

DECISION OF THE COMMUNICATIONS AUTHORITY

PRELIMINARY ENQUIRY INTO THE ALLEGED ANTI-COMPETITIVE CONDUCT OF TELEVISION BROADCASTS LIMITED IN RELATION TO THE FORECLOSURE OF HONG KONG TELEVISION NETWORK LIMITED FROM ENTERING THE TELEVISION PROGRAMME SERVICE MARKET

Complaint against	Television Broadcasts Limited (“TVB”)
Key Issue(s)	Alleged anti-competitive conduct or abuse of dominance of TVB, in that TVB has abused, and continues to abuse trade mark law and procedures as part of a concerted campaign to prevent Hong Kong Television Network Limited (“HKTVN”) from obtaining a domestic free television programme service licence and to foreclose or delay its entry, which has the purpose or effect of preventing, distorting or substantially restricting competition in the television programme service market in Hong Kong.
Relevant Provision(s)	Section 13 and/or section 14 of the Broadcasting Ordinance (“BO”) (Cap. 562)
Decision	No case for TVB to answer and there is no justification to proceed to full investigation.
Outcome	The complaint case is closed at the preliminary enquiry stage without proceeding to the full investigation stage.
Case Reference	OFCA/M/BO2/2-14C

THE COMPLAINT

On 12 June 2014, the Office of the Communications Authority (“OFCA”) received a complaint from HKTVN against TVB via its legal representatives¹, alleging that TVB had engaged in anti-competitive conduct by abusing its dominant position and by engaging in conduct which had the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market, contrary to sections 13 and 14 of the BO (collectively “Competition Provisions”).

2. The main thrust of HKTVN’s complaint was that TVB had abused and continued to abuse trade mark law and procedures as part of a concerted campaign to prevent HKTVN from obtaining a domestic free television programme service licence (“FTV licence”) and thereby to further strengthen TVB’s dominance in a Hong Kong television programme service market. HKTVN alleged that TVB did this by seeking pre-emptively to register and to appropriate HKTVN’s trade marks² and by opposing HKTVN’s applications to register HKTVN’s trade marks in the Trade Marks Registry of Intellectual Property Department, Hong Kong (hereinafter collectively referred to as “Registry Proceedings”).

3. In its complaint, HKTVN briefly mentioned some events that were alleged to be part of TVB’s concerted campaign, viz. (1) TVB sought leave to apply for Judicial Review to prohibit the Chief Executive in Council (“CE in C”) from granting a FTV licence to HKTVN in January 2013 and (2) TVB exerted some sort of media influence, as evidenced in an interview of Mr. Lee Po On (General Manager of TVB) with South China Morning Post on 26 November 2012 discussing on “no room for new players in the free-to-air TV market”, and the episode “Scoop” broadcast on 5 November 2013 which was found by the Communications Authority (“CA”) as not impartial and was capable of adversely affecting the reputation of HKTVN. These events are collectively referred to as the “other events”. However, HKTVN did not elaborate further on the relevance of these other events in its complaint but

¹ For the purpose of this report, any reference of HKTVN collectively includes its legal representatives, unless otherwise stated.

² A trade mark is a sign that distinguishes the goods and services of one trader from those of others. Typically a trade mark can be words (including personal names), indications, designs, letters, characters, numerals, figurative elements, colours, sounds, smells, the shape of the goods or their packaging or any combination of these. A sign must be capable of being represented graphically in order for it to be registered as a trade mark.

(http://www.ipd.gov.hk/eng/intellectual_property/trademarks/registry/how2apply.pdf)

focused on the alleged breach of the Competition Provisions by TVB in relation to the Registry Proceedings.

4. HKTVN sought remedies by way of a CA direction under section 16 of the BO to TVB, requiring it to withdraw those related applications in the Trade Marks Registry and to refrain from repeating or engaging in equivalent act or conduct to interfere with HKTVN's use and registration of HKTVN's trade marks in Hong Kong, and the imposition by the CA of a financial penalty on TVB under section 28 of the BO where appropriate.

THE BACKGROUND

5. As at the date of this decision, HKTVN is one of the three applicants for the FTV licence.³ On 31 December 2009, HKTVN (formerly City Telecom (H.K.) Limited) submitted its first FTV licence application to the former Broadcasting Authority ("BA"). The former BA processed the application in accordance with the BO and established procedures, and submitted its recommendation to the CE in C on 13 July 2011. On 15 October 2013, the Government announced that the CE in C decided to refuse HKTVN's application. On 6 January 2014, HKTVN applied for leave to apply for judicial review against the CE in C's decision to refuse its application. On 24 April 2015, the Court of First Instance handed down its judgement in quashing the CE in C's decision and remitting it back to the CE in C for re-consideration. On 19 May 2015, the CE in C decided to lodge an appeal against the judgement earlier handed down by the Court of First Instance on the judicial review case.

