

DECISION OF THE COMMUNICATIONS AUTHORITY

PRELIMINARY ENQUIRY INTO THE ALLEGED ANTI-COMPETITIVE CONDUCT OF HONG KONG CABLE TELEVISION LIMITED AND ITS ASSOCIATES IN RELATION TO THE SUB-LICENSING OF BROADCASTING RIGHTS TO THE 2010 FIFA WORLD CUP AND THE 2012 OLYMPIC GAMES

Complaint against	Hong Kong Cable Television Limited (“HKCTV”) and its Associates ¹ (collectively “i-CABLE”)
Key Issue(s)	i-CABLE, as the holder of the exclusive broadcasting rights to the 2010 FIFA World Cup and 2012 Olympic Games, was alleged to have engaged in anti-competitive conduct through bundling the broadcasting rights to each of the two events with its own commentary, advertising, editing and other promotional content in its sub-licensing offer to Television Broadcasts Limited (“TVB”).
Relevant Provision(s)	Section 13 and/or section 14 of the Broadcasting Ordinance (“BO”) (Cap. 562)
Decision	No case for i-CABLE to answer and there is no justification to proceed to full investigation.
Outcome	The complaint case is closed at the preliminary enquiry stage without proceeding to the full investigation stage.
Case Reference	OFCA/M/BO2/1-12

¹ The associates of HKCTV, which are not licensees under the Broadcasting Ordinance, are (1) i-CABLE Communications Limited, (2) i-CABLE Entertainment Limited, (3) i-CABLE News Limited, (4) i-CABLE Sports Limited and (5) i-CABLE Sports (BVI) Limited.

THE COMPLAINT

On 1 June 2012, TVB filed a complaint with the Communications Authority (“CA”) against i-CABLE via its legal representatives, alleging that i-CABLE had engaged in anti-competitive conduct which had the purpose or effect of preventing, distorting or substantially restricting competition in a television (“TV”) programme service market in contravention of sections 13 and 14 of the BO.

2. In its submissions², TVB alleged that, having acquired the exclusive broadcasting rights to the 2010 FIFA World Cup and the 2012 Olympic Games, i-CABLE, instead of simply sub-licensing the broadcasting rights to the two sports events to TVB, had bundled the sub-licensing of such rights with its own commentary, programming, promotional materials and advertising (“Bundled Offer”). TVB alleged that i-CABLE’s Bundled Offer forced TVB to purchase a product that it did not want to acquire (i.e. i-CABLE’s commercials, promotional materials, and commentary) together with the product that it wanted (i.e. broadcasting rights to the 2010 FIFA World Cup and the 2012 Olympic Games). TVB alleged that such conduct had an anti-competitive purpose or resulted in an anti-competitive effect in the downstream market for the supply of TV programme service to viewers. TVB alleged that this conduct constituted mandatory product bundling³ in breach of sections 13 and 14 of the BO.

3. TVB also alleged in its submissions that i-CABLE was the sole supplier of the exclusive broadcasting rights to the two sports events in the relevant market, and thus had a monopoly over the underlying broadcasting rights to the two sports events in Hong Kong.

4. According to TVB, i-CABLE had leveraged on its dominant position as the sole supplier of the exclusive broadcasting rights to the two sport events to weaken competition in the market for advertising, as a separate breach of section 14 of the BO.

² Altogether OFCA had received four submissions from TVB dated 1 June, 11 June, 4 July and 23 August 2012.

³ Paragraph 85 of the *Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance* provides that mandatory product bundling generally means the tying of the supply of one service or product in which the supplier is not dominant to the supply of other in which the supplier is dominant, i.e. forcing consumers of products in which the supplier is dominant to take products in which it is not dominant.

BACKGROUND⁴

Sub-licensing of the Broadcasting Rights to the 2010 FIFA World Cup⁵

5. i-CABLE acquired the exclusive broadcasting rights to the 2010 FIFA World Cup from Federation International de Football Association (“FIFA”) and became the holder of the ultimate broadcasting rights to the event in Hong Kong. According to TVB, under the terms of its agreement with FIFA, i-CABLE had committed to ensuring that a subset of the event’s content was broadcast on a free to air (“FTA”) TV platform⁶. On 3 February 2010, i-CABLE invited the two FTA TV services providers in Hong Kong, i.e. TVB and Asia Television Limited (“ATV”), to bid for the sub-licensing of the event’s broadcasting rights. In i-CABLE’s offer of 3 February 2010, the successful bidder was required to carry prescribed programming blocks which contained –

- (a) the broadcasting rights to the 2010 FIFA World Cup, including four live matches with English commentaries available in NICAM, daily highlights, and opening and closing ceremonies; and
- (b) i-CABLE’s advertising and promotional materials.

6. TVB and ATV rejected this offer of i-CABLE. On 21 April 2010, i-CABLE proposed a second offer to TVB. The difference between the two was that under the second offer, TVB had the right to insert one minute of its own promotions and advertisements per hour of the programming content. In return, TVB had to make available an equivalent amount of advertising airtime to i-CABLE on TVB’s platform. The second offer was accepted by TVB on 23 April 2010.

Sub-licensing of the Broadcasting Rights to the 2012 Olympic Games⁷

7. i-CABLE acquired the exclusive broadcasting rights to the 2012

⁴ The facts as stated in this part are based on the submissions of TVB and i-CABLE and are not disputed by the parties.

⁵ The 2010 FIFA World was held in South Africa from 11 June to 11 July 2010.

⁶ i-CABLE has not raised any objection concerning the existence of this obligation in its submissions to OFCA.

⁷ The 2012 Olympic Games was held in London from 27 July to 12 August 2012.

Olympic Games from International Olympic Committee (“IOC”) as the event’s ultimate broadcasting rights holder in Hong Kong. According to TVB, pursuant to the terms of i-CABLE’s licence agreement with the IOC, i-CABLE had the obligation to sub-license a subset of its exclusive broadcasting rights to an FTA TV services provider in Hong Kong⁸. On 2 April 2012, i-CABLE invited the FTA TV services providers in Hong Kong, i.e. TVB and ATV, to bid for the sub-licensing of the event’s broadcasting rights. In i-CABLE’s offer of 2 April 2012, the successful bidder was required to carry prescribed programming blocks which contained –

- (a) the broadcasting rights to the 2012 Olympic Games, including important events and/or daily highlights, the opening and closing ceremonies, as well as the news feeds as provided by i-CABLE; and
- (b) i-CABLE’s advertising and promotional materials.

8. Under the terms of this offer, the successful bidder would not be allowed to make any changes or edit the prescribed programming blocks. Compared to the initial offer made by i-CABLE regarding the sub-licensing of the broadcasting rights to 2010 FIFA World Cup, this offer contained a new feature requiring the successful bidder to broadcast the event’s news feeds provided by i-CABLE. In addition, the prescribed programming blocks for the opening and closing ceremonies were required to be carried simultaneously on both the analogue and digital channels of the successful bidder.

9. TVB did not respond to i-CABLE’s offer by i-CABLE’s deadline on 10 April 2012. After the offer had lapsed, TVB and i-CABLE continued to correspond with each other. On 4 June 2012, i-CABLE made a second offer to TVB and ATV. While both TVB and ATV declined the second offer on 6 June 2012, ATV made a counter offer to i-CABLE on the same day. On 7 June 2012, i-CABLE accepted ATV’s counter offer and sent an agreement to ATV for execution. One day later, on 8 June 2012, ATV raised its concerns to i-CABLE that ATV’s unilateral broadcasting of the 2012 Olympic Games without involving TVB would be a breach of an agreement between TVB and ATV whereby the two had agreed to broadcast certain important sports programmes jointly. On the other hand, TVB issued press releases on 11 July and 13 July 2012 respectively indicating that it was in negotiations with the IOC on the acquisition of rights to broadcast the 2012 Olympic Games on the

⁸ i-CABLE had not raised any objection concerning the existence of this obligation in its submissions to OFCA.

