

**Report by the Communications Authority
Regarding Asia Television Limited’s Complaint Against
Television Broadcasts Limited’s Alleged Violations of
the Competition Provisions of the Broadcasting Ordinance
(CA 01/2013)**

Executive Summary

I. Introduction

- 1.1 On 10 December 2009, the Former Broadcasting Authority (“BA”) (the Communications Authority (“CA”) since 1 April 2012, collectively referred to as the “Authority” hereinafter) received a formal complaint from Asia Television Limited (“ATV”) against Television Broadcasts Limited (“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 (“BO”).
- 1.2 The Authority has completed its investigation and concluded that some of the allegations in the complaint are substantiated.
- 1.3 This Executive Summary highlights the principal issues, analysis and findings of the Authority. It is provided for easy reference by the general readers only and must not be taken as substituting, modifying or varying any part of this report (“Report”) nor does it form part of the Report.
- 1.4 The Report, with confidential materials excised, is available on the Authority’s website at –

www.coms-auth.hk

II. The Complaint

- 2.1 The allegations which form the subject matter of this Report were

brought to the attention of the Authority in 2009. ATV raised the issue at the special meeting of the Panel on Information Technology and Broadcasting of the Legislative Council held on 30 June 2009 and lodged a formal complaint to the Authority on 10 December 2009.

2.2 The Authority decided on 28 August 2010 to launch a full investigation into some of the contractual clauses and policies of TVB as alleged in ATV's complaint. They are –

- (a) exclusive occasional use artiste and singer contracts with harsh and unreasonable terms;
- (b) artistes on serial-based and one-show contracts with TVB are prohibited from having their original voices when performing in other television (“TV”) stations’ programmes (no original voice policy);
- (c) artistes on serial-based and one-show contracts with TVB are prohibited from attending promotional activities of the productions of other TV stations which also featured the artistes concerned (no promotion policy); and
- (d) artistes on contracts with TVB are prevented from speaking Cantonese in the programmes of other TV stations in Hong Kong (no Cantonese policy).

III. Broadcasting Ordinance and the Authority's Jurisdiction

3.1 Section 13 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. Section 14 prohibits 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. TV programme service is defined in section 2 as the provision of a service that includes television programmes for

transmission by telecommunications that are readily accessible to the general public or to persons having equipment appropriate for receiving that service.

3.2 The Authority rejects TVB's argument that the Authority lacks jurisdiction under the BO to consider the complaint because the alleged conduct takes place in the upstream artiste supply market, not in the TV programme service market. 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 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.

3.3 Sections 13 and 14 confer upon the Authority jurisdiction based upon the purpose and/or 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.

3.4 Section 13 empowers the Authority to act where "conduct" has either as its purpose or its effect of "preventing, distorting or substantially restricting competition in a television programme service market". In examining "purpose", the Authority may intervene if the Authority concludes that the "purpose" is one which is intended to bring about effects that prevent, distort or substantially restrict competition. Explanations given by licensees can be evidence that the Authority would consider admissible and take into account when seeking to determine what the actual "purpose" of the conduct is and whether it is aimed at effects that prevent, distort or substantially restrict competition.

The alternative to purpose is effect. When considering effects, the Authority will generally look for actual effects upon the market. In appropriate cases, the Authority will also examine 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.

- 3.5 Section 14 of the BO prohibits the abuse of a licensee in a dominant position and a licensee who is in a dominant position is deemed to have abused its position if the licensee has engaged in conduct which has either the purpose or effect of preventing, distorting or substantially restricting competition. In considering “purpose”, the Authority is likely to adopt an approach similar to that applicable to section 13. When examining “effects”, in addition to taking into account the analysis under section 13 as part of the analysis under section 14, the Authority will also consider any additional evidence which is relevant to whether the licensee is dominant and whether the conduct by a dominant licensee is abusive including whether the conduct has the effect of actually or potentially preventing, distorting or substantially restricting competition.

IV. The Analysis

Supply and Demand of Artistes

- 4.1 All of the main local TV broadcasters (including pay 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. The most popular programmes in Hong Kong are general entertainment (such as drama, comedy, lifestyle, game show, etc.) programmes and of these, drama and comedy are the most important drivers of ratings and therefore advertising revenue. Both types of programmes, by their nature, require input from artistes. Artistes are therefore a necessary input for the general entertainment shows.

- 4.2 Though it is difficult to estimate consistently the number of artistes contracted with each TV station in Hong Kong, the evidence reviewed by the Authority indicates that during 2007 – 2010, TVB contracted with a significant proportion of all the artistes on contract with the main Hong Kong broadcasters. Information gathered from record companies also suggests that approximately 90% of singers entered into contracts with TVB.
- 4.3 From the evidence available to the Authority, apart from full-time contracts, TVB entered into three types of occasional use contracts with artistes and singers, including one-show contracts¹, serial-based contracts² and singer contracts³. The Authority decides 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. As such, the Authority's investigation focuses on the occasional use contracts.

Relevant Markets and Assessment of Market Power

- 4.4 On the basis of the analytical framework set out in the Competition Investigation Procedures and the Guidelines to Application of the Competition Provisions of the BO, the Authority finds that there are two relevant economic markets: all TV viewing market and TV advertising market.
- 4.5 In the all TV viewing market, TVB has a persistent market share of above 60% between 2006 and 2010. Its market share is significantly larger than that of its competitors. As the barriers to entry to the TV market are high and the countervailing buyer and supplier power is weak, the Authority concludes that TVB possesses a dominant position in the all TV viewing market.

¹ 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.

² 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.

³ 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.

