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Court of First Instance of Hong Kong quashes abuse of dominance decision against TVB, setting out important principles for future competition law cases

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On 29 January 2016, the Court of First Instance of Hong Kong ruled in favour of TVB and against the Communications Authority (the “CA”), in the ‘no Cantonese’ policy abuse of dominance case.

The 2013 decision by the CA, in which the broadcaster was fined nearly HKD 1 million under the sector-specific competition rules of the Broadcasting Ordinance (the “BO”) for a series of abusive practices in relation to artists’ management, is now set aside.

The case is likely to be of considerable importance for the future of competition law enforcement in Hong Kong. While the decision was quashed under constitutional grounds (neither the Communications Authority nor the Chief Executive in Council were found to be an ‘independent and impartial tribunal’ for the purpose of the Bill of Rights Ordinance), the Court ruled that the CA had used the correct ‘civil’ standard of proof to establish TVB’s violations of the law. This effectively sets a relatively low bar for future competition cases in Hong Kong, in a way that will facilitate the task of the CA and the newly set-up Competition Commission in fighting anti-competitive practices. Importantly, the court also validated most of the competitive analysis of the CA. Finally, the court provided useful information as to what type of remedies can be imposed to put an end to anti-competitive practices.

Justice Godfrey Lam heard the case against the CA’s initial decision and wrote the judgment summarised below. He has recently been appointed as the first President of the Competition Tribunal, which further underlines the relevance of the TVB case for competition law enforcement in Hong Kong.

Below we provide an overview of the fact and a brief analysis of how the case will affect competition law enforcement in Hong Kong.

The 2013 case

In September 2013, after four years of investigation, the CA found that TVB engaged in anti-competitive conduct in violation of Sections 13 and 14 of the BO (the “**Decision**”). The BO prohibits conduct by a licensee which has the purpose or effect of preventing, distorting or substantially restricting competition, and prohibits abuses of dominant position by TV licensees.

The Hong Kong broadcasting market follows a specific model, where most of the artists are polyvalent, regularly singing, dancing and acting in TV shows and series, whilst generally being affiliated with one TV station.

Following a complaint by ATV, the second and only other free-to-air TV station in Hong Kong, the CA found that TVB was dominant on the free-to-air market, having more than 50% of the market for free-to-air television, and more than 60% of the market for TV advertising.

It also found that TVB had engaged in the following anti-competitive conducts:

Exclusive clauses

In a majority of its contracts with local artists, TVB inserted exclusive clauses that either required consent from TVB before engaging in outside work, or were exclusive to TVB during the contractual period. Many artists were signed by TVB on one-show contracts but they were prevented from working for other TV stations for long periods.

‘No original voice’ and ‘no promotion’ policies

The ‘no original voice’ policy prohibited TVB’s contractual artists’ original voice from being used in TV productions by other local or foreign TV stations. As a result, when a TVB artist appeared in a TV show on another channel, all other artists on the show used their original voice, but the TVB artist’s voice is dubbed.

The ‘no promotion’ policy prohibited TVB’s contractual artists from appearing at the promotional activities of TV productions in which they starred but which are broadcast by other local TV stations.

The policies greatly reduced the value of TVB artists for other TV stations.

‘No Cantonese’ policy

The ‘no Cantonese’ policy refers to an unwritten rule where artists on contract with TVB were not permitted to speak Cantonese when they appeared in the programmes of other TV stations in Hong Kong. Artists who did not comply with the rule ran the risk of retaliation by TVB.

The CA found that the rule had a foreclosure effect in that it disrupted the flow and the coherence of other stations’ shows on which TVB artists appear.

Penalty and remedies

TVB was fined HKD 900,000, close to the statutory maximum fine of HKD 1 million provided for in the BO. In addition, TVB had to abandon the infringing contractual clauses and policies and it was ordered to publicly explain that it had put an end to the no-Cantonese policy.

The Court of First Instance ruling

The court quashed the Decision on the basis that neither the CA, which made the Decision, nor the Chief Executive in Council, which reviewed it, were an ‘independent and impartial tribunal’ for the purpose of the Bill of Rights Ordinance. This part of the ruling, whilst important from a constitutional point of view, is unlikely to affect the enforcement of competition law in Hong

Kong.

However, the court's ruling validates most of the CA's competitive assessment, in a way that will impact competition law enforcement in Hong Kong, including under the Competition Ordinance which, following its introduction in December 2015, brings into force two competition regimes in Hong Kong: the sector-based telecoms and broadcasting regime, enforced by the CA, and a new competition regime under the Competition Ordinance.

