

Case Reference : CA 01/2013
Sections 13 and 14 of the Broadcasting Ordinance (Cap. 562)
Report of the Communications Authority

**Opinion and Decision by the Communications Authority dated
19 September 2013 Regarding Asia Television Limited's Complaint
Against Television Broadcasts Limited's Alleged Violations of the
Competition Provisions of the Broadcasting Ordinance***

- * This is the non-confidential version of the Communications Authority's decision on the complaint. Confidential Information and data has been redacted. Redactions are indicated by “[...]”.

Table of Contents

	Page
I. The Complaint	3
(A) The Preliminary Investigation	3
(B) The Full Investigation	4
II. Broadcasting Ordinance and the Authority's Jurisdiction	9
(A) The Authority's Jurisdiction	9
(B) Sections 13 and 14 of the Broadcasting Ordinance	14
III. The General Analytical Framework	19
IV. Artiste Contracts and Communications with TVB	21
(A) TVB's Artiste and Singer Contracts	21
(B) Tacit Agreement	24
(C) Communications with TVB	24
V. Overview of the Broadcasting Sector in Hong Kong	26
(A) Hong Kong Television Market	26
(B) Hong Kong Advertising Market	29
(C) Supply and Demand of Artistes in Hong Kong Broadcasting	30
VI. The Market	36
(A) Viewer's Side of the Market	36
(B) Advertiser's Side of the Market	49
VII. Analysis of TVB's Conduct	53
(A) Exclusive Contracts	55
(B) No Original Voice and No Promotion Policies	73
(C) No Cantonese Policy	79
VIII. The Authority's Decision	84
Appendix A	87
Appendix B	89

I. The Complaint

(A) The Preliminary Investigation

1. The allegations which form the subject matter of this report were brought to the attention of the former Broadcasting Authority (“BA”) (the Communications Authority (“CA”) since 1 April 2012, collectively referred to as the “Authority” hereinafter)¹ in 2009. Asia Television Limited (“ATV”) raised the issue at the special meeting of the Panel on Information Technology and Broadcasting of the Legislative Council (“LegCo”) held on 30 June 2009 and Television Broadcasts Limited (“TVB”) was asked to provide information on the matter.

2. On 10 December 2009, the Authority received a formal complaint from ATV against TVB, alleging that certain clauses in TVB’s contracts with its artistes and singers and certain informal policies and practices pursued by TVB violate sections 13 and 14 of the Broadcasting Ordinance (Cap 562) (“BO”) –

- (a) Monopolisation of the pool of talents
 - (i) Unilaterally extending contract of artistes;
 - (ii) Exclusive contract with harsh and unreasonable terms;
 - (iii) Requiring film companies that hired TVB artistes to undertake that the film would not be sold to other television (“TV”) broadcasters in Hong Kong;
 - (iv) Prohibiting artistes who worked on Mainland-produced dramas from using their own voices and from attending promotions regarding the concerned dramas in Hong Kong;
 - (v) Prohibiting artistes on serial-based contracts with TVB from promoting productions of other TV stations which also featured the artistes concerned;
- (b) Imposition of language restriction on artistes;
- (c) Various tactics to disadvantage competitors
 - (i) Editing out [...] at the 28th Hong Kong Film Awards broadcast by TVB;
 - (ii) Concurrent scheduling of fund raising charity shows for Sichuan Earthquake;

¹ The Communications Authority (“CA”) was established under the Communications Authority Ordinance on 1 April 2012 as a unified regulatory body overseeing the converging telecommunications and broadcasting sectors. The functions of the former Broadcasting Authority were transferred to the CA on the same date.

- (iii) Denial of non-TVB artistes' exposure in TVB's live broadcast of 512 Artistes Fund Raising Campaign;
- (iv) First right of interview with an athlete in 2008 Olympics;
- (v) Unwritten rules of retaliation; and
- (d) Unfair advertising practices

ATV also alleged that Radio Television Hong Kong ("RTHK") had been unfairly scheduling RTHK's popular programmes for broadcast on TVB only².

3. Following this, the Authority commenced investigation of the complaint and wrote to ATV and TVB to request comments on the substance of the complaint, further information and documents relating to the complaints and copies of artiste contracts.

(B) The Full Investigation

The Scope of the Full Investigation

4. After preliminary investigation, the Authority decided on 28 August 2010 to launch a full investigation into some of the contractual clauses and policies alleged in ATV's complaint. On 10 September 2010, the Authority informed ATV and TVB of its decision to proceed to the Full Investigation stage and issued a press release on the same day. The Authority decided that the Full Investigation would cover the following allegations –

- (a) exclusive occasional use artiste and singer contracts with harsh and unreasonable terms;
- (b) prohibiting artistes on serial-based and one-show contracts with TVB from having their original voices when performing in other TV stations' programmes (no original voice policy);
- (c) prohibiting artistes on serial-based and one-show contracts with TVB from attending promotional activities of the productions of other TV stations which also featured the artistes concerned (no promotion policy);
- (d) imposition of language restriction on artistes (artistes on contracts with TVB are prevented from speaking Cantonese in the programmes of other TV stations in Hong Kong);
- (e) unwritten rules of retaliation;
- (f) unfair advertising practices (one station buy policy); and

² As ATV's allegations against RTHK fall outside the scope of the Memorandum of Understanding signed between Commerce and Economic Development Bureau, RTHK and the Authority, the allegations were referred to RTHK for follow up in March 2010.

- (g) requiring film companies that hire TVB artistes to undertake that the film would not be sold to other TV stations in Hong Kong.

Collection of Evidence

5. From October 2010 – November 2011, the Authority collected evidence from various stakeholders to analyse whether the allegations were substantiated. The actions taken during the information gathering process include:

- (a) Requested information through written submissions from licensees;
- (b) Held interviews with a licensee, record companies and singers;
- (c) Visited TVB’s premises and examined [...] TVB’s one-show, serial-based and singer contracts entered into in the period 2007 - 2010;
- (d) Reviewed records of artistes’ interviews on Hong Kong Cable Television Limited (“Cable TV”) and ATV (including keeping a log of over 300 TV interviews of TVB artistes which featured on Cable TV between July 2010 and August 2011. Details of the contractual relationship of each artiste with TVB at the time of the interview as well as the language spoken were recorded);
- (e) Requested information through written submissions from advertising agencies;
- (f) Analysed advertising spending data for years 2006 – 2010 from AdmanGo³;
- (g) Analysed TV ratings data from CSM Media Research; and
- (h) Commissioned an Economic Consultant to define the relevant market and assess TVB’s market power and to develop an economic framework to assess the effects of TVB’s conduct.

6. Throughout this process, the Authority sought legal advice in determining what further information would be required at each stage and whether the allegations contravened the BO.

TVB’s Representations on the Authority’s Draft Report

7. On 12 December 2011, TVB was invited by the Authority to make representations on the Authority’s draft report (the “Draft Report”).

8. By this stage of the Full Investigation, the Authority’s assessment was that, based on the materials available, there was insufficient *prima facie* evidence to justify

³ AdmanGo is a company which provides a comprehensive advertisement tracking and media spending analysis service through an online platform in both Hong Kong and China.

further investigation into allegations 4(e) – 4(g) in paragraph 4. These allegations were therefore not pursued and accordingly were found not substantiated (Details of the Authority's assessment are at Appendix A). The Draft Report contained the Authority's findings that allegations 4(a) – 4(d) in paragraph 4 were substantiated and that TVB's conduct had both the purpose and the effect of preventing, distorting or substantially restricting competition in a TV programme services market in Hong Kong, contravening sections 13 and 14 of the BO.

9. On 2 May 2012, TVB submitted to the Authority their representations on the Draft Report. The gist of TVB's representations was that –

- (a) the Authority lacked jurisdiction over the alleged conduct⁴;
- (b) the Draft Report failed to properly identify the relevant markets and the respective market positions of the parties, leading to a flawed analysis of the effects of the alleged conduct;
- (c) the investigation had not conformed with the principles of natural justice and had relied on evidence which was of questionable probative value; and
- (d) the proposed remedies were disproportionate in the light of the alleged conduct.

10. On 5 July, 6 July, 16 July, 18 July, 30 August and 18 October 2012, TVB submitted further representations to the Authority on the Draft Report in which it argued that -

- (a) the market data relied on by the Draft Report concerning TVB's position in relation to advertising was seriously flawed and that it did not support the Authority's findings concerning TVB's position in the television advertising market; and
- (b) artiste contracts should be treated as outside the Authority's jurisdiction because exploitation of artistic talent or ability was explicitly exempted from the anti-competition provisions in the sound broadcasting licences and the same principle should apply to television broadcasters.

11. TVB requested the Authority to consider the arguments and evidence put forward in its submissions and order additional investigation measures the Authority sees fit. TVB also requested the Authority to provide it with complete access to the evidence in the Authority's file, and issue new provisional findings under paragraph 37 of the Competition Investigation Procedures ("Investigation Procedures"). As "a gesture of goodwill", TVB had taken unilateral actions to remove certain exclusive clauses in all singer contracts upon renewal and not to sign or renew one-show contracts with artistes.

⁴ The alleged conduct is the four allegations 4(a) - 4(d) in paragraph 4 of this report.

TVB's Representations on the Revised Draft Report

12. The Authority took account of these representations and, on 25 January 2013, issued a revised draft report (the "Revised Draft Report") to TVB for further representations.

13. On 21 and 25 March 2013, TVB submitted to the Authority its further representations on the Revised Draft Report. TVB alleged that there had been procedural unfairness in the Authority's investigation and thus it described its representations appended to its letter of 25 March 2013 as an "initial submission" made under protest, and without prejudice to its right to amend or expand upon its defence once proper procedural fairness had been accorded. TVB indicated that it would make additional submissions once it had been put in a position to present informed representations. TVB requested the Authority to arrange an oral hearing at which TVB could make oral submissions before the Authority reached any final opinion in the investigation.

14. TVB's representations largely repeated its earlier submissions; the principal new allegations were that the Revised Draft Report failed to adduce any convincing evidence of the alleged conduct's foreclosure effects on the relevant broadcasting market and that judgment of the court in the judicial review ("JR") initiated by ATV in relation to the Authority's report on the control and management of ATV (the "ATV Investigation") supported TVB's allegations of procedural unfairness.

15. In both its written submissions, and also in its oral representations made at a meeting of the Authority on 20 May 2013 (when it essentially repeated the written submissions), TVB claimed that it was entitled to disclosure of all information, evidence and documents obtained by the Authority in the course of the investigation, and that the Authority had acted unlawfully, irrationally and unreasonably in failing to disclose the "Non-Disclosed Materials" for TVB's consideration, including the unredacted ATV correspondence, full transcript/recording of the ATV interview, unredacted unnamed licensee correspondence and full transcript/recording of the record companies' and singers' interviews. TVB's written representations sought to rely on the Court of First Instance's judgment ("the CFI Judgment") on 19 October 2012 in relation to the judicial review of the ATV Investigation. The Authority noted that a redacted version of the CFI Judgment was provided by the Court to TVB on 26 March 2013. The CFI Judgment was however overturned by the Judgment of the Court of Appeal of 15 May 2013 (the "Appeal Judgment"). [...]

16. Taking account of TVB's written submissions in March 2013, the Authority invited TVB to make further representations specifically on the Authority's draft responses to TVB's representations relating to the definition of the upstream market and the assessment of market power on 7 August 2013. On 26 August 2013, TVB submitted its further representations, which largely reiterated its earlier arguments on those two aspects.

17. This report sets out the Authority's opinion and decision in relation to the four allegations 4(a) – 4(d) as set out in paragraph 4. TVB's written representations made on 2 May, 5 July, 6 July, 16 July, 18 July, 30 August and 18 October 2012 and

on 21 and 25 March, 29 May, 6 June and 26 and 28 August 2013, as well as its oral representations made at a meeting of the Authority on 20 May 2013 have been fully considered and taken into account by the Authority in finalising this report. A summary of TVB's representations and the Authority's responses to them are at Appendix B.

II. Broadcasting Ordinance and the Authority's Jurisdiction

(A) The Authority's Jurisdiction

18. The Authority's primary functions in relation to competition are set out in sections 13 and 14 of the BO, which are repeated 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.

(3) Subject to subsection (4), a provision in an agreement is void in so far as it provides for or permits, whether directly or indirectly, conduct which contravenes subsection (1).

(4) The Authority may-

- (a) on an application made to it in the specified form by a licensee;
- (b) on a prescribed ground; and
- (c) by notice in writing served on the licensee,

exempt conduct specified in the application from subsection (1) subject to such conditions as the Authority thinks fit specified in the notice.

(5) Subsection (1) shall not apply to-

- (a) any restriction imposed on the inclusion in a television programme service of a television programme produced wholly or substantially by the licensee of the service; or
- (b) any prescribed restriction.

(6) For the avoidance of doubt, it is hereby declared that nothing in this section shall prejudice the existence of any rights arising from the operation of the law relating to copyright or trademarks.

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 the 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.”

19. Section 13(1) of the BO prohibits a licensee from engaging in conduct which, in the opinion of the Authority, has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market. 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 TV programme service market. Sections 13(2) and 14(5) provide examples of conduct which the Authority may consider as falling within the scope of proscribed conduct under 13(1) and 14(4) respectively. Pursuant to section 4(2)(c) of the BO, the Authority promulgated two sets of guidelines viz. the Investigation Procedures and Guidelines to Application of

the Competition Provisions of the BO (“Application Guidelines”) in February 2001 explaining how the Authority will apply and enforce the competition provisions of the BO. The two sets of guidelines were updated in May 2007 and April 2012.

20. The key issue which the Authority must resolve before proceeding to the merits of the allegations is whether the Authority has jurisdiction over these allegations. Referring to paragraph 13 of the Application Guidelines,⁵ TVB argued that the Authority lacked jurisdiction under the BO to consider the complaint because the alleged conduct (with the exception of one-station-buy, which the Authority has decided not to pursue) did not take place in the TV programme service market. All of the alleged conduct instead took place in the upstream artiste supply market, over which the Authority exercised no jurisdiction.

(a) Anticompetitive Impact in the Television Programme Service Market

21. Both sections 13 and 14 of the BO, the substantive competition provisions in the BO, specifically refer to the TV programme service market. Section 13(1) states that “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.” Section 14(1) provides that “a licensee in a dominant position in a television programme service market shall not abuse its position”. Sub-section (4) proceeds to elucidate the concept of abuse of dominance, defining it as “conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.” Both section 13(1) and section 14(4) focus on conduct that has the purpose or effect of preventing, distorting or substantially restricting competition in the TV programme service market.

22. The BO does not define the term “television programme service market”, but it does provide a definition of TV programme service. In section 2 of the BO, TV programme service is defined as “the provision of a service that includes television programmes for transmission by telecommunications - (A) that are readily accessible to, or made available to, the general public in or outside Hong Kong; or (B) to persons, in 2 or more specified premises, simultaneously or on demand, whether on a point-to-point or a point-to-multipoint basis, or any combination thereof, having equipment appropriate for receiving that service, and, includes a service, or a service belonging to a class of services, which is a television programme service in accordance with the provisions of a notice under section 2(5)(a)[.]” For the avoidance of doubt, section 2(9) of the BO clarifies that “a television programme service includes any advertisements comprised within the service[.]”

23. The Authority rejects TVB’s argument. Sections 13 and 14 of the BO apply to conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in the TV programme service market. In other words, it requires the licensee’s conduct either to have an objective purpose of

⁵ Paragraph 13 of the Application Guidelines states that “the CA considers that a television programme service market refers to a downstream market or markets for the provision of television programme service to the general public or a smaller segment of the public. The CA considers, therefore, that the focus of its regulation should be on the conduct of licensee in a downstream market.”

preventing, distorting or substantially restricting competition in the TV programme service market or to create competitive harm in that market. So long as the conduct, wherever it is said to take place, exerts competitive impact on the TV programme service market, it falls within the Authority's jurisdiction.

24. This interpretation is supported by the other subsections of sections 13 and 14 of the BO. Section 13(2) provides some specific examples of conduct that is proscribed by section 13. It prohibits "(b) conduct preventing or restricting the supply of goods or services to competitors; ... (e) applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing them at a competitive disadvantage". Subsection (b) prohibits the prevention or restriction of supply of goods or services to competitors, which refers to conduct taking place in the upstream market of the supply of goods and services to TV stations. Such conduct does not take place in the TV programme service market, in which the sellers are the TV stations and the buyers TV viewers.

25. Similarly, if subsection (e) had been intended to apply only to transactions between the licensees and TV viewers, it would not have used the language "trading parties". It is highly unusual to refer to TV viewers as the trading parties of TV stations. The term "trading parties" must be intended to also include suppliers and other upstream transaction counter-parties of the licensees. Both subsections (b) and (e) thus refer to conduct in markets upstream to the TV programme service market. The fact that they are included as examples of proscribed conduct suggests that the scope of section 13 is not confined to conduct that takes place in the TV programme service market. It extends to conduct in upstream markets that affects the provision of TV programme service.

26. The same situation is observed in section 14 of the BO. Section 14(5) provides examples of conduct that constitute abuse of dominance by licensees. Subsection (d) mentions "discrimination in the supply of services to competitors" as one of the examples. Again, discrimination in the supply of services to competing TV stations does not take place in the TV programme service market. It takes place in the upstream market for the supply of services to TV stations. The fact that subsection (d) enumerates conduct that takes place in markets upstream to the TV programme service market suggests that the scope of section 14 is not confined to conduct that takes place in that market. It extends to conduct taking place in upstream markets that affects the provision of TV programme service. In short, in determining the jurisdictional reach of sections 13 and 14 of the BO, the key question is not where the conduct takes place, but whether the conduct has the purpose or effect of preventing, distorting or substantially restricting competition in the TV programme service market.

(b) References in the Application Guidelines and Previous Complaint Cases

27. The Authority has consistently adopted this interpretation of sections 13 and 14 of the BO, and states in paragraph 14 of the Application Guidelines that "*the CA also considers that licensee's conduct in other upstream or related markets (that is, markets which might not fall within the definition of a television programme service market) where the conduct results in the prevention, distortion or substantial restriction of competition in a television programme service market may breach the*

competition provisions since the restriction of competition occurs in a television programme service market.” With respect to artiste and singer contracts, the subject matter of this investigation, paragraph 21 of the Application Guidelines states that “[c]ompetition issues arising from artists’ contracts with licensees are not exempted from the provisions of the Ordinance and as such are subject to the same prohibitions as any other agreement.” These statements encapsulate the view the Authority consistently holds about the jurisdictional reach of sections 13 and 14.

28. In fact, TVB lodged two complaints in 2003 against Cable TV’s acquisitions of exclusive broadcast rights for the 2002 FIFA World Cup and for the Spanish League matches from 2003/04 to 2005/06 (Cases BA 01/2003 & BA 02/2003). In those cases, TVB argued that these exclusive broadcast rights prevented, distorted and substantially restricted competition in the TV programme service market in violation of section 13 of the BO.

29. Those two cases involved the supply of inputs to TV programme service in the upstream market, except that TVB was the complainant in those two cases and the defendant in the instant one. All three cases concern alleged exclusivity arrangements in the upstream supply of inputs into the provision of TV programme service, in those two cases broadcast rights for foreign football matches and in the instant one the supply of artistes and singers. In those two cases, the conduct—the exclusive broadcast agreements between Cable TV and the rights holders—did not take place in the TV programme service market, but in the upstream broadcast rights supply market. TVB did not object to the Authority’s jurisdiction over those exclusive agreements then.

30. The Authority’s view is also consistent with the one it articulated in Case BA 02/2002. That case concerned a market allocation agreement between TVB and ATV under which they agreed not to submit individual bids to Cable TV for the sub-licensing rights to the FIFA World Cup and the Olympics, and instead only to submit a joint bid. In rejecting Cable TV’s argument that the Authority should focus on the upstream broadcast rights market, the Authority asserted that the upstream conduct would be subject to scrutiny so long as it affected the TV programme service market. In paragraph 3.20 of that decision, the Authority asserted that it was “entitled to consider, and has considered, any indirect impact that the conduct being complained of has on competition in a television programme service market even if the conduct does not directly affect competitions in a market for the provision of a television programme service.”

(c) Conclusion

31. In the light of the foregoing, the Authority rejects TVB’s arguments that the Authority lacks jurisdiction over the alleged conduct. The jurisdictional reach of sections 13 and 14 of the BO encompasses upstream conduct that has the purpose or effect of preventing, distorting or substantially restricting competition in the TV programme service market.

(B) Sections 13 and 14 of the Broadcasting Ordinance

32. In this section, the Authority describes the structure of the legislative framework which governs this case and sets out the Authority's interpretation of the legislation. This section is not intended to provide an exhaustive analysis of the approach the Authority will adopt but summarises certain key issues of interpretation of the relevant legislation. The relevant principles derive from sections 13 and 14 of the BO.

33. Both sections confer upon the Authority jurisdiction based upon the purpose and/or the effect of conduct. This means that sections 13 and 14 provide for four different potential jurisdictional bases :

- Section 13 purpose;
- Section 13 effect;
- Section 14 purpose; and
- Section 14 effect.

The Authority has considered whether to act under each of these jurisdictions.

(a) Section 13 of the BO

34. Section 13 empowers the Authority to act where "conduct" has either as its purpose or its effect "preventing, distorting or substantially restricting competition in a television programme service market". It is clear that the phrase "conduct" covers agreement but is also wider than agreements and can include unilateral conduct by a licensee. This is evident from the language of section 13 itself which, when setting out the non-exhaustive list of behaviour which can amount to conduct, refers to both "conduct" (e.g. subsection 13(2)(b)) and "agreements" (e.g. subsection 13(2)(a) and (c)). It is also a proper inference to be drawn from the fact that the legislature has chosen to use the word "conduct" and not the phrase "agreement" that the legislature expressly decided not to limit the jurisdiction of the Authority to agreements only.

35. Further support for this conclusion lies in the fact that the use of the expression "agreement" is a phrase commonly found in international competition law where it is usually expanded by the addition of a "concerted practice" and "a decision of an association of undertakings"⁶. The legislature could have adopted this sort of language had it intended to limit the jurisdiction of the Authority to purely contractual or consensual conduct. But on the contrary the legislature has adopted a broader term "conduct" and has deliberately not limited jurisdiction in the way that some other jurisdictions have done.

36. It is also clear that the conduct can include both acts and omissions. Thus, for instance, the BO gives as illustrations of "conduct" that has the purpose or effect of preventing, distorting or substantially restricting competition, that which prevents or limits supply, or that which limits or controls investment. A refusal to do something can entail a deliberate decision which can limit supply or investment and thereby create barriers to expansion that prevents, distorts or substantially restricts

⁶ See Article 101 of the Treaty on the Functioning of the European Union.

competition. Accordingly a decision by a licensee not to do something is in principle also capable of amounting to “conduct” for the purpose of section 13.

37. This does not of course mean that the Authority has unfettered rights to intervene in relation to the commercial activities of the licenses. The Authority may only intervene in relation to “conduct” which either has its purpose or its effect of preventing, distorting or substantially restricting competition. Further that intended or actual effect must occur “in a television programme service market”.

38. There are three points of interpretation that the Authority wishes to elaborate as follows:

“Purpose” in Section 13

39. The Authority takes the view that the relevant question to ask is what the “purpose” is which lies behind the conduct in question. If the Authority concludes that the “purpose” is one which is intended to bring about effects that prevent, distort or substantially restrict competition then the Authority may intervene. The use of “purpose” as a trigger for jurisdiction is very common in international competition law. It enables a regulator to intervene to protect a market before that market is harmed. An anticompetitive “purpose” may become manifest before the effects do and as such it creates a prophylactic jurisdiction which operates upon the basis that prevention is better than cure. 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.

40. In examining “purpose”, the Authority will have regard to the interpretation given to commensurate expressions in other jurisdictions. For example, the Authority will have regard to the meaning of the word “object” in Article 101 of the Treaty on the Functioning of the European Union (“EU”). In that provision of EU competition law, a prohibition is imposed upon agreements and concerted practices which have as their “object or effect the prevention, restriction or distortion of competition”. The phrase “object” there is used in a similar way to the phrase “purpose” is used in section 13. In EU law, the consistent jurisprudence of the European Court of Justice suggests that the object of an agreement or concerted practice, or of the decision of an association of undertakings can be determined by considering the content of the conduct identified (this will apply in particular where the conduct is embodied in agreements or written documents), its objective, and the legal and economic context of which it forms a part. The Authority will also examine any objective justifications advanced for the conduct in question by the parties.

“Effect” in Section 13

41. The alternative to purpose is effect. In many instances the parties to conduct will not set out to achieve a purpose of preventing, distorting or substantially restricting competition, but the conduct may nonetheless exert such effects. It is for this reason that competition regimes worldwide invariably create effects based jurisdiction in addition to purpose or object based jurisdiction.

42. The analysis of effects will normally occur within a defined product market and for this purpose the Authority will normally define the market in which the effects that prevent, distort or substantially restrict competition are said to occur. In the context of the BO this exercise is also constrained by the requirement that the conduct must prevent, distort or substantially restrict competition “in a television programme service market”. The Authority has set out in the previous section the analysis of the meaning of this phrase.

43. When considering effects the Authority will generally look for actual effects upon the market. In appropriate cases the Authority, 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.

44. In examining whether conduct has such an effect it may be appropriate to consider the appropriate counterfactual i.e. the situation in the market that would exist in the absence of the conduct in question. This is a useful exercise which provides a benchmark against which the effects of the conduct in question can be measured.

Market Power

45. Conduct engaged in by a licensee with a very small market share may be innocuous and incapable of exerting any effects that prevent, distort or substantially restrict competition in the relevant market. Accordingly, the Authority will normally only consider conduct to engage section 13 if the licensee in question possesses a sufficient degree of market power. The Authority will take account of a range of relevant factors in assessing market power. For illustration the Authority may take account of market share both in absolute terms and in relative terms comparing the market share of the licensee in question with those of rivals. The Authority may also consider the extent to which there are entry and/or expansion barriers, etc.

46. The Authority has indicated in the Application Guidelines that the Authority would not ordinarily consider that there is a material risk to competition if the licensee in issue does not hold at least 25% of the relevant market. This is however only a guideline. In some cases the Authority may for instance consider there to be no material risk to competition in relation to conduct on the part of a licensee with a significantly larger market share.

(b) Section 14 of the BO

47. Section 14 of the BO prohibits the abuse of a dominant position. Section 14(1) provides that: “A licensee in a dominant position in a television programme

service market shall not abuse its position". Section 14 also sets out a dual jurisdictional approach whereby intervention is permitted by reference to 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" (Section 14(4)). That provision provides that conduct is "deemed" abusive if it meets this test.

48. Section 14(5) provides a non-exhaustive, illustrative list of conduct which may be abusive. It cites pricing examples of predation and discrimination. Subsection 14(5)(c) categorises as a potential abuse: "making the conclusion of agreements to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the agreement". The concept of a "harsh" term or condition is not however one which is common in international competition law. The Authority will examine terms and conditions alleged to be "harsh" on a case by case basis. It is likely that one factor that will influence the analysis is the size of the counterparty to the dominant licensee. If the counterparty is a major corporation the Authority may be less inclined to conclude that a term is "harsh"; but if the counterparty is an individual or a very weak legal person then this may suggest otherwise. However, the Authority would emphasise that in the absence of case law or extensive experience in this regard, the approach that will be adopted is a case by case one.

Dominance

49. The Authority only has jurisdiction to intervene where the licensee is dominant in the relevant market. As explained in relation to section 13, the Authority will examine the facts to determine the appropriate market from an economic perspective but will of course be guided by the limitation in the BO that the abusive conduct affects competition "...in a television programme service market".

50. The guiding principle behind dominance is the ability of the licensee to act to a significant extent independently in the market. This is reflected in section 14(2) which states that a licensee is in a dominant position when in the opinion of the Authority that it is able to act without significant competitive restraint from its competitors and customers. This is essentially the same test as is applied in Article 102 of the Treaty on the Functioning of the EU. The Authority will have regard to the case law and guidance on that Article when applying section 14, and will bear in mind that the law of Hong Kong demands independent interpretation. The Authority will take into account a range of factors including, but not limited to, absolute market shares and relative market shares, and entry and expansion barriers.

Responsibilities of a Dominant Licensee

51. On their own terms sections 13 and 14 bear many similarities. However, there are also material differences.

52. First, section 14 only applies where the licensee is dominant. This is by no means commonplace. When a licensee is however found to be dominant then it will be subject to a stricter obligation than a non-dominant licensee. That duty is not to engage in conduct which is abusive in the sense that it has the purpose or effect

of preventing, distorting or substantially restricting competition or is harsh etc. In EU jurisprudence this is sometimes termed the “special responsibility” of dominant undertakings. It can, for instance, mean that a dominant licensee is not allowed to engage in conduct that a non-dominant company can freely engage in. The examples given in section 14 are illustrations. For instance predatory pricing can occur where a dominant licensee sells below an appropriate measure of cost. Selling below cost can foreclose equally efficient rivals. However, selling below cost is virtually never viewed as anticompetitive outside the context of dominance. Accordingly, a non-dominant licensee can generally set its prices at will and a very low (loss making) price may actually be pro-competitive or at least not anticompetitive. This is an illustration only. Case law from elsewhere (such as the EU) gives other illustrations including, for example, agreements which tie in counterparties and which either do or are capable of foreclosing competitors from access to relevant markets.

Abuse

53. As observed the list of possible abuses in section 14(5) is illustrative only. 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. In the case of conduct which is alleged to exert a foreclosing or exclusionary effect the Authority will in particular examine whether the conduct has actually or could potentially foreclose a rival. 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.

“Purpose” in Section 14

54. The Authority is likely to adopt an approach similar to that applicable to section 13 in seeking to determine whether conduct has the purpose of preventing, distorting or substantially restricting competition.

“Effect” in Section 14

55. Section 14(4) of the BO provides that the conduct of a licensee in a dominant position is “deemed” abusive if it, in the opinion of the Authority, has “... the effect of preventing, distorting or substantially restricting competition in a television programme service market”. In addition to taking into account the analysis under section 13 as part of the analysis under section 14, the Authority will consider any additional evidence which is relevant to whether the licensee is dominant and whether conduct by a dominant licensee is abusive including whether the conduct has the effect of actually or potentially preventing, distorting or substantially restricting competition.

III. The General Analytical Framework

56. Both the Application Guidelines and the Investigation Procedures set out a multiple-step framework for analysing competition claims brought against a licensee. Paragraph 26 of the *Application Guidelines* provides a three-stage framework consisting of:

- (a) Stage 1: Defining the relevant market in which the party(ies) (more specifically, the product(s)) under review operates;
- (b) Stage 2: Assessing market competition to identify whether the party(ies) has/have market power;
- (c) Stage 3: Assessing whether the conduct under review has the purpose or effect of preventing, distorting or substantially restricting competition in the defined TV programme service market.

57. Paragraph 30 of the *Investigation Procedures* states that “[t]o make a sound judgment, the Authority needs to answer the following questions:

- (a) What is the relevant market?
- (b) What is the competitive situation in that market (i.e. is the target of the complaint able to act independently of other players)?
- (c) What are the practical effects of the conduct being complained of?
- (d) What remedies would be appropriate if the complaint is substantiated?”

58. Both frameworks essentially involve the same steps. The first step is to define the relevant market. The second step is to determine whether the licensee at issue possesses market power under section 13, or a dominant position under section 14. The third step is to assess the objective purpose or competitive effects of the conduct at issue to determine whether it prevents, distorts or substantially restricts competition in the relevant market. If the result of the third step is in the affirmative, the Authority then decides what are the appropriate remedies that will alleviate the competitive harm done by the alleged conduct.

