

Chapter 58

TV License Refusal and Competition Policy in Hong Kong: What Is the Scope of Public Participation?

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ABSTRACT

This chapter looks from the perspective of competition law and regulatory decision-making at an event that reshaped the debate over public participation in Hong Kong. By analyzing the public's reaction to a regulatory decision in 2013 to deny a free-to-air TV licence to HKTU, this chapter attempts to understand how the existing regulatory framework has shaped public discourse and government narrative. This chapter argues that the lack of publicity of debates around regulatory decisions triggers the creation of social movements, and that the Hong Kong government and regulators must learn from this episode in the light of the imminent enforcement of competition law in Hong Kong. Several judicial challenges to the regulatory decision-making process are analyzed, in the context of the competitive environment of Hong Kong. If the Hong Kong government and regulators in Hong Kong do not learn from the HKTU episode, and do not make efforts to explain and publicize their decisions and decision-making process, this may endanger the launch of competition law in Hong Kong.

INTRODUCTION: HK TV LICENSES, TRANSPARENCY AND COMPETITION IN THE TV SECTOR IN HONG KONG

In November 2013, the Hong Kong government denied a free-to-air TV license to the HKTU station, to the surprise of the public and of commentators. Following an initial refusal by the executive branch of government to explain the rationale for the refusal, the public reacted very strongly and several days of demonstrations on a square adjacent to government offices followed. The public demanded both the publication of the government documents supporting the decision, and the overturning of the decision

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on the basis that the government was overstepping its powers in deciding how many TV stations should be allowed to broadcast freely (two other stations were granted a free-to-air license on the same day).

In the end, while the public interest for the issue remained strong, the furore over the decision declined when the government published some details about the regulatory decision-making process and the fact that the decision was motivated by the risk of failure for HKTV. Another cooling factor was that in the following months, HKTV acquired the HK mobile operator arm of China Mobile, a move that would allow the TV station to be broadcast online and to become a digital free-to-air station (Tam, 2013).

This chapter explores two aspects of the public reaction that followed the decision: on the one hand the protesters' claim that the government had encroached into the private sector's rights and overstepped its authority in refusing a free-to-air license and trying to regulate competition in the sector, and the demands for transparency and publication of the related government documents. On the other hand, the government's

According to the annual ranking of the Heritage Foundation and the Wall Street Journal, Hong Kong is ranked the freest economies in the world. As Hong Kong tries to implement competition law from the end of 2014, regulatory activity increases and more business practices are scrutinised by government agencies and bodies. I argue that the uninvited participation of the public in the regulatory process, and the attempts by the protestors to determine the boundaries between the private and the public domain, are healthy expressions of a democratic society.

The first part of this chapter looks at the public's reaction in the Hong Kong regulatory context, and in light of recent legislative innovations in Hong Kong. The second part addresses the question of competition in the broadcasting sector from the perspective of the government's argument that there could be excessive competition in the market if all three licenses were granted. The fourth part looks in detail at a series of judicial reviews that have been filed by various parties before and after the license refusal, and analysis to which extent the court expanded the public participation in the HKTV devate. The fourth part is made of several case studies, analysing recent events around the globe in which regulatory decisions triggered social unrest. The fifth part is focused on the secrecy of the government decision while the sixth part summarizes the role of the public in the regulatory debate in Hong Kong.

The HKTV case study contributes to the study of the links between regulation, competition and public society, by affirming the benefits of public participation and of the calls for more transparency and openness in the regulatory process.

1. THE HKTV DECISION, PUBLIC REACTION, AND REGULATORY CONTEXT

On 15 October 2013, Hong Kong Television Network Limited, the TV company founded by local businessman and media veteran Ricky Wong Wai Kay (thereafter, "Ricky Wong"), lost its bid for a free-to-air TV license. This had a substantial impact on the company – on the same day it announced 320 job cuts. However the focus of this sub-section is on public's reaction to the HKTV license rejection, in the regulatory context of Hong Kong. Demonstrations took place almost immediately after the rejection was announced as between 36 000 and 80 000 people descended on government headquarters (Chong, Chow, & Lau, SCMP, 2013). The sit-in lasted for days as about a hundred HKTV employees remained on the site, and massive demonstrations reconvened in the following days. The HKTV employees remained involved in the protests, and two hundred of them sent a letter to the Chief Executive a week after the protests began (Nip, Chow & Lam, SCMP, 2013). Despite the impact of the decision on the company,

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