

## A Tale of Two Competition Law Regimes — The Telecom-Sector Competition Regulation in Hong Kong and Singapore

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*Competition law has seen very active development in Asia in recent years. Ironically, Hong Kong and Singapore, as two of the freest and most competitive economies in the region, long held a sceptical attitude towards competition law. Singapore enacted its first cross-sector competition law in 2004, some say only due to American pressure. For years, the Hong Kong government defended its sectoral model and insisted that the city had no need for a cross-sector competition law. However, that obstinate attitude shifted in March 2007, when the government announced that Hong Kong would follow Singapore's footsteps. Until the new law is passed, however, telecommunications remain one of the two sectors in both economies that are subject to active competition law enforcement. The telecom-sector regimes hence may provide useful examples for the new general competition regulator in Singapore, and for Hong Kong as it drafts its new cross-sector law. These telecom-sector regimes also carry independent significance. They are part of the two governments' effort to liberalize their respective telecom sectors. This article evaluates these two regimes in light of their avowed objective of facilitating liberalization, and draws lessons from their experience to shed light on Hong Kong's effort to adopt a cross-sector competition law.*

### INTRODUCTION

Competition law has taken on increasing prominence in Asia in recent years. As of March 2007, China was on the verge of ending its thirteen-year legislative effort to introduce its first comprehensive competitive law.<sup>1</sup> India was in the process of revamping its decades-old regime under the Monopolies and Restrictive Trade Practices Act.<sup>2</sup> South Korea has attracted considerable international attention with its active enforcement against multinational corporations such as Microsoft and Intel.<sup>3</sup> In sharp contrast to this intense activity, Hong Kong and Singapore, two of the most successful and competitive economies in East Asia, have long held a sceptical attitude towards competition law. Until recently, both have resisted internal and external pressure to adopt a cross-sector competition law. However, their stance on competition

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<sup>1</sup> H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, (2006) 7 Chi. J. Int'l L. 169.

<sup>2</sup> Aditya Bhattacharjya, *Amending India's Competition Act*, (Oct. 14, 2006) Econ. and Pol. Weekly.

<sup>3</sup> See, e.g., MSNBC, *South Korea rejects Microsoft antitrust appeal*, (22 May 2006) at <<http://www.msnbc.msn.com/id/12919287/>>; CNN Money, *Intel's worst nightmare* (16 November 2006), at <[http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/08/21/8383598/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/08/21/8383598/index.htm)>.

law has shifted recently. It is therefore an interesting time to examine the current state and the future direction of competition law development in these two economies.

#### I. DEVELOPMENT OF COMPETITION LAW IN HONG KONG AND SINGAPORE

Hong Kong and Singapore have been the most vibrant economies in East Asia for decades. According to the World Bank, Hong Kong and Singapore had the fourteenth and twenty-eighth highest GDP per capita in the world in 2006.<sup>4</sup> They are major trading entities and possess two of the largest container ports in the world by volume.<sup>5</sup> They are also major financial centres and home to the regional headquarters of numerous multinational corporations.<sup>6</sup> These two former British colonies have long shared a common belief in the free market and have taken pride in the minimal regulation of business activities in their economies.<sup>7</sup> They both have attributed their economic successes partly to this policy of government non-intervention.

Hong Kong's and Singapore's scepticism towards government regulation extends to the realm of competition law and policy. As of early 2007, Hong Kong still had no competition law that applied to all sectors of the economy. The Hong Kong government was, for a long time, a vocal opponent of competition law in international arenas such as the WTO.<sup>8</sup> The government has revised its position, however, and announced in March 2007 that the city would follow the international trend and adopt a cross-sector competition law. Until that law is passed, the telecom and the television broadcasting sectors remain the only two sectors that are subject to sector-specific competition laws.<sup>9</sup> Singapore's reservations about competition law remained unchanged until 2004, when it adopted the Competition Act.<sup>10</sup> This cross-sector competition law was one of the obligations in the United States-Singapore Free Trade

<sup>4</sup> According to the CIA's *The World Factbook*, Hong Kong and Singapore had the fourteenth and twenty-eighth highest GDP per capita in the world respectively, as measured by purchasing power parity, in 2006. See CIA, *The World Factbook*, available at <<https://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html>>.

<sup>5</sup> According to the Institute of Shipping Economics and Logistics based in Bremen, Germany, as of mid-2006, Singapore and Hong Kong had the two largest container ports in the world by volume. See Institute of Shipping Economics and Logistics, *ISL Monthly Container Port Monitor July-September 2006*, at 3, available at <[http://www.isl.org/products\\_services/publications/pdf/MCPM\\_3rd\\_quarter\\_2006\\_sum.pdf](http://www.isl.org/products_services/publications/pdf/MCPM_3rd_quarter_2006_sum.pdf)>.

<sup>6</sup> According to the Hong Kong Trade Development Council, Hong Kong's stock market was the seventh largest in the world by market capitalization as of the end of 2006, and 1,228 international companies used the city as their regional headquarters as of June 2006. Hong Kong Trade Development, *Economic and Trade Information on Hong Kong*, at <<http://www.tdctrade.com/main/economic.htm>>. According to the Singapore Economic Development Board, 330 international companies set up their regional headquarters in the city-state. See Singapore Economic Development Board, *Industry Sectors—Headquarters and Professional Services*, available at <[http://www.edb.gov.sg/edb/sg/en\\_uk/index/industry\\_sectors/headquarters\\_and\\_professional.html](http://www.edb.gov.sg/edb/sg/en_uk/index/industry_sectors/headquarters_and_professional.html)>.

<sup>7</sup> According to the *Economic Freedom of the World 2006 Annual Report*, Hong Kong and Singapore were the two freest economies in the world in 2004. This assessment took into account the extent of government regulation of business activities in the two economies. See The Fraser Institute, *Economic Freedom of the World: 2006 Annual Report*, 13, at <<http://www.freetheworld.com/2006/1EFW2006ch1.pdf>>.

<sup>8</sup> World Trade Organization Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of Feb. 20-21, 2003*, WT/WGTCP/M/21 (26 May 2003).

<sup>9</sup> The relevant provisions are Sections 7K, 7L, 7N, and 7P of the Telecommunications Ordinance (Cap. 106), and Sections 13 and 14 of the Broadcasting Ordinance (Cap. 562).

<sup>10</sup> Burton Ong, *The Origins, Objectives and Structure of Competition Law in Singapore*, (2006) 29 W. Comp. 2 269-70.

Agreement.<sup>11</sup> The Competition Act came into effect in phases. Most of the substantive provisions of the Act came into force in 2006, while the merger control provisions will come into effect on 1 July 2007.<sup>12</sup> The Competition Commission of Singapore has taken a cautious approach to enforcement. As a result, case law and decisions are scant. As in Hong Kong, Singapore has sector-specific competition laws which apply to the telecom and broadcasting sectors.<sup>13</sup> Given the history of competition law enforcement in these two sectors, there is a considerable amount of materials, including codes and advisory guidelines, which can be examined.

Both Hong Kong and Singapore adopted sector-specific competition laws for the telecom sector following the liberalization of that sector, which began in Hong Kong in 1995 and in Singapore in 2000.<sup>14</sup> These laws contain not only the *ex post* regulation of anticompetitive conduct that is found in the competition law of most jurisdictions, but also provisions that impose special *ex ante* obligations on the dominant firm.<sup>15</sup> It was recognized by the two governments that both *ex ante* control and *ex post* regulation were needed to rein in the incumbent monopolies and to foster competition in the recently opened markets. In addressing the relationship between the Competition Act and the telecom-sector competition regime in Singapore, and the need for special *ex ante* control in that sector, the Singaporean telecom regulator declared that “[t]here is a fundamental presumption that ex-monopolies have significant market power at the start of full liberalization, which could be abused to frustrate the competition process.”<sup>16</sup> Because of the large initial investments needed to provide telecom services, and the prominent network effects in that sector, new entrants were particularly susceptible to abusive conduct by the dominant firm and required more vigilant competition law enforcement. It is noteworthy that the *ex ante* control imposed on the incumbent monopolies in both jurisdictions shares noticeable similarities with the *ex ante* dominance obligations imposed by the British telecom regulator.<sup>17</sup>

Under these *ex ante* control and *ex post* regulations, the telecom liberalization process has made considerable progress in both economies. As of March 2007, there were four major fixed line telephone service operators in Hong Kong and no firm was deemed to be dominant *ex ante* in any telecom market.<sup>18</sup> Hong Kong also boasts one of

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<sup>11</sup> *Ibid.*, at 274.

<sup>12</sup> *Ibid.*, at 270.

<sup>13</sup> The relevant legal authorities are the *Telecom Competition Code 2005*, as enacted under Section 26(1) of the Telecommunication Act, and the *Code of Practice for Market Conduct in the Provision of Mass Media Services*, as enacted under Section 17 of the Media Development Authority of Singapore Act 2002.

<sup>14</sup> Spectrum Strategy Consultants, *Report on the Effectiveness of Competition in Hong Kong's Telecommunications Market in 2005*, 12 (2005); see also Ong, as note 10 above, at 271, n. 2. The report was commissioned by OFTA and is available on OFTA's website.

<sup>15</sup> In Hong Kong, *ex ante* control was imposed through the FTNS licences issued to the telecom operators. Of all the competition-related provisions in the Telecommunications Ordinance itself, only Section 7G, which has never been invoked, imposes an *ex ante* obligation.

