

The inside track on competition
law and regulatory change

Antitrust in Asia: Concurrences

Hong Kong, May 24

Regulators and legal practitioners gathered in Hong Kong recently for the 2019 Antitrust in Asia forum on 24 May organized by Concurrences with the support of The Chinese University of Hong Kong and the Hong Kong Competition Association. The challenges presented by the digital economy were very much to the forefront of discussion as seniors officials from agencies in Hong Kong, Japan and Singapore shared their views on the key issues affecting antitrust enforcement in the region.

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Hong Kong antitrust agency to further engage with government to facilitate competition

by Joyce Chen

The Hong Kong antitrust agency will engage more strongly with the government to facilitate greater competition in public schemes, Chief Executive Brent Snyder said in the Island state today (24 May).

Thus, the competition watchdog is to put increasing focus on engaging and advising the government, the CEO added.

Speaking at a conference –“Antitrust Asia: One Size Fits All”–co-organized by Concurrences Review, City University of Hong Kong Law School and the Hong Kong Competition Association, Snyder told the audience that the recent taxi scheme proposed by the Hong Kong government was “deeply flawed from a competition standpoint”.

In April, the Hong Kong Transport and Housing Bureau (THB) released the Franchised Taxis Scheme (FTS), a plan to grant three franchises to operate a total of 600 premium taxis. In the same month, the Competition Commission (CC) of Hong Kong announced it had submitted suggestions on the scheme to the government.

The government is “not contemplating any type of price competition within the FTS”, Snyder said of the scheme, adding that this indicates that “there are, at least parts of the government, that either seem unwilling, or incapable, or unable to really undertake a competitive impact assessment of schemes that are under consideration.”

Singapore chief says labor market negatively impacted by competition

by Joyce Chen

Competition can be a “bad thing” for the labor market, the chief executive of Competition and Consumer Commission of Singapore (CCCS) said at a conference today (24 May) in Hong Kong.

Agreeing that antitrust agencies should closely monitor anticompetitive misconduct in the market, Han Li Toh said that boosting wage competition could drive salaries down and hurt labor.

Toh made the remarks during a conference – “Antitrust Asia: One Size Fits All” – co-organized by Concurrences Review, City University of Hong Kong Law School and the Hong Kong Competition Association.

His comment came in response to the notion advanced during an enforcer’s round table that defense lawyers could use the argument that cutting wages helps companies save costs and deliver products to consumers at a cheaper price.

“I do think there is a trade-off sometimes between the consumer and the worker, and sometimes it can’t be resolved,” Toh said, adding that is the reason for minimum salaries and collective bargaining.

“My point is to say is that for labor markets, it’s not so simple,” he concluded.

Following Toh’s remarks that competition could disbenefit labor, Pierre Horna, the legal affairs officer for competition with UNCTAD, said it is an area where agencies need to “be careful how to interact”.

During the same session, the Chief Executive of the Competition Commission (CC) of Hong Kong also cautioned that both employers and employees should understand “the amount of collectiveness really needs to be limited” when it comes to collective bargaining agreements.

It could be subject to competition concerns if parties go “further than [what] is necessary,” he said, while agreeing that the commission generally has no objection to collective bargaining when it is achieved with full knowledge of both employers and employees.

Digital economy viewed as key focus area for antitrust agencies

by Freny Patel and Joyce Chen

Young agencies should not adopt a wait and watch approach to the digital economy if their jurisdictions are impacted, the UNCTAD's competition legal affairs officer Pierre Horna said in Hong Kong on Friday (24 May).

The digital economy is not yet a priority for new competition agencies in Southeast Asia, Horna told delegates at a conference – “Antitrust Asia: One Size Fits All” – co-organized by Concurrences Review, City University of Hong Kong Law School and the Hong Kong Competition Association. UNCTAD provides special training on algorithms to young agencies in Southeast Asia, he said during an enforcers' roundtable.

Singapore's Chief Executive Han Li Toh told the same panel that digital is one of his agency's key focus areas, identifying algorithms as of equal relevance both to mergers and cartels, as machines could be fixing prices by themselves.