59. Paragraph 9 of the Application Guidelines stipulates that in ascertaining the purpose of a conduct, “CA would consider the objective meaning and purpose of the conduct in its economic context.” Such determination necessarily entails the inference of the objective purpose of the conduct in light of the direct, if it is available, and circumstantial evidence available to the Authority.

60. The Authority’s position is supported by the overseas jurisprudence, especially that of the EU, from which the distinction between purpose and effect is derived. The European Courts have held on numerous occasions that purpose, or

object, refers to the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied.⁷

⁷ Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v. Commission* [1984] ECR 1679, [1985] CMLR 688, paras. 25-26; Case T-148/89 *Sandoz Prodotti Farmaceutici v. Commission* [1990] ECR I-45; Case T-148/89 *Trefilunion v. Commission* [1995] ECR II-1063, para. 79; Case C-551/03 *General Motors v. Commission* [2006] ECR II-3173, [2006] 5 CMLR 4491, paras. 77-78.

IV. Artiste Contracts and Communications with TVB

(A) TVB's Artiste and Singer Contracts

61. From the evidence available to the Authority, it seems that TVB enters into [...] main types of contract with artistes and singers. The [...] main types of contract are: one-show contracts, serial-based contracts, singer contracts and other contracts[...].

(a) One-show Contracts

62. One-show contracts refer to contracts between TVB and its artistes in which the artistes are only signed for a minimum one-show commitment during the contractual period. TVB and the artistes agree that the artistes will appear in TVB's shows if the need arises at agreed-upon rates. These contracts contain a clause stipulating that TVB has no obligation to utilise the artiste during the contractual period. One-show contracts can be further classified into contract for services, form of engagement, and retainer contracts. Based on the [...] one-show contracts signed between 2007 – 2010 that the Authority has reviewed –

- (a) [...]almost all one-show contracts require artistes to obtain TVB's consent before undertaking outside work;
- (b) [...]very few one-show contracts require the artistes' total exclusivity subject to TVB consenting otherwise; and
- (c) [...]a very small number of one-show contracts require artistes to notify TVB prior to undertaking outside work.

63. In addition, [...]very few one-show contracts contain an additional clause that further restricts specific categories of work.

64. Moreover, subject to TVB granting consent to the artiste to undertake outside work, the artiste will be prohibited from using his/her original voice and attending promotional activities for the outside work concerned. This applies to [...]a significant proportion of one-show contracts.

65. Frequency of the contract clauses found in one-show contracts is set out in Table 1.

(b) Serial-based Contracts

66. Serial-based contracts refer to contracts between TVB and its artistes in which the parties agree to a rate for a drama series of varying lengths. For example, TVB may agree to pay an artiste a certain amount for a drama series of 20-episode duration. The contracts may set out a schedule of rates. In some of these contracts, the rates increase as the number of drama series TVB commissions from the artiste increases. Again, serial-based contracts contain the no-obligation-to-use clause which absolves TVB from an obligation to use a contracted artiste during the contractual period. Serial-based contracts can be further classified into contract for

services and form of engagement contracts. Based on the [...] serial-based contracts signed between 2007 – 2010 that the Authority has reviewed –

- (a) [...]a vast majority of serial-based contracts require artistes to obtain TVB's consent before undertaking outside work; and
- (b) [...]some serial-based contracts require the artistes' total exclusivity subject to TVB consenting otherwise.

67. In addition, [...]some serial-based contracts contain three additional clauses that further restrict specific categories of work.

68. Moreover, subject to TVB granting consent to the artiste to undertake outside work, the artiste is prohibited from using his/her original voice and attending promotional activities for the outside work concerned. This applies to [...]a significant proportion of serial-based contracts.

69. Frequency of the contract clauses found in serial-based contracts is set out in Table 1.

(c) Singer Contracts

70. For singer contracts, singers are engaged on a show-by-show basis. TVB and the singers agree that the singers will appear in TVB's shows if the need arises at agreed-upon rates. Again, singer contracts contain the no-obligation-to-use clause which absolves TVB from an obligation to use a contracted singer during the contractual period. Singer contracts can be further classified into contract for services and retainer contracts. Based on the [...] singer contracts signed between 2007 – 2010 that the Authority has reviewed –

- (a) [...]a vast majority of singer contracts require singers to obtain TVB's consent before undertaking outside work; and
- (b) the remaining [...]singer contracts require singers to notify TVB prior to undertaking outside work.

71. In addition, [...]a vast majority of singer contracts contain an amplifying clause which prohibits singers' music videos from being broadcast by other local broadcasters.

72. Frequency of the contract clauses found in singer contracts is set out in Table 1.

73. Regarding other contracts which are collectively referred to as “full-time contracts”, the Authority considers that for artistes under full-time contracts, the exclusive clauses included in their contracts appear to be proportionate, as those artistes are fully engaged by TVB and are remunerated with a fixed salary amongst other benefits. The ensuing analysis will thus focus on one-show, serial-based and singer contracts (collectively refer to as “occasional use contracts”).

Table 1. Proportion of TVB artiste contracts (2007-10) containing different “exclusivity” clauses

Clause	Summary	Applies to occasional use		
		One show [...]	Serial-based [...]	Singer [...]
Almost all occasional use contracts (except [...] a small number of serial-based contracts) contain either clause a, b or c -				
a	Consent required for outside work (Almost all one-show contracts and a vast majority of serial-based and singer contracts contain this clause)	[...]	[...]	[...]
b	Total exclusivity subject to TVB consenting otherwise (Some one-show and serial-based contracts contain this clause)	[...]	[...]	[...]
c	Notify TVB prior to undertaking outside work (Some one-show and singer contracts contain this clause)	[...]	[...]	[...]
In addition to clauses a, b and c, some occasional use contracts also contain clause d, e, f or g -				
d	Consent required to perform (Some one-show and serial-based contracts contain this clause)	[...]	[...]	[...]
e	Consent required to be involved in TV (Some serial-based contracts contain this clause)	[...]	[...]	[...]
f	Notification required to be involved in TV and subject to - a) Outside company not registered in Hong Kong b) No original voice in Cantonese and/or Mandarin in dramas and Cantonese in non-dramas c) Priority to TVB on release of work in Hong Kong d) No promotion for outside work e) In the event of a clash TVB has priority (A small number of serial-based contracts contain this clause)	[...]	[...]	[...]
g	Prohibition of singers' music videos from being broadcast by other broadcasters in Hong Kong (A vast majority of singer contracts and one serial-based contract contains this clause)	[...]	[...]*	[...]
Some one-show and serial-based contracts contain clause h -				
h	No original voice and no promotion (A significant proportion of one-show and serial-based contracts contain this clause)	[...]	[...]	[...]

Source: Data obtained by the Authority from inspection of TVB's contracts

*Clause g also applied to one serial-based artiste.

(B) Tacit Agreement

74. For one of the allegations i.e. the imposition of language restriction on artistes (“no Cantonese policy”), the restriction is not found in TVB contracts. To find out the existence of the alleged restriction, the Authority reviewed records of artistes interviews on Cable TV and ATV (including keeping a log of over 300 interviews of TVB artistes which featured on Cable TV between July 2010 and August 2011. Details of the contractual relationship of each artiste with TVB at the time of the interview as well as the language spoken were recorded). The findings regarding interviews of TVB artistes in Cable TV are as follows -

Table 2. Analysis of Cable TV interviews with artistes

Type of TVB contract	Language spoken - No. of interviews			% Putonghua
	Cantonese	Putonghua	Total	
Singer	[...]	[...]	[...]	[...]
“Other” TVB	[...]	[...]	[...]	[...]
No contract with TVB	[...]	[...]	[...]	[...]

(Almost all the singers and a significant proportion of other artistes contracted with TVB spoke Putonghua during the interviews)

Source: Analysis by the Authority of interviews with artistes on Cable TV, July 2010 – August 2011

NOTES: “Other” = serial-based, one-show or full-time contracts / “Singer” category includes [...] artistes who were also employed on serial-based contracts with TVB at the time of the interview. / Singer analysis excludes one interview where the artiste began speaking in Cantonese but switched to Putonghua part way through.

(C) Communications with TVB

75. Throughout the investigation, the Authority has gathered relevant information from TVB to find out whether the allegations are substantiated, including communications with TVB in the following areas –

- (a) TVB contracts
 - (i) Samples of contracts provided by TVB -
 - 25 October 2010
 - 29 October 2010
 - (ii) Inspection of contracts at TVB –
 - 27 June 2011 for around two weeks
- (b) Artiste figures (i.e. number of shows performed, rates per show, outside work applications, outside work notifications, outside work parties) –
 - 31 March 2011
 - 18 August 2011

(c) Explanations for the contract clauses and/or unwritten agreement

On allegation 4(a) exclusive contracts -

- 16 October 2009
- 10 February 2010
- 11 November 2010
- 18 August 2011

On allegations 4(b) and 4(c) no original voice and no promotion policies -

- 17 August 2009
- 16 October 2009
- 10 February 2010
- 11 November 2010
- 18 August 2011

On allegation 4(d) no Cantonese policy -

- 10 February 2010
- 21 April 2011

(d) Legal arguments

- 10 February 2010
- 11 November 2010
- 11 December 2010
- 21 April 2011

(e) Information on allegations not substantiated

- 10 February 2010
- 11 March 2011
- 21 April 2011

(f) Written Representations

- 2 May 2012
- 5, 6, 16 and 18 July 2012
- 30 August 2012
- 18 October 2012
- 21 and 25 March 2013
- 29 May and 6 June 2013
- 26 and 28 August 2013

(g) Oral Representations

- 20 May 2013

V. Overview of the Broadcasting Sector in Hong Kong

(A) Hong Kong Television Market

76. Hong Kong has a vibrant broadcasting sector which supplies over 600 channels of which around 249 Free to Air (“FTA”) channels and around 358⁸ pay channels transmitted over a range of distribution platforms.

(a) Free to Air Services

77. The two FTA broadcasters, TVB and ATV, rely on advertising revenues for their funding. They transmit 11 channels in Cantonese, Putonghua and English on Digital Terrestrial Transmission (“DTT”) including simulcasts of the main Cantonese channels (TVB Jade and ATV Home) and English language channels (TVB Pearl and ATV World) on Analogue Terrestrial Transmission (“ATT”). The channels broadcast a mix of self-produced and third party programming. Additionally RTHK is a government funded broadcaster that produces programming which is broadcast on TVB, ATV and other pay TV channels. The channels shown by the local FTA broadcasters are set out in Table 3 below.

Table 3. TVB and ATV’s FTA channels

	TVB	ATV
ATT and DTT	TVB Jade (Cantonese) TVB Pearl (English)	ATV Home (Cantonese) ATV World (English)
DTT only	J2 iNews TVB Jade HD	CCTV1, Asia Channel, TVS Shenzhen Satellite

Source: HKBA Annual Report 2010-2012, <http://digitaltv.tvb.com/digitaltv.html>, http://www.hkatv.com/v3/atve/index_e.html.

(b) Pay Services

78. There are three main domestic licensed pay TV providers: Cable TV, PCCW Media Limited (“Now TV”) and TVB Network Vision Limited (“TVB Network Vision”). Hong Kong Broadband Network (“HKBN”) also provides pay TV services. However, because HKBN’s service is provided over the Internet, it is exempted from the licensing regime of the BO. These services providers offer a range of channels in return for subscriptions as well as selling advertising. Each pay TV retailer broadcasts a mix of own-branded channels which are specific to its platform, as well as imported or third party channels which appear on multiple platforms. The number of households with access to pay TV is estimated to be around 60% as of 2009⁹. The main pay TV broadcasters are set out in Table 4 below.

⁸ As at March 2012. Source: HKBA Annual Report 2010-2012 paragraph 2.2.1.

⁹ CEDB Topical Information: Television Broadcasting in Hong Kong

Table 4. TV distribution platforms

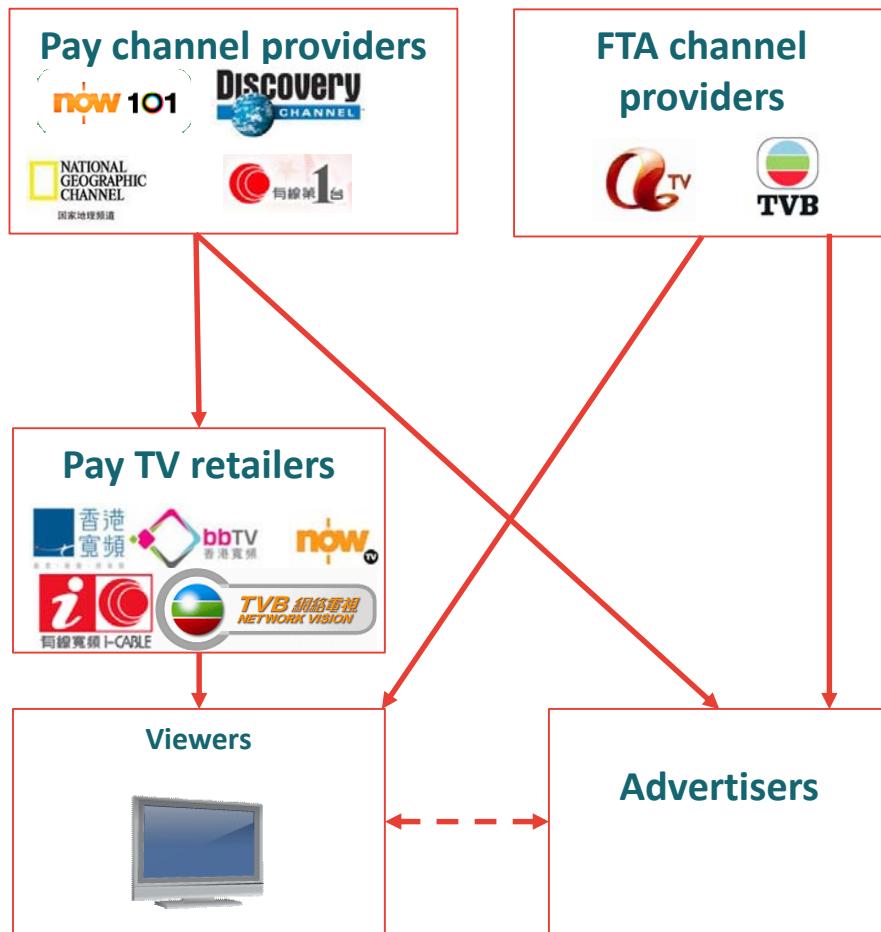
Broadcaster	Owned by	Distribution technology	Subscribers (2010)
Now TV	PCCW	Broadband network	1.04m
Cable TV	i-Cable	Hybrid fibre coaxial, satellite, Microwave Multipoint Distribution system.	1.1m
TVB Vision	TVB	Satellite and broadband network	[...]
HKBN	CVC Capital Partners	IPTV	150k

Sources: <http://www.i-cablecomm.com/ir/presentation/2010/2010final.pdf> ,
[http://www.pccw.com/staticfiles/PCCWCorpsite/About%20PCCW/Investor%20Relations/Announcements%20&%20Notices/2011/Mar/e1-2011.03.22%20\(Annual%20Results\).pdf](http://www.pccw.com/staticfiles/PCCWCorpsite/About%20PCCW/Investor%20Relations/Announcements%20&%20Notices/2011/Mar/e1-2011.03.22%20(Annual%20Results).pdf), <http://202.66.146.82/listco/hk/citytelecom/annual/2010/ar2010.pdf>.

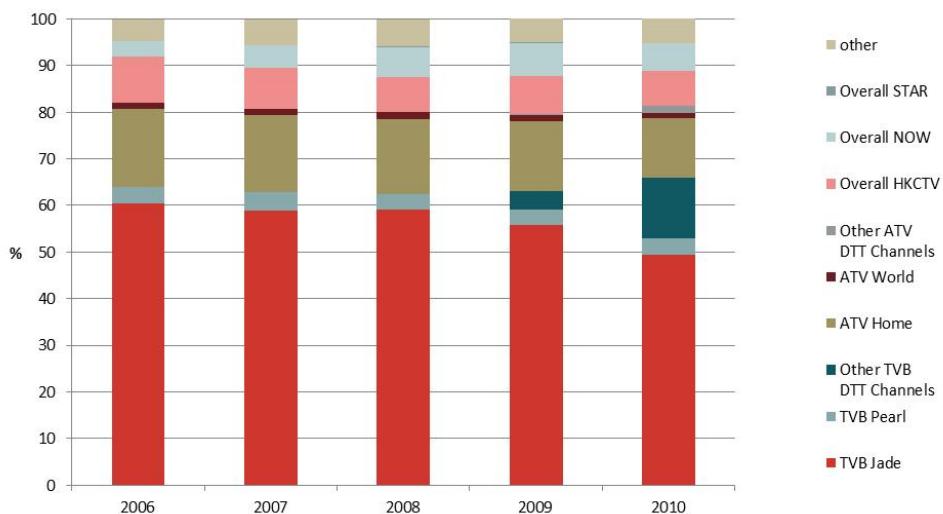
Note: TVB Network Vision subscriber numbers is an estimate based on data from HKBA on total pay TV subscribers and published data from PCCW and Cable TV.

79. Figure 1 below sets out a stylised structure of the broadcasting sector in Hong Kong. Channel providers aggregate third party content or create self-produced programming. They either provide these channels directly to consumers on a free to air basis, or supply the channels to pay TV retailers (such as Cable TV or Now TV) who offer the channels to consumers in return for monthly subscriptions. Channel providers also supply advertising spots to firms wishing to promote their products. There is some vertical integration in the broadcasting markets where some pay TV retailers also provide their own channels and package these with other channels for which consumers pay a subscription.

Figure 1. Stylised structure of the broadcasting sector



80. As shown in Figure 2 below, TVB's share of viewing has been between 60-70% since 2006. ATV's share has fallen from around 20% to around 15%. Pay TV's share of viewing has remained relatively constant at around 20%.

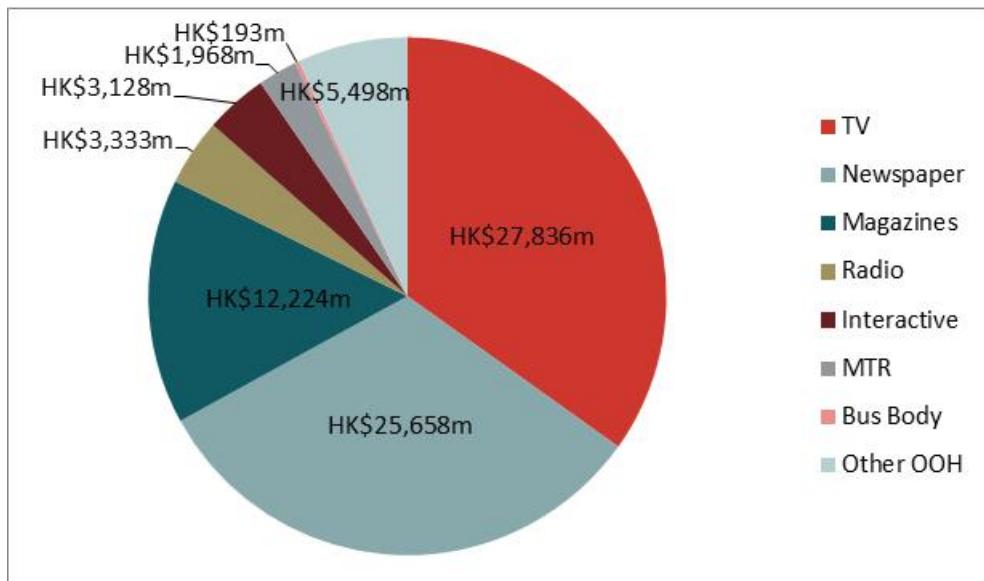
Figure 2. Hong Kong broadcaster share 2006 – 2010

Notes: Annual average of weekly TV Audience Share for All Time. Other includes TVB's pay services.
Source: CSM Media Research

(B) Hong Kong Advertising Market

81. The supply of TV advertising is closely linked to the supply of TV viewing in that broadcasters compete for viewers and gain revenues from the advertising side of the market. In 2010, based on the mid-point of the prices published in each broadcaster's rate card before applying any discount, HK\$80,000m was spent on advertising in Hong Kong. Of this TV advertising was the single biggest category of HK\$28,000m which is approximately 35% of the total.

Figure 3. Total spending on advertising 2010 (HK\$)



Notes: Interactive refers to advertising on the Internet like banner, textlinks, welcome screen messages, MTR refers to advertising in the Hong Kong MTR railway system, OOH refers to Out Of Home media like airport, bus shelter, video wall.

Source: AdmanGo.

82. There are various models of buying advertising in Hong Kong. Some advertisers may have in-house advertising agencies to take care of the production of advertisements and the purchase of advertising time for their own products. Some advertising/media agencies provide full services to clients including both creative production and media buying/planning. Some buyers of advertising buy directly from TV stations or other sellers of advertising. Others may buy via sales houses who negotiate on behalf of buyers.

(C) Supply and Demand of Artistes in Hong Kong Broadcasting

83. TVB has imposed restraints on the ability of artistes and singers to work for rivals. The legal concern relates to the possibility of input foreclosure, which describes a case where a firm is able to use its control over an important upstream input to prohibit rivals from accessing the input and competing in the TV programme service market. If this conduct has the purpose or effect of preventing, distorting or substantially restricting competition, it is prohibited by section 13(1) of the BO which deals with certain categories of conduct by licensees. Section 13(2) lists some of the types of conduct which may be considered to fall within section 13(1) including:

- “13(2)(b) conduct preventing or restricting the supply of goods or services to competitors;
- 13(2)(f) making the conclusion of agreements subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements”

84. Furthermore, if the conduct has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market,

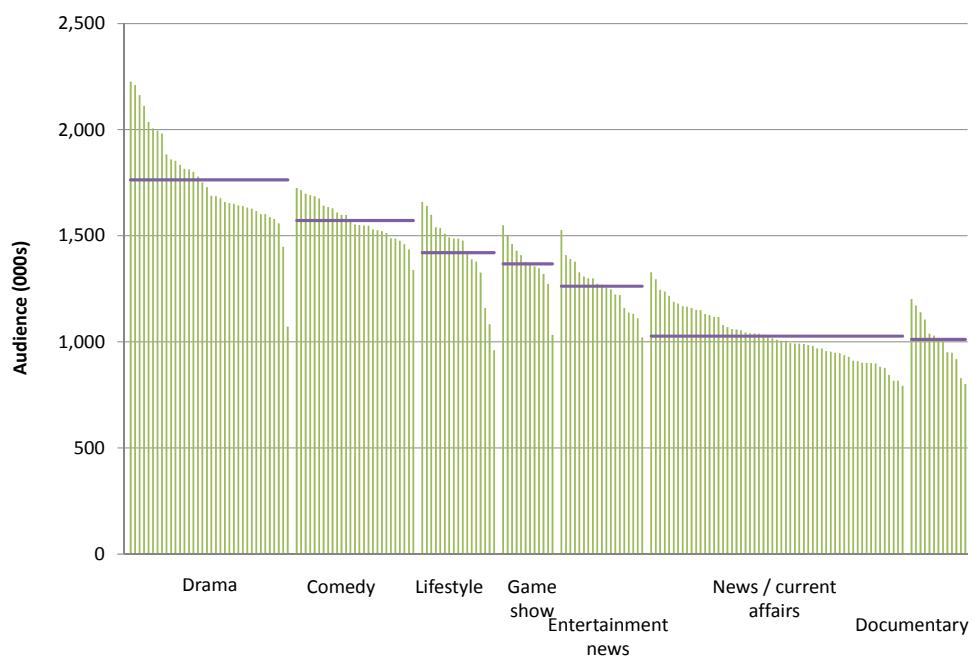
it could be prohibited by section 14(1) of the BO as TVB is considered to be in a dominant position of a TV programme service market (to be discussed in the next section).

(a) Artistes are Important Input Into Broadcasting

85. All of the main local TV broadcasters show a range of general entertainment channels and some genre or demographic specific channels which broadcast self-produced programming aimed at the Cantonese speaking Hong Kong market. Additionally, the pay TV broadcasters also offer channels which specialise in sport or movies and offer a range of third party channels which are sourced from outside Hong Kong.

86. To understand which types of programming drive ratings in Hong Kong, we have analysed data on TV ratings¹⁰ by looking at the top 50 programmes, based in each of four “normal”,¹¹ weeks during 2010 (200 programmes in total). As shown in Figure 4 below, the most popular programmes in Hong Kong were general entertainment (such as drama, comedy, lifestyle, game show, etc.) programmes, which represented 72% of the sampled highest rated programmes.

Figure 4. TV audience ratings by genre of programming



Note: The lines in purple denote the average TV audience for each genre of programming in the top 200 programmes.
Source: CSM Media Research, the Authority analysis.

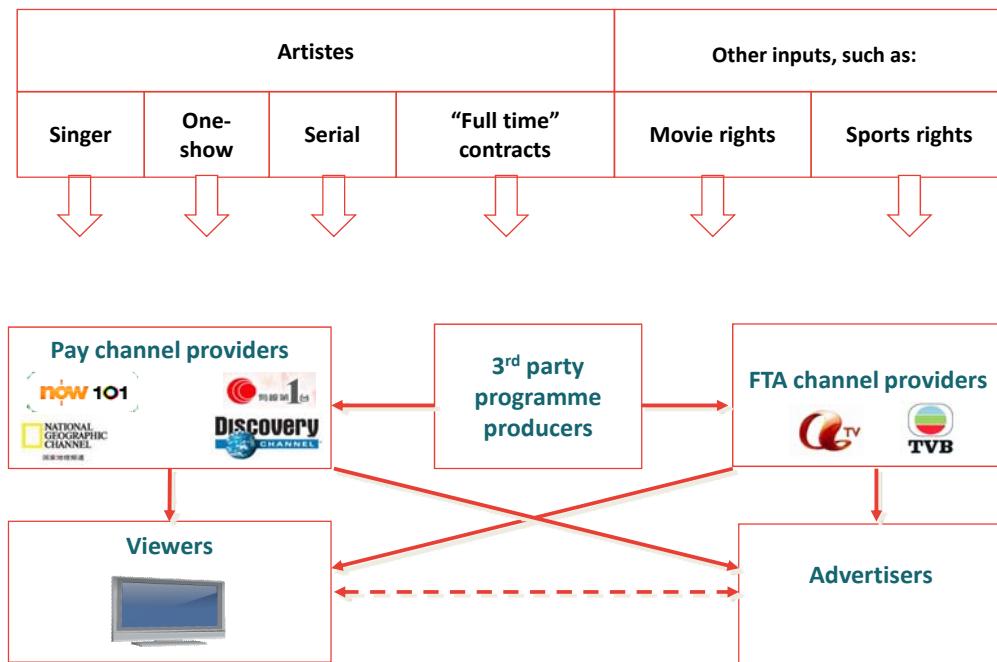
87. Of this, drama and comedy were the most important drivers of ratings and therefore advertising revenue. Both types of programming, by their nature required input from artistes working on either a full time (i.e. artistes with [...] contracts) or

¹⁰ Measured by the number of individuals who were watching each programme during a particular week.

¹¹ By “normal”, the Authority used four weeks evenly spread throughout the year which were not affected by either major sporting events or public holidays.

occasional basis (i.e. artistes/singers on one-show, serial-based or singer contracts). Figure 5 below describes how artistes supply their services to programme producers.

Figure 5. Artistes and the TV value chain



Note: pay TV providers self-produce programming as well as use programming from third party providers. Third party producers include for example RTHK or overseas producers of programmes. Some third party programme producers supply Hong Kong pay or FTA broadcasters.

88. Other genres of programmes are unlikely to be a relevant substitute for programmes featuring artistes for most broadcasters, given the most popular programmes in Hong Kong are dramas and comedies. If a general entertainment broadcaster¹² which offers a wide range of programmes of different genres (like TVB or ATV) is restricted to offer certain types of programmes which do not include artistes, its programmes line-up would be very limited, so would be its ability to attract viewers. It is also unlikely that a general entertainment broadcaster could successfully depend solely on programmes which do not include artistes, as such programmes have only niche appeal. The most popular dramas and comedies have more than 50% higher ratings than the most popular news or documentary programmes, and other types of programmes such as children's programming, sport and horseracing do not feature in the most popular programmes regularly shown on TV. Non-station produced programmes only account for about 36% of all programmes in the Cantonese analogue channels of domestic free TV programme services. About two-thirds of them are acquired programmes from overseas and are not among the most popular programmes in Hong Kong. The remaining one-third are independent local productions and could consist of a wide variety of contents, only parts of which are drama and comedy. Besides, some of the artistes they engage come from the same pool of artistes contracted with local broadcasters.

¹² A general entertainment broadcaster is a broadcaster whose strategy is to show programming which includes a mix of genres, including but not limited to comedies and dramas. Most of the channels operated by TVB and ATV are general entertainment channels, such as TVB Jade and ATV Home, which broadcast a wide range of programmes of different genres.

89. A significant amount of programmes on TVB Jade and ATV Home, the most popular general entertainment channels in Hong Kong between 2006 and 2010, were self-produced. In fact, although there are numerous channels not operated by ATV or TVB which are often niche or genre-specific, their share of viewers is much smaller than general entertainment channels featuring artistes. All these point to the popularity of general entertainment programmes and hence the importance of artistes as an input into TV broadcasting.

90. Since artistes are a necessary input to popular programmes such as dramas and comedies, a TV operator would likely face a fall in viewership for its programmes if it relies solely on inputs other than dramas and comedies, and that, by denying other TV operators' access to a large number of local popular artistes, TVB artificially reduces their competitiveness in producing more attractive programmes with more popular artistes.

(b) Limited Supply of Key Talent

91. Artistes are therefore a necessary input for the general entertainment shows, which seem to be some of the most popular programmes shown in Hong Kong. If there was a large pool of key talent from which broadcasters could draw and if restrictions were only imposed on a small proportion of the total pool then it would be unlikely that the restrictions could have a detrimental effect on competition. If, on the other hand, restrictions were imposed on the majority of the pool of available key talent then it would be more likely that the restrictions could prevent, distort or substantially restrict competition. The evidence that we have collected on remuneration of artistes and on artiste' media profile suggests that there are a large number of relatively low value artistes, and a much more restricted supply of more "valuable" artistes. A small number of artistes tend to receive high levels of remuneration and there is a long tail of artistes who receive relatively low levels of remuneration. Similarly, there are a small number of artistes who appear to have a very high media profile and a long tail of artistes with a lower media profile.

92. In addition, the scope for rival broadcasters to switch to alternative sources of input (whether artistes or programmes from abroad) appears limited, as it takes time to nurture new talent and programming imported from outside Hong Kong appears to be of limited attractiveness from the point of view of viewers.

93. On the whole, artistes and programmes from outside Hong Kong are less popular, and that broadcasters would likely lose viewers and profits if they switch to these alternatives. The vast majority of the top 200 most popular programmes as mentioned in paragraph 86 above were Hong Kong produced programmes rather than imported programmes. The Authority recognises that a limited number of artistes from outside Hong Kong may be able to forge a successful career in Hong Kong and some programmes from outside Hong Kong may attract viewers. However, that does not necessarily mean that the market should be defined so wide as to include all artistes currently working overseas or all programmes from overseas. The Authority considers that if the available pool of Hong Kong based artistes were restricted, a broadcaster who instead relied significantly or solely on overseas artistes would be less able to compete as they would be unable to source sufficient well qualified and

experienced artistes or artistes with a Hong Kong media profile. Also, given that dramas and comedies are usually in Cantonese and those with the highest ratings almost all feature local artistes speaking Cantonese, viewers place a higher value on programming featuring local artistes who speak in the local language, and overseas artistes would likely need to speak Cantonese to have a reasonable prospect of pursuing their careers in the Hong Kong broadcasting market. As such, overseas artistes in general are not effective substitutes for local artistes.

