Abuse of substantial market power in Hong Kong

From a sector-based approach to a genuine framework for enforcement

Abuse of dominance is not a popular concept in the Hong Kong legal and regulatory landscape. Many industries are structured in an anticompetitive way, and there is, at the time of writing, not across-the board competition law enforced in the Special Administrative Region of the People's Republic of China. A Competition Ordinance, passed in June 2012, is expected to enter into force in December 2015 after more than 3 years of preparation. Competition rules have been in place in some sectors, notably in the telecoms and broadcasting sectors, sometimes for more than 15 years. In many other sectors such as electricity or rail transport, one or two players enjoy a state-backed unfretted power. Abuses, in many instances, are an expression of this lack of competition at the policy level, where industrial policies have dominated the agenda and where large market players have been allowed to act without the constraints of the market.

This chapter is therefore divided into two main sections. In a first part, it looks at the state of abuse of dominance in the broadcasting and telecoms sector, detailing the legislative provisions and the related case-law and attempting to determine whether these provisions have been sufficient to promote competition in these two sectors. In a second part, it analyses the provisions of the new Competition Ordinance against abuses of substantial market power, and the related provisions of the Draft Revised Guidelines published by the Competition Commission after a round of consultation. This chapter concludes that the new Competition Ordinance constitutes an undeniable progress towards better competition in Hong Kong, however a large degree of uncertainty remains about the effectiveness of the new law, in part because of the large concessions and compromises that were made during the legislative drafting process.

1. The limits of the sector-based approach to abuse of dominance in Hong Kong

Long before there was any talk of a cross-sector competition law in Hong Kong, the small common-law jurisdiction which returned to China in 1997 enacted competition provisions in the telecoms and the broadcasting sector. To a minor extent, some forms of competition law have been in place in the financial services and in the transportation sector, although these are more akin to competition policy principles that sector regulators must take into account.

This section of the chapter looks at provisions and case-law in (A) the telecoms and (B) the broadcasting sector, and relies on existing research to evaluate the ability of the Hong Kong sector-based approach to protect competition.

1.1. Abuse of dominance in the telecoms sector

In 2000, following some concerns with the competition provisions included directly in telecoms licences, the Hong Kong government raised these provisions to the statutory level by including them in the Telecommunications Ordinance (cap. 106). Prior to this inclusion in the law, competition obligations were imposed on licence carriers by the virtue of their licence, whose content could vary from a carrier to another. The provisions are enforced by the Communications Authority, a new regulator created in 2012 to regroup the functions of the Telecommunications Authority and the Broadcasting Authority (this chapter will therefore refer to "the Authority" to describe the Telecommunications Authority and the new Communications Authority indiscriminately). Competition decisions can be appealed at the Telecommunications (Competition Provisions) Appeal Board – thereafter the "Appeal Board". The provisions can only be enforced against a company which holds a telecommunications license under the Telecommunications Ordinance (the "TO"). The regulator, with the input of market participants, has drafted guidelines for the implementation of the competition provisions in the TO, in 1995, 2004 and 2010. This chapter refers to the 2010 version of the guidelines (the "Telecoms Guidelines").

1.1.1. The competition provisions in the Telecommunications Ordinance and the Telecoms Guidelines

Section 7L of the TO's section on abuse of position ("Section 7L") reads as follows:

"(1) A licensee in a dominant position in a telecommunications 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 take into account 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 telecommunications market;

(d) the degree of product differentiation and sales promotion;

(e) such other relevant matters as may be stipulated in guidelines referred to in section 6D(4)(a).

(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 or substantially restricting competition in a telecommunications market.

(5) The Authority may consider conduct to fall within the conduct referred to 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 telecommunications networks, systems, installations, customer equipment or services;

(c) making conclusion of contracts subject to acceptance by other parties of terms or conditions which are harsh or unrelated to the subject of the contract;

(d) arrangements (other than arrangements the subject of an authorization referred to in section 7K(3)(b)) requiring a person seeking the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service either from the licensee providing the service or from another person;

(e) discrimination in supply of services to competitors.*"*[1]

In addition Section 7N of the Telecommunications Ordinance prohibits discriminatory behaviours by licensees who are in a dominant position or who hold an exclusive licence.

"(1) Subject to subsection (4) and without prejudice to the operation of section 7K, a licensee who is in a dominant position in a telecommunications market shall not discriminate between persons who acquire the services in the market on charges or the conditions of supply.

(2) Subject to subsection (4), an exclusive licensee or a carrier licensee shall not discriminate between a person who lawfully acquires and uses telecommunications networks, systems, installations, customer equipment or services to provide services to the public and any other person who is not providing a service to the public.

(3) Discrimination includes discrimination relating to-

(a) charges, except to the extent that the discrimination only makes reasonable allowance for difference in the

[1] TO, Cap. 106 of the Laws of Hong Kong, Section 7L.

> cost or likely cost of supplying the service;
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> (b) performance characteristics; and
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> (c) other terms or conditions of supply.
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> (4) The prohibitions in subsections (1) and (2) apply only where in the opinion of the Authority such discrimination
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> has the purpose or effect of preventing or substantially restricting competition in a telecommunications market."[2]

Finally, some of the other competition provisions of the TO overlap with what would be considered abuse of dominance provisions in other jurisdictions, as it is the case for instance with Section 7K(2)(b) which prohibits "an action preventing or restricting the supply of goods or services to competitors", or section 7K(3)(b) which prohibits bundling when "without the prior written authorization of the Authority, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person". These two extracts from Section 7K, which is titled "anti-competitive practices", do raise more concerns when the player who is suspected of having engaged in them is in a dominant position, simply because of the fact that the provisions follow an "object or effect" test.

The specificity of the Hong Kong approach to dominance in the telecoms sector is the *ex ante* nature of the regime: firms are declared dominant in advance of any enforcement, and is subject to the provisions identified above, as well as to some provisions on pricing, by virtue of its dominant status.

