



...with Brent Snyder

In this edition of CPI Talks we have the pleasure of speaking with Mr. Brent Snyder, Chief Executive Officer of the Hong Kong Competition Commission.

Thank you, Mr. Snyder, for sharing your time for this interview with CPI.

1. Please briefly outline the functions of the Commission, its work focus, and its industry focus in antitrust investigations.

Hong Kong now has its first economy-wide competition law, in the form of the Competition Ordinance (the “Ordinance”), which was enacted in 2012. The Ordinance, which aims to promote competition in the Hong Kong territory, and to prohibit anti-competitive practices by businesses, was implemented on a phased basis, so that businesses would have time to familiarize themselves with the legal requirements, and make necessary arrangements. The Competition Commission (Hong Kong) was established in 2013, as an independent statutory body to enforce the Ordinance, which came into full effect in December 2015.

In safeguarding a level playing field in Hong Kong, the Commission is entrusted with three major functions:

- **Enforcement** – investigating conduct that may contravene the Competition Ordinance and taking appropriate enforcement action to uphold its provisions.
- **Policy Advice** – advising the Government on competition matters both in and outside Hong Kong, and conducting market studies into matters affecting competition in Hong Kong.
- **Advocacy** – promoting public understanding of the value of competition and encouraging compliance by businesses.

The Commission’s work focus revolves around these three key functions, which are very much intertwined, informing and supplementing each other to achieve the goals of bringing the many benefits that flow from competition to the people of Hong Kong.

A. Enforcement

1. Complaints, Enquiries, and Investigations

Since the full commencement of the Ordinance in December 2015, the Commission has received and processed over 4,000 complaints and enquiries. About 60 percent related to the First Conduct Rule, which prohibits anticompetitive agreements, with cartel conduct being the major concern. About 20 percent related to the Second Conduct Rule, which prohibits abuse of substantial market power.

In the roughly four years since full implementation of the Ordinance, the Commission has already brought five cartel cases involving bid-rigging, market sharing, price fixing and the exchange of competitively sensitive information before the Competition Tribunal (“Tribunal”). Among them, the first two cases were decided in favor of the Commission in May 2019, marking a key milestone for both the Commission and the Hong Kong competition law regime. The other three cases are pending trial.

As we continue to investigate and bring enforcement actions against anti-competitive conduct, our primary focus will remain on hard-core cartels, which are the cardinal sins of competition law. That said, we certainly will not ignore other anti-competitive agreements or abuses of market power that we uncover through our investigations. As a relatively young agency, the Commission's resources are currently focused on encouraging compliance in the Hong Kong economy as a whole, rather than focusing on specific sectors or industries.

2. Exclusions and Exemptions

In addition to pursuing enforcement actions, the Ordinance also provides for certain exclusions and exemptions which, if applicable, mean that the First Conduct Rule and/or the Second Conduct Rule do not apply. Undertakings wishing to confirm whether their conduct or arrangements are excluded or exempt from the Conduct Rules may choose to apply to the Commission.

To this end, the Commission has so far published a Block Exemption Order for Vessel Sharing Agreements ("VSAs") between liner shipping companies, and two decisions on exclusions and exemptions in the banking and pharmaceutical industries. These are all important sectors of Hong Kong's economy, and the decisions have widespread impact. It is worth noting that following the Commission's decision not to exempt Voluntary Discussion Agreements ("VDAs") among liner shipping companies, all of the VDAs which previously covered Hong Kong have been terminated, including international VDAs, which had been in place for a number of years. In publishing its decisions, the Commission also provided useful guidance on its assessment criteria.

B. Policy Advice

While certain structural defects in markets are beyond the ambit of the competition rules, the Commission has a policy advisory function that allows it to make recommendations to the Government and public bodies on how to advance competition in various markets. The Commission also has a duty to assist the government in articulating its competition policy across public sector activities and functions that affect the daily lives of people in Hong Kong. In fulfilling this function, the Commission has been working on various fronts, including direct engagement with government departments and public bodies on issues relating to competition, the making of submissions, and publication of reports or advisory bulletins that assist policy makers to assess the competition risks and impacts of public policies and initiatives.

Examples of this work by the Commission include two market studies into the residential building maintenance and auto-fuel sectors, which were conducted in response to public concerns over potential anti-competitive conduct in these markets. The Commission has also published an advisory bulletin on liquefied petroleum gas supply for public housing estates, and made submissions on the electricity market and a proposed franchised taxi scheme.

