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ANTITRUST IN ASIA: ONE SIZE FITS ALL?

ASEAN, CHINA, HONG-KONG, INDIA…

25 April 2016, Singapore

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FOREWORD

The 2nd edition conference Antitrust in Asia, organized by Concurrences Review in partnership with ESSEC Business School and Sorbonne-Assas International Law School, was attended by 140 people on April 25, 2016 at the ESSEC Asia-Pacific Campus. Attendees included enforcers, academics, economists, and practitioners who engaged in an lively debate about Asian countries' competition law systems, and what this means in law, policy and on-the-ground reality for practitioners, consumers, and the world.

The main topic covered during this full day of panels was the possibility of existing a "one size fits all" approach in competition law in Asia. Panel 1 discussed "The political economy of competition in Asian countries: Why are national competition regimes so different?"; Panel 2 analyzed the "Competitive neutrality and competition law enforcement in Asia"; Panel 3 questioned "Leniency, transparency and procedural rules in competition law enforcement in Asia: Is there a need for convergence?"; Panel 4 hosted a showcase session delving into "Cross-border mergers in Asia"; a final discussion covered "Standard essential patents and antitrust issues in China."

We would like to thank the panel sponsors – Baker & McKenzie, Clifford Chance, Linklaters, RBB Economics, and White & Case – and the media sponsor – PaRR – who helped make this event a success from both scholarship and networking perspectives.

We hope to see you at the 2017 conference in Hong Kong. Meanwhile, we invite you to explore some of the key features of the 2016 conference. ■

Frédéric Jenny
Director ESSEC Business School of Economics

Laurence Idot
Professor
University Sorbonne-Assas International Law School

Nicolas Charbit
The Editor
Concurrences Review

ATTENDEES

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PROGRAM

08.30 Coffee & Registration

09.00 **WELCOME**

Pascal VENNESSON | Professor of Political Science, University Panthéon-Assas (Paris II) and S. Rajaratnam School of International Studies, Nanyang Technological University, Singapore

Martine BRONNER | Professor, Dean, ESSEC Business School, Asia-Pacific, Singapore

09.15 **Keynote Speech**

Aubeck KAM | Chairman, Competition Commission of Singapore

09.30 **The political economy of competition in Asian countries: Why are national competition regimes so different?**

Philip MONAGHAN | Executive Director, Competition Commission, Hong-Kong

Ir. Muhammad NAWIR MESSI | Commissioner and former Chairman, Indonesian Commission for the Supervision of Business Competition, Jakarta

Devender Kumar SIKRI | Chairman, Competition Commission of India, New Delhi

Deborah HEALEY | Professor, University of New South Wales Law School, Sydney

Dave PODDAR | Partner, Clifford Chance, Sydney

CHAIRPERSON: Ian McEWIN | Managing Partner, Competition Consulting Asia, Kuala Lumpur

11.00 Coffee Break

11.15 **Competitive neutrality and competition law enforcement in Asia**

Tan Sri Dato' Seri SITI NORMA YAAKOB | Chairman, Malaysia Competition Commission, Kuala Lumpur

Ir. Muhammad NAWIR MESSI | Commissioner and former Chairman, Indonesian Commission for the Supervision of Business Competition, Jakarta

Thomas Kin-Hon CHENG | Associate Professor, Faculty of Law of University of Hong Kong

Vinod DHALL | Former Chairman, Competition Commission of India | Chairman, Vinod Dhall-TT&A, New Dehli

George SIOLIS | Partner, RBB Economics, Melbourne

Clara INGEN-HOUSZ | Partner, Linklaters, Hong-Kong

CHAIRPERSON: Frédéric JENNY | Chairman, OECD Competition Committee | Director of International Relations, Co-Director, European Center for Law and Economics, ESSEC, Paris | President, International Committee Concurrences Review

13.00 Lunch

14.00 **Leniency, transparency and procedural rules in competition law enforcement in Asia: Is there a need for convergence?**

Han Li TOH | Chief Executive, Competition Commission of Singapore

Hiroyuki ODAGIRI | Commissioner, Japan Fair Trade Commission, Tokyo

Dong-Kweon SHIN | Commissioner, Korean Fair Trade Commission, Seoul

Munesh R. MAHTANI | Senior Competition Counsel, Google, London

Noah BRUMFIELD | Partner, White & Case, Washington D.C.

CHAIRPERSON: Laurence IDOT | Professor, University Panthéon-Assas (Paris II) / Sorbonne-Assas International Law School | Member, Competition Authority, Paris | President, Scientific Committee Concurrences Review

15.30 Coffee Break

15.45 **Cross-border mergers in Asia: Survivor Showcase Session**

William E. KOVACIC | Professor, George Washington University, Washington D.C.

Kirstie NICHOLSON | Managing Counsel, Competition, BHP Biliton, Singapore

Jean-Yves ART | Assistant General Counsel, Microsoft, Brussels

David BLANCO | Assistant General Counsel Region Asia-Pacific, Monsanto, Singapore

Dominique LOMBARDI | Lecturer, Sorbonne-Assas International Law School, Singapore

CHAIRPERSON: Ken CHIA | Partner, Baker & McKenzie, Singapore

17.30 **FINAL DISCUSSION**

Standard essential patents and antitrust issues in China

Wendy NG | Lecturer, Melbourne University

Xiaoye WANG | Professor, Chinese Academy of Social Sciences, Beijing

CONFERENCE SUMMARY

Martine Bronner – Dean, ESSEC Asia-Pacific – and Pascal Vennesson – Professor, University Panthéon-Assas (Paris II) – opened the conference. Aubeck Kam – Chairman, Competition Commission of Singapore – set the scene with a keynote speech.

KEYNOTE SPEECH

AUBECK KAM

COMPETITION POLICY IN ASIA: MOVING TOWARDS CONVERGENCE

Aubeck KAM (Chairman, Competition Commission of Singapore) delivered the keynote speech, underlining that we have seen significant progress in the development and enforcement of competition law in Asia in the last decade. Multilateral efforts have been made and the process towards convergence has been helped by the sharing of knowledge that takes place in fora such as the OECD and the ICN. Some would consider that the ultimate success for this process of convergence would be the emergence of a common competition policy and law expanding to all of Asia, but it is unrealistic to expect that such an objective will be achieved any time soon, mainly due to the diversity characterising the Asian region and the different stages of development of competition law and policy across Asia. The Regional Free Trade Agreements do not contemplate such a goal, even as a remote possibility. According to Kam, the focus must be put on identifying the specific situations in which taking a "one size fits all" approach is desirable.

With regard to two areas in particular, we will continue to see considerable diversity across Asia, but the different approaches adopted should not be seen as a sign of failure; rather, they should be regarded as tailored and more flexible solutions to the existing problems. The first area is cross-border cooperation in competition enforcement. One example of virtuous cooperation was the cooperation between Taiwan's Fair Trade Commission and counterparts in the US, EU and Singapore in the capacitors cartel in 2015. Cross-border cooperation could be advanced and made more efficient if there were greater consistency in the substantive and procedural competition laws across Asia, and if the many asymmetries were eliminated. The second area is the position that competition authorities have in the context of their domestic political economy. Some authorities are more mature and established institutions, whereas others are still trying to find their position and to establish their credibility. In these two areas, it is too early to expect that a single approach is adopted, but what is important is that the direction of change is positive and convergent. In other areas (such as in the public effort to enhance the understanding and support of competition policy, and in developing a policy for the e-commerce sector), it would be meaningful and productive to strive for a "one size fits all" model across Asia. ■


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PANEL 1

THE POLITICAL ECONOMY OF COMPETITION IN ASIAN COUNTRIES: WHY ARE NATIONAL COMPETITION REGIMES SO DIFFERENT?

In this fhis first panel, moderated by **Ian McEWIN** (Managing Partner, Competition Consulting Asia), the speakers illustrated the main differences existing in the competition regimes in Asian countries, and they tried to provide explanations for the existing diversities, focusing on reasons that could be found in the political economy background. Mr. McEwin stressed the importance of adopting the competition law model that is best tailored to the political and economic context in each country.

Ir. Muhammad NAWIR MESSI (Commissioner and former Chairman, Indonesian Commission for the Supervision of Business Competition, Jakarta) pointed out that competition law would not have been adopted in Indonesia if it were not for the Asian financial crisis that hit this country and others in 1997. The crisis upset pre-existing government-business relations, and it led many in Indonesia to conclude that anticompetitive practices had contributed to the crisis. A great effort was thus made to achieve a compromise between the socialist background of the country (reflected, for instance, by Article 33 of the Indonesian Constitution, which provides that sectors of the economy that are important for the country and affect the life of the people are to be controlled by the State) and the goal of achieving an open market economy.

In reference to Indonesia, Mr. McEwin pointed out that the national competition law adopted in 1999 was also largely drafted by the Parliament, with little influence exerted by the Executive. Commissioner Namir Messi agreed that this was a sign of the significance and strength of the legislative reform undertaken.