In terms of their wording, the telecoms competition provisions do not deviate from international standards of competition legislations. To the practitioner used to the minimalist wording of Article 101 and Article 102 of the Treaty on the Functioning of the European Union or the US Sherman Act, Section 7L may appear over-prescribing. This section contains details that in the US or in Europe are more likely to be found in guidelines and other non-binding texts, rather than in the law. In a very recent US case, the Supreme Court recalled that, Congress has voluntarily left a wide margin of appreciation to the courts in antitrust matters, by enacting statutes that were not as detailed as, for instance, intellectual property laws. (cite Kimble v Marvel Entertainment) However there are two reasons why this seemingly over-prescribing statute is not necessarily an issue for the regulator or for the courts: firstly because this is not particularly unusual in the Asia-Pacific region, where competition legislations in places such as Australia and New Zealand tend to be long and detailed – including the new Competition Ordinance discussed in the second part of this chapter. Secondly because over-prescribing legislations only generate problems when they are poorly drafted, while Section 7L above does not deviate from what is expected from a law prohibiting abuses of dominance.

Under Section 7L, a dominant player is a player who is able to act "without significant competitive constraint from its competitors and customers", a definition perfectly in line with international practice. Indeed the EU guidelines on abuse of dominant position recall that

> "Dominance has been defined under Community law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers"[3]

This approach is consistent with the view that dominance can only be appreciated with regards to the conditions surrounding the undertaking in question, starting with the structure of the market. In this regard, a healthy reminder can be found in the Telecoms Guidelines that "In the context of Hong Kong's telecommunications

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[2] *Ibid*, Section 7M.

[3] *Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009/C 45/02, para. 10.

sector, caution needs to be exercised concerning the weight to be attached to market shares when dominance is being considered and in characterising a licensee's market position by reference to this single dimension."[4] In the following paragraph of the Telecoms Guidelines, the Authority explains that the complexity of determining dominance in the telecoms sector is partially due to convergence,[5] a factor which could for instance allow a player to leverage its high market share in one market to abuse its (non-dominant) position in another market. The Authority therefore does not consider useful nor helpful to define a market share threshold for dominance. To further reinforce this absence of threshold, the Telecoms Guidelines make reference to other jurisdictions, where even when a threshold is provided, "it is normally cautioned that dominance may be established below that threshold and market share above that threshold may not indicate substantial market power".[6] Finally, when taking into account market shares, the Telecoms Guidelines indicate that these can be expressed in several different ways, for instance by revenue, number of subscribers, network capacity or traffic volume. Interestingly, the Telecoms Guidelines then list a number of elements that can be taken into account by the Authority when assessing the licensee's position in the market, even though some of these elements – as well as others not repeated in the Telecoms Guidelines - are already prescribed by the TO. The factors listed are once again consistent with the international standards for the assessment of market power and they include for instance barriers to entry, countervailing buyer power, closeness of competition.[7] The Telecoms Guidelines provide some assistance for the use of three of these factors: pricing power, barriers to entry and differentiated products. On pricing, the Telecoms Guidelines point at a use of the SNIP test by the Authority, although they do not specifically refer to it: "Where prices have moved and there is evidence of customer switching to effective substitutes, a finding of a dominant position is less likely."[8] The Telecoms Guidelines are more detailed in the area of barriers to entry, something that can be explained by the fact that telecommunications are a heavily regulated market, that phone and internet services are generally considered a public utility which was traditionally provided by a singe state-owned monopoly, and that access to the telecoms market involves very high sunk costs and heavy investments. All of these factors tend to convert into high barriers to entry, an assessment which is still valid in spite of convergence and the digitalisation of phone services. Indeed, in the age of VoiP, although it may be possible to provide voice calls from a computer, this still requires the use of a telecommunications network to transport the data from a point to another. The Telecom Guidelines enact the fact that, following the enactment of WTO principles, Hong Kong has adopted an open-license policy and that there is no regulatory barrier in the Hong Kong telecoms market.[9] Remaining barriers to entry are either structural – such as high sunk costs for instance – or strategic – referring for instance to customers' brand loyalty. In terms of the closeness of competition, the Telecoms Guidelines note that market participants are less affected by the competitive constraint exercised by other companies when the services they offer are less interchangeable – for instance because they are slightly differentiated. In recent years, the closeness of competition has become one of the most important factors in the assessment of market power by competition authorities in the telecoms sector, both in the EU (cite Sybel) and in Hong Kong (cite concurrences).

1.1.2 <u>The enforcement of the provisions against abuse of dominance in the Hong Kong telecoms sector</u>

From the onset, the provisions of the TO have been made difficult to implement, either by the decisions of Authority or by the case-law of the Appeal Board. In 2003 in the HKCTV Bundling of Pay TV and Broadband Internet Access Services case, the Authority took the view that predatory pricing was an anti-competitive "by

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[4] Telecommunications Authority, *Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance*, 30 December 2010, para. 4.11.
[5] *Ibid*, para. 4.12.
[6] *Ibid*, para. 4.13.
[7] *Ibid*, para. 4.14. For a similar list of factors, although much more detailed, see the EC Guidelines on article 82, above at note 3, paras. 12-17.
[8] *Ibid*, para. 4.17.
[9] *Ibid*, para. 4.24.

effect" prohibition, despite the absence of such indication in the TO.[10] This high barrier to predatory pricing accusations was reinforced shortly after in the PCCW-IMS case, where the Authority ruled that predatory pricing could only be the deed of a dominant player, in a market with high barriers to entry.[11] The Authority's approach consisting in linking predatory pricing with high barriers to entry was repeated and detailed the same year in the PCCW-HKT IDD Fixed Plans case, where the Authority ruled that "[e]ven if PCCW-HKTC could successfully drive all its competitors out of the market, it is unlikely that it can charge excessive prices afterwards because competitors would re-enter the market once PCCW-HKTC increases its prices."[12] In the same case, the Authority declared PCCW non-dominant in the market for external (i.e. international) communications.[13] This analysis is flawed as it fails to take into account the incumbent operator's ability to leverage its market power in one market to reinforce its position in another market, something that has since been pointed at in the Telecoms Guidelines. The Authority subsequently improved its approach of pricing issues and interconnected markets in its first margin squeeze case. In the PCCW-IMS Margin Squeeze case, the Authority, by then equipped with draft guidelines on how to interpret the TO, looked at the case-law from the European Court of Justice to establish that "an undertaking with a dominant position in one market may abuse that position by engaging in conduct in another market".[14] In this case the Authority did not find evidence of margin-squeeze.

