CFRED-EUAP Competition Law Series

Second Annual Conference

‘ENFORCING COMPETITION LAW IN HONG KONG AND THE EUROPEAN UNION’

Friday, 22 April 2016

Lecture Theatre 2, Graduate Law Centre, Chinese University of Hong Kong
2/F Bank of America Tower, 12 Harcourt Road, Hong Kong

Organisers
CUHK Faculty of Law’s Centre for Financial Regulation and Economic Development (CFRED)
European Union Academic Programme Hong Kong (EUAP)
Allen & Overy

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Conference Director
Prof. Sandra Marco Colino
(Chinese University of Hong Kong)

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Speakers

Keynote Speakers (in alphabetical order)

- **Justice Godfrey Lam (Hong Kong Competition Tribunal)**

  Godfrey Lam read law at Trinity College, Cambridge and obtained a Master of Laws from the University of Washington, Seattle. He read for the Postgraduate Certificate in Laws at the University of Hong Kong in 1993. In 2008, he was appointed to the rank of Senior Counsel to Hong Kong. He practiced at the Bar primarily in commercial and company law. He became a Judge of the Court of First Instance of Hong Kong in January 2013 and the President of the Competition Tribunal in August 2013.

- **Ms. Rose Webb (Hong Kong Competition Commission)**

  Ms. Rose Webb was appointed to the position of Chief Executive Officer of the Competition Commission (Commission) in March 2016. She previously held the position of Senior Executive Director at the Commission from April 2014. Ms. Webb has been closely involved in the formation and development of the Commission and in all aspects of its operations since the commencement of the Competition Ordinance on 14 December 2015. She has represented the Commission in Hong Kong and at international meetings. Immediately prior to her appointment to the Commission, Ms. Webb was Executive General Manager, Mergers and Adjudication at the Australian Competition and Consumer Commission (ACCC). Ms. Webb has over 25 years of government and regulatory authority experience with wide exposure at Australian federal government departments and regulatory authorities such as the ACCC and the Australian Securities and Investment Commission (ASIC). She has led a wide range of legal and enforcement teams and possesses a deep understanding of competition law and policy. Ms. Webb graduated with a double degree in Economics and Law from the Australian National University and has an LLM degree from Sydney University. She also holds a Graduate Diploma in Practical Legal Training from the College of Law and a Graduate Diploma in Governance, Policy and Public Affairs from Queensland University.
Welcome Address

- **Dean Christopher Gane (Faculty of Law, Chinese University of Hong Kong)**

Professor Christopher Gane was appointed Dean of the Faculty of Law in September 2011. Prior to coming to the Chinese University of Hong Kong he held the Chair of Scots Law at the University of Aberdeen where he was Dean of the Faculty of Law from 1995 to 2000. In 2004 he was appointed University Vice-Principal (Pro Vice-Chancellor) and over the next seven years was responsible for a number of strategic portfolios, including Library and Information Services, Culture and Communities and Equality and Diversity. In 2008 he was appointed Head of the College of Arts and Social Sciences (which comprises the Schools of Business; Divinity, History and Philosophy; Education; Language and Literature; Law; Social Sciences).

Prior to his appointment at Aberdeen he held academic appointments at the Universities of Reading, Edinburgh, Lancaster and Sussex. Between 1986 and 1989 he was Head of the Department of Law at the University of Lancaster. From 1991-1994 he was Director of the Centre for Legal Studies at the University of Sussex.

His research and teaching interests include domestic Criminal Law and Procedure, International Criminal Law and Human Rights. He is the author, co-author or editor of twelve books / editions and more than fifty scholarly articles and papers.

He has acted as consultant to the Scottish Executive in respect of their Human Rights obligations under the Scotland Act 1998 and the Human Rights Act 1998, as advisor to the Scottish Parliament on a number of criminal law, criminal justice and criminal procedure Bills and as advisor to the Scottish Government on European Union criminal law and procedure. He was a member of the Committee appointed by the Secretary of State for Scotland to review the Law on disposals of serious violent and serious sex offenders (the McLean Committee) and a member of the Sentencing Commission for Scotland throughout its term of appointment. He was the co-founder of the group which produced the Draft Criminal Code for Scotland, published by the Scottish Law Commission. In 1997 he was appointed an Honorary Sheriff of Grampian Highland and Islands at Aberdeen.
Other speakers (in alphabetical order)

- **Ms. Janie Huang (Deacons and CUHK alumna)**

  *Alumna discussant*

  Janie Huang is a graduate of the Masters of Laws in International Economic Law from the Chinese University of Hong Kong. She studied Competition Law during the autumn semester of 2013 and now works for Deacons as a paralegal. During her studies, she nurtured her interest in the subject and she is now researching the topic of big data and competition law together with Prof. Sandra Marco Colino.