FTA TV platform. On 16 July 2012, i-CABLE wrote to TVB requesting the latter to stop interfering in i-CABLE's contractual relations with ATV and IOC.

10. Following a meeting on 17 July 2012 among the Secretary for Commerce and Economic Development, TVB, ATV and i-CABLE, i-CABLE and TVB reached a sub-licensing agreement on the same day, by which i-CABLE granted to TVB -

- (a) the broadcasting rights for a total of 200 hours of the 2012 Olympic Games (including the opening and closing ceremonies, daily highlights and live events);
- (b) the right to edit, to add other material and to subtract from, delete, cut or modify its coverage and recording of the opening and closing ceremonies, daily highlights and live events with respect to the 2012 Olympic Games; and
- (c) to sub-license its rights to ATV.

TVB'S ALLEGATIONS

Relevant Market and Market Power

11. TVB submitted that the alleged conduct of i-CABLE occurred in the upstream market for the supply of Hong Kong TV broadcasting rights to the 2010 FIFA World Cup and the 2012 Olympic Games, and had an anti-competitive purpose and effect in the downstream TV programme service market. According to TVB, as i-CABLE had acquired the exclusive broadcast rights across all media platforms for the 2010 FIFA World Cup and the 2012 Olympic Games, it was the sole supplier for the sub-licensing of broadcasting rights to the two sports events, and i-CABLE therefore had a dominant position or at least had market power in that upstream market.

Alleged Anti-competitive Conduct of i-CABLE in 2010

12. In relation to the 2010 Bundled Offer, which TVB claimed to amount to mandatory product bundling, TVB's key allegations were that i-CABLE's offer forced TVB to purchase a product that it did not want to acquire (i.e. the package of TV commercials and promotional materials of i-CABLE and the commentary surrounding the coverage) together with the product that it wanted (i.e. the international feeds of the 2010 FIFA World Cup

and the 2012 Olympic Games). TVB claimed that i-CABLE's Bundled Offer had an adverse impact on competition between TV services providers in Hong Kong, as such conduct prevented TVB from offering its own programming content, thus inhibiting TVB's ability to differentiate its content from that of i-CABLE's. Viewers' choice was limited as a result. This would likely have an adverse impact on viewership in the long term, as well as on TVB's ability to attract advertising revenue.

13. In addition, TVB alleged that through mandatory product bundling, i-CABLE had leveraged on its dominance (acquired through its exclusive broadcasting rights) to a separate, neighbouring market, namely the advertising market. TVB alleged that i-CABLE's leveraging conduct had enabled it to raise significant advertising revenues while TVB's advertising revenue declined. Hence, the financial ability of TVB to compete for broadcasting rights to premium events in the future was also adversely affected.

Alleged Anti-competitive Conduct of i-CABLE in 2012

14. Regarding i-CABLE's conduct in 2012 relating to the Olympics Games, even though i-CABLE ultimately did not sub-license to TVB the broadcasting rights in the form of the 2012 Bundled Offer, TVB still pursued its complaint against i-CABLE and claimed that i-CABLE had (1) engaged in delaying tactics during the negotiations process resulting in TVB being unable to have sufficient time to prepare for the broadcasting of the event and enter into agreements with advertisers and sponsors ("Delaying Tactics"); and (2) acted in a way which prevented TVB's production team from operating effectively during the event ("Obstructive Conduct"). TVB complained that i-CABLE's conduct in relation to the sub-licensing of the 2012 Olympic Games had contravened both the purpose and effect limbs under sections 13 and 14 of the BO.

PROCEDURAL STEPS TAKEN IN HANDLING THE COMPLAINT

Investigation Procedures and Competition Guidelines

15. In handling this complaint, the Office of the Communications Authority ("OFCA") has followed the *Competition Investigation Procedures* ("Investigation Procedures") and the *Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance* ("Competition Guidelines") issued by the CA in April 2012.

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

Paragraph 6

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

Paragraph 19

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

Steps Taken by OFCA

17. After receiving TVB’s complaint on 1 June 2012, OFCA sought clarifications from TVB pursuant to the Investigation Procedures. TVB provided supplementary information and documents to OFCA in support of its complaint on 11 June and 4 July 2012 respectively. As the information provided by TVB showed that the matter under complaint was within the scope of section 13 and/or section 14 of the BO, a preliminary enquiry (“Preliminary Enquiry”) was opened pursuant to the Investigation Procedures to consider the matter further. TVB was so informed on 26 July 2012.

18. As part of the Preliminary Enquiry, OFCA sought representations from i-CABLE in relation to the complaint on 31 August 2012. i-CABLE provided its representations on TVB’s complaint first on 28 February 2013, and then on 10 September 2013. Follow-up correspondence seeking further clarifications on some of the issues raised in the submissions were issued to i-CABLE on 10 March and 16 June 2014 respectively. Replies from i-CABLE were received by OFCA on 19 May and 28 July 2014 respectively.

i-CABLE's Representations

19. i-CABLE denied the allegations made by TVB and any breach of sections 13 and 14 of the BO. i-CABLE's responses to TVB's allegations are summarised in paragraphs 20 – 27.

Relevant Market and Market Power

20. i-CABLE was of the view that the conduct under complaint occurred in the market for the purchase, supply or licensing of broadcasting rights, which was an upstream market. i-CABLE argued that any conduct in the upstream market was subject to sections 13 and 14 of the BO only if the alleged conduct resulted in a substantial restriction of competition in the downstream TV programme service market. i-CABLE's view was that the relevant market for assessing both the conduct and market power/dominance was the downstream TV programme service market consisting of both FTA and pay TV services providers in Hong Kong.

21. i-CABLE considered that the upstream market was irrelevant for assessing market power and/or dominance. It went on to deny it had a dominant position or market power in the downstream TV programme service market. Even if the downstream TV programme service market consisted only of pay TV services providers in Hong Kong, i-CABLE argued that its market share (in terms of the number of subscribers) was likely to be significantly below 50% during 2010-2012 and therefore a presumption of dominance should not apply to i-CABLE. As i-CABLE did not consider itself to have either the market power or dominance in the TV programme service market (whether the market was defined as consisting of both FTA and pay TV services providers or just pay TV services providers), it argued that it lacked the ability to behave in an anti-competitive manner during the relevant period from 2010 to 2012.

Mandatory Product Bundling

22. i-CABLE disputed that the Bundled Offer amounted to mandatory product bundling. It argued that mandatory product bundling involved the compulsory supply of two separate products together, to the effect that consumers were forced to take those separate products from the same supplier, when they might have preferred to take one of the products from another supplier. For a conduct to be construed as mandatory product bundling, it was necessary to establish that (1) at least two separate products existed (a "tying product" and a "tied product"); and (2) the consumer was coerced into

taking the bundle, in that the seller refused to sell the alleged tying product without the tied product on a take-it-or-leave-it basis.

23. i-CABLE submitted that the commentaries, promotional materials and advertisements as constituent components of the Bundled Offer were merely components of a single product. There was no independent demand for the commentaries, promotional materials and advertisements as standalone products/services. Accordingly, the broadcasting rights to the sports events on the one hand, and the commentaries, promotional materials and advertisements on the other hand, should not be regarded as distinct products.

24. i-CABLE also argued that TVB was not forced to take the Bundled Offer. There had been process of negotiations, bargaining and modification of contractual terms between i-CABLE and TVB before the agreements on sub-licensing of the broadcasting rights to the two sports events were concluded. In particular, in respect of the 2012 Olympic Games, TVB did not accept the 2012 Bundled Offer and did not broadcast the event together with any prescribed commentaries or advertisements. In respect of the 2010 FIFA World Cup, although TVB was required to broadcast certain prescribed commentaries and advertisements, the final agreement contained modifications to the original offer, and there was therefore no take-it-or-leave-it offer. As both conditions referred to in paragraph 22 above could not be met, i-CABLE concluded that the Bundled Offer did not amount to mandatory product bundling.