6. In April 2014, HKTVN submitted a second application for FTV licence which is being processed by the CA. At the material time, HKTVN has operated its internet TV business cum online shopping for a wide range of products in its website⁴ since November 2014.

7. As at the date of this decision, TVB is one of the three holders of FTV licences in Hong Kong. On 1 April 2015, having regard to the recommendations of the CA submitted in January 2015, the CE in C decided to grant a FTV licence to HK Television Entertainment Company Limited for a term of 12 years. Having regard to inter-alia the recommendations of the CA, the CE in C decided on 1 April 2015 not to renew the FTV licence of

³ Apart from HKTVN, there are two other applications for FTV licences, from Fantastic Television Limited, and Forever Top (Asia) Limited respectively, which are under processing by the CA.

⁴ <http://www.hktvmall.com>.

Asia Television Limited (“ATV”) and, for the purpose of complying with the statutory requirement under the BO, to extend the term of ATV’s existing licence to 1 April 2016. On 12 May 2015, having regard to the recommendations of the CA, the CE in C decided to renew TVB’s FTV licence for another 12 years from 1 December 2015 to 30 November 2027. HKTVN submitted that TVB has been a dominant player in the domestic free television programme service market in Hong Kong at all material times.

HKTVN’S KEY ALLEGATIONS

8. The main thrust of HKTVN’s complaint relates to TVB’s actions in relation to the Registry Proceedings, which are alleged to be anti-competitive and/or abusive of its dominance, contrary to sections 13 and 14 of the BO.

TVB’s Conduct in the Registry Proceedings

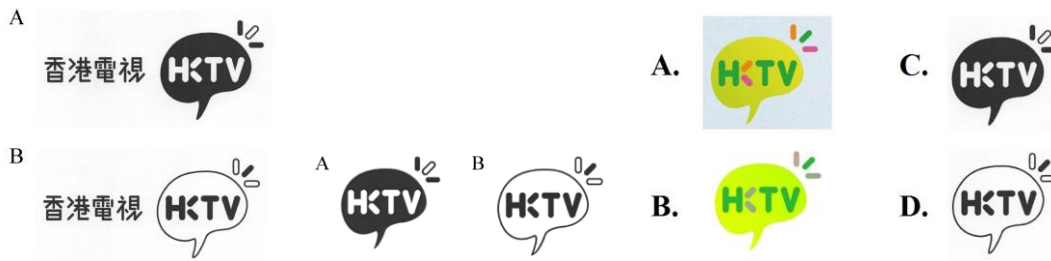
9. HKTVN claimed that it had a prior history of using the name or logo of “HKTV” in its business since November 2012. According to HKTVN, the alleged anti-competitive conduct or abusive behaviour of TVB involved at different stages in numerous trade mark proceedings (“TVB’s Conduct”) could be generally categorised into two types: (1) TVB’s oppositions to HKTVN’s trade marks applications including TVB’s proactive invalidation claim against a registered trade mark of HKTVN which has been used by HKTVN since 2012 onwards (“TVB’s Oppositions”) and (2) TVB’s trade marks applications, pursuant to which TVB (as alleged by HKTVN) sought to register pre-emptively and appropriate HKTVN’s trade marks (“TVB’s Applications”). HKTVN alleged that TVB applying to obtain the business name of a new entrant as its own trade marks is not “competition on the merits”.

10. HKTVN submitted that those trade marks in dispute involved a variety of classes, particularly class 38 (relating to television broadcasting, etc) and class 41 (relating to television entertainment, etc) which were directly relating to HKTVN’s principal business.

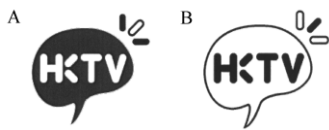
11. From the materials submitted to OFCA by HKTVN, the contested trade mark proceedings arose in or around May 2013, when TVB proceeded to make its trade mark applications to register the following trade marks with its tricolour corporate logo. The TVB’s Applications (as shown below) bear the following characteristics and features -



12. Subsequently, TVB filed various applications to oppose the trade mark applications of HKTVM which covered a variety of classes as mentioned in paragraph 10 above. The related HKTVM's trade marks which are subject to TVB's Oppositions bear the following characteristics and features -



13. Amongst TVB's Oppositions, an invalidation action was lodged on 30 July 2014 against the trade marks registration granted by the Trade Marks Registry to HKTVM on 5 August 2013, following HKTVM's application filed in November 2012 (see below image of the trade marks).