- **Ms. Qing Huang (Chinese University of Hong Kong)**

  *Student discussant*

  Qing Huang is an LLM student at the Chinese University of Hong Kong. She majors in International Economic Law. She studied competition law last semester from September to December 2015, and is currently a student research helper in the project ‘Enhancing Innovation and Competition in Hong Kong’s Telecommunications Industry’, led by Professor Sandra MARCO COLINO and funded by the Research Grants Council. She received her Bachelor of Law Degree in mainland China, where she also studied mainland China’s Anti-Monopoly Law and Anti-Unfair Competition Law. She once studied European laws in Ghent University in Belgium as an exchange student.

- **Dr. Victor Hung (Hong Kong Consumer Council)**

  Dr. Victor HUNG, after obtaining his PhD from the London School of Economics, spent many years teaching economics, finance and business strategy in University of Southampton, City University of Hong Kong and University of Hong Kong. He joined Consumer Council in 1997 advocating competition legislation in Hong Kong. He worked on many market studies, for instance grocery market, energy market, communications market and food supply chains. He specialized in economics of monopolization, manipulation, deception and misbehaviour. He headed the Division to work on contemporary consumer issues, such as food security, online shopping, sustainable consumption, vulnerable consumer protection and lobbying industry and government to induce policy to safeguard consumer welfare.
Dr. Mary Catherine Lucey

Public Enforcement in Ireland: Always ‘Out of Step’ with the EU Norm?

Summary: That the public enforcement of EU competition law in Ireland is ‘out of step’ with most other Member States who use civil fines as a core tool has been highlighted by the OECD, the EU Commission and the Irish Competition Authority (now the Competition and Consumer Protection Commission). Due to the absence of civil/administrative fines Ireland, an enthusiastic participant in the ECN, finds itself as an outlier in the EU enforcement landscape where convergence in enforcement is increasingly ‘encouraged’ by the EU Commission. This paper reflects on recent attempts at national level which have, so far, failed to achieve EU style enforcement competences for the NCA. The most creative ‘soft law’ initiative involved recourse to the bailout package where the grant of financial aid from the Troika (comprising IMF, ECB and European Commission) was made conditional on reforming competition legislation to include deterrent fines.

Dr Mary Catherine Lucey BCL, LLM, BL is Associate Dean (Undergraduate Programmes) in the UCD Sutherland School of Law, Ireland where she teaches EU competition law. She has taught EU competition law in Fordham University and also to judges from several EU states. She was invited to be the rapporteur for Ireland in EU-wide AHRC funded project on Comparative Private Enforcement and Collective Redress Project co-ordinated by University of Strathclyde (2011-13). She is Non-Governmental Advisor to the Irish Competition and Consumer Protection Commission and participates in ICN conferences and workshops on its behalf. Her research on competition law has been accepted by international peer reviewed journals including Legal Studies, Journal European Competition Law and Practice, Journal of Antitrust Law Enforcement and Competition Law Review.

Prof. Kelvin Kwok (University of Hong Kong and Des Voeux Chambers)

The Case Televisions Broadcasts Limited v Communications Authority and its implications for the Hong Kong Competition Ordinance

Summary: The speaker will discuss the recent Hong Kong case of Televisions Broadcasts Limited v Communications Authority, and its implications for competition law enforcement under the new Competition Ordinance. The speaker will focus on the issues of procedure, competition law analysis and remedy featured in the case.
Kelvin Kwok specialises in competition law as a practising barrister at Des Voeux Chambers and an academic at the University of Hong Kong. He has experience handling competition law matters involving dispute resolution, exclusion/exemption-related applications, and advisory work. He currently teaches competition law at the University and has published internationally on the subject. He regularly gives CPD talks and accepts media interviews on competition law. He serves on the Bar Association’s Special Committee on Competition Law, the Consumer Council’s Competition Policy Committee, and the Hong Kong Competition Association’s Executive Committee, and as a Non-Governmental Advisor to the International Competition Network.