Anti-competitive Purpose or Effect

25. i-CABLE argued that there was no anti-competitive purpose in its conduct as it only wanted to benefit from its investments in acquiring exclusive broadcasting rights to the two sports events, which was a legitimate objective. It considered that if undue strictures were placed on the ability of the winners to exploit their exclusive rights, services providers would be discouraged from investing effort and resources to bid for such rights in the first place. The danger of diminution of investment incentives was further heightened because of the existence of the joint purchasing agreement between TVB and ATV (“Joint Purchasing Agreement”), the only two FTA service providers in Hong Kong at the time, for the acquisition of broadcasting rights to the FIFA World Cup (from 2002 to 2010) and the Olympic Games (from 2004 to 2012). i-CABLE argued that the Joint Purchasing Agreement rendered it extremely difficult, if not impossible, for holders of exclusive rights like i-CABLE to obtain a fair return on any sub-licensing agreement by virtue of licensing fees alone.

26. i-CABLE further argued that the Bundled Offer could not have the effect of preventing, distorting or substantially restricting competition in the downstream TV programme service market. In respect of the 2012 Olympic Games, as the Bundled Offer was not accepted, no anti-competitive effect could be seen to flow from it. In respect of the 2010 FIFA World Cup, there was no evidence from TVB showing that its acceptance of the Bundled Offer did or would cause an actual decline of viewership for TVB. If there was any viewership effect, the effect would be trivial, given the short duration and one-off nature of the sports events and the limited quantity and scope of programming affected. TVB also did not provide any evidence showing how its future investments in bidding for sports events, programming development or otherwise were affected by i-CABLE's conduct. TVB also failed to prove that its ability to compete with other services providers in the relevant market was hampered by the loss of advertising revenue caused by the Bundled Offer.

27. Regarding TVB's allegations that i-CABLE had engaged in Delaying Tactics regarding the sub-licensing of the broadcasting rights to the 2012 Olympic Games, i-CABLE's response was that much of the delay to the conclusion of an agreement between the parties was caused by TVB's "*intractable insistence on terms exclusively in its favour*". i-CABLE also argued that TVB had not presented any evidence to support the other claims it made in relation to the Obstructive Conduct regarding the sub-licensing of the broadcasting rights to the 2012 Olympic Games.

Engagement of Economic Consultant

28. To assist the CA to consider the issues arising from TVB's complaint, OFCA had engaged an economic consultant, Frontier Economics Limited ("Frontier") to conduct an economic analysis of the extent of impact or likely impact, if any, the alleged conduct of i-CABLE had on the competition in a TV programme service market.

OFCA'S ASSESSMENT

Relevant Provisions

29. The CA's primary functions in relation to competition in the TV programme service market under the BO are set out in sections 13 and 14, which are extracted below.

Section 13 - Prohibition on Anti-Competitive Conduct

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

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

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

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

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

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

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

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

Section 14 - Prohibition on Abuse of Dominance

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

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

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

- (a) the market share of the licensee;*
- (b) the licensee's power to make pricing and other decisions;*
- (c) any barriers to entry to competitors into the relevant television programme service market;*
- (d) such other relevant matters as may be stipulated in guidelines concerning the test of dominance issued under section 4 by the Authority in consultation with the licensees in the relevant television programme service market.*

(4) *A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Authority, the licensee has engaged in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.*

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

- (a) predatory pricing;*
- (b) price discrimination, except to the extent that 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.*

30. Section 13(1) of the BO prohibits a licensee from engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market. Section 13(2)(a) to (f) set out a non-exhaustive list of examples of the conduct prohibited under section 13(1). Sections 14(1) and 14(4) prohibit a licensee in a dominant position from abusing that position by engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market. Section 14(5) sets out a non-exhaustive list of examples of the conduct prohibited under sections 14(1) and 14(4).

Framework of Analysis

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

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

33. The CA makes it clear in paragraph 27 of the Competition Guidelines that these stages should not be regarded as separate, self-contained exercises. The CA would not apply the guidelines as a linear, step-by-step progress that invariably follows the exact order of the three stages as set out above. An integrated approach to competition analysis may be adopted as appropriate. Market definition can help inform competitive effects while competitive effects can help inform market definition. The CA's central focus remains on evaluating whether the alleged anti-competitive conduct has, or is likely to have, an anti-competitive purpose or effect.

34. Paragraph 33 of the Competition Guidelines further provides that it may be clear in some cases that, although more than one market definition

could potentially be used in the analysis, the conduct under examination would not be considered a breach of the section 13 and/or section 14 of the BO on any reasonable market definition. In such cases, it would normally be unnecessary to have a definitive view on the precise boundary of the market.

Jurisdiction and Relevant Markets

35. Under both sections 13 and 14 of the BO, the test the CA is required to apply in deciding whether there is an infringement is “*whether the licensee’s conduct has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market*” (paragraph 7 of the Competition Guidelines). In addition, in deciding whether section 14 of the BO is applicable, as a pre-requisite, the CA must first be satisfied that the licensee is “*in a dominant position in a television programme service market*”. Prior to any assessment of the purpose or effect of the alleged conduct, it needs to be established that: (1) the alleged conduct has the required nexus to a TV programme service market required for either section 13 or section 14 of the BO to be potentially applicable; and (2) to the extent that the alleged conduct has such a nexus, what the relevant economic market(s) for the assessment of the alleged conduct should be.

Jurisdiction

36. According to section 2 of the BO, “*television programme service*” means the provision of a service that includes TV programmes for transmission by telecommunications and paragraph 13 of the Competition Guidelines states that a TV 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*”.

37. In this case, OFCA considers that the upstream supply of broadcasting rights to the 2010 FIFA World Cup and 2012 Olympic Games does not constitute a “*downstream market for the provision of television programme service to the general public or a smaller segment of the public*” since, in the absence of a sub-licensing agreement, the content would not have been available for broadcast to the public or a segment of the public via an FTA TV platform in Hong Kong. However, the downstream market for the supply of TV programme services to the general public in Hong Kong, in which TVB is active and in which it alleged that the Bundled Offer could have had an anti-competitive purpose or effect, clearly falls within the definition set out in section 2 of the BO and paragraph 13 of the Competition Guidelines. There is a clear potential nexus between conduct in the upstream market for

the supply of content to TV service providers and the downstream TV programme services market. Therefore, assuming the conduct in the upstream market for the supply of content to TV service providers had an anti-competitive purpose or effect as alleged by TVB, the CA would have jurisdiction over the conduct in question under section 13 of the BO.

38. Section 14 of the BO would be applicable only if the CA were also satisfied that i-CABLE was in a dominant position in a downstream market for the provision of a TV programme service to the general public or a smaller segment of the general public. The question of whether i-CABLE may be dominant in a downstream market for the provision of a TV programme service to the general public or a smaller segment of the general public requires an examination of the relevant economic markets and the degree of market power held by i-CABLE. The relevant assessment is set out below.

Relevant Markets

39. In light of the facts of this case, the relevant downstream TV programme service market is likely to entail two interrelated markets, namely the TV viewing market and the associated TV advertising market⁹. The geographical scope of the TV viewing market and the associated TV advertising market is the geographical area within Hong Kong.

40. Paragraph 13 of the Competition Guidelines states that the focus of the CA's regulation should be on the conduct of licensee in a downstream market, namely markets for the provision of TV programme services to the general public or a smaller segment of the public. Paragraph 14 makes it clear that a licensee's conduct in market(s) which might not fall within the definition of a TV programme service market may contravene section 13 and/or section 14 of the BO, so long as the conduct results in the prevention, distortion or substantial restriction of competition in a TV programme service market. TVB's allegation is that i-CABLE's conduct in the upstream market for the supply of Hong Kong TV broadcasting rights to the 2010 FIFA World Cup and the 2012 Olympic Games had an anti-competitive purpose and effect in the downstream market for the supply of TV programme services to viewers. In the light of TVB's allegations, it is necessary to also consider the relevant upstream market(s) in the current case.

