TELEVISION BROADCASTS LIMITED V COMMUNICATIONS AUTHORITY & ANOR [2016] HKCU 222

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Antitrust, Competition & Trade Regulation Alert

INTRODUCTION: AN INSIGHT INTO HOW THE PROVISIONS OF THE COMPETITION ORDINANCE MAY BE APPLIED

On 29 January 2016, the Hong Kong Court of First Instance handed down its eagerly awaited judgment in a judicial review application brought by Television Broadcasts Limited ("TVB") against the Communications Authority ("CA") and the Chief Executive in Council ("CEIC").

The case had gained wide interest not only because it concerned the CA's investigation into and censure of TVB for its conduct and use of contractual clauses with respect to the employment of TV artistes and singers, but also because the case raised novel issues regarding the (now repealed) competition provisions in the Broadcasting Ordinance ("BO") which broadly mirror the provisions underpinning the new Competition Ordinance ("CO") in Hong Kong. The CO came into full effect on 14 December 2015.

The case is particularly relevant for any company that may be impacted by the CO because TVB's application was heard by Judge Godfrey Lam, who was recently appointed as the President of the Competition Tribunal. The Competition Tribunal is the judicial body established to hear and determine competition cases in Hong Kong. While we await the first test case to be brought before the Competition Tribunal, Judge Lam's judgment offers an insight as to the stance that the Competition Tribunal may take with respect to important principles such as the applicable standard of proof and the imposition of remedies. These principles will likely shape how investigations and cases are conducted under the CO.

THE CASE: ISSUES AND KEY FINDINGS

The TV broadcasting sector in Hong Kong includes both Free to Air ("FTA") and pay television services. At the relevant time, there were two FTA broadcasters, namely TVB and Asia Television Limited ("ATV"). They transmitted 11 channels in Cantonese, Mandarin and English, comprising a mix of self-produced and third party programmes. FTA broadcasters rely on revenue generated from commercial advertising for their operation and funding.

On 10 December 2009, the CA received a complaint from ATV against TVB, alleging that certain clauses in TVB's contracts with its artistes and singers and certain policies and practices used by TVB violated sections 13(1) and 14(1) of the BO. The crux of ATV's complaint was that between 2007 and 2010, TVB had contracted with about 75-80% of all the artistes on contract with the main Hong Kong broadcasters and the majority of the singers. TVB used three main types of contracts with these artistes and singers, namely, one-show contracts, serial-based

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contracts, singer contracts (as well as other contracts, considered to be full-time contracts, which were not the subject of the CA's investigation). The contracts imposed various restrictions, including in relation to (a) working for rival TV producers, (b) appearing at the promotional activities of TV productions in which they star but which are broadcast by other local TV stations, and (c) the use of the artiste's original voice in productions featuring his or her image broadcast by other TV stations. The contracts also stipulated that TVB had no obligation to make use of the artiste's services beyond a minimum requirement. In the case of a one-show contract, the minimum requirement was one show. In addition, TVB maintained a policy whereby artistes on contract with TVB were not permitted to speak Cantonese when they appeared in the programmes of other TV stations in Hong Kong.

On 19 September 2013, the CA decided that TVB had contravened the competition provisions of the BO by adopting the above-mentioned clauses and practices in its contracts with artistes and singers, which had the purpose and effect of harming competition in the television programme service market in Hong Kong. The CA imposed a financial penalty on TVB of HK$900,000 (the maximum amount being HK$1 million) and made orders requiring TVB to cease and desist from continuing with the anti-competitive conduct.

TVB lodged its application for judicial review in December 2013 (further grounds were added by subsequent amendment in August 2015), challenging the constitutionality of the investigation and decision making process by the CA and review by the CEIC via the appeal procedure. TVB also raised various competition law and other legal issues, including the CA's assessment of TVB's dominant market position, the extent of the relevant market and the relevant standard of proof for assessing whether TVB's conduct had the purpose or effect of harming competition in Hong Kong.