14. In brief, the materials provided to OFCA by HKTVM showed that both HKTVM and TVB were involved in the on-going process of opposing each other's trade marks applications/registrations. HKTVM submitted in its various documents filed to the Trade Marks Registry that the trade marks in question had been used/or promoted by HKTVM since 2012, and that HKTVM had acquired its distinctive character. HKTVM claimed that TVB's Applications were made in "bad faith" to damage HKTVM's business by preventing it from legitimately obtaining registered trade marks rights to its name and brand in Hong Kong, which constituted anti-competitive conduct

with the purpose or effect of preventing or distorting competition in the Hong Kong television programme service market.

15. In HKTVN's complaint, it has relied upon or made reference to a number of overseas cases, namely the *AstraZeneca* case⁵ and the *Osrsm/Airam* case⁶ in support of its claim that abuse of dominance may be found in the manner in which an undertaking makes filings or fails to withdraw filings with government bodies in relation to intellectual property rights; and also the cases of *ITT Promedia*⁷ and *Professional Real Estate Investors v Columbia Pictures Industries*⁸ which held that objectively baseless proceedings with the aim to eliminate competition would constitute an anti-competitive abuse.

16. HKTVN claimed that the documents submitted by it to OFCA including those related to the Registry Proceedings should be sufficient in facilitating CA's assessment into proceeding to a full investigation ("Full Investigation")⁹ of this matter pursuant to the BO Procedures (as defined in paragraph 20 below).

Alleged Delay Caused to HKTVN's Entry into and Foreclosure in the Relevant Market by TVB's Alleged Anti-competitive Conduct

17. HKTVN alleged that the overall effect of TVB's Conduct in relation to the Registry Proceedings was to frustrate HKTVN's ability to build brand recognition and to impede or otherwise threaten HKTVN's entry into all TV viewing market under its brand, leading to a foreclosure of a potential competitor from the relevant market, thereby causing the consumer a lack of choice of television programming.

18. Making reference to the CA's decision regarding TVB artists contracts (CA 01/2013, adopted on 19 September 2013¹⁰) ("CA Decision 01/2013"), HKTVN submitted¹¹ that the CA should proceed with analysing this complaint on the basis that the relevant market was no wider than "all TV

⁵ Case Comp/A. 37.507/F3 – AztraZeneca dated 15 June 2005.

⁶ European Commission's Eleven Report on Competition Policy (1981).

⁷ Case T-111/96 .

⁸ 508 US 49 (1993) US Supreme Court.

⁹ According to paragraph 27 of the BO Procedures, if after the Preliminary Enquiry the CA considers that there is no case to answer or that the matter being investigated has no substantial effect on competition, or both, the case will be closed.

¹⁰ http://www.coms-auth.hk/filemanager/statement/en/upload/221/20130919TVB_final_en.pdf.

¹¹ As submitted in HKTVN's solicitors letter of 11 May 2015.

viewing” market¹² as adopted in CA Decision 01/2013.

The Alleged Competitive Harm

19. HKTVN claimed that TVB’s Conduct and the other events were not based on “competition on merits” but with a purpose and effect of pursuing some exclusionary strategy, preventing the entry of HKTVN, as a new player into the free-to-air and all TV viewing markets, and restricting HKTVN’s ability to compete after entry. Specifically, HKTVN claimed that TVB’s Conduct in relation to the Registry Proceedings was clearly different from practices normally adopted in the course of competition in the market, and should be categorized as an abuse by TVB of its dominant position in violation of sections 13 and 14 of the BO.

PROCEDURAL STEPS TAKEN IN HANDLING THE COMPLAINT

BO Procedures and Application Guidelines

20. In handling this complaint, OFCA has followed the *Competition Investigation Procedures* (“BO Procedures”) and the *Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance* (“Application Guidelines”) issued by the CA in April 2012.

21. Paragraphs 6 and 19 of the BO Procedures, with extracts highlighted below, relate to the submission of information and evidence by and the role of the complainant in facilitating the CA in the handling of a complaint -

Paragraph 6

“Although it is not the CA’s intention to place the burden of proof solely on complainants, it is important that a complainant provides the CA with sufficient information upon which it can consider what may be the problem and how it should proceed.”
(emphasis added).

¹² HKTVN initially made reference to “free-to-air” and “all TV viewing” markets in its complaint submitted on 12 June 2014, but confirmed on 11 May 2015 that the relevant market was no wider than “all TV viewing” market by reference to the CA Decision 01/2013.

Paragraph 19

*“The complainant should state its case in full and, in particular, the complaints must be specific. A general allegation that the competition provisions have been breached is likely to be considered inadequate. **Allegation must be supported by specific, relevant evidence.**”* (emphasis added).

Steps Taken by OFCA

22. After receiving HKTVN’s complaint on 12 June 2014, OFCA sought clarification from HKTVN pursuant to the BO Procedures. HKTVN then provided supplemental information and documents to OFCA in support of its complaint.¹³ As HKTVN showed that the matter being complained of was within the scope of the Competition Provisions of the BO, a preliminary enquiry (“Preliminary Enquiry”) was opened pursuant to the BO Procedures to further consider the matter¹⁴. HKTVN was so informed on 18 November 2014.