Standard of proof

This is the most important element of the ruling. In the new competition regime under the Competition Ordinance, the standard of proof was left to be determined by the Competition Tribunal, and it remained unclear whether the regulator needs to establish violations 'on the balance of probability' – a relatively low threshold – or 'beyond reasonable doubt', a much higher bar. The court ruled that the 'balance of probability' was the correct bar for competition cases in Hong Kong.

The uncertainty around the appropriate standard of proof came from the fact that competition law enforcement, and the fines and penalties which can result from it, are not clearly classified as 'civil' or 'criminal'. TVB contended that since the proceedings before the CA amounted to the determination of a criminal charge, the applicable standard of proof in such proceedings is proof beyond reasonable doubt, and that the CA had failed to apply that standard and applied a lower standard instead. However, after considering the European case-law on the subject, the court ruled that the proceedings concerned in the present case were not criminal in nature, determining instead that the applicable standard of proof was the balance of probabilities.

Importantly, the court added that "*the consideration of whether TVB's conduct had an anti-competitive purpose or effect and whether TVB abused a dominant position requires a careful and detailed inquiry.*" The court confirmed that in a competition case resulting in the imposition of a financial penalty and loss of contractual rights, the case must be proved by commensurably cogent and compelling evidence.

The impact of this ruling on competition law enforcement in Hong Kong is substantial, with the Court effectively setting a relatively low bar for competition law enforcement, which will likely apply in telecoms and broadcasting cases, as well as in cases under the new Competition Ordinance.

Reasonableness of remedies

The court ruled that it was disproportionate for the CA to require TVB to abandon all relevant clauses and policies in relation to all artists. In particular, the court said that the CA should have taken into account the fact that some contractual clauses had been voluntarily abandoned by TVB and that the CA should have considered whether the remaining parts would have ceased to infringe competition rules.

This will impact the way regulators and courts impose remedies in competition cases in Hong Kong, and the new Competition Commission will most likely study the judgment very carefully to ensure that they do not over-exercise their powers when requesting or imposing corrective measures. In practice, this means that remedies imposed will have to be narrowly tailored to the anti-competitive effects at play.

Market definition of upstream and downstream markets

In the Decision, the CA defined the relevant market as the market for downstream free-to-air television (i.e. the number of viewers and the advertising revenue). TVB contended in court that the CA should have defined the market for the input of artists (the ‘upstream market’).

The court ruled that it was not necessary to define the upstream market, since the BO makes clear that the relevant market is the “market for television programme service market”. This part of the ruling is likely to bear importance when parties in competition cases are faced with practices that affect the market for the sale and supply of products, but where the anti-competitive practice may have taken place in the upstream market (for instance the market for providing raw materials or the wholesale market). The court’s ruling makes clear that it is “[not necessary] to define the upstream market in every case where it is alleged that conduct in the upstream market has foreclosed input for the relevant downstream market”.

Dominant position of companies

This part of the judgment is likely to be very relevant to companies with a substantial market power in Hong Kong. The CA, in its Decision, found TVB dominant on the basis of, amongst others, its high market share in terms of the number of viewers. The court rejected the argument that the number of viewers was irrelevant for free-to-air broadcasters, and that the correct metric for assessing TVB’s market power was their revenue, finding that “[t]he question of market power is ultimately about constraints – constraints from the ability profitably to raise prices or [...] to reduce production cost or the quality of television programmes.” This analysis, whilst in appearance narrowly limited to the broadcasting market, reveals in reality that the court aligns with international practice for the assessment of market power by dominant companies. The court cited the *Hoffman-La Roche* judgment of the European Court of Justice to assert its point that market power is mostly about “freedom of action” from competitive constraints. This is important for the future of competition law in Hong Kong, since this approach has also been favoured by the Competition Commission in its guideline on abuse of substantial market power.

Useful links

The full judgment of the court can be found [here](#).

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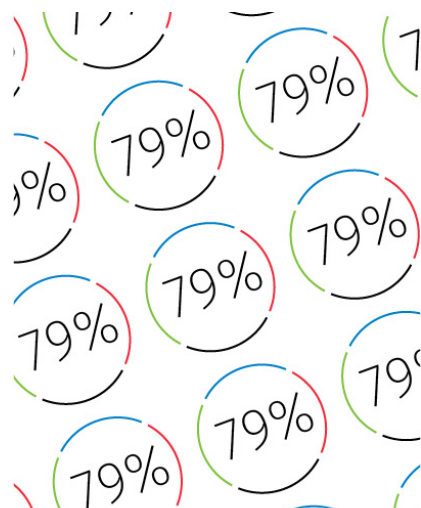
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