Whilst case after case the bar for proving abuses of dominance was raised by the Authority, some complainants resorted in relying on the telecoms licences' pricing provisions rather than on – or in combination with - the competition provisions of the TO. This however was not successful either.[15]

A clear sophistication of the Authority's analysis took place with the PCCW Interconnection Charge case in 2010.[16] In this case, the Authority accepted the complainants' submission with regards to the market affect, and subsequently defined the market in a very narrow way - an approach that is consistent with interconnection cases at other competition authorities.[17] Once again predatory pricing and abuse of dominance could not be established, however the authority engaged in a detailed and lengthy analysis of costs and margins, something that was missing from previous cases. The Interconnection Charge case decision towers at 63 pages to which, for the first time, the Authority attached 57 pages of annexes. This is a demonstration of the increased commitment of the Authority in the interpretation and the enforcement of the competition provisions of the TO. This latest decision[18] marks a clear improvement, and there is hope for the Authority to transform this essay into a successful enforcement of the competition provisions of the TO in the future.

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[10] Telecommunications Authority, *Complaint concerning HKCTV's Bundling of Pay TV and Broadband Internet Access Services*, June 2003, T210-02, paras 32-34.
[11] Telecommunications Authority, *Complaint concerning PCCW-IMS' "Sha La La" Calling Card*, July 2003, T9-03, para. 20.
[12] Telecommunications Authority, *Complaint about the IDD Fixed Fee Plans Offered by PCCW-HKT Telephone Limited"*, August 2003, T55-03, para. 16.
[13] *Ibid*.
[14] Telecommunications Authority, *Complaint Against PCCW-HKTC's Conduct Relating to its Residential Broadband Internet Service"*, September 2004, T249-03, para. 5.
[15] The Telecommunications Authority, *Complain about Unauthorised Discounts given by PCCW-HKT Telephone Ltd*, November 2004, T140-03; and Complaint about Unauthorised Discounts given by PCCW-HKT Telephone Limited to Business Customers, May 2005, T156-03.
[16] The Telecommunications Authority, *Investigation into Alleged Anti-Competitive Conduct of PCCW-HKT Telephone Limited,* November 2010, T62-08
[17] *Ibid*, para 6.11, 6.25-28, and 7.41.
[18] There was one subsequent abuse of dominance case at the Authority. In the first telecoms case under the new Competition Authority, the regulator looked at whether Apple has abused its dominant position by preventing iPhone 5 handsets and certain

1.2 <u>Abuse of dominance in the broadcasting sector</u>

The broadcasting sector is a at first sight one of the prides of Hong Kong, where both free-to-air and pay-TV enjoy a 99% penetration rate as of 2015.[19] Contrasting with these scores – which are higher than in the US – the lack of competition in the free-to-air sector would probably provide ample materials for a TV drama. TVB, the dominant player in free-to-air television, has recently been enjoying an even more comfortable field with the demise of its only competitor, ATV.[20] At the policy level, the government has endeavoured to open the free-to-air market to new entrants by granting licenses. After several years of consultations, it launched an application process and granted two licenses in November 2013, while denying a license to the local media company HKTV. HKTV filed for judicial review on the basis that the government contradicted its clear policy of opening-up the market, and changed the ruled during the application process by announcing that, because of the risk of excessive competition in the market, only two licenses were to be granted, therefore imposing a cap on the number of licensees after the process was launched. HKTV recently won its judicial review bid, forcing the government to re-assess HKTV's application.[21] The ruling is mainly based on the government's change of rules during the application process.[22] At the time of writing, it remained unclear whether the government is going to appeal the court ruling, or what could be the final result of HKTV's application for a free-to-air licence.

1.2.2 <u>The competition provisions in the Broadcasting Ordinance</u>

As with the telecoms sector, competition provisions were first included in the licenses of market participants by the government of Hong Kong in the 1990's. In 2000, the government enacted the Broadcasting Ordinance (the "BO"), creating the Broadcasting Authority and entrusting it with the enforcement of the new regulatory framework for the television sector. As explained above, the Broadcasting Authority and the Telecommunications Authority were mergers in 2012 into the Communications Authority, and for the sake of convenience all these three regulators are designed as the "Authority" in this chapter. Section 13 of the BO deals with anti-competitive conduct, and Section 14 prohibits abuses of dominance, in the following terms:

> "(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
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> > (a) the market share of the licensee;
> >
> > (b) the licensee's power to make pricing and other decisions;
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> > (c) any barriers to entry to competitors into the relevant television programme service market;

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other Apple devices from connected to certain 4G networks, and by doing this had conspired with several mobile operators. The complaint was dismissed on the basis that Apple Asia does not own a telecoms licence, whilst the actual sim-lock is effected by Apple Inc. in California, and therefore is not under the jurisdiction of the Authority. Appeal for the case is pending at the time of writing.

[19] Office of the Communications Authority*,* Key Communications Statistics, available at http://www.ofca.gov.hk/en/media_focus/data_statistics/key_stat/ [accessed on July 2015]

[20] ATV, a Hong Kong-based TV station, has experienced financial hardship and its difficulties have made the headlines in Hong Kong from the middle of 2014 up to now.

[21] *Hong Kong Television Network Ltd v Chief Executive in Council*, HCAL 3/2014, 24 April 2015.

[22] *Ibid*., para. 155.

(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."

