has received wide support from the industry and the community during the consultation exercise conducted in 1998.

5. One deputation suggested that the scope of the competition provisions in the Bill should be extended to cover markets with a co-dependent relationship with a television programme service market. The intention was to prevent a dominant licensee from restricting competition in a co-dependent market through abusing its dominant position in the television service market. We consider that this suggestion is outside the scope of the Bill, which is to provide for a licensing and regulatory framework for the television programme service market. In addition, the remit of the Broadcasting Authority (BA), as clearly stipulated in the Broadcasting Authority Ordinance, is to regulate broadcasting services only. We, therefore, do not consider it appropriate to expand the jurisdiction of the BA to non-broadcasting markets. Furthermore, we believe that the sector-specific approach that we have proposed is similar to that adopted by other overseas regulators. In the UK, for example, the jurisdiction of the Independent Television Commission (ITC) in competition matters is also limited to its licensees. Nonetheless, it should be noted that if the abusive conduct of a dominant licensee in other markets has an effect of restricting competition in the television programme service market, such conduct may likely be caught by the clause on prohibition of abuse of dominance.

Exemption by Broadcasting Authority

6. There were comments that the power of the BA to exempt conduct from the application of the clause on prohibition of anti-competitive conduct (i.e., Clause 13(4)(b)) seemed to be too discretionary. We should like to clarify that the exemption must be made on a ground prescribed by regulation made by the Chief Executive in Council pursuant to Clause 41(f) of the Bill. Such regulation is subsidiary legislation, which is subject to the negative vetting procedure of the Legislative Council. There is no such regulation for the time being. If and when the BA considers it necessary, it will put forth details of the "prescribed grounds" for the consideration by the Chief Executive in Council. From experience in other jurisdictions, the prescribed grounds may be, for example, promotion of technical progress of the television broadcasting industry or the setting of technical standards for all the industry. Take for instance, an agreement between all licensees in Hong Kong to adopt the same technology in relation to the provision of Digital Terrestrial Television should be exempted.

Conduct of Non-licensees

7. One deputation commented that a loophole might exist if the competition provisions were applicable to licensees only. It was concerned that a dominant licensee might form a separate corporate entity for its programming supply operations and, through this "programme supplier", engage in anti-competitive conduct without regard to the BA's powers. We should like to clarify that the competition provisions are intended to deal with anti-competitive behaviour of licensees irrespective of the formalities by which it has been reached. The use of separate legal entities will therefore not shield parties concerned from the application of the appropriate competition provisions. In the above example, if the "programme supplier" is a subsidiary of a dominant licensee, its action can be treated as the action of the licensee. Even if the "programme supplier" is not an associated company of a licensee, but provided that its anti-competitive conduct is a result of an agreement or understanding with a licensee, the conduct will also be caught by the competition provisions.

Exclusive Programmes

8. One deputation commented that acquisition of exclusive programme rights should, in general, not be considered anti-competitive. We recognise the fact that it is a commonly accepted practice in both local and overseas broadcasting industry that broadcasters enter into agreements on the acquisition of exclusive programme rights. We should like to clarify that Clause 13(2)(b) of the Bill does not prohibit exclusive programme rights per se. This clause is intended to prohibit conduct which restricts the supply of goods or services which the other licensees rely on for the provision of their services and where such conduct has the purpose or effect of preventing or substantially restricting competition in a television programme service market. This may catch, for example, an agreement with the sole supplier of a material essential for the production of television programmes not to supply such material to other TV stations. On the other hand, in the absence of other relevant factors, a one-off agreement for the acquisition of exclusive rights of individual programmes is extremely unlikely to have an effect of restricting competition on a television programme service market.

Separate Accounting

9. One submission enquired under what circumstances would the BA direct a licensee to adopt an accounting practice pursuant to Clause 16(2) of the Bill. For illustration purposes, the following are some examples of such circumstances -

(a) the BA, as a result of an investigation or in the light of the developments of the broadcasting industry, is satisfied that the adoption of a specific accounting practice is required to ensure that the accounts as kept are readily understood; or

(b) the BA may direct a licensee to keep specific accounts for its different businesses to prevent cross-subsidisation of such businesses.

Competition Guidelines

10. There were suggestions that the draft competition guidelines should be made available as soon as possible for consultation. We should like to advise Members that the drafting of the competition guidelines is in progress. The industry will be fully consulted on the guidelines.

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