⁹ Section 2(9)(a) of the BO provides that "a television programme service includes any advertisements comprised within the service".

TV viewing market

41. For the relevant TV viewing market, the starting point is TVB's position, viz. it claims to have suffered from the anti-competitive conduct of i-CABLE. TVB is an FTA services provider. It is not unreasonable to assume that the content available on ATV's FTA channels is perceived by viewers as sufficiently close substitutes of that available on TVB's FTA channels. **Hence, as a starting point, the TV viewing market should consist of the TV content provided by the two FTA TV services providers.**

42. Having established the initial boundary of the TV viewing market, the next step is to consider if there are other alternatives available that viewers would consider as sufficiently close substitutes to the content available via FTA TV services providers. Pay TV services in Hong Kong are predominantly provided by three domestic TV programme services providers, namely HKCTV, PCCW Media Limited ("Now TV"), and TVB Network Vision Limited ("TVB Network Vision"). Besides, Hong Kong Broadband Network Limited ("HKBN") which provides its pay TV service mainly to its telecommunications service subscribers via the Internet could also be included as another local supplier of pay TV services¹⁰. The content available from these pay TV services providers is perceived to be close enough substitutes for that available from FTA services providers in relation to those viewers who are also pay TV service subscribers. Hence, for those viewers who are already pay TV service subscribers, the content available from pay TV services providers should be treated as part of the same TV viewing market as FTA content¹¹.

43. As for viewers who are not pay TV subscribers, the extent to which the content available from pay TV services providers is substitutable with that available from FTA TV services providers can only be determined through detailed data analysis. The data required for undertaking such an analysis is however not available and therefore no definitive conclusion can be drawn in this regard. That notwithstanding, as can be seen from OFCA's

¹⁰ HKBN provides fixed telecommunications network services in accordance with a licence issued under the Telecommunications Ordinance. Its provision of pay TV service over the Internet does not require a licence under the BO.

¹¹ If the starting position for market definition as discussed in paragraph 41 above is i-CABLE instead of TVB, then Now TV, TVB Network Vision, HKBN together with i-CABLE could possibly form a market of its own consisting of all pay TV services providers. Applying similar logic as that discussed in paragraph 42 above, it would also lead to the conclusion that FTA services providers offer close enough substitutes to the services provided by pay TV services providers that both sets of services providers compete in the same TV viewing market.

assessment below, the precise boundary of the relevant market should be of no concern as the assessment will not be affected whether the TV viewing market is defined narrowly to include just the content available from FTA TV services providers, or from just pay TV services providers, or, if defined more widely, to include content available from both pay TV and FTA TV services providers.

44. Beyond content available from pay TV services providers, content available through other platforms such as cinema, DVD and internet streaming which are provided on demand of the viewers is sufficiently different in characteristics from that available on either the FTA TV or pay TV platforms. As such, this other content is not included as part of the TV viewing market.

45. Accordingly, for the purpose of this case, **the boundary of the TV viewing market should be no wider than the content available from both FTA TV and pay TV services providers (“All TV viewing market”), or could be as narrowly defined as content available from just the pay TV services providers (“Pay TV viewing market”), or from just the FTA TV services providers (“FTA TV viewing market”).** Given TVB’s claim that the alleged anti-competitive conduct of i-CABLE as a pay TV service provider had adversely affected TVB as an FTA TV service provider, **OFCA is inclined to identify the boundary of TV viewing market as the All TV viewing market.** That said, in view of the analysis set out below regarding the likely impact of the alleged conduct, the precise boundary of the downstream market needs not be decided. The reason is that the conclusion drawn from the analysis below remains valid irrespective of whether the downstream market is defined narrowly or widely as described above.

TV advertising market

46. TV advertising combines sound and moving images in a way which provides a more engaging experience in comparison with other forms of advertising (such as print media, billboards, and radio)¹². From the advertisers’ perspective, advertisements placed on either the pay TV platform or the FTA TV platform are close enough substitutes that advertisements placed in both platforms should be included in the TV advertising market. **Hence, the boundary of the TV advertising market is identified as advertisements placed on both pay TV and FTA TV platforms.**

¹² Internet display advertisement is not considered as a reasonable substitute for TV advertising. This view is in line with that set out in the *Opinion and Decision by the Communications Authority dated 13 September 2013 Regarding Asia Television Limited’s Complaint Against Television Broadcasting Limited’s Alleged Violations of the Competition Provisions of the Broadcasting Ordinance* (“CA Decision 2013”). See paragraph 146 of the CA Decision 2013.

Upstream market for the supply of content to TV services providers

47. The relevant upstream market boundary in this case could be as narrow as the one claimed by TVB, where the supply of each piece of content (viz. Hong Kong TV broadcasting rights to the 2010 FIFA World Cup and the 2012 Olympic Games) can be conceived as a separate market. Alternatively, the relevant market could be as wide as the supply of TV broadcasting rights in Hong Kong to all live sports events. However, in view of the analysis given below, regarding the likely impact the alleged conduct had on the TV programme service market, the precise boundary of the upstream market needs not be decided. The reason is that the conclusion drawn from the analysis below remains valid irrespective of whether the upstream market is defined narrowly or widely as described above.

Assessment of i-CABLE's Market Power in the Relevant Markets

48. Having identified the relevant markets, the next step is to assess the degree of market power held by i-CABLE in these markets. The wording of section 13 of the BO does not explicitly mention any specific market power test, paragraph 46 of the Competition Guidelines states that “[o]nly a licensee with market power (or a group of licensees acting together that jointly possess market power) can behave in a potentially anti-competitive manner”. In a decision made by the CA in September 2013, it was stated that the CA would normally only consider whether a conduct engaged in by a licensee might contravene section 13 of the BO “if the licensee in question possesses a sufficient degree of market power”¹³. The market power test under section 14 of the BO is one of dominance. In either case, the ultimate purpose of market power assessment is to examine the extent to which a licensee's conduct is or is not constrained by rivals in the relevant market.

Assessment of i-CABLE's Market Power in the TV Viewing Market

i-CABLE's market position in the TV viewing market

49. The relative size of market shares among competitors can be indication of their respective market power within a relevant market. Based on the data on share of TV viewership collected by CSM Media Research (“CSM”)¹⁴, i-CABLE's share in the All TV viewing market (including both

¹³ Paragraph 45 of CA Decision 2013.

¹⁴ CSM is a research company which provides media-related data.

FTA TV and pay TV platforms) was [5% - 20%] throughout the relevant period from 2010 to 2012. During the same period, TVB's share in the same market was between [60% - 75%] to [60% - 75%]. Now TV also had a share of that market of between [1% - 15%] to [1% - 15%] during that same period.

50. Based on the available market data, with TVB's share of that market at persistently above [60% - 75%] during the period, and Now TV holding a market share persistently close to that held by i-CABLE, there appears to have been sufficient constraints on i-CABLE's conduct, such that it is unlikely to have been able to act to any appreciable extent independently of its rivals in the All TV viewing market at the relevant time. If the TV viewing market is narrowly defined as the Pay TV viewing market only, there also appears to have been sufficient constraints on i-CABLE's conduct such that it is unlikely to have been able to act to any appreciable extent independently of its rivals. Based on the number of subscribers¹⁵ of the pay TV service providers for the relevant period from 2010 to 2012¹⁶, i-CABLE's market share was between [15% - 30%] to [15% - 30%]¹⁷. Now TV's market share during the same period was between [50% - 65%] to [50% - 65%]. Other rivals held a combined market share of about [15% - 30%] during the period¹⁸.

51. While as suggested in paragraph 45 above, one of the possible definitions of the relevant market in this case is the FTA TV viewing market,

¹⁵ Unlike the All TV viewing market where data on share of viewership is used as the basis for the calculation, number of subscribers is used here instead for the purpose of calculating the market share for each of the pay TV services providers in the Pay TV viewing market. Market share by number of subscribers can give a more accurate picture of the business conditions and market environment characterizing the Pay TV viewing market. Information on number of subscribers was provided by the various pay TV services providers to OFCA.