<sup>16</sup> Info-communications Development Authority of Singapore, *Code of Practice for Competition in the Provision of Telecommunication Services 2005*, 12.

<sup>17</sup> Ian Walden and John Angel, *Telecommunications Law and Regulation*, 2nd Edn, Oxford University Press, United States, 2005, pp. 320-22.

<sup>18</sup> See Section III.C, below.

the most competitive mobile telephony markets in the world, with five major operators serving a population of less than seven million people.<sup>19</sup> None of these operators have a greater than 30 percent market share. Market concentration, as measured by the Herfindahl-Hirschman Index (“HHI”), remains one of the lowest among the developed economies.<sup>20</sup> Meanwhile, SingTel, the incumbent monopoly in Singapore, is still regarded as a dominant telecom operator by the regulator. Singapore’s mobile telephony market is also more concentrated than Hong Kong’s.<sup>21</sup> Yet progress has been made towards liberalization. SingTel’s dominance obligations have been exempted in a number of markets on the grounds that it had lost its dominance in those sectors. These markets include international telephone services and international capacity services.

Against this backdrop of gradual liberalization and increasing competitiveness in the telecom sector of both economies, it is important to evaluate whether their respective telecom-sector competition laws will continue to serve the purpose of facilitating competition. In light of the history of the telecom sector in these two economies, with monopolies operating under government franchises dominating the sector until recent years, regulation of abuses of dominance is of particular relevance. The competition regimes should afford new entrants sufficient protection from abuses by the dominant firm, while avoiding offering undue assistance to inefficient operators in the name of promoting competition. The incumbent monopolies should be allowed to compete vigorously against emerging rivals. As noted earlier, both regulatory regimes impose *ex ante* control and *ex post* regulation on dominant firms. Under the *ex ante* control system, a dominant firm is declared to be dominant in advance, and is subject to special obligations and restrictions on its conduct. The *ex post* system regulates competitive conduct after the event. Both Hong Kong’s and Singapore’s regulatory regimes impose a host of restrictions on the dominant firm, some of which demand close examination.

Aside from its practical effectiveness, this sectoral regulatory regime also raises some interesting theoretical issues. As shall be seen below, the sectoral approach suffers from severe limitations. The telecom-sector competition laws in both jurisdictions only apply to firms that are licensed to provide telecom services. The regulators have no jurisdiction over non-licensees. A stronger justification exists for applying the *ex ante* control on a sector-specific basis, given that many of them were tailored to the unique circumstances of the telecom sector in the initial stages of liberalization. The arguments are not so clear for *ex post* regulation.

This article assesses the effectiveness of the telecom-sector competition laws in Hong Kong and Singapore in fostering competition. Section II examines their respective *ex ante* dominance control regimes, including their approaches to classification, declassification, and exemptions. Section II provides an overview of the

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<sup>19</sup> *Report on Effectiveness*, as note 14 above, at 13.

<sup>20</sup> *Ibid.*, at 15-16.

<sup>21</sup> *Ibid.*, at 14-16.

*ex post* regulation of abuses of dominance in both places, and briefly reviews their thus far limited bodies of case law. Relying upon one of the most well-known competition law cases in Hong Kong as illustration, this article seeks to demonstrate the limitations of sectoral competition law and argues that the Hong Kong government correctly decided to adopt a cross-sector competition law.

## II. THE EX ANTE DOMINANCE CONTROL SYSTEM

The telecom-sector regulator in Hong Kong is the Telecommunications Authority (“TA”), which by convention has consisted of only one person. The Office of Telecommunications Authority (“OFTA”) was established in 1993 and is the executive arm providing support to the TA.<sup>22</sup> Under the auspices of the TA, competition law was first introduced to the telecom sector in 1995, when three new operators were introduced to compete with the incumbent Hong Kong Telecom in the local fixed line telephone service market.<sup>23</sup> All four operators were issued with what was known as the Fixed Telecommunication Network Services (“FTNS”) licences, which incorporated competition law provisions in the form of General Conditions (“GC”).<sup>24</sup> Of particular relevance were GCs 15-17, 20-22, and 44. GC 15 regulates anticompetitive behaviour by non-dominant licensees, including collusion and concerted practices, while GC 16 regulates abuses of dominant position. Both conditions are *ex post* in nature. The incorporation of general *ex post* prohibition of anticompetitive conduct in GCs 15-16 is similar to the inclusion by the UK’s Office of Telecommunications (“OFTEL”) of fair trading conditions, which closely resemble Articles 81 and 82 of the EC Treaty, in British Telecom’s licence in the mid-1990s.<sup>25</sup> GC 17 regulates a dominant firm’s accounting practices. GCs 20 to 22 set up an *ex ante* tariff approval and control system for the dominant firm. GC 44 allows a firm that was previously classified as dominant to apply for a review of its dominant status. Once a firm is declassified as non-dominant, the tariff control regime and other special obligations no longer apply.<sup>26</sup> These competition law provisions in the FTNS licences were incorporated, with some modifications, in Sections 7F to 7H, 7K, 7L, and 7N of the Telecommunications Ordinance (“TO”) in 2000.<sup>27</sup> GCs 15 and 16 became Sections 7K and 7L respectively. Section 7N imposes an obligation on a dominant telecom operator not to discriminate in its

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<sup>22</sup> Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge University Press, Cambridge, 2005, p. 310. Although the TA is the statutory body vested with regulatory powers over the telecom sector, this article will use the terms TA and OFTA interchangeably to refer to the Hong Kong telecom regulator. In particular, OFTA will be used when the Hong Kong regulator is referred to in conjunction with the Singaporean agency.

<sup>23</sup> *Report on Effectiveness*, as note 14 above, at 12.

<sup>24</sup> See, e.g., Telecommunication Ordinance (Cap. 106), Fixed Telecommunication Network Services (“FTNS”) Licence issued to Wharf T&T Limited (27 June, 1995), available at <www.ofa.gov.hk>.

<sup>25</sup> *Telecommunications Law and Regulation*, as note 17 above, at 302.

<sup>26</sup> FTNS Licence, as note 24 above, at 26.

<sup>27</sup> *Competition Policy and Law in China*, as note 22 above, at 314, 317.

dealing with other telecom operators.<sup>28</sup> Together with Section 7P, which was inserted into the TO in 2003 and empowers the TA to review mergers and acquisitions, these provisions constitute the only complete framework of competition law in Hong Kong.<sup>29</sup>

The Info-communications Development Authority (“IDA”) is OFTA’s counterpart in Singapore. IDA first issued the *Telecom Competition Code* (the “Code”), which is the main source of competition regulation in the city-State soon after liberalization began in the telecom sector. The *Code* was revised and re-issued in 2005. Section 2 of the *Code* outlines the *ex ante* dominance classification mechanism.<sup>30</sup> Section 4 imposes a range of *ex ante* special obligations on a firm that has been classified as dominant under Section 2.<sup>31</sup> *Ex post* regulation of abuses of dominant position is set out in Section 8.<sup>32</sup> In addition, Section 9 regulates collusion and concerted practices on an *ex post* basis and Section 10 sets out the merger control provisions.<sup>33</sup>

#### A. THE DOMINANCE CLASSIFICATION SYSTEM

Both Hong Kong’s and Singapore’s telecom-sector competition regimes feature a dominance classification system in which a dominant firm is designated as such in advance, and is subject to restrictions and special obligations.

##### 1. Definition of Dominance

In Hong Kong, Section 7L of the TO defines dominance as a firm’s ability “to act without significant competitive constraint from its competitors and customers.”<sup>34</sup> In determining whether a firm is dominant, the TA will consider a range of factors, including the firm’s market share, its power to make pricing and other decisions, the existence and extent of entry barriers, the degree of product differentiation and sales promotion, among others.<sup>35</sup> This definition and list of relevant factors are consistent with the approach taken by major jurisdictions. The US Supreme Court has defined monopoly power as the power to control prices or to exclude competition.<sup>36</sup> US courts consider similar factors as those listed in Section 7L when determining the existence of

<sup>28</sup> *Telecommunications (Amendment) Ordinance*, 2000, § 7N (HK).

<sup>29</sup> *Competition Policy and Law in China*, as note 22 above, at 324-327.

<sup>30</sup> *Telecom Competition Code 2005*, § 2, available at <<http://www.ida.gov.sg/Policies%20and%20Regulation/20061010135522.aspx>>.

<sup>31</sup> *Ibid.*, at § 4.

<sup>32</sup> *Ibid.*, at § 8.

<sup>33</sup> *Ibid.*, at § 9, § 10.

<sup>34</sup> *Telecommunications (Amendment) Ordinance*, as note 28 above, at § 7L(2).

<sup>35</sup> *Ibid.*, at § 7L(3).