Devender Kumar SIKRI (Chairman, Competition Commission of India, New Delhi) provided some background on the adoption of competition law in India, recalling that in 1969 the Monopolies and Restrictive Trade Practices Act was enacted to control the concentration of wealth and means of production. In 1999, the Government of India constituted a committee to work on a proposal for a modern competition law for the country. The Competition Act was adopted in 2002 and subsequently amended by the Competition (Amendment) Act 2007 and the Competition (Amendment) Act 2009. Following many legal tribulations that left the Commission in suspended animation for several years, the still-developing regime is growing more mature and consolidating its practice and policies.

Philip MONAGHAN (Executive Director, Competition Commission, Hong Kong) illustrated the history and status of competition law in Hong Kong. The Hong Kong Competition Ordinance was enacted in 2012, and the Hong Kong Competition Commission was then established, but the Ordinance did not enter into force until December 2015. Some of the key factors that contributed to the launch of the competition law regime were the existing public sentiment and desire to enhance global business and international commercial relationships, the increasing demand for competition in certain industries, the general perception that competition law was lacking, and calls for action in the Hong Kong press. The Ordinance was heavily influenced by the other competition law models, but in the Hong Kong context significant adaptations were made, not least by declining to adopt merger control provisions for the general economy (i.e., provisions that would apply outside of the existing sector-specific rules for telecoms mergers).

Deborah HEALEY (Professor, University of New South Wales Law School, Sydney) underlined that if the different Asian competition law regimes are compared they are clearly very diverse, especially in practice. While some diversity is inevitable given the different backgrounds of the various countries in the region, something must be wrong if the application of analogous provisions leads to very different outcomes. This highlights three key issues for the effective and efficient enforcement of competition law: is competition law supported by sound economic principles? Second, are exemptions and areas of non-application of competition law well-conceived and construed? And third, is the government committed to supporting the competition agencies financially?

Dave PODDAR (Partner, Clifford Chance, Sydney) recalled that it is crucial to establish what a country would like to achieve by implementing its competition law and to set clearly the ultimate goal of competition. The question is therefore what the Asian countries are trying to achieve by adopting the “one size fits all” approach.

The panellists also discussed the factors that play a role in ensuring that the competition law regime is effectively enforced. They agreed that it is crucial for competition authorities to receive support from the government in this regard. The introduction

1 **Panel**
2 **Ian McEWIN**
3 **Ir. Muhammad NAWIR MESSI**
4 **Devender Kumar SIKRI**
5 **Philip MONAGHAN**
6 **Deborah HEALEY**
7 **Dave PODDAR**

of competition laws represented a very meaningful step for the Asian countries discussed, and for the growth of their markets and economies. The session was concluded by stressing the importance of regarding competition law as a dynamic institution, and as such it must change and evolve with the political economy context to which it applies.

The Chair then opened the floor for comments and questions. Professor **Allan FELS** observed that there is often no local domestic constituency that supports competition law, and that a number of developing countries adopted competition laws only because they were compelled to do so in order to accede trade agreements or due to other outside pressure. Professor **Mel MARQUIS** asked the agency representatives to comment on how economics are incorporated in organizational decision-making and policy choices. In both Hong Kong and in Indonesia, economists were part of the process of decision-making. It was also remarked that, in Hong Kong, economic analysis is integrated routinely in investigations, not only by staff economists but by lawyers, who receive economic training. The panel Chair, who had worked on the Singapore law in 2002, stressed the importance, within an enforcement agency, of assigning at least the same level of leadership authority to a senior economist as that assigned to senior lawyers. He also suggested that it is crucial to have an economist leading or at least sharing leadership of the team drafting the relevant competition law – or reviewing the law, as the case may be. ■

PANEL 2

COMPETITIVE NEUTRALITY AND COMPETITION LAW ENFORCEMENT IN ASIA

In Panel 2, chaired by Professor **Frédéric JENNY** (Director of International Relations, Co-Director, European Center for Law and Economics, ESSEC, Paris, and President, International Committee, Concurrences Review), the central topic was competitive neutrality.

Tan Sri Dato' Seri SITI NORMA YAAKOB (Chairman, Malaysia Competition Commission, Kuala Lumpur) recalled that competitive neutrality is the recognition that significant government business activities in competition with the private sector should not have a competitive advantage because of government ownership. She described the different types of SOEs operating in Malaysia, and explained that government ownership may be direct and indirect and may be found at the federal or state level. She concluded by asserting that the current legal framework in Malaysia provides greater transparency and accountability with regard to SOEs.

Vinod DHALL (Former Chairman, Competition Commission of India, Chairman, Vinod Dhall-TT&A, New Delhi) highlighted the importance of competition law as an essential part of a country's economy, and especially to stimulate investment. In India there has traditionally been a high level of concentration, and frequent abuses of monopoly power. With the Competition Act 2002 and its amendments, India has begun to address the distortions resulting from its protective regime and post-independence system of governmental control, thus promoting conditions for a free market economy.

Professor Jenny observed that the issue of competitive neutrality did indeed create challenges for enforcers, especially in the application of the "as efficient competitor" test, which may be quite hard to apply to publicly owned firms or firms that have otherwise benefited from public largesse.

Thomas Kin-Hon CHENG (Associate Professor, University of Hong Kong and Commissioner, Hong Kong Competition Commission) commenced his presentation by discussing the "administrative monopoly" provisions in China's Anti-Monopoly Law. After describing three pertinent cases (AQSIQ, 2008; Taiyuan Railway, 2011; Yunnan Telecoms, 2015), Cheng discussed a proposal for "Fair Competition Review", conceived as part of the transition to a more competition-oriented model in the hope of delivering better economic outcomes. On 19 April 2016, President Xi reemphasized the importance of establishing such a review system. Cheng concluded that Hong Kong could benefit from a redefinition of the role of SOEs, as well as from a fiscal policy reform and a general reform of the regulatory framework that would provide for separation of ownership rights and regulatory powers.

George SIOLIS (Partner, RBB Economics, Melbourne) discussed why competitive neutrality matters, and how it has been addressed in Australia. The main concern is that regulatory or other benefits from public ownership could allow government businesses to price below equally efficient rivals, thus reducing economic efficiency and consumer welfare by distorting the allocation of resources. Siolis highlighted the work of the 1993 Hilmer Committee, whose recommendations were given effect through the Competition Principles Agreements signed by the Commonwealth and State Governments in 1995. According to Siolis, state-derived privileges are likely to cause inefficiencies in an economy by distorting resources. Direct intervention with regard to pricing practices is unlikely to provide a suitable corrective to such distortion.

Clara INGEN-HOUSZ (Partner, Linklaters, Hong-Kong) underlined that competitive neutrality is a broader phenomenon than initially thought, and that it should be linked to any sort of state action which results in a distortion of the economy. Ingen-Housz also stressed the importance of the role played by competition authorities, which often want to be involved as active players in the debate on competitive neutrality, but which may not have adequate tools to act effectively in this regard.

From the audience, **Dr. Nell Lixia ZHOU** observed that in China there are many SOEs in strategic sectors of the industry which at least in practice may enjoy strong protection from the application of the Anti-Monopoly Law, partly due to their classification by SISAC as being in the strategic national interest. Professor Cheng agreed that the AML is only a partial solution at best, and he expressed his doubt as to whether competitive neutrality objective can be attained in China without a more serious re-thinking of the role of the State in the economy. ■

1 **Panel**

2 **Frédéric JENNY**

3 **Tan Sri Dato' Seri SITI NORMA YAAKOB**

4 **Vinod DHALL**

5 **Thomas Kin-Hon CHENG**

6 **George SIOLIS**

7 **Clara INGEN-HOUSZ**

8 **Nell Lixia ZHOU**

PANEL 3

LENIENCY, TRANSPARENCY AND PROCEDURAL RULES IN COMPETITION LAW ENFORCEMENT IN ASIA: IS THERE A NEED FOR CONVERGENCE?

This panel, chaired by Professor **Laurence IDOT** (University Panthéon-Assas, Paris II, Sorbonne-Assas International Law School; Member of the Competition Authority, Paris, and President, Scientific Committee, Concurrences Review), concerned the topics of leniency, transparency and procedural rules in competition law enforcement in Asia. A notable theme here was that if convergence on procedural competition rules in Asia is appropriate – though some participants felt this was a big "if" – then leniency provisions would likely be a good place to start.

Han Li TOH (Chief Executive, Competition Commission of Singapore) provided some background on the state of procedural rules in Singapore, focusing on leniency. He noted that a public consultation was launched in 2015 by the Commission on proposed changes to the leniency guidelines. The key principles guiding the changes were clarity, consistency and confidentiality. The Commission proposed the following changes: (i) to make clear that leniency is available for all "object" cases; (ii) elimination of "defensive" leniency application, thus requiring an admission of illicit conduct; and (iii) optional waivers of confidentiality as regards all jurisdictions in which the applicant has filed for leniency.