¹⁶ The calculation of i-CABLE's market share does not take into account the number of i-CABLE's IPTV viewers, the details of which have not been provided by i-CABLE to OFCA since July 2010. In brief, the IPTV service of i-CABLE is not a service that end customers may individually subscribe to and pay for. i-CABLE enters into agreements with the management offices and/or incorporated owners of buildings or property development, for i-CABLE's provision of its CABLE Channel No.1 to all the residents of the buildings or property development concerned for viewing. Since i-CABLE provides only one channel to these IPTV customers for viewing, counting the number of residents who are able to receive signals of CABLE Channel No.1 may potentially inflate i-CABLE's market power.

¹⁷ Even if i-CABLE's IPTV viewers were taken into account, its market share in the Pay TV viewing market would not exceed [35% - 50%] during the relevant period, whereas Now TV's market share would be [35% - 50%] correspondingly. Considering that Now TV was able to secure [35% - 50%] of the market within a span of less than 10 years since its entry into the pay TV market in 2003, it is unlikely that i-CABLE would be able to act independently of its rivals between 2010 to 2012.

¹⁸ Other rivals include TVB Network Vision and HKBN.

since i-CABLE was not a participant in the FTA TV viewing market at the material time, logically therefore, i-CABLE could not possibly have any market power in that market.

Barriers to entry and countervailing buyer power in the TV viewing market

52. Consideration is also given to whether i-CABLE would face any potential threat of new market entry, or whether its conduct would be constrained by the countervailing power of its customers. The relatively high fixed costs associated with the production or acquisition of TV content would suggest that there are barriers to entry to the market regardless of the market definition adopted. That said, HKBN's entry into the TV viewing market appears to suggest that while barriers to entry to the TV viewing market may be significant, they may not be insurmountable. To a certain extent then, i-CABLE's conduct would also be constrained by the threat of new entrants, though in view of the significant market barriers, such threat would pose a far less effective constraint on i-CABLE's conduct than its existing rivals. Regarding customer power, the programming content of i-CABLE is supplied to viewers who are predominantly residential customers. They are small individually relative to i-CABLE, or indeed to any FTA or pay TV services provider and are unlikely to exercise any countervailing market power vis-à-vis i-CABLE. Hence, i-CABLE's conduct would unlikely be constrained by the buyers (viz. its viewers) in the TV viewing market.

Conclusion on i-CABLE's market power in the TV viewing market

53. Despite that significant barriers to entry exist and customers individually are unable to act as constraints to pay TV services provider, having regard to the high market shares of TVB on the All TV viewing market and the relatively high market shares of Now TV in the Pay TV viewing market, **it is unlikely that i-CABLE would be able to act to any appreciable extent independently of its rivals, either in the All TV viewing market or the Pay TV viewing market during the relevant period from 2010 to 2012.**

Assessment of i-CABLE's Market Power in the TV Advertising Market

i-CABLE's market position in the TV advertising market

54. Between 2010 to 2012, ATV and TVB's shares in the TV advertising market, in terms of advertising revenue¹⁹, were between █% to █% and between █% to █% respectively while that of i-CABLE was between █% to █%. Now TV held a market share of between █% to █% in the same period.

Barriers to entry and countervailing buyer power in the TV advertising market

55. The TV advertising market is interlinked with that of the TV viewing market. To be able to supply TV advertising services, the service provider would need to enter the TV viewing market in the first place. In this context, the discussion on and assessment of the barriers to entry to the TV viewing market at paragraph 52 above applies here. As regards countervailing buyer power, advertisers and advertising agencies are the buyers in the TV advertising market. They are likely to have relatively more bargaining power compared with viewers who are buyers in the TV viewing market. In general, it would appear that advertisers and advertising agencies would be able to exert higher bargaining power vis-à-vis TV services providers with smaller viewer base compared with those with larger ones. While it is difficult to specify the exact extent to which i-CABLE's conduct in the TV advertising market would be constrained by advertisers and advertising agencies, it is unnecessary to form a definitive view here as paragraph 54 above indicates that i-CABLE's conduct in this market is likely to be sufficiently constrained by its rivals²⁰.

Conclusion on i-CABLE's market power in the TV advertising market

56. In sum, **the evidence examined does not seem to suggest that i-CABLE could act to any appreciable extent independently of its rivals in the TV advertising market.**

¹⁹ Data on advertising revenue is provided by AdmanGo.com Limited ("AdmanGo"). AdmanGo is a company which provides a comprehensive advertisement tracking and media spending analysis service.

²⁰ The buyer power exerted by advertisers and advertising agencies, depending on its exact magnitude, would only further reinforce the constraints on i-CABLE's conduct imposed by that of its rivals from the supply side.

Assessment of i-CABLE's Market Power in the Upstream Market for the Supply of Content to TV Services Providers

i-CABLE's market position in the upstream market for the supply of content to TV service providers

57. In the present case, the market position of i-CABLE in the upstream market for the supply of content for services providers potentially might range from modest (if the upstream market is defined broadly such as the supply of content for all sports content) to a position of monopoly (if the upstream market is defined narrowly for each of the two sports events as alleged by TVB).

58. In the current case, there is also a special feature of the upstream market which is relevant to the assessment of i-CABLE's market power. The standard notion of a market entails suppliers on one side of the market willing to sell goods/services at the right prices, and buyers on the other side who are also willing to purchase goods/services that are worth their prices. The key word here is "willing", which means buyers and sellers have freedom to contract. They do not have to enter into an agreement if they do not want to buy/sell, or they cannot agree on the terms. This is not the situation in the current case. According to the agreements between i-CABLE and IOC and FIFA respectively, in its capacity as a pay TV services provider, i-CABLE was obliged to ensure that a subset of content of both sports events was broadcast via the FTA TV platform ("Sub-licensing Obligation"). As such, under its agreements with FIFA and IOC, i-CABLE had to sub-license the broadcasting rights to the two sports events to FTA services providers in Hong Kong.

59. To a certain extent then, the notion of the existence of an upstream market in the current case is artificial as, unlike the standard notion of market depicted in paragraph 58 above, the option of not sub-licensing the broadcasting rights to the two events was in fact unavailable to i-CABLE under the Sub-licensing Obligation. The Sub-licensing Obligation would weaken the bargaining position of i-CABLE as a supplier of sub-licensing rights to the two sports events vis-à-vis its buyer(s), viz. the FTA TV services providers in the present case. In other words, despite being the *sole supplier* for the sub-licensing of the broadcasting rights to the two sports events, i-CABLE's conduct in the upstream market would be constrained to some degree because of the existence of the Sub-licensing Obligation.

Barriers to entry and countervailing buyer power

60. Depending on where the precise boundary of the upstream market lies, ranging from the narrowest possible definition where the supply of Hong Kong TV broadcasting rights to a single sports event viz. the 2010 FIFA World Cup or the 2012 Olympic Games is conceived as a standalone market, to the widest possible definition where the market is identified as the supply of TV broadcasting rights in Hong Kong for all live sports events, the corresponding barriers to entry to that market varies from insurmountable to modest. As the CA has not formed a definitive view on the precise boundary of the upstream market in this case for reasons discussed in paragraph 47 above, the CA also does not have to form a definite view on the height of the barriers of entry to the upstream market.

61. With regard to countervailing buyer power, it is important to recognise the existence of the Joint Purchasing Agreement, which had the effect of allowing ATV and TVB to form a single and the only eligible party in negotiating and bargaining with i-CABLE for the sub-licensing of the broadcasting rights to the two sports events. Had it not been for the existence of the Joint Purchasing Agreement, i-CABLE would have been able to negotiate and bargain with ATV and TVB separately and rivalry between the two FTA services providers would place i-CABLE in a stronger bargaining position vis-à-vis its FTA rivals. The Joint Purchasing Agreement thus enabled ATV and TVB to have a significant degree of countervailing buying power vis-à-vis i-CABLE during the process of negotiating and bargaining over the terms of sub-licensing of the broadcasting rights for the two events in the upstream market.