<sup>36</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992).

monopoly power.<sup>37</sup> In a number of landmark decisions, the European Court of Justice has similarly defined dominance as “the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers.”<sup>38</sup> Market share, entry barriers, and product differentiation are also considered when assessing dominance under EC competition law.<sup>39</sup>

IDA adopts a broader definition of dominance. Section 2.2.1 of the *Telecom Competition Code* sets out two separate criteria. The first one is similar to the definition of dominance in Section 7L of the TO, and deems a firm as dominant if “it has the ability to exercise Significant Market Power in any market in which it provides telecommunication services[.]”<sup>40</sup> The factors to be considered under this criterion, set out in Section 2.6.2, are also similar. The second criterion is premised on the ownership of a facility that is sufficiently costly or difficult to replicate. It states that a firm is dominant if it operates “facilities used for the provision of telecommunication services in Singapore that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry[.]”<sup>41</sup> It is noteworthy that IDA stops short of characterizing such a facility as essential in the *Telecom Competition Code*. This criterion is problematic because the reach of such a facility does not define or necessarily coincide with the boundary of a market. That facility may be only one of the many ways to supply a particular service. Even though it would be too costly for an entrant to replicate that facility, it does not follow that the entrant must replicate it to provide the relevant service. Moreover, a relevant market may consist of a number of telecom services that are substitutes for each other. The inability to provide a particular type of service due to the lack of access to an important facility does not necessarily preclude an operator from competing in the relevant market.

This argument is supported by the reasoning of the European Court of Justice (“ECJ”) in the *Oscar Bronner* case.<sup>42</sup> In that case, the defendant Mediaprint Zeitungs owned the only national newspaper distribution network in Austria.<sup>43</sup> The plaintiff

<sup>37</sup> *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1219 (9th Cir. 1977) (“[Monopoly] power . . . can be demonstrated by evidence of the exercise of actual control over prices[.]”); *Rebel Oil, Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (considering market share when deciding whether defendant possesses market power); *Am. Prof'l. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns., Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997) (“[N]either monopoly power nor the dangerous probability of achieving monopoly power can exist absent barriers to new entry or expansion.”)

<sup>38</sup> Case 27/76, *United Brands v. Commission*, [1978] ECR 207, [1978] 1 CMLR 429, para. 38; Case 85/76, *Hoffman-La Roche v. Commission*, [1979] ECR 461, [1979] 3 CMLR 211, para. 38.

<sup>39</sup> Case C-62/86, *AKZO v. Commission*, [1991] ECR I-3359, [1993] 5 CMLR 215 (holding that a market share of over 50% creates a presumption of dominance); Case 22/78, *Hugin v. Commission*, [1979] ECR 1869, [1979] 3 CMLR 345 (regarding design copyright protection as a form of entry barrier in determination of dominance); Case 27/76, *United Brands v. Commission*, [1978] ECR 207, [1978] 1 CMLR 429, paras 91-94 (United Brand's efforts to differentiate its product, such as its advertising campaigns and brand image, are indication of dominance).

<sup>40</sup> *Telecom Competition Code 2005*, as note 30 above, § 2.2.1.

<sup>41</sup> *Ibid.*

<sup>42</sup> Case 7/97, *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, [1998] ECR I-7791, [1999] 4 CMLR 112.

<sup>43</sup> *Ibid.*, at para. 24.

Oscar Bronner, which published a small daily newspaper *Der Standard*, argued that the distribution network constituted an essential facility, and therefore the defendant must make it available to its competitors.<sup>44</sup> Mediaprint Zeitungs would be considered dominant under the facility-based definition of dominance in Section 2.2.1 of the *Telecom Competition Code*. The ECJ rejected the characterization of the distribution network as an essential facility. More importantly, it refused to impute dominance to Mediaprint Zeitungs in the newspaper market based on its ownership of the distribution network. Instead, the ECJ focused on its circulation and advertising revenue.<sup>45</sup> The ECJ suggested that Mediaprint Zeitungs' ownership of the sole network in Austria would only be relevant if newspaper distribution services constituted a separate market.<sup>46</sup> Moreover, the ECJ noted that the fact that Oscar Bronner did not have access to the network did not preclude it from competing with Mediaprint Zeitungs. There was no abuse of dominance as long as Oscar Bronner could compete through other means, such as mail delivery or sale through shops and kiosks.<sup>47</sup> The *Oscar Bronner* case highlights the flaws in the facility-based definition of dominance in the *Telecom Competition Code*. The reach of such a facility does not define the boundary of a market. Competition law is not violated as long as there are other viable means for competitors to compete.

The reasoning of this criterion is similarly inconsistent with US antitrust law. Defining dominance based on the ownership of a facility that is costly and difficult to replicate is comparable to presuming market power based on patent ownership. In the United States, this presumption was first set out in the antitrust context in the *International Salt* case in 1947, although it had been previously established in patent law.<sup>48</sup> Commentators have criticized this presumption as it fails to reflect economic learning and reality.<sup>49</sup> The FTC and the DOJ explicitly rejected this approach in the 1995 *Antitrust Guidelines for the Licensing of Intellectual Property*.<sup>50</sup> The US Supreme Court finally overturned this presumption in the *Illinois Tool Works* case in 2006. Critics have argued that “contrary to the presumption, patents frequently convey little if any actual economic power in the market for the patented product.”<sup>51</sup> Implicit in this criticism is the idea that access to the patented product is not always necessary for a firm to compete in the relevant market. There may be close substitutes for the patented product such that the patented product's pricing is tightly constrained by them. In fact, the facility-

<sup>44</sup> *Ibid.*, at paras 4, 24–25.

<sup>45</sup> *Ibid.*, at para. 6.

<sup>46</sup> *Ibid.*, at paras 33–36.

<sup>47</sup> *Ibid.*, at para. 43.

<sup>48</sup> *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. \_\_\_, 126 S.Ct. 1281, 1288 (2006).

<sup>49</sup> See, e.g., 10 *Areeda* para. 1737a (“[T]here is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent”); William Landes and Richard Posner, *The Economic Structure of Intellectual Property Law*, Belknap Press, Cambridge, 2003, p. 374.

<sup>50</sup> Department of Justice and Federal Trade Commission, *Antitrust Guidelines For the Licensing of Intellectual Property*, § 2.2 (1995).

<sup>51</sup> Kenneth J. Burchfiel, *Patent Misuse and Antitrust Reform: ‘Blessed be the Tie?’*, (1991) 4 Harv. J. L. & Tech. 57.



based criterion for dominance in Section 2.2.1 goes one step further than a presumption of market power. Under the *Telecom Competition Code*, the right to operate a facility that is costly or difficult to replicate is tantamount to dominance. It is true that the telecom sector is distinct in that market entry entails substantial initial investment to build the requisite infrastructure, and facilities are not always easy to replicate. No doubt the right to operate a facility that is costly or difficult to replicate should be one consideration in determining dominance. The special characteristics of the telecom sector may even warrant the allocation of extra weight to this factor. However, to substantiate a finding of dominance solely on this ground contradicts economic learning and market reality. IDA's overly broad definition of dominance captures firms that would not be deemed dominant under a more appropriate definition of dominance, and impedes their ability to compete. In its over-zealous effort to facilitate liberalization in the telecom sector, IDA may be protecting inefficient competitors from the full rigor of competition, resulting in allocative inefficiencies.

## 2. *Market-Based vs. Licensee-Based Classification*

Under the Hong Kong regime, dominance classification is done on a market-by-market basis. This approach is consistent with that used in the European Union. The incumbent monopoly, Hong Kong Telecom (and subsequently PCCW-HKT),<sup>52</sup> was considered dominant in every market in which it operated when it was issued its FTNS licence in 1995. Under GC 44 of that licence, a dominant licensee may apply to the TA for declassification on a market-by-market basis.<sup>53</sup> Upon declassification, the TA can exempt the dominant licensee from some or all of its special obligations.<sup>54</sup> PCCW-HKT applied for declassification in one market after another until it shed its dominant status completely in 2005.<sup>55</sup> Meanwhile, Singapore uses a licensee-based approach to dominance classification. When an operator is found to be dominant in one telecom market, it will be branded as a dominant licensee in all markets in which it operates.<sup>56</sup> It is subject to special obligations in all telecom markets unless it receives an exemption from IDA.<sup>57</sup> Similar to the situation in Hong Kong, SingTel, the incumbent monopoly in Singapore, was designated as dominant when liberalization began in 2000. Section 2.3 of the *Telecom Competition Code* allows a dominant firm to apply for declassification

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<sup>52</sup> Hong Kong Telecom was acquired by PCCW in August 2000. *Competition Policy and Law in China*, as note 22 above, at 314.

<sup>53</sup> FTNS Licence, as note 24 above, at 26.

<sup>54</sup> *Ibid.*

<sup>55</sup> PCCW-HKT gradually lost its dominant status in the international long-distance markets in 2001 and 2002. In 2002, it was deemed non-dominant in the external bandwidth services wholesale market. A year later, it applied for a declaration of non-dominance in the residential fixed line telephone service market. Finally, it shed its designation of dominance in all markets when it was issued a Fixed Carrier ("FC") licence in 2005. Under this new licence, the firm is no longer subject to an *ex ante* tariff control scheme. See Office of the Telecommunications Authority, *Implementation of ex post Regulation of the Tariffs of PCCW-HKT Telephone Limited under a New Fixed Carrier License—Statement of the Telecommunications Authority*, (2005).

<sup>56</sup> *Telecom Competition Code 2005*, as note 30 above, § 2.2.

