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Secretary for Information, Technology and Broadcasting
(Attn : Mr. Eddie Mak (PAS(A))
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By Fax
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Dear Mr. Mak,

Broadcasting Bill

At the Bills Committee meeting on 20 April 2000, Members raised queries on the scope of the competition provisions of the Bill, in particular, whether the anti-competitive conduct of a subsidiary of a licensee will be caught by those competition provisions. Since that meeting, I have taken the opportunity to further examine clauses 13 and 14 of the Bill in the light of the Administration's response set out in Paper Nos. CB(2)1722/99-00(01) and CB(2)1743/99-00(02). My comments are as follows:

(a) According to the Administration, actions of a subsidiary of a licensee can be treated as those of the licensee. However, as you may be aware, in company law, a limited company is a separate legal entity and it is only in special circumstances that the courts will lift the corporate veil so that the subsidiary and the parent company are treated as a single entity. For the purpose of this Bill, if it can be proved that there exists an agency relationship between the subsidiary and the licensee, the licensee will be bound by the action of the subsidiary. But it should be noted that a subsidiary is not automatically an agent of the parent company. Whether a subsidiary acts as an agent for the parent

company or on its own is a question of fact to be decided by the courts. Given this background, what is the legal basis for asserting that actions of a subsidiary of a licensee can be treated as those of the licensee?

(b) in circumstances where there is no agency relationship between the licensee and another company and the anti-competitive conduct concerned is wholly performed by the latter company, how can it be proved that the anti-competitive conduct is a result of an agreement or understanding with the licensee, in particular, when the agreement or understanding is not in writing and there is nothing to suggest that the other company has received any benefit out of the agreement or understanding?

(c) although the Administration does not intend to expand the scope of the competition provisions to cover markets with a co-dependent relationship with a television programme service market, will the Administration consider giving the persons aggrieved by a breach of the competition provisions a right to bring an action for damages, injunction or other remedies against the person who is in breach? As you may be aware, such a right to seek remedies has been proposed in the Telecommunication (Amendment) Bill 1999; and

(d) in clause 13(5)(a) of the Bill, should a distinction be made between television programmes wholly or substantially produced by a licensee and programmes acquired or purchased by a licensee with only nominal production by the licensee? If so, please reflect this in the drafting of the provision. The Consumer Council has raised the same concern in its submission to the Bills Committee.

At the Bills Committee meeting on 26 April 2000, a Member queried the adequacy of the appeal mechanism proposed in the Bill. As you may be aware, the Administration has proposed Committee Stage amendments to the Telecommunication (Amendment) Bill 1999 to establish a Telecommunications Appeal Board so that any person aggrieved by the Telecommunications Authority's opinion, decision, determination or direction in relation to the competition safeguard provisions under that Bill may appeal to the new Appeal Board against TA's opinion, decision, etc. Will the Administration consider introducing a similar appeal mechanism in relation to the competition provisions in this Bill?

I should be grateful if you would let me have your reply in both languages as soon as possible.

Yours sincerely,

(Connie Fung)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Mr. Geoffrey A Fox, SALD)
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