Citing Uber Technologies sale of its ASEAN assets to its regional rival Grab, Toh said that one of the remedies imposed by the Competition and Consumer Commission of Singapore (CCCS) referenced algorithms.

Since dynamic pricing depends on the level of demand and supply at certain times of the day, algorithms would respond and set the price. During peak hours, one would end up paying more and during non-peak hours, one would pay less. With the merger of Grab and Uber's operations in ASEAN, prices rose considerably due to the algorithm since without a competitor, demand could not be spread, Toh said.

“With only one player left post merger, can you imagine how high the price would be during peak hours,” Toh said, justifying why the CCCS had to impose remedies with regards to search pricing.

Hong Kong being a relatively new antitrust agency, has not prioritized the digital economy, Chief Executive Officer Brent Snyder told the audience.

Hong Kong antitrust authority assessing options in wake of first tribunal decisions

by Freny Patel

- Both cases under litigation could see appeals
- Criminal standard of proof not insurmountable

Hong Kong's antitrust authority is still assessing its next course of action and the impact of the Competition Tribunal's first two decisions on its future enforcement, the agency's chief executive officer said in Hong Kong today (24 May).

Last week the tribunal handed down two decisions, which were largely in favor of the Competition Commission, with 14 of the 15 named respondents found to have contravened the Competition Ordinance. Tribunal Chairman Justice Godfrey Lam found that a criminal level of proof applies to the commission's pecuniary penalty actions.

Chief Executive Officer Brent Snyder said that though the Commission had "argued and believes that a civil standard of proof should apply to its cases, that does not mean that we have concluded that Justice Lam's ruling is wrong or that we are going to appeal".

He was speaking during an enforcer's panel at a one-day conference – "Antitrust Asia: One Size Fits All" – co-organized by Concurrences Review, City University of Hong Kong Law School and the Hong Kong Competition Association.

The Commission is still evaluating the impact on its future enforcement. Both cases are still under litigation and there could be appeals, Snyder said.

Justice Lam's decisions were "extremely thorough and well written" and set some foundational precedent on issues such as standard of proof in pecuniary penalty cases, the standard of attribution of an employee's action, the burden of proof in the application of economic efficiency's exclusion available under the Ordinance, and the concept of an undertaking as a single economic unit, Snyder said.

The rulings show that while the criminal standard of proof is high, it is not insurmountable – especially in cartel cases – Snyder said. However, the higher standard does mean that the quality of the evidence presented at trials is more crucial, and leniency applications are one means through which competition agencies can obtain high quality evidence, he added.

"In my experience trial cases are far stronger if the evidence of a leniency applicant is supplemented and corroborated by evidence that comes from companies and individuals that do not receive leniency and instead admit a contravention and are penalized," Snyder said.

The lack of clarity in Hong Kong's policy may have led to the lack of cooperation because the commission did not receive any corporate cooperation in connection with the first two cases, Snyder said. As a result, the Commission released its cooperation and settlement policy in late April, he added.

Hong Kong telecom regulator sees no major regulatory changes amid advent of 5G

by Joyce Chen

No “radical change” will be seen in the manner in which the Communication Authority (CA) of Hong Kong regulates the market despite the advent of 5G technology, Winnie Tam, chairperson of the authority, said in Hong Kong today (24 May).

Delivering the keynote at “Antitrust Asia: One Size Fits All” co-organized by Concurrences Review, City University of Hong Kong Law School and the Hong Kong Competition Association, Tam recognized the need to consider technologies such as the Internet of Things in market regulation, but there would be no significant changes in the CA’s work as the nature of licensing work remains the same.

Although there might be differences in the context of competition law enforcement, “we’re confident that the authorities do have the expertise and commitment to deal with these (issues),” she said.

Tam said it would be beneficial to seek and exchange knowledge and expertise with other agencies and organizations in order to be “better equipped” to handle regulatory matters, she added.

The CA is currently one of the two competition watchdogs overseeing the Hong Kong communication market. The other agency is the Competition Commission (CC) of Hong Kong.

Asked if the two regulators would consolidate, Tam said it was unlikely for the time being.

However, if the merger rule under the Competition Ordinance is made applicable to the broadcasting sector, the agencies will need to examine workloads and capabilities, as well as work out the best way for both parties to move forward.

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