<sup>57</sup> *Ibid.*

(confusingly termed as reclassification in the *Code*) if it no longer meets either of the two criteria in Section 2.2.1, which means that it must possess no significant market power and no right to operate a facility that is costly or difficult to replicate in any telecom market in Singapore.<sup>58</sup> Furthermore, Section 2.5 empowers IDA to grant exemptions from specific dominance obligations when IDA finds that the firm is no longer dominant in a particular market.<sup>59</sup>

This licensee-based classification approach is overly inclusive, as it may impute dominance to a licensee in markets in which it possesses no significant market power, and has been challenged within Singapore.<sup>60</sup> In response to these challenges, IDA argued that this approach was appropriate for Singapore because its “telecommunications market is less developed than in some other jurisdictions that have a longer history of liberalisation[.]”<sup>61</sup> What presumably concerns IDA is the dominant firm’s ability to leverage its market power in the market in which it is dominant and extend it to a competitive market. This concern is particularly relevant in light of the fact that liberalization only began in Singapore in 2000 and effective competition is still lacking in some telecom markets. While this is a legitimate concern, the best way to tackle it is not the blunt instrument of licensee-based classification. Instead, it should be addressed through substantive conduct provisions focusing on anticompetitive leveraging of market power. Provided that there is sufficient safeguard against such leveraging, there is little economic justification for treating a dominant licensee as dominant in every market in which it operates, regardless of the presence of significant market power.

The burden on the dominant firm under this licensee-based classification system is somewhat alleviated by the fact that the firm may apply for exemptions under Section 2.5 of the *Telecom Competition Code*. Exemptions are granted on a per-obligation basis. A dominant licensee conceivably could apply for exemptions from each of its special obligations in one market, which would effectively give the licensee a market-wide exemption. If such market-wide exemptions are granted in every market in which the dominant licensee does not possess significant market power, licensee-based classification in effect becomes market-based classification. Singapore’s classification system would have little operational difference with that in place in Hong Kong. In Hong Kong, if a previously dominant firm loses its dominance in a particular market, the TA will declare it non-dominant in that market accordingly. However, market-based exemptions may be inconsistent with Section 2.2.1 of the *Code*, which defines and requires assessment of dominance on a per-licensee basis, even though the wording of Section 2.5 does not explicitly preclude such exemptions.<sup>62</sup>

Licensee-based classification may present particular problems when a previously non-dominant firm is reclassified as dominant. The initial classification of SingTel as

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<sup>58</sup> *Ibid.*, at § 2.3.

<sup>59</sup> *Ibid.*, at §§ 2.5–2.6.

<sup>60</sup> *Code of Practice*, as note 16 above, at 4.

<sup>61</sup> *Ibid.*, at 5.

<sup>62</sup> *Telecom Competition Code 2005*, as note 30 above, at § 2.5.

dominant was uncontroversial because it was dominant in almost all, if not all, of the markets in which it operated in 2000, when liberalization began. However, should another firm become dominant in the future in one of the ten telecom markets in which it operates, for example wholesale external bandwidth services, Section 2.2.1 of the *Telecom Competition Code* would require the firm to be deemed as dominant in each of those ten markets. Classifying this hypothetical firm as dominant in all ten markets based on its dominance in one of them would be over-inclusive. Licensee-based classification could be modified so that dominance in a majority of the markets in which a firm operates is required before it will be classified or reclassified as dominant. In the above example, the emerging dominant firm would not be declared dominant unless it achieves such status in six markets. The obvious flaw in this suggestion is that it is under-inclusive. The firm would be spared its special obligations as long as it is dominant only in five markets. Competitors and consumers in those five markets would be deprived of the protection they deserve. The firm would act strategically to ensure that it does not achieve dominance in a sixth market. It may offer lower quality services or restrain its competitive activity. Competition would be distorted in the remaining five competitive markets. It may be possible to come up with a solution to this dilemma. However, this dilemma can be easily avoided by switching to market-based classification.

#### B. EXEMPTIONS FROM EX POST REGULATIONS

In Singapore, under Section 2.5 of the *Telecom Competition Code*, a dominant licensee may apply for exemptions not only from the *ex ante* special obligations imposed in Section 4, but also from the *ex post* regulation of abuses of dominance under Section 8. Although the application of Section 2.5 to *ex post* regulations is not explicitly spelt out in that section, Section 2.6 of the *Reclassification and Exemption Guidelines* issued by IDA devotes special attention to the application of Section 2.5 to Section 8 *ex post* regulation.<sup>63</sup> In a decision issued on 12 November, 2003, IDA exempted SingTel's wholesale international telephone services from *ex post* regulation, arguing that because SingTel is no longer dominant in that market, it is incapable of violating Section 8 as it has no dominant position to abuse.<sup>64</sup> If this exemption practice were in place in the United States or the European Community, it would mean that a dominant firm could apply to exempt itself from the application of Section 2 of the Sherman Act or Article 82 of the EC Treaty.

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<sup>63</sup> Info-communications Development Authority of Singapore, *Advisory Guidelines Governing Petitions for Reclassification and Requests for Exemption under Sub-sections 2.3 and 2.5 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005*, 16.

<sup>64</sup> Info-communications Development Authority of Singapore, *Explanatory Memorandum Issued by Info-communications Development Authority of Singapore—Request of Singapore Telecommunications Ltd for Exemption from Dominant Licensee Obligations with respect to the International Telephone Services Market*, 9.

The situation is similar in Hong Kong. Under GC 44 of the FTNS licence, the TA may only exempt a dominant licensee from GC 17 and GCs 20 to 23, which impose special accounting practices, tariff control, and approval procedures for trials of new services. GC 44 does not allow the TA to grant exemptions from GC 16, which prohibits abuses of dominance. Moreover, Section 7L of the TO should apply regardless of exemptions under GC 44. Nowhere in the TO allows exemptions to be granted from Section 7L. However, the TA holds the view that once a firm is deemed to be non-dominant under GC 44, GC 16 and Section 7L should no longer apply. In an industry consultation paper concerning PCCW-HKT's application for a declaration of non-dominance in the residential fixed line telephone service market, the TA emphasizes that he is "mindful of the implication of rendering the prohibition of certain strategic behaviour . . . under section 7L of the Ordinance or GC 16 of the Licence inapplicable" as a result of a declaration of non-dominance.<sup>65</sup> In fact, GC 16 was deleted in the new Fixed Carrier ("FC") licence the TA issued to PCCW-HKT. Furthermore, in his statement announcing the end of tariff control over PCCW-HKT and declaring that firm non-dominant in all telecom markets, the TA specifically noted "the abandonment of the conventional approach to *ex post* regulation via positive finding of non-dominance that would prejudice the subsequent application of the competition provisions in the Ordinance [Section 7L]."<sup>66</sup>

The TA's logic in declaring GC 16 and Section 7L inapplicable to a firm that has been declared non-dominant is understandable. If a firm no longer has significant market power, logically it has no dominant position to abuse. However, that logic is flawed. A declaration of non-dominance only means that that firm does not possess significant market power in a particular market at a moment in time. The firm may have no dominant position to abuse then, but it may reacquire significant market power in the future. By explicitly allowing a dominant firm to apply for exemptions from Section 8 of the *Telecom Competition Code*, IDA commits the same mistake as OFTA's. What both regulators have failed to appreciate is the difference between *ex ante* control and *ex post* regulation. While the former entails a prior finding of dominance before special obligations may apply, the latter does not. In fact, in most jurisdictions, a litigant is required to show significant market power every time it alleges an abuse of dominance against a firm. However, in a telling public statement which illustrates the TA's lack of appreciation of the distinction between *ex ante* control and *ex post* regulation, he noted that "it is not the international best practice to adopt the test of dominance as a pre-requisite for the implementation of *ex post* regulation."<sup>67</sup> By granting exemptions from the *ex post* conduct regulations, the two regulators in effect turned *ex post* regulation into *ex ante* control. Granting exemptions from *ex post*

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<sup>65</sup> Office of Telecommunications Authority, *Application for A Declaration of Non-Dominance for PCCW-HKT Telephone Limited in the Market for Residential Direct Exchange Line Services—Industry Consultation Paper*, 18.

<sup>66</sup> Office of Telecommunications Authority, *Implementation of ex post Regulation of the Tariffs of PCCW-HKT Telephone Limited under a New Fixed Carrier License—Statement of the Telecommunications Authority*, 5.

<sup>67</sup> *Implementation of ex post Regulation of Tariffs*, as note 55 above, 6.

regulation may even prejudice private lawsuits if private parties are not allowed to challenge the regulator's finding of non-dominance.

Exemptions from *ex post* regulation would be less troubling if the two regulators could swiftly revoke the exemptions, and if a private litigant could challenge the regulators' finding of non-dominance *de novo* in a future lawsuit. The *Telecom Competition Code* does not provide for a private right of action. A private party may petition IDA to initiate an enforcement action.<sup>68</sup> However, the discretion rests with the regulator. Therefore, the second consideration is irrelevant. Regarding the ease with which IDA may revoke exemptions, in a number of exemption decisions, IDA has stipulated that the exemptions would remain in effect unless IDA determines that re-imposition of dominance obligations, both *ex ante* and *ex post*, is needed to preserve competition in the relevant telecom markets.<sup>69</sup> These decisions provided little guidance on how IDA will go about determining when re-imposition is necessary. Section 2.5 of the *Telecom Competition Code* is similarly silent on the procedures for revocation of exemptions. Section 2.7.1 of the *Advisory Guidelines on Reclassification and Exemption* briefly states that "IDA will provide an opportunity for comment prior to re-imposing any regulatory requirement"<sup>70</sup>, without elaborating what this opportunity for comment entails. Assuming that revocation could be carried out swiftly, the adverse impact of exemptions from *ex post* regulation may be reduced. However, given the extra administrative hassle created by exemptions from *ex post* regulation—IDA may choose not to grant such exemptions at all—one may legitimately question what IDA's rationale for granting them is.