23. As part of the Preliminary Enquiry, OFCA also sought representations from TVB on the complaint. TVB provided its response to HKTVN’s complaint submissions on 5 January 2015, and further submissions on 25 February 2015. TVB’s responses are summarised in paragraphs 25 to 33 below.

24. During the Preliminary Enquiry, HKTVN provided OFCA with some updates in relation to the Registry Proceedings on 11 March 2015 and upon OFCA’s request, HKTVN further provided on 11 May 2015 some clarifications to its complaint submission but declined to provide certain information sought, which was largely related to the effect of the alleged anti-competitive conduct of TVB. The response given by HKTVN was that HKTVN would be ready to assist the CA, but HKTVN was reluctant to proceed without some assurance that further regulatory action would be taken

¹³ The supplement information and documents were contained or enclosed in subsequent correspondences from HKTVN including (1) a letter dated 4 August 2014 from HKTVN’s solicitors enclosing a bundle of documents in substantiation, (2) a letter dated 3 September 2014, and (3) a letter dated 22 September 2014.

¹⁴ Under the BO Procedures, as a preliminary step of processing the complaint, OFCA has to study whether the complaint submissions contain the requisite information to enable it to proceed further, namely an opening of a preliminary enquiry on the basis that the subject complaint falls within the scope of the competition provisions which CA has the jurisdiction to consider.

against TVB, including a full investigation.

TVB's Responses

25. TVB categorically denied the allegations of HKTVN and any breach of the Competition Provisions. TVB's responses to HKTVN's allegations, particularly on TVB's Conduct in relation to the Registry Proceedings and the alleged concern on foreclosure/delay in entry issue, are categorised and summarised as follows -

TVB's Prior History of Use of the Trade Names

26. TVB provided documentary evidence showing its prior history of using the trade names of “香港電視” (which was the Chinese equivalent of “Hong Kong Television”), “Hong Kong Television”, and “HKTVB” to promote its business. TVB has since 1967 distributed its weekly publication, in the name of “香港電視” in Hong Kong, which was the best selling television magazine in Hong Kong during the 1980s to 1990s. TVB submitted that “香港電視”, “Hong Kong Television” and “HKTV” were widely known by the different generations of Hong Kong citizens as three of the TVB's distinguished brands and TVB had acquired substantial goodwill and long-time association with the said names.

TVB's Corporate Trade Marks Practice

27. TVB explained that it was its established corporate practice to protect their trade marks/brands worldwide, which was largely built upon their enforcement experience, rather than relying upon any corporate policy/office manuals in written form. TVB provided relevant records listing TVB's worldwide trade marks applications, registrations and oppositions lodged in different jurisdictions. Given the long lapse of time, TVB could not locate any records (including any internal records) showing any application or any attempt to apply for registration of “香港電視” or “Hong Kong Television” in the past. TVB also explained that they did not normally take minutes or records for those day-to-day routine works and so there were no internal company records evidencing its decision to make TVB's Applications and/or TVB's Oppositions to the HKTVN's marks.

TVB's Attempts to protect its Goodwill and its Business

28. The HKTVN's trade marks in dispute are “device marks” (see the images in paragraphs 12 and 13 above) containing logos with words of

“Hong Kong Television” “HKTV” or “香港電視”. TVB submitted that HKTVN’s trade marks registration applications of the words “Hong Kong Television”, “HKTV” or “香港電視” were absolutely refused by the Trade Mark Registrar on the grounds of being descriptive of the intended goods and services to be provided by HKTVN and devoid of distinctive character. TVB’s Oppositions to those HKTVN’s marks were to protect its own business and goodwill. TVB contended that it was misconceived to say that TVB “appropriated” HKTVN’s marks, as alleged. TVB said that it was HKTVN that had sought to ride on TVB’s reputation by registering the HKTVN’s trade marks which were under dispute, and it was HKTVN’s acts in bad faith that alarmed TVB to protect its own interests.

HKTVN’s “Forum Shopping”

29. TVB contended that the CA had no jurisdiction to determine a dispute concerning the registrability of a trademark because the trade mark per se was not an essential input/output in the “downstream market of supplying television programme services to viewers”. To the contrary, it was of the view that the subject matter related to trade mark issue fell within the *exclusive* jurisdiction of the Trade Marks Registry. TVB contended that the lodging by HKTVN of this “competition complaint” with the CA concurrently with the Registry Proceedings was clearly “forum shopping”, seeking a possible shortcut for the grant of its trade mark registrations.

HKTVN’s Alleged Delay in Entry/Foreclosure in the Relevant Market

30. TVB submitted that the alleged TVB’s Conduct had no exclusionary effect in the television programme service market, in particular that failure to obtain registration of the concerned trade marks by HKTVN should not be a factor affecting HKTVN’s ability to enter the relevant market. TVB averred that HKTVN could still enter the relevant market without its preferred trade marks.