In assisting the public sector and policy makers to assess competition risks and impacts of public policies and programs, the Commission has produced tailor-made guidance and conducted targeted training by leading international competition law experts to facilitate their recognition and assessment of competition issues. With our extensive and proactive engagement over the years, competition considerations are playing an increasingly important role in the formulation and execution of public policies and schemes. Last year, the Commission provided advice on approximately 30 public policies and initiatives which concern Hong Kong's consumers and the business environment.

C. Advocacy

Education and advocacy are just as important as enforcement actions, if not more important, at the introductory stage of a new law. In a new competition regime like Hong Kong's, the Commission's goal is first of all to instill an appreciation of the benefits of competition and educate about the limits of permissible conduct under the Ordinance. It is also particularly crucial for us to build up credibility and rally public support through means other than enforcement at an early stage.

Since the Commission's inception, we have been actively engaging the public and businesses through outreach and educational initiatives in various forms, with the aim of raising community awareness and understanding of the Ordinance as well as encouraging compliance. An average of 80 engagement events have been conducted every year including seminars and meetings for public and businesses, roving exhibitions, school talks and advocacy campaigns on different competition themes and topics. The Commission has also produced a wide range of easy-to-understand publications, educational videos, practical tools and guidance for different stakeholders, in particular the small and medium enterprises.

As a result of our advocacy efforts, there is increasing awareness of the Ordinance, as well as gradual and concrete changes in business practices and culture in Hong Kong. As the Commission develops, advocacy and enforcement will reinforce each other, with advocacy bringing in complaints and cases. This is best exemplified by our first case, which was derived from a complaint filed by a corporate procurement officer who had attended one of our seminars. Enforcement actions also serve as an effective form of advocacy by heightening awareness of and interest in our work thereby enhancing compliance. Advocacy and education will remain a key focus of our work going forward.

2. The Commission has initiated several antitrust investigations against cartel and bid-rigging conduct. Could you please explain to our readers the goals in this enforcement area?

As a young and relatively small agency, it is important to make efficient use of our resources. Guided by the principle that the goal of competition law is to bring the benefits of competition to consumers, the Commission prioritizes investigations and enforcement actions that result in the greatest overall benefit to competition and consumers in Hong Kong.

To this end, hard core cartels have been one of our top priorities, as they are the cardinal sins of competition law, have the greatest potential consumer impact, and attract significant public interest. This is also supported by the complaints and queries we have received from consumers and businesses in the city so far, which predominantly relate to concerns over cartel conduct.

Our first enforcement action was a bid-rigging case in 2017, and brought home the point that bid-rigging is a longstanding problem in Hong Kong. Bid-rigging is perceived to be particularly serious in certain sectors where it affects a wide spectrum of economic activities and consumers, as evidenced by the fact that the Commission receives more complaints about suspected bid-rigging than any other topic.

The Commission's second, third, and fourth enforcement actions involved market-sharing and price fixing by decorating contractors. These cartels were particularly egregious, because they targeted some of Hong Kong's most vulnerable and low-income consumers. These consumers need and deserve the Commission to fight against cartels that harm them, and the Commission will spare no efforts in pursuing them and seeking severe sanctions against not only the corporate cartelists but also the individual executives and employees who carry them out. We are seeking to drive home the deterrent message that not only companies, but also individuals who engage in cartels should expect to face the full force of the law.

Our latest case, filed at the beginning of 2020, involved the exchange of competitively sensitive price information that compromised a procurement exercise by a Hong Kong public body. This case is another important enforcement milestone for the Commission as this is the Commission's first case resulting from a successful leniency application. This is also the first time the Commission made use of an infringement notice as a remedy, which is consistent with the Commission's focus on encouraging compliance in its initial years.

While pursuing cartel conduct will continue to be an enforcement priority, the Commission will not shy away from bringing abuse of substantial market power cases under the Second Conduct Rule where the facts support them, and we are actively investigating suspected abuses. This is important not only for the sake of enforcement itself, but also for the purpose of establishing judicial precedents that interpret the Ordinance and provide guidance to the business and legal communities.

3. Compared to other jurisdictions, does the Commission have to deal with different market characteristics and conduct, which might lead to different challenges?