The court found in favour of TVB and quashed the CA's decision. The key findings are summarised below:

THE CA AND THE CEIC WERE NOT INDEPENDENT AND IMPARTIAL TRIBUNALS FOR THE PURPOSES OF THE BILL OF RIGHTS

Article 10 of the Bill of Rights ("BOR") provides for the right to have a fair and public hearing by a competent, independent and impartial tribunal established by law. This right is regarded as being of fundamental importance to the constitutional set-up of Hong Kong and the rule of law. The court held that Article 10 of the BOR applied because the CA's decision involved a determination of a serious and genuine dispute of TVB's rights and obligations, namely whether TVB had acted unlawfully by breaching the statutory prohibition against anti-competitive conduct.

As regards whether the CA was an independent and impartial tribunal, the court took into account the fact that the CA performed a dual role; on the one hand being a policy-making body and having an advisory function, and on the other hand investigating and determining allegations of breach of the competition provisions on the other hand. The court noted that the process has been described as administrative and inquisitorial, with the CA acting successively as the investigator, the prosecutor and the judge. While a body does not necessarily lose impartiality merely because it carries out advisory functions in addition to the determination of civil rights and obligations, the court considered that an objective observer may legitimately doubt whether the CA could decide the issues solely on their legal and factual merits with the detachment and objectivity required by Article 10, uninfluenced by any policy considerations in the adjudication of guilt or innocence in terms of whether sections 13(1) and 14(1) of the BO had been contravened. Accordingly, the court found that CA did not satisfy the requirement of an independent and impartial tribunal for the purpose of the case.

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Similarly, the court agreed with TVB that the right to appeal the CA's decision to the CEIC under section 34 of the BO could not cure the lack of independence and impartiality of the CA. Typically, appeals to the CEIC would generally concern the formulation of policy or the exercise of administrative or policy-orientated discretion. Indeed, section 64 of the Interpretation and General Clauses Ordinance proscribed the CEIC from acting in a judicial or quasi-judicial capacity. The court was unconvinced that the CEIC could properly evaluate the evidence, find facts, determine the law, and apply the law to the facts found in the CA's decision, without regard to considerations arising from policy, expediency or public interest and without at least acting in a quasi-judicial capacity. The CEIC's role in the formulation of policy in relation to the broadcasting sector cast doubt over its ability to be impartial for the purposes of considering an appeal by TVB under section 34 of the BO.

THE COURT IS NOT A COURT OF FULL JURISDICTION FOR THE PURPOSES OF JUDICIAL REVIEW

The court considered the question of whether subsequent control by a court that has full jurisdiction and provides the protection of Article 10 of the BOR could render the entire process compliant.

In the context of an administrative decision, full jurisdiction does not require the court's decision to be made de novo or that there be a full re-examination of the merits of the case. The court is primarily concerned with the lawfulness of the decision. The court may quash the decision if it is based on a finding of facts which is perverse or irrational, or where there was no evidence to support it, or where it was made by reference to irrelevant factors or without regard to relevant factors; but the court cannot make the decision itself or substitute its own findings of fact for those of the decision-making body.

The more a matter amounts to a question of policy or expediency, the less it is necessary for the reviewing court to be able to substitute its own opinion for that of the decision-maker. Conversely, the more a matter turns on a disputed question of fact, and the less safeguards there exist in the original process, the less likely it is that a limited scope of review will be accepted as sufficient for the purposes of Article 10 of the BOR.

The court considered that the decision that the CA was required to make under sections 13 and 14 of the CO was a "far cry from a classic exercise of administrative discretion". Rather, it was a finding of liability for breach of a statutory prohibition and a decision on the sanction for such culpable conduct. The questions involved were primarily questions of fact, which required the proper evaluation of a large amount of evidence, the establishment of subsidiary facts and the carrying out of a complex economic assessment. The rights affected by the CA's decision involved civil rights customarily adjudicated upon by the court.