Other Events Allegedly Being Part of the Concerted Campaign

31. As to the other events alleged to be used by TVB as part of the concerted campaign as mentioned in paragraph 3, TVB responded that HKTVN had mingled the trade mark dispute in question with a few unrelated, individual happenings, and collated them into one conspiracy theory, which was unwarranted and far-fetched. TVB submitted that TVB and its executives, being members of the public, should not be barred from the right to contribute their views. As for the CA’s decision on the “Scoop” broadcast, TVB

submitted that the said decision was subject to appeal at the CE in C and whether the CA's decision would be upheld has not been concluded.

Legal Cases Relied on by HKTVN

32. On the two cases relied on by HKTVN in support of its claim that conduct in intellectual property rights proceedings may constitute an abuse of dominant position, TVB responded as follows -

- (a) Regarding the *Osram* case, TVB submitted that the registration of "Airam" by Osram in Germany would have serious foreclosure or exclusionary effect on the Finland company OY Airam AB, as by virtue of Osram's trade mark registration, Airam could not import its lamp products into Germany; whereas in the present case there was no import restriction due to trade mark registration in the television programme service market in Hong Kong. TVB alleged that even if HKTVN failed to secure a trade mark registration, it could still provide its television services in Hong Kong which it was now providing. Further, in the *Osram* case, the abusive behaviour was Osram's registration of exactly the same trade mark (i.e. "Airam") as the one used by OY Airam AB in the other EU member states. But in the present case, TVB does not seek registration of the same marks as HKTVN's. Rather, TVB applies for its trade marks with its corporate logo which are readily distinguishable.
- (b) As regards the *AstraZeneca* case, TVB submitted that the present complaint was totally distinguishable from the findings in that case. First, TVB had not acquired any rights that it should not have possessed by misrepresentation, inducement or fraud.¹⁵ Second, in the *AstraZeneca* case, it was held that the abusive behaviour of AstraZeneca arose as the product and registration in dispute (i.e. the patent registration) corresponded to its relevant drug product or technology market, i.e. pharmaceutical product market. In the present complaint, the trade mark rights concerned do not correspond to the products/services offered in the television programme service market. In any event, HKTVN could still enter the television programme service market without its preferred trade mark registrations. Thus, TVB considered

¹⁵ In the *AstraZeneca* case, the abuses consists of misleading representations to patent offices which related to AstraZeneca's application for the Supplementary Protection Certificate for the purpose of extending the patent period resulted in preventing the entry of the generic drug producers.

that there is no exclusionary effect to the relevant market.

33. In summary, TVB categorically denied all the allegations made by HKTVN, and submitted that HKTVN's complaints were an abuse of process, wasting resources of the CA and TVB.

OFCA'S ASSESSMENT

Relevant Provisions

34. The CA's primary functions in relation to competition under the BO are set out in sections 13 and 14 of the BO, which are extracted below.

Section 13 - Prohibition on Anti-Competitive Conduct

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

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

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

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

(c) *direct or indirect agreements between licensees to share any television programme service market between them on agreed geographic or customer lines;*

(d) *limiting or controlling production, markets, technical development or investment;*

(e) *applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing them at a competitive disadvantage;*

(f) *making the conclusion of agreements subject to*

acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

Section 14 - Prohibition on Abuse of Dominance

(1) A licensee in a dominant position in a television programme service market shall not abuse its position.

(2) A licensee is in a dominant position when, in the opinion of the Authority, it is able to act without significant competitive restraint from its competitors and customers.

(3) In considering whether a licensee is dominant, the Authority shall have regard to relevant matters including, but not limited to—

(a) the market share of the licensee;

(b) the licensee's power to make pricing and other decisions;

(c) any barriers to entry to competitors into the relevant television programme service market;

(d) such other relevant matters as may be stipulated in guidelines concerning the test of dominance issued under section 4 by the Authority in consultation with the licensees in the relevant 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 Authority, the licensee has engaged in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.

(5) The Authority may consider conduct to fall within the conduct mentioned in subsection (4) as including, but not limited to—

- (a) *predatory pricing;*
- (b) *price discrimination, except to the extent that discrimination only makes reasonable allowance for differences in the costs or likely costs of supplying the service or other matter;*
- (c) *making the conclusion of agreements subject to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the agreement;*
- (d) *discrimination in the supply of services to competitors. ”*

35. Section 13(1) of the BO prohibits a licensee from engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market. Section 13(2)(a) to (f) set out a non-exhaustive list of examples of the conduct prohibited under section 13(1). Sections 14(1) and 14(4) prohibit a licensee in a dominant position from abusing that position by engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.