- **Dr. Sandra Marco Colino (Chinese University of Hong Kong)**

  **The Limits to Private Enforcement of Competition Law in Hong Kong**

  **Summary:** This presentation focuses on the obstacles to private enforcement of competition law in Hong Kong. In particular, an analysis of the implications of the removal of stand-alone private rights of action will be conducted. It is argued that the ‘centralised’ competition enforcement regime responds to traditional enforcement models of budding antitrust regimes, but with the accumulation of experience over the years opening the door to private enforcement might lead to increased efficiency.

  Sandra Marco Colino is an Assistant Professor at the Faculty of Law of the Chinese University of Hong Kong. She is the Deputy-Director of the European Union Academic Programme in Hong Kong, and the Director of the Centre for Financial Regulation and Economic Development. Before moving to Hong Kong she was a Lecturer in EU Law at the University of Glasgow. Her main teaching and research interests lie in the fields of competition law, communications law, EU law and the regulation of gambling. In 2007 she was awarded a PhD from the European University Institute in Florence. She also holds an LLM in EU Law from the Universidad Carlos III of Madrid. A qualified lawyer in Spain and a member of the Madrid Bar, Dr. Marco Colino has been a trainee at the European Commission and the law firm 'Miguel Cid y Asociados'. She has been a Visiting Scholar at UW-Madison, UC Berkeley, the University of Melbourne and the University of Birmingham. She is the Hong Kong news correspondent for the European Competition Law Review. In 2015, Dr. Marco Colino was appointed as a Non-Governmental Advisor for Hong Kong to the International Competition Network.
Mr. François Renard (Allen & Overy)

A Comparison between the Hong Kong and PRC Competition Enforcement Rules

Summary: Our Basic Law makes clear that laws adopted in Mainland China cannot apply in the Hong Kong SAR. The 2007 Anti-Monopoly Law is therefore not applicable in the Region; only the HK Competition Ordinance that entered into effect on 14 December 2015 applies to conducts that have their object or effect of preventing, restricting or distorting competition in the Hong Kong SAR. However, competitive misconducts have no borders. Undertakings active in Mainland or the Hong Kong SAR can easily breach competition rules on the other side of the border. This is why they need to identify and understand key differences and similitudes between the two regimes. This session will focus on this topic.

François Renard, a registered foreign lawyer in Hong Kong, has managed Allen & Overy’s Greater China antitrust practice since November 2008. He has extensive experience advising Western and Asian clients on China, APAC, EU and other national competition laws, including merger control, anti-competitive agreements and concerted practices; intellectual property and antitrust interface; abuses of dominant position, market investigations and antitrust compliance. François is listed as a leading lawyer in PLC’s antitrust cross-border category in China, International Who’s Who of Competition Lawyers, Global Competition Review (GCR), Chambers APAC and IFLR 1000, respectively. He is also the ILO Client Choice Award 2015 for the Competition & Antitrust category in China. François is regularly invited to speak at conferences throughout the APAC region and in Europe, and has published numerous articles on antitrust matters in Europe and China. He is a lecturer at the Institute of European Studies (Brussels) since 1997, and was invited as a visiting professor to one of the major Beijing universities (CUPSL) in 2014. François speaks English, French, Italian and Dutch.

Prof. Barry Rodger (University of Strathclyde)


Summary: This presentation will first outline key aspects of an AHRC-funded project on Comparative private enforcement and collective redress in the EU. The project considered the application of competition law in the national courts of the European Union Member States. This was an empirical project with rapporteurs for 27 Member States entrusted with the task of identifying competition case-law judgments in their national courts in the period between 1 May 1999 and 1 May 2012. The presentation will briefly outline the research methodology and outcomes in relation to the case-law data. The general
hypothesis was that private enforcement practice across the legal systems of the EU Member States may at least partly be explained by the existence or availability of particular institutions, mechanisms and cultural factors. The picture presented by the data together with the national reports is one of evolving national stories and contexts - which appear to be affected to a greater or lesser extent in different Member States by a combination of national cultures, competition law architecture and civil procedural rules. It is inevitable that patterns of competition litigation will continue to vary considerably across the EU for the foreseeable future, reflecting, to a great extent, the variable landscape of legal and institutional provision for private enforcement in the EU Member States. Nonetheless, the passing of the EU Antitrust Damages Directive may have some impact on private enforcement across the EU in the future, and the key provisions in that legislative measure will be briefly considered.