94. While there are new artistes/singers in the industry who can gain wide popularity within a short time, the percentage is small and they seldom take a leading role in general entertainment programmes, particularly dramas. It seems unlikely that a local TV broadcaster could rely significantly or solely on inexperienced or aspiring artistes to participate in general entertainment programmes to drive ratings and advertising revenue. It takes time to nurture new talent, who gradually build up expertise and media profile over a number of years to become artistes playing leading roles in dramas. Therefore, aspiring or inexperienced artistes are unlikely to be full substitutes for experienced and trained artistes.

95. It is not a common phenomenon for artistes who are not contracted with broadcasters to regularly work for Hong Kong broadcasters. Under the current arrangement, artistes usually sign contracts with TV broadcasters to perform in programmes produced by the TV broadcasters concerned. While some top artistes/singers may not need to sign any contracts for appearing on TV, the percentage is small. Most of these high value artistes seldom perform or do not regularly perform in TV programmes, though they may occasionally appear in music programmes, variety shows, charitable events or award presentation ceremonies on TV on a one-off basis instead of participating in dramas. While there are high value artistes who are not under contract with TVB, it is noted that such artistes also tend not to sign any contract with any local TV broadcasters. It seems unlikely that a local broadcaster could rely significantly or solely on high value artistes not under contract with any TV broadcasters to participate in general entertainment programmes to drive rating and advertising revenue.

(c) TVB Contracts with a Large Proportion of Artistes

96. Further analysis of the top 200 programmes in 2010 shows that all such programmes were broadcast on TVB. Though it is difficult to estimate consistently the number of artistes contracted with each TV station in Hong Kong, the evidence we have reviewed indicates that during 2007 – 2010, TVB contracted about [...]% to [...]% (a significant proportion) of all the artistes on contract with the main Hong Kong broadcasters. Information gathered from record companies also suggested that approximately 90% of singers entered into contracts with TVB. Though following a dispute between TVB and four record companies¹³, the number of singers contracted with TVB fell by [...] in 2010¹⁴, TVB still contracted with a majority of singers in 2010.

¹³ Five record companies when BMA Entertainment Holdings Limited later joined Hong Kong Recording Industry Alliance Limited (“HKRIA”) in 2010

¹⁴ TVB’s letter dated 13 March 2011 at page 3

97. As such, the Authority concludes that artistes are an important input into TV viewing in Hong Kong and that TVB has contracted with a significant proportion of available pool of artistes.

VI. The Market

(A) Viewer's Side of the Market

(a) Definition of Relevant Market

The General Framework

98. The first step in the analysis as set out in the Application Guidelines and Investigation Procedures is to define the relevant market. The purpose of market definition is to identify the products or services that serve as reasonable substitutes in the eyes of the consumers for the products or services of the firm being investigated, which, in the instant case, are TVB's programming services.

99. According to the Application Guidelines, there are three dimensions to a relevant market: product, geographic, and temporal. Temporal market definition is of little relevance to this case as the complaint does not focus on a TV programme of a limited duration, such as the FIFA World Cup or the Olympic Games. The conduct complained of proceeds on a continual basis. Therefore, there is no need to define a temporal market. The Authority concludes that the relevant geographic market in this case is the territory of Hong Kong. TV viewers in Hong Kong generally only receive TV programme service from the six local providers. This is the case for most viewers in Hong Kong, except for a small number of them who possess satellite dishes to receive satellite TV.

Demand Side Substitutability and the SSNIP Test

100. The most important dimension of a relevant market is product. According to the Application Guidelines, the relevant product market will be defined with reference to demand substitutability and supply substitutability. Demand substitutability refers to the extent to which consumers substitute one product for another in response to an increase in price of the first product. If the substitution response is sufficient to cause the price increase to be unprofitable, the first and second products are said to belong to the same market. As stated in paragraph 34 of the Application Guidelines, “[d]emand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in relation to their pricing decisions as well as other factors affecting the terms on which services are available to customers and viewers.”

101. Demand substitution depends on a variety of factors, such as viewer preferences, quality of programmes, etc. Switching costs may also play a role in demand substitution, especially as between FTA TV and pay TV. For a viewer to switch to pay TV, he must be willing to pay the monthly subscription fees. For a viewer to switch to satellite TV, he must be willing to incur the costs of installing a satellite dish. The greater the switching costs, the smaller must be the impetus to switch away from the existing product. Viewers would be willing to bear a greater price increase or deterioration of quality of the existing product before they incur the substantial costs to switch to competing products.

102. More formally, market definition can be conceptualised under the framework of the so-called SSNIP (Small but Significant, Non-Transitory Increase in Price) test, otherwise known as the hypothetical monopolist test. This is a framework that has been adopted in a great number of jurisdictions. The SSNIP test imagines a hypothetical monopolist that is not subject to price control and is the only supplier of a relevant product in the relevant geographic area. The hypothetical monopolist is then assumed to raise the price of its product by a small but significant, non-transitory amount.¹⁵ If it cannot do so profitably, it means that there are reasonable substitutes for the relevant product to which consumers switch. As consumers consider these products to be reasonable substitutes for each other, they must be included in the relevant market. The price increase process is performed again, this time with the relevant products encompassing both the hypothetical monopolist's product and its closest substitute. If the hypothetical monopolist cannot raise the price of the relevant products profitably, the process is repeated until the price increase becomes profitable for the hypothetical monopolist. When that happens, all the reasonable substitutes for the hypothetical monopolist's product have been captured in the relevant market. The market definition exercise is complete.

Supply Side Substitutability

103. In addition to demand substitution, the Authority will consider supply substitution, which refers to the ability of other firms to enter the relevant market to compete with the firm whose conduct is being investigated. In the context of TV programme service, this entails a new TV station or content provider entering the Hong Kong market to compete with the existing licensees. According to the Application Guidelines, the Authority will consider evidence on the technology and other requirements for offering a competing service, spare capacity within the industry, consumer willingness to switch to new suppliers, past supply-side substitution events.¹⁶

104. Sometimes the lack of empirical data means that it may not be possible to apply the SSNIP test. In the absence of quantitative data on demand substitution, the Authority will consider qualitative evidence. In particular, the Application Guidelines states that "market definition is a conceptual framework and is not intended to be applied mechanically. Accordingly the CA would not necessarily follow each step indicated [in the Application Guidelines]."¹⁷ This is consistent with the approach adopted by competition enforcement agencies in other jurisdictions.

¹⁵ Under the 1992 U.S. Horizontal Merger Guidelines, SSNIP was generally assumed to be a 5% increase in price. Under the revised 2010 U.S. Horizontal Merger Guidelines, the percentage used depends on whether the price which the firm explicitly or implicitly charges for the value of its contribution to the final product or service used by consumers can be identified. If that can be done, the U.S. competition authorities typically use a SSNIP of 10% of those prices. If it cannot be done, the U.S. authorities will base the SSNIP on the price paid by customers for the final product or service in question, and a lower SSNIP will be used, typically 5% and possibly lower. The European Commission also uses 5% to 10% for SSNIP for market definition purposes. See Commission Notice on the definition of relevant market for the purposes of Community competition law para. 17. Non-transitory refers to a sufficiently long period of time so that consumers have sufficient incentives to consider alternative products. The appropriate time period depends on the industry at issue.

¹⁶ Application Guidelines at paragraph 42.

¹⁷ Application Guidelines at paragraph 33.

For example, the U.S. authorities stated in the *2010 U.S. Horizontal Merger Guidelines* that even when the quantitative evidence necessary to perform the hypothetical monopolist test is not available, the conceptual framework of the test provides a useful methodology for gathering and analysing evidence pertinent to customer substitution and market definition.

105. As the BO requires the Authority to focus on the TV programme service market, the relevant market in this case is either the market for TV programme service generally or a part thereof, such as FTA TV or pay TV. The Authority has recognised in some past cases such as Case BA 02/2003 and Case BA 01/2008¹⁸ that the choice of the relevant market does not affect the outcome of the analysis. In those cases, the Authority did not feel compelled to choose between the alternative market definitions, which simplified the analysis but still produced the outcome.

106. To assist the Authority with market definition in this case, the Authority has commissioned a professional economic consultancy to conduct a comprehensive study of the TV sector in Hong Kong, which focuses on market definition and assessment of market power. The Authority's analysis draws on the evidence supplied by the Economic Consultant, although the Authority conducts its own analysis and draws its own conclusions. All the opinions and decisions given in this report are those of the Authority. On the viewer's side of the market, the Authority finds that the relevant market as no greater than all TV viewing. We are unable to rule out the possibility of a smaller market of FTA TV, but ultimately leaves open the question as it does not affect the result of assessment of market power. Under both plausible market definitions, TVB is clearly dominant, which further implies that it must have sufficient market power for the purpose of section 13 and 14.

107. As stated in the Application Guidelines and as is consistent with the Authority's decisional practices, the Authority need not settle on a particular market definition if the conclusion of the analysis is the same under either definition. Therefore the Authority can conceivably leave the market definition open between all TV viewing and FTA TV. In this investigation, however, the Authority proceeds on the basis that the relevant market is that of all TV viewing, which is more favourable to TVB than the possible narrower market of FTA TV, in which TVB's market share has been close to 80% for years.

108. The Authority's product market definition proceeds under the framework set out in the Application Guidelines, whereby the Authority examines demand and supply substitutions, paying special focus on consumer switching and the characteristics of TV programming in Hong Kong. As discussed in the previous section, there are currently six main TV service providers in Hong Kong. TVB and ATV are the two FTA TV providers and Cable TV, Now TV, TVB Network Vision and HKBN are the four main pay TV providers.

¹⁸ Case BA 02/2003 *Complaint regarding Acquisition of Free Television Broadcasting Rights to the Spanish League by Hong Kong Cable Television Limited*, paragraph 16; Case BA 01/2008 *Complaint about the Service Termination Practices Adopted by Hong Kong Cable Television Limited*, paragraph 24.

Two Sided Markets

109. From an economic perspective, the TV programme service market is a two-sided market, in which there are two interrelated groups of consumers. The market is called two-sided because the producer in the market, TV stations, is situated between the two groups of consumers, the viewers and the advertisers. Viewers watch TV programmes produced by TV stations, which generate their revenue by selling advertising time to advertisers. The larger the viewership of the station's programmes, the more attractive will be the station to potential advertisers. The station can hence command higher advertising rates. FTA TV service providers such as TVB and ATV rely predominantly on advertising for revenue, whereas pay TV service providers derive substantial revenue from user subscription fees. The two-sided nature of the market, however, generally only goes in one direction. While the advertisers value larger viewership of a TV station, the viewers in most cases do not value a greater number of commercials on TV.

Absence of Price Related Data from Viewers

110. If the required empirical data are available, it is possible to run a SSNIP test to determine the boundary of the relevant market. Pricing data can be analysed to determine to what extent consumers switch to substitute products when the price of a product increases. There are, however, two problems for applying the SSNIP test to the TV sector. The first and foremost problem is that FTA TV is free, and therefore, it is not possible to observe demand substitution when the price of FTA TV service increases. It is of course possible to examine demand substitution for pay TV service, which is not free to consumers. This, however, is not particularly helpful in the present inquiry as the target of the investigation is TVB, and not the pay TV service providers.

111. This problem can be remedied by focusing not on the price, but on the quality, of TV programmes. We can instead think of the impact of a small drop in quality on FTA TV to enhance the hypothetical monopolist's profitability (perhaps as a result of fewer popular programmes, an increase in the amount of advert breaks or an increase in the proportion of repeats) and explore whether customers would be expected to substitute away. The idea is that if a hypothetical monopolist cannot boost profitability by raising prices, it may do so by cutting costs, which can be achieved if the hypothetical monopolist reduces the quality of its programmes.

112. This approach was suggested in a European Commission report which examined methodological issues concerning market definition in the media sector.¹⁹ It is also consistent with the Authority's approach in Case BA 02/2002 that "the absence of charging for programming in no way precludes the ability to define the supply of programming to viewers as a relevant market as there is competition for viewers by means of non-price variables (e.g. quality and scheduling of content)."²⁰

¹⁹ Market Definition in the Media Sector—Economic Issues—Report by Europe Economics for the European Commission, DG Competition, paragraph 2.4.25 et seq., available at http://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf.

²⁰ Case BA 02/2002 at paragraph 5.10.

113. The second problem with applying the SSNIP test to the TV sector, which is related to the suggested solution to the first problem, is that empirical data on TV programmes in Hong Kong does not allow the Authority to determine consumer reaction to a drop in the quality of TV programmes. Drop in quality is subjective and often difficult to quantify. Therefore, the Authority adopts a qualitative approach to market definition. It examines the various potential substitutes for TV programme services and assesses the extent to which they function as reasonable substitutes in the eyes of the consumers.

Substitutability with Other Audio Visual Entertainment

114. To delineate the outer boundary of the market, the Authority needs to determine whether consumers consider other audio-visual entertainment such as cinema, DVD viewing, Internet-based content, and pay-per-view programming as reasonable substitutes for TV programme services. Having carefully considered these alternatives, the Authority concludes that none of these are deemed to be reasonable substitutes by consumers and they should be excluded from the relevant market.

Cinema

115. While cinema and TV are alternative forms of entertainment, there are substantial differences between them. First, TV programmes can be viewed at home while watching a film at the cinema requires the consumer to go to the cinema. If a consumer wants to stay at home, cinema is not a meaningful entertainment option. Second, TV provides a much wider range of programmes than films. There are news programmes, documentaries, educational programmes, live sports events, etc. which are not available in cinemas. Third, and largely related to its ready availability, most consumers watch TV much more often than they go to the cinema. The Authority finds that the average Hong Kong household watches more than 5.4 hours of TV per day²¹. Consumers clearly do not spend nearly as much time in the cinema. Fourth, the costs of the two vary substantially. Once one has purchased a TV set, watching FTA TV is practically free (apart from the negligible electricity costs). Even the monthly subscription cost of pay TV pales in comparison to the cost of watching a film in the cinema *on a per-hour basis*. All these differences between cinema and TV programme service convince the Authority that consumers do not consider them as reasonable substitutes for each other. They do not belong to the same relevant market.

DVD

116. DVD viewing suffers from similar problems as cinema. While DVD viewing obviously can be, and is mostly, done at home, the range of content available on DVDs is more limited than that on TV. Live sports events and news programmes are not available on DVDs. TV dramas, which are highly popular, are available on TV, but only on a delayed basis on DVDs. Viewers who prefer prompt viewing would

²¹ CSM Media Research, 2010 2nd wave HKTAM Establishment Survey. Weighted average of Monday to Friday, Saturday and Sunday. Another survey reported that among those who had watched free TV at least one day a month, the average time spent on watching free TV was 3.2 hours per day. Source: http://www.hkba.hk/en/doc/report_2010.pdf (see page 93, paragraph 14)

not consider DVDs to be a reasonable substitute for TV as far as dramas are concerned. The costs of DVD viewing also differ significantly from watching TV programmes. Beyond the initial equipment purchase costs, DVD viewing entails continual DVD purchase costs. This sets it apart from FTA TV. The costs of DVD viewing are also substantially greater than pay TV *on a per hour basis*. Therefore, the Authority is of the opinion that DVD viewing is not in the same market as TV programme service.

PPV

117. Pay-per-view programming offered by Cable TV and Now TV is not a reasonable substitute for general FTA TV and pay TV programmes. This is because much of the pay-per-view programming appears to consist of premium or adult content. Its range of content is simply not wide enough to compete with FTA TV and pay TV programmes.

Internet

118. Among the four, Internet-based content is probably the closest substitute for TV programmes. Internet-based content more than matches the variety of TV programmes. Much of the Internet-based content is free, and can be easily watched at home. In terms of time spent by consumers, the difference between the Internet and TV is also smaller. It has been reported that the average Hong Kong resident spent almost 1.6 hours a day online in 2009.²² This number has been on the rise. The average Hong Kong resident spent approximately ½ hour a day online in 2002²³. Given this three-fold increase in the space of seven years, one would expect to see a corresponding decline in TV viewing time if the two were reasonable substitutes. This, however, has not been observed. TV viewing time has only dropped from 5.8 hours per day in 2006 to 5.2 hours per day in 2010²⁴. The level of decline is insufficient to suggest that there has been a significant shift from TV programmes to Internet-based content.

119. A number of reasons may explain this. First, not all the time spent on the Internet is spent on viewing Internet-based content; it may be spent on emails, messaging, online chatting, etc. Therefore, the increase in Internet usage may not replace TV programmes as a source of entertainment for consumers. Checking emails and messaging friends serve different functions from watching TV. Second, most TV viewers may still prefer to watch programmes on larger screens. With the popularisation of flat-screen TVs in recent years, the size of TV screens has increased substantially. TV screens dwarf the screens of most desktop, let alone laptop, computers. TV sets may also have higher definition and may be connected to better sound systems, rendering them even harder to be replaced by computers. These deficiencies would become irrelevant if households could view Internet-based content on their TV sets. This, however, proves unlikely as it is estimated that only around

²² The report noted that Hong Kong residents with a computer spent on average 2½ hours a day on line. (See: http://adage.com/china/article/fast-facts/time-spent-online-in-hong-kong-up-10-from-last-year/_136859/). Given about 63% of households had access to the internet, this implies that on average all residents spent almost 1.6 hours a day on line.

²³ Source: http://www.nielsen-online.com/pr/pr_021212.pdf

²⁴ CSM Media Research, 2006 1st wave to 2010 2nd wave HKTAM Establishment Surveys

6% of the households in Hong Kong were able to do that in 2010.²⁵ In short, the Authority concludes that Internet-based content is not a reasonable substitute for TV programmes in the current environment in Hong Kong.

Conclusion on Widest Possible Market

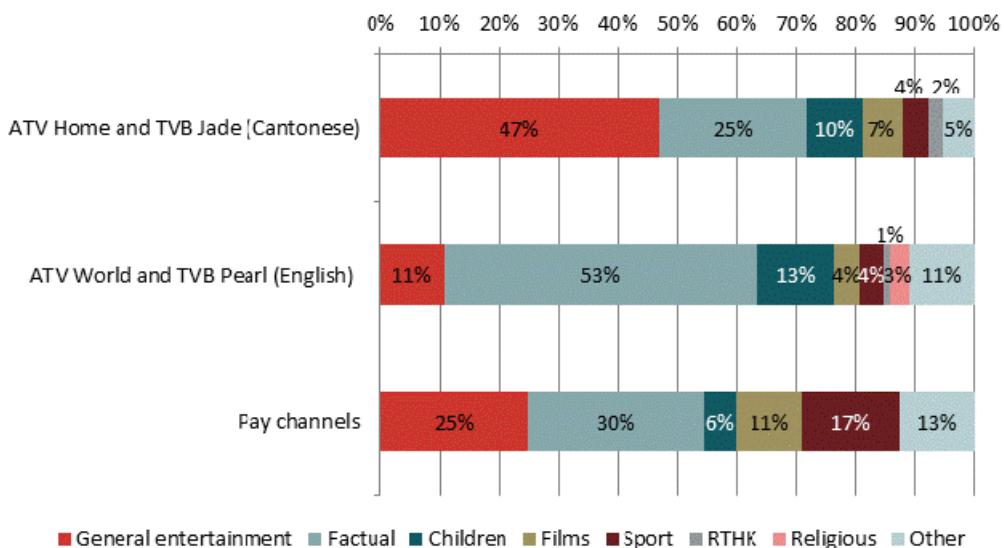
120. In conclusion, the Authority is of the view that the widest possible relevant market in this case would be that of TV programme services generally, including both FTA TV and pay TV. The Authority concludes that none of the other audio-visual entertainment options, such as pay-per-view programmes, cinema, DVD viewing, and Internet-based content are close enough substitutes for TV programme services to be included in the relevant market.

FTA TV and Pay TV

121. The remaining question is whether FTA TV and pay TV constitute separate markets. Although the Authority has defined the relevant market in Case BA 01/2002, BA 01/2004, and BA 01/2005 as that of pay TV, the TV sector in Hong Kong has experienced significant changes, such as the introduction of digital FTA channels and the further growth of pay TV subscriber base, since those cases were decided. The Authority examines the issue afresh in this case.

122. As mentioned earlier, there are currently six main TV programme service providers in Hong Kong, four supplying pay TV service and two FTA TV service. TVB and ATV both offer a Cantonese and an English channel each. In addition, TVB and ATV both offer analogue and digital channels. It is possible that the market is even smaller than FTA TV and should be defined as FTA Cantonese TV programmes. This would be a plausible market definition. As shown in Figure 6 below, the content on the English channels is somewhat different from that found on the Cantonese channels.

²⁵ CSM Media Research, 2010 2nd wave HKTAM Establishment Survey

Figure 6. Programming genres TVB Jade and Pearl and ATV (hours of programming)

Notes: “general entertainment” includes: drama, variety, music, magazine, talk shows, non-children animation, advertising and sponsorship programming; “factual” includes: news / weather, business / financial, documentary; “other” includes young / old, arts / culture, education.

Source: HKBA Annual Report 2008/09, Section 8.

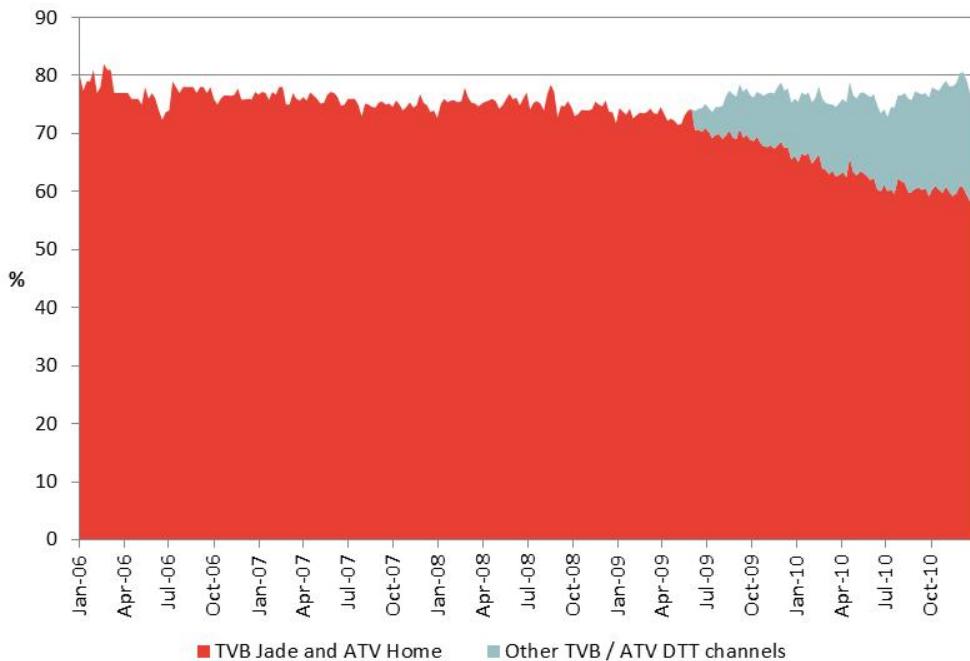
123. The Authority recognises that the viewer bases for Cantonese and English TV programmes do not seem to have significant overlap. However, we also observe that segregating the Cantonese and the English channels does not make a material difference in the assessment of market power. The market shares of TVB and ATV are similar in the Cantonese and English channels respectively. Therefore, the Authority treats the Cantonese and the English channels as comprising one market.

Analogue and Digital Channels

124. It is possible that the analogue and digital channels constitute different markets. The digital channels have an advantage in quality in that the programmes are broadcast in higher definition. The digital channels also carry more content than the analogue channels. The cost implications are different in that households must purchase either a decoder or a high-definition TV set in order to view the digital channels.²⁶ The Authority, however, is of the view that for the purpose of this investigation, the analogue and the digital channels should not be segregated. This is because the allegations in ATV’s complaint concern TVB’s artiste and singer management practices. These practices apply to artistes appearing on both the analogue and the digital channels. In fact, there are no indications that artistes specialise in either the analogue or the digital channel, or that TVB has distinct artiste management policies for the two channels. As shown in Figure 7 below, the Authority finds that consumers appear to have switched viewing from the analogue to digital channels as coverage of DTT has increased, while the share of overall FTA viewing has remained at approximately the same level. This is consistent with the products being close substitutes, and so being in the same market.

²⁶ This may not be a serious hurdle as according to a regular public survey conducted in March 2011, 63% of the households in Hong Kong have purchased the necessary receivers to watch digital television.

Figure 7. Market share of FTA analogue and DTT viewing, 2006-2010



Notes: TV Audience Share for All Time All Week

Sources: CSM Media Research

Pay TV - General Considerations

125. The most plausible divide in the TV programme service market is FTA TV and pay TV services. This is largely due to the fact that FTA TV is free while pay TV requires monthly subscription fees. The programming structure is also different in that FTA TV only offers a limited number of composite channels incorporating a wide range of programmes, while pay TV comprises tens if not hundreds of specialised channels. The extent to which a distinct FTA TV market exists depends on the degree of demand substitution between FTA TV and pay TV. If a small but significant, non-transitory deterioration in programme quality by a hypothetical monopolist FTA TV provider will drive viewers to the pay TV providers in sufficient numbers to render this quality reduction unprofitable, then FTA TV and pay TV belong to the same market. Otherwise, the two constitute distinct relevant markets.

126. The extent to which such demand substitution takes place depends on the degree of penetration of pay TV in Hong Kong. If most households already have pay TV subscriptions, they would be quick to switch to pay TV service if the quality of FTA TV programmes deteriorates. If a significant number of them do not subscribe to pay TV, the deterioration in quality would need to be more pronounced to cause viewers to incur subscription costs.

127. Survey data suggests that a significant proportion of homes have multiple subscriptions. According to information provided by the Commerce and Economic Development Bureau, the penetration rate for pay TV subscription was about 60% as of 2009.²⁷ In that case, demand substitution between FTA TV and pay TV will be

²⁷ CEDB Topical Information: Television Broadcasting in Hong Kong.

limited for the 40% of households without pay TV subscription. These households must incur the costs of installing and subscribing to a pay TV service first. This means that there may be two distinct markets for this 40% of households, while one overall TV viewing market exists for the remaining 60% of households. It is an empirical question whether the presence of switching costs for 40% of households without pay TV is significant enough to imply that FTA TV and pay TV are in separate economic markets.

128. The empirical data needed to answer this question is unavailable. Since the Authority's assessment of market power reaches the same result irrespective of the choice of market definition between an all TV viewing market and an FTA TV market, the Authority is of the opinion that it is unnecessary to explore this issue further. To give TVB the benefit of the doubt, the rest of the decision proceeds on the basis that the relevant market is that of all TV viewing. It is less likely to establish dominance in a broader market. The Authority's adoption of all TV viewing as the relevant market is hence more favorable to TVB than the alternative FTA TV market.

129. In its letter dated 11 November 2010, TVB argued that the relevant market should be that of artiste management, in which TVB did not hold a dominant position. The Authority rejects artiste management as the relevant market. As explained earlier, the statutory language in sections 13 and 14 of the BO requires the Authority to focus its attention on the TV programme service market. While upstream conduct is within the Authority's purview, its legality must be assessed in light of its impact on the TV programme service market. Therefore, the appropriate market definition should be the TV programme service market, or a part thereof. The Authority's remit under the BO does not extend to competition in the artiste management market if it has no material effect on TV viewers.

Conclusion on the Relevant Market

130. On the basis of the above, the Authority concludes that the market should be defined no wider than a market for "All TV viewing" provided over any platform. From the viewer's perspective there are similarities in the type of content that is broadcast on FTA and on pay TV, which suggests that FTA TV and pay TV are substitutes for each other and hence in the same viewing market. However, we cannot rule out the possibility of a narrower market of FTA TV only as a significant minority (around 40%) of consumers may face significant switching costs when switching from FTA to pay TV. However since our conclusions on dominance are unchanged irrespective of whether the relevant market includes FTA TV only, or also pay TV, the Authority gives TVB the benefit of the doubt and the rest of the decision proceeds on the basis that the relevant market is that of all TV viewing. The relevant market does not contain other types of audio-visual entertainment such as cinema, DVD, PPV services or TV programmes on the internet.

(b) Assessment of Market Power

The General Framework

131. According to the Application Guidelines, only a licensee with market power can behave in a potentially anticompetitive manner.²⁸ This is obviously true for section 14 of the BO, which prohibits abuse of dominance. It is also true of section 13 of the BO, particularly regarding vertical restraints are concerned. A vertical agreement between two firms without significant market power in any of the relevant markets is unlikely to have anticompetitive effects. Therefore, it is important to assess whether TVB possesses a dominant position in the relevant market of all TV viewing. The existence of a dominant position necessarily implies significant market power—in fact, dominance merely connotes a very large degree of market power—and satisfies the market power requirement under section 13. Therefore, the ensuing discussion focuses on proving dominance under section 14. The market power requirement under section 13 is deemed satisfied once dominance is shown.

132. The first and foremost factor to be considered in the assessment of market power is market share, including its changes over time. While a firm with a large market share is not necessarily dominant, it is generally true that a firm with a small market share is highly unlikely to be dominant.²⁹ It is difficult to establish a universally applicable market share threshold above which a firm is deemed dominant. Instead, the Application Guidelines set out a market share threshold of 50%, above which there is a rebuttable presumption of dominance.³⁰ The Application Guidelines also state that a licensee is unlikely to be individually dominant, in the absence of contrary evidence, if its market share is below 40%.³¹

133. Contrary evidence may include the existence of very weak competitors, substantial entry barriers, and limited countervailing buyer power, which may still establish the dominance of a firm with less than 40% market share.³² These market share thresholds do not refer to market share at one point in time, but refer to market share over time. Therefore, the Authority needs to show a market share persistently in excess of 50% in order to establish the presumption of dominance.³³ Market share may be calculated using a range of different data, such as the number of viewers or subscribers, or the amount of advertising revenue.³⁴

134. The Application Guidelines states that “no single piece of evidence can provide a reliable indicator of the degree of competition in a market.”³⁵ In addition to market share, the existence of dominance depends on a host of other factors. These factors include “the potential for entry and exit from the market, including the existence and scale of any barrier to market entry; the extent of countervailing buyer

²⁸ Application Guidelines at paragraph 46.

²⁹ Application Guidelines at paragraph 53.

³⁰ Application Guidelines at paragraph 55(a).

³¹ Application Guidelines at paragraph 55(a).

³² Application Guidelines at paragraph 55(c).

³³ Application Guidelines at paragraph 55(b).

³⁴ Application Guidelines at paragraph 56.

³⁵ Application Guidelines at paragraph 49.

power and the presence of supplier countervailing power[,] ... the behaviour of existing competitors ... [and] the scope for potential competition imposed on existing firms in the market by firms outside the market[.]”³⁶ The Application Guidelines discuss a number of barriers to entry, including high minimum efficient scale and substantial sunk costs associated with market entry, first-mover advantage, access to key content, high switching costs on the part of consumers, strong brand awareness of incumbent operators, access to delivery platforms, and the degree of vertical integration.³⁷

135. Market shares are one way to measure market power but in markets with heterogeneous products (such as FTA TV and pay TV), there can be different ways to measure market share, and the way best suited to assess a firm’s ability to exercise market power will depend on the nature of the competition being studied. In the case of TVB, the Authority considers that its ability to exercise market power is best reflected in its share of viewers, since TVB’s business model is to provide programming for free to consumers in order to attract viewers and thereby generate advertising revenues. If TVB has market power, it would be able to behave independently of its rivals and ultimately consumers. Therefore, if it is able to reduce the quality of its programming without a significant impact on loss of viewers to other channels, and thus on its revenues, this would be an indication of the extent of market power. Also, the Authority does not consider assessing TVB’s market share based on customers’ willingness to pay for extra pay TV channels appropriate, since it does not reflect these customers’ (and other customers’) actual viewing choices, which is the relevant metric for understanding the degree to which TVB’s viewers would switch from its channels to other channels in response to a decline in the quality of TVB’s programmes.