Framework of Analysis

36. According to paragraphs 21 and 27 of the BO Procedures, during the Preliminary Enquiry stage, initial consideration is given to determine whether there is a case to answer and whether to proceed to an investigation. If, after the initial analysis, the CA considers that there is no case to answer or that the matter being investigated has no substantial effect on competition, or both, it will close the case and inform the parties involved.

37. OFCA conducted the initial analysis in the Preliminary Enquiry stage under the BO Procedures with reference to the Application Guidelines which set out the general approach of a competition analysis, which typically involves assessments in three broad stages, including (1) defining the relevant market, (2) assessing whether the concerned licensee is dominant or possesses the market power, and (3) assessing whether the conduct in question has the purpose or effect of preventing, distorting or substantially restricting competition.

38. The CA makes it clear in paragraph 27 of the Application

Guidelines that these stages should not be regarded as separate, self-contained exercises. The CA would not apply the guidelines as a linear, step-by-step progress that invariably follows the exact order of the three stages as set out above. An integrated approach to competition analysis may be adopted as appropriate. Market definition can help inform competitive effects while competitive effects can help inform market definition. The CA's central focus remains on evaluating whether the alleged anti-competitive conduct has, or is likely to have, an anti-competitive effect. Paragraph 33 of the Application Guidelines further provides that it may be clear in some cases that, although more than one market definition could potentially be used in the analysis, the conduct under examination would not be considered a breach of the competition provisions on any reasonable market definition. In such cases, it would not normally be necessary to establish which of the potential market definitions is correct.

39. For the purpose of the present assessment, OFCA considers it appropriate to adopt an integrated approach as set out in the Application Guidelines and to focus the evaluation on whether the TVB's Conduct has, or, is likely to have, an anti-competitive effect.

The Relevant Market and Market Power of TVB

40. Under the Competition Provisions of the BO, licensees are prohibited from engaging in conduct with anti-competitive purpose or effect in a "television programme service market". What is a relevant "television programme service market" depends on the actual facts of each case.

41. In HKTVN's complaint, HKTVN identified the relevant market as "all TV viewing" by making reference to the previous CA Decision 01/2013, which defined the relevant market to include the free-to-air ("FTA") and pay television ("pay-TV") markets, but exclude "internet-based content" market,¹⁶ and submitted its views that TVB has been in a dominant position.

42. TVB submitted that this was a case which primarily fell outside the parameters of BO and therefore it was not necessary or appropriate to define the market in which the TVB's Conduct under complaint took place; or in the alternative, HKTVN had not properly defined the market in its complaint submission.

43. For the purpose of this assessment, OFCA has considered the

¹⁶ Paragraph 120 of the CA Decision 01/2013 is referred.

possibilities of different market definitions such as the “FTA TV only” market and the “all TV viewing” market and the possible level of TVB’s market power in such markets. OFCA has also drawn reference to the CA Decision 01/2013, and noted in the context of that Decision that TVB was in a dominant position in the market for “all TV viewing” as well as “FTA TV only” if a narrower market was to be adopted. Having regard to the approach laid down in the Application Guidelines as mentioned above, OFCA considers that it is not necessary for the CA to reach a definite view on either the definition of relevant market or whether TVB possesses market power or whether TVB is in a dominant position in that market because of the findings on the purpose and effect of TVB’s Conduct to be discussed below. Irrespective of what market definition is adopted or what level of market power TVB may possess in that market, the ultimate conclusion of the assessment for this complaint will be the same.

Assessment of conduct in question

44. Under both sections 13 and 14 of the BO, it is necessary to consider whether the relevant conduct has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market. For the present case, the focus of the assessment would be **TVB’s Conduct** in relation to the Registry Proceedings (i.e. TVB’s Oppositions and TVB’s Applications).

Assessment for the “Purpose” Limb

45. As stated in paragraph 9 of the Application Guidelines, in ascertaining the purpose of the conduct in question, the CA would consider the objective meaning and purpose of the conduct in its economic context. In the absence of direct and overwhelming evidence to the contrary, the CA may, on the basis of evidence available, infer a proscribed purpose or draw an inference from conduct and other circumstances. Thus, the assessment of the “purpose” of the relevant conduct is primarily an objective assessment.¹⁷ However, if there is evidence of a subjective intent to prevent, distort or substantially restrict competition, this would be taken into account. Besides,

¹⁷ Paragraph 39 (of the CA Decision 01/2013) states that “*the Authority will exercise caution when examining the **objective purpose of a licensee**. It is not uncommon for companies to use aggressive language in internal documents and emails. The Authority is conscious that aggressive marketing language can reflect a pro-competitive as well as an anti-competitive intention or purpose. However, internal comments and explanations given by licensees can be evidence that the Authority will consider admissible and will take into consideration when seeking to determine what the actual “purpose” of conduct is and whether it is aimed at effects that prevent, distort or substantially restrict competition.*” (emphasis added)

the CA will also consider any “objective justification” for the conduct in question.¹⁸