Hiroyuki ODAGIRI (Commissioner, Japan Fair Trade Commission, Tokyo) recalled that Japan's leniency programme was incorporated within the Anti-Monopoly Act in 2005, and that it took effect in January 2006. A subsequent revision in 2010 increased the number of applicants permitted to file (while also making it possible to apply after the launch of an investigation) and provided for joint applications by enterprises in the same company group. Despite initial doubts about whether Japanese companies would in fact take advantage of a leniency system, between 2005 and 2015 a total of 938 applications for leniency were filed.

Dong-Kweon SHIN (Commissioner, Korean Fair Trade Commission, Seoul) explained that Korea first introduced a leniency programme in 1996. As in other countries, leniency played a crucial role in detecting cartels, due to the lack of material evidence. Owing to the cultural background and legal uncertainty, the Korean leniency programme helped detect only one cartel per year until its revision in 2004. The revision considerably enhanced the transparency and effectiveness of the programme.

Noah BRUMFIELD (Partner, White & Case, Washington, DC) noted that the particular procedural rules under a leniency programme are extremely important for their effectiveness. It is critical to have a clear understanding of the procedure and, for this reason, the relevant institutions should provide the utmost transparency. The application and enforcement of competition law in general would benefit from increased transparency and convergence of leniency programmes.

Munesh R. MAHTANI (Senior Competition Counsel, Google, London) observed that transparency on procedural rules is essentially part of due process and, as pointed out in *Ballard v. Hunter (USSC, 1907), the concept of due process eludes precise definition: "[W]hile its fundamental requirement is [an] opportunity for hearing and defense, the procedure may be adapted to the case"*. Mr Mahtani acknowledged that convergence on procedure is difficult, but he also stressed that convergence at least on common principles is certainly possible. While the benefits of the correct application of due process rights and procedures are not often discussed, it is essential to achieve better and sounder decisions.

From the audience, Professor **Caron BEATON-WELLS** asked if it would not be beneficial for competition authorities to make compliance programmes a necessary condition for leniency. She suggested that such a requirement would likely prevent recidivism, which is the ultimate objective of the compliance programmes. Commissioner Dong-Kweon Shin and Commissioner Hiroyuki Odagiri commented that, in Korea and in Japan respectively, there is no systematic link between compliance and leniency programmes at the moment. With regard to Singapore, Han Li Toh expressed scepticism with regard to the need for such a link. He observed that leniency programmes in Singapore are about imposing a penalty for a past conduct, and that a prospective commitment to adopt or improve a compliance programme should not necessarily be directly linked to such a penalty. ■

1 Panel
2 Laurence IDOT
3 Han Li TOH
4 Hiroyuki ODAGIRI
5 Dong-Kweon SHIN
6 Noah BRUMFIELD
7 Munesh R. MAHTANI
8 Caron BEATON-WELLS

PANEL 4

CROSS-BORDER MERGERS IN ASIA: SURVIVOR SHOWCASE SESSION

The last panel, moderated by **Ken CHIA** (Partner, Baker & McKenzie, Singapore) addressed the topic of cross-border mergers in Asia, focusing on the experience of practitioners.

Dominique LOMBARDI (Partner, Rajah & Tann, Singapore and Lecturer, Sorbonne-Assas International Law School, Singapore) reviewed the current merger rules in Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Due to the different regimes applicable to mergers, it is crucial to be aware of the relevant notification requirements and of the consequences of the notification process. Lombardi concluded that no uniform approach can be identified, and she observed that in cross-border mergers involving local companies there is often a serious lack of understanding of the applicable legal framework.

William KOVACIC (Professor, George Washington University, Washington D.C. and Non-Executive Director of the Competition and Markets Authority, London) observed that there is enormous value in setting a benchmarking system according to performance and process, in order to assess the effectiveness of the system. Generally speaking, years are needed to verify whether a merger review system is actually working. There is a massive amount of information available now regarding thresholds, and agencies would do well to develop a simple process of keeping track of how long it takes to go through each stage and to accomplish missions. Another important practice that agencies need to develop over time is a method for assessing the effectiveness of remedies, and to constantly reassess performance and make improvements as capacity and expertise develop.

Jean-Yves ART (Assistant General Counsel, Microsoft, Brussels) underlined that the vast majority of mergers raise absolutely no issue. The Microsoft/Nokia merger in 2013 raised very interesting questions, the main one being whether the fact that Nokia kept a number of patents in the phone business would change the incentives of Nokia to license the patents to other phone manufacturers. Some agencies considered that the problem was relevant, other agencies considered it unnecessary to address the issue. How can companies deal with a situation in which agencies take such different approaches? Promoting more cooperation and knowledge sharing, and allowing agencies to work in parallel would be of enormous benefit to the overall merger review system. Jean-Yves Art concluded that in no known case had convergence ever proven detrimental to the businesses involved in international mergers.

David BLANCO (Assistant General Counsel Region Asia-Pacific, Monsanto, Singapore) commented that technology-oriented industries make it necessary for agencies to take the special characteristics of such industries into account. There is also a big debate concerning market data and about which data can be presented and analysed. Sometimes the process of requesting and providing more data is long and painful. Some agencies often do not have the time and resources to go through a great deal of data.

Kirstie NICHOLSON (Managing Counsel, Competition, BHP Billiton, Singapore) added that the most relevant problem practitioners encounter is the lack of consistency between the approaches taken by different competition authorities assessing cross-border mergers. What firms are really interested in understanding is the degree of risk and the possible consequences they may face. This is often a very difficult question to answer in practice, and cooperation and convergence on procedural rules could be of great value in this respect.

Professor Kovacic underlined that predictability in the merger review process is crucial to allow enterprises to decide what action to take on the market. One way to improve this aspect would be to make agencies more approachable, providing a space where agencies and firms can meet and where questions can be asked to enhance understanding of the review process.

The panelists then commented on how innovation impacts the application and enforcement of competition law, and on how the past experience of agencies around the world can be used to improve the effectiveness of competition authorities in Asia. ■

1 **Panel**
2 **Ken CHIA**
3 **Dominique LOMBARDI**
4 **William KOVACIC**
5 **Jean-Yves ART**
6 **David BLANCO**
7 **Kirstie NICHOLSON**
8 **Panel**

FINAL DISCUSSION:
WENDY NG / XIAOYE WANG

STANDARD-ESSENTIAL PATENTS AND ANTITRUST ISSUES IN CHINA

Wendy NG (Lecturer, Melbourne University) and **Xiaoye WANG** (Professor, Chinese Academy of Social Sciences, Beijing and Distinguished Professor, Hunan University) closed the session, discussing the relationship between standard-essential patents and antitrust law in China. In China's Anti-Monopoly Law there is no specific provision dealing with standard-essential patents. The topic of Fair, Reasonable and Non-Discriminatory (FRAND) commitments was also discussed, with the speakers focusing, inter alia, on whether respect for FRAND commitments should be imposed by contract law rather than antitrust law. An audience member asked what the role of the National Development and Reform Commission (NDRC) would be in relation to antitrust law. Professor Wang explained that the NDRC carries out the enforcement of price-related conduct, investigating pricing practices and price-related aspects of "monopoly agreements" and abuses of dominant position. ■

Editor

This synthesis has been prepared by Cristina Volpin, Research Fellow in Competition Law, Queen Mary University of London.


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VIDEOS

During the conference, some of the speakers summarized some of their ideas in short videos. These can be watched on the concurrences.com website (Events > April 25, 2016 > Singapore).

KEYNOTES

Pascal Vennesson
University Panthéon-Assas, Paris II
S. Rajaratnam School of International Studies

Aubeck Kam
Competition Commission of Singapore

Xiaoye Wang
Chinese Academy of Social Sciences

PANEL 1

Ian McEwin
Competition Consulting Asia

Philip Monaghan
Hong-Kong Competition Commission

Deborah Healey
University of New South Wales Law School

PANEL 2

Vinod Dhall
Formerly Competition Commission of India; Vinod Dhall-TT&A

Thomas Cheng
The University of Hong Kong, Faculty of Law

Frédéric Jenny
OECD Competition Committee; European Center for Law and Economics, ESSEC

Clara Ingen-Housz
Linklaters

PANEL 3

Munesh R. Mahtani
Google

Han Li Toh
Competition Commission of Singapore

Dong-Kweon Shin
Korean Fair Trade Commission

Hiroyuki Odagiri
Japan Fair Trade Commission

PANEL 4

William Kovacic
George Washington University

Ken Chia
Baker & McKenzie

Dominique Lombardi
Sorbonne-Assas International Law School

PRESS REPORTS

PARR SPECIAL REPORT

Two major resounding themes discussed at length at the Concurrences Asia Conference in Singapore this year urged the need for greater cooperation among Asian competition regulators in light of the growth of disruptive technologies; and the need for Asian competition regulators progressing and keeping space with their respective economies, public needs and governments. There was also a push largely by multinationals to see some degree of convergence across jurisdictions when it comes to merger filings and leniency applications in terms of transparency and consistency.