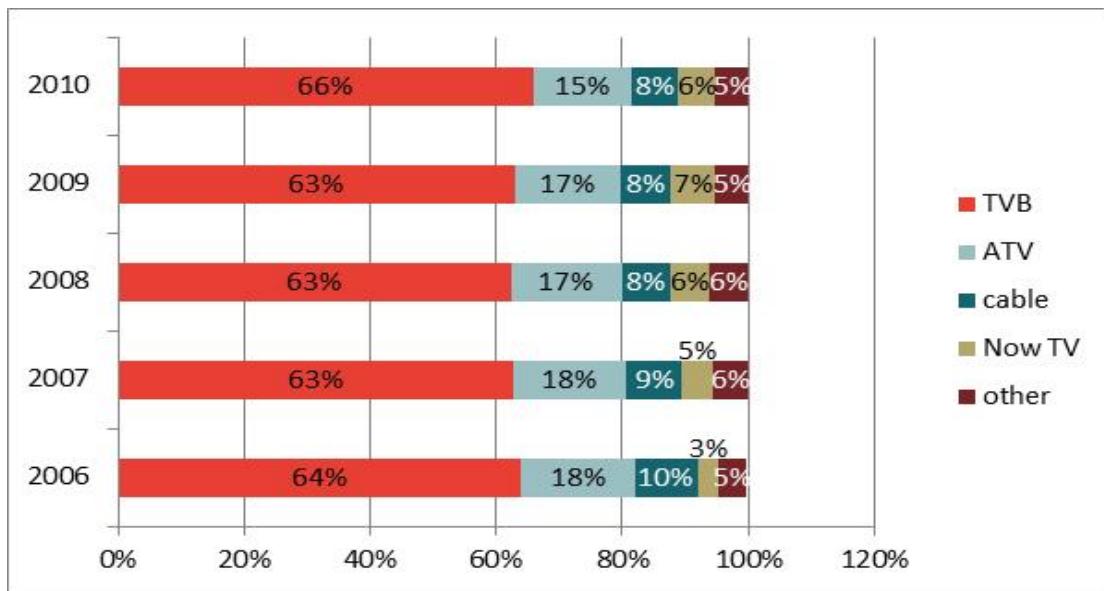
TVB’s Market Share

136. Based on the criteria identified above, the Authority finds that TVB is dominant in the relevant market. In terms of market share as measured by viewership, TVB had a 66% share in the all TV viewing market in 2010. More importantly, TVB’s large market share has persisted over time. Its share in the all TV viewing market has remained above 60% between 2006 and 2010. A persistent market share of above 60% is sufficient to establish a presumption of dominance under the Application Guidelines. Figure 8 below shows the evolution of the broadcasters’ market shares as measured by viewing in 2006 – 2010,

³⁶ Application Guidelines at paragraph 50.

³⁷ Application Guidelines at paragraph 62.

Figure 8. Evolution of market shares measured by viewing, 2006 to 2010



Source: CSM Media Research

Categories of Evidence Relied Upon

137. This presumption is reinforced when one considers other characteristics of the relevant market. First, TVB has managed to maintain such a large market share despite the entry of a number of competitors, such as Cable TV and Now TV, over the years. This clearly attests to TVB's rivals' inability to compete viewers away from it.

138. Second, TVB's market share is significantly higher than that of its competitors. As shown in Figure 8 above, in 2010, ATV's market share was 15%, Cable TV 8% and Now TV 6%. TVB's market share was more than four times as large as that of its nearest competitor, and more than twice as large as that of the three other competitors combined. A substantial difference in market share between firms further bolsters the conclusion of dominance. This is consistent with the European Commission's analysis in the *Virgin Atlantic/British Airways* decision, in which the Commission found British Airways' 39.7% market share to be sufficient to substantiate a finding of dominance, when its nearest rival Virgin Atlantic's market share was only 5.5%.³⁸ While TVB's market share does not dwarf that of its nearest rival to the same extent as British Airways did in the *Virgin Atlantic/British Airways* case, TVB's market share is much greater than British Airways'. The Authority is therefore satisfied that the gap in market share between TVB and its competitors strengthens the conclusion of dominance on the part of TVB.

139. Third, there are substantial barriers to entry in the TV sector. TVB enjoys a certain level of brand loyalty. As shown in Figure 8, the Authority finds that there has not been a history of changing and fluid market shares which suggests there is some inertia in viewing habits. The so-called brand loyalty means that a new entrant must incur higher costs to lure viewers away from TVB.

³⁸ Virgin /British Airways [2000] OJ L30/1, [2000] 4 CMLR 999, paragraph 88.

140. There are substantial sunk costs associated with market entry. The production of TV content is characterised by high fixed costs of production and low marginal costs of distribution. For example, the costs of producing a TV drama series are high, especially for a new TV station, which needs to purchase the necessary equipment, rent or purchase premises for shooting, and more pertinently to this investigation, requires access to popular artistes who draw audience. If access to popular artistes is denied for one reason or another, a new TV station will need to expend substantial resources to identify and groom new artistes, who may not turn out to be popular. This further increases the initial sunk costs of entry of a new entrant. It is possible for a new entrant to acquire content from other sources. Content need not be self-generated. However, there are limits to this strategy and it is likely that any successful entrant into the TV sector in Hong Kong will need to produce some content of its own to cater to the local audience.

141. Access to delivery platforms is also an issue. A new pay TV entrant would need to construct its own delivery platform that can reach hundreds of thousands of households. Cable TV built its co-axial fibre network from scratch to enter the market. Without access to an existing delivery platform, the sunk costs of entry for a new entrant would be even higher.

142. Lastly, countervailing buyer power in the relevant market is weak as individual TV viewers have close to no bargaining power vis-à-vis TVB. Countervailing supplier power is likely to be weak as well. Take singers as an example. Record company executives informed the Authority that they had a weak bargaining position vis-à-vis TVB and had to accept most of TVB's demands. The lack of countervailing supplier power is also evident in the very low compensation rate which TVB offers to most singers. Many of them only receive \$[...] as compensation for appearing in one show on TVB.

143. In the light of the foregoing analysis, the Authority concludes that TVB possesses a dominant position in the market of all TV viewing. This allows the Authority to proceed to analyse TVB's alleged conduct both as abuses of dominance under section 14 and restrictive agreements under section 13.

(B) Advertiser's Side of the Market

(a) Definition of Relevant Market

Two Sided Markets

144. The Authority also considers the relevant market from the TV advertising perspective. As noted earlier, the TV market is a two-sided market in the sense that there are two interrelated groups of consumers. TV viewers watch TV for the viewing experience, but advertisers advertise on TV because they can reach TV viewers. Accordingly the attractiveness of a particular TV channel to an advertiser will depend on the quality of the viewing experience. In principle, given that the two sides of the market are interrelated, one could consider market definition for both sides simultaneously. However, it is more practical to explore market definition for the viewing and advertising sides separately, but to recognise that a SSNIP on the TV

side of the market which leads to consumer switching will also lead to secondary impacts on the advertising side of the market.³⁹ If there is a drop in quality in broadcasters' programming due to lack of access to key input such as artistes, there would be a decline in viewership and hence advertising revenues. Given that TVB is a broadcaster that competes for viewers and gains revenues from the advertising side of the market, when conducting the hypothetical monopolist thought experiment for advertising, the Authority considers as a focal product the supply of advertising on TV. We then consider the impact of a SSNIP on the price of advertising on firms' decisions to buy advertising. Firms could substitute to alternative means of advertising (demand side substitution) or alternatively new broadcasters could choose to enter the market to supply advertising (supply side substitution)

Demand Side Substitution

145. On the demand side, the Authority seeks to explore whether a customer of TV advertising would switch to alternative channels (such as cinema, internet, radio, magazines or bill boards), in the event that a hypothetical monopolist of TV advertising raised prices. The Authority finds that the relevant market is that of TV advertising. TV advertising differs from other types of advertising, such as print advertising or billboard advertising, in a number of ways. First, in contrast with print advertising and radio advertising, TV advertising consists of moving images and sounds. It is capable of attracting audience attention in ways that print or radio advertising is unable to do. The same can be said of billboard advertising. Second, TV advertising also has wide demographic appeal and reaches 98% of the households in Hong Kong.⁴⁰ This sets it apart from print advertising. No print media can boast the reach of TV in Hong Kong.

146. There are other types of display advertising, such as Internet display advertising and display advertising on public transportation such as buses. Although the conclusions on TVB's dominance are unchanged irrespective of whether the relevant market includes Internet display advertising or not, the Authority considers whether Internet display advertising is within the same market as TV advertising given that some types of Internet display advertising have similar characteristics to TV advertising in that Internet can support sound and moving images. However, the Authority finds that Internet display advertising should not be a reasonable substitute for TV advertising in the eyes of advertisers. Advertisers desiring to reach the TV viewers will not resort to Internet display advertising if the price of TV advertising increases significantly. This is also consistent with the market definition on the viewer's side that Internet-based content does not belong to the same market as TV programme services. As for display advertising on buses such as Roadshow, the market is small compared to TV advertising, which suggests that advertisers do not see that type of display advertising as a reasonable substitute for TV advertising.⁴¹ Lastly, the Authority considers that cinema advertising should be excluded from the relevant market for the same reason that it generates comparatively small revenue, which means that advertisers do not see it as a substitute for TV advertising. The

³⁹ The two-sided nature of the market seems only likely to work in one direction, as few TV viewers place high value on the quality or nature of the adverts available.

⁴⁰ BA Annual Report 2009-2010, at s 4.

⁴¹ AdmanGo advertising spending data 2006 – 2010. See Figure 3 above. Display advertising on buses is included under OOH.

foregoing analysis suggests that demand substitution is unlikely to impose an effective competitive constraint on the price of TV advertising.

Supply Side Substitution

147. As for supply substitution, this would equate to a broadcaster choosing to enter the market as a result of an increase in the price of advertising, within a relatively short space of time and on a scale sufficient to constrain prices. In the context of the TV advertising market a new supplier may include an existing foreign broadcaster who currently does not broadcast in Hong Kong. The same analysis as that on the viewer's side of the market applies here. There are barriers to entry and expansion which would be likely to restrict the ability of a new broadcaster to enter the market on a sufficient scale enough to constrain TVB. It takes time to build up a recognisable brand. Existing broadcasters have built up their market positions slowly. In addition, broadcasters would have to source and buy content to show on channels. Therefore we do not consider that a small increase in the price of advertising would incentivise new providers to enter the market and start supplying TV advertising.

Conclusion on the Relevant Market

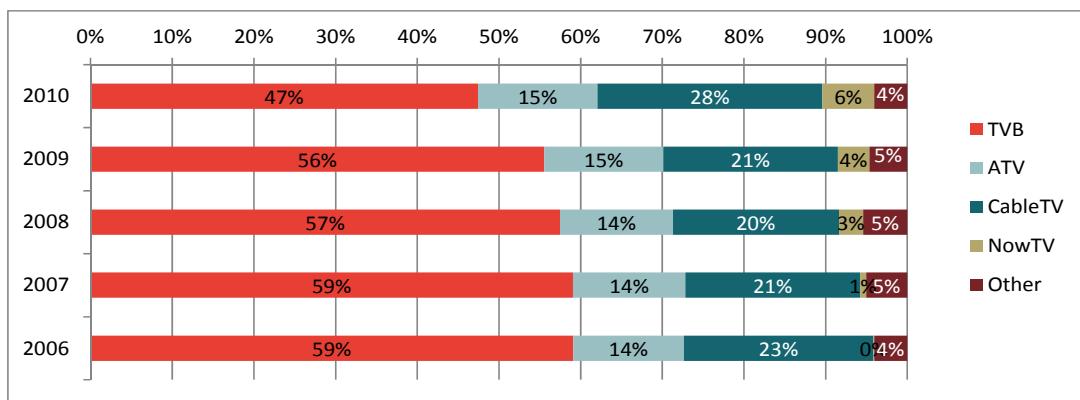
148. There appear to be differences in the characteristics of TV advertising and other types of advertising to the extent that they are not in the same market as TV, with the possible exception of display advertising on the internet. Furthermore, there is very limited scope for supply substitution, which leads the Authority to conclude that the relevant market is TV advertising in Hong Kong.

(b) Assessment of Market Power

149. Based on the market definition set out above, the Authority considers whether TVB's position in the TV advertising market is likely to give rise to concerns of dominance. From an economic perspective, this is an important market in relation to the alleged abuse, as it appears that a key mechanism by which TVB would monetise any such abuse is through increased advertising revenues. The Authority finds that TVB possesses a dominant position in the relevant market of TV advertising.

TVB's Market Share in TV Advertising

150. As shown in Figure 9 below, TVB's market share in TV advertising was persistently between 56% and 59% from 2006 to 2009, which according to the Authority's Application Guidelines on the application of the competition provisions of the BO, leads to a presumption of dominance. In 2010, TVB's market share dropped to 47%. However, this fall is largely explained by a surge of advertising revenue for Cable TV, which could be attributed to one-off events such as FIFA World Cup and the Asian Games. The Authority is of the view that TVB's market shares from 2006 to 2009 were more indicative of TVB's genuine presence in the market. Such persistently large market shares establish a presumption of dominance under the Application Guidelines.

Figure 9. TVB market share in TV advertising since 2006

Source: AdmanGo

151. This presumption is further reinforced by other characteristics of the relevant market. As the market for TV is two-sided, to enter the market for TV advertising a supplier would need to also enter the market as a broadcaster. As previously discussed, given factors such as entry barriers, substantial sunk costs of entry, brand loyalty, etc, the Authority is of the view that barriers to entry into the TV advertising market are high and rival entry would not be sufficient to constrain TVB. The buyers on the advertising side of the market are different from those on the viewer's side. They are advertisers or advertising agencies as opposed to viewers. Advertisers and advertising agencies are likely to have more countervailing bargaining power than TV viewers. However, the Authority does not consider that the power is substantial enough to offset TVB's dominance in the TV advertising market. Given TVB's large viewership, TVB is unique among all the TV stations in terms of consumer reach. Creating an alternative provider of TV advertising would also be extremely difficult.

152. In light of the foregoing analysis, the Authority concludes that TVB possesses a dominant position in the market for TV advertising. This conclusion is supported by its persistently large market shares, high entry barriers, high sunk costs of entry, brand loyalty, and low countervailing buyer power.

VII. Analysis of TVB's Conduct

153. In the previous section, we have defined that the relevant market in our case as all TV viewing market and TV advertising market. In the TV viewing market, TVB market share has remained above 60% between 2006 and 2010. Its market share dwarves that of its competitors and there is substantial barrier to entry in the TV sector due to TVB's brand loyalty. There are also substantial sunk costs and limited access to delivery platform. Countervailing buyer and supplier power is also very weak. As such, the Authority concludes that TVB possesses a dominant position in the market of all TV viewing. In the TV advertising market, TVB's market share was persistently between 56% and 59% from 2006 to 2009. Taking into account other factors such as entry barriers, substantial sunk costs, brand loyalty and low countervailing buyer power, the Authority also concludes that TVB possesses a dominant position in the TV advertising market. The Authority proceeds to examine TVB's conduct in this context.

154. Market definition and assessment of market power are merely the preliminary steps to establishing an infringement of sections 13 and 14 of the BO. Under section 13, it must be shown that a licensee has undertaken conduct, which has the purpose or effect of preventing, distorting or substantially restricting competition. Under section 14, it must be proved that a licensee has abused its dominant position by engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition. As concluded in the previous section, TVB possesses a dominant position in the relevant market of all TV viewing and the related market of TV advertising and thus fall within the purview of section 14. By extension, TVB also possesses sufficient market power for its conduct to fall within the purview of section 13. Having defined the relevant market and assessed TVB's market power in that market, what remains to be proven by the Authority is to show that TVB's conduct has the purpose or effect of preventing, distorting or substantially restricting competition under section 13 and abuse of dominance under section 14.

155. In the analysis, the Authority considers each of the following alleged conduct to determine whether it has the purpose or effect of preventing, distorting or substantially restricting competition under sections 13 and 14 of the BO:

- (a) TVB has exclusive occasional use contracts with its artistes and singers (with harsh and unreasonable terms);
- (b) TVB prohibits the original voices of artistes on serial-based and one-show contracts with TVB from being broadcast in other TV stations' programmes (the no original voice policy) ;
- (c) TVB prohibits artistes on serial-based and one-show contracts with TVB from attending promotional activities of productions featuring the artistes concerned in other TV stations (the no promotion policy); and
- (d) The imposition of language restriction on artistes.

156. To assist the Authority to investigate whether TVB's policies above have had the purpose and/or effect of preventing, distorting or substantially restricting

competition, the Authority has commissioned the Economic Consultant to develop an economic framework that can then be used by the Authority to assess the evidence in the light of the relevant provisions of the BO.

(A) Exclusive Contracts

(a) Purpose of the Exclusive Clauses

157. As indicated in the previous section, TVB had contracts with the majority of artistes and singers of the four main broadcasters in Hong Kong and these contracts contain a range of clauses restricting artistes/singers from providing services to other TV broadcasters in Hong Kong.

Exclusive Clauses

158. In almost all one-show and serial-based contracts, TVB has inserted provisions that either require the artiste to obtain consent from TVB before engaging in outside work (Clause a), or to be totally exclusive to TVB during the contractual period subject to TVB consenting otherwise (Clause b). A small number of one-show contracts require the artiste to notify TVB prior to undertaking outside work (Clause c). The case for singers is similar. The types of restriction imposed on singers contracted with TVB either requires the singer to obtain consent from TVB before engaging in outside work (Clause a) or give TVB prior notification before engaging in outside work (Clause c) –

Clause a A typical contractual clause imposing a consent requirement states:

[...]
[appear in [...]almost all one-show and [...]a vast majority of serial-based
and [...]singer contracts]

Clause b A typical contractual clause mandating outright exclusivity subject to TVB consenting otherwise states:

[...]
[appear in [...]some one-show and [...]serial-based contracts]

Clause c A typical contractual clause requiring the artiste to give TVB prior notice states:

[...]
[appear in [...]some one-show and [...]singer contracts]

159. It is unclear whether there are any practical differences between Clauses a and b. The Authority recognises that both clauses may function similarly in practice and provide the artistes at least the possibility of obtaining consent from TVB. However, the evidence reviewed suggests that the consent clauses may well amount to *de facto* exclusivity. The Authority will elaborate on this later.

160. As for Clause c, this is mainly applicable to singers. The Authority is aware that TVB has recently transferred many of its singers on to retainer contracts, under which singers are merely required to give TVB notice of their engagements elsewhere [...] days in advance. Even though these retainer contracts do not require formal consent or approval but just prior notification, the evidence reviewed,

including interviews with singers and record company executives, suggests that the notice requirement functions as de facto exclusivity which the Authority will elaborate later.

161. By referring to de facto exclusivity in this report, we refer to the situation where a significant degree of foreclosure that limits rivals' access to key inputs such as artistes or singers. The Authority recognises that while Clauses a, b and c are slightly different in nature, they all to varying degrees exert foreclosing effect by substantially restricting rivals access to artistes and would therefore have the capability of foreclosure, of which the Authority will elaborate on later.

162. All contracts between occasional use artistes and TVB contained a clause that TVB is not under an obligation to use the contracted artiste. The no-obligation-to-use clause is generally formulated as follows:

[...]

163. As the Authority will elaborate on later, when used in conjunction with the consent clauses, this no-obligation-to-use clause could enable TVB to warehouse artistes and therefore prevent, distort or substantially restrict competition by preventing other broadcasters from accessing artistes at minimal cost to TVB. In addition to the consent clauses and no-obligation-to-use clause above, there are other clauses in occasional use contracts that would enable TVB to extend the exclusivity of the artistes/singers from its rivals. Some contracts contained the following clauses which prohibit certain categories of work, again subject to TVB consenting otherwise.

Clause d [...] [appear in [...]some one-show and [...] serial-based contracts]

Clause e [...] [appear in [...]some serial-based contracts]

Clause f [...] [appear in [...]some serial-based contracts]

164. TVB has also inserted a clause in a vast majority of its singer contracts that prohibits its contracted singers' music videos from appearing on other local TV stations. A typical clause is as follows:

Clause g [...]
[appear in [...]a vast majority of singer contracts]

165. The extent to which a majority of artistes and singers contracted with TVB through occasional use contracts are "exclusive" depends on whether the requirement to seek consent amounts to *de facto* exclusivity, and therefore prevents broadcasters from accessing artistes and singers.

166. On the one hand it could be argued that the "seek consent" clause has a limited effect on rival's ability to access artistes/singers. This is because TVB has stated that it has given consent to all artistes/singers who have sought permission to work elsewhere; relatively few artistes have asked for consent to work elsewhere; and the evidence from rival broadcasters of the instances where artistes/singers were

prevented from working with them due to this clause appears somewhat limited.

167. However, TVB has only approved a relatively few instances of artistes/singers seeking consent and this could be as a result of the presence of the restrictive clauses which deter artistes/singers from seeking consent and broadcasters from approaching TVB artistes/singers. Potentially, TVB artistes/singers may be deterred from asking permission to work elsewhere if they are concerned that making such an approach would have detrimental effects on their future careers with TVB.

168. The Authority has examined the operation of the consent mechanism in details to determine if consent is rarely given and that the exclusivity clauses listed above do amount to *de facto* exclusivity.

169. The Authority has analysed the consent approval statistics provided by TVB. According to information provided by TVB, the number of applications received and approved by TVB for outside work is shown at Table 5. During the period between 2007 to 2010 inclusive, TVB received a total of [...] (a few dozens) outside work applications from artistes on one-show or serial-based contracts, all of which were reported to be approved.⁴² In particular, TVB received [...] (very few) outside work application from one-show artistes in 2007, [...] (very few) in each year of 2008 and 2009 and [...] (very few) in 2010. Similarly, TVB received only [...] (very few) applications from artistes on serial-based contracts in each year of 2007 and 2008, [...] (very few) in 2009 and [...] (very few) in 2010. And TVB has received [...] (very few) applications from the singers they contracted with during the period and [...] (very few) notifications for singers to appear on other TV broadcasters⁴³. These are staggeringly low numbers given the number of serial-based, one-show and singers contracts TVB had during this period were [...] in 2007, 2008, 2009 and 2010 respectively⁴⁴.

Table 5. Applications to TVB for outside work consent

	No. of outside work applications received		
	One-show artistes	Serial-based artistes	Singers
2007	[...]	[...]	[...]
2008	[...]	[...]	[...]
2009	[...]	[...]	[...]
2010	[...]	[...]	[...]

(Outside work applications were received from a small number of one-show and serial-based artistes from 2007 to 2010.)

Source: TVB's letter to HKBA dated 31 March 2011

170. None of the above approvals by TVB between 2007 and 2010 involved artistes working for TVB's rival TV stations in Hong Kong. Many of them are public organisations [...].

⁴² TVB letter dated 31 March 2011 at pages 2-3

⁴³ TVB letter dated 31 March 2011 at page 4

⁴⁴ Number of one show and singer contracts - TVB letter dated 31 March 2011; Number of serial-based contract - TVB letter dated 18 August 2011.

⁴⁵ TVB letter dated 18 August 2011 at page 3

171. The Authority considers it quite unreasonable that none of the local TV stations wanted to use at least one of TVB's numerous artistes or singers in their shows over a four-year period, while TV stations outside of Hong Kong and public and semi-public entities in Hong Kong did. Some of these artistes are very popular in Hong Kong. For example, all of the leading artistes starred in the top 200 programmes in Hong Kong in 2010 were employed by TVB and some of them were on occasional use contracts. There no doubt must have been demand for TVB's artistes from the other local TV stations during the four-year period.

172. Furthermore, a vast majority of them speak Cantonese as their first language, and would have been able to appear in local TV productions. It seems likely that the possible explanation for the lack of rejected approval by other local TV stations for TVB's artistes/singers is that the artistes and singers were aware of the futility of the request and hence did not bother with it. It also seems likely that many of them may fear retaliation by TVB, such as being denied opportunities to appear on TVB's programmes or given fewer number of prizes in TVB's awards presentations (Please see paragraph 266).

173. Therefore, the above statistics suggest that even though it is theoretically possible for TVB artistes/singers to obtain consent from TVB to appear on rival local TV stations, in reality, the consent clauses in the artiste and singer contracts impose *de facto* exclusivity. Rival TV stations' access to TVB's vast inventory of artistes on one-show, serial-based and singer contracts is effectively foreclosed.

174. As mentioned previously, in all of the contracts between occasional use artistes and TVB, there is a clause stating that TVB is not under an obligation to use the contracted artistes. The data provided by TVB seems to suggest that there are a significant number of artistes under one-show, serial-based and singer contracts who are not fully engaged by TVB during the contractual period and would be fully capable of rendering their services to rival local TV stations, yet are still subject to the exclusivity terms. TVB submitted data on the frequency with which artistes and singers were involved in different numbers of shows. From this analysis, we know that over the period 2007-2010, artistes on one-show contracts performed in [...] shows per year, artistes on serial-based contracts performed in [...] shows per year and singers performed in [...] shows per year. Table 6 below shows how many and what proportion of the occasional use artistes appeared in [...] shows during 2007 - 2010. Performing in [...] shows per year would be equivalent to working slightly less than [...] a fortnight. Therefore, we would suppose that working any less than this would leave an artiste with time available to devote to other projects.

Table 6. Minimal use of occasional use artistes ([...] shows / year)

Year	No. / % of occasional use artistes performing in [...] shows		
	One-show	Singer	Serial-based
2007	[...]	[...]	[...]
2008	[...]	[...]	[...]
2009	[...]	[...]	[...]
2010	[...]	[...]	[...]

(Almost all singers and some serial-based artistes from 2007 to 2010, a significant proportion of one-show artistes from 2007 to 2009 and a vast majority of one-show artistes in 2010 have low utilisation rates during their contractual periods.)

Source: Data submitted to the Authority by TVB.

Note: According to the Authority's understanding, the number of shows is calculated based on an artiste's appearance in the final edited version of a programme. If the artiste's performance is not included in the final edited version, his performance will not be counted regardless of the time he spent on shooting. The calculation of programme time also varies from artiste to artiste, but "one show" is commonly 0.5 to 1 hour for dramas.

175. In fact, given the unique nature of one-show contracts, which only commit TVB to deploy the artiste at issue in one show at minimum during the contractual period, and the low rate TVB pays many of these artistes, the Authority is of the view that TVB could have used these contracts expressly to tie up artistes to deny rivals' access to them. This is especially true for artistes who had low utilisation rates during their contracts. As set out in Table 6 above, in 2007, [...]a significant proportion of its one-show artistes performed in fewer than or up to [...] shows. In fact, [...]some of them performed only up to [...] shows. In 2008, [...]a significant proportion of its one-show artistes performed in fewer than or up to [...] shows. In 2009, [...]a significant proportion of them performed in fewer than or up to [...] shows⁴⁶. The case is even more obvious in the case of singers. A review of utilisation rates suggests that TVB does not even come close to fully engaging its singers during the contractual period. As illustrated in Table 6 above, only [...] [...]some singers in 2007, [...] [...]some in 2008, [...] [...]some in 2009, and [...] [...]none in 2010 were put on more than [...] shows.⁴⁷ In fact, [...]a significant proportion of TVB's singers had a utilisation of [...] show during those years [...]. The Authority is of the view that these singers are forced to sit idle and required to turn away potential engagements offered by other TV stations because of TVB's exclusivity provisions.

176. The cost of failure to utilise a particular one-show artiste during the contractual period [...] is the agreed-upon fee for one show by that artiste. Under one-show contracts, TVB is only obligated to use the contracted artiste for a minimum of one show. Based on the information provided by TVB, [...]% of them received

⁴⁶ TVB letter dated 31 March 2011 at page 2

⁴⁷ TVB letter dated 31 March 2011 at page 3

equal to or less than \$[...] per show in 2007, [...]% received equal to or less than \$[...] per show in 2008, [...]% received equal to or less than \$[...] per show in 2009⁴⁸.

177. For a vast majority of these one-show artistes, the cost to TVB of leaving them idle is clearly not substantial. Take 2009 as an example. Assuming that the average one-show artiste [...] receives \$[...], the cost to TVB of leaving all these artistes idle would only amount to \$[...]. Using estimates that are most favorable to TVB, and assuming that these artistes all received [...], the cost to TVB of leaving all these artistes idle would still only amount to \$[...].

178. Similarly, the cost to TVB for contracting with singers is also very low. According to information provided by TVB[...]⁴⁹, in the four-year period from 2007 - 2010, at least [...]% of the singers received a rate of \$[...] for each show performed for TVB. According to a record company executive, the record company sometimes even needed to cover the costs of singer make-up, hair-do, costumes, and other incidental expenses itself as TVB's provision of such services was not up to its standards. The record company executive estimated the cost to be about \$[...] per show. In other words, TVB was able to obtain services at minimal cost from a vast majority of singers in Hong Kong during the investigation period between 2007 to 2010 and TVB was able to keep them exclusive to TVB at minimal cost.

179. Set against its turnover in 2010 of \$4,675 million and profit of \$1,330 million⁵⁰, it is obvious that such a cost is minuscule and well affordable to TVB. In other words, the Authority is of the view that the no-obligation-to-use clause together with the low per-show fee for many of these one-show artistes and singers allow TVB to sign them up on an exclusive basis at low cost to itself to foreclose rivals' access to these artistes.

180. TVB offered an array of defenses or justifications for its exclusivity provisions. The Authority has taken into account these defenses or justifications in determining the legality of TVB's conduct to the extent that whether it is objectively justified. TVB's defenses and Authority's analysis are set out below.

Unhealthy Competition

181. In response to Clauses a, b, d, e, f and g above (see paragraphs 158-164), TVB said that "It is, however, our contention that such clauses are justifiable and necessary to prevent unhealthy competition between television stations."⁵¹ To illustrate what it meant by unhealthy competition, TVB referred to a single incident in 1994 when both TVB and ATV broadcast *Judge Pao* (包青天) at the same time for months. TVB proceeded to argue that "[o]ne way to prevent such unhealthy competition is to engage an artiste *on an exclusive basis* so that rival TV stations could not produce same or similar programmes with the same artiste within a relevant period of time."⁵²

⁴⁸ TVB letter dated 31 March 2011 at page 2

⁴⁹ TVB letter dated 31 March 2011 at page 4

⁵⁰ 2010 TVB Annual Report

⁵¹ TVB letter dated 11 November 2010 at page 5; TVB letter dated 18 August 2011 at Appendix pages 7-8.

⁵² TVB letter dated 11 November 2010 at page 5

182. The Authority finds this line of argument problematic for a number of reasons. First of all, it is not TVB's role to decide whether competition is unhealthy. There is a presumed preference for competition in competition law. Parties are expected to compete rigorously and are not allowed to use private means to stifle competition. If there is unhealthy competition, it is the responsibility of the government, and not private parties, to decide on remedy by legislation or other administrative means. It is not up to TVB to use private contractual terms to restrict or attempt to regulate competition. TVB's justification that the clauses are necessary to prevent "unhealthy" competition by engaging artistes on an exclusive basis confirms that the purpose of these clauses is to prevent, distort or substantially restrict competition. This is no different, certainly not in spirit, from a number of bidders rigging bids under the excuse of eliminating unhealthy competition among them.

183. Second, even if avoiding simultaneous broadcast of the same programme is the professed goal of TVB's exclusivity provisions, the provisions are clearly disproportionate. TVB need not require outright exclusivity. All that it needs to do is to prohibit its artistes from appearing on shows of rival TV stations that are identical or substantially similar to TVB's offering. That would address the problem.