The competition provisions of the BO have been detailed and studied by Professor Thomas Cheng, and there is no need to reassess them in the present chapter.[23] Instead it may be useful to reiterate how familiar Sections 14 – and the competition provisions in the BO in general – appear to those who are familiar with Article 102 of the TFEU, "including an enumeration of proscribed abuses".[24] Professor Cheng notes however that the "object or effect" approach to abuse of dominance is contrary to EU and US case-law, where a *per se* approach to abuses has been rejected. In that sense, he notes, the Hong Kong approach to abuse of dominance is instead aligned with the Australian practice of proscribing abuses based on object only.[25]

The Authority is aided in its enforcement mission by guidelines on the application of Sections 13 and 14 (the "Broadcasting Guidelines").[26] The Broadcasting Guidelines rely on the EU practice for the determination of market power, and indicate a rebuttable presumption of market power for a license carrier persistently holding a 50% market share.[27] Professor Cheng identified the influence of the AKZO case at the EU in the approach to market shares and market power.[28] He notes that while the Broadcasting Guidelines list a number of ways of calculating market shares – as with the telecoms sector's market share calculation – one element has never been used by the Authority: advertising revenue. This lack of diversity and this refusal of the Authority to look at the upstream market remains to date one of the flaws of the Authority's practice in relation to Section 14, as it will be discussed in the next subsection below. Lastly, the Broadcasting Guidelines provide guidance on how to assess whether a conduct has the object or effect of distorting competition, under which some practices are deemed anti-competitive by object only, leaving to the regulator and to the courts the arduous task of determining the intent of a company, and leaving little room for the actual effects and analysis of the conduct in the context in which it takes place.[29]

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[23] C. K. Thomas, Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies¸ World Competition 2010(33:2), pp. 217-243.
[24] *Ibid ,* 324.
[25] *Ibid*.
[26] Broadcasting Authority, *Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance*, April 2012.
[27] *Ibid*, para. 55(a).
[28] Cheng, above note 23, at 327.
[29] *Ibid*, 327-328.

1.2.3 <u>Enforcement of the provisions against abuse of dominance in the broadcasting sector: the early years</u>

The early years of enforcement of competition rules in the broadcasting sector were marked by the inability of the Authority to play its role. Through technical mistakes and insufficient analysis, the Authority repeatedly refused to even seriously consider the complaints which were brought to it. Instead, each of the early decisions of the Authority, from 2000 to 2013, shows a desire to close the case in a swift way and illustrates the possible incompetence of most of the Authority's members when it comes to competition law.

In close to fifteen years, the Authority has not been submerged by its competition duties, as it only ruled in nine cases. Of these, several concerned issues of dominance, and only one resulted in an infringement decision. This subsection discusses these cases, with a focus on the recent TVB case, and attempts to underline the shortcomings of the BO by analysing the Authority's interpretation of Sections 13 and 14.

In a 2002 case, three new pay-TV licensees complained about HKCTV on the basis of promotions offered for Valentine's Day and for the 2002 World Cup. As one can expect from a case ruled by a new regulator, the decision is short – 7 pages. The Authority declares HKCTV dominant, before turning to a creative argument to rule against the complainants. Instead of assessing the pricing of the service offered during the promotion in relation to the costs of delivering the service, the regulator considers that, because a similar – and even higher – promotion was offered the previous year by the same carrier, there is no anti-competitive object in the promotion offered.

The same lack of cost-based analysis can be found in the second broadcasting predatory pricing case. In the Channel A case, the Authority had to decide whether HKCTV violated Section 14 of the BO by offering Channel A for less than HKD 2 per household to some household, under collective subscription fees charged to the estates' management offices. The regulator is obviously struggling with the idea that low prices can be anti-competitive, and on the contrary sees low prices as something that widens consumer choice. Finally, the Authority mistook its own role as a nascent competition authority and did not fully understand the challenge of market definition: by considering pay-TV and free-to-air TV to be a single market, in which HKCTV is not dominant, it declared that the TV operator is not engaged in predatory pricing.

Two years later, the same TV provider was targeted by another complaint, from PCCW, in which the video-on-demand of PCCW argued that HKCTV had abused its dominant position by acquiring some exclusive rights to Spanish football games, and by including them in its basic offering, together with a 30-month minimum subscription for customers wishing to benefit from a combined promotion. This conduct, PCCW argued, had the purpose or effect of preventing, distorting, or substantially restricting competition in the market, as customers interested in Spanish football could only purchase this content from one provider, were forced to acquire basic content as well, and were locked-in for 30 months. In assessing the complaint, the Authority noted that the European Commission has ruled that the acquisition of football rights on a exclusive basis was not necessarily anti-competitive, even for multi-year licensing deals. Based on these international precedents, the Authority found the exclusive acquisition of rights to be not anti-competitive. This fairly short assessment is made without any reference to the Hong Kong market, and does not for instance attempt to study the effects of the acquisition deal on Hong Kong viewers, nor does it compare the duration of the licensing deal with the common industry practice in Hong Kong. What is visible in the Euro 2004 case is that international precedents provide an easy way for a young and immature competition authority to avoid having to properly assess a market or a conduct. In terms of bundling football matches with basis content, the Authority finds no violation of the BO, based on the absence of evidence that customers' choice has been hampered or affected by the bundling. On the 30-month subscription period, the decision relies on this type of subscription being common business practice, and it notes that the period is not mandatory but only confers a financial benefit to those who chose it. The Authority finds no violation of the BO in customers being locked-in with a dominant player for two-and-a-half year. What is particularly missing in the decision is an assessment of the three alleged practices together, as a single conduct or as a series of conduct having a similar effect, which is what the complainant alleged in the first place. In the Euro 2004 case, the Authority missed an opportunity to affirm its ability to run complex and serious analysis, and instead it focuses on the individual elements of one practice, leading to the complaint being deemed unsubstantiated.

In the Jewel in the Palace case, PCCW and HKCTV complained that the provision of a Korean drama on an exclusive basis by TVB – a dominant player – to Galaxy, without an open bidding process, was a violation of Sections 13 and 14 of the BO. An interesting question appeared at the market definition stage, where the Authority writes that:

> "In the absence of any substantive evidence, it is difficult to argue that subscribers consider any individual programme or drama series to be so unique and compelling that no other content (whether alternative Korean drama series or other comparable content) is substitutable, even if other content is offered to subscribers at a lower price to reflect the differential level of quality."

The question remained unanswered, since the Authority took the view that the case raised no competition issue. As identified by Professor Cheng, the Authority's argument that the complainants were registering customer growth despite being denied access to some programmes is antiquated, as "subscriber growth could have been high without the alleged anti-competitive conduct".