MULTINATIONAL ANTITRUST LENIENCY APPLICATIONS REQUIRE MORE TRANSPARENCY, CONSISTENCY

by **Arlan Thayib** and **Freny Patel** in Singapore

- Cross border cases involve different leniency arrangements
- Transparency brings safeguards that encourage leniency applications

Antitrust regulators worldwide need to converge in terms transparency and confidentiality in order to encourage more leniency applications, panelists said at the Concurrences Conference in Singapore yesterday (25 April).

Companies need a greater degree of clarity when it comes to filing for leniency with various antitrust regulators, said Noah Brumfield, a partner at White & Case. Aside from the actual procedures, companies also like to know to what degree information filed with the regulator is sufficient to gain leniency and whether markers can be annulled.

Brumfield was contributing to a panel titled: "Leniency, Transparency and Procedural Rules in Competition Law Enforcement in Asia: Is There a Need for Convergence?"

The process on what kind of incentives are in store for for potential second and third-in parties if they apply for leniency is generally still very unclear, Brumfield added. Companies face a lot of pressures to respond to regulators, answer subpoenas and anticipate dawn raids.

In cross border cases, companies face different regimes with and without criminal sanctions as well as different leniency arrangements, Google senior compliance counsel Munesh Mahtani told the audience. Competition authorities need to focus more on due process.

Transparency brings stronger due process which will in turn bring stronger procedural safeguards to companies and thus better engagement and flow of information between the authorities and the business community, Mahtani added.

If it is very difficult to converge leniency programs due to specific legal frameworks and procedural issues, but at least authorities worldwide are converging in terms of general leniency principles, Mahtani said.

Transparency is very important to encourage leniency applications and leniency has contributed 70% of all cases being handled by the Korean Fair Trade Commission (KFTC), KFTC commissioner Dong-Kweon Shin said during the panel. However, the concept has been met with some social justice controversy. Part of the South Korean public questions why companies that collude are being given a chance for amnesty.

The KFTC is also averse to announcing any of its investigations to the public, even though such announcements may induce leniency applications among related parties, to safeguard companies' reputation, Shin added. Companies under scrutiny may or may not be guilty.

Similarly, the Japan Fair Trade Commission (JFTC) also refrains from making any official announcements, although stories about ongoing investigations do leak out to the newspapers, JFTC commissioner Hiroyuki Odagiri said.

Many investigations do not lead anywhere and bad publicity resulting from botched investigations will benefit nobody, Brumfield added. Competition agencies should not be in the business of shaming business entities.

Singapore is taking a conservative stance in revealing its investigations, going only as far as naming the sectors under scrutiny and not the names of the parties, chief executive of the Competition Commission of Singapore (CCS) Han Li Toh said.

Toh expressed his hope that as the only jurisdiction with a fully-functioning leniency regime in Southeast Asia, Singapore would be a beacon of intelligence. In relevant cases, the CCS could use information provided by leniency applicants to its counterparts in neighboring countries. ■

ASIAN COMPETITION REGULATORS SEE COMPETITIVE NEUTRALITY **AS TOUCHSTONE**

by **Freny Patel** and **Arlan Thayib** in Singapore

- **Cartelists in region often blame government policy for apparent price-rigging**
- **Governments need to strike balance between state and private sector interests**
- **Regional regulators alone lack muscle to bring about change**

Governments need to phase out programs that tend to discourage competitive neutrality, said Siti Norma Yaakob, chairperson of the Malaysia Competition Commission (MyCC).

Competitive neutrality is a regulatory framework within which public and private enterprises face the same set of rules and where contact with the state does not bring competitive advantage to any market participant, according to the Organisation for Economic Co-operation and Development (OECD).

The challenge is for governments to find the right balance for the market, Yaakob said on 25 April at the Concurrences Conference themed "Antitrust in Asia: One Size Fits All?" in Singapore. Malaysia is working toward amending the competition framework in some sectors, she noted.

Most Asian antitrust jurisdictions lack a competition neutrality framework. Nearly unanimous on that point, regulators sitting on the Competitive Neutrality & Competition Law Enforcement in Asia panel said that competitive neutrality recognizes that government business activity that competes with the private sector should not enjoy a competitive advantage or disadvantage simply by virtue of its ownership or control.

Malaysia does not have a competitive neutrality framework in its competition regulations, said Yaakob, adding that the government should consider phasing out policies that prevent competitive neutrality.

The Competition Commission of India (CCI) has no authority with the muscle to push policy on the government; the best it can do is play an advisory role and point out when a policy could have an anticompetitive impact on the economy, said Vinod Dhall, a former CCI chairman.

Dhall cited an occasion in July 2015, when the CCI slapped cumulative penalties of INR 6.71bn (USD 106m) on four state-run insurers -- National Insurance (INR 1.63bn), New India Assurance (INR 2.51bn),Oriental Insurance (INR1bn) and United India Insurance (INR 1.57bn) -- for alleged anticompetitive conduct. A circular from the Ministry of Finance calling for certain anticompetitive actions was withdrawn when the CCI intervened, said Dhall, now head of the Delhi-based law firm Vinod Dhall-TT&A.

Similarly, Korean construction companies working on multimillion-dollar state projects have engaged in cartel conduct partly as a result of government directives on pricing alignment, PaRR previously reported.

Likewise, in Indonesia, cartels can appear to be actually facilitated by government policy, said Nawir Messi, commissioner and former chairman of Indonesia's Commission for the Supervision of Business Competition (KPPU). It has become common for companies charged with collusive conduct to blame ministries for either tacitly or directly encouraging the formation of cartels, he added.

Indonesia President Joko Widodo and members of the parliament have been advised that flawed lawmaking has played a role in fostering anticompetitive conduct, Messi said. The KPPU is working with local universities to introduce courses on competition law.

Moreover, regulators are tackling blocks to competitive neutrality across a number of jurisdictions, panelists noted.

Instrumental in framing India's draft national competition policy -- which has yet to be enacted -- Dhall said all sector regulations should be competition-driven. He also urged the government to introduce a sunset clause that would place a specific lifespan on legislation, he added.

Clara Ingen-Housz, a partner with Linklaters in Hong Kong, speaking on the same panel, said that while it is good that authorities recognize the issue, they should not have to shoulder all the responsibility to bringing about a more balanced approach to competitive neutrality. After all, in most cases they lack the muscle to bring about change. ■

ANTITRUST CONDUCT ACROSS **DIGITAL ECONOMIES CALLS FOR COOPERATION**

by **Freny Patel** and **Arlan Thayib** in Singapore

- **Competition authorities should develop technological competencies, says chairman of Singapore competition body**
- **Disruptive innovation has made pricing behavior more transparent**

Technology has allowed cartelists to monitor pricing behavior, Aubeck Kam, chairman of the Competition Commission of Singapore (CCS), said, providing for greater convenience and pricing transparency. This is why a common approach across jurisdictions is required, he pointed out, adding that the advent of the digital economy has seen the retail sector grow by as much as 25%.

Using pricing algorithms, it is now easier to monitor industry behavior and detect the existence of cartels, Kam said in his keynote address at the one-day Concurrences Conference on "Antitrust in Asia: One Size Fits All?" in Singapore on Monday.

The digital economy can impact any country according to a study undertaken by the Singapore regulator, Kam said, citing the first prosecution by the US Department of Justice in April 2015, targeting e-commerce in online poster sales on Amazon. A former executive of an e-commerce retail platform for posters, prints and framed art pleaded guilty to conspiring to fix the prices.

The US Fair Trade Commission also created an office for technology research, he added, pointing to the need for competition authorities to develop new technologies.

Disruptive innovation across industries has given rise to a degree of tension between regulations and competition policy. This is one of the key topics that will be discussed among antitrust regulators at the forthcoming annual meeting of the International Competition Network (ICN) in Singapore later this week, as PaRR previously reported. Disruptive innovation essentially covers new products or services and business models – primarily offered via online platforms - which have drastically altered markets and introduced radical changes, usually unforeseen.

Competition authorities need to be mindful of new technologies, especially disruptive ones that replace conventional business models, Dave Podder, partner at Clifford Chance based in Sydney said at a panel during the conference. These innovations tend to improve people's lives and authorities need to recognize that and act accordingly, he added, saying that competition is dynamic and thus antitrust agencies must embrace changes, especially those pertaining to new technology.

Embracing change

In the internet age, price transparency has achieved considerable gains, Podder told the audience. If knowledge is power, then the internet puts power in the hands of the consumers now that they can easily access pricing information and a better idea on how prices are set.

Cooperation among antitrust regulators [across jurisdictions] is required when it concerns disruptive technologies, Kam said in his keynote, noting that it would be unrealistic to expect convergence of competition law across Asia. While antitrust law in Asia is in an exciting growth phase, the landscape in the Asia is considerably very diverse as opposed to the situation in Europe, he noted.

