



Hong Kong competition law in the post-pandemic era

Summary of the seminar jointly hosted by Freshfields Bruckhaus Deringer and the British Chamber of Commerce in Hong Kong.

On 21 March 2023, **Rasul Butt**, Chief Executive Officer of the Hong Kong Competition Commission (the **Commission**), was the keynote speaker at a seminar co-hosted by Freshfields and the British Chamber of Commerce. A panel discussion followed with **Lester Lee**, Head (Litigation) of the Commission, with **Catrina Lam**, Barrister, of Des Voeux Chambers and Freshfields lawyers, **Laurent Bougard**, Senior Associate and **Alastair Mordaunt**, Partner, who moderated the discussion.

Mr. Butt's keynote speech and the ensuing panel discussion provided insights into enforcement practices and priorities in Hong Kong, including on cooperation between the Commission and other law enforcement agencies, topical issues such as the digital economy and expected future developments.

Latest developments in Hong Kong competition law enforcement

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

- Overall, 2022 was an eventful year for the promotion of competition law despite the many challenges posed by the COVID-19 pandemic in Hong Kong.
- Since the competition regime came into full effect in December 2015, the Commission has issued proceedings in the Competition Tribunal in 12 cases, including three in 2022. The Tribunal has ruled in favour of the Commission in all five of the cases decided to date, with seven other cases pending trial or judgment. In addition, the Commission has used non-litigation measures to resolve potential competition concerns in five cases.
- In 2022, key developments in cases brought before the courts included:
 - The air-conditioning cartel case which led to one of the respondents agreeing to pay a pecuniary penalty of HKD 150 million. In addition to being the largest fine to date, the Commission considered the case to be a breakthrough as this respondent and its employees admitted liability and entered into cooperation agreements with the Commission, thereby avoiding protracted litigation.
 - The MSG products case which was significant not only as the first resale price maintenance case, but also as a standout case whereby the Commission offered to issue an infringement notice against the respondent instead of commencing an action before the Tribunal, but the respondent refused to accept the infringement notice.
 - The Court of Appeal ruled in favour of the Commission in an appeal against a decision on fining calculations. In particular, the Commission succeeded in appealing against a decision by the Tribunal to reduce the pecuniary penalty applicable to certain respondents who subcontracted out their activities and who had been implicated due to the anticompetitive conduct of the subcontractor.
- The Commission has also launched or resolved a number of other cases and investigations in 2022, including investigating on-line food delivery platforms and securing commitments from seven car distributors (both cases involved the invitation of comments from businesses / the public), and

conducting joint searches of premises with other law enforcement agencies such as the Police Force in recent investigations into alleged bid-rigging and price-fixing.

- In relation to initiatives aimed at the business community, the Commission has released its leniency policy guidelines for individuals and guidance on joint negotiations in the labour sector, updated its model non-collusion clauses for procurers to incorporate in their invitation to bid documents and contracts, and produced its first docudrama series on television. Additionally, the Commission provided advice on about 20 public policies and initiatives, including responses to policymakers and proactive engagement.
- The Commission's focus for 2023 is (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.

Trends in enforcement and cases in Hong Kong

- It was observed that the number of complaints received by the Commission had dropped between 2020 and 2021 but remained steady between 2021 and 2022 although there had been a spike in cases escalated to initial assessment or investigation stage in 2021.
- The Commission sees three trends from the number of complaints and cases in the past three years:
 - There has been an influx of COVID related issues from the height of the pandemic relating to subsidies from the Hong Kong government supporting businesses. The Commission has received complaints relating to an abuse of funds or businesses coming together to exploit the subsidy programmes. The Commission expects this trend to continue and hopes to see one or more cases being taken forward.

Note: the week after the seminar, the Commission took its first cartel case relating to the government's subsidy scheme to the Tribunal.

- In relation to ongoing litigation before the Tribunal, the Commission noted that parties and their legal advisors have become more sophisticated. As a result, the Commission has found it easier to reach a compromise with parties, including acceptance of pecuniary penalties recommended by the Commission. The Commission sees this as a welcome change from the early cases of the regime where parties had

typically sought to challenge every aspect of enforcement.

- On future enforcement, the Commission expects to work closely with other government agencies, with both the Commission and these agencies now more acquainted with how to operate together. Such collaboration has the benefit of enabling the Commission to tap into the other agency's resources and intelligence network.
- During discussions on how the Commission considers the use of alternative (non-litigation) enforcement tools, it was noted that the Commission would be more willing to consider non-Tribunal enforcement outcomes where it is in the public interest to do so and where it favours a remedy outcome, the implementation and monitoring of which may not be straightforward. Based on the Tribunal's practice so far, it was felt that the Tribunal is unlikely to view the ordering of more complex behavioural remedies to be within its supervisory remit.

Cooperation and Initiatives

- The Commission has increased the number of cases involving cooperation with other government agencies in Hong Kong. These can be categorised as follows:
 - If the matter entails concurrent jurisdiction with another agency (such as bid-rigging which may, for example, fall under the jurisdiction of the Commission and the Police Force due to the possibility of criminal behaviour), the Commission and the other relevant agency will need to ascertain which of them has primary jurisdiction and conduct procedures for gathering evidence accordingly. If the matter concerns the Commission's sole jurisdiction but the Commission requires the assistance from other government agencies, the conduct of the investigation would be more straightforward, and any search warrant obtained will encapsulate assistance from other government agencies such as the Police Force.
- As regards cooperation with competition agencies outside Hong Kong, engagements are so far limited to the policy level and not cooperation on actual enforcement cases. In particular, the Commission's engagement with the Anti-Monopoly Bureau of the State Administration for Market Regulation in the Mainland has been focussed on the possibility of issuing guidance for businesses operating in the Greater Bay Area.

Topical Issues

- As regards the digital economy, the Commission's view is that Hong Kong is unique in that large Western technology corporations compete against large Chinese technology corporations in a free and unregulated manner.
- This means that whenever the Commission is asked to look into a particular matter involving digital sectors, the Commission will have to consider whether any overseas experience or jurisprudence is applicable to the specific situation of Hong Kong. In particular, the Commission will keep in mind to consider whether behavioural remedies applied in other jurisdictions could be relevant to Hong Kong. The Commission has looked at developments overseas, and in particular in the European Union where the Digital Markets Act entered into force in November 2022.

Future Developments

- Views on possible future developments included the need for a more formal cooperation mechanism (such as a memorandum of understanding) between the Commission and the Police Force in respect of joint enforcement operations, strengthening the framework to enable standalone private actions or collective actions and the need for further guidance on the assessment of competitor or industry-wide collaborations in respect of sustainability objectives, as competition law enforcement is often cited as an impediment to such initiatives.



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