Conclusion on i-CABLE's market power in the upstream market for the supply of content for TV services providers

62. Any market power assessment depends upon the boundary of the relevant economic market, as well as an assessment of the structure of that market and the relative bargaining positions of the sellers and buyers in the market. As noted above in paragraph 57, the market position of i-CABLE in the upstream market potentially might range from modest to a position of monopoly. However, for the reasons explained above, irrespective of i-CABLE's market share in the upstream market (however defined) during the relevant period, its conduct is likely to have been constrained by the existence of the Sub-licensing Obligation and the Joint Purchasing Agreement in respect of the sub-licensing of the broadcasting rights of the 2010 FIFA World Cup and the 2012 Olympic Games. Ultimately, it is unnecessary for the CA to

form a firm view on the precise boundary of the upstream market or on the extent of i-CABLE's market power, since, as the analysis below demonstrates, i-CABLE's conduct does not appear to have had an anti-competitive purpose or effect, irrespective of the market definition adopted and notwithstanding any market power i-CABLE may have possessed.

Assessment of the Purpose or Effect of i-CABLE's Conduct in relation to Sub-licensing of Broadcasting Rights to the 2010 FIFA World Cup

63. i-CABLE was only successful in concluding an agreement with TVB on the Bundled Offer in relation to the 2010 FIFA World Cup, but not the 2012 Olympic Games. This part of the assessment focuses therefore on the 2010 Bundled Offer made and accepted by i-CABLE and TVB respectively with regard to the sub-licensing of broadcasting rights to the 2010 FIFA World Cup in the context of section 13 of the BO. The assessment of i-CABLE's conduct in relation to the 2012 Olympic Games is made separately and is set out in paragraphs 85 to 92.

64. Before we start the section 13 assessment, it should be noted that in respect of TVB's complaint against the possible contravention of i-CABLE of section 14 of the BO in relation to an alleged abuse of its dominant position, it is necessary to establish that a licensee holds a position of dominance in a TV programme service market. As the discussion in paragraphs 49 to 56 above indicates, the available evidence suggests that i-CABLE did not have a dominant position in a TV programme service market. As such, there is no need to consider whether the alleged conduct of i-CABLE would infringe section 14 of the BO.

65. Coming back to section 13 of the BO, TVB claimed that i-CABLE's conduct was in contravention of the section, which prohibits a licensee from engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a TV programme service market. As discussed in paragraph 48 above, section 13 does not explicitly provide for any market power test, but the CA has said in a previous decision²¹ that it would normally only consider whether a conduct engaged in by a licensee might contravene section 13 if the licensee in question possesses "*a sufficient degree of market power*". In this connection, whether the licensee may have a sufficient degree of market power in a market other than a TV programme service market may be relevant consideration, if the licensee's conduct in that market has the purpose or effect of preventing,

²¹ Paragraph 45 of CA Decision 2013.

distorting or substantially restricting competition in a TV programme service market.

66. As discussed in paragraphs 49 to 56, **the available evidence does not appear to suggest that i-CABLE could act to any appreciable extent independently of its rivals in a TV programme service market.** Regarding the upstream market for the supply of content to services providers, no firm view is taken regarding the precise market definition, or the extent of i-CABLE's market power as discussed above. This is considered unnecessary given the analysis of the effect of i-CABLE's conduct in a relevant TV programme service market, as discussed below.

Assessment of the Effect Limb under Section 13 or 14 of the BO

67. The focal allegation which runs through all of TVB's submissions was that through mandatory product bundling²², i-CABLE could leverage on its position as the sole licensee of world renowned popular premium sporting events in order to gain market penetration and associated advertising revenues, which it could not have obtained otherwise. OFCA considers that, irrespective of the labelling by TVB of i-CABLE's conduct as "mandatory product bundling", the ultimate test so far as the effect limb of section 13 of the BO is concerned is whether the conduct as alleged had the effect of preventing, distorting or substantially restricting competition in the TV programme service market.

68. If the alleged bundling conduct of i-CABLE were to have any anti-competitive effect in the TV programme service market (viz. TV viewing and TV advertising markets), specifically in the form of anti-competitive foreclosure (viz. denying rival(s), in this particular case TVB, from access to those two markets), and depending on the precise boundary of the TV viewing market, such effect would be reflected in changes in viewership shares (for All TV viewing market) or the number of subscribers (for Pay TV market) as well as advertising revenue shares in the TV advertising market. More concretely, if the alleged bundling conduct of i-CABLE were to have any anti-competitive effect, its conduct would be expected to raise either its viewership share or its number of subscribers in the TV viewing market and its advertising revenue share in the TV advertising market. At the same time, TVB's relative shares

²² TVB alleged that i-CABLE's 2010 Bundled Offer constituted mandatory product bundling. See paragraphs 12 and 13 above.

in the corresponding markets would be expected to drop²³.

69. Based on the monthly viewership data provided by CSM, the relative changes in i-CABLE's and TVB's shares of viewership in the All TV viewing market during the period from January 2006 to September 2012 are examined as set out in Figure 1 below. It is observed that during the 2006 FIFA World Cup, where i-CABLE had exclusive broadcasting rights to that event and sub-licensed those rights to TVB and ATV, without bundling the rights with its own commentary, promotion materials and advertisements, the viewership share of i-CABLE experienced an observable uplift from about [5% - 20%] prior to the event to [5% - 20%] during the event, despite competition from TVB and ATV, which were free to package the content sub-licensed by i-CABLE in any way they wanted. It is however noteworthy that the jump in i-CABLE's relative viewership share did not last, and in fact it reverted to the pre-event level at [5% - 20%] as soon as the event ended. Correspondingly, during the 2006 FIFA World Cup, TVB's viewership share dropped from about [55% - 70%] prior to the event to [55% - 70%], but as soon as the event ended, TVB's viewership share returned to the pre-event level at [55% - 70%].

70. Similar pattern of viewership changes is observed during the 2010 FIFA World Cup, despite the fact that in 2010, i-CABLE sub-licensed the broadcasting rights in the form of a bundle. For the duration of the 2010 FIFA World Cup, i-CABLE's viewership share rose from about [5% - 20%] prior to the event to about [5% - 20%], but it dropped back to the pre-event level as soon as the event ended. Correspondingly, TVB's viewership share dropped from about [55% - 70%] prior to the event to about [55% - 70%], but reverted to the pre-event level at about [55% - 70%] as soon as the event ended.

²³ Many factors other than the alleged bundling conduct of i-CABLE might have caused changes in market shares in both the TV viewing market and in the TV advertising market. The data available to OFCA does not enable OFCA to isolate the effect that i-CABLE's alleged bundling conduct might have in the TV viewing and TV advertising market. Giving TVB the benefit of the doubt, OFCA's analysis treats any observable changes in market shares across participants in both markets as if they were solely attributable to i-CABLE's alleged bundling conduct. The same approach also applies to OFCA's analysis in relation to i-CABLE's conduct in 2012.