While cross border cooperation does play an important role, as seen in the recent capacitor cartel case where the Taiwan Fair Trade Commission (TFTC) imposed a USD 176bn fine, Kam said that more often than not Asian antitrust agencies receive more requests for assistance than they make, which can be quite difficult given the limited resources.

Kam went on to highlight a lack of conformity across Asian jurisdictions in terms of the application of competition law, citing how Hong Kong and Malaysia do not have a merger control regime. Similarly, some regulators exclude state-owned enterprises (SOEs) from the purview of competition law as is the case with Vietnam, while others like Indonesia have yet to introduce a leniency policy, he added.

Another issue of concern in Asia is the differing positions taken with regard to domestic economies, Kam said. While some are fairly mature, others are still finding their way or operating in an environment of political uncertainty. The lack of a uniform competition policy across Asian economies should not be seen as an obstacle so long as the movement towards competition law is positive, he added. ■

ASIAN ANTITRUST AUTHORITIES **SHOULD** PROGRESS APACE WITH GOVERNMENT AND PUBLIC NEEDS

by **Freny Patel** and **Arlan Thayib** in Singapore

When augmenting antitrust regimes, Asian lawmakers should not progress ahead of the needs and understanding of the governments and people, panelists said at the Concurrences Conference in Singapore today.

It is easy to identify the omissions in a competition regime, such as lack of merger rules or dawn raid powers, said Philip Monaghan, executive director at the Competition Commission of Hong Kong said at Concurrences, a panelist at this morning's session on the political economy of competition in Asian countries. But the development of competition law must go hand-in-hand with the public's familiarity and expectations of the law.

Hong Kong's competition law framework, which is transitional in nature, is intended to suit the current public needs, Monaghan added.

In the early day of the implementation of Hong Kong's competition law, small and medium-sized enterprises under the turnover threshold of HKD 25m (USD3.2m) were exempted from the law. Merger review, which proved controversial during the law's drafting, did not make it to the regime.

Each country faces challenges as they progress through stages of development, but antitrust regulators are united in the need to gain government support, professor at the University of New South Wales Law School Deborah Healey said.

Regulators need to adopt a transparent approach when liaising with the public and business community so as not to spook them, Healey noted. They need to explain the importance of merger rules, for instance, and let the end consumer know how cartels harm the economy.

In its first few years, Indonesia's Commission for the Supervision of Business Competition (KPPU) had few friends outside the press, KPPU commissioner and ex-chairman Nawir Messi told the assembly. Jakarta showed little interest in enforcing the competition law and the courts didn't seem to understand it and ruled against the agency's early judgments.

The KPPU began to look into cases that captured the public's attention and impacted ordinary people. They investigated an instant messaging (IM) cartel and advocated for airline policy, Messi said. Cheaper text messaging resulted; airfare came down to earth, he said, adding that people began to see first- hand the value of the competition law.

Government support was in short supply. As an entirely independent body, the KPPU operates independently of government ministries and regulators, Messi said. It is trying to maintain a balanced approach to Jakarta, maintaining its independence while staying close enough to win Lawmaker support for needed policy changes.

The Competition Commission of India meanwhile is trying to boost credibility through neutrality and by treating the public and private sectors equally, chairman Devender Kumar Sikri said. The agency is also clearing mergers expeditiously – by as much as half the allotted time, by some accounts -- and has thereby reduced uncertainty in the business community. ■

MULTINATIONALS ADVOCATE CONVERGENCE IN MERGER FILINGS

by **Freny Patel** and **Arlan Thayib** in Singapore

- **Indian regulator requires reliable data filing from independent third-parties**
- **Indonesia, Singapore sole SE Asian countries offering a degree of guidance**
- **Nokia/Microsoft deal saw some Asian agencies take a different approach**

Business representatives advocated greater cooperation and common timelines among competition agencies in the merger review process at a conference in Singapore today (25 April).

The theme emerged in discussion by panelists speaking on cross-border merger reviews at the one-day Concurrences Conference, "Antitrust in Asia: One Size Fits All?"

It takes just one agency to undo a deal, which is seen by other agencies as being a good deal, said Jean-Yves Art, assistant general counsel with Microsoft.

Asked to illustrate his point, Art told participants that while most of Microsoft's acquisitions went through without much of an antitrust hitch, he highlighted the Nokia/Microsoft deal of 2013 where some agencies took a different approach from others. Antitrust agencies in Europe, the US, India and Russia among others cleared the Nokia/Microsoft deal. However, third parties flagging concerns on potential patent licensing consequences of Microsoft's deal with Nokia, saw some Asian agencies taking a hard stance. These included China, Korea and Taiwan imposing conditional remedies, as reported.

Promoting more cooperation and more common timelines will help, Art said, adding that it would also be beneficial if antitrust authorities speak to each other as a group in the merger review process. This would make it more difficult for one agency to differ markedly in its approach from others. "I do not know of any case where convergence would be detrimental," he said.

Speaking on the same panel, Dominique Lombardi, a partner at Rajah & Tann in Singapore, also highlighted how companies have to deal with a number of regulatory regimes, where there could be a lack of understanding or market information. At the same time, parties are often reluctant to provide too much information to the regulators, she added.

Currently other than in Indonesia and Singapore, there is no guidance offered by Southeast Asian competition regulators, Lombardi said. Agencies should review guidance offered regularly as such reviews tend to offer some degree of clarity, provided that these are not frequent exercises, because businesses also want a degree of certainty, she added.

India is a cause of concern for corporates when it comes to merger filings, delegates at the event heard. Not only do mergers that meet the necessary thresholds need to be filed with the Competition Commission of India (CCI) within 30 days of notification, but the Indian antitrust regulator also requires reliable third party data filing as well, according to Kirstie Nicholson, competition managing counsel at BHP Billiton in Singapore.

Supporting other panelists' calls for convergence among competition regulators on procedural issues, Nicholson recalled one merger review case involving BHP, in which the CCI threatened that the deal could go to phase II review should the company fail to provide reliable third party data.

David Blanco, assistant general counsel with Monsanto in Singapore echoed other panelists, saying that although most deals go through without a hitch, the process is sometimes "quite painful".

Blanco said that explaining aspects such as biotechnology in relation to agriculture deals, and producing complicated detailed market data which is not always easy to come by, can prove difficult.

As agencies tend to ask for more data and questions, it can become "painful", especially some of the Asian agencies, which are quite new and do not have the necessary resources or knowledge base, he added. ■

INTERVIEWS

> “... WE HOPE TO IMPROVE OUR CONSUMER ADVOCACY EFFORTS TO HELP CONSUMERS UNDERSTAND THAT CCS IS NOT A PRICE REGULATOR AND DOES NOT INTERVENE SOLELY ON THE BASIS OF HIGH PRICES.”

AUBECK KAM

FRÉDÉRIC JENNY
> Concurrences Review, April 2016

Aubeck Kam (Competition Commission of Singapore) was interviewed by Frédéric Jenny (OECD Competition Committee). M. Kam delivered the opening keynote speech of the conference.

Frédéric Jenny: Experiences with the introduction of competition laws have been quite varied in Asian countries. Singapore is widely recognized as a country in which the introduction of a competition law has been very successful and in which the competition authority is dynamic and competent. What are, in your view, the factors which have made the introduction of competition and competition law successful in Singapore?

Aubeck Kam: The first factor, which is often taken for granted, is political and fiscal certainty. Once the Competition Act was passed in 2005, and the CCS established, there was no turning back. We were fortunate to be able to build the organisation without having to contend with uncertainty about funding, or worry about our legitimacy vis-*à*-vis other stakeholders.

Second, we benefitted from the help offered by more mature competition authorities. We also tapped on forums such as the International Competition Network and the OECD and found their work products very useful. This eased the steep learning curve which CCS faced. Our founding Chairman, Mr. Lam Chuan Leong also provided steady guidance and built CCS in its first decade.

Third, we focused on building a sound and trusted institution that was credible, clear and consistent in its actions. We made sure to respect due process, instill accountability, promote transparency, and uphold our independence.

Fourth, we wanted the public and businesses to understand that we were on their side and that it was only anti-competitive behaviour we were targeting. To this end, CCS embarked on an intensive outreach effort to the public, business associations and even students. This created greater awareness and benefits of competition law, which translates to greater compliance as well as more members of the public surfacing anti-competitive conduct to CCS’s attention.

Finally, we are fortunate that in the Singapore public service, there is a good tradition of collaborative partnerships. This helped us in our advocacy efforts to other government agencies, so that government policies across the board could be more pro-competition at the same time allowing CCS to gain deeper insights into the sector from the respective government agency. A good example is the partnership with Singapore’s Land Transport Authority, which received an ICN-World Bank award in 2015. Third-party taxi booking apps appeared in Singapore in late 2013. To harness the benefits brought about by such new technologies and business models, while at the same time, safeguard commuters’ safety and interests, the Land Transport Authority (LTA) introduced a regulatory framework requiring third-party taxi booking services to register with LTA in order to operate in Singapore. In formulating its regulatory approach, LTA worked with CCS to assess the competition impact of these third-party taxi booking apps on the taxi industry, as well as how to encourage innovation within the market while preserving the fundamental tenets of LTA’s taxi regulatory policies. CCS, on its part, undertook a market study of the taxi industry to better understand the competitive landscape and the competition issues faced by different stakeholders as they operate in this market. The joint collaboration between the two agencies helped to promote competition in the taxi industry by facilitating the entry of third-party taxi apps while ensuring that taxi commuters’ interests are safeguarded regardless of whether a booking is made through a taxi company or a third-party taxi booking service provider.