IDA's thinking can be gleaned from a number of decisions in which it granted exemptions from *ex ante* obligations but not the *ex post* regulation. In refusing to exempt the incumbent SingTel from *ex post* regulation in the commercial retail international telephone services market, IDA referred to the fact that the incumbent "may be able to use any residual market power that it may have to act anti-competitively . . . given its current market share. . . . In the event that SingTel acts anti-competitively, this will provide an effective means for IDA to take *ex post* enforcement measures."<sup>71</sup> IDA therefore acknowledges that *ex post* enforcement measures are necessary in some markets in which the incumbent possesses residual market power. The implication is that in some markets, IDA is in fact able to predict that such enforcement measures will not be needed in the future. The question is whether IDA could make such predictions accurately. Given the fact that exemptions have an

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<sup>68</sup> *Telecom Competition Code 2005*, as note 30 above, at § 11.4.

<sup>69</sup> See, e.g., Info-communications Development Authority of Singapore, *Decision of the Info-communications Development Authority of Singapore on the Request by Singapore Telecommunications Limited for Exemption from the Application of Dominant Licensee Obligations with Respect to the Provision of International Capacity Services*, 7.

<sup>70</sup> *Advisory Guidelines Governing Petitions for Reclassification and Requests for Exemption*, as note 63 above, at § 2.7.1.

<sup>71</sup> Info-communications Development Authority of Singapore, *Preliminary Decision on the Request by Singapore Telecommunications Limited for Exemption from Dominant Licensee Obligations with Respect to the Retail International Telephone Services Market Pursuant to Sub-section 2.5.1 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005*, 21.

indefinite duration absent changes in market conditions, and market conditions may change rapidly in such a technology driven sector as telecom, there is little reason for IDA to attempt such difficult predictions, and incur unnecessary administrative hassle to revoke exemptions when those predictions prove inaccurate. IDA should categorically refrain from granting exemptions from *ex post* regulation.

Revocation of exemptions does not apply in Hong Kong. Section 7L does not have in place an explicit exemption mechanism. That section was deemed inapplicable to the incumbent monopoly in light of the TA's above quoted declaration that a firm that is no longer dominant cannot violate Section 7L. Therefore, Section 7L could only be reapplied if the firm is reclassified as dominant. It is unclear from the TO and other supplementary documents whether reclassification is possible in the current regulatory regime. When the TA declassified PCCW-HKT in all markets, he undertook public consultation and issued a new licence to the firm. It is most likely that in order to reclassify a firm as dominant, the TA would have to go through a similar process. This is obviously very cumbersome. The private right of action is clearly recognized in Section 39A of the TO.<sup>72</sup> Nothing in Section 7L or the rest of the TO requires the TA's prior finding of non-dominance to be binding on future private lawsuits. In theory, a private litigant should be allowed to challenge the TA's finding in a Section 39A action. If private litigants were bound by the TA's finding, however, the effectiveness of Section 7L would be severely undermined. A private abuse of dominance suit against a declassified firm would entail a petition to the TA for reclassification. Pursuit of judicial remedies under Section 7L would become excessively time-consuming and onerous. At this stage of liberalization in Hong Kong and Singapore, only the incumbent monopolies have been declassified and benefit from exemptions from *ex post* regulation. By allowing such exemptions, OFTA and IDA have impaired competitors' ability to protect themselves from abuses of dominance, and have made it easier for the incumbent monopolies to reverse the gains of liberalization.

### C. EX ANTE SPECIAL DOMINANCE OBLIGATIONS

Both Hong Kong's and Singapore's regulatory regimes impose a range of *ex ante* special obligations on a dominant firm. Sections 4 and 6 of the *Telecom Competition Code* are entirely devoted to these obligations. These obligations include a duty to obtain prior IDA approval over tariff proposals or revisions under Section 4.4.1, a duty to provide services on a non-discriminatory basis under Section 4.2.1.2, and a duty to provide unbundled services at just and reasonable prices, terms, and conditions under Section 4.2.2.1. Under the FTNS licence, a dominant licensee is subject to a number of special obligations. The obligations that raise the most interesting competition law

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<sup>72</sup> Section 39A of the TO states that "[a] person sustaining loss or damage from a breach of section 7K, 7L, 7M, or 7N, . . . may bring an action for damages, an injunction or other appropriate remedy, order or relief against the person who is in breach." *Telecommunications (Amendment) Ordinance*, as note 28 above, at § 39A.

issues are GCs 20–22, which create a tariff control regime and will be discussed below. After the declassification of PCCW-HKT in 2005, no Hong Kong telecom operator is currently subject to the special obligations contained in the FTNS licence. These obligations may still be of relevance, however, if the TA decides to reclassify a licensee as dominant and reinstate them in the future.

IDA imposes tariff control over a dominant licensee. Section 4.4.1 of the *Telecom Competition Code* requires a dominant licensee to obtain approval from IDA for any tariff proposal or revision. Under Section 4.6, a dominant licensee must provide its services on prices, terms, and conditions which are consistent with the published tariffs. IDA has brought an enforcement action against a dominant licensee that violated Section 4.6. On 25 September 2002, IDA fined SingTel S\$10,000<sup>73</sup> for deviating from its effective tariff for local leased circuit high speed grooming service.<sup>74</sup> Section 4.2.1.1 further instructs a dominant licensee to provide services at just and reasonable prices, terms, and conditions, although the section is silent on what constitutes such prices and terms. Similar to the *Telecom Competition Code*, the FTNS licence also requires prior regulatory approval over tariff and requires a dominant licensee to adhere to published tariffs. Under GC 20, a dominant licensee is required to publish its tariff and charge no more than the published tariff.<sup>75</sup> It is also prohibited from offering discounts from the published tariff, and from offering a bundle of services in a single tariff without offering each constituent service at a separate tariff.<sup>76</sup> GCs 21 and 22 require a dominant licensee to obtain the TA's approval for every tariff revision and tariff for a new service.<sup>77</sup>

The tariff control system in both regimes imposes complete price control on the dominant licensee. The systems were instituted when telecom liberalization was in its infancy in both economies. Both regulators were understandably nervous about the incumbent monopolies' ability to drive out competitors through predatory pricing. That is the likely rationale behind prohibiting unauthorized discounts. However, a requirement of tariff approval and a complete ban on unauthorized discounts go beyond what is necessary to achieve this purpose. What is needed is a prohibition of predatory pricing with the appropriate cost standard.<sup>78</sup> It is consumers who gain from discounts and lower tariffs. By disallowing price-cutting, the TA deprives consumers of the benefit of competition.

<sup>73</sup> The average exchange rate between the US dollar and the Singaporean dollar in the month prior to 23 January 2007 was 1.54:1. Based on this exchange rate, S\$10,000 roughly equals US\$6,494.

<sup>74</sup> R/E/I/018, *SingTel's failure to tariff pursuant to Section 3.3.4 of the Telecom Competition Code* ("Code"), (25 Sept. 2002), available at <<http://www.ida.gov.sg/Policies%20and%20Regulation/20060426102551.aspx>>.

<sup>75</sup> FTNS Licence, as note 24 above, at 10–11.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, at 11–12.

<sup>78</sup> The question of the appropriate cost standard for predatory pricing is of course one of the most vexing and extensively debated questions in competition law. See, e.g., Philip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, (1975) 88 Harv. L. Rev. 697; F.M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, (1976) 89 Harv. L. Rev. 869; Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, (1977) 87 Yale L.J. 284; Paul L. Joskow and Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, (1979) 89 Yale L.J. 213; William J. Baumol, *Predation and the Logic of the Average Variable Cost Test*, (1996) 39(1) J.L. & Econ. 49. This article does not seek to address it.

If the intention is to limit the scope of aggressive price-cutting by the dominant firm, in order to help preserve competition in the initial stages of liberalization, a more restrictive cost standard can be used. One possibility is the long-run average incremental cost standard ("LRAIC"), which takes into account the long term infrastructure investments of a telecom operator. This may be especially appropriate in the case of IDA, as the Singapore telecom sector lags behind Hong Kong in liberalization. Curiously, IDA has specifically rejected LRAIC in favour of the more permissive average incremental cost ("AIC") standard for the predatory pricing offence under Section 8.2.1.1, arguing that LRAIC "would be too restrictive, and could deter pro-competitive price competition."<sup>79</sup> This permissive approach is all the more surprising when juxtaposed with the tight restrictions imposed on a dominant firm under Section 8.2.1.2 regarding price squeezes, under Section 8.2.1.3 relating to cross-subsidization, and under Section 8.3 concerning anticompetitive preferences.

The TA has not completely abandoned consumers, however. GC 20 disallows a dominant licensee from charging prices in excess of the published tariffs. The likely rationale behind this is to protect consumers. Another consequence of a dominant licensee charging higher prices is that it gives its competitors room to raise their prices as well. The dominant licensee creates a price umbrella of sorts for its competitors. With higher prices, it would be easier for a new entrant to establish itself in the market. Therefore, letting a dominant licensee charge higher prices, while causes short-term harm to consumers, may in fact foster competition in the market in the long term. By prohibiting upward deviations from the published tariffs, the TA may have inadvertently impeded the emergence of effective competition in the telecom markets.