Figure 1: Impact of 2006, 2010 FIFA World Cup and 2012 Olympic Games on Viewership Share



71. It is observed that i-CABLE's viewership share had increased during the duration of both the 2006 FIFA World Cup (without any bundled offer) and 2010 FIFA World Cup (with the bundled offer). One possible way of interpreting the changes in viewership is that i-CABLE's bundling conduct in 2010, of itself, had *no effect* in the All TV viewing market²⁴. An observable lift in i-CABLE's viewership share vis-à-vis TVB is noted whether or not i-CABLE had engaged in the bundling conduct. In any case, even if i-CABLE's bundling conduct were the sole reason behind the rise of its viewership share (and TVB's corresponding drop) during the 2010 FIFA World Cup, such rise of viewership share did not last. Any effects resulting from i-CABLE's conduct would thus be unlikely to be significant enough to have the capability to adversely affect the competitive process, as the quick return of the viewership share for both i-CABLE and TVB to their respective

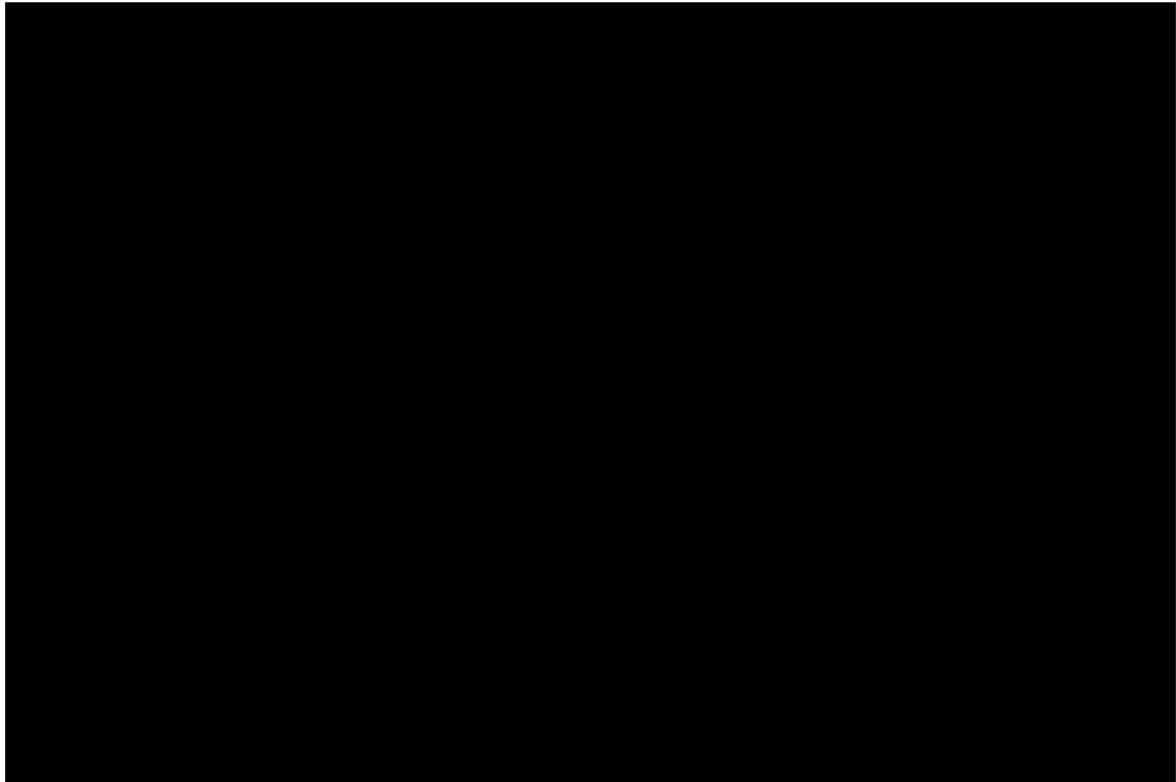
²⁴ Under this interpretation, the viewership pattern during the 2006 FIFA World Cup can be treated as the counterfactual - that is, what would have happened to viewership pattern when the alleged anti-competitive conduct on the part of i-CABLE was absent.

pre-event levels as soon as the event ended has demonstrated. Indeed, the short duration of the FIFA World Cup, lasting no longer than a month, combined with the fact that the event is held only every four years, render it unlikely that i-CABLE's bundling conduct would have the effect of preventing, distorting or substantially restricting competition in the All TV viewing market.

72. As discussed in paragraph 45 above, it may also be appropriate to examine whether the assessment of the effect of i-CABLE's bundling conduct would be any different if a narrower market of Pay TV viewing market or FTA TV viewing market was adopted.

73. For the Pay TV viewing market, Figure 2 below shows the changes in the number of subscribers across the pay TV market participants during the relevant period from 2010 to 2012. Around the time of the 2010 FIFA World Cup, the number of i-CABLE's subscribers is found to be dropping while that of its major rival in the Pay TV viewing market, Now TV, was on the rise. The changes in the number of subscribers as shown in Figure 2 suggest that i-CABLE's broadcast of the 2010 FIFA World Cup, together with the sub-licensing of its broadcasting rights in the form of a bundle, did not result in any gain for itself in terms of subscribers acquisition, or any loss of subscribers on the part of its major pay TV rival, namely Now TV, or even HKBN. *A fortiori*, there is no evidence that would suggest that the bundling conduct of i-CABLE, of itself, had led to any anti-competitive effect in the Pay TV viewing market.

Figure 2: Impact on the Number of Pay TV Services Subscribers



74. As regards the FTA TV viewing market, despite the fact that i-CABLE did not possess any market power as it did not operate FTA TV services (see paragraph 51), OFCA has also looked into whether i-CABLE's alleged anti-competitive bundling conduct, which took place in the upstream market, could result in any anti-competitive harm in the downstream FTA TV market.

75. For the FTA viewing market, OFCA again observes from the data available that the respective viewership shares for both TVB and ATV experienced a minor fall for the duration of the 2010 FIFA World Cup, but returned to the pre-event level as soon as it ended. The available evidence also does not appear to suggest that i-CABLE's bundling conduct at the material time had resulted in anti-competitive effect in the FTA viewing market.

76. OFCA has also examined whether i-CABLE's bundling conduct had any anti-competitive effect in the TV advertising market. If i-CABLE's bundling conduct were to have anti-competitive effect in the TV advertising market, i-CABLE's relative share in the TV advertising market should rise vis-à-vis those of its rivals'. This is so because i-CABLE would be able to

extend its reach to a larger viewer base through its bundling conduct than it otherwise could, thereby rendering i-CABLE relatively more attractive as an outlet for advertisers and advertising agencies vis-à-vis its rivals.

77. In this regard, data on the advertising revenue of the TV advertising market has been examined²⁵. OFCA observes that in 2009, i.e. a year prior to the 2010 FIFA World Cup, i-CABLE's advertising revenue share in the TV advertising market stood at █% while that of TVB was at █%. While TVB's advertising revenue share dropped to █% and that of i-CABLE rose to █% in the 2010, that pattern of change in terms of advertising revenue share soon reversed itself in 2011. In 2011, a year after the event ended, i-CABLE's advertising revenue share fell █ percentage points from the level the year before to █% while that of TVB increased by █ percentage points from the level the year before to reach █%, a level higher than its pre-event level in 2009. During the period between 2009 and 2011, Now TV saw its advertising revenue share experiencing a steady increase, from █% in 2009 to █% in 2010, and further to █% in 2011. ATV was the only other main participant in the TV advertising market which experienced a decline of advertising revenue share during that same period. Overall, the changes in i-CABLE's and its rivals' relative shares in the TV advertising market do not support the allegation that i-CABLE's bundling conduct had any anti-competitive effect in the TV advertising market during the relevant period.

78. Having carefully considered the available evidence in terms of changes in viewership shares and the number of subscribers across participants in the TV viewing market (including the wider All TV viewing market, the Pay TV viewing market and the FTA TV viewing market) and changes in the participants' advertising revenue shares in the TV advertising market during the period examined, **OFCA considers that the alleged conduct of i-CABLE in 2010 had no substantial effect on competition and there is no case for i-CABLE to answer on the effect limb under section 13 of the BO.**

79. TVB also claimed that the same bundling conduct of i-CABLE in 2010 was in breach of section 14 of the BO. Given that no anti-competitive effect is observed to have resulted from the alleged conduct as discussed above and that i-CABLE's dominance in a TV programme market cannot be established as a prerequisite for the application of section 14 in the first place, **OFCA also considers that there is no case for i-CABLE to answer on the effect limb under section 14 of the BO.**

²⁵ Only annual figures for TV services providers' advertising revenue are available.