Frédéric Jenny: Singapore argued in international foras for a long time (particularly in the WTO) that since it was a small island with liberalized international trade, it did not need a competition law. Yet it has adopted a competition law. How is this competition law now seen in Singapore? Is there a feeling that anticompetitive practices are a real danger for consumers in Singapore? What have been the challenges faced by the Competition Commission of Singapore in its advocacy efforts?

Aubeck Kam: It is not wrong that in a small economy with a highly liberalised trade policy (like Singapore or Hong Kong), consumers can more easily seek alternatives to dominant domestic suppliers, for many internationally traded goods. Furthermore, modern competition law only really began to take off in the late 1990s, which is why we based ours on the UK Competition Act 1998.

Having said that, after more than a decade of competition law in Singapore, it is now well entrenched as part of the business environment. In our stakeholder perception survey in 2014, we found that competition law is regarded seriously by Singapore businesses. A good track record in effective and balanced enforcement has also given the public confidence that the law is being upheld.

There remain some challenges. In particular, we still encounter expectations that are beyond our ability to meet. For example, we hope to improve our consumer advocacy efforts to help consumers understand that CCS is not a price regulator and does not intervene solely on the basis of high prices. I think this reflects a common challenge faced by all competition authorities, which is the technical nature of competition law. This is not an easy subject to grasp and many consumers and businesses may not fully understand the concept. CCS has tried out innovative ways to explain competition concepts, such as an easy-to-read manga comic book series, and an exclusive premiere screening of the movie "The Informant", or holding a digital animation film contest. We hope to continue to find new ways to conduct public education and outreach.

Frédéric Jenny: Are there specific features of Asian economies which must be considered when thinking about the introduction and the development of competition law in Asia?

Aubeck Kam: There is no special or unique characteristic of Asian economies that suggests a different approach is needed.

The easiest thing to do is to model the competition laws on those in other countries, such as the more well-established jurisdictions in US, EU, Australia, etc. And I think many Asian countries have done that.

What we need to remember though, is that institutional and economic dynamics always differs from country to country. The same law, applied in a different institutional and economic context, will produce very different results. So rather than try to do "tickbox" comparisons against an idealised model of what a model competition law framework should be, it is always more fruitful to evaluate each system in terms of what it actually delivers – i.e., what impact does it have in promoting competition in the economy, and how much that has helped the economy become more vibrant and dynamic.

Frédéric Jenny: How much regional cooperation on mergers among Asian competition authorities has taken place? What are the main obstacles to cooperation in the region?

Aubeck Kam: The single biggest factor is that there is no standard approach to merger control across Asia! We have rules governing merger, but Malaysia does not, and neither does Hong Kong.

Frédéric Jenny: Do you consider that the development of regional cooperation as necessary to the development of competition in Asian countries? Why or why not?

Aubeck Kam: At some point in the future, the answer would be YES.

Given the present situation, regional cooperation on mergers is probably not the most important thing to focus on. The priority must surely be on building up the capability of the recently established competition authorities. For cross border cartel cases there is more room for cooperation.

This is why bilateral and multi-lateral agreements, such as the Regional Comprehensive Economic Partnership (RCEP), are important. They can help establish a baseline framework in competition law, and a process for cooperation across competition agencies in the RCEP countries. Such early engagements can set the stage for deeper regional cooperation in the future. ■

> "...THE COMMISSION FOUND THAT THE OPPOSITE PARTIES ARE IMPOSING UNFAIR/DISCRIMINATORY CONDITIONS AND INDULGING IN UNFAIR/ DISCRIMINATORY CONDUCT IN THE MATTER OF SUPPLY OF NON-COKING COAL TO POWER PRODUCERS."

SHRI DEVENDER KUMAR SIKRI

DEBORAH HEALEY
> Concurrences Review, April 2016

Shri Devender Kumar Sikri (Chairman, Competition Commission of India, New Delhi) was interviewed by Deborah Healey (University of New South Wales Law School). They participated in the panel on "The political economy of competition in Asian countries: Why are national competition regimes so different?".

Deborah Healey: The Indian Competition Act has broad application to SOEs. Can you describe the way that it applies to these bodies? What are the exceptions to this general coverage?

Shri Devender Kumar Sikri: The Competition Act, 2002 proscribes abuse of dominant position and entering into anti-competitive agreements by/between enterprises and persons. The term 'enterprise' has been defined under Section 2(h) of the Act as a person or a Department of the Government, who or which does any of the activities mentioned therein but does not include the activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the Central Government dealing with atomic energy, currency, defence and space. Further, Section 19 (4) the Act prescribes 'monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise' as one of the relevant considerations while determining whether an enterprise enjoys dominant position in the given relevant market. Thus, the provisions of the Act do not differentiate between private entities and SOEs.

However, by virtue of the above discussed definition of enterprise, the jurisdiction of the Commission does not extend to the functions of the Government that are sovereign in nature. It is also relevant to mention that Section 54 of the Act inter alia empowers the Central Government to exempt any enterprise which performs a sovereign function on behalf of the Central Government or a State Government.

Deborah Healey: The Competition Act is also unusual in that it is equally applicable to all State entities including Government administrative authorities. Could you please discuss couple of the cases taken?

Shri Devender Kumar Sikri: As has been discussed above, the provisions of the Act do not differentiate between private enterprises and SOEs. There have been several instances where the Commission had received information against SOEs/Public Sector Undertakings and in appropriate cases, the Commission had also ordered investigation. Some of significant enforcements against SOEs/public undertakings include the following:

Abuse of dominant position by Coal India Limited (CIL): In this matter, the arbitrary nature of certain clauses in the coal supply agreement entered by CIL with its customers was alleged as abuse of dominant position. The Commission found that the opposite parties are imposing unfair/discriminatory conditions and indulging in unfair/ discriminatory conduct in the matter of supply of non-coking coal to power producers. The Commission, after investigation of the case, held that various clauses of the fuel supply agreements signed with the informants were in contravention of the provisions. Besides directing CIL to cease and desist from imposing onerous conditions through the fuel supply agreement, the Commission had imposed a penalty of INR 1773.05 crores on CIL for contravening the provisions of the Act.

Bid rigging by public sector insurance company: Commission had imposed a total penalty of Rs. 671.05 crores upon 4 Public Sector Insurance Companies for manipulating the bidding process initiated by Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna for the years 2010-11, 2011-12 and 2012-13. While imposing penalties, the Commission noted that the case related to bid rigging in public procurement for social welfare schemes, the beneficiaries of which were poor families and as such the same was taken as an aggravating factor.

Abuse of Dominant Position by Indian Trade Promotion Organization (ITPO): In this case, it was alleged by Indian Exhibition Industry Association that Indian Trade Promotion Organization (ITPO), under the Ministry of Commerce, imposed unreasonable and arbitrary conditions on the exhibitors such as making it compulsory for the exhibition to take 'foyer area' along with the allocated area, though not at all desired or required by the exhibitors. The organizers were not at liberty to engage House Keeping Agency of their choice and were constrained to use only the agency empanelled by ITPO. The Commission found ITPO to be dominant in the relevant market for provision of venue for organizing international and national trade fairs/exhibitions in Delhi and held the aforesaid conducts of ITPO amounted to abuse of dominant position. The proceedings also resulted imposition of a penalty of INR 6.75 crores on ITPO.

Deborah Healey: The Government may however exempt things for a specified period including any enterprise or class of enterprise, any practice or agreement, or any enterprise performing a sovereign function on behalf of government (Section 54). Can you describe the way that the Government exempted merger and takeover plans for loss making and failing banks for five years under this provision?

Shri Devender Kumar Sikri: The Government has been empowered under Section 54 of the Act to provide exemption to class of enterprises on the basis of public interest. Pursuant to the request of the Reserve Bank of India and the Department of Financial Services, the Central Government after consultation with the Commission had exempted banking companies in respect of which Central Government has issued notification under Section 45 of the Banking Regulation Act, 1949. Such notification is general issued for merger/acquisition financially distressed banks.

Exemption has been provided on the basis that such transaction generally does not give rise to competition concerns and the need for approval of the Commission may only delay the transaction and further worsen the financial position of the distressed bank.■

> “THE IMPLEMENTATION OF THE COMPETITION ORDINANCE HAS ALREADY RESULTED IN THE ABOLITION OF SOME LONGSTANDING ANTI-COMPETITIVE PRACTICES IN HONG KONG.”