The preceding discussion illustrates the difficulty associated with price control. A pricing policy that strikes the right balance between promoting consumer welfare and controlling predatory behaviour is not easy to achieve. High and low prices harm and benefit consumers and competitors in different ways. Moreover, price control often distorts the market in unforeseen ways. In the United Kingdom, the retail price control over British Telecom has led to artificially high usage prices, but artificially low line rental charges.<sup>80</sup> The result is that customers are discouraged from making phone calls.<sup>81</sup> That is why competition agencies refrain from price control. The TA attempted that with GCs 17, 20-22. It was an ill-advised attempt. The TA should refrain from reintroducing such control in the future. IDA should phase out its tariff control scheme, which remains in operation.

Section 4.2.2.2 of the *Telecom Competition Code*, which imposes on a dominant licensee a duty to allow resale of end user telecommunication services, raises some interesting issues from a competition law perspective. Under that section, a dominant licensee must allow another licensee to purchase any telecommunication service that

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<sup>79</sup> *Code of Practice*, as note 16 above, at 7.

<sup>80</sup> *Telecommunications Law and Regulation*, as note 17 above, at 325.

<sup>81</sup> *Ibid.*



the former makes available to end users on the same terms and conditions as those available to end users.<sup>82</sup> Furthermore, a dominant licensee must not require another licensee to disclose to end users that its services incorporate input from the dominant licensee.<sup>83</sup> The reasoning behind this provision presumably is that the retail price which a dominant firm charges its end users should be its profit-maximizing price. Given that sales are made at the same price, the dominant firm should be indifferent between selling to end consumers or a competitor. A competitor that purchases the service at retail prices would not be able to undercut the dominant firm's prices unless it is willing to suffer losses. In fact, this rationale reflects the US Supreme Court's reasoning in the *Aspen Skiing* case.<sup>84</sup> In that case, the US Supreme Court held that Aspen Skiing, the dominant firm in the Aspen ski slope market, violated Section 2 of the Sherman Act by terminating and refusing to revive the package ski lift tickets it had previously offered in conjunction with its rival Aspen Highlands.<sup>85</sup> One of the key factors that convinced the Supreme Court to uphold the lower court's finding of violation was the fact that Aspen Skiing had refused to sell its ski tickets to its rival even at retail prices.<sup>86</sup> This gave the jury valid grounds on which to infer a willingness to sacrifice short-term profit to harm competition.<sup>87</sup> This same reasoning seems to support Section 4.2.2.2. However, as Eleanor Fox insightfully pointed out, a predatory intent to harm competition is not the only possible inference from that key factor in the *Aspen Skiing* case. If Aspen Skiing had continued to allow its competitor to purchase the tickets at retail and resell them, the dominant firm would have been diverting sales from itself.<sup>88</sup>

Likewise, under Section 4.2.2.2, if a competitor is allowed to resell the dominant firm's service, the dominant firm could suffer harm. Given that the competitor already purchases the service at retail price, it could not achieve any profit through resale to consumers. However, if the competitor is willing to resell at the retail price, foregoing profit, it could conceivably expand its sales and take over the market. If the competitor demands that the dominant firm sell to the competitor its entire current output at retail price, the dominant firm presumably would have to comply under Section 4.2.2.2. In that case, the dominant firm could only maintain a retail presence by producing output beyond the profit-maximizing level. For the dominant firm to sell the additional output, it would have to lower its price. The equilibrium price for the service will drop. When output and price deviate from the profit-maximizing level, the overall revenue for the dominant firm drops. The firm therefore suffers harm. In fact, this revenue loss outcome does not require such an extreme scenario. The competitor need not seek to take over the entire market. The dominant firm may want to maintain a minimum level

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<sup>82</sup> *Telecom Competition Code 2005*, as note 30 above, at § 4.2.2.2.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>85</sup> *Ibid.*, at 585–86.

<sup>86</sup> *Ibid.*, at 608. See also Eleanor M. Fox, *Is there Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, (2005) 73 *Antitrust L.J.* 161–62.

<sup>87</sup> *Aspen Skiing*, 472 U.S. at 608.

<sup>88</sup> Fox, as note 86 above, at 161, n. 40.

of retail sales for a variety of reasons. If the competitor purchases an amount of output from the dominant firm that would leave the latter with less than its minimum desired level of retail sales, the dominant firm may choose to maintain its retail presence at the expense of lower profit. A duty to allow resale of end user services may be justified at the initial stages of liberalization, when the regulator must offer considerable assistance to the new entrants. After the new entrants have established themselves, and the market has become more competitive, however, competitors should be expected to compete on their own.<sup>89</sup> The dominant firm should no longer be required to sacrifice profit to make room for its competitors.

### III. EX POST REGULATION OF ABUSES OF DOMINANCE

#### A. EX POST REGULATION UNDER THE TO

*Ex post* regulation of dominant firms is important because *ex ante* control is only intended to give new entrants time to establish themselves in the market and should be withdrawn once the market has reached a sufficient degree of competitiveness. At that point, competition should be regulated entirely by *ex post* regulation. Parties may disagree on when the market reaches that point, but should concur that *ex ante* control is merely transitional. This is consistent with the view expressed by the European Commission in its 1999 Communications Review, in which the Commission urges for a shift from *ex ante* control to *ex post* regulation of conduct.<sup>90</sup> The UK government similarly believes that telecom-specific *ex ante* control should be removed as liberalization proceeds.<sup>91</sup> The Communications Act 2003 proclaims that competition law, as opposed to *ex ante* control, should be the primary regulatory instrument in the telecom sector.<sup>92</sup>

Both Hong Kong and Singapore impose *ex post* conduct regulation on a dominant firm. The regulations in Hong Kong are the less elaborate of the two. Sections 7L and 7N of the TO are the relevant provisions. Section 7L sets out a general proscription of abuses of dominance, and enumerates some examples of them, such as predatory pricing, price discrimination, imposition of contract terms that are harsh and unrelated to the subject of the contract, and bundling.<sup>93</sup> Section 7N further instructs a dominant

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<sup>89</sup> The difficult question is of course deciding when a market is competitive enough to phase out this duty. For a discussion of the appropriate benchmark for deciding when the telecom sector should be deregulated, see Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, (2006) 5(1) J. Telecomm. & High Tech. L. 159.

<sup>90</sup> Communication from the Commission, *The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework* (26 April 2000), COM(2000)239. However, recent market entrants opposed the Commission's proposal, arguing that it was premature to lift the *ex ante* controls. The 2003 telecom regulation thus retained many *ex ante* control provisions. *Telecommunications Law and Regulation*, as note 17 above, at 19.

<sup>91</sup> *Telecommunications Law and Regulation*, as note 17 above, at 293-94.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Telecommunications (Amendment) Ordinance*, as note 28 above, at § 7L.

licencee not to “discriminate between persons who acquire the services in the market on charges or the conditions of supply.”<sup>94</sup> Under Sections 7L and 7N, in order to prove an offence, it must be shown that the conduct at issue “has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.”<sup>95</sup> This requirement shares some similarity with the language of Article 81(1) of the EC Treaty, which prohibits agreements and concerted practices “which have as their object or effect the prevention, restriction or distortion of competition[.]”<sup>96</sup> What is curious is that the similarity is shared with Article 81, which deals with anticompetitive agreements and concerted practices, and not with Article 82, which prohibits abuses of dominance. Article 81 prohibits an agreement between undertakings that has the purpose of restricting competition. However, the finding of an abuse under Article 82 usually does not focus on the intent of the party, but on the objective effect of the conduct.<sup>97</sup> Similarly, under US antitrust jurisprudence, proof of the competitive harm of the relevant conduct is generally required to establish monopolization under Section 2 of the Sherman Act.<sup>98</sup> By prohibiting conduct that only has the purpose, but not the effect, of substantially restricting competition, Section 7L goes beyond both Section 2 and Article 82.

The obvious argument in defence of Section 7L is that by prohibiting conduct that has an anticompetitive purpose, but not yet an anticompetitive effect, it deters a dominant firm from attempting such conduct in the first place. However, absent clear documentary evidence, the purpose of particular conduct is often difficult to prove, and may have to be inferred from its effect. What is likely to happen is that conduct which lacks anticompetitive effect will be condemned on the basis of inferences drawn from its market impact, even though the effect is short of anticompetitive and the conduct would be permissible if only effect and not purpose was considered. The standard of proof will be lowered and dominant firms will be deterred from competing vigorously. Therefore, by prohibiting competitive conduct by a dominant firm that only has the purpose, but not necessarily the effect, of substantially restricting competition, Sections 7L and 7N deviate from accepted competition law principles. In pursuit of greater competition under liberalization, the TA has restricted a dominant firm’s ability to

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<sup>94</sup> *Ibid.*, at § 7N.

<sup>95</sup> *Ibid.*, at § 7L.

<sup>96</sup> *Treaty Establishing the European Community*, 24 December 2002, OJ (C 325) 81 (2002).

<sup>97</sup> See Case 85/76, *Hoffman-La Roche v. Commission*, [1979] ECR 461, [1979] 3 CMLR 211, para. 91 (“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which . . . has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”); see also Richard Whish, *Competition Law*, 4th Edn, Butterworths, London, 2001, p. 167.