184. It is also worth noting that the kind of simultaneous broadcast problem that TVB allegedly wants to prevent with its exclusivity provisions practically can only exist with acquired programmes. What is clear from the foregoing discussion is that TVB's proffered solution cannot prevent simultaneous broadcasting presented by *Judge Pao*. If TVB was concerned about the simultaneous broadcast of acquired programmes, it could acquire them on an exclusive basis. That would solve TVB's concern without the need to resort to imposing exclusivity on its artistes. The Authority considers a single incident happened once in 1994 cannot justify the imposition of exclusivity on such a large number of artistes that effectively foreclosed rivals' access to them.

Production or Broadcasting Schedule

185. In response to Clause a above (see paragraph 158), TVB said that the clause "is to ensure that the artiste will not perform in situation where it could conflict with our production or broadcasting schedule."⁵³ Similarly, for Clause c, TVB said that the clause is "to study whether the singer's intending outside engagement will conflict with the production, broadcast or promotion schedule of our programme for the singer, or any other legitimate interest of TVB; and if yes to discuss with the singer concerned whether there is any feasible way to resolve the conflict."⁵⁴

186. The Authority finds that even assuming that it is legitimate for TVB to secure priority on a large number of artistes over its rivals, the means used by TVB is disproportionate to the ends. TVB could have easily avoided scheduling conflict by means less drastic than requiring outright exclusivity. TVB could have instead stipulated priority in the contracts so that the contracted artistes would have been

⁵³ TVB letter dated 16 October 2009 at pages 2, 4

⁵⁴ TVB letter dated 18 August 2011 at Appendix page 8

obligated to give TVB priority over rivals with respect to access to their services. No TV station should be able to impose terms on artistes or singers that immunise itself from all possible scheduling conflicts. Therefore, the Authority rejects this defense as a justification for exclusivity on proportionality grounds.

187. The Authority, however, questions whether TVB should be allowed to secure for itself systematic priority access to artistes whom TVB does not deem to be valuable enough to contract on a full time or substantial basis. The Authority believes that TVB should be made to compete with other TV stations for access to such artistes. TVB cannot be allowed to secure priority or even exclusive access to artistes in advance by paying a small or minimal fee to them. Competing for artistes is as much part of the competition in TV sector as competing for viewers and advertisers. If TVB decides that a particular artiste is not valuable enough to it to be secured on a full time basis, TVB should not have exclusivity on the artiste and other local TV stations should have the same access to that artiste.

188. With respect to one-show contracts, TVB attempted to justify them by analogising them to retainer contracts for professional services “where the firm would agree to provide services to clients on a priority basis and charges would only be payable when work has been done. The show rate should not therefore be regarded as a remuneration package.”⁵⁵ Most businesses only need one or at most a handful of professional services firms to supply services to them. Therefore, most business would only enter into a small number of retainer contracts. Unfortunately for TVB, if one were to push the retainer contract analogy further, what TVB has done with the one-show artistes amounts to a firm entering into retainer contracts with most of the prominent auditing firms in town to ensure that rivals cannot obtain the service they need.

Protect TVB Investment

189. In response to Clause a regarding singers (see paragraph 158), TVB said that “this requirement is necessary to protect TVB investment in providing exposure and opportunities for the artiste on its platforms and to ensure that TVB’s production or broadcasting schedules will not be affected”⁵⁶.

190. The Authority distinguishes between genuine investment and mere provision of exposure on TVB. Here it is instructive to juxtapose TVB’s investments on artistes on [...]full-time contracts on the one hand and its investments on one-show, serial-based and singer contracts on the other hand. [...]⁵⁷ The Authority deems these to be genuine investment that may justify exclusivity under the appropriate circumstances. And the Authority agrees that TVB has a legitimate interest to protect such genuine investments by way of contracts of a permanent nature[...]. The mere opportunity to appear on TVB, however, does not constitute an investment in an artiste. All that TVB has allowed the artiste to do is to perform in a show, which no doubt is valuable to the artiste, but also to TVB. Based on TVB’s rationale, TVB would be allowed to enter into exclusivity arrangements with

⁵⁵ TVB letter dated 10 February 2010 at Attachment A, page 1.

⁵⁶ TVB letter dated 10 February 2010 at Attachment A page 4

⁵⁷ TVB letter dated 16 October 2009 at page 5

any artiste or singer that appears on TVB. That would be clearly disproportionate to the need to protect genuine investments in an artiste or singer.

191. As explained above, the Authority questions whether TVB should be allowed to secure for itself systematic priority access or even exclusivity to artistes whom TVB does not deem to be valuable enough to contract on a full time or substantial basis. The Authority believes that TVB should compete with other TV stations for access to such artistes and TVB cannot be allowed to secure priority or exclusive access to artistes in advance by paying a small or minimal fee to them.

Protect Value of Music Videos and Sound Recordings

192. In response to Clause g (see paragraph 164), TVB said that the clause is to “protect the promotional value of the music videos and hence the commercial value of the relating sound recordings, which in turn safeguards the commercial interest of the singers and their record companies”⁵⁸.

193. The Authority considers that it is odd for TVB to decide how to protect the commercial value of the music videos of the singers. If the record companies determine that the commercial value of their videos are enhanced by showing them on multiple channels, as some of them seem to believe according to the interviews, the clause would actually work to the record companies’ disadvantage. In any case, there is no reason to think that the record companies cannot decide for themselves how best to protect their interests.

Unscrupulous Exploitations

194. In response to Clause d above (see paragraph 163), TVB said that this clause is “to protect the artiste concerned against unscrupulous or inappropriate exploitations of his/her appearance, performance or other personal services by a third party... This clause is usually inserted in contracts for engagement of kid performers who may not have the necessary knowledge and experience in identifying the nature and effects of their outside engagements.”⁵⁹.

195. It is unclear how obtaining TVB’s approval would prevent unscrupulous or inappropriate exploitations of an artiste’s likeness. The Authority considers that it is in as much of an artiste’s interest as TVB’s to protect his own image. If he wants to avoid unscrupulous exploitation of his likeness, the artiste can simply refuse to appear on other TV stations’ programmes. And if he voluntarily appears on other stations’ programmes, he presumably has consented to the exploitation of his likeness by other stations. If the exploitation exceeds the scope agreed upon by the artiste and other stations, it is a matter of contractual dispute between them and TVB has no right to interfere with it. The artiste can resort to contract law, not TVB’s prior approval, to protect his own interest.

196. TVB advanced the argument that the clause was mainly inserted into contracts with “kid performers who may not have the necessary knowledge and

⁵⁸ TVB letter dated 18 August 2011 at Appendix page 8

⁵⁹ TVB letter dated 11 August 2011 at page 7

experience” to protect themselves. However, information provided by TVB confers this clause was applied to [...] artistes. [...] of these artistes are indeed child artistes; however, [...] of the artistes whose contracts contain the clause are not child artistes. Consequently, the justification proposed by TVB does not apply in all cases. In addition, the child artistes can turn to their parents for help. What TVB has essentially done with the clause at issue is to appoint itself as the guardian for these kid performers. The Authority believes that these performers’ interests would be better looked after by their parents. In any case, the Authority finds TVB’s proffered solution to the alleged problem, which is to prohibit all appearances on rival stations, scrupulous or not, to be clearly disproportionate to the problem being addressed. The Authority therefore rejects this defense.

Other Television Stations Adopted Similar Restrictive Clauses

197. In response to the exclusivity clauses in general, TVB said that “[i]n fact, the provisions in our artiste contracts are less restrictive than those of the other television stations.”⁶⁰ [...]⁶¹.

198. Restrictive clauses in agreements between firms that do not have market power are unlikely to prevent, distort or substantially restrict competition. However, where one or both parties to the agreement have some market power the restrictions could prevent, distort or substantially restrict competition. The Authority has set out in the Application Guidelines that the Authority would not ordinarily consider that there is a material risk to competition if the licensee in issue does not hold at least 25% of the relevant market. Given TVB is dominant in the markets for TV viewing and TV advertising, such restrictive clauses could have the purpose or effect to prevent, distort or substantially restrict competition.

No Obligation to Use

199. In response to leaving artistes idle and the no-obligation-to-use clause, TVB made the following arguments –

“There is no room for TVB to leave these artistes idle after recruiting them. In addition, as a listed company, TVB is accountable to its shareholders for every dollar it spends on its daily operations. There is no way for TVB to intentionally run its business at loss by leaving the engaged artistes idle or by making excessive payments to the artistes”⁶²

“With regard to the “no obligation to use” clause, this is in fact a boilerplate clause globally adopted in an artiste engagement system...The purpose of this clause is to protect the company that engages the artiste from being sued by the artiste for loss of opportunity, publicity or other sufferings in the event the company fails to use the artiste’s services as contemplated...”⁶³

⁶⁰ TVB letter dated 11 November 2010 at page 7, paragraph 19

⁶¹ TVB letter dated 11 December 2010 at page 1

⁶² TVB letter dated 11 November 2010 at pages 8-9

⁶³ TVB letter dated 11 November 2010 at page 9

200. However given the low costs involved in entering these contracts, especially the singer contracts, the costs of leaving these artistes and singers idle are negligible. Moreover, as the benefits to TVB from denying rivals' access to these artistes and singers outweigh these costs, TVB would not be incurring a loss at all by signing up artistes and singers and leaving them idle. TVB also argued that the no-obligation-to-use clause was in fact globally adopted in an artiste engagement system. However the fact that the no-obligation-to-use clause may be a standard contractual clause elsewhere does not mean that it cannot exert anticompetitive effects when combined with TVB's market dominance in Hong Kong and the exclusivity clauses in its artiste and singer contracts. As we explained previously, given the low per-show fee for many of the one-show artistes and singers, the no-obligation-to-use clause, when used in conjunction with the consent clauses, could enable TVB to warehouse artistes and therefore prevent, distort or substantially restrict competition by preventing other broadcasters from accessing artistes at minimal cost to TVB. With the noobligationtouse clause, TVB has been able to sign up as many artistes and singers as possible without any regard to its actual anticipated needs for artistes and singers. Inability to utilise a particular artiste or singer will result in no consequence for TVB except for the show fees, which are very low in the case of a vast majority of artistes and singers. The Authority is of the view that in the local TV sector, the clause has the purpose of exerting anticompetitive effects when combined with TVB's other practices.

201. TVB's exclusivity clauses are augmented by a few other clauses in its serial-based and one-show contracts, including the clause that prohibits its contractual artistes' original voice from being used in TV productions featuring their images broadcast by other local TV stations (the no original voice clause), and the clause that prohibits its contractual artistes from appearing at the promotional activities of TV productions in which they star but which is broadcast by other local TV stations (the no promotion clause). For singers, apart from the exclusivity clauses, there is also the tacit agreement of the no Cantonese policy. Details of the no original voice, no promotion and no Cantonese policies are discussed in the following sections.

(b) Effect of the Exclusive Clauses

Capability of Foreclosure

202. TVB's various exclusivity clauses and the associated no original voice policy, the no promotion policy and no Cantonese policy (to be discussed in the next sections) in one way or another have the effect of limiting to a material degree the extent to which rival broadcasters can obtain key inputs into their self-produced programmes for which artistes services are a key input and this has the effect of making rivals to TVB less able to expand their output and compete with TVB. In the absence of these restrictions rivals would have greater access to artistes. They would be able to obtain higher quality inputs and this would make their self-produced programmes requiring artistes' input more attractive to viewers and in turn advertisers. This would enable them to generate increased revenues and this would improve their competitive position versus TVB.

203. The clauses in TVB's one-show, serial-based and singer contracts require TVB's artistes to deal exclusively with TVB and with no other local TV stations.

The three associated policies reinforce the exclusive effects of the arrangement. In particular, what TVB has essentially done is to secure for itself exclusive supply of a large portion of an essential input in TV and music programme production, i.e. artistes and singers. The main possible anticompetitive effect of such conduct is to foreclose rivals' access to the essential input, or to raise the costs of rivals' access to such input that the rivals' ability to compete with TVB is impaired. This impairment will ultimately cause harm to consumers by resulting in a higher price of the relevant product (in the context of the instant case, this most likely only applies to the pay TV services) or, more relevantly for our case, a deterioration of quality of rivals' self-produced TV programmes for which artistes services are a key input.

204. Paragraph 21 of the Application Guidelines addresses restrictive or exclusive clauses in artiste contracts. It states that while "it is unlikely that any individual artist's contract with a licensee in itself could have the purpose or effect of preventing, distorting or substantially restricting competition", restrictive clauses in artiste contracts may be anticompetitive if "the restrictive terms in the agreement [are] repeated in a number of similar contracts affecting other artists; and the licensee in question [is] dominant in the relevant market." This clearly applies to our case.

205. The Authority is of the view that TVB's exclusivity provisions prevent, distort or substantially restrict competition by foreclosing rivals' access to artistes and singers, which are an essential input in self-produced TV and music programmes requiring artistes' input. The Authority's analysis focuses on the extent to which TVB's rivals' access to artistes and singers has been foreclosed by TVB's contractual clauses and policies.

206. In the analysis of the effects of the various exclusive clauses in foreclosing competition, the Authority draws on relevant guidelines and case law from other jurisdictions on exclusive dealing arrangements as a guidance to assist the analysis. A focus on the foreclosure effects of a vertical agreement is well recognised internationally. In the *European Commission Guidelines on Vertical Restraints*, issued in 2010, the first potential anticompetitive effect of a vertical restraint identified by the European Commission is "anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion."⁶⁴

207. In paragraph 111, the European Commission identifies a range of factors that may be relevant to the evaluation of the competitive effects of vertical agreements, including "(a) nature of the agreement; (b) market position of the parties; (c) market position of competitors; ... (e) entry barriers; ... (h) nature of the product [or service]".⁶⁵ More concretely, the European Commission suggests a focus on the market share of the party imposing the exclusivity obligation, the extent of foreclosure of the supply of input, the duration of exclusivity, entry barriers to the supplier level of the market, and countervailing power of suppliers.⁶⁶

⁶⁴ European Commission Guidelines on Vertical Restraints 2010 OJ [2010] C 130/01, at para. 100(a).

⁶⁵ European Commission Guidelines on Vertical Restraints 2010 OJ [2010] C 130/01, at para. 111.

⁶⁶ European Commission Guidelines on Vertical Restraints 2010 OJ [2010] C 130/01, at paras. 195 to 198.

208. With respect to the market share of the party imposing exclusivity, the European Commission notes that “[w]here a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anticompetitive effects.”⁶⁷ The Authority has already found TVB to be dominant in the relevant market of all TV viewing, which is the downstream market in the context of the instant case. And TVB has required its occasional use artistes to supply their services exclusively to it, even though TVB may only been able to utilise them for one show or one series during the entire contractual period. Drawing reference to the European Commission’s guidelines, TVB’s exclusivity provisions *may likely have* significant anticompetitive effects.

Differentiated Intermediate Products

209. The European Commission proceeds to note that for “differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream markets.”⁶⁸ Here, artiste/singer service is clearly a differentiated product in that the service of every artiste/singer is distinguishable and somewhat unique. Every artiste/singer is perceived somewhat differently by the viewers. Artiste/singer service is an intermediate product in that it is an input in TV production. And competing buyers for artiste/singer service, namely TVB’s competitors in the TV programme service market, are considerably smaller in terms of market share than TVB. This has been discussed in detail in the section on market definition.

Supply Foreclosure

210. The European Commission identified a few other factors to be considered when determining the extent of anticompetitive foreclosure. One of the factors relates to the nature of the exclusivity obligations: the degree of supply foreclosed. It is important to emphasise that the foreclosure need not be complete. While the literal meaning of foreclosure may connote complete blockage of access, foreclosure in competition law merely requires a significant restriction of access (i.e. *de facto* exclusivity). In the previous section, it has already been estimated that TVB contracted with a significant proportion of artistes and singers on contract with any of the Hong Kong main broadcasters. We have also shown that most of the artistes on one-show, serial-based and singer contracts were not fully engaged by TVB during the contractual periods and were fully capable of rendering services to rival local TV stations. The Authority is of the view that the stipulation of exclusivity for these artistes is unjustified as these artistes/singers are forced to sit idle and required to turn away potential engagements offered by other TV stations because of TVB’s exclusivity provisions. The Authority believes that TVB’s rivals ability to compete with TVB, by deploying the best artistes/singers available in the market, has been impaired by TVB’s exclusivity provisions, to the extent that these artistes/singers are valued by the viewers, and this is likely to be the case given that TVB has at its disposal most of the popular artistes in Hong Kong, many of whom are on one-show and serial-based contracts. This is even more pervasive in the case of singers, as some

⁶⁷ European Commission Guidelines on Vertical Restraints 2010 OJ [2010] C 130/01, at para. 194.

⁶⁸ European Commission Guidelines on Vertical Restraints 2010 OJ [2010] C 130/01, at para. 199.

record company executives independently confirmed that over 90% of the singers in Hong Kong have signed singer contracts with TVB. The end consumers of the TV programme services market, all the TV viewers in Hong Kong, suffer harm as they are denied higher quality TV programmes with their preferred artistes and singers.

211. In light of the foregoing, the Authority is of the view that the correct measurement of foreclosure should be based on the percentage of one-show, serial-based artistes and singers, which the Authority deems to be generally available to take on engagements from other TV stations, accounted for by TVB among all such artistes, particularly high value artistes, in Hong Kong. The Authority considers that this is a sufficiently large percentage to support a conclusion that a substantial degree of foreclosure has resulted from TVB's exclusivity provisions.

212. Such an exclusionary strategy has been condemned by both courts in the U.S. Acquisition by a dominant firm of inputs of production, including employees, not for the purpose of utilising them, but in order to deny rivals' access to them, has been repeatedly held to violate antitrust law in the U.S. As early as 1911, the U.S. Supreme Court held that the acquisition of production plants by American Tobacco for the purpose of denying rivals' access to them is illegal under section 2 of the Sherman Act.⁶⁹ Subsequent cases have held that the hiring by a dominant firm of rival's employees for the purpose of deny rivals' access to these employees is exclusionary and illegal under section 2 of the Sherman Act.⁷⁰ In those cases, only a handful of important employees were hired by the dominant firm at issue to deny rivals' access to them. In the instant case, TVB has denied rivals' access to a large number of artistes and singers.

Entry Barriers

213. The European Commission identified entry barriers at the supplier level as a relevant consideration. While there may exist an available supply of "new", inexperienced artistes/singers, supply of more experienced artistes/singers is likely to be more limited. There are a number of barriers which could limit supply of high quality artistes/singers: for example "high quality artistes" would need to learn a range of skills relevant to their work on TV; they may need to be trained and coached to improve their skills; and the artistes may need to develop and build a media profile. There would be significant resources required to "nurture" talent and the returns on the investment could be uncertain. However, even nurturing talent would not be a suitable approach in all cases. For example it could not be used to respond to short term changes in demand given the length of time that it would take to nurture the talent. It would not be an appropriate strategy to respond to ad hoc demand for artistes/singers to appear as a guest on a limited number of self-produced programmes given the potential costs to broadcasters of nurturing the artiste. Finally, in many cases a broadcaster may have demand for artistes/singers that are not signed directly to it. For example, if the broadcaster is covering a live event (such as a charity sporting event) featuring artistes/singers contracted with a range of broadcasters it may need to feature these artistes/singers in its programme. There are therefore

⁶⁹ *United States v. American Tobacco Co.*, 221 U.S. 106, 183 (1911).

⁷⁰ See *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990); *Midwest Radio Co. v. Forum Publishing Co.*, 942 F.2d 1294, 1297 (8th Cir. 1991); *Wichita Clinic v. Columbia/HCA Healthcare Corp.*, 1997 WL 225,966, 1997-1 Trade Cas. ¶71,829 (D. Kan.).

substantial entry barriers in the supply of artistes/singers.

Duration of Exclusivity

214. In terms of duration of exclusivity, even though most one-show, serial-based and singer contracts are officially only of [...] duration, the exclusive relationships between TVB and many of these artistes seem to have persisted over a period. First, some of these contracts provide for renewal. It is unclear whether artistes may refuse renewal. TVB stated that they might,⁷¹ while the contractual language is unclear. Secondly, from paragraph 96 above, it can be seen that TVB has persistently contracted with a large proportion of artistes (i.e. [...]% of all the artistes on contract with the main Hong Kong broadcasters each year) over a four-year period. Particularly in the case of singers, record companies have noted that 90% of the singers in Hong Kong have signed singer contracts with TVB.

Suppliers' Countervailing Power

215. The European Commission also referred to the countervailing power of suppliers. For artistes, the suppliers in the instant case are of course the artistes themselves. The artistes, apart from the most famous and popular ones, have little countervailing bargaining power vis-à-vis TVB. Given TVB's immense popularity among viewers, individual artistes who want to maintain a regular exposure on Hong Kong TV would not risk offending TVB. As compared to individual artistes, the countervailing power of record companies in the case of singers is comparatively greater. However, a number of record company executives have informed the Authority that they have little choice but conform to TVB's wishes. This shows that the record companies' countervailing power is still relatively small.

Effect of Foreclosure

216. Apart from the capability of foreclosure, the Authority has analysed evidence on the foreclosure effect of TVB's exclusivity contract clauses. The foreclosure effects have been confirmed by other licensees. ATV reported to the Authority at least two instances where the singers contacted by ATV refused to appear on its programmes for fear of reprisal by TVB and nine instances which might have been the results of the restrictions. Another licensee reported 10 instances where TVB artistes declined invitations to appear in its programming between 2008 and 2010 as a result of the restraints imposed by TVB. The licensee informed the Authority that “[i]n most of the cases, we simply have not approached the artistes knowing that they would decline our offers since they are either in a contractual relationship with TVB and/or are very mindful of possible harm to their relationship with TVB if they are to accept an opportunity from [us].” Instead, the licensee commissions independent programmes to circumvent TVB's restrictions. Some artistes apparently believe that TVB will be less offended by such an indirect approach. This approach, however, imposes a higher cost on rival stations. In addition, as reflected in the Authority's analysis, the majority of the most popular programming is self-produced whereas third party programming does not tend to attract the highest ratings.

⁷¹ TVB letter dated 10 February 2010 at Attachment A, page 2.

217. The Authority was informed by a licensee that “[i]t is common knowledge in the industry that TVB has leveraged its market power to limit the willingness or ability of artistes to appear in non-TVB shows...” The prevalence of the exclusivity provisions and their impact on the industry is underscored by this executive’s observation that “many alleged practices have been in the market so long that there exists a huge risk that the concerned would take such practices as the norm and consider them acceptable to this industry.”

218. Similarly, both singers and record company executives interviewed by the Authority have informed the Authority that TVB contracted singers do not perform for other local TV stations. A record company executive informed the Authority that its company had not made use of the consent mechanism because it was understood that consent would only be granted for RTHK TV productions. A singer also said that although there was a consent mechanism laid down in the contract, singers would not seek consent in practice. It is not possible for him/her to perform on other local TV stations at all. One record company executive and one singer also told the Authority that singers do not accept interview requests by ATV. All these interview testimonies suggest that TVB maintains a consent mechanism that amounts to de facto exclusivity and these exclusivity clauses have a direct foreclosing effect by preventing rival stations’ access to its contracted artistes and singers. The exclusivity provisions in artiste contracts artificially impair rivals’ ability to produce high-quality TV productions to compete with TVB or make it more expensive for rivals to produce or acquire TV programmes requiring artistes’ input.

219. These exclusivity provisions in singer contracts also denied rivals’ access to 90% of the Hong Kong singers who otherwise would have been available to provide their services to the other TV stations. To the extent that these singers are valued by the viewers, which is highly likely as they account for 90% of the singers in Hong Kong, the end consumers of the TV programme service market, all the TV viewers in Hong Kong, suffer harm as they are denied higher quality music programmes with their preferred singers. In fact, one record company executive informed the Authority that even the quality of TVB’s programmes have suffered due to the lack of competition from other TV stations, which are unable to produce high-quality TV programmes because of TVB’s singer exclusivity. The harm on competition created by TVB’s exclusivity policy could have far-reaching effect.

220. As set out in paragraph 96, TVB has contracted with a significant proportion of the available pool of artistes and singers in Hong Kong. The exclusivity provisions in TVB’s contracts are imposed on the majority of the pool of available key talent. This limits rivals’ access to artistes, which are a necessary input in order to be able to produce general entertainment shows as they are the most important drivers of ratings and hence advertising revenues. The contractual restrictions therefore prevent, distort or substantially restrict competition by affecting rivals’ ability to compete in the TV programme service market.

(c) Conclusion

Section 13 – Purpose

221. Based on the evidence examined by the Authority above, the Authority is of the view that clauses a, b and c have the purpose of foreclosing rival's access to artistes and singers (whose services represent very important content and inputs into programme making) hence preventing, distorting or substantially restricting competition in the relevant market, violating section 13 of the BO. As explained above, the concerned clauses to a material degree have the purpose of seeking to impose a significant degree of exclusivity upon artistes vis-a-vis TVB. In addition, when these clauses are used in conjunction with the no-obligation-to-use clause, they could allow TVB to warehouse artistes at minimal cost. Clauses d - g also have the purpose of enabling TVB to extend the exclusivity of the artistes/singers from its rivals. The Authority finds that TVB has not provided any reasonable objective justifications for these clauses. In fact, TVB's explanation that the clauses are necessary to prevent "unhealthy" competition confirmed that the purpose of these clauses is to prevent competition.

Section 13 - Effect

222. We have established in Chapter VI that TVB has a substantial degree of market power. Indeed, for the purposes of section 14, the Authority has concluded that TVB possesses a dominant position. The degree of market power found to be held by TVB is a relevant factor in the Authority's assessment of the effects of the conduct in question. Based on the information provided by other broadcasters, record companies and singers, the Authority is of the view that the consent mechanism is not used in practice and rival broadcasters have difficulty accessing artistes and singers on contracts with TVB. It is difficult for artistes to break out of the de facto exclusivity on their own as they have little countervailing supplier power. The complained of provisions in artiste contracts artificially impair rivals' ability to produce high-quality TV productions to compete with TVB and have also raised rivals' costs by making it more expensive for them to produce or acquire TV programmes featuring artistes. 90% of the singers are also foreclosed from rival access and all the TV viewers in Hong Kong suffer harm as they are denied higher quality music programmes with their preferred singers. As such, the Authority is of the view that the conduct in question is both capable of foreclosing and has foreclosed rivals' access to artistes and singers, and hence has the effect and/or is capable of having the effect of preventing, distorting or substantially restricting competition in the relevant market.

Section 14 – Purpose and Effect

223. In the market definition study, we have demonstrated that TVB has a dominant position in the all TV viewing and advertising markets. Based on the evidence examined by the Authority above, the Authority is of the view that clauses a, b and c have the purpose of foreclosing rival's access to artistes and singers (whose services represent very important content and inputs into programme making) hence preventing, distorting or substantially restricting competition in the relevant market, violating section 14 of the BO. As explained above, the concerned clauses to a

material degree have the purpose of seeking to impose a significant degree of exclusivity upon artistes vis-a-vis TVB. TVB has not provided any reasonable objective justifications for these clauses.

224. In addition, the Authority has also established in the previous section that the relevant clauses have the capability of foreclosing rival's access to artistes and singer and that there is evidence that they have actually exerted such an effect. As such, the Authority is of the opinion that TVB also violates section 14 of the BO.

(B) No Original Voice and No Promotion Policies

(a) Purpose of the No Original Voice and No Promotion Policies

225. TVB has implemented the no original voice policy and the no promotion policy in relation to artistes and the no Cantonese policy in the case of singers (details to be discussed in the next section). The clear purpose of these clauses is to hinder the ability of rivals to TVB from using artistes who have worked for TVB. This further impairs rivals' ability to obtain their services of TVB's artistes/singers.

No Original Voice and No Promotion Clause

226. The no original voice and the no promotion policies are encapsulated in TVB's one-show contracts and serial-based contracts in this standard clause:

[...]

This clause is incorporated in [...]a significant proportion of one-show contracts and [...]serial-based contracts. The prevalence of these two policies is clear.

227. The no original voice policy prohibits TVB's contractual artistes' original voice from being used in TV productions featuring their images broadcast by other local TV stations. It requires other TV stations to dub the voices of TVB's artistes if they wish to acquire overseas TV productions featuring these artistes. In the light of their popularity, it is not uncommon for TVB artistes to be invited to appear in TV productions by production houses or TV stations outside Hong Kong, mainly in the Mainland and Taiwan. Other local TV stations have been known to acquire the rights to broadcast these overseas productions. Under the no original voice policy, the other local TV stations must dub TVB's artistes' voices before they can broadcast these overseas productions.

228. This often creates the anomalous situation in which other local artistes in the drama series appear in their original voices except for TVB's contracted artistes, whose voices are dubbed. ATV has provided a few examples of drama series which had to be broadcast with the original voices of TVB's artistes dubbed[...].

229. In fact, TVB confirmed the existence of the no original voice policy. In its letter dated 10 February 2010, TVB stated that it "will normally give consent for its contracted artistes to be engaged in television production of outside parties provided that the production will not be released in the artistes' original voice."⁷² This policy was affirmed in TVB's response to the specific case of [...] and the dubbing of her voice in the series [...], in which TVB confirmed that it "would normally give consent provided that any video production of the artiste should not be released in the artiste's original voice."⁷³

230. The no promotion policy prohibits TVB's contractual artistes from appearing at the promotional activities of TV productions in which they star but which

⁷² TVB letter dated 10 February 2010 at page 3.

⁷³ TVB letter dated 10 February 2010 at page 4.

are broadcast by other local TV stations. This policy means that even if a rival local TV station has acquired the rights to broadcast an overseas TV production featuring a TVB contracted artiste, the station will not be able to procure the presence of that artiste in local promotional activities for the production. This often creates a difficult position for rival TV stations to have to promote their drama series without the leading actor or actress, where the TVB artiste is the leading actor or actress of the series. The promotional activities would be more effective if the leading cast members of the series could be present. ATV has provided a long list of TVB contracted artistes who refused to attend ATV's promotional activities.[...]

231. With respect to the no original voice and no promotion policies, the Authority is of the view that the policies exist and are actively enforced in the light of the prevalence of the relevant contractual clause and the number of examples reported by ATV.

232. With respect to the no original voice and no promotion policies, TVB offered a number of explanations. The Authority relies upon these explanations as evidence that demonstrates TVB's purpose in introducing the no original voice and no promotion policies. These defences and the Authority's analysis are set out below.

Unhealthy Competition

233. TVB said that the no original voice and no promotion clause was "to prevent unhealthy competition in the Hong Kong TV market without unduly restraining the development or livelihood of the artistes concerned."⁷⁴ TVB said that "for instance, our rivals may through a production company, indirectly engage our artistes to produce programmes identical or similar to ours for broadcast on their channels. In order to plug such loopholes, we have stated in our artiste contracts that in the event such outside video production is released on another television station in Hong Kong, the original voice of the artiste concerned will not be released and the artiste will refrain from attending promotional activities for the release of the video on such other television station. These measures are, again, intended for preventing unhealthy competition between television stations in Hong Kong"⁷⁵.

234. The Authority's view on the prevention of unhealthy competition has been thoroughly elaborated in the previous section and will not be repeated here. Similar to the exclusivity clauses, TVB confirmed that the no promotion and no original voice clauses were "to prevent unhealthy competition in the Hong Kong TV market". TVB's justification is not reasonable and proportionate. In fact, TVB's response that the clauses are to prevent "unhealthy" competition confirms that the purpose of these clauses is to prevent, distort or substantially restrict competition.