46. Specifically, in the context of assessing any abuse under section 14(4) of the BO by way of conduct with an anti-competitive purpose, it would be necessary to consider any “objective justification” at the time when examining whether the alleged conduct exerts or is capable of exerting foreclosing effects which go beyond that which would flow from “*competition on the merits*”.¹⁹

47. On the part of TVB, it has provided credible evidence of its prior history of using the relevant trade names, particularly for its magazine publication since 1967 to 1997, i.e. for three decades. The use of these trade names by TVB has remained widely known particularly among the generations of people residing in Hong Kong during the concerned period of time, notwithstanding that the name of the magazine was subsequently renamed or replaced by “TVB weekly” or in its Chinese “TVB 周刊” .

48. On the part of HKTVN, it was originally incorporated under the name of City Telecom (H.K.) Limited (“City Telecom”) on 19 May 1992. It changed its name to Hong Kong Television Network Limited on 10 January 2013²⁰, which was three years after City Telecom’s decision to enter the domestic free television programme service market by submitting an application for the FTV licence in December 2009.

49. Taking into account the circumstances outlined in paragraphs 47 and 48 above, it was not unreasonable from a commercial perspective for TVB to take steps to submit TVB’s Applications and to lodge TVB’s Oppositions against the HKTVN’s marks. TVB’s Conduct in relation to the Registry Proceedings is consistent with a commercial desire of one seeking to protect its own reputation and goodwill on those trade names.

50. On the information presently available, there appears to be a *bona fide* commercial dispute between TVB and HKTVN as to the right to seek trade mark protection in respect of certain trade names. OFCA’s view is that

¹⁸ Paragraph 40 (of the CA Decision 01/2013) states that “*the Authority will also examine any objective justifications advanced for the conduct in question by the parties.*” (emphasis added)

¹⁹ Paragraph 53 (of the CA Decision 01/2013), it is stated that “*In very general terms the Authority will examine conduct to see whether it exerts or is capable of exerting foreclosing effects which go beyond that which would flow from competition on the merits. The Authority will examine any objective justification advanced by the licensee in question for the conduct.*” (emphasis added)

²⁰ <http://www.hktv.com.hk/eng/about/milestones.htm>.

it cannot be fairly concluded that TVB's Conduct in relation to the Registry Proceedings is "*a mere sham*" or is designed to prevent, distort or substantially restrict competition. OFCA finds that the existing evidence tends to show that TVB acted reasonably with a view to asserting one's legal rights. Also, based on the available evidence, OFCA could not reach a finding that TVB instigated baseless lawsuits in the Registry Proceedings which no reasonable litigant would realistically expect success on the merits, and could not find support for HKTVN's contention that TVB's action concealed an attempt to interfere directly with the business relationship of a competitor. The *ITT Promedia* case and the *Professional Real Estate* case relied on by HKTVN are therefore not applicable on the facts of the present complaint.

51. There is no direct evidence that TVB's Conduct in relation to the Registry Proceedings was the result of any exclusionary strategy on the part of TVB to foreclose its competitors from the market. As regards the indirect evidence concerning the other events which allegedly formed part of the TVB's concerted campaign of exclusionary or foreclosure strategy (see paragraph 3 above), OFCA notes that these other events are not related to the Registry Proceedings. Further, referring to TVB's comments mentioned in paragraphs 25 to 33 above and particularly in paragraph 31, OFCA finds no reasonable basis of drawing an inference that TVB had a purpose of engaging in exclusionary or foreclosure strategy in these other events.

52. On the basis of the information obtained during the Preliminary Enquiry and having regard to the above analysis, OFCA has not found that TVB's Conduct under complaint was committed with a "purpose" of preventing, distorting or substantially restricting competition, under the relevant Competition Provisions. OFCA considers that there is no case for TVB to answer on the purpose limb under the Competition Provisions of the BO.

Assessment for the "Effect" Limb

53. In assessing whether TVB's Conduct under complaint has an effect of prevention, distortion or substantial restriction of competition, OFCA has considered not just whether the said conduct has had an actual effect on competition but also whether it is potentially capable of producing such an effect. The approach adopted in the present case is consistent with that

adopted in the CA Decision 01/2013,²¹ i.e. to assess whether the TVB's Conduct has exerted a foreclosing or exclusionary effect, in particular by deferring its competitor from entry into the market, imposing additional difficulties by say increasing the entry costs, or creating uncertainties, etc (apart from a total exclusion from the relevant market).²²

54. It is worthy of note that it is not for the CA to seek to prejudge the merits of the proceedings before the Trade Marks Registry. The assessment of the merits of the trade mark proceedings is outside the jurisdiction and functions of the CA and it would not be appropriate for the CA to reach any findings involving any interpretation or application of the Trade Marks Ordinance.