PHILIP F. MONAGHAN

DAVE PODDAR
> Concurrences Review, April 2016

Philip F. Monaghan (Competition Commission, Hong-Kong) was interviewed by Dave Poddar (Clifford Chance). They participated in the panel “The political economy of competition in Asian countries: Why are national competition regimes so different?”.

Dave Poddar: With the Competition Ordinance coming into effect in December 2015, how has it been received and what changes in behaviour are you seeing as people prepare for compliance?

Philip F. Monaghan: The feedback we have received so far has been very encouraging. The implementation of the Competition Ordinance has already resulted in the abolition of some longstanding anti-competitive practices in Hong Kong, such as the setting of fee scales by professional and trade associations in different sectors. I would like to attribute this to our extensive education and engagement campaigns in the run up to full implementation of the Ordinance, but credit should also go to the business community for their efforts in understanding and complying with the new law.

We have been gratified to see the media and the public in Hong Kong responding positively to the Ordinance. Competition law compliance is becoming part of the wider public discourse and the press is increasingly able to identify a policy or practice as raising potential competition concerns and knowledgeably comment on the relevant issues. And the public has also been actively engaging with the Commission by coming to us with queries and complaints in respect of possible anti-competitive conduct.

Overall, we’re off to a very promising start. We are seeing the beginning of a culture of competition in Hong Kong.

Dave Poddar: Have there been any unexpected issues or challenges since the Competition Ordinance has come into effect?

Philip F. Monaghan: It is fair to say we have been busy since the full commencement of the Competition Ordinance on 14 December 2015. As at the end of February, we had received around 750 enquiries and complaints from businesses and members of the public. While I would not say this volume of contacts was entirely unexpected, the Commission is a small organisation and handling and responding to this number of complaints and queries poses challenges in terms of the resources needed. In line with our Enforcement Policy, we are focusing on pursuing those cases likely to have the greatest impact on competition in Hong Kong. We will accord priority to cartel conduct, other agreements contravening the First Conduct Rule which cause significant harm to competition in Hong Kong, and abuses of substantial market power involving exclusionary behaviour by “incumbents” (i.e., those entities with long standing positions of substantial market power in the market in Hong Kong).

A further challenge has been managing expectations as to what may and may not be addressed by the Competition Ordinance. As is only natural with the introduction of a new law, we have found that there are some common questions, concerns and, in certain cases, misconceptions related to competition issues faced by businesses and the general public, based on the complaints we have been receiving and our general outreach work. We released a set of Frequently Asked Questions at the end of last month, which go some way toward clarifying the scope of the Ordinance – what it can reach and what in cannot – in relation to matters such as tendering, low pricing and/or parallel pricing. More generally, we are continuing with many of the public educational and advocacy activities we engaged in in the months prior to full commencement, including public seminars, print and television campaigns and the publication of guidance and easy-to-follow brochures. We are fortunate that the business community and the public have shown a strong interest in

the Ordinance, and I am confident that we can further build on public understanding of the types of issues that may (and may not) be tackled under our law.

Dave Poddar: What next? Where will the focus be for the Commission now that the Ordinance has come into effect?

Philip F. Monaghan: Prior to the Ordinance coming into effect, we concentrated on educating the public and business community on competition law. Our focus is now inevitably shifting to investigating potential anti-competitive conduct and actively enforcing the rules. In transitioning to this phase, we will adhere to the approach set out in our guidelines (in particular our Guideline on Complaints and Guideline on Investigations) and our Enforcement Policy.

That said, education and advocacy will continue to be a key function of the Commission. We want businesses to know how to comply with the Ordinance, and for the public to be able to identify potential contraventions and come to us with complaints that are well informed.

The coming year will also see the publication of market studies in respect of the building maintenance and auto-fuel sectors in Hong Kong. We are reviewing the liner shipping industry's application for a block exemption, and are currently engaged in consultations with relevant stakeholders. All in all, it is looking to be a busy year ahead for the Commission.

Dave Poddar: How have you seen inter-agency cooperation working effectively in relation to international cartels?

Philip F. Monaghan: It is still very early days in so far as inter-agency cooperation in international cartel cases is concerned but we nonetheless consider such cooperation an important element of our overall cartel strategy. In this regard, our Leniency Policy envisages the granting of waivers by leniency applicants to facilitate cooperation and the exchange of information with overseas authorities. The need for a waiver from an applicant will be dealt with on a case by case basis but a waiver would likely be standard if the leniency applicant has made multiple applications for immunity.

More generally, we have had a number of dialogues with other agencies – in the Asia region and more widely - exchanging know-how and best practices in relation to leniency and other cartel enforcement matters. These have been through both formal channels such as the international competition organisations, as well as informal contacts, meetings and bilateral visits. As the 'new kid on the block', we are always keen to hear and learn from other agencies. These contacts have been part of the Commission's wider efforts to build good working relationships with our counterparts in other jurisdictions, including our neighbours here in Asia, which will only intensify in the years to come. ■

"CURRENTLY, THE COMPETITION LAW CURRICULUM IS EXPECTED TO BE PART OF EDUCATION PROGRAMS FOR NEWLY APPOINTED JUDGES, AND BE SUBJECT FOR HIGHER EDUCATION IN THE SUPREME COURT…"

DR. MUHAMMAD SYARKAWI RAUF

IAN McEWIN
> Concurrences Review, April 2016

Dr. Muhammad Syarkawi Rauf (Indonesian Commission for the Supervision of Business Competition) was interviewed by Ian McEwin (Competition Consulting Asia). They participated in the panel " The political economy of competition in Asian countries: Why are national competition regimes so different?"

Ian McEwin: The KPPU has had many more cases than any other country in Southeast Asia - what have been the major enforcement problems in the last 15 years and how have they been resolved?

Dr. Muhammad Syarkawi Rauf: There are several main issues in law enforcement at the Commission. First, the limited authority in obtaining evidence, where our Commission can not intercepted and do the mandatory searched (dawnraid). It is still a problem of its own, for example when dealing with cartel cases which oftenly done in secret, we will demand the ability of investigators to look for qualified evidences from documents, witness statements, expert testimonies, instructions, businesses information, which sometimes difficult to obtain with such limited authority. Secondly, number of our investigators is very little compared to variety of cases that go to the Commission. Investigators who really have the relevant capacity and quality as well as good experience in handling cases are limited.

We are overcoming these issues with several measures. To overcome the problem of limited authority, the Commission has done a formal cooperation (memorandum of understanding) with the Indonesian National Police to encourage collective action through the "joint investigation". For example in an alleged cartel case, there was a joint investigation where the criminal aspect is

deal with the National Police, while the competition aspect is deal with the Commission. When the necessity for tapping is arising, the Police have opened themselves to help the Commission to tap the certain parties. On the need for a search or dawnraid, the Police can assist the Commission in obtaining data and information from businesses in accordance with the authority of those who have the means of force. Technical manual is the drafting stage, specifically to define how the Commission and the National Police will coordinate in conducting joint investigations. More recently, the Commission and the Police Department has conducted a joint investigation in the beef and rice cartel cases. In dealing with limited number and quantity of investigators, we have carried out variety of trainings to improve their capacity in handling cases.

While in the strengthening of evidence, the Commission has been starting to develop "circumstantial evidence" in the form of communication and economic analysis. Economic analysis as evidence to uncover cartels have started to be accepted in Indonesia, and proven in some of the cases in past year, for instance in car tire cartel case, one type of evidences presented during the trial and examination are evidences from economic analysis. As the result, in the substance, the District Court (PN) strengthen the Commission's decision, although the court reduce the fines from Rp. 25 billion to each reported parties (with a total of Rp. 150 billion), into each Rp. 5 billion to each reported parties. That is only a total of Rp. 30 billion. The positive learning was that, the economic economy has begun to be accepted by the court. In the future, we hope, the Commission can consistently use economic evidence in conducting our law enforcement or investigation of cartel practices, which may occur in different sectors and commodities.

Ian McEwin: Indonesia's competition law has multiple objectives, namely public interest, national economic efficiency, equal opportunity, preventing unfair competition, and promoting effective and efficient business. Has the wide range of objectives created problems for enforcement? In particular has the notion of Pancasila made it difficult to adopt an economics approach?

Dr. Muhammad Syarkawi Rauf: In general, the purpose of competition law composes of two objectives, namely "single goals" and "multiple goals". "Single goals" of competition law enforcement, namely efficiency, but on the other hand there are a variety of other purposes. Especially for Indonesia, we are embracing multiple objectives, so there are many goals to be achieved in the enforcement, like protecting public interest, creating efficiency, equal access, equal opportunities, justice, and business efficiency and effectiveness themselves.

At a glance, we may see the goals are similar to one another, for instance national economic efficiency and promoting effective and efficient business. The first is national efficiency, while the second is business efficiency and effectiveness. Both have topics on efficiency. For "equal opportunity", it relates to equal access on the industry or various businesses, while "preventing unfair competition" is related to the issue of fairness in business and to prevent unfair competition practices.