In the second part of the presentation I will discuss the key aspects of the enhanced collective redress mechanisms introduced recently in relation to competition law infringements in the UK by the Consumer Rights Act. The legislation is a particularly significant development because of the historical and contemporary focus on the ‘consumer’ at the heart of competition/antitrust law and because the reforms also reflect more recent debates generally in legal practice about ‘access to justice’. The presentation will reflect on the limited provision in the UK on collective redress in relation to competition law infringements prior to the Consumer Rights Act, and then focus on the Act’s provisions (and associated Tribunal rules) in relation to opt-in/opt-out collective proceedings and settlements. The Tribunal rules on certification will be considered, noting the potential difficulties in their practical application, before further analysis of two key problematic aspects of the proposed opt-out collective redress scheme, which may limit its effectiveness and uptake. The first concerns the appointment of the class/settlement representative and the second concerns the potential funding arrangements in relation to opt-out collective proceedings. It is as yet unclear whether the combination of these two aspects may dis-incentivise and unnecessarily limit the effectiveness of the new opt-out provisions.

Professor Barry Rodger has been an academic at Strathclyde University Law School since 1993 and has been a Professor there since 2001. Professor Rodger has published widely in competition law (and international private law). A fifth edition of his co-authored textbook (with A MacCulloch) Competition Law and Policy in the EC and UK (Cavendish) was published in 2014 and he has published numerous articles in journals such as the European Competition law Review, Columbia Journal of European Law, The Common Market Law Review, the Journal of Antitrust Enforcement, the Irish Journal of European law, World Competition and Concorrenza e Mercato. Many of his recent publications have focused on private enforcement of competition law including his comprehensive studies of all competition-related litigation in the UK courts (ECLR 2006, GCLR 2009), the Kluwer Law International book Competition Law and Article 234:

Professor Rodger is the Secretary and co-organiser of the Competition Law Scholars’ Forum (www.clasf.org) and co-editor of the *Competition Law Review*, and is on the organizing committee of the Scottish Competition Law Forum.

- **Mr. Stephen Ryan (Hong Kong Competition Commission)**
  
  *Roundtable discussant*

  Stephen Ryan, Manager (Legal), has been working at the Competition Commission since June 2014. He was involved in many of the preparations towards the full entry into force of the Competition Ordinance in December 2015 and since then has been participating in case work on a number of Commission matters. Prior to joining the Commission, Stephen worked at a major international law firm in their London, Brussels and Hong Kong offices, where he specialised in competition law. During this time, he advised clients in Europe and Asia on a number of complex unilateral conduct and merger control mandates. Stephen graduated with an undergraduate degree in Law and French from Trinity College Dublin, and a Masters in European Legal Studies from the College of Europe, Bruges. He is admitted as a solicitor in England and Wales.

- **Dr. Andrew Simpson (Certari Consulting)**
  
  *Roundtable discussant*

  Dr. Andrew Simpson is Principal at Certari Consulting, which provides policy advice to governments, enforcement training to regulators, and compliance training to companies in relation to competition law and economic regulation. He has 20 years’ experience in competition law and economic regulation, including in private practice, as a staff member of the New Zealand Commerce Commission, and as a policy advisor to various nations’ governments.
Prof. Alexandr Svetlicinii (University of Macau)

The Dark Matter in EU Competition Law: Non-Infringement Decisions in the New EU Member States Before and After Tele2 Polska (co-authors: Maciej Bernatt and Marco Botta)

Summary: Under the decentralized system of the EU competition law enforcement, the national competition authorities (NCAs) have to notify opened investigations and envisaged decisions applying Articles 101/102 TFEU to the European Competition Network (ECN). The enforcement statistics indicates the existence of a certain “dark matter” since about 50% of the opened investigations do not finalize into the infringement decisions. It is assumed that a significant part of the “dark matter” concerns situations where the NCA did not find sufficient evidence for intervention under Articles 101/102 TFEU and decided to close the case, which it does not have to notify to the ECN. The paper explores this type of decisions and assesses their compatibility with the powers of NCAs under Article 5 Regulation 1/2003, as interpreted by the European Court of Justice in Tele2 Polska case. In order to remedy the limited coverage that the “new” Member States have received in the academic literature so far, the paper studies the legislation and enforcement practices in the countries that have joined the EU during the 2004 (Czech Republic, Poland, Slovakia), 2007 (Bulgaria, Romania), and 2013 (Croatia) enlargements. The research also provides a critical assessment of the national enforcement practices in the light of the 2015 EU Commission’s initiative on procedural harmonization of the enforcement powers of the NCAs.