Unlike the approach taken by the European courts regarding the review of legality, coupled with the unlimited jurisdiction of the courts in penalty cases, the court said that the machinery of judicial review in Hong Kong fell short of the requirement of a court of full jurisdiction.

THE CA'S DECISION DID NOT CONSTITUTE A DETERMINATION OF A CRIMINAL CHARGE

TVB argued that the CA's decision constituted a determination of a criminal charge and fell within the protection of Article 11 of the BOR. Article 11 of the BOR permits anyone convicted of a crime to have his conviction and sentence reviewed by a higher tribunal according to law.

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Having considered the criteria set out in Engel v The Netherlands (No 1) [1976] 1 EHRR 647, namely, (a) the classification of the offence under domestic law; (b) the nature of the offence; and (c) the nature and severity of the potential sanction, the court concluded that the proceedings were not to be treated as criminal for the purposes of Article 11 of the BOR. In particular, the court said that the relevant provisions in the BO were of a disciplinary and regulatory character as they only imposed restrictions on a very limited number of entities. Also, as the maximum fine that could be imposed under the BO was insubstantial compared to the total advertising revenue of the television industry, the effect of the financial penalty under the BO was intended to be disciplinary and regulatory, rather than deterrent and repressive.

THE APPLICABLE STANDARD OF PROOF TO BE APPLIED WAS THE BALANCE OF PROBABILITIES IN CIVIL PROCEEDINGS

TVB contended that because the proceeding constituted a determination of a criminal charge within Article 11 of the BOR, the applicable standard was proof beyond reasonable doubt. The CA's position was that irrespective of whether or not the proceeding constituted a determination of a criminal charge, the applicable standard of proof was the lower civil threshold, namely the balance of probabilities.

The court considered the approach taken by the European courts, the United Kingdom and other common law jurisdictions and found that the civil standard of proof was typically applied in cases involving the imposition of pecuniary penalties. The court noted also that some jurisdictions only applied the criminal standard in hard-core cartel cases that might result in a custodial sentence.

Having regard to the Hong Kong Court of Final Appeal's decision in Koon Wing Yee v Insider Dealing Tribunal [2008] 11 HKCFAR 170, the court found that the beyond reasonable doubt standard did not have to be applied in all cases classified as criminal for the purposes of Article 11 of the BOR, and that a degree of flexibility was permissible.

Taking into account the overall scheme of the BO, and even assuming the proceedings against TVB could be classified as criminal (which the court rejected), the court found that the applicable standard was proof on a balance of probabilities.

THE REMEDIES IMPOSED BY THE CA WERE DISPROPORTIONAL

The CA ordered TVB to remove all of the exclusivity clauses in relation to all artistes and singers who had current serial-based, one-show contracts and singer contracts and to abandon the Cantonese policy.

TVB contended that the order imposed by the CA was disproportionate and irrational because (a) it went beyond what was justified by the CA's conclusions or what was necessary to redress the anti-competitive harm; (b) by the time the CA's decision was made, TVB had already removed the exclusivity clauses from all one-show contracts; and (c) the CA's decision was vague and uncertain and left it in doubt as to what TVB could or could not do under the decision.

The court took the view that the manner in which the CA exercised its power to impose requirements and issue directions under the BO would depend on the circumstances of the case and the nature of the infringement. The removal of certain components of TVB's system would have been sufficient to bring the infringement to an end. Accordingly, the court found that the CA had erred in law and quashed the order made in the CA's decision.

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CONCLUSION: IMPLICATIONS FOR INVESTIGATIONS AND CASES UNDER THE CO

As noted above, Judge Lam's judgment is particularly relevant for any company that may be impacted by the CO. The Judge gave careful consideration to an array of jurisprudence on competition law and human rights issues and gave detailed analysis and reasons in support of his determinations on the applicable standard of proof, the imposition of remedies and several other issues. It is likely that the judgment will be followed in proceedings before the Competition Tribunal if the same or similar issues arise.

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