Hong Kong has a long history as a successful and open market economy, yet there are deep-rooted practices that are anti-competitive in nature and the Ordinance imposed a paradigm shift in Hong Kong business culture. While SMEs constitute 98 percent of business establishments and employ 45 percent of the workforce in the private sector, there are also highly concentrated markets in some sectors. Against this background, the Commission is looking at potentially anti-competitive conduct across a wide range of sectors. As a result, the Commission's portfolio of investigations has been increasing in number, variety and complexity.

As for other challenges, for a new jurisdiction like Hong Kong, it takes time for people to grow to understand the law, as well as the nature and permissible extent of our work, which makes managing public expectation a challenge. In the beginning, some businesses had the misconception that competition law is a legislative construct that stifles entrepreneurship and innovation and marks a retreat from Hong Kong's historic laissez-faire approach. Similarly, some SMEs are worried that they may unwittingly contravene the law, or that the competition law may be wield-

ed as a weapon against them by big corporations. And, some of the public expect us to break up conglomerates and regulate prices. We need to manage public expectations about our authority and how we appropriately seek to enforce the law. On-going education and engagement is especially important in this regard, and we have been actively reaching out to the community through targeted advocacy and public engagement campaigns as well as the production of easy-to-understand educational materials and practical toolkits to help businesses to comply.

Secondly, Hong Kong is an import-export hub, and this presents another type of challenge. The First and Second Conduct Rules in the Ordinance apply to agreements and practices by undertakings outside Hong Kong if the conduct affects competition in Hong Kong. The extra-territorial application of the conduct rules means that in our enforcement we need to address, for example, how regional export cartels may impact Hong Kong, and how economic activities across borders should be taken into account. This will present an enforcement challenge, and will raise jurisdictional questions. To this end, the Commission has been establishing bilateral liaisons with its counterparts. In addition to the MOU with the Competition Bureau of Canada, we are in liaison with a few counterparts in the region to ensure an effective, joined-up approach to competition policy and law enforcement through MOUs and partnerships.

4. What is the future development scheme of the Commission?

Going forward, the Commission will maintain its momentum in its enforcement, policy, and advocacy work.

Enforcement of the Ordinance will remain a key focus of the Commission's work. As noted, the Commission's portfolio of investigations has been growing in number, variety and complexity across a wide range of sectors encompassing both the First Conduct Rule and Second Conduct Rule. It is expected that a number of promising investigations will result in various enforcement outcomes, such as issuing warning or infringement notices, as well as accepting commitments, in addition to bringing cases to court. Some of these investigations will set important new precedents for competition enforcement in Hong Kong, and offer guidance to businesses.

Internally, to cope with the growing number and complexity of enforcement and legal actions, our focus is on strengthening our professional staff and raising our level of competition law expertise. This includes leveraging overseas experience as well as providing targeted training and learning opportunities for our staff. As we continue to have more experience with our leniency policy and resulting leniency applications, we are also considering whether any fine-tuning or modifications are necessary.

On the policy front, the Commission will continue to play an active role in assisting the public sector and policy makers assess the competition risks and impacts of public policies and initiatives. To encourage the integration of competition principles into regulations, the Commission is conducting a research project involving academics from Hong Kong, Australia and the Mainland to compare different approaches to the competition impact assessment of policies and their effectiveness, with the aim of producing recommendations and practical guidelines for the public sector in Hong Kong.

As regards advocacy and engagement, we will continue reaching out to various stakeholders in the local community. With good progress in achieving a broad public awareness and understanding of the Ordinance, the Commission has entered another stage of advocacy strategy with more focused and targeted engagement initiatives to help the public and different business sectors to recognize potential competition issues. These include multi-pronged thematic campaigns on specific topics, sectoral business roundtables as well as training to help lawyers with limited competition law experience to advise their clients (in particular SME clients) on matters related to competition law. In the coming year, a particular focus will be on "intermediary" groups such as auditors, lawyers, compliance officers, company secretaries, accountants etc. as these professions are in the best position to advise businesses and companies on risk management and compliance matters. To expand its engagement, the Commission also intends to strengthen the use of social media in the coming year.

Internationally, we will remain actively engaged with our counterparts through participation in and hosting of international and regional conferences, as well as by leveraging our "Competition Exchange" (www.compex.org) online platform, to collaborate and share knowledge, experience and best practices.

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