55. If HKTVN is ultimately unsuccessful in the trade mark proceedings, and is required to change its trade names, this will be the result of TVB's legitimate enforcement of its intellectual property rights. TVB's Conduct in respect of such intellectual property rights enforcement could not be characterised as anti-competitive within the meaning of section 13 and/or section 14 of the BO.

56. If HKTVN is ultimately successful in the trade mark proceedings, it will obtain the registrations sought and the apparent effect of TVB's Conduct will have been to delay HKTVN's purported registration for a longer time than is otherwise the case. However, this does not appear to have prevented, distorted or substantially restricted competition in the circumstances where HKTVN has continued to use the relevant trade names, e.g. in its internet TV operation and associated shopping mall business and, if HKTVN were granted a FTV licence, HKTVN could also use the relevant trade names pending resolution of Registry Proceedings. HKTVN has not identified any harm to competition process arising from the time required to resolve contested Registry Proceedings.

²¹ Reference was drawn to paragraphs 43 and 44 of the CA Decision 01/2013. *"The CA will generally look for **actual effects** upon the market, and in appropriate cases the CA, having regard to the approach adopted by regulators elsewhere in the world, will examine whether conduct is capable of **exerting effects** that prevent, distort or substantially restrict competition or has **inherent effects** that prevent, distort or substantially restrict competition. A counterfactual approach (i.e. the absence of the conduct) may also be used to provide a benchmark against which the effects of the conduct in question can be measured."* (emphasis added)

²² Relevant Extracts of Paragraph 53 (of the CA Decision 01/2013) *"..... In this context **foreclose does not mean only total exclusion from a market but also encompasses and includes the case where rivals are artificially deterred from expanding their market shares or potential entrants to the market are deterred from entering because of the increased difficulty they encounter as a result of the dominant licensees' conduct. This is consistent with the position adopted in international competition law regimes.**"* (emphasis added)

57. Neither has HKTVN provided sufficient information and supported by specific and relevant evidence to demonstrate that a delay in resolving the Registry Proceedings would produce material foreclosure effects on its entry into a television programme service market. HKTVN has continued to pursue a FTV licence since submitting its first application on 31 December 2009, and its second application in April 2014. It has not produced any evidence to suggest that the delay in the Registry Proceedings has had any impact on its intention to enter a television programme service market in the event that HKTVN were granted a FTV licence.

58. The two cases, namely *Osram* and *AstraZeneca*, cited by HKTVN are wholly distinguishable from the present facts of the complaint, having regard to the unique features of the television programme service market in Hong Kong and TV broadcasting industry, and the submissions from TVB mentioned in paragraph 32 above.

59. In OFCA's view, the time taken to reach a resolution of various Registry Proceedings on the trade mark disputes does not play any material role in HKTVN's ability to enter a television programme service market in Hong Kong. Of far greater importance is the programme quality and diversity of the TV programme services offered, including the performance and reputation of artists, and variety of choices of TV programmes, etc. These key factors would substantially affect the viewer choice as well as that of the advertisers, and do play a much more significant part in HKTVN's entry issue, and/or its ability to compete in the relevant television programme service market subject to its successful application of FTV licence.

60. On the basis of the information obtained during the Preliminary Enquiry and having regard to the above analysis, OFCA has found that TVB's Conduct does not have any substantive effect on competition, particularly on the foreclosure or delay in entry of HKTVN into such a market. OFCA does not rule out the possibility that an abuse of trade mark procedures might in exceptional circumstances lead to anti-competitive effect prohibited under Competitive Provisions of the BO. However, for the reasons given above, in relation to the HKTVN's complaint, OFCA considers that there is no case for TVB to answer and that the matter being investigated has no substantial effect on competition.

Conclusion

61. On the basis of the assessment at paragraphs 41 to 60 above,

OFCA concludes that there is no case for TVB to answer and that the matter being investigated has no substantial effect on competition. There are no reasonable grounds to suspect that TVB's Conduct -

- (a) had the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market in Hong Kong, thereby contravening section 13(1) of the BO; or
- (b) amounted to an abuse of a dominant position in a television programme service market in Hong Kong in contravention of section 14(1) of the BO.

62. As such, there is no justification for proceeding to a second stage for full investigation pursuant to the BO Procedures.

THE CA'S ASSESSMENT AND DECISION

63. After examining the facts of the case and the submissions provided by HKTVN and TVB, the CA affirms OFCA's assessment that there is no case for TVB to answer and that the matter being investigated has no substantial effect on competition. The CA concludes that there are no reasonable grounds for it to suspect that TVB has infringed the Competition Provisions of the BO, and that a full investigation is not justified. The CA decides to close the case following the Preliminary Enquiry without proceeding to the full investigation stage.

Communications Authority

August 2015