In the HKCTV Termination Practices case, the Authority again avoided the question asked by a complainant – whether delayed and harsh termination practices by a dominant player were a violation of the BO – by simply declaring HKCTV to be not dominant. The analysis of the market structure is flawed: in previous decisions, HKCTV was found to be dominant – mostly on the basis of its high market shares. However in the Termination Practices cases, which took place two years after the previous case, HKCTV's market share had begun to decline and the regulator took this as a sign that it was not dominant anymore. Yet, the very practice in question was about HKCTV engaging in delaying tactics to prevent customers from shifting pay-TV providers. Instead, the Authority heavily relied on the Broadcasting Guidelines to determine that the 50% threshold above which as player is presumed dominant was not crossed. The incompleteness of the analysis is particularly apparent when, after having mentioned the shifting trend in the market, the Authority declares that "[g]iven the evidence that HKCTV faces competitive constraints from its existing competitors, the BA is of the view that there is no need to consider whether it might also be constrained by factors such as new entrants or buyer power." [CITE]

1.2.4 <u>The TVB no-Cantonese policy case: coming of age</u>

The first years of the Authority in the broadcasting sector were marked by the regulator's inability to enforce the competition provisions of the BO. After eight unfortunate decisions, most of which concern abuses of dominance and were discussed in detail in the previous section, the Authority received a complaint from ATV, the only other free-to-air TV station, about TVB's alleged abuse of dominance. The decision that ensued, although far from flawless and currently under appeal, shows a dramatic increase in quality. Following a serious competitive assessment, the Authority fined TVB HKD 900,000 for abusing its substantial market power. It also imposed behavioural remedies on TVB, which was forced to modify contractual clauses with artists and to report annually to the Authority. The length and the level of detail of the competition analysis are witnesses of the regulator's improved stance on competition law enforcement. On the other hand, the complexity of the question raised by ATV and the novelty of the case were as many challenges to a regulator who, previously, never seriously discharged its competition duties. This section analyses the TVB decision, looking at (i) the challenges posed by the complaint, (ii) the competitive assessment in the decision, and (iii) the shortcomings of the decision.

1.2.4.1 The challenges posed by the complaint

ATV complained that TVB's use of exclusive contracts with a high number of artists and singers in Hong Kong deprived ATV of the ability to compete for viewers, that artists contracted with TVB could not use their original voice when appearing on other TV channels and therefore were of little value to other channels, that TVB artists could not take part in promotional activities on other TV channels, and finally that TVB artists were prohibited from speaking Cantonese on other TV channels. If this seems slightly odd to an outside observers, it may be useful to note that in Hong Kong, many artists are polyvalent and affiliated with a TV channel, in the same way that artists in the US at the beginning of the 20th Century were signing, acting and promoting under one major film studio.

In their substance, the claims were novel, and required the Authority to enter into a detailed analysis of contractual relationships on competition in the market. The case presented the additional challenge of requiring the Authority to take into account unwritten rules – some of the artists were allegedly under threat of retaliation from TVB, for instance if they were to speak in Cantonese on other TV channels. Finally, it required the regulator to potentially crack-down on a practice which the artists themselves favoured – as Cantonese is a language that is not spoken outside of Hong Kong and the Pearl River Delta, and they would reach a much wider audience by speaking in Mandarin, which is spoken in most of China, Taiwan and Singapore. Most of all, the Authority faced the daunting task of enforcing competition rules soundly, after ten years of failed, erroneous and incomplete competition analysis. This, in the wake of the new competition regime that will, once into force, coexist with the sector-based competition regime in the telecoms and broadcasting sectors, was necessary for the Authority to step back into the arena of competition law, and impose itself as an effective and viable competition authority, or face the risk of irrelevancy. The coexistence of the two competition regimes, of which the TVB decision is already the first produce, shows interestingly that even the world of competition law can benefit from competition.

1.2.4.2 The competitive assessment in the TVB decision

The Authority's analysis of the market is remarkably detailed, and shows a true improvement from previous decisions in terms of length, level of detail, and sophistication. The relevant market is defined, as per the Broadcasting Guidelines, with reference to the demand side and supply side substitutability, for which a SSNIP test is required.[30] Rightly so, the Authority identifies early on that TV is a two-sided market,[31] in which price-related data is either unavailable or irrelevant, a finding based in the decision on the European practice.[32] In the absence of price-related data, the Authority relies on the quality of programmes to measure the impact of conducts on consumers, an element that was crucially missing in previous cases, including the "Jewel in the Palace" case discussed above. Ultimately, the Authority left open the question of the product market, noting that choosing before an "all TV" and a pay-TV market would not affect the outcome of the decision.

The assessment of TVB's market power is the second solid element of the decision: the Broadcasting Guidelines, used in previous decisions to avoid enforcing the competition provisions of the Broadcasting Ordinance, are instead put to better use and reinforce the Authority's analysis that TVB has a substantial market power. The decision mentions European case-law to establish that, even if it had a market share of less than 40% - instead it has a 60% market share – TVB would still probably be found to be dominant, because of the structure of the market and of the weakness of competitors.[33]

1.2.4.3 The shortcomings of the Authority's analysis and reasoning

In spite of the considerable efforts and improvements made by the Authority in the TVB decision, several aspects or it reveal that the sector regulator is still not up to the level of international practice when it comes to competition enforcement.

A large part of TVB's anti-competitive conduct in the decision consists in a foreclosure of artists on the market for TV. As explained above, the Authority analysed in detail a number of contract, focusing on contractual clauses which prevented one-show artists from ever appearing on other TV channels or, if they did, on clauses that would ensure that they were less appealing to other channels – because they could not use their original voice, nor speak in the language most used in Hong Kong. However, nowhere in the decision features a ratio analysis that would establish what share of Hong Kong artists are thus tied to TVB. Nor is there any attempt to rank these artists, for instance by separating them into tiers according to their popularity, fame, and earning capacity. The Authority struggles to find cases where foreclosure effects took place in a market for employees, which in a sense is the conduct that TVB is fined for under the decision. However it would have been useful to consider *United States v International Boxing Club of New York*, a US Supreme Court decision in which boxers

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30 Communications Authority, *Opinion and Decision Regarding ATV's Complaint against TVB's Alleged Violations of the Competition Provisions of the Broadcasting Ordinance*, CA 01/2013, 19 September 2013, paras. 100-108.