Assessment of the Purpose Limb under Section 13 or 14 of the BO

80. In order to assess the purpose limb under section 13 or 14 of the BO, reference is made to paragraph 9 of the Competition Guidelines which states that “[i]n ascertaining the purpose of the conduct in question, the CA would consider the objective meaning and purpose of the conduct in its economic context”. For a conduct to engage the purpose limb of section 13 of the BO, it needs to be established that the conduct in question, by its very nature, is capable of inflicting anti-competitive harm to the competition process, thus rendering it unnecessary to assess whether the conduct has any anti-competitive effect.

81. With regard to the alleged conduct of mandatory product bundling on the part of i-CABLE in relation to the sub-licensing of broadcasting rights to the 2010 FIFA World Cup, TVB did not articulate in its submissions how i-CABLE’s conduct had the purpose of harming competition in the TV programme service market. On the other hand, i-CABLE argued in its submissions that its conduct in relation to the sub-licensing of broadcasting rights to the 2010 FIFA World Cup was simply an attempt to obtain a “fair” return for its heavy investment in acquiring the broadcasting rights to the event in the first place.

82. OFCA considers that the alleged bundling conduct of i-CABLE (whether it can be categorised as “mandatory product bundling” or not) is not by its nature anti-competitive and there is no evidence available suggesting that the conduct could have had the purpose of harming competition. Indeed, in paragraph 86 of the Competition Guidelines, the CA has provided guidance that for conduct that falls with the category of “mandatory product bundling”, the *effect* of such conduct would need to be assessed to determine whether a breach of section 13 and/or section 14 of the BO could be established. As discussed above, i-CABLE’s conduct in relation to the sub-licensing of the 2010 FIFA World Cup had no effect on the competition in the relevant markets.

Conclusion

83. Accordingly, OFCA considers that **there is no case for i-CABLE to answer in relation to its conduct under the purpose limb of sections 13 or 14 of the BO.**

Assessment of the Purpose or Effect of i-CABLE's Conduct in Relation to Sub-licensing of Broadcasting Rights to the 2012 Olympic Games

84. With regard to the sub-licensing of the 2012 Olympic Games, TVB's original complaint in June 2012 was directed against i-CABLE's 2012 Bundled Offer. On 17 July 2012, TVB signed a sub-licensing agreement with i-CABLE that did not include any bundling. Notwithstanding, TVB continued to pursue its complaint against i-CABLE and claimed that i-CABLE had engaged in Delaying Tactics and Obstructive Conduct and contravened both the purpose and effect limbs under sections 13 and 14 of the BO.

Assessment of the Effect Limb under Section 13 or 14 of BO

85. To assess the effect of the alleged i-CABLE's sub-licensing conduct with regard to the 2012 Olympic Games (viz. Delaying Tactics and Obstructive Conduct), OFCA has examined the viewership data for the period between 2006 – 2012 (see [Figure 1](#)) and observed similar pattern of viewership change in 2012 as that observed in the 2010 FIFA World Cup. During the period of the 2012 Olympic Games, i-CABLE's viewership share experienced a rise from [5% - 20%] prior to the event to [5% - 20%] during the event, while that of TVB fell from [65% - 80%] prior to the event to [65% - 80%] during the event for the All TV viewing market. However, that viewership pattern was, again, not sustainable, as both i-CABLE and TVB's viewership reverted to their respective pre-event levels as soon as the 2012 Olympic Games ended. For the Pay TV viewing market and the FTA viewing market, the effect of i-CABLE's conduct was also observed to be insubstantial having regard to the pattern of the changes in the number of subscribers and viewership share respectively, as well as the lack of sustainability of such changes, in similar ways as that of 2010.

86. For the TV advertising market, similarly there is no evidence to suggest that i-CABLE's conduct with regard to its sub-licensing of the 2012 Olympic Games had any significant impact in that market. TVB's advertising revenue share dropped [] percentage point from []% in 2011 to []% in 2012, and increased to []% in 2013. During the same period, i-CABLE's advertising revenue share was at []% in 2011, slightly increased to []% in 2012, and stayed at that level in 2013. For the other rivals of i-CABLE in the TV advertising market, ATV's advertising revenue share slightly dropped from []% in 2011 to []% in 2012, and stayed at the same level in 2013, whilst that of Now TV fell slightly from []% in 2011 to []% and []% respectively in 2012 and 2013. In the light of the available data,

OFCA considers that the alleged conduct of i-CABLE in 2012 had no substantial effect on competition and there is no case for i-CABLE to answer on the effect limb under section 13 of the BO.

87. TVB also claimed that the same conduct of i-CABLE in 2012 was in breach of section 14 of the BO. Given that no anti-competitive effect is observed to have resulted from the alleged conduct as discussed, and that i-CABLE's dominance in a TV programme market, a prerequisite for the application of section 14 in the first place, cannot be established, **OFCA also considers that there is no case for i-CABLE to answer on the effect limb under section 14 of the BO.**

Assessment of the Purpose Limb under Section 13 or 14 of BO

88. To assess whether i-CABLE's sub-licensing conduct with regard to the 2012 Olympic Games would engage the purpose limb under section 13 or 14 of the BO, it is necessary to consider whether the Delaying Tactics and Obstructive Conduct as alleged by TVB could by their very nature inflict harm on the competition process. In this connection, TVB has not articulated in its submissions in what way i-CABLE's alleged conduct had the purpose of harming competition.

89. With regard to the Delaying Tactics, OFCA notes from the evidence available that i-CABLE and TVB had engaged in a process of negotiations since 28 March 2012 for the sub-licensing of the broadcasting rights to the 2012 Olympic Games. An agreement between the two parties on the terms concerned was finally reached on 17 July 2012. During that period, there were communications back and forth between the parties, with exchange of offers and counter-offers. In the end, after such a vigorous negotiations process, a sub-licensing agreement was reached in terms which were very different from the original bundled offer proposed by i-CABLE. As such, **OFCA considers that there is no evidence available suggesting that i-CABLE's conduct in the negotiations was by its nature harmful to the competition process.**

90. With regard to the Obstructive Conduct, the specific allegations of TVB were that i-CABLE (1) did not provide sufficient accreditations for TVB's reporters and production staff; (2) did not offer to share accommodation at the Olympic event's International Broadcast Centre with TVB; and (3) failed to secure a transport licence for TVB, rendering it necessary for TVB's production crew to walk to the event venues while carrying their equipment with them. TVB similarly had not articulated why

and how such conduct on the part of i-CABLE was by its very nature harmful to the competitive process.

91. With no elaboration on the part of TVB, OFCA finds it difficult to see how the alleged Obstructive Conduct, even if proved, could by its nature harm the competitive process. **No conclusion of any harm to the competition could be drawn without a proper effects analysis.** Indeed as discussions in paragraphs 85 to 87 above have demonstrated, i-CABLE's conduct is found to have no substantive effect on the TV programme service market.

Conclusion

92. Accordingly, in light of the evidence at hand, OFCA considers that there is no case for i-CABLE to answer in relation to its conduct in 2012 under the purpose limb of section 13 or 14 of the BO.

OFCA's Overall Assessment

93. On the basis of the assessment at paragraphs 29 to 92 above, OFCA concludes that there is no case for i-CABLE to answer as the matter being investigated has no substantial effect on competition. Accordingly, there are no reasonable grounds to suspect that i-CABLE's conduct –

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

94. As such, there is no justification for the CA proceeding to a second stage for full investigation pursuant to the Investigation Procedures.

THE CA'S ASSESSMENT AND DECISION

95. After examining the facts of the case and the submissions provided by TVB and i-CABLE, the CA affirms OFCA's assessment that there is no case for i-CABLE to answer and that the matter being investigated has no substantial effect on competition. The CA concludes that there are no

reasonable grounds for it to suspect that i-CABLE has infringed section 13 and/or section 14 of the BO, and that a full investigation is not justified. The CA decides to close the case following the Preliminary Enquiry without proceeding to the full investigation stage.

Communications Authority

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