⁷⁴ TVB letter dated 18 August 2011 at Appendix page 7

⁷⁵ TVB letter dated 11 November 2010 at pages 6-7

Production and Broadcasting Schedule

235. TVB said that “any video production of the artiste to be broadcast in other TV stations in Hong Kong should not contain the artiste’s original voice. This is to ensure that the artiste will not perform in situation where it could conflict with our production or broadcasting schedule.”⁷⁶

236. In most cases, the recording of the artistes’ original voice does not take place separately, but is done during the same time as filming. If the filming of the programme does not conflict with TVB’s production schedule, there is no reason why the simultaneous recording of the artistes’ original voice in the broadcast would create any additional conflict. Even for programmes that record the artistes’ original voice separately and subsequently, it is entirely possible for the production company to coordinate with TVB to avoid the conflict. The Authority is of the view that the no original voice policy is a vastly disproportionate response to potential production conflicts.

237. As to the avoidance of conflict in broadcasting schedule, this argument is tantamount to saying that TVB wants to avoid competition in programming with its rivals. The broadcast of high quality programmes by competing TV channels is the essence of competition. TVB has no right to avoid competition with programmes that feature a certain artiste’s voice simply because it has produced a programme with that artiste before. Similarly, it is difficult to see how the no original voice and no promotion policies would have helped prevent rivals from producing “identical or similar” programmes. It is unclear how any rational business would choose the no original voice and no promotion policies as a solution to the alleged problem. The Authority also believes that the risk of rivals producing an identical programme is overblown and in any case does not justify the policies. The policies needlessly impair rival stations’ ability to compete with TVB while in no way protecting any legitimate interests of TVB’s.

Artistes’ Endorsement

238. TVB said that “the condition imposed is reasonable in that the voice or the appearance of an artiste is considered as an endorsement or support of a product, film, programme, service or event. Artistes are often engaged and paid to attend functions or promotional events. Their services are their personal presence, appearance and/or performance”⁷⁷.

239. The Authority fails to see how the appearance of an artiste’s image or likeness in the drama programmes of other TV stations is less of an endorsement than the presence of his or her voice or his or her attendance in promotional activities. In terms of audience perception, the fact that an artiste has taken part in a drama programme should convey the same level of endorsement, regardless of the presence of his or her original voice or appearance in promotional activities. This argument should therefore be dismissed.

⁷⁶ TVB letter dated 16 October 2009 at page 4.

⁷⁷ TVB letter dated 10 February 2010 at page 3; TVB letter dated 17 August 2009 at page 2

Exclusively Engaged by TVB

240. TVB said that “such restriction is reasonable given the continuous engagement of the artiste by TVB and the regular exposure of the artiste in TVB programmes. Given that the artiste was engaged by TVB exclusively at the time, the artiste obviously felt inappropriate to promote for other stations when she was engaged by TVB at the relevant time”⁷⁸.

241. As demonstrated in the previous section, there are a significant number of occasional use artistes, particularly those under one-show or singers contracts who are not fully engaged by TVB during the contractual period and are fully capable of rendering their services to rival local TV stations, yet are still subject to the exclusivity terms. The Authority considers that TVB could engage artistes exclusively by contracting them on a full time or substantial basis, but not those on occasional use contracts. The Authority believes that TVB should be made to compete with other TV stations for access to such artistes. TVB cannot be allowed exclusive access to artistes in advance by paying a small or minimal fee to them. If TVB has decided that a particular artiste is not valuable enough to it to be secured on a full time basis, TVB should not have exclusivity on the artiste and other local TV stations should have the same access to that artiste.

242. In sum, the Authority is of the view that none of the arguments offered by TVB can objectively justify the no original voice and no promotion policies.

(b) Effect of the No Original Voice and No Promotion Policies

Capability of Foreclosure

243. The no original voice and no promotion clause apply to a reasonable proportion of artistes on serial-based and one-show contracts.

244. The two policies are significant in that they extend the reach of TVB’s exclusivity provisions. They create additional hurdle for other local TV stations to obtain TVB’s one-show and serial-based artistes directly. One licensee informed the Authority that they have resorted to commissioning work from independent production houses, many of them overseas, to involve TVB’s artistes indirectly. The effect of the two policies is to undermine this effort by other TV stations to ensure that these stations will not obtain the full benefit of these artistes’ services even if these stations have paid the full market price for the independent productions. These two policies thus have created a penumbra of semi-exclusivity around the core strict exclusivity imposed by TVB’s contractual provisions. The foreclosure effects of the exclusivity clauses are further magnified in that rival TV stations will only obtain a package of services from TVB’s artistes which is artificially compromised by TVB’s no original voice and no promotion policies.

⁷⁸ TVB letter dated 10 February 2010 at pages 4-5

Effect of Foreclosure

245. Apart from capability of foreclosure, the Authority has analysed evidence on the foreclosure effect of the no original voice and no promotion policies.

246. The no original voice policy may impose direct and indirect costs on rivals. One of the broadcasters informed the Authority that “the re-dubbing definitely had a negative impact on the appeal, popularity and rating performance of these dramas. The artistes’ voice was inseparable from their performance and it was one of the key elements the viewer would expect and identify with in watching the programme. We believe that the dramas would have attracted more audiences if the original Cantonese voice could be broadcast intact.” There is a distinct preference on the part of the local audience for programmes featuring the artistes’ original voices, as demonstrated by the fact that most local films used to be dubbed but are now mostly played with the actors’ original voices. It is clear that given the choice, and all else being equal, TV viewers would choose a programme in which all actors are presented with their original voices. By rendering rivals’ programmes featuring TVB’s occasional use artistes less appealing to TV viewers, TVB may have indirectly reduced their attractiveness to potential advertisers.

247. The policy also imposes direct costs on rivals by requiring them to dub acquired programmes. ATV reported that it spent additional costs on dubbing [...] voice in [...]. In most other cases, the drama series had already been dubbed by the production house or the distributor. The dubbing costs have already been imputed into the acquisition costs. Regardless of the size of the costs, these are costs that were incurred solely because of TVB’s no original voice policy. Absent an objective justification on the part of TVB for this policy, these are costs that could have been avoided if there had been no such policy.

248. As to the costs of the no promotion policy, there are similarly direct and indirect costs. The indirect costs could be the reduced viewership of the drama series resulting from rivals’ inability to procure the attendance of the leading cast members to promote it. Reduced viewer ratings translate into lower advertising revenue. The direct costs exist in the form of extra advertising and promotional expenses that rival stations have had to incur to promote a drama series as a result of their inability to promote the series effectively without the leading cast members. ATV reported to the Authority that it expended additional costs to place advertisements in the press to promote [...] due to [...] absence from its promotional events. Again, regardless of the size of the costs, these are costs that were incurred because of TVB’s no promotion policy. Absent an objective justification on the part of TVB for this policy, these are costs that could have been avoided if there had been no such policy.

(c) Conclusion

Section 13 – Purpose

249. A conduct will be deemed to have the purpose of preventing, distorting or substantially restricting competition if its objective economic purpose is such and there are no legitimate justifications for the conduct. The Authority is of the view

that for the no original voice and the no promotion policies, the likely objective economic purpose is to impair rivals' ability to compete with TVB and to raise their costs. There is no acceptable objective justification offered by TVB for these policies. The Authority concludes that these two policies have the purpose of preventing, distorting or substantially restricting competition and violate section 13 of the BO.

Section 13 – Effect

250. We have established in the previous section that TVB has significant market power in the relevant market. The no original voice and no promotion clause applies to a significant proportion of artistes on serial-based and one-show contracts. In particular, it affects a significant number of those artistes who appeared in the most popular Hong Kong TV programmes in 2010 and therefore could reasonably be deemed to be most attractive. Given the evidence available, it is clear that where rivals wish to broadcast programmes which feature a TVB contracted artiste, they will face higher costs (due to the necessary dubbing). Dubbing an artiste's voice is also likely to reduce the perceived quality and attractiveness of the programming. In addition, it seems likely that where rivals wish to broadcast programmes which feature a TVB contracted artiste, they will be constrained in their promotional activities. Both requirements could therefore reduce viewership and hence advertising revenues. In the opinion of the Authority, the justifications for this clause proposed by TVB are not reasonable nor proportionate. As such, the Authority concludes that these two policies have the effect of preventing, distorting or substantially restricting competition and violate section 13 of the BO and also are capable of exerting such effects.

Section 14 – Purpose and Effect

251. In the market definition study, we have demonstrated that TVB has a dominant position in the all TV viewing and advertising markets. Based on the evidence examined by the Authority in the previous section, the Authority is also of the view that the objective economic purpose of the no original voice and no promotion policies is to impair rivals' ability to compete with TVB and to raise their costs, hence preventing, distorting or substantially restricting competition in the relevant market, and TVB has not provided any acceptable objective justifications for these policies. In addition, the Authority has also established earlier that these policies have the capability to impair rivals' ability to compete with TVB and to raise their costs. As such, the Authority is of the opinion that TVB also violates section 14 of the BO.

(C) No Cantonese Policy

(a) Purpose of the No Cantonese Policy

252. The no Cantonese policy refers to a policy where artistes on contract with TVB are not permitted to speak Cantonese when they appear in the programmes of other TV stations in Hong Kong. The existence of the no Cantonese policy is perhaps less obvious because it is not encapsulated in any contractual provisions. Nor has TVB admitted to the existence of the policy. However, a log of sample interviews with TVB artistes and singers which were featured on Cable TV between July 2010 and August 2011 indicated [...] almost all the singers contracted with TVB spoke Putonghua instead of Cantonese during the interviews (see Table 7 below).

Table 7. Analysis of Cable TV interviews with artistes

Type of TVB contract	Language spoken - No. of interviews			% Putonghua
	Cantonese	Putonghua	Total	
Singer	[...]	[...]	[...]	[...]
“Other” TVB	[...]	[...]	[...]	[...]
No contract with TVB	[...]	[...]	[...]	[...]

(Almost all the singers and a significant proportion of other artistes contracted with TVB spoke Putonghua during the interviews)

Source: Analysis provided by the Authority of interviews with artistes on Cable TV, July 2010 – August 2011

NOTES: “Other” = serial-based, one-show or full-time contracts / “Singer” category includes [...] artistes who were also employed on serial-based contracts with TVB at the time of the interview. / Singer analysis excludes one interview where the artiste began speaking in Cantonese but switched to Putonghua part way through.

253. In fact, all of the singers and record company executives interviewed by the Authority unequivocally confirmed the existence of the policy. The interviewees confirmed that it is an informal policy based on an implicit understanding among TVB, singers, and record companies. Despite its tacit nature, the interviewees also left no doubt that the policy was well understood by all singers and record companies. One record company executive explained that there was no need to brief its singers on the policy as it was well understood. Other record company executives stated that they instructed their singers to comply with the no Cantonese policy and refrain from speaking Cantonese on other local TV stations. One of the interviewed singers stated that the singer had strictly complied with the no Cantonese policy and had never spoken in Cantonese during interviews with other local TV stations.

254. The existence of this no Cantonese policy has also been confirmed by other licensees. A licensee explained to the Authority that “[i]t is common knowledge in the industry that TVB has leveraged its market power to limit the ability of artistes to speak in Cantonese in non-TVB shows...” The licensee provided the Authority with specific examples of singers (TVB contracted and those under big labels) who refused to be interviewed in Cantonese at a local sporting event, totally unrelated to singing performance. ATV also informed the Authority that singers spoke Putonghua on two of their programmes, Showbiz Update and Twinkle Star.

255. The Authority has been further informed about two incidents that clearly confirmed the existence of the no Cantonese policy. One record company executive told the Authority that when the company's singers signed contracts with TVB, he asked TVB what restrictions would be imposed on the singers. He was specifically told by TVB staff members that the singers could only speak in Putonghua and not in Cantonese on other local TV stations. One of the record companies explained to the Authority that a singer was not given any work by TVB for a few months after the singer had spoken in Cantonese on another local TV station.

256. Some record company executives confirmed that as far as they were concerned, the policy only applied to singers who were still on contract with TVB. However, one of the interviewed singers said that the singer continued to comply with the policy even after the singer's contract with TVB had expired for fear of possible reprisal.

257. The practice of removing the microphone flag for singers on contracts with TVB to speak in Putonghua at interviews with other TV stations was corroborated by some record company executives. A record company executive told the Authority that a pay TV licensee had not requested its company's singers to speak in Cantonese in its programmes. The no Cantonese policy was well understood and accepted by all in the industry and it was not necessary for the company to discuss it with the pay TV licensee.

258. While the no Cantonese policy is not explicitly imposed through a contractual clause, the Authority is of the opinion that the amount of evidence at its disposal shows that it is actively practised amongst singers as a result of TVB's policy.

259. TVB has neither admitted nor denied the existence of the no Cantonese policy. To explain the reasons for singers and artistes speaking Putonghua in interviews, TVB argued that -

- (a) "to convenience those overseas members of the media that do not speak or understand Cantonese. It has been increasingly common for such overseas members (including in particular those from mainland China and Taiwan) to interview the Hong Kong artistes and singers together with the reporters from Hong Kong, in a group. Under such circumstances, it may not be proper or polite for the artistes and singers to speak in Cantonese."⁷⁹
- (b) "[e]ven in one-on-one interview, an artiste or singer may like to speak in Mandarin because such an interview may be released in mainland China, Taiwan and/or other overseas Mandarin-speaking territories. This will increase the exposure and popularity of the artiste or singer in such markets which in turn will enhance his or her career development."⁸⁰
- (c) "Personal reasons of the artistes or singers – Take for instance, [...]. He has recently told the press that it is his custom to speak in Mandarin when

⁷⁹ TVB letter dated 21 April 2011 at page 3.

⁸⁰ TVB letter dated 21 April 2011 at page 3.

interviewed by Cable TV and in Cantonese when interviewed by NOW Broadband TV.”⁸¹

260. The Authority does not agree with the justifications provided on two grounds. First, this contradicts the testimonies by the singers. One of them told the Authority that the policy had been put in place before the Mainland media became prominent. Some singers also told the Authority they would prefer to speak Cantonese without the restriction. Second, the Authority has no objection to the artistes’ voluntary choice of language in interviews. There is, however, ample evidence that the choice of Putonghua is compelled. We would further elaborate this in the following section.

(b) Effect of the no Cantonese policy

Capability and Effect of Foreclosure

261. The Authority finds that the no Cantonese policy affected a very large proportion of singers and some proportion of artistes. If the policy has prevented artistes from speaking Cantonese when interviewed by rivals TV stations, then it could have affected the ability of rivals to compete with TVB. This is because in Hong Kong, Cantonese is by far the most commonly used language.

262. A licensee was of the view that the practice of artistes’ (TVB contracted and those under big labels) not speaking Cantonese made the programme flow and presentation uneven and unattractive in the case where they were interviewing both TVB contracted artistes and other artistes who weren’t constrained by this policy. A singer also noted that the policy would have a negative impact on the programming of singers who did not speak fluent Putonghua as they would not be able to express themselves. Singers have confirmed to the Authority that if not of this policy, they would speak in Cantonese when interviewed by other TV stations in Hong Kong.

263. Further evidence of the potential effect of the choice of language can be seen following the dispute between the HKRIA and TVB over royalty payments. While the no Cantonese policy restricts singers on contract with TVB from speaking in Cantonese when appearing on other TV broadcasters in Hong Kong, it was observed that some singers under HKRIA record companies who had previously abided by the agreement began switching to Cantonese following the dispute although their singer contracts with TVB had yet to expire. Other singers under HKRIA companies continued to follow the no Cantonese policy and spoke in Putonghua until the expiration of their singer contracts. The above notwithstanding, singers under HKRIA companies who did not sign singer contracts with TVB would speak in Cantonese during interviews with other TV stations. Singers’ change of language as a result of the royalty dispute was also confirmed through the Authority’s meetings with record companies. One company opined that following the royalty dispute, they might have realised that their singers would not be able to perform in TVB programmes and that they would get no more benefits from observing TVB’s rules. They therefore decided to deviate from the no Cantonese policy so that their singers could speak in Cantonese when interviewed by other TV stations. .

⁸¹ TVB letter dated 21 April 2011 at pages 3-4.

264. Since the dispute, singers under HKRIA record companies have been unable to work for TVB and have had to promote themselves and their records on other stations. Consequently, those artistes chose to promote themselves using Cantonese rather than Putonghua. Were interviews in Putonghua equally compelling as interviews in Cantonese from a viewer's perspective, then the artistes would not have felt it necessary to change language.

265. The no Cantonese policy also augments the foreclosure effects of the exclusivity provisions. Record companies noted that artistes wished to contract with TVB as it provided a platform to reach a wide audience. For example, TVB had an audience share of 66% in 2010 across all its channels. Artistes accept that some of the policies (such as the no Cantonese policy) restrict their exposure on other Hong Kong broadcasters in return for being allowed to contract with TVB.

266. When asked why they abide by the no Cantonese policy, the interviewed singers and record companies uniformly spoke of fear of retaliation by TVB. Specifically, they mentioned the risk of being denied opportunities to appear on TVB's self-produced programmes and being given fewer number of prizes in TVB's music awards presentation ceremonies. Another record company opined that the language restriction was an "invisible shackle" whereby singers and management personnel were concerned about the implications of not following the policy, e.g. not being able to appear on TVB, retaliation by TVB, affecting singers' career development, etc. One record company executive stated that he had been told of an example of a singer who spoke Cantonese on other local TV stations and was not given performances in TVB's self-produced programmes. As set out in Appendix A, "unwritten rules of retaliation" was one of the allegations the Authority has looked into during the investigation process but found that there are insufficient grounds to conclude that TVB's conduct contravenes sections 13 and/or 14 of the BO. Although the Authority does not conclude that TVB has a deliberate policy of retaliation, many of the interviewees that met with the Authority had a perception that they could be subject to retaliation by TVB if they deviated from the policy. While the Authority's decision does not rely on this perception as truth of the policy, it does accept that there is a genuinely held perception, rightly or wrongly, of a retaliation policy; it is possible that such perception could have the effect of imposing exclusivity if the "policy" creates a "visual or psychological effect"⁸² on singers which prevents them from going to other stations to promote their songs.

267. A record company opined that record companies had not tried to negotiate with TVB over the rule because they did not have much bargaining power with TVB and that TVB's conduct had restricted other TV stations' ability to compete. The no Cantonese policy therefore exacerbates the foreclosure effect of the exclusivity provisions in singer contracts.

⁸² See for example Miller v Commission 19/77 [1978] ECR 131 in the context of export bans.

(c) Conclusion

Section 13 – Purpose

268. The Authority is of the view that for the no Cantonese policy, the likely plausible objective economic purpose is to impair rivals' ability to compete with TVB. None of the reasons offered by TVB could objectively justify the policy. The Authority concludes that the policy has the purpose of preventing, distorting and substantially restricting competition and therefore violates section 13 of the BO.

Section 13 – Effect

269. We have also established in the previous section that TVB has significant market power in the relevant market. Based on the evidence above, the Authority is of the view that the no Cantonese policy has both the capability of reducing the quality of the interviews with singers on rival TV stations and making it more difficult for viewers to understand, thus impairing rivals' ability to compete with TVB, and it has this actual effect. It exacerbates the foreclosure effect of the exclusivity provisions in singer contracts because the singers would not expect effective promotion when they appear on other channels. The Authority concludes that this policy has the effect of preventing, distorting or substantially restricting competition and violates section 13 of the BO.

Section 14 – Purpose and Effect

270. In the market definition study, we have demonstrated that TVB has a dominant position in the all TV viewing and advertising markets. Based on the evidence examined by the Authority in the previous section, the Authority is of the view that for the no Cantonese policy, the likely plausible objective economic purpose is to impair rivals' ability to compete with TVB, and TVB has not provided any reasonable objectively justifications for these policies. The facts and matters relied upon by the Authority in relation to section 13 apply under section 14. The no Cantonese policy violates section 14 of the BO because of its purpose.

271. In addition, the Authority has also established in the previous section that this policy has both the capability to impair rivals' ability to compete with TVB and the actual effect of doing so. As such, the Authority is of the opinion that TVB also violates section 14 of the BO because of its effect.

VIII. The Authority's Decision

272. The Authority has thoroughly investigated the allegations made by a detailed process of collection of factual evidence, interviews with media executives and other relevant personnel, review of hundreds of TVB contracts with artistes and singers. The Authority has also sought the assistance of an economic consultant and has taken their findings into account.

273. As set out in Appendix A, for allegations 4(e) – 4(g) in paragraph 4 i.e. unwritten rules of retaliation, one station buy policy and requiring film companies that hired TVB artistes to undertake that the film would not be sold to other TV broadcasters in Hong Kong, the Authority is unable to, based on the materials available, identify sufficient *prima facie* evidence to justify further investigation into these allegations. These allegations are therefore not pursued and accordingly are found not substantiated. However, the Authority is of the view that the one station buy policy has the capability to be exclusionary and has the purpose of preventing, distorting or substantially restricting competition in the TV programme service market by undermining other broadcasters' ability to compete. The Authority would like to make clear that, provisionally, the one station buy policy will not generally be acceptable and should not be practised by licensees in dominant positions or with market power.

274. After careful analysis of the available evidence, the Authority finds that allegations 4(a) to 4(d) in paragraph 4 are substantiated. TVB has committed an infringement of sections 13(1) and 14(1) of the BO by adopting the following practices during the period from 2007 to 2010 in the circumstances set out in this Decision:

- (a) prohibiting artistes or singers who have existing serial-based, one-show, or singer contracts with TVB from, or requiring such artistes or singers to seek consent from or notify TVB for, appearing on or providing services to other TV stations in Hong Kong;
- (b) prohibiting artistes who have existing serial-based or one-show contracts with TVB from, or requiring such artistes to seek consent from TVB for, appearing on other TV stations in their original voices or attending promotional activities of other TV stations for TV programmes and drama productions featuring these artistes; and
- (c) requiring, formally or informally, its singers and artistes to refrain from speaking Cantonese on other TV stations in Hong Kong.

The Authority is of the opinion that TVB's various exclusive clauses (Clauses a – g set out in Chapter VII), and the no original voice, no promotion and no Cantonese policies have the purpose and effect of preventing, distorting or substantially restricting competition in the relevant market by impairing rival TV stations' ability to compete with it. In particular, the Authority finds that, through its contractual provisions (including the no-obligation-to-use clause) and various formal and informal policies, TVB has imposed a system of exclusivity over artistes and singers

which actually and potentially forecloses rivals' legitimate access to an essential input for TV programme production. Such foreclosure has produced and has the potential to continue to produce a significant detriment to the end consumers of TV viewers by causing a deterioration of quality of rivals' programme offerings. TVB has failed to offer acceptable justifications for its practices. TVB's defences either confirm its anticompetitive intent or suggest that the practices are excessive and disproportionate to the goals which TVB seeks to achieve, even assuming that they are objective and acceptable. The Authority is of the opinion that the conduct objected to serve to insulate TVB from normal competition for artistes and singers with rival TV stations.

275. For the infringement referred to in paragraph 274, a financial penalty of \$900,000 is imposed on TVB. In setting this fine, the Authority has taken into account the submission of TVB, the gravity of the violations in terms of both scope and duration, and the fact that TVB has taken unilateral action to remove certain exclusivity clauses in its singer contracts upon renewal and has agreed not to sign or renew one-show contracts with artistes.

276. The Authority directs TVB under section 16 of the BO to forthwith bring to an end the infringement referred to in paragraph 274 above, and refrain from repeating or engaging in any act or conduct which has an equivalent purpose or effect to that referred to in paragraph 274.

277. To ensure compliance with the above provisions, upon the service of the investigation report on TVB, TVB shall:

- (a) within three months (i.e. on or before 18 December 2013), communicate to all artistes and singers who have current serial-based, one-show or singer contracts with TVB that TVB abandons the infringing contractual clauses and policies described in paragraph 274 above and make it clear to all artistes and singers concerned that any artiste or singer who acts in a manner which is inconsistent with the proscribed contractual clauses and policies will not be treated as being in breach of contract to TVB;
- (b) within two weeks (i.e. on or before 2 October 2013), issue a public statement (in both English and Chinese and with wordings to be agreed with the Authority) explaining and declaring that TVB will not require singers and artistes which it engages to refrain from speaking Cantonese on other TV stations in Hong Kong; and
- (c) within four months (i.e. on or before 18 January 2014), provide a full report to the Authority describing the steps taken by TVB to comply with this direction and including a signed statement by the Group General Manager of TVB confirming that the steps have been performed.

278. In addition, the Authority makes clear the following in relation to the above remedies –

- (a) that, as explained previously in the report, the decision does not apply to full time contracts of employment concluded between artistes and TVB but this fact is not to be taken as indicating that the Authority either approves or disapproves of such agreements or has formed any views about the consistency of such agreements with the relevant law; and
- (b) that, as for the future conduct of TVB is concerned, it is for TVB, taking into account the principles set out in this decision, to decide for itself how it proposes to ensure compliance with the relevant laws and the Authority reserves all rights in this respect.

Communications Authority
September 2013

ATV's allegations which are not substantiated by the Authority**(a) Unwritten Rules of Retaliation**Allegation Details

1. ATV alleged that TVB has a policy of retaliating against artistes who appeared on other domestic TV channels. An example quoted was that [...] was asked by reporters if she had any concern about retaliating action taken by TVB for her appearance in an ATV's game show. [...].

The Authority's Assessment

2. The information submitted to the Authority by ATV is only based on hearsay and newspaper articles. Other TV broadcasters have also not been able to provide examples of artistes who faced retaliation by TVB. Besides, there are many examples of artistes who appear on both TVB and other broadcasters' programmes. As there is no *prima facie* evidence, the Authority concludes that this allegation be put aside.

(b) One Station Buy PolicyAllegation Details

3. TVB was alleged to have engaged in anti-competitive conduct by offering higher discount rates to advertisers which undertook not to place advertisements with ATV, namely the "one station buy" policy. [...].

The Authority's Assessment

4. Relevant parties have confirmed that there were advertisers who only placed advertisements with TVB but provided no indication on whether they did so because of conditional discounts. None of the parties have been able to provide sufficient evidence which demonstrates that TVB is using exclusivity discounts as an overall strategy to foreclose its rivals.

5. As no relevant parties have been able to provide information which suggests TVB is using formal exclusivity discounts to foreclose its rivals, the *prima facie* evidence is not strong enough for the Authority to conclude that there has been a contravention of the BO. Although the Authority finds no evidence to substantiate the allegation, the Authority is of the view that the one station buy policy has the capability to be exclusionary and has the purpose of preventing, distorting or substantially restricting competition in the TV programme service market by undermining other broadcasters' ability to compete. The Authority would like to make clear that, provisionally, the one station buy policy will not generally be acceptable and should not be practised by licensees in dominant positions or with market power.

(c) Requiring film companies that hired TVB artistes to undertake that the film would not be sold to other TV broadcasters in Hong Kong

Allegation Details

6. Based on a magazine interview with [...], ATV alleged that TVB monopolised the pool of talents by requiring film companies hiring TVB artistes to undertake that the film would not be sold to other TV stations.

The Authority's Assessment

7. The Authority obtained sample copies of contracts signed between film production companies, TVB and TVB artistes and noticed the following clause:

[...]

8. In response to our enquiry on the above clause, TVB submitted that at all material times, it did not have any practice, policy, agreement, understanding or arrangement with any persons or companies which prohibited or prevented films featuring TVB artistes from being sold to other TV broadcasters. It explained that the relevant clause was not intended to prohibit the film company from selling the film featuring the TVB artistes to other TV broadcasters but to "protect the performers' rights (both economic and non-economic) of their artistes [...].

9. This clause has only been seen in film contracts concerning artistes under TVB [...] contracts which the Authority has decided not to pursue in this investigation. Moreover, judging from the small number of films released in Hong Kong that feature TVB artistes, TVB's ability to foreclose rivals through such a clause appears to be limited. Other local broadcasters have not been able to provide any examples showing that they have encountered difficulties in purchasing films featuring TVB artistes from film companies. On the other hand, the Authority observes that Cable TV has been broadcasting films which feature TVB artistes, including artistes on [...] contract.

10. The above analysis indicates that this clause does not appear to foreclose any of TVB's rivals. The Authority considers that any intended anti-competitive purpose in this clause seems to be indirect, if there is any at all. As there is no *prima facie* case to support the allegation and the alleged restriction is unlikely to be effective, the Authority concludes that there are insufficient grounds to determine it a violation of the BO.

TVB's representations and the Authority's responses

1. On 12 December 2011 and 25 January 2013, the Authority invited TVB to make representations on the Draft Report and Revised Draft Report, respectively. TVB subsequently made both written and oral representations to the Authority as described in paragraphs 7 – 16 of the report. The following paragraphs summarise the representations made by TVB, and the Authority's responses to TVB's submissions. On 7 August 2013, the Authority further invited TVB to make representations on the Authority's draft responses relating to the definition of the upstream market and the assessment of market power. TVB submitted its further representations on 26 August 2013, which largely reiterated its earlier arguments on those two aspects.

(a) The Authority's Jurisdiction

2. In its representations on the Draft Report, TVB again argued that the Authority lacked jurisdiction over the alleged conduct, and quoted previous documents published by the Authority to support its stance.

3. As explained in Chapter II of the report, sections 13 and 14 of the BO apply to conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market. So long as the conduct, wherever it is said to take place, exerts competitive impact on the TV programme service market, it falls within the Authority's jurisdiction.

4. In its representations, TVB quoted a number of documents published by the Government and the Authority to support its argument that the competition regulatory regime only covered the downstream TV programme service market. The Authority has carefully examined all the quoted documents. In each of those cases, either the Government or the Authority, as appropriate, has clearly stated in the same document that the conduct in other markets which impact the downstream market is also within the Authority's jurisdiction, or the concerned statement is being quoted out of context. The Authority's position is very clear all along, that the licensee's conduct in the upstream market where the conduct results in the prevention, distortion or substantial restriction of competition in a TV programme service market is within the jurisdiction of the competition provisions of the BO.

5. TVB also argued that "*it was the legislative intent that artiste contracts would be specifically exempt from the application of section 13 of the Broadcasting Ordinance upon application to the Chief Executive in Council*". When the Government first introduced the Broadcasting Bill into the LegCo in 2000, a clause was included in the Bill to exempt restriction on artistic talent or ability from section 13 of the Bill. Members of the relevant LegCo Bills Committee set up to scrutinise the Broadcasting Bill considered that exclusive contracts would have implications on the competition of the relevant market and it would be difficult to define artistes' talents and ability. To address the concerns of the relevant Bills Committee, the Administration agreed to delete the concerned exemption clause and the enacted Ordinance does not contain such an exemption. Since the enactment of the

Ordinance, the Chief Executive in Council also has not prescribed any restriction that should be exempted from section 13 of the BO. As such, the Authority considers that the legislative intent is very clear - no exemption is provided for artiste contracts under section 13 of the BO.

6. TVB further pointed out that the sound broadcasters licensed under the Telecommunications Ordinance (Cap. 106) were prohibited from engaging in anti-competitive practices under the terms of their respective licences, but such prohibition did not apply in respect of any restriction, impediment or restraint on "any person from using or exploiting his artistic talent or ability" (condition 41.3(b)(ii) of the sound broadcasters' licences). TVB considered that the upstream market for artiste services was the same for both sound and television broadcasting, and any restriction on an artiste from using or exploiting his or her artistic talent or ability contained in a contract with a radio broadcaster would therefore also affect the artiste's ability to offer his or her services to television broadcasters. As such, TVB argued that if the Authority expressly authorised all radio broadcasters to engage in a specific type of practice in an upstream market, it must also acknowledge that the same practice in the same market should be permitted for television broadcasters. TVB considered that this would affect the substantive analysis on the anti-competitive effects of such practice under the BO, and the Authority's ability to impose a sanction on anti-competitive practice.