31 *Ibid.*, para. 109.

32 *Ibid.*, para. 112.

33 *Ibid.*, para. 138, citing *Virgin Atlantic/British Airways*.

were not all considered equal, and for the purpose of market definition were ranked into tiers.[34] This level of detail is missing in the decision, and the TVB case heavily relies on the practice of competition authorities in TV cases, while it would have been potentially beneficial to explore precedents from the world of sports, in particular where this world intersects with antitrust.

Finally, the "upstream" market for advertising is only mentioned and briefly analysed at the market assessment stage, but does not support the Authority's finding that TVB has abused its substantial market power. This is missing in the decision: it would have reinforced the Authority's case if it could have been established that TVB not only has the ability to foreclose competitors on the market for TV, but also potentially on the market for advertising. In the light of the Google online search case at the EC,[35] it would have been interesting to analyse whether a player with a substantial market power is imposing, for instance, exclusivity clauses for advertisers, thus depriving its competitors of substantial advertising revenue by exploiting its market power on the other side of the two-sided market.

2. <u>The new Competition Ordinance: a new age for abuse of dominance?</u>

In June 2012, after ten years of negotiations and hesitations, Hong Kong adopted the Competition Ordinance (Cap 619), the first cross-sector competition legislation of the Special Administrative Region. At the time of writing, the Competition Ordinance has not come into effect yet, and is expected to come fully into force on 1 December 2015. A newly appointed Competition Commission (the "Commission") has published two series of draft guidelines, and is expected to finalise them between now and 1 December 2015. The new law, which has been amply studied and explained, generally follows an EU model of competition legislation, with a prosecutorial twist. A newly appointed Competition Commission will investigate competition violations and bring cases to a newly created Competition Tribunal, which can impose penalties and fine and hear follow-on actions but to which individuals and companies do not have a access directly. The Commission will not be able to make findings or to impose fines, and must bring cases to the Competition Tribunal. Whilst the Hong Kong government was originally planning to devise a purely administrative regime of competition law for Hong Kong, a ruling by Hong Kong's highest court in an unrelated insider dealing case during the drafting phase forced the government to adopt a judicial enforcement system. The government set up a tribunal to comply with the obligation enunciated in *Koon Wing Yee v Insider Dealing Tribunal* [36] in which the court ruled that defendants enjoy criminal procedural safeguards if the fine imposed is considered punitive.[37] The Competition Ordinance lacks a comprehensive merger control regime but prohibits, agreements which prevent, restrict or distort competition in Hong Kong, and prohibits abuses of substantial market power. This section discusses the later prohibition, called under the Competition Ordinance the Second Conduct Rule. After (1) a brief explanation of the main provisions relating to the Second Conduct Rule, this section will (2) look into the most controversial and unusual issues relating to the Second Conduct Rule and make references to international standards and practice of competition law. Finally (3) this section concludes that while the text of the Competition Ordinance shows little variation in comparison with the competition provisions already in place in the telecoms and broadcasting sectors, the Competition Ordinance nonetheless marks a new age for competition law in Hong Kong, and the enforcement of competition law in Hong Kong will most likely gain in intensity and severity.

2.1 A detailed look at the wording of the Second Conduct Rule

The Competition Ordinance prohibits abuses of substantial market power under the Second Conduct Rule. The Second Conduct Rule is largely modelled after the EU rules on abuse of dominance. Section 21 of the Competition Ordinance reads as follows:

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[34] SCOTUS, *International Boxing Club of New York v United States*, 358 U.S. 242 249, 252 (1959).

[35] *Google case*, above at note 48.

[36] (2008) 11 HKCFAR 170

[37] C. K . Thomas, Ready for Action: Looking Ahead to the Implementation of Hong Kong's Competition Ordinance, Journal of European Competition Law and Practice 2015(5:2), p. 91.

> "(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.
>
> (2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—
>
> > (a) predatory behaviour towards competitors; or
> >
> > (b) limiting production, markets or technical development to the prejudice of consumers.
>
> (3) Without limiting the matters that may be taken into account in determining whether an undertaking has a substantial degree of market power in a market, the following matters may be taken into consideration in any such determination—
>
> > (a) the market share of the undertaking;
> >
> > (b) the undertaking's power to make pricing and other decisions;
> >
> > (c) any barriers to entry to competitors into the relevant market; and
> >
> > (d) any other relevant matters specified in the guidelines issued under section 35 for the purposes of this paragraph.
>
> (4) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "second conduct rule"."

What is immediately apparent to the experienced competition lawyer is the wording "substantial degree of market power", which differs from the EU approach where anti-competitive conducts violate the law if these are the deed of "dominant" undertakings. The Competition Ordinance's wording follows instead the Australian model. Under Australia's Competition and Consumer Act 2010, Section 46(1) reads:

> *"*A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
>
> > (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> >
> > (b) preventing the entry of a person into that or any other market; or
> >
> > (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*"*

Beyond the initial impression of similarity between the two legislations, a remark stems from the comparison of the Competition Ordinance with the Australian example. The threshold for the application of the Second Conduct Rule is lower, and potentially much lower, than in the EU's article 102. This reality was enacted by the government during the negotiation and drafting phase of the Ordinance. Whilst the government has had to make many concessions during the drafting phase to appease the business community, such as the exemption of Hong Kong's numerous statutory bodies,[cite] there is a sense that the Second Conduct Rule may be enforced more vigorously against undertaking than it is in Europe or, to an even larger extent, in the United States. This possibility, driven by the impression that "substantial degree of market power" is a lower threshold than "dominance", is reinforced at the reading of some of the Hong Kong government's preparatory documents. The government distanced itself from the high dominance thresholds of the EU to take into account the highly oligopolistic nature of many of Hong Kong's markets. In a response to Hong Kong's legislative body about outstanding issues in the final weeks before the adoption of the bill in 2012, the government justified the wording by explaining that the "dominance" threshold was unsuitable to Hong Kong, as it requires a market share persistently over 50%. Without naming any sector nor any company, the government noted that:

> *"*Given that Hong Kong is a small and geographically concentrated economy, it is not unusual for a small number of firms, each constituting a significant but short of 50% market

share, to have control over certain markets in Hong Kong (i.e. oligopolistic market). Adopting a threshold as high as "dominance" would affect the effectiveness of the Bill in addressing public concerns over anti-competitive conduct of some oligopolies in Hong Kong.*"*[38]

In this extract, the government refers implicitly to the AKZO presumption of dominance where a market player has a 50% or more market share under EU law.[39] If there was any doubt that the Second Conduct Rule was designed to catch more undertakings than EU's Article 102, a look at the ensuing discussion clarifies that the government considered establishing a market share threshold at 25% for the definition of "substantial degree of market power" (more on the market share threshold below).[40] It stems from this that with such a low threshold for the enforcement of abuse rules, the Competition Commission will have the option in many cases of pursuing anti-competitive conducts either under the First Conduct Rule (anti-competitive agreements) or the Second Conduct Rule, something that is almost impossible under the current EU threshold of dominance. This option, highlighted by observers before the publication of the Draft Revised Guidelines,[41] has even been included as a possibility in the Draft Revised Guidelines, where the Commission notes that:

> "[t]he application of the First Conduct Rule as described in this Guideline does not preclude the parallel application of the Second Conduct Rule to the same conduct. Conduct in the form of an agreement that harms competition and therefore contravenes the First Conduct Rule might also contravene the Second Conduct Rule where the agreement involves an abuse of a substantial degree of market power.*"*[42]

Overall, the wording and the inspiration of the Second Conduct Rule may surprise experienced competition practitioners, in particular those used to the long-established and fairly high threshold for dominance under EU law. However, as discussed above, the market conditions in Hong Kong, which the government was more than aware of, dictated a stricter approach than in the EU.[43] In addition, while observers in Europe may be dismayed that a new competition jurisdiction would use Australia as an example, it must be reminded here that Hong Kong is geographically and culturally not completely isolated from Australia. Hong Kong has a sizeable Australian expatriate population. As a testimony to this cultural proximity, several senior members of the Commission were directly poached from ACCC, the Australian Competition and Consumer Commission.[44]

2.2 A detailed comparison with Australia and the EU: unusual approaches under the Second Conduct Rule

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38 Legislative Council, Bill Committee on Competition Bill, *Responses to outstanding issues from previous meetings*, 10 April 2012, CB(1)1506/11-12(02), para. 2, available at ,http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc120410cb1-1506-2-e.pdf [accessed July 2015].

39 ECJ, Case C-62/86 1991] ECR I-3359, [1993] 5 CMLR 215, para. 60. On the AKZO presumption, see generally R. Whish, Richard, and D. Bailey, Competition Law, 7th edition, Oxford University Press 2012, 182-183.

40 *Ibid*., para. 4.

41 Cheng, above at 37, p. 93.

42 Competition Commission, *Revised Draft Guideline on the First Conduct Rule*, para. 1.12.

43 K. Kwok, The New Hong Kong Competition Law : Anomalies and Challenges, World Competition, (37 :4), 551.

44 A. Nip, and T. Chong, "Australian pair hired for senior jobs at Hong Kong competition watchdog", *South China Morning Post*, 21 March 2014, available at http://www.scmp.com/news/hong-kong/article/1453329/australian-pair-hired-senior-jobs-hong-kong-competition-watchdog [accessed July 2015].

Beyond the mere question of threshold, discussed in the previous sub-section, several aspects of the Second Conduct Rule differ from international practice and, even more, from the Australian example that has been followed in setting a low threshold for substantial market power.

Abuses of dominance under EU law aim in principle as much at practices against competitors - exclusionary abuses - as they target companies with a substantial market power preying on their customers - exploitative abuses. It is difficult under EU law to enforce Article 102 against, for instance, excessive pricing charged to customers. This is because, as noted with Richard Whish, "in the absence of barriers to entry a monopolist earning monopoly profits would be expected to attract new entrants to the market: in other words exploitation of a monopoly position may in itself increase competition over time."[45] As a result the enforcement of competition law against exploitative abuses has been deemed a "paradox".[46] However it is not impossible to enforce abuse rules against undertakings which harm consumers - but not competition. This is increasingly visible in the case law of national competition authorities in Europe.[47] In addition, there are signs of exploitative abuses in the complaints and the charges of the European Commission against Google's alleged abuses of dominance in the market for online search, a case that promises to be one of the most important ones of these past few years for European competition law enforcement.[48] In Australia on the contrary, despite competition law and consumer protection being intertwined and more integrated than in most other jurisdictions, the wording of Section 46(1) – misuses of market power – only applies in so far as it hurts a competitor or a potential new entrant, and is therefore not applicable to exploitative abuses. In Hong Kong, under the Competition Ordinance only exclusionary abuses are falling under the Second Conduct Rule. One observer noted that excessive pricing of an intermediate good would still fall under the Second Conduct Rule, as it may affect competition on the downstream market.[49] This analysis is incomplete, as it is possible not only to enforce the Second Conduct Rule against excessive, but also against predatory pricing – both in the case of an intermediate good and to final consumers. This point – predatory pricing – further distinguishes the Competition Ordinance from the EU model of competition law. Under the original meaning and application of Article 102, the European Commission did not have to prove the antic-ompetitive effects of pricing below costs, and could entirely rely on the mere existence of such a pricing to find a violation of Article 102. However nothing in the wording of article 102 warrants such a strict approach. Amid the general impression that a "by object" approach was too far-reaching and not based on sound economics, recent cases have stirred away from this rigidity.[50] The European framework for the analysis of below-cost prices now embraces an analysis of the effects of predatory pricing, through the "as-efficient-competitor test". Under this test, the courts established two levels of predatory pricing. If prices are below average variable costs, the practice can be deemed anti-competitive by object. However if prices are above average variable costs but below average total costs, the European Commission needs to establish that the conduct has the potential effect of driving competitors that are as efficient out of the market.[51] No such analysis is required under the current Hong Kong framework. Predatory pricing comes first in the list of examples that can constitute an abuse of substantial market power.[52] The guidelines make clear that predatory pricing is the type of conduct that may have the object of harming competition.[53] In the detail of the guidelines, the

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45 Whish, above at 39, p. 201.