4.6 In the TV advertising market, TVB's market share was persistently between 56% and 59% from 2006 to 2009. In 2010, TVB's market share dropped to 47%. However, this fall is largely explained by a surge of advertising revenue for Hong Kong Cable Television Limited ("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. Taking into account other factors such as entry barriers, substantial sunk costs, brand loyalty and low countervailing buyer power, the Authority concludes that TVB also possesses a dominant position in the TV advertising market.

TVB's Conduct

(a) Exclusive Contracts

4.7 TVB has contracted the majority of artistes and singers on contract with the 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.

4.8 In the 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, or for the artiste to be totally exclusive to TVB during the contractual period unless with TVB's consent. A small number of one-show contracts require the artistes concerned to notify TVB prior to undertaking outside work. As for singers, they are either required to obtain consent from TVB before engaging in outside work or give TVB prior notification before engaging in outside work. In addition, all occasional use contracts contain a clause that TVB is not under an obligation to use the contracted artistes. The data provided by TVB suggests that there is 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 are fully capable of rendering their services to rival local TV stations, yet

are still subject to the exclusivity terms.

4.9 With these “exclusive clauses”, artistes undertaking outside work are subject to TVB giving consent. The Authority has examined the operation of the consent mechanism in detail. Even though it is theoretically possible for TVB artistes to obtain consent from TVB to appear on rival local stations, in reality, the consent clauses in the artiste and singer contracts impose de facto exclusivity. As regards those contracts which only require singers to give TVB prior notice, the evidence reviewed by the Authority suggests that the notice requirement functions as de facto exclusivity. For example, between 2007 and 2010, TVB approved very few applications from artistes for performing outside work and none of the applications approved by TVB involved artistes working for TVB’s rival TV stations in Hong Kong. In addition, TVB has only received very few notifications from singers to appear on other TV broadcasters. It is difficult for artistes to break out of such de facto exclusivity on their own as they have little countervailing supplier power. Rival TV stations’ access to TVB’s vast inventory of artistes on occasional use contracts is effectively foreclosed. The clauses 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. In addition, when these clauses are used in conjunction with the no-obligation-to-use clause, they allow TVB to warehouse artistes at minimal cost. 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 confirms that the purpose of these clauses is to prevent competition. The Authority is of the view that the “exclusive clauses” have the purpose of foreclosing rival’s access to artistes and singers and violate section 13 of the BO.

4.10 As regards singers, 90% of the singers are also foreclosed from rivals’ access and all the TV viewers in Hong Kong suffer 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 in fact foreclosed rivals' access to artistes and singers, and for this reason has the effect and/or is capable of having the effect of preventing, distorting or substantially restricting competition in the relevant market, violating section 13 of the BO.

4.11 TVB has a dominant position in the all TV viewing and advertising markets. Given that the "exclusive clauses" have the purpose and capability of foreclosing rival's access to artistes and singers, and that there is evidence that they have actually exerted such an effect, the Authority is of the opinion that TVB also violates section 14 of the BO.

(b) No Original Voice and No Promotion Policies

4.12 The no original voice and no promotion policies are encapsulated in a significant proportion of TVB's one-show contracts and serial-based contracts. The Authority is of the view that the likely objective economic purpose of these policies 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.

4.13 TVB has significant market power in the relevant market. The no original voice and no promotion policies affect a significant number of those artistes who appeared in the most popular Hong Kong TV programmes in 2010⁴ and who therefore could reasonably be deemed to be most attractive. The evidence indicates 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,

⁴ The Authority analysed data on TV ratings by looking at the top 50 TV programmes in 2010, based on four weeks evenly spread throughout the year which were not affected by either major sporting events or public holidays.

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 these policies advanced by TVB are neither 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.

4.14 TVB has a dominant position in the all TV viewing and advertising markets. Since 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, and these policies are capable and have the effect of preventing, distorting or substantially restricting competition, the Authority is of the opinion that TVB also violates section 14 of the BO.

(c) No Cantonese Policy

4.15 While the no Cantonese policy is not explicitly imposed through a contractual clause, the Authority is of the opinion that the amount of evidence examined by the Authority (including records of artistes' interviews on Cable TV and evidence submitted by other licensees, singers and record companies) shows that it is actively practised amongst singers as a result of TVB's policy. This policy affected a very large proportion of singers and some proportion of artistes. The likely plausible objective economic purpose of this policy 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 BO section 13, and also section 14 given its dominant position.

4.16 The no Cantonese policy has both the capability of reducing the quality of the interviews of 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 clauses 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 BO section 13, as well as section 14 given its dominant position.

V. The Authority's Decision

5.1 After a careful analysis of the available evidence and taking into account TVB's representations, the Authority finds that the four allegations as set out in paragraph 2.2 are substantiated. TVB has committed an infringement of sections 13(1) and 14(1) of the BO by adopting the following practices in the circumstances summarised in Chapter VIII of the Report –

- (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.

5.2 For the infringement referred to in paragraph 5.1, a financial penalty of \$900,000 is imposed on TVB.

- 5.3 The Authority directs TVB under section 16 of the BO to forthwith bring to an end the infringement referred to in paragraph 5.1 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 5.1.
- 5.4 To ensure compliance with the above provisions, upon the service of the 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 of the Report 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 written 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.
- 5.5 In addition, the Authority makes clear the following in relation to the above remedies –
- (a) that 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.

5.6 For the allegations on unwritten rules of retaliation⁵, one station buy policy⁶ and requiring film companies that hired TVB artistes to undertake that the film would not be sold to other TV broadcasters in Hong Kong⁷, 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.

⁵ ATV alleged that TVB has a policy of retaliating against artistes who appeared on other domestic TV channels.

⁶ 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.

⁷ 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.