The objective of Law No. 5 of 1999 is to achieve efficiency and fairness in business activities. Is these number of purposes raises significant issue? Yes, there is definitely a problem. However, in developing countries, especially in Indonesia, we will not be possible to promote competition law by simply referring to the goal of efficiency, but we also should need to pay attention to the fairness in business activities. The relationship between large and small companies, for example, if both are in the same relevant market and out into a head-to-head competition, then it will lead to unbalanced competition. The bridge between the two is the partnership agreement which may promote an equitable relationship. It is a characteristic of the economy not only in Indonesia, but also Asia in general, since because Japan and South Korea also embraces the protection of small businesses. Indonesia also adheres to the same thing in competition law, although we are not explicitly mentioned about the protection of small and medium enterprises in the Law No. 5 of 1999, but in Article 50 there is exception to the SMEs with the objective of achieving business equitability.

The purpose of competition is to achieve great efficiency, high productivity, and better economic growth. The implementation of competition law in Indonesia is far more difficult than developed countries, in which they only have single focus as their objective, namely business efficiency. The Fifth Principle of Pancasila which reads "social justice to all Indonesian people" can be attributed to the principle of kidness, acknowledging the collaboration to achieve positive purpose, not cartel collaboration, conspiring, fixing prices, sharing markets, or restricting production. Such Indonesian culture (that bears the kidness principle) makes the competition is sometimes considered incompatible with the principle values of Pancasila. The community is not familiar with the culture of competition. There is also negative connotations' having competition as a mean to kill each other, liberalism, and free competition. It is indeen a challenge for the Commission.

Ian McEwin: Many KPPU decisions have been overturned by district courts. Some commentators say that the courts lack economic expertise. Do you agree and what do you think should be done about improving the economic knowledge of udges in Indonesia?

Dr. Muhammad Syarkawi Rauf: I agree with this opinion. Proving the cartel by using indirect evidence in the form of economic evidence has not been easily accepted by the judge in the District Court (DC). The level of knowledge and understanding of the judges against complex economic analysis still limited. In other words "lack of economic expertise", so that economic analysis presented in our verdict was not acceptable to the DC. Almost half of the KPPU decision was lost at DC level.

But there were positive improvement made last year, where our objected decision was frequently affirmed by DC. I think it is along with improvements in the ability of judges in deciding competition cases in particular, cases with economic analysis in cartel cases. Our last decision car tires cartel, it was strengthened by the DC. Later the sms cartel case by several telecom operators, where one of the proofs was based on economic analysis, was affirmed by the Supreme Court (SC). It means that the level of acceptance by our judges on economic evidence is improved. This may be a result of the Commission's effort to actively conduct workshops for district judges for years. The workshop was proved helpful to bring knowledge on how competition law and policy works, especially in handling economic evidences. In addition, the Commission also actively conducts seminar gathering judges with cooperation with ASEAN Competition Institute (ACI) by presenting Professor Frederic Jenny as one of the French Supreme judge. The seminar was very effective to convince judges on the use of indirect evidences.

Currently, the competition law curriculum is expected to be part of education programs for newly appointed judges, and be subject for higher education in the Supreme Court (MA), or even become one of compulsory subjects at universities throughout Indonesia. Lastly, it would be better if profession like forensic economists is emerging, so we can create a link between competition authorities and court and provide shared perception between institutions. Such profession has evolved in developed countries. If we can do those, the rejection by judges against our decision will reduced.

Ian McEwin: What is the progress in amending Law No 5? Are the changes likely to work?

Dr. Muhammad Syarkawi Rauf: The amendment of Indonesian competition law will focus on five (5) key points, namely proposal for mandatory pre-merger notification; improvement in the authority; strengthening the institutional setting, increase administrative fine; and broadening the definition of enterprises. In addition, there is on-going issues at the House of Representative to propose specific article on partnership in the competition law. They also requested simplification of articles contained in the competition law. Procedures on case handling must also be shared in a more detailed in the amendment. Hopefully, the amendment process can be completed by this year long with shared commitment by the House of Representative.

Ian McEwin: Is the level of expertise of KPPU staff increasing? Does the KPPU have difficulty retaining staff?

Dr. Muhammad Syarkawi Rauf: The competency of KPPU staffs is increasing as their experiences in handling variety of cases and trainings undertaken by the Commission. Investigators are increasingly improved their expertise in handling big-rigging cases since most cases is associated with tender conspiracy. It is expected that the knowledge and ability of investigators can be developed, along with sustainably increased non-tender cases. Along with the increased ability and expertise of KPPU staffs, the Commission does face challenge to retain competent employees due to the Secretariat's unclear institutional remark. It aims that the currently discussed Presidential Regulation on our institutional status can provide clearer career prospects for employees, with better income and work environment.

Ian McEwin: What priority is a new President in Indonesia likely to place on competition law in the future?

Dr. Muhammad Syarkawi Rauf: After the Commission stands for more than fifteen years, competition policy, law, and institution are formally entered Indonesian Medium Term National Development Plan 2015-2019, where we are placed in a very central position as competition is used as the basis for achieving national competitiveness. The President Joko Widodo has an optimist target to achieve economic growth of 7% (seven percent) in the medium term, that said only be achieved by applying proper competition law and policy. President Jokowi realizes that competitive environment is the only way to improve efficiency, productivity, and boost economic growth in Indonesia from the original 5% to 7% at the end of his reign.

President Jokowi also placed KPPU in a very good position on par with other law enforcers. Coordination with various ministries and other institutions is very effective nowadays. Even the Commission is now often included as reviewer of government regulations and ask opinion on legal aspects of competition policy. This is a positive progress by the Commission since it's in line with the mainstreaming of competition policy into all decision-making processes, including Presidential Decree No. 71/2015 on Strategic Commodities and Foods Prices, which involves KPPU as one of the reviewers.

During several meetings between President Jokowi and KPPU, the President also ordered special request to the Commission to focus on cartel issues that relates the vast interest of Indonesian people, namely food commodities like rice, chicken, beef, and garlic. They now become our high priority. As associated with Mental Revolution, the main program of President Jokowi, the Commission succeeded to became separate section in the mental revolution. Let alone the President on several occasions always convey "the age of competition" in many speeches. They are associated with changes in behavior and how to build competition culture in Indonesia, thereby internalizing competition value will be very important and will change the mental attitude of both businesses and regulator.

Ian McEwin: How is Indonesia helping new competition agencies in Southeast Asia? Do you think there will be a convergence of competition laws?

Dr. Muhammad Syarkawi Rauf: In Southeast Asia, the level of development is widely vary, as it can be divided into two groups like Indonesia, Thailand, Singapore, Malaysia, Vietnam, and the Philippines as a group with competition law enforced, and Brunei Darussalam, Cambodia, Laos, and Myanmar as a group under transition. Countries economic development also different. Indonesia's contribution to countries with new competition law takes form of exchange of experiences and information related to the implementation of Indonesian competition law and policy for the last 15 years. Economic development and intense economic cooperation between countries in ASEAN, is making the need for competition law and policy indispensable. It is allowed in the future that there may be convergences of competition law in Southeast Asia. However, such convergence may not be fully equal between groups. I believe similar approach was taken place in the European Union, of which six main European countries formed specific avenue which build the establishment of European Economic Community and initiative on the European Competition Authorities.

Ian McEwin: Do you think an ASEAN competition law is likely in the future?

Dr. Muhammad Syarkawi Rauf: Convergence in competition law in ASEAN will occur when all countries established their competition law and agency. The application of competition law will be a requirement since that the economy will not grow without competition. They shall emerge consciousness and capital or commitment to achieve such convergence. The convergence will take a long time, maybe for the first stage on five or six ASEAN countries in the 10 years to come, while other within 20 years. So that in the 20 years to come, namely in 2036, we may propose to form a single competition authority in ASEAN.

We hope that this convergence will be accelerated along with the business dynamics and linkages between ASEAN countries. The Commission will draw up a roadmap towards the future of regional competition policy and law, which explains corresponding steps so it will not limited to the coordination of law enforcement or the exchange of data related on competition, but more. If it is done, then it will give great effect to the economy. We are in the middle of it, and hope to share it to other competition authorities at the upcoming ICN Annual Conference in Singapore, 26 to 29 April 2016. ■

> “THE LENIENCY PROGRAM WAS USED IN 109 CASES OUT OF 136 CASES TO WHICH LENIENCY PROGRAM CAN BE APPLICABLE BETWEEN 2006 AND THE END OF MARCH 2016. THIS SHOWS THE EFFECTIVENESS OF THE LENIENCY PROGRAM IN DETECTING CARTELS.”

HIROYUKI ODAGIRI

LAURENCE IDOT
> Concurrences Review, April 2016

Hiroyuki Odagiri (Japan Fair Trade Commission) was interviewed by Laurence Idot (University Panthéon-Assas, Paris II). They participated in the panel “Leniency, transparency and procedural rules in competition law enforcement