46 B. Lyons, The Paradox of the Exclusion of Exploitative Abuse, CCP Working Paper 08-1 (2007).

47 P. Hubert, and M. Combet, Exploitative abuse: The end of the Paradox?, Concurrences 2011(1), p. 44.

48 European Commission, *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*, 15 April 2015. Available at http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm [accessed July 2015].

49 Cheng, above at 37, p. 93.

50 CJEU, case C-280/08 P, *Deutsche Telekom AG v Commission* 5 CMLR 1495

51 On predation under EU law and the AKZO test, see generally J. Faull, and A. Nikpay, The EU Law of Competition, Oxford University Press 2014, pp. 398-399.

52 Competition Ordinance (Cap. 619), Section 21(2)(a).

53 *Guideline on the First Conduct Rule*, above at 42, para. 4.14.

Commission seemingly adopted the two-tier system of the EU, and the "as-efficient-competitor test". However a closer look at the wording of the guidelines reveals that, in the case of prices above average variable costs but below average total costs, "there may be evidence of a predatory strategy."[54] Where the Commission discusses the analysis of the effects of likely effects of predatory pricing, the language chosen makes clear that this is purely facultative, and it is clear that in the absence of proven or likely effects, the Commission will rely on the object of predatory pricing or on the proven intent of the undertaking to seek enforcement of the Second Conduct Rule. It is necessary to point here that the guidelines are not binding for the Competition Tribunal, and that undertakings charged for predatory pricing under a by-object approach will no doubt challenge the economic rationale behind such a move. As such, and in spite of the above, it remains likely that the Commission will at least attempt to establish the effects of predatory pricing.

Perhaps next to the by-object approach to predatory pricing, the second most controversial issue under the Second Conduct Rule is the absence of clear threshold for what constitutes substantial market power. As stated in the previous sub-section, the government made clear in its negotiations with the legislature that it considered the threshold to be low, and if anything much lower than in the EU – to the point where it suggested inserting a 25% market share threshold in the text of the Competition Ordinance of the legislature insisted in including one. This is half of the threshold for dominance in the EU, and this certainly contrasts with the 60% dominance threshold in Singapore. The absence of a clear threshold in the draft guidelines was one of the most common comments in the submissions received by the Commission during the consultation phase, and it appeared quickly that despite this widespread demand, the Commission was not ready to include one. This differs from international practice, as dominance thresholds – first imposed by the courts in Europe, and then reiterated in the guidelines for enforcement by the European Commission – are seen as a provider of certainty, allowing firms to know whether they have "special responsibilities". In its report explaining the Draft Revised Guidelines to the public, the Commission cited several reasons for not including a market share threshold for determining substantial market power nor "safe-harbour" market shares. The Commission reminded in the report that market shares are only one factor among several to determine market power, that the interpretation of "substantial market power" will ultimately lie with the Competition Tribunal, that market share thresholds would fail to take into account the diversity of market structures, and that there was no agreed number among the submissions in the public consultation for the definition of a market share threshold. Ultimately, the decision not to indicate market share thresholds nor safe-harbours sets Hong Kong apart from other jurisdictions.

The final point that emerges from the comparison of the Second Conduct Rule to international practice is the absence of possible enforcement against collective dominance. The language of the Second Conduct Rule refers to "[a]n undertaking", and the provisions herein can therefore not be applied to undertakings who, together, hold a substantial market power, or abuse it. This looks like a loophole at first. But a detailed look at the Ordinance shows that legislators took instead the path of tacit collusion, and have defined an agreement as "express of implied".[55] This may not appear revolutionary, but this could indicate the legislator's intent to shift from an approach using abuse of substantial market power, to an enforcement against joint and collective dominance using tacit collusion instead. Indeed it is possible to see how the regulator will argue that a tacit agreement not to compete is an implied agreement. In light of the EU case law[56] and hesitations on collective dominance,[57] it

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54 *Ibid*, para. 5.6(b).

55 Competition Ordinance (Cap. 619), Section 2.

56 Court of First Instance of the European Union*, Laurent Piau v Commission*, Case T-193/02, 26 January 2005, para. 9.

57 See, on the investigations into collective dominance in the EU mobile phone markets : Ryan, Patrick S., "European Competition Law, Joint Dominance and the Wireless Oligopoly Problem", *Columbia Journal of European Law*, Vol. 11 (2005), 355. For a summary of the EU case law on collective dominance, see Petit, Nicolas, "The "Oligopoly Problem" in EU Competition Law", in *Research Handbook on Competition Law*, by Liannos, I., and Geradin, D. eds. (Edward Elgard, September 2013), at note 394.

would seem easier to enforce competition rules against tacit collusion than against collective dominance *without* tacit collusion, something that would be further facilitated if an agreement can be "implied".

3. Conclusion: a revolutionary approach to abuse of substantial market power?

The above analysis of the "old" and "new" rules on abuse of substantial market power paint the picture of an insufficient framework under the sector-based approach, and a slightly innovative set of rules under the Competition Ordinance. In the broadcasting sector, the Authority seems to have adopted international practice with the TVB decision, a case that remains controversial and – at the time of writing – under appeal. The new Commission, charged with bringing cases under the Competition Ordinance, inherits a legislation in appearance inspired by the Australian Competition and Consumer Act 2010, therefore potentially less business-friendly than the EU rules on abuse of dominance. The guidelines' final version have not been published yet but are not expected to vary substantially from the second draft published by the Commission. The absence of indicative market share thresholds and the by-object prohibition of predatory pricing further reinforce the impression that the Second Conduct Rule may be enforced vigorously by the Commission, and in any case more energetically than under the sector-based competition regime.