Dr. Alexandr Svetlicinii is Assistant Professor at the Faculty of Law of University of Macau where he also served as Acting Programme Coordinator for the Master of International Business Law. Prior to joining the University of Macau, Dr. Svetlicinii was a senior researcher at the Jean Monnet Chair of European Law of the Tallinn Law School, Tallinn University of Technology. Dr. Svetlicinii received his law degree at the Free International University of Moldova (Chisinau), LL.M International Business Law (Cum Laude) with specialization in EU law at the Central European University (Budapest), Master of Research (Law) at the European University Institute (Florence) and PhD in Law at the European University Institute (Florence). In addition to his academic work Dr. Svetlicinii acted as a Non-Governmental Advisor to the International Competition Network (Merger Working Group) and as a freelance expert in a number of international projects related to competition law enforcement. Research interests include: comparative competition law, international trade law and alternative dispute resolution.
Ms. Mandy Yau (Chinese University of Hong Kong)

*Student discussant*

Ms. Mandy Yau is currently a final year LLB student at the Faculty of Law of the Chinese University of Hong Kong. She studied competition law in her third year of studies and wrote her independent research paper on 'The Effectiveness of the Enforcement of Competition Law in Hong Kong'. She works as a part-time legal intern, which has given her the opportunity to examine the consequences of the introduction of the Competition Ordinance to commercial agreements and practices.

Ms. Natalie Yeung (Slaughter and May)

*Roundtable discussant*

Natalie is a partner and head of the Asian competition practice at Slaughter and May. She is based in the Hong Kong office.

Natalie is an experienced competition and regulatory lawyer who represents clients in relation to the new Hong Kong competition legislation and cross-border merger filings with a focus on China and Asia. She has worked on a number of matters involving HK, EU and UK competition law, and her experience covers a range of sectoral regulation, anti-trust and merger control work.

In Hong Kong, Natalie has recently advised on antitrust issues for numerous clients, including:
- the Hong Kong Liner Shipping Association on its application for a block exemption application (being the first such application in Hong Kong);
- various clients (including MTR Corporation, other listed companies and investment banks) on competition compliance issues arising from existing practices;
- certain key sectors on potential industry-wide competition issues (including the Hong Kong Association of Banks) in anticipation of the implementation of the Competition Ordinance; and
- the Hong Kong Communications Authority on various regulatory matters.

Natalie has extensive experience in coordinating the Chinese and Asian merger notifications in the context of global transactions, often involving complex legal, economic and policy issues. Recently Natalie has advised on the following transactions:
- Shell on its proposed £47 billion acquisition of BG Group. The transaction triggered merger control and foreign investment approvals across the world;
• Starwood Hotels & Resorts Worldwide Inc. on its proposed acquisition by Marriott International Inc. for US$13.6 billion;
• Rolls Royce on its acquisition of the 50% remaining stake in Rolls-Royce Power Systems joint venture from Daimler and various other transactions;
• Thermo Fisher Scientific on its US$13.6 billion proposed takeover of Life Technologies Corporation, involving commitments offered globally and to the PRC Ministry of Commerce (MOFCOM);
• Bertelsmann on the Random House/Penguin JV, creating the No.1 English language book publisher in Europe and globally;
• INEOS on (i) the creation of a 50/50 oil refining joint venture with PetroChina and (ii) its PVC joint venture with Solvay (combining Europe’s two largest PVC producers);
• CSR plc on (i) its transfer to Samsung of development operations in handset connectivity and location and (ii) its subsequent acquisition by Qualcomm; and
• Aegis plc on the recommended cash offer by Dentsu Inc.

In addition, Natalie has recently advised multinational companies who have been subject to investigations (formal and informal) by the National Development and Reform Commission (NDRC) in China. She has also advised on internal investigations of potential anti-competitive activity in China.

Natalie is recognised as a leading lawyer in The International Who's Who of Competition Lawyers & Economists 2015, one of only three lawyers listed in HK, and was named as the youngest lawyer in Global Competition Review’s ‘40 under 40’ in 2015. Natalie is also listed in Chambers Asia 2016 where she is described as ‘a very accomplished lawyer’ who demonstrates ‘a level of intellectual capability that is quite rare’.

Natalie is the co-author of the HK chapter of Getting the Deal Through’s ‘Cartel Regulation’ publication.

Natalie speaks Chinese and English, and travels regularly between Hong Kong and Beijing offices. She is qualified in both Hong Kong and England and Wales.