



Hong Kong Competition Law – current trends and outlook for 2022: Insights from a webinar with the Hong Kong Competition Commission

Summary of webinar hosted by Freshfields Bruckhaus Deringer with the support of the British Chamber of Commerce in Hong Kong

In March 2022, **Rasul Butt**, Chief Executive Officer of the Hong Kong Competition Commission (the Commission), was the keynote speaker on a webinar co-hosted by Freshfields and the British Chamber of Commerce. A panel discussion followed with **Jindrich Kloub**, Executive Director (Operations) of the Commission, with Freshfields lawyers, **Hazel Yin**, Partner, and **Laurent Bougard**, Senior Associate, and chaired by **Alastair Mordaunt**, Partner.

Insights covering the Commission's enforcement work, coordination and benchmarking in relation to overseas authorities, digital economy and policy developments are summarised below:

Latest development and outlook of the Commission's work

Mr. Butt highlighted a number of the Commission's achievements and views on enforcement, policy and advocacy work, which include:

- the Commission's successful enforcement record since full commencement of the Competition Ordinance (Cap 619) in 2015 (the **Ordinance**), including successful judgments in all five cases already ruled by the Competition Tribunal (the **Tribunal**) and resolving and rectifying less serious competition concerns swiftly and cost-effectively in three cases using non-litigation measures provided under the Ordinance. These included accepting commitments from the parties concerned and issuing infringement notices;

- the publishing of the new policy on Section 60 commitments, the Commission's public engagement events, advisory work on over 30 public policies and initiatives concerning Hong Kong consumers and the business environment and the forthcoming launch of its first ever documentary drama TV series showcasing the first few competition cases in Hong Kong. The latter initiative aims to deepen public understanding of the Ordinance and the Commission's work; and
- the three main areas of focus for the coming years: (a) anti-competitive behaviours affecting people's livelihoods, particularly low income or grass-root groups; (b) cartels that take advantage of government or public funding; and (c) the digital economy.

The following topics were then covered in the panel discussion.

The Commission's enforcement record and priorities

- In the past six years, the Commission has commenced proceedings before the Tribunal in relation to nine cartel cases and one abuse case against a total of 52 respondents including 40 corporates and 12 individuals. In addition, the Commission has resolved two cases by way of commitments and has started to use new enforcement tools such as infringement notices.
- The Commission has been careful in selecting and prioritising cases to take to the Tribunal with a view to gradually building a solid foundation of precedents on important issues, for example issues such as the concept of an undertaking, a single economic entity and the efficiency exclusion.
- The level of deterrence is a factor the Commission takes into account when selecting and prioritising cases. The three main focus areas mentioned above play an important role in the prioritisation process and are capable of covering a wide range of cases with different levels of deterrence.

- The Commission has constantly made efforts to push boundaries through its selection of cases (for example, the medical gases case and the textbooks case which are both currently before the Tribunal), the implementation of a variety of enforcement tools (eg the infringement notice and commitments) and regular coordination/engagement with overseas authorities. The Commission is at the same time mindful of avoiding problematic losses, leading to precedent that could hamper future enforcement.

Coordination and benchmarking in relation to overseas authorities

- The Commission tends to benchmark its approach in relation to overseas authorities in the following two areas.
 - **Interpretation of the Ordinance** – since the substantive rules of the Ordinance are largely similar to Articles 101 and 102 of the Treaty on the Functioning of the European Union, the Commission has benefited from precedents in the EU when interpreting the Ordinance. In this respect, the Commission has also looked to other jurisdictions with competition laws (eg Canada and Australia). Such reference to overseas precedents might gradually reduce over time as the regime matures and develops its own precedents
 - **Approach to initiated cases** – when the Commission approaches cases it has prioritised or initiated, it will look into similar studies or investigations overseas to understand the approach authorities overseas have taken to tackle similar issues, albeit tailoring its approach to suit the market environment in Hong Kong.
- On the other hand, the Commission has avoided:
 - directly transplanting actions taken against specific respondents overseas into Hong Kong purely on the basis that such respondents are active in Hong Kong; and
 - handling cases without a nexus to Hong Kong. All cases initiated by the Commission to date have a sufficient connection to Hong Kong, and these have been brought to attention through local channels, such as inquiries by market players, leniency applications, the Commission's own market intelligence or intelligence from other Hong Kong law enforcement agencies.
- The Commission frequently coordinates with overseas authorities to share knowledge, know-how and experiences. These authorities are not limited to jurisdictions having a formal Memorandum of Understanding with Hong Kong.

- There has been no public cross-border enforcement case in Hong Kong to date.

Additional views on the US, the EU and China:

- The State Administration for Market Regulation (**SAMR**) in China has historically engaged in extensive international coordination for high profile merger control cases with agencies in the EU, the US and some Asian countries too. More recently, SAMR has also established international coordination mechanisms for conduct investigations with various agencies to enable information sharing and case cooperation. There have also been some me-too type investigations although SAMR would build up the nexus to China and its own theory of harm to inform its decision.
- In terms of international coordination, antitrust issues in relation to labour markets have become something of a hot topic. There has been increased scrutiny by antitrust authorities of agreements that restrict the solicitation or movement of employees, in particular in the US but also more recently in EU member states. The Commission produced an advisory bulletin on labour-related issues in 2018 which has since remained an area of focus for the authority.

Digital economy

- The digital economy is one of the new focal points of the Commission's enforcement work. The Commission has recently been looking into online delivery platforms, and it is building up its capacity and expertise to deal with cases in the digital economy.
- When considering cases relating to the digital economy, the Commission will avoid investigating cases with little nexus to Hong Kong, or where a remedy available overseas also addresses potential issues in Hong Kong.
- Unlike the SAMR, the Commission has no plans to issue any guidance on the digital or platform economy in the short term.

Policy developments

- Further to its policy on Section 60 commitments, the Commission is considering issuing more policies or guidance to reflect their learnings from recent experience.
- In respect of the treatment of sustainability agreements/ESG issues, this is an important topic and the Commission is following developments in this area closely but it has not received sufficient questions on it to warrant issuing guidance at this point.

**Alastair Mordaunt**

Partner

T +852 2846 3396

E alastair.mordaunt@freshfields.com**Hazel Yin**

Partner

T +86 10 6535 4546

E hazel.yin@freshfields.com**Laurent Bougard**

Senior Associate

T +32 2 504 7006

E laurent.bougard@freshfields.com**Charles Tay**

Associate

T +852 2846 3398

E charles.tay@freshfields.com**freshfields.com**

This material is provided by Freshfields Bruckhaus Deringer, an international legal practice operating through Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the laws of England and Wales authorised and regulated by the Solicitors Regulation Authority (SRA no. 484861)), Freshfields Bruckhaus Deringer US LLP, Freshfields Bruckhaus Deringer (a partnership registered in Hong Kong), Freshfields Bruckhaus Deringer Law office, Freshfields Bruckhaus Deringer Foreign Law Office, Studio Legale associato a Freshfields Bruckhaus Deringer, Freshfields Bruckhaus Deringer Rechtsanwälte Steuerberater PartG mbB, Freshfields Bruckhaus Deringer Rechtsanwälte PartG mbB and other associated entities and undertakings, together referred to in the material as 'Freshfields'. For further regulatory information please refer to www.freshfields.com/support/legal-notice.

Freshfields Bruckhaus Deringer has offices in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates, the United States and Vietnam.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2022