<sup>98</sup> Lawrence A. Sullivan and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook*, West Group, St. Paul, 2000, p. 103. The intent or purpose of a firm’s action is relevant for establishing an attempt to monopolize claim under Section 2. However, that is different from Section 7L of the TO, which only applies to a licensee that already occupies a dominant position. Attempt to monopolize claims obviously would not apply to a dominant firm with respect to conduct perpetrated in a market which the firm already dominates. However, these claims may apply if the firm leverages its monopoly power in a different market.

compete on the merits, and has sheltered inefficient operators from the full rigor of competition.

#### B. EX POST REGULATION UNDER THE TELECOM COMPETITION CODE

Section 8 of the *Telecom Competition Code* contains more specific prohibitions on abuses of dominant position. Prohibited abuses include predatory pricing under Section 8.2.1.1, price squeezes under Section 8.2.1.2, cross-subsidization under Section 8.2.1.3, discrimination against non-affiliated licensees under Section 8.2.2.1, predatory network alteration under Section 8.2.2.2, and anticompetitive preferences under Section 8.3. This list is supplemented by Section 3.2.3 of the *Telecom Competition Guidelines*, which prohibits refusal to supply, anticompetitive discounts, and tying.<sup>99</sup>

IDA has adopted a creative, if erroneous, interpretation of the prohibitions of price squeezes, cross-subsidization, and discrimination. According to Section 8.2.1.2, there are two elements in a price squeeze claim. A litigant must show that a dominant firm's service or facility is an essential input for that firm's own downstream operation and a downstream competitor's provision of a telecom service, and that the price charged by the dominant firm for the essential input is so high that its own downstream operation could not profitably sell its service if it were required to pass on the full input cost to its customers.<sup>100</sup> A cross-subsidization claim under Section 8.2.1.3 requires proof that the dominant firm subsidizes its operation in a competitive market with revenue from a market in which it enjoys significant market power, and that the subsidy unreasonably restricts competition.<sup>101</sup> A dominant firm commits a discrimination offence under Section 8.2.2.1 if it provides non-affiliates access to its infrastructure or services that are as a practical matter necessary for those non-affiliates' services on less favourable terms and conditions than those terms and conditions offered to an affiliate.<sup>102</sup> In a consultation paper released by IDA in November 2004, in which the regulator responded to SingTel's request for exemptions from these prohibitions, IDA observed that each of these prohibitions contains two separate offences.<sup>103</sup> It is illegal for a dominant firm to charge high prices for an essential input, to offer cross-subsidy to an affiliate or sub-division, and to discriminate against non-affiliates over access to an essential infrastructure and service.<sup>104</sup> It is also illegal for any licensee to be "the beneficiary of this type of conduct by another entity that has market power."<sup>105</sup> The giving and the receiving of a benefit or preference are separately prohibited.

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<sup>99</sup> Info-communications Development Authority of Singapore, *Advisory Guidelines Governing Abuse of Dominant Position, Unfair Methods of Competition and Agreements Involving Licensees that Unreasonably Restrict Competition under Sections 8 and 9 of the Code of Practice for Competition in the Provision of Telecommunication Services 2005*, 16-17.

<sup>100</sup> *Ibid.*, at 10-11.

<sup>101</sup> *Ibid.*, at 12-13.

<sup>102</sup> *Ibid.*, at 14-15.

<sup>103</sup> *Preliminary Decision*, as note 71 above, at 33.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

There are a number of problems with IDA's interpretation. First, as discussed in Section II.B, IDA should have recognised that no exemptions should be granted from *ex post* regulation. Second, IDA's interpretation is particularly problematic for the price squeeze offence. With the other two offences, the affiliate does receive an advantage from the dominant firm with which it is affiliated, in the form of a subsidy or preferred access to an infrastructure or services. With price squeeze, the affiliate is in fact charged a higher price for an essential input, a price so high that the affiliate would sustain losses if it were required to pass on the full purchase price to consumers. The receipt prong of the price squeeze offence would in fact penalize a firm for paying a loss-making price for an input. Third, in the consultation paper, IDA declared that the receipt prong of these offences is independent from the giving prong, and applies even to an entity that has no market power.<sup>106</sup> To prohibit an entity with no market power from receiving preferential treatment is excessively stringent and is inconsistent with accepted competition law principles. Receipt of preferential treatment would count as unilateral conduct, if it constitutes competitive conduct at all. Unilateral conduct by a firm without significant market power rarely falls within the reach of competition law. The only way to justify the inclusion of an affiliate with no market power is if IDA considers the dominant firm and its affiliate to be separate undertakings involved in an anticompetitive vertical agreement. In that case, there would no longer be two separate offences. Participation by both the dominant firm and its affiliate would be required to form an agreement. This would contradict IDA's interpretation.

In IDA's defence, the separation of the price squeeze, cross-subsidization, and discrimination offences into two distinct offences is driven by a concern to prevent a telecom licensee from receiving preferences from a dominant non-telecom firm. In its consultation paper, IDA expressed concern over a non-dominant licensee receiving subsidy from an affiliated firm that is dominant in a non-telecom market.<sup>107</sup> IDA, like OFTA, has no jurisdiction over non-licensees.<sup>108</sup> IDA's jurisdictional limitation resulted in its strained interpretation of Sections 8.2.1.2, 8.2.1.3, and 8.2.2.1, which exposes the limitations of a sectoral competition regulatory regime. In Singapore, these limitations are alleviated by the existence of a cross-sector competition law, the Competition Act. In Hong Kong, until the new cross-sector law is passed, there is no recourse for a victim of anticompetitive conduct if the perpetrator is beyond the sectoral regulator's jurisdiction. This deficiency in Hong Kong's existing competition law regime was evident in an OFTA case in 2004, as will be seen in the next sub-section.

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<sup>106</sup> *Ibid.* In fact, Section 8.3 shares a similar focus on the beneficiary, and prohibits a licensee, regardless of dominance, from leveraging the significant market power of an affiliate, either in a telecom or a non-telecom market, in a way that would unreasonably restrict competition. *Telecom Competition Code 2005*, as note 30 above, § 8.3.

<sup>107</sup> *Preliminary Decision*, as note 71 above, at 33.

<sup>108</sup> See *Telecom Competition Code 2005*, as note 30 above, at § 1.3; *Telecommunications (Amendment) Ordinance*, as note 28 above, at § 7L ("A licensee in a dominant position in a telecommunications market shall not abuse its position.").

## C. CASE LAW

Enforcement actions over abuse of dominance have been rare in both Hong Kong and Singapore. In 2002, there was an allegation of abusive pricing practices against SingTel under Section 8.2 of the *Telecom Competition Code*.<sup>109</sup> Upon investigation, IDA concluded that there was insufficient evidence. An interesting and controversial case arose in Hong Kong in 2003 and 2004 over the alleged bundling of internet services by a residential estate management company. One of the major real estate developers in Hong Kong had included internet access service charges in its management fee.<sup>110</sup> Residents of the estate, Banyan Garden, could not opt out of the arrangement, and would have to pay for the service regardless of actual usage.<sup>111</sup> A public uproar ensued after reports of the practice appeared in the media. The outrage was largely due to the fact that the internet service provider was an affiliate of the estate management.<sup>112</sup> The public regarded this kind of bundling arrangement as unfair and overreaching. In the absence of a cross-sector competition law, residents of the estate could not complain about the estate management's bundling practice. The internet service provider, however, falls within the TA's jurisdiction under the TO. Residents of the estate filed an unfair advantage claim against the internet service provider under Section 7K(3)(c) of the TO.

The claim in the complaint was not an abuse of dominance claim. Section 7K is concerned with anticompetitive agreements and concerted practices. However, if the appropriate legal instrument had been available, i.e. a cross-sector competition law, this case would have been brought as a bundling case, which usually falls within the rubric of abuse of dominant position.<sup>113</sup> Under Section 7K(3), a licensee gives an undue preference or receives an unfair advantage if "a competitor could be placed at a significant disadvantage, or competition would be prevented or substantially restricted."<sup>114</sup> These two are alternative conditions. There is no need to show substantial restriction of competition if a party is able to demonstrate significant disadvantage for a competitor. The TA himself observed that "Section 7K(3)(c) does not require proof that particular conduct has the actual purpose or effect of preventing or substantially restricting competition[.]"<sup>115</sup> Substantiating a Section 7K(3)(c) claim would only require proof that the preference is undue or the advantage is unfair, and that a competitor is placed at a significant disadvantage as a result.

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<sup>109</sup> R/E/1/021, *SingTel's Pricing Practices for its IDD, Local Leased Circuit and ISDN Services*, (26 July 2002), available at <<http://www.ida.gov.sg/Policies%20and%20Regulation/20060426102551.aspx>>.

<sup>110</sup> T 261/03, *Complaints about Arrangements for the Provision of Telephone and Internet Access Services at Banyan Garden Estate*, [2003], para. 3.

<sup>111</sup> *Ibid.*, at paras 3, 17.

<sup>112</sup> *Ibid.*, at paras 73-76.

<sup>113</sup> Bundling/tying cases are also brought as concerted practices claims. For example, in the United States tying cases are often pursued under Section 1 of the Sherman Act. *The Law of Antitrust*, as note 98 above, at 387.

<sup>114</sup> *Telecommunications (Amendment) Ordinance*, as note 28 above, at § 7K(3).

<sup>115</sup> *Banyan Garden Estate*, as note 110 above, at para. 24.

Section 7K(3)(c) is inconsistent with accepted competition law principles for two reasons. Firstly, it is highly unusual for a competition law offence to have no regard for the intent to restrict competition or actual competitive harm. Secondly, the offence does not require a proof that the licensee possesses significant market power. It is puzzling why competition law should be concerned with a firm's preference for one entity over another when that firm wields no significant market power. Such preferences are unlikely to have competitive effects on the market. This theoretical flaw in Section 7K(3)(c) is ever more apparent when it is compared to the prohibition of anticompetitive preferences under Section 8.3 of the *Telecom Competition Code*, which only applies to dominant firms, and Condition 57 of British Telecom's licence in the United Kingdom, which shares many similarities with Section 7K(3)(c) and only applies to British Telecom, a firm which the Office of Communications ("OFCOM") has deemed to possess significant market power.<sup>116</sup>

Notwithstanding its theoretical shortcomings, Section 7K(3)(c) was applied in the *Banyan Garden* case. In that case, the estate management had instituted a bidding process for internet access service in the estate.<sup>117</sup> There was ample evidence suggesting that the bidding process lacked transparency and that the estate management may have made up its mind before the process had even begun.<sup>118</sup> The TA affirmed that the licensees at issue did receive an advantage from its affiliated estate management company.<sup>119</sup> However, he determined that the advantage was not unfair.<sup>120</sup> His analysis of the existence of an unfair advantage focused on whether the estate management conducted an open and fair tender process for internet access service, whether the licensees knew that they were given a preference, and whether they did anything to facilitate the receipt of the advantage.<sup>121</sup> This standard of unfairness is not informed by competition analysis. The TA ignored the economic impact of the bundling practice, and focused on how other internet service providers had been disadvantaged in the bidding process. If the TA was concerned about competition at all in his analysis, he was concerned about competition in the bidding process.

The TA should have analysed the alleged abuse as a tying or bundling claim in the context of the real estate market and the internet access service market. This is not to say that the alleged abuse would necessarily be deemed anticompetitive or exclusionary under proper competition law analysis. It is not at all clear that the estate management company possessed significant market power in the relevant market. Moreover, given the competitiveness of the relevant real estate market, consumers who are dissatisfied with the bundling arrangement can purchase property elsewhere. Yet, the point remains that a proper analytical framework should have been adopted and the TA should have focused on the competitive effects of the alleged bundling, instead of the

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<sup>116</sup> *Telecommunications Law and Regulation*, as note 17 above, at 317, 321.

<sup>117</sup> *Banyan Garden Estate*, as note 110 above, at paras 29-40.

<sup>118</sup> *Ibid.*, at paras 49-67, 78-79.

<sup>119</sup> *Ibid.*, at para. 84.

<sup>120</sup> *Ibid.*, at paras 88-95.

<sup>121</sup> *Ibid.*

fairness of the bidding process. The regulator's lack of appreciation for the importance of competitive effects was evident in the remedy he suggested to the licensees. The TA asked the licensees to "support their associates in adopting open and competitive selection procedures."<sup>122</sup> The underlying rationale was that because the estate management's affiliated internet service providers were subject to unfair advantage restrictions under Section 7K(3)(c), the estate management itself should conduct a fair and open bidding process. It is unclear why the estate management was obliged to conduct a bidding process at all. Just like any private market actor procuring a service, the estate management should have the right to choose an internet service provider in whichever way it sees fit, with or without bidding. In his defence, the TA was precluded from undertaking a theoretically sound analysis because such an analysis would focus on the estate management and entail an examination of the residential estate market, over which it had no jurisdiction. The TA himself acknowledged that "any regulatory action in this particular case should ... be targeting the person conferring the advantages rather than the operators."<sup>123</sup> He was forced to adopt a contorted analysis because of his limitations as a sectoral regulator.

The *Banyan Garden* case inevitably leads one to question the wisdom of a competition law regime consisting solely of sectoral regulation. Having long been suspicious of competition law generally, the Hong Kong government consistently defended its sector-specific approach to competition law.<sup>124</sup> As mentioned earlier, television broadcasting is the only other sector that is currently subject to competition regulation. A number of political and policy reasons underline the government's choice of telecom and television broadcasting for competition law enforcement. These two sectors have traditionally been subject to licensing requirements and government regulation.<sup>125</sup> An operator must obtain a government licence before it can operate in either sector. Licensees are already subject to a host of sector-specific regulations. Further regulation in the arena of competition may not create substantial extra burden. Moreover, these two sectors traditionally have not experienced full competition. HKT was a government-franchised telephone monopoly until 1995. The television broadcasting sector, especially free-to-air television broadcasting, is still dominated by one operator.

The current state of affairs, however, has become indefensible from a competition law perspective. There is no reason to single out these two sectors for enforcement. These two sectors, especially telecom, do not seem particularly uncompetitive compared to the rest of the economy. The telecom sector has been liberalized and now experiences healthy competition in many markets. The TA's removal of PCCW-HKT's special dominance obligations attests to that. There are other sectors that equally deserve attention. The Consumer Council, a consumer protection advisory body established by the government, has produced reports outlining the lack of competition

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<sup>122</sup> *Ibid.*, at para. 9.

<sup>123</sup> *Banyan Garden Estate*, as note 110 above, at para. 6.

<sup>124</sup> *Competition Policy and Law in China*, as note 22 above, at 301-02.

<sup>125</sup> *Ibid.*, at 309-11, 348-49.



and the prevalence of anticompetitive conduct in Hong Kong.<sup>126</sup> Public allegations concerning anticompetitive conduct in sectors such as supermarket and petrol retail are rife. Although no claims have been substantiated because of the government's lack of investigatory power, there is no reason to spare other sectors from competition law enforcement.<sup>127</sup> Most importantly, as problems in the *Telecom Competition Code* in Singapore and the *Banyan Garden* case in Hong Kong show, a sectoral regime has severe limitations. Given the interrelationships between different sectors and the prevalence of conglomerates in the Hong Kong economy, these limitations will surely be exposed time and time again in the future. The time has come for Hong Kong to adopt a cross-sector competition law to rectify this state of affairs.

#### IV. CONCLUSION

This article provides an overview of the telecom-sector competition regulatory regimes in Hong Kong and Singapore. It explores some of the theoretical issues and practical problems of these two regimes from a competition law perspective. Both regimes are overly restrictive on dominant firms and provide inefficient competitors excessive protection from full competition. IDA's definition of dominance is overly inclusive. Its licensee-based dominance classification also unduly restricts a dominant licensee's ability to compete in markets that are already competitive. Both regimes impose tariff control on dominant firms and IDA obliges a dominant firm to allow resale of its end user telecommunication services. These measures are excessively restrictive and impair a dominant's firm ability to compete. Tariff control may also be counter-productive to promoting new entries. The *ex post* regulation of both regimes is also too onerous on the dominant firm. Moreover, both regimes fail to appreciate the difference between *ex ante* dominance control and *ex post* conduct regulation, and erroneously grant exemptions from the latter. Such exemptions fetter competitors' ability to protect themselves from anticompetitive conduct by the dominant firm.

This article also examines the severe limitations of the sectoral competition regulation. It asserts that Hong Kong should follow Singapore's example and introduce a cross-sector competition law, which is close to being realized. After more than a decade of public discussion and lobbying by the Consumer Council and political parties, the Hong Kong government finally announced on 19 March 2007 that it will abandon its long-cherished sector-specific approach, and will adopt a cross-sector

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<sup>126</sup> *Ibid.*, at 244-254, 257-58. See also Hong Kong Consumer Council, *Are Hong Kong depositors fairly treated?* (1994); Hong Kong Consumer Council, *Report on the supermarket industry in Hong Kong* (1994); Hong Kong Consumer Council, *Assessing competition in the water heating and cooking fuel market* (1995); Hong Kong Consumer Council, *How competitive is the private residential property market?* (1996); Hong Kong Consumer Council, *Ensuring competition in the dynamic television broadcasting market* (1996); Hong Kong Consumer Council, *Achieving competition in the liberalized telecommunications market* (1996); Hong Kong Consumer Council, *Report on competition in the foodstuffs and household necessities retail sector* (2003).

<sup>127</sup> Competition Policy Review Committee, *Report on the Review of Hong Kong's Competition Policy*, 20-21, 34-36 (2006).

competition law. As of May 2007, intensive preparation for the drafting process has begun and the government is rumoured to have planned to submit a draft ordinance to the Legislative Council, Hong Kong's legislative body, during the legislative season of 2007 to 2008. A cross-sector competition law could come into force by the summer of 2008. While details of the law remain to be finalized, the new competition law reportedly will not incorporate merger control. The government argues that merger control, which entails regulation of market structure, is too intrusive and is inconsistent with the city's free-market philosophy. The lack of merger control will set Hong Kong apart from many established competition law regimes, and will undermine the effectiveness of competition law enforcement. However, given the government's longstanding hostility towards competition law, the recent development is to be welcomed. With its decision to adopt a cross-sector competition law, the Hong Kong government has made a big step towards fulfilling and enhancing the city's reputation as one of the freest and most competitive economies in the world.