7. As explained above, the legislative intent of the anti-competition provisions in the BO is very clear and no exemption is provided for artiste contracts. The sound broadcasting licences are issued under a different legislation, viz. the Telecommunications Ordinance. While both the sound and television broadcasting services are under the jurisdiction of the Authority, the two regulatory regimes are set out under two different ordinances. The Authority regulates the television and sound broadcasting sectors in accordance with the respective governing laws. Whether a particular practice is permitted under the respective regime must be considered in accordance with the relevant provisions of the corresponding ordinance, regulations, or licences. Against the prevailing legislative frameworks, it is groundless for TVB to argue that if the Authority authorises radio broadcasters to engage in a specific type of practice, it must also acknowledge that the same practice should be permitted for television broadcasters.

8. In TVB's submission on 25 March 2013, it argued again that the Authority lacked jurisdiction over the alleged conduct. TVB's arguments were similar to those presented in its previous submissions and the Authority's position is fully explained above and in Chapter II of the report. TVB also expressed that while it agreed that the possibility of exempting exclusivity provisions of artiste contracts with TV broadcasters and the actual exemption of such provisions in contracts with radio broadcasters were not directly relevant to inform the Authority's views on its jurisdiction, they were relevant to inform the analysis of the legitimacy of the contractual provisions at issue as well as the proportionality of any remedy the Authority might seek to impose. The Authority has considered and taken into account all the submissions and representations put forward by TVB in reaching its findings.

(b) Procedural Fairness

9. TVB made various claims on procedural fairness, relying on the judgment of Au J in the ATV JR case. In its submission on 25 March 2013, TVB considered that the ATV JR case was highly relevant to TVB's position in this investigation as certain key information and materials obtained and relied upon by the Authority had not yet been disclosed to TVB. TVB submitted that "it is palpably clear from the Judgment of the Court of Appeal in Asia Television Limited v. Communications Authority, unrep., CACV 258/2012, 28 February 2013 (on appeal from HCAL 77/2012), that this was the very practice that has already been held to be unlawful by the Court... It is quite clear that the matters it succeeded on are the very same practices that have been applied to TVB in this case."

10. [...]

11. First, TVB claimed that during the Authority's investigation and until the release of the Draft Report to it on 12 December 2011, TVB was not informed of the evidence requested by the Authority that was being gathered against it. This allegation is groundless. Since ATV lodged its complaint at the special meeting of the LegCo Panel on Information Technology and Broadcasting on 30 June 2009, the Authority had kept TVB informed of the allegations and sought its comments. After the Authority received a formal complaint from ATV, the Authority wrote to TVB on 30 December 2009 to set out all the allegations made by ATV and informed TVB that "*[t]he BA is assessing whether the alleged TVB's conduct has the purpose or effect of preventing, distorting or substantially restricting competition in the relevant television programme service market in Hong Kong, contrary to sections 13 and/or 14 of the Broadcasting Ordinance*". The Authority again invited TVB to comment on the substance of the complaint and provide information on the case in order to facilitate the Authority's assessment of the complaint. On 10 September 2010, the Authority informed TVB of its decision to proceed to the Full Investigation stage and issued a press release on the same day. Since then, the Authority has approached TVB from time to time for information and clarification. Against this background, it is clear that TVB has been well informed of the investigation all along. In addition, after the Authority issued the Draft Report to TVB on 12 December 2011, TVB was further afforded about fourteen months to make its representations. It was left in no uncertain terms of what allegations have been made against it and what case it has to meet.

12. Secondly, TVB requested the Authority to provide it with complete access to evidence in the Authority's file. Without full access, TVB alleged that it had not been given the opportunity to assess the relevance, credibility and probative value of all the evidence that the Authority was relying on, or generally to comment on the evidence that might lead to the remedial requirements being imposed by the Authority. In the light of the CFI Judgment on the ATV JR case, TVB, in its representations on 21 March and 25 March 2013, requested the Authority to disclose to TVB the Non-Disclosed Materials. [...]

13. The Authority does not accept TVB's submissions. In the process of the investigation, the Authority has provided TVB with abundant materials to enable TVB to make focused and meaningful representations. These materials include the

Economic Consultant's reports, submissions from other licensees and interview records of record companies and singers. Some of the information has been redacted/excluded after the Authority has considered and balanced competing interests between the demand for fairness to enable TVB to make focused and meaningful representations, the nature and confidentiality of the information, and in particular, the need to protect the identity of the information providers, the statutory context, the nature and the issues of the investigation, the relevance and necessity of the information sought, the risk of unfairness or prejudice to TVB without disclosure being made, the public interest in securing relevant information and protecting the integrity of the investigation of process, and the need to conduct the investigation efficiently.

14. As a matter of law, [...] the extent of disclosure required must be considered on a case by case basis, and is to be guided by what fairness demands. In both the ATV Investigation and the present investigation, the domestic free television broadcasters under investigation sought disclosure of all information, documents and evidence obtained in the investigation and the identities of those parties from whom such materials were obtained. In both investigations concerns were raised by the providers of information about possible adverse consequences if their identities were disclosed and assurances were given by the Authority to keep this information confidential. The Authority has had regard to the full judgment of the Court of Appeal but for present purposes would highlight that the Appeal Judgment gives clear guidance as to how this issue should be determined (references to numbered paragraphs are to those of the Appeal Judgment):

- (a) “The level of disclosure required to meet the standard of fairness is to enable the affected person to make “meaningful and focused representations to the adverse materials” (paragraphs 61, 83 and 109 of the Appeal Judgment); “The consideration is not whether [the affected party] would be better off with the disclosure of the further information it seeks, but whether the procedure adopted by the Authority was actually fair” (paragraph 106);
- (b) “It is not possible or appropriate to lay down hard and fast rules if verbatim disclosure and the disclosure of the identity of a witness should be made. Each case must be considered on its own facts and circumstances to see what fairness requires” (paragraph 64);
- (c) “A restrictive approach to disclosure of confidential information” under section 27 of the BO “should be adopted, and confidentiality should be maintained unless disclosure is required to facilitate the investigation or is otherwise justified in the public interest” (paragraph 78);
- (d) “In considering whether and how much of the confidential information has to be disclosed, the Authority should balance various competing factors, including the respondent’s right to know and to respond, the right to protection of the Interviewees, the public interest in securing information for the interviewees and the need to conduct the investigation efficiently” (paragraph 108);

- (e) “Witnesses in investigations such as the present one should be encouraged to come forward and speak frankly. This is of particular importance in the present context, as the broadcasting industry is a relatively small and closely related circle with only two free television broadcasting providers, where most people would tend to know each other, and hence the confidentiality of the identities of the Interviewees becomes of the utmost importance” (paragraph 79);
- (f) “If the assurances to preserve confidentiality given to the Interviewees were to be lightly withdrawn, witnesses would be reluctant to come forward to provide information and the statutory purpose of conducting an investigation in such a closely connected industry would be thwarted” (paragraph 80); and
- (g) “It is unrealistic to expect the Authority to investigate in detail the facts behind the claim of fear of reprisal put forward by each person, so long as there are reasonable grounds to believe that this is a genuine claim” (paragraph 84).

15. The guidance of the Court of Appeal is of direct relevance to the present investigation and the Authority has followed it. The investigation is being conducted by the Authority within the same statutory framework, and just as in the ATV Investigation, the Authority in the present case has to address concerns about possible reprisals and adverse consequences raised by the providers of information, as recorded in the summaries of interviews which had been provided to TVB. The Authority is of the view that in the circumstances of this case, there are reasonable grounds to believe that the fears of reprisal from TVB that had been expressed are genuine. The Authority has accordingly formed the view that the requests for confidentiality are relevant factors which it should take into account when determining the extent of disclosure of information to TVB. In this regard the Authority does not agree [...] that the ATV case could be distinguished from the TVB investigation [...]. The maximum penalty in both cases is the same. While the focus in the ATV case is on the corporate governance of the service provider, the TVB case is of no less serious nature in that it involves a serious abuse of its dominant position on a fairly large scale and for a significant duration. The situation has persisted for at least a few years, and many artistes, singers and record companies are affected, not to mention the significant public interest involved. TVB is a dominant player in the industry with a substantial market share, which means its threat on the witnesses could be more real and substantial. The Authority is of the view that this case is no less serious than the ATV case.

16. The starting point is that the Authority should provide sufficient information to enable TVB to make focused and meaningful representations. The relevant question is what is fair, not whether TVB would be better off with further disclosure. The investigation is not a court trial, and it is undesirable to over-judicialise an administrative process.

17. As noted in paragraph 13 of this Appendix and throughout the report, a significant amount of information has already been disclosed to TVB. The Authority considers it procedurally unnecessary to disclose commercially sensitive information since general descriptions of the Authority's findings based on such sensitive information have already been provided to TVB as far as possible for it to make representations. In adopting this approach, the Authority has properly balanced the competing interests between TVB's right to have sufficient information to make focused and meaningful representations, the rights of those parties who have provided information to the CA in confidence and the need to conduct the investigation efficiently. Accordingly, the Authority maintains that it should not disclose the Non-Disclosed Materials to TVB in full.

18. In disclosing the ATV correspondence to TVB, TVB submitted that the Authority's redaction of the dubbing costs of [...] voice in [...] disenabled TVB to assess if the costs incurred were reasonable. However, the Authority redacts such information because it is commercially sensitive. In fact, as mentioned in paragraph 247 of the report, such costs were made necessary solely due to TVB's no original voice policy, the discussion of the effect of which on rival broadcasters is unaffected by the quantum of the costs incurred.

19. Regarding TVB's submission that the Authority only provided TVB with a summary record of the interview with ATV, the Authority would like to make clear that it has no audio recording of the concerned meeting and the summary record is the only record of the meeting held by the Authority. When disclosing the interview record to TVB, the Authority has only redacted the identities of the ATV representatives attending the meeting, the meeting venue, names of artistes mentioned by ATV at the meeting and other unrelated matters (such as internal file reference). In addition, the Authority has not relied on any information provided by ATV at the meeting in the report.

20. In addition, as regards the provision of an index of the Authority's investigation file, the Authority did provide TVB with a list of categories of documents submitted by outside parties which were relied upon in the preparation of the Draft Report via its letter dated 5 March 2012, and the Authority is not required as a matter of procedural fairness to disclose any further details of its investigation file. Indeed, TVB has no right to the full investigation file.

21. Insofar as the witnesses' identity and full transcripts are concerned, the Authority has already provided TVB with a redacted summary of their evidence, the redaction being made only to remove those parts of the evidence that may reveal the identity of the witness.⁸³ The Authority has to and does strike an appropriate balance between the confidentiality owed to the interviewees and TVB's rights to be informed of the main points of the evidence collected in the investigation to enable it to make focused and meaningful representations, having taken into account the factors

⁸³ As far as the licensees are concerned, one of the licensees has specifically requested that its identity and the information given by it to be treated confidential. The Authority has assured the licensee that information given by the licensee will be kept confidential in accordance with section 27 of the BO.

identified in paragraph 13 of this Appendix and the principles summarised in paragraph 14 of this Appendix.

22. Record companies and singers attending the interviews have provided information to the Authority on a confidential basis and against an undertaking by the Authority that their identities should not be disclosed. As explained in paragraph 266 of the report, the interviewees who met with the Authority had a perception that they could be subject to retaliation by TVB, such as the risk of being denied opportunities to appear on TVB's programmes and being given fewer number of prizes in TVB's music award presentation ceremonies. Given the rather small circle of business in the television industry and the dominance of TVB in the industry, the Authority is satisfied that the interviewees had a genuine and reasonable perception that they could be subject to retaliation by TVB and there is a need to provide assurance to interviewees who have real or perceived fear of reprisals.

23. The Authority considers it important and in the public interest to maintain the confidentiality of the singers and record companies and others who have provided information to the Authority on a confidential basis, and to whom the Authority has undertaken to maintain confidentiality.

24. The redacted summaries, which have excluded only those parts of the evidence that may reveal the identity of the information providers, are sufficient to enable TVB to make focused and meaningful representations. As the summaries of the interviews of the singers and record companies have been reviewed by the concerned interviewees and the members of the Authority who conducted the interviews before disclosure to TVB, there is no question of such interview records being unfairly re-phrased or re-formulated by the interviewer. The Authority is satisfied that these records fairly and accurately reflect what the interviewees have said and afford TVB the opportunity to make focused and meaningful representations.

25. In addition, the Authority, when considering the information obtained in the interviews, has taken into account the possible bias of the interviewees. In particular, the Authority is well aware that record companies and artistes may have vested interests in relation to TVB's arrangements. Thus, in drawing its conclusion, the Authority does not rely solely on their evidence. In particular, the Authority's conclusion is heavily relied upon the analysis of numerous contractual provisions and statistical information, which does not depend on witnesses' credibility.

26. On balancing all these factors, the Authority is satisfied that TVB has been provided with sufficient information to appreciate the nature, extent and basis of the allegations elicited by the Authority from the interviewees. In this regard, the Authority finds comfort in the following passage in the Appeal Judgment which is applicable to this investigation:

“As for the complaint that without disclosure of the Interviewees’ identities and the full transcripts, ATV would not be able to properly assess whether the summaries prepared by the Authority amounted to a full and balanced interpretation of their evidence, I am inclined to think this is an over-exaggeration. The important thing is whether ATV adequately

appreciates the nature, extent and basis of the allegations elicited by the Authority from the Interviewees. I am satisfied that it does, from the summaries provided by the Authority. The consideration here is not whether ATV would be better off with the disclosure of the further information it seeks, but whether the procedure adopted by the Authority was actually unfair.” (paragraph 106 of the Appeal Judgment)

27. As for other information, at TVB’s request, the Authority has already provided TVB with the relevant non-commercially sensitive information from outside parties possessed and relied upon by the Authority in an appropriate form and non-commercially sensitive information relating to the unsubstantiated allegations.

28. Further, the Authority also notes that TVB had already applied for leave to the Court for the release of the CFI Judgment on 26 March 2013, and was subsequently provided with a redacted copy of it by the Court. TVB also has a copy of the Appeal Judgment. TVB therefore has had the opportunity to consider the two judgments before it made oral representations on 20 May 2013. Given that TVB has been afforded about ten months to make representations since the issue to it of the Draft Report, and another two months to make further representations on the Revised Draft Report issued to it on 25 January 2013, the Authority considers that TVB has already been given sufficient time to make representations on the Authority’s findings and rejects for this reason TVB’s request for a further extension of the deadline for making representations. However, the Authority agrees to notify TVB of the Authority’s decision and provide it with an advance copy of the report before the Authority publishes the decision and the report.

(c) Definition of the Upstream Market

29. In its representations, TVB argued that a clear relationship should be established between the alleged conduct upstream and the competition in the downstream market. The Authority notes that TVB is active in a number of vertically related markets. Its main activities are in supplying TV viewing services to viewers and TV advertising services to advertisers. In order to carry out its activities, TVB must purchase inputs from the upstream market. Figure 5 in the report has already clearly set out the links among artistes, programme producers and broadcasters in the vertical supply chain.

30. TVB also argued that “*previously every time the Authority has analysed the validity of exclusivity arrangements, it has recognised the importance of properly defining the upstream markets*” (emphasis added), and considered that the Authority had failed to observe its own analytical framework and that the lack of a formal market definition would render the Authority unable to assess the market positions of the parties and identify the scope of available substitutes for rival broadcasters. TVB also contended that the relevant upstream market was wider than the “available pool of talent” as defined by the Authority and there was no proper substitutability analysis in determining the size of the available pool of artistes.

31. The Authority notes that the above statement by TVB is made rather out of context vis-à-vis the facts of the past competition complaints handled by the Authority. Since the enactment of the competition provisions in the BO, the Authority has completed investigation into a total of five competition complaint cases which involved exclusivity arrangements in the upstream markets. The Authority considered that the relevant markets were the downstream markets in two of those cases and hence the upstream markets were not defined in those cases. For the remaining three cases, the Authority explicitly stated in all of the investigation reports that the investigation focused on whether the conduct in question (including those in the upstream market) had an anti-competitive purpose or effect on the downstream market. The approach taken by the Authority in each case depended on the facts and evidence relevant to the cases. As set out in the Authority's Application Guidelines, "*the framework for competition analysis should not be regarded as separate, self-contained exercises. The purpose of defining the relevant market is to provide a framework within which to analyse the operation of competition – market definition is not an end in itself..... Therefore, the CA would not apply the guidelines as a linear, step-by-step process that invariably follows the exact order of the three stages..... The CA's central focus remains in evaluating whether the alleged anti-competitive conduct has, or is likely to have, an anti-competitive effect..... The CA takes the view that while previous cases can be informative, they should not be regarded as binding with respect to future decisions*"⁸⁴.

32. The Authority has duly followed the analytical framework described in the Application Guidelines in defining the relevant markets and in conducting the foreclosure analysis. Given that the jurisdictional basis of sections 13 and 14 of the BO relates to conduct which restricts competition in the downstream TV programme service market, the Authority defines the relevant downstream market and analyses the competition effects of the alleged conduct in the defined downstream market.

33. While formal market definition is not a necessary step to establish that input foreclosure can have a harmful effect on competition, the Authority's approach in assessing the likely substitutes available to broadcasters in the report is consistent with a market definition. When the Authority considers the "available pool of talent", the Authority has taken into account the substitutes available to broadcasters. While the Authority defines the "pool of talent" to include all artistes who contracted with the main Hong Kong broadcasters, we also recognise that some suitably qualified artistes who have not contracted with a Hong Kong TV broadcaster could be included in the analysis and the available pool of talent may include a number of distinct sub-markets (such as defined by skills or value). However, the Authority does not think that it is necessary to formally define other distinct sub-markets as, according to data collected by the Authority, TVB has contracted with the majority of all the occasional use, singers and full time artistes in the available pool of talent. In a case of input foreclosure, the relevant question is whether foreclosing access to a certain group of artiste inputs has a material effect on rival broadcaster's ability to compete. The Authority's approach in defining the "available pool of talent" considers the substitutes available to broadcasters in the event that the supply of artistes is restricted. It is analogous in approach to a formal definition of markets, and it focuses on the precise competition concern at hand, which is whether TVB can

⁸⁴ Application Guidelines, paragraphs 26 – 29

restrict supply of important inputs to the detriment of competition and consumers. This demonstrates that the Authority has conducted a substitutability analysis in determining the size of the available pool of talent and the available choices of artistes for producers of TV programmes in Hong Kong. The relevant analysis and consideration can be found in the Economic Consultant's report⁸⁵ and also at paragraphs 92 to 95 of the report, and paragraphs 38, 46 and 47 of this Appendix.

34. TVB referred to the European Commission's Guidelines on Vertical Restraints to explain that the first step of any analysis of vertical restraints should be that "the undertakings involved need to establish the market shares of the supplier and the buyer on the market where they respectively sell and purchase the contract products". TVB also referred to European Commission's Vertical Block Exemption Regulation which created a presumption of legality for most agreements containing vertical restraints if the parties to the contract had positions below certain thresholds on each of the relevant markets.

35. The Authority does not agree with TVB's arguments. Firstly, as the Authority has explained above, a formalistic or mechanistic implementation of the market definition is not a necessary step in order to assess the economic effects of the conduct. Secondly, the Authority's conclusion that "*artistes are an important input into TV viewing in Hong Kong and that TVB has contracted with a significant proportion of available pool of artistes*" is based on the assessment of the evidence on the substitutability between the artistes (including those who have contracts with TVB which contain exclusivity and other restrictions) and other inputs. The analysis is therefore not subjective or "discretionary" as claimed by TVB but is consistent with the Application Guidelines, which state that individual contracts with artistes may prevent, distort or substantially restrict competition which "*may include the immense popularity of the artist; the restrictive terms in the agreement being repeated in a number of similar contracts affecting other artists; and the licensee in question being dominant in the relevant market.*" Thirdly, The EU Verticals Guidelines highlight the importance of the buyer's market share on the downstream market (in this case the TV viewing market where the Authority considers that TVB is dominant), and note that "*[w]here a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects*"⁸⁶. In the current case, TVB is dominant in the downstream market and restrictions which imply exclusive supply may easily lead to significant anti-competitive effects.

36. TVB argued that the Revised Draft Report only used three paragraphs to conclude that the only relevant upstream input worthy of being considered was the supply of artistes. It submitted that the central assumption of the report was that a TV operator could not succeed in Hong Kong without producing dramas and comedies using artistes that were already under contract with Hong Kong TV operators, and that the report mentioned little of other inputs.

37. The Authority notes that the paragraphs quoted by TVB set out just a summary of the findings of the Economic Consultant, which the Authority had

⁸⁵ Economic Consultant's report in January 2012.

⁸⁶ Guidelines on Vertical Restraints OF C 130/18 paragraph 194.

commissioned to conduct an economic analysis of the present case. The full economic analysis reports have already been provided to TVB.

38. The Authority does not consider that other genres of programmes are likely to be a relevant substitute for programmes featuring artistes for most broadcasters, given the most popular programmes in Hong Kong are dramas and comedies. If a general entertainment broadcaster⁸⁷ which offers a wide range of programmes of different genres (like TVB or ATV) is restricted to offer certain types of programmes which do not include artistes, its programmes line-up would be very limited, so would be its ability to attract viewers. It is also unlikely that a general entertainment broadcaster could successfully depend solely on programmes which do not include artistes, as such programmes have only niche appeal. The Authority notes that the most popular dramas and comedies have more than 50% higher ratings than the most popular news or documentary programmes, and other types of programmes such as children's programming, sport and horseracing do not feature in the most popular programmes regularly shown on TV. The Authority also notes that non-station produced programmes only account for about 36% of all programmes in the Cantonese analogue channels of domestic free TV programme services. About two-thirds of them are acquired programmes from overseas and are not among the most popular programmes in Hong Kong. The remaining one-third are independent local productions and could consist of a wide variety of contents, only parts of which are drama and comedy. Besides, some of the artistes they engage come from the same pool of artistes contracted with local broadcasters.

39. In addition, while TVB cited the success of [...] and a Mainland Chinese costume drama achieving high ratings as evidence of successful programming produced without relying on artistes or produced by third parties, the Authority observes that a significant amount of programmes on TVB Jade and ATV Home, the most popular general entertainment channels in Hong Kong between 2006 and 2010, were self-produced. In fact, although there are numerous channels not operated by ATV or TVB which are often niche or genre-specific, their share of viewers is much smaller than general entertainment channels featuring artistes. The programme [...] quoted by TVB was hosted by an experienced artiste. Also, despite TVB's submission that only three out of the 22 highest rated programmes in the week of 20 February 2010 were dramas, the Authority notes that based on an analysis of the rating figures by individual episodes, over 30% of the top-50 broadcasts in that week were dramas or comedies, and 62% of these top-50 broadcasts were general entertainment programmes that require artistes' input. If the same data are analysed by considering individual episodes' contribution to viewership, general entertainment programmes accounted for about 70% of the viewership of the programmes concerned. The Authority also notes that all of the top 10 broadcasts were general entertainment programmes, of which 8 were dramas and comedies. All these point to the popularity of general entertainment programmes and hence the importance of artistes as an input into TV broadcasting.

⁸⁷ A general entertainment broadcaster is a broadcaster whose strategy is to show programming which includes a mix of genres, including but not limited to comedies and dramas. Most of the channels operated by TVB and ATV are general entertainment channels, such as TVB Jade and ATV Home, which broadcast a wide range of programmes of different genres.

40. Regarding TVB's argument that the Authority's findings are based on a "central assumption" that a TV operator cannot succeed in Hong Kong if it cannot produce dramas and comedies using artistes that are already under contracts with Hong Kong TV operators, what the Authority finds in the report is that since artistes are a necessary input to popular programmes such as dramas and comedies, a TV operator would likely face a fall in viewership for its programmes if it relies solely on inputs other than dramas and comedies, and that, by denying other TV operators' access to a large number of local popular artistes, TVB artificially reduces their competitiveness in producing more attractive programmes with more popular artistes. As explained in Chapter VII of the report, in analysing foreclosure, foreclosure does not mean total exclusion from the market.

41. The Authority also emphasises that Figure 5 of the report, which TVB used in advancing its argument in its "initial submission" that the Authority has failed to mention other inputs for TV programming, is intended to be a simple illustration of the "artistes and the TV value chain", describing how artistes supply their services to programme producers. The economic analysis conducted by the Economic Consultant did recognise other inputs. In fact, the genres of programming are among the many so listed in Figure 4 of the report.

42. TVB submitted that only around 25% of total programming available in the relevant period in Hong Kong in the "All TV viewing market" belonged to "general entertainment", as opposed to what Figure 6 of the report suggested. It further argued that the relevant entertainment programming produced by local broadcasters, which was potentially affected by the alleged conduct, accounted for around 16% of the total programming available at the relevant period in Hong Kong in the "All TV viewing market". The Authority notes that TVB's calculation is based on the number of broadcast hours of TV programmes, which is not the correct metric to measure the importance of an input to broadcasters. Instead, viewing shares (or prices where these are available) are the key metric since they are the key determinant of advertising revenues and other revenues. The value of a programme to a free TV broadcaster is not measured by its length (hours) but by its viewers. A broadcaster would be unlikely to rely on programmes that do not contain artistes without affecting its ratings or revenues. The Authority also notes that pay TV operators have a specific strategy of targeting consumers with a very high willingness to pay.

43. Making reference to the Hong Kong University Public Opinion Programme, TVB claimed in its "initial submission" that many non-drama and non-comedy programmes enjoyed greater success with the public than dramas and comedies. It also considered the fact that pay TV operators aired less than 25% of entertainment programmes but were able to compete successfully in the "All TV viewing" market. The Authority notes that among the 200 highest rated TV programmes mentioned in TVB's "initial submission" dated 25 March 2013, almost all of the top 20 programmes with the highest ratings in each of the four selected weeks are dramas, comedies or programmes which require artistes' participation. The ratings of news and public affairs programmes never ranked among the top 20 for the period concerned. The Authority also notes that none of the 200 highest rated TV programmes were broadcast on pay TV channels, which echoes with Figure 8 of

the report that shows a much smaller viewing share for the pay TV broadcasters than for the free TV broadcasters.

44. TVB contended that the relevant upstream market was wider than the “available pool of talent” as defined by the Authority. In its “initial submission”, TVB provided a list of 80 main artistes in TVB’s ten highest-rated serial dramas in 2011 and 2012. Claiming that [...] of those artistes listed were not originally from Hong Kong, TVB submitted that artistes from outside Hong Kong were effective resources for local TV broadcasters. It also pointed out that [...] of those 80 artistes had no prior acting experience before signing a contract with TVB, and an additional [...] had limited experience, suggesting that artistes with no or limited experience could be relied on for successful programming. In addition, TVB argued that artistes without a contract with TV broadcasters, such as singers, did perform in TV programmes.

45. The Authority would like to make clear that the data submitted by TVB on the “main artistes” in its highest-rated serial dramas covers the period of 2011-2012, while the Authority only examined TVB’s occasional use contracts entered into in the period 2007-2010. The data is therefore not relevant to this investigation. However, for the sake of completeness, the Authority would set out some of its observations on the concerned data in the following paragraphs.

46. The Authority considers that the evidence does not support TVB’s argument that the relevant upstream market is wider than that defined by the Authority as –

- (a) There is only a limited number of artistes from abroad who worked with the local TV Broadcasters

As mentioned in paragraphs 92 to 93 of the report, the evidence suggests that, on the whole, artistes and programmes from outside Hong Kong are less popular, and that broadcasters would likely lose viewers and profits if they switch to these alternatives. The vast majority of the top 200 most popular programmes in the survey assessed by the Authority were Hong Kong produced programming rather than imported programmes. The Authority recognises that a limited number of artistes from outside Hong Kong may be able to forge a successful career in Hong Kong and some programmes from outside Hong Kong may attract viewers. However, that does not necessarily mean that the market should be defined so wide as to include all artistes currently working overseas or all programmes from overseas. The relevant question in the context of market definition would be to consider whether given a 10% increase in the price (from the competitive level) of all Hong Kong based artistes, would broadcasters switch, within a short period of time (a year for example), to supply of artistes from outside Hong Kong in order to produce their programming. The list of “main artistes” in TVB’s most popular dramas in 2011 and 2012 provided by TVB suggests that when artistes have just travelled to work in Hong Kong, they are generally less qualified and experienced. As such, it is unlikely that in a short space of time (a year), broadcaster would be able to switch to supply of artistes who are not based in Hong Kong and who have equivalent media presence in

Hong Kong and are as experienced and qualified as existing Hong Kong artistes. The Authority therefore considers that if the available pool of Hong Kong based artistes were restricted, a broadcaster who instead relied significantly or solely on overseas artistes would be less able to compete as they would be unable to source sufficient well qualified and experienced artistes or artistes with a Hong Kong media profile. In fact, TVB itself notes that the “*majority of Hong Kong based artistes have been trained by the television based broadcasters since the outset or have otherwise succeeded in gaining initial public recognition as contestants of talent shows organized by the television broadcasters*”⁸⁸. As regards the list of 80 main artistes featured in the ten highest-rated serial dramas in 2011 and 2012 provided by TVB, the Authority observes that, according to information available from the Internet, among the [...] artistes that TVB alleged to be not originally from Hong Kong, some were actually born in Hong Kong. Others were migrants to Hong Kong since they were young, and the Authority doubts whether these artistes, having been exposed to and assimilated in Hong Kong’s culture, language and society since their younger days, should be treated as overseas artistes. Also, given that dramas and comedies are usually in Cantonese and those with the highest ratings almost all feature local artistes speaking Cantonese, the Authority considers that viewers place a higher value on programming featuring local artistes who speak in the local language, and overseas artistes would likely need to speak Cantonese to have a reasonable prospect of pursuing their careers in the Hong Kong broadcasting market. This is reflected in the list of the 80 artistes provided by TVB, which shows that only one does not speak Cantonese. In addition, the Authority observes that with the exception of one artiste, all those artistes identified by TVB started and developed their TV careers in Hong Kong. As such, the Authority considers that while a limited number of artistes from outside Hong Kong may be able to forge a successful career in Hong Kong, overseas artistes in general are not effective substitutes for local artistes.

- (b) Aspiring untrained artistes are unlikely to be full substitutes for experienced and trained artistes

The Authority observes that while there are new artistes/singers in the industry who can gain wide popularity within a short time, the percentage is small and they seldom take a leading role in general entertainment programmes, particularly dramas. It seems unlikely that a local TV broadcaster could rely significantly or solely on inexperienced or aspiring artistes to participate in general entertainment programmes to drive ratings and advertising revenue. Also, according to information available from the Internet, among the 80 artistes whom TVB claimed to be “main artistes” performing in TVB’s ten highest-rated serial dramas in 2011 and 2012, [...]only very few had their contracts with TVB commencing in 2009 or later. Among [...]those few artistes concerned, [...]some have acting experience before joining TVB, while the remaining few have little or none. In other words, only [...]a very small percentage of the 80 “main artistes” [...] in the

⁸⁸ TVB’s representations on 2 May 2012, page 8

highest-rated dramas as identified by TVB in 2011 and 2012 had three years or less of acting experience as at 2011, and none of them were first leading artistes in the dramas concerned. This shows that it takes time to nurture new talent, who gradually build up expertise and media profile over a number of years to become artistes playing leading roles in dramas. Therefore, aspiring or inexperienced artistes should not be included as part of the pool of available artistes.

- (c) Experienced artistes who have not contracted with any TV broadcaster could not be full substitutes to local TV broadcasters for dramas or comedies

The Authority observes that it is not a common phenomenon for artistes who are not contracted with broadcasters to regularly work for Hong Kong broadcasters. TVB pointed out that one of the record companies interviewed opined that popular singers would be invited to TVB's shows even if they were not on contracts. However, the same record company also said they "estimated that over 90% of singers entered into contracts with TVB". Under the current arrangement, artistes usually sign contracts with TV broadcasters to perform in programmes produced by the TV broadcasters concerned. While some top artistes/singers may not need to sign any contracts for appearing on TV, the percentage is small. The Authority also observes that most of these high value artistes seldom perform or do not regularly perform in TV programmes, though they may occasionally appear in music programmes, variety shows, charitable events or award presentation ceremonies on TV on a one-off basis instead of participating in dramas. While there are high value artistes who are not under contract with TVB, it is noted that such artistes also tend not to sign any contract with any local TV broadcasters. The evidence supplied by TVB does not suggest that there is a significant pool of suitably qualified artistes who are currently not contracted with a broadcaster. It seems unlikely that a local broadcaster could rely significantly or solely on high value artistes not under contract with any TV broadcasters to participate in general entertainment programmes to drive rating and advertising revenue.

47. The Authority therefore disagrees with TVB's comments that the market definition and the available pool of talents should be drawn wider to include artistes from outside Hong Kong, other TV programming inputs or aspiring artistes. The Authority recognises that in principle the available pool of talent could include suitably qualified Hong Kong based artistes not contracted with a Hong Kong broadcaster and that in its analysis the Authority has taken into account some singers that have not contracted with TVB. However, the Authority sees no evidence that this wider market definition would substantially change its conclusion that TVB contracts exclusively with the majority of the available pool of qualified TV artistes in Hong Kong.

48. The Authority also notices that, TVB suggested⁸⁹ that if it were to comply with the Authority's decision on remedies, then this would create a "substantial change" to the way that TVB conducts its business. This argument is contradictory

⁸⁹ TVB's representations on 2 May 2012, page 23.

to another statement of TVB that “*there are countless musicians, theater and movie actors, singers, comedians, dancers, magicians, circus artists, etc. who make up an extensive pool of artistes who could be used for the production of entertainment programming on television*”⁹⁰. If the TVB artistes are simply part and parcel of some vast substitutable group of available talents, amending the terms of the artiste/singer contracts would unlikely cause a “substantial change” to its business.

49. TVB argued that the Authority did not explain why the pool of artistes should be limited to those under contract with Hong Kong TV broadcasters; how the Authority calculated the size of the available pool of artistes and TVB’s share of artistes on contract with the main Hong Kong broadcasters; and how other suitably qualified artistes as set out in paragraphs 33 and 47 of this Appendix were included in the total number of artistes.

50. The Authority disagrees with TVB and notes in effect that Chapter V of the report has demonstrated step-by-step why the pool of artistes should be limited to those under contract with Hong Kong TV broadcasters.

51. TVB made an out-of-context reference to paragraphs 33 and 47 of this Appendix, which have unambiguously stated that the available pool of artistes should be confined to artistes contracted with the main Hong Kong broadcasters and refuted the argument that artistes from outside Hong Kong, aspiring artistes and other suitably qualified Hong Kong-based artistes not contracted with a Hong Kong broadcaster need to be included in the analysis. It is based on this definition of the pool of artistes that the Economic Consultant calculated the total number of artistes and TVB’s share of artistes on contract with Hong Kong’s main TV broadcasters between 2007 and 2010. As shown in the Economic Consultant’s report⁹¹, the calculation of the size of the available pool of artistes is based on the number of artistes contracted with all Hong Kong TV broadcasters. The artiste figures in the copy of the Economic Consultant’s report provided to TVB are redacted since some of the information provided by the other licensees is commercially sensitive. As for the artiste figures of TVB, they were provided by TVB itself to the Authority.

(d) Assessment of Market Power

52. TVB argued that an assessment of the market power of broadcasters based on revenues would be more appropriate than one purely based on audience share. The Authority considers that market shares are one way to measure market power but in markets with heterogeneous products (such as free-to-air TV and pay TV), there can be different ways to measure market share, and the way best suited to assess a firm’s ability to exercise market power will depend on the nature of the competition being studied. In the case of TVB, the Authority considers that its ability to exercise market power is best reflected in its share of viewers, since TVB’s business model is to provide programming for free to consumers in order to attract viewers and thereby generate advertising revenues. If TVB has market power, it would be able to behave independently of its rivals and ultimately consumers. Therefore, if it is able to

⁹⁰ TVB’s representations on 2 May 2012, page 8.

⁹¹ Economic Consultant’s report in January 2012.

reduce the quality of its programming without a significant impact on loss of viewers to other channels, and thus on its revenues, this would be an indication of the extent of market power. Also, the Authority does not consider assessing TVB's market share based on customers' willingness to pay for extra pay TV channels appropriate, since it does not reflect these customers' (and other customers') actual viewing choices, which is the relevant metric for understanding the degree to which TVB's viewers would switch from its channels to other channels in response to a decline in the quality of TVB's programmes.

53. TVB argued that the Authority's report relied on seriously flawed data (from AdmanGo) to assess the advertising spending. The published advertising revenues of TVB were significantly lower than those reported by AdmanGo. If TVB's published advertising revenues were substituted in the analysis, TVB estimated that its market share would be significantly less than [...]%. To support its arguments, TVB made reference to the estimated advertising revenues in reports published by two other organisations. TVB also submitted that the Authority could have exercised its powers under section 26(1) of the BO to request actual advertising revenue information from the relevant operators, instead of relying on AdmanGo's data.

54. In assessing the market share of the operators in the television advertising market, the Authority considers the shares based on not just advertising revenues but also television viewing. The share of television viewing is a key driving demand for advertising. TVB's share based on viewing (63%-66%) is significantly larger than its estimated share of television advertising revenues. In general, these two measures (television viewing share and share of advertising revenues) are expected to be reasonably consistent with one another, as advertising revenues are in general closely correlated with viewing shares. In addition, TVB's estimate is based on a comparison between its financial figures and AdmanGo's data, which are calculated on different bases and so are not comparable. The Authority also notices that, based on information contained in TVB's letter addressed to the LegCo Members on 19 November 2012 concerning the new free domestic television license applications and TVB's annual reports, TVB took up a very large percentage (over 90%) of the advertising revenue among free TV broadcasters during the five-year period from 2006 - 2011. This finding is consistent with the analysis of market power using AdmanGo's data.

55. The actual advertising revenue of some advertising media in Hong Kong (including some local television stations) is commercially sensitive information and such information is not available in the public domain. However, the AdmanGo dataset enables an analysis to be conducted on broadcaster advertising revenue shares across a long time period, based on data collected consistently across different channels. The AdmanGo dataset reports revenues based on the mid-point of prices in the published rate cards before any discounts are applied, rather than actual revenues. As far as we understand it, there is currently no other reliable alternative source of advertising data in Hong Kong which covers the actual revenues of all the major television broadcasters. Given this, the AdmanGo dataset appears to be one of the best available sets of comparable advertising data that can be used for the economic analysis. The Authority also notes that AdmanGo's data is often cited by major advertisers, advertising agencies and TV broadcasters, including TVB,

reflecting the broad recognition of the reliability of the data within the industry.

56. TVB's approach of estimating market shares based on two different datasets (i.e. its own financial accounts and data from another organisation) is unlikely to provide an accurate assessment of market shares. If we were to measure TVB's market share based on its reported advertising revenues, then the data should be compared with the advertising revenues from other operators in the market measured on the same basis. However, TVB has not provided any evidence which suggested that reported revenues from its published accounts were measured on the same basis as the data on advertising spending supplied by AdmanGo and the other two sources as quoted by TVB .

57. We understand that the advertising revenues data in 2011 published by the two organisations quoted by TVB is sourced from two other advertising agencies. One of the datasets is based on numerous sources and is estimated by applying rates that the advertising agency concerned believes to be the market rates that it would use in commercial deals. As far as the television advertising revenues data is concerned, the set of data covers terrestrial television only and does not include pay television. As such, the concerned advertising revenues data is not based on actual figures, but rather relates to estimates based on an advertising agency's internal assumptions. Moreover, the data does not include all major television broadcasters. These factors likely explain the considerable discrepancy between the advertising revenues data used in the report and those quoted by TVB.

58. As regards the other advertising spending data set quoted by TVB, we have confirmed with the concerned organisation that they do not possess the breakdown of advertising spending on television as quoted and have no details on the source of this data. As such, we are unable to establish its accuracy or reliability.

59. Separately, we note that these two organisations both quoted the advertising expenditures as measured by AdmanGo in their other reports. They advised that AdmanGo's data was used in their reports as AdmanGo focuses on Hong Kong and the Mainland, or it provides more detailed data and monitors all media in greater depth.

60. Based on the foregoing, TVB's allegation that the Authority's report relies on seriously flawed data to assess the total television advertising spending cannot be accepted.

61. Given this, the Authority does not see any justifiable reason not to adopt AdmanGo's data in assessing advertising market shares, or using this as a basis for assessment of TVB's market power.

62. TVB further argued that the decline in its market share between 2009 and 2010 could not be explained by one off events such as the FIFA World Cup and the Asian Games as otherwise TVB's share would have dipped during the previous World Cup in 2006. Instead, TVB considered that the trend as shown in Figure 9 in the report suggested that its market share had been decreasing over a six-year period.

63. TVB's market power in the television advertising market has been assessed over a period of five years between 2006 and 2010. Over that period, TVB was found to have had a persistently large market share between 56% and 59% in 2006 to 2009 and 47% in 2010. As explained above, the drop of TVB's market share in 2010 could be largely explained by a surge of advertising revenue for Cable TV which could be attributed to one-off events such as FIFA World Cup and the Asian Games. We note that the increase in Cable TV's share of advertising revenues was not reflected in its share of viewing. We also note that TVB's advertising revenue in 2011 has increased by 14% over that in 2010 to \$2,837 million.

(e) Exclusive Clauses

64. TVB considered that the Draft Report did not demonstrate that the alleged conduct could have the effect of causing downstream foreclosure or consumer harm. It considered that the Authority's analysis attempted to attribute the success of TVB's programmes solely to the quality of its artistes, and that its conduct only related to a small proportion of artistes on occasional use contracts. TVB also argued that the scope and duration of the concerned restrictions imposed on such artistes were limited and not excessive.

65. The Authority does not agree that its analysis attempts to attribute the success of TVB's programmes solely to the quality of its artistes. The Authority notes that many factors contribute to the success of a programme. However, artistes are a necessary input to popular programmes such as dramas and comedies, and that other inputs would not be a substitute. By denying other broadcasters' access to a large number of popular local artistes, TVB artificially hampers their ability to compete with TVB by producing more attractive programmes with more popular artistes. Regarding TVB's claim that [...] of the artistes who were contracted with TVB were affected by the alleged conduct, the Authority notes that the majority of artistes employed by TVB on a full time basis were under even more restrictive contracts and they are prevented from being able to work for other broadcasters.

66. TVB argued that the scope and duration of restrictions were limited and not excessive. The Authority conducts an analysis of the relevant clauses and finds that the exclusivity imposed upon artistes by the relevant restrictive clauses appear to be quite wide. Since consent was rarely given to artistes for working for other local TV stations, the Authority finds that such clauses do amount to de facto exclusivity⁹². TVB argued that the one-show artistes would not be prevented from appearing in other types of production (as such a film produced by a rival broadcaster) and singers would not be prevented from appearing in other media such as internet or radio. While this may be true, the Authority notes that these types of production are generally inputs into different downstream markets (for example retail markets for films distributed, radio broadcasting, internet). Only a small amount of a broadcaster's programmes may include films, and such inputs are generally less important to broadcasters than dramas, comedies, or lifestyle or entertainment shows. Other TV broadcasters are prevented from accessing artistes and singers contracted with TVB to appear in their programmes and thus materially prevented from

⁹² See paragraphs 168 – 173 of the report

competing in the downstream markets for TV viewing and TV advertising. As explained previously in the report, the Authority finds that the clauses in some of the contracts are drafted in such a way that it is unclear whether artistes whose contracts with TVB are about to end could refuse renewal and thus freely contract with rival broadcasters. TVB had contracted with a significant proportion of the available pool of artistes over a prolonged period and there is also no evidence to suggest that a material number of artistes switch to alternative broadcasters at the end of their contracts.

67. As such, the Authority rejects TVB's claims that the exclusivity under one-show and singer contracts is very limited.

68. TVB claimed that exclusivity was necessary to protect its investments, enable it to differentiate itself from rivals, and avoid scheduling conflicts and obstruction to timely completion of programme production. However, the Authority notes that in its representations in 2012, TVB did not set out what investments in artistes that TVB was attempting to protect by requiring exclusivity and did not explain why it was necessary to contract exclusively with artistes in order to differentiate itself. The mere artiste exposure on TVB programme does not constitute as investment of TVB in an artiste. TVB also argued that exclusivity clauses were common practice in Hong Kong and artistes often willingly agreed to the restrictive clauses in their contracts. While the Authority agrees that exclusive supply contracts engaged by a non-dominant firm or a firm without market power are unlikely to be anticompetitive per se, when they are made with the majority of available inputs, and made by a dominant firm, it is more likely that they can have harmful impact on competition. Furthermore, the Authority notes that in citing training as a form of investment on artistes in its representations in March 2013, TVB has not made a distinction between full-time and occasional use contracts, as the Authority observes that most artistes on occasional use contracts with TVB are singers or experienced artistes, and TVB has not provided any evidence that it provides training to occasional use artistes. As regards TVB's claim of the need to avoid scheduling conflict and ensuring timely completion of production, the Authority considers that the restrictions should be proportionate to any justification offered and TVB has provided no evidence to demonstrate that its restrictions are proportionate and not unduly onerous. As mentioned in paragraph 186 of the report, less restrictive obligations could allow TVB to achieve the same result. The Authority also observes that, while TVB argues for the need to impose exclusivity for securing a leading artiste in the production of a TV series, exclusivity clauses have been applied to contracts with almost all occasional use artistes and many of whom do not play leading roles in dramas and comedies, which the Authority considers disproportionate to its ends.

69. TVB argued that there was little actual evidence that rivals had been foreclosed from the market as its share of TV advertising revenues had increased at a much slower rate than ATV, Cable TV or Now TV. The Authority notes that the data TVB relied on is gross advertising prices before any discounts are applied. In assessing market foreclosure, the Authority relies on evidence on viewing share as a proxy for market power. Despite rapid increase in take up of pay TV platforms, TVB has maintained (even slightly increased) its market share of viewing. In addition, when considering the effects of a conduct, the Authority examines both the actual

effects upon the market and whether the conduct is capable of exerting effects that prevent, distort or substantially restrict competition or has inherent effects that prevent, distort or substantially restrict competition. This is consistent with the EU case law under Article 102.

70. TVB claimed that if full-time contract artistes who received a guaranteed amount of work each year were excluded from the analysis, then the same was true for artistes on serial-based contract artistes and they should also be excluded from the analysis. However, the Authority considers that a higher degree of exclusivity is more acceptable for full-time artistes because they are, unlike serial-based artistes, on full-time employment with a guaranteed payment for their full-time service regardless of the amount of work they have done for the concerned period. Serial-based contracts only engage artistes to perform in a given number of programmes, the production of which usually does not require full-time service of the artistes for the whole contractual period, meaning that artistes should have plenty of time to work for other TV stations and production companies but are unable to do so because of the exclusivity provisions.

71. TVB submitted that the Revised Draft Report failed to establish that the exclusivity provisions had prevented other licensees from engaging artistes or singers as a result of TVB's restrictions, and outright exclusivity only affected a small percentage of artistes under contract with TVB. However, the Authority finds that almost all occasional use contracts contain clauses that result in de facto exclusivity, which has prevented rival TV stations from accessing TVB's artistes. This is demonstrated in paragraphs 165 to 175 of the report. The Authority considers that there is a demand for the services of the TVB's artistes by its rival stations, but artistes do not exercise the "seek consent" clause and request TVB's permission for engaging in outside work due to their awareness of the futility of the request and the fear of retaliation by TVB, hence the few number of outside work applications from artistes. This is supported by evidence cited in, among others, paragraphs 216 and 218 of this report.

72. TVB also argued that films constituted a large percentage of a broadcaster's programming, claiming that about 40% of pay TV's programmes were movies and entertainment shows. The Authority does not find a comparison with the proportion of movies and entertainment programmes among all programmes of pay TV helpful in understanding the relative importance of movies to broadcasters, as dramas and comedies have been shown to be the most popular programmes. Also, the Authority observes from TVB's data that only about 11% of all programmes of pay TV are movies (consistent with the data in Figure 6 of the report) and presumably, only some of such movies are Cantonese movies featuring local artistes relevant to the analysis. In addition, given that the most important driver of ratings and hence advertising revenues is not movies but entertainment programmes that require artistes' input, even if artistes are allowed to appear in films, other TV stations are still foreclosed from having TVB artistes appearing on their entertainment programmes.

73. TVB argued that occasional use artistes were not left idle but were engaged in such activities as training, promotions, etc. However, TVB has so far provided no evidence to support its claim. On the contrary, as demonstrated in

paragraphs 165 to 175 of the report, many one-show artistes and singers were under-utilised between 2007 and 2009. They would have the capacity to take on outside work but were forced to sit idle because of TVB's exclusivity provisions.

74. TVB claimed that it no longer entered into or renewed one-show contracts, nor did it include exclusivity provisions in singer contracts any more. The Authority acknowledges such unilateral actions taken by TVB. However, such recent actions taken do not change the fact that the exclusivity provisions and hence their effect on competition were in force in the period 2007 to 2010. That said, due consideration has been given by the Authority to TVB's change in contractual practices, as reflected in its decision to lower the financial penalty imposed as explained in paragraph 275 of the report.

(f) No Cantonese Policy

75. Regarding the no Cantonese policy, TVB submitted that the Authority failed to take into account or give any weight to evidence which contradicted the Authority's allegations that the no Cantonese policy impaired rivals' ability to compete with TVB. It highlighted the evidence of a record company executive who said that –

- (a) the no Cantonese policy would not make singers' appearance in rival channels less attractive and would help singers improve their Putonghua;
- (b) it was the organisational system of the TV station, the quality of its programmes and its audience base, rather than the no Cantonese policy, which affected viewership most. ATV's system had been problematic due to the frequent changes in its top management;
- (c) TVB was not monopolising the pool of singers but rather record companies did not consider it advisable to arrange singers to perform in other TV stations after considering relevant factors; and
- (d) on an occasion, TVB did not object to a famous singer's participation in a film promotional event broadcast by ATV since the event was film-related and the singer had only signed a singer contract with TVB.

76. In preparing the Draft Report, the Authority has thoroughly reviewed all the evidence it has gathered during the investigation. As explained in Chapter VII of the report, the evidence reviewed by the Authority indicates that the no Cantonese policy affected a very large proportion of singers and some proportion of artistes. For example, a licensee indicated that artistes not speaking Cantonese made the programme flow and presentation uneven and unattractive. Singers also confirmed to the Authority that if not of this policy, they would speak in Cantonese when interviewed by other local television stations. In fact, following the dispute between the HKRIA and TVB over royalty payments, some singers under HKRIA record companies began to switch to Cantonese. According to information provided by TVB, TVB has received no application for outside work with other local television

stations from the occasional use artistes and singers they contracted with and [...] very few notifications for singers to appear on self-produced programmes of other television broadcasters between 2007 and 2010. As such, after weighing all evidence gathered during the investigation, including the contradictory evidence highlighted by TVB, the Authority is of the opinion that, on a balance of probabilities, while the no Cantonese policy is not explicitly imposed through a contractual clause, the amount of evidence at its disposal shows that it is actively practised amongst singers as a result of TVB's policy.

(g) Analysis of TVB's Conduct

77. TVB referred to Article 101 of the Treaty on the Functioning of the EU and argued that if the practices were to be analysed by reference to Article 101, the Authority would need to demonstrate with clear evidence the actual foreclosure effects of the alleged conduct on the relevant markets.

78. The Authority disagrees with TVB's views, as the EU law is quite clear that, when the object or purpose jurisdiction is invoked, there is no need to prove actual effects or to identify relevant product markets. This is reflected in Case *C-8/08 T-Mobile*, where the Court ruled that, in order to ascribe a restrictive purpose or object to conduct, showing any impact on competition including any actual effects was not necessary. TVB is incorrect that, when the Authority invokes a purpose or object jurisdiction, there must be clear evidence of foreclosure effects even insofar as EU law is a relevant guide to the interpretation of the BO. EU law indicates that (i) there is no requirement to prove effects; (ii) all that need to be shown is that the clause has the potential or capability in an individual case to result in a restriction; and (iii) whether and to what extent, in fact, such a potential effect results is not relevant to object.

79. TVB submitted that the Authority was required to conduct a full-blown "but for" analysis, and that the Authority needed to demonstrate that ATV's lack of success was a result of its inability to offer entertainment programmes caused by TVB's exclusivity provisions, in the absence of which competition would not be restricted. It also submitted that the Authority had ignored the evidence that certain artistes did not find it desirable to work with ATV no matter whether the exclusivity provisions existed.

80. In assessing TVB's conduct, the Authority has examined the restrictive terms of the agreements within their full economic context in order to determine whether they can have an appreciable effect on competition. The factors considered relevant include (i) TVB's dominant position in the market for TV viewing (and the related market for TV advertising) where artistes are used as an input; (ii) the importance of artistes to broadcasters in downstream markets; (iii) the scope for broadcasters to substitute to alternative forms of artiste or other alternative inputs; (iv) the large share of artistes contracts that use these restrictive clauses; (v) the effect that the clauses have on rival broadcasters' abilities to compete (either by reducing the quality of their product or raising their costs); and (vi) the length of the contracts and scope for other broadcasters to acquire artistes at contract renewal. It is however not necessary to demonstrate the actual effect of the conduct in terms of larger market

shares for TVB or smaller market shares, higher costs or lower quality for its competitors in order to demonstrate that the conduct has an appreciable actual or potential effect upon competition.

81. TVB's assertion that the counterfactual should demonstrate ATV's lack of success was due to TVB's exclusivity provisions in any case goes materially beyond what has to be proven. All that need to be shown is that in the counterfactual there would be a more than de minimis impact upon competition, and if that is proven, that can then be taken as the extent to which competition has been distorted. In the present case, the relevant counterfactual is that TVB would not operate the exclusivity or other impugned clauses in question. In the counterfactual, the Authority shows how artistes would be much freer and could hence enter into a variety of contracts with other television companies. In such a scenario, ATV might hire or employ more such artistes and this might, at least to some degree, improve its performance. It is not necessary to show that absent the offending clauses ATV would necessarily suddenly recover from its commercial difficulties. On the contrary, all that need to be shown is that in the relevant counterfactual competitive outcomes might be different, and this is aptly demonstrated, for example, in paragraphs 202, 230, 246, 247, 248 and 262 of the report.

82. The Authority does not consider that whether artistes favour ATV or not is relevant, as it does not change the fact that in the counterfactual, TVB and ATV and anyone else would compete on a level playing field for artistes and ATV would have a better opportunity to procure some artistes than is the case at present.

83. TVB also claimed that except for paragraphs 171, 202 and 216, the report failed to establish that the alleged conduct had the capability or practical effects of restricting competition in a TV programme service market. It also claimed that the report did not discuss the actual or potential effects of the alleged conduct on third-party producers. The Authority does not agree with TVB's argument. In the case of exclusive contracts, the Authority followed internationally-recognised practice and made reference to the analytical framework suggested in the European Commission Guidelines on Vertical Restraints in determining the capability of foreclosure of the exclusivity clauses. Evidence was produced in paragraphs 208 to 210 and 213 to 215 of the report in relation to the five aspects that the Guidelines suggest. The Authority then further demonstrated, with evidence from the licensees and the interviewees, that the exclusive clauses also have an actual effect of foreclosure in paragraphs 216 to 220 of the report. In the case of no original voice and no promotion policies, the Authority established that the policies create additional hurdle for other local TV stations to obtain TVB's one-show and serial-based artistes directly and concluded that the policies had the capability of foreclosure. In paragraphs 245 to 248 of the report, evidence was provided to demonstrate the policies incur direct and indirect costs on rivals and hence cause foreclosure effect. The Authority also adduced evidence from singers and record companies in paragraphs such as 262 and 267 of the report to demonstrate the capability and effect of foreclosure of the no Cantonese policy.

84. As regards the effects or potential effects of the alleged conduct on third-party producers, the Authority does not consider a discussion necessary as

self-produced programmes form the vast majority of top rated programmes on the free-to-air general entertainment Cantonese channels and are the ones to which the restrictions TVB imposes would apply.

85. TVB submitted that most of the detailed review of the purpose and effect of the alleged conduct in paragraphs 153 to 271 of this report focused on TVB's relationship with artistes, singers and record companies and on their ability to compete in upstream markets, rather than on the purpose and effect of the alleged conduct in the TV programme service market. TVB claimed that except for paragraph 216 of this report, there was no discussion or analysis of the actual or potential effects of the alleged conduct, and that, quoting paragraph 166 of this report, there was a lack of evidence for the alleged conduct's anti-competitive effects in the TV programme service market.

86. The Authority disagrees with TVB's argument. The effects of the alleged conduct in the TV programme service market are discussed thoroughly in Chapter VII of the report. In particular, the potential and actual effects of the exclusive clauses in occasional use contracts are discussed in paragraphs 202 to 220 and 222 to 224 of the report; the potential and actual effects of the no original voice and no promotion policies in one-show and serial-based contracts are discussed in paragraphs 243 to 248 and 250 to 251 of the report; while the potential and actual effects of the no Cantonese policy applying to singers are discussed in paragraphs 261 to 267 and 269 to 271 of the report. Paragraph 274 of the report also draws the conclusion on the effects of alleged conduct based on these discussions.

87. The Authority considers that TVB has quoted paragraph 166 of the report out of context. In relation to the "seek consent" clauses, apart from collecting evidence from rival broadcasters, the Authority has also analysed the consent approval statistics and the data on the frequency of artistes and singers being involved in different numbers of shows provided by TVB. Paragraph 167 of this report discusses that the fact that TVB has only approved a relatively few instances of artistes/singers seeking consent could be due to the restrictive clauses which deter artistes/singers from seeking consent and broadcasters from approaching TVB artistes/singers. Paragraph 173 of this report further analyses that the small number of consent approvals given by TVB suggests that even though it is theoretically possible to obtain consent from TVB to allow its artistes/singers to appear on rival local TV stations, in reality, the consent clauses in the artiste and singer contracts impose de facto exclusivity. Rival TV stations' access to TVB's vast inventory of artistes on one-show, serial-based and singer contracts is effectively foreclosed. As such, the Authority does not rely solely on the evidence given by rival broadcasters in assessing whether the seek consent clauses amount to "de facto exclusivity" and hence the foreclosure effect of these clauses.

88. TVB claimed in its initial submission" that the Authority failed to observe its only analytical framework to conduct the foreclosure analysis. The Authority disagrees. In fact, it has duly followed the analytical framework described in the *Application Guidelines* and analyses the competition effects of the alleged conduct in the defined downstream market in Chapter VII of the report.

89. TVB also claimed that the Authority's competition analysis of the exclusivity arrangements deviated from two previous cases⁹³ determined by the BA. The Authority distinguishes the present case with the two cases cited by TVB. In considering whether exclusivity arrangements should be prohibited, the Authority does not just consider whether other programmes are available to attract viewers but also whether other programmes are effective substitutes. In the absence of effective substitutes, exclusivity may potentially cause foreclosure. In both *Euro 2004* case and *TVB/Galaxy* case, the Authority demonstrated that the programmes involved in the complaints were substitutable by other programmes.⁹⁴ But in the present case, the Authority does not agree that the other genres of programmes are likely to be effective substitutes for programmes featuring artistes for most broadcasters.

(h) The Authority's Decision and the Remedies Imposed on TVB

90. TVB argued that the remedies suggested by the Authority were disproportionate and lacked a proper statutory basis. In considering the remedies, the Authority adopts the principle that the remedies must be proportionate and go no further than necessary to cure the restrictions found. The Authority has taken into account TVB's representations in finalising the decision in Chapter VIII of the report, and revised the remedies and related actions that TVB is directed to implement. Regarding the proposed remedies on various exclusive clauses in the occasional use contracts, the Authority directs TVB to bring to an end the infringement referred to in paragraph 274 of the report. The Authority requires TVB to communicate to all concerned artistes and singers who have current occasional use artiste contracts with TVB within three months that TVB would abandon the infringing contractual clauses and policies and to make it clear to them that any act in a manner which is inconsistent with the proscribed contractual clauses and policies will not be treated as being in breach of the contract with TVB. The proposed remedies only apply to the existing occasional use artiste contracts, which only accounted for [...] of the total contracts entered into with TVB. The Authority emphasises that the proposed remedies are applicable to occasional contracts, which, as explained in paragraph 73 of the report, cover one-show contracts, serial-based contracts and singer contracts. In addition, the Authority has taken into account that TVB has taken unilateral actions to remove certain exclusivity clauses in its singers' contracts upon renewal and not to sign or renew one-show contracts with artistes and decides not to impose the maximum level of financial penalty of \$1 million. In deciding the remedies and financial penalty, consideration has also been given to all TVB's representations.

91. TVB also cited Article 7(1) of Regulation 1/2003 of the Council of the EU and four European Commission cases in arguing that any remedies should not exceed

⁹³ The two cases are respectively Complaint regarding "Euro 2004" Promotion by Hong Kong Cable Television Limited (BA 01/2004) and Complaints regarding Supply of a Drama Programme and Four Channels by Television Broadcasts Limited to Galaxy Satellite Broadcasting Limited (BA 01/2005).

⁹⁴ Preliminary Enquiry Report of the Broadcasting Authority on a Complaint regarding "Euro 2004" Promotion by Hong Kong Cable Television Limited (BA 01/2004), paragraph 23; and Preliminary Enquiry Report on Complaints regarding Supply of a Drama Programme and Four Channels by Television Broadcasts Limited to Galaxy Satellite Broadcasting Limited (BA 01/2005), paragraphs 19-20

what was appropriate and necessary to re-establish compliance with the rules infringed, and the infringing parties should retain their choice of how to comply with the law. While the Authority notes that regulators in the EU sometimes simply impose a prohibition or cease and desist order on the offending conduct and then leave it to the undertaking concerned to work out for itself how to comply in the future, this does not however mean that regulators are stripped of the power to impose more specific, tailor-made remedies if they see fit. The obligations imposed by the European Commission in the following cases are in fact very similar to those proposed by the Authority: *Case T-34/92 Fiatgori [1994] ECR II-905, Johnson [1981] 2 CMLR287; VW-Audi [1998] 5 CMLR 33, Case United Brands [1976] 1 CMLR D28*. The Authority considers that, in the circumstances of this case, the proposed remedies are reasonable and proportionate and go essentially to monitoring and effectiveness. This notwithstanding, the Authority has further amended the remedies in paragraphs 274 to 278 of the report by making it clear that TVB has committed an infringement of sections 13 and 14 of the BO by adopting the alleged conduct, and the Authority directs TVB under section 16 of the BO to bring to an end the infringement and TVB shall refrain from repeating or engaging in any act or conduct which has an equivalent purpose or effect of the alleged conduct.

92. TVB submitted that the “seek consent” clauses precisely implemented what the Authority in paragraph 186 of the report considered legitimate, i.e. to stipulate priority in the contracts so that the contracted artistes would be obligated to give priority over rivals with respect to access to their services. It also questioned why the Authority required TVB to cease the relevant restrictions with all artistes on occasional use contracts, when it contended that the detrimental effect on competition would likely be limited if the relevant restrictions were only imposed on a small proportion of available artistes.

93. The Authority considers that TVB’s interpretation of paragraph 186 of the report is incorrect, as the same paragraph states clearly that “[n]o TV station should be able to impose terms on artistes or singers that immunise itself from all possible scheduling conflict”. TVB must not use restrictive terms like the “seek consent” clauses to impose de facto exclusivity on artistes. The Authority accordingly considers it proportionate to direct TVB to bring to an end the concerned infringement and take into account the principles set out in the Authority’s decision to propose steps to take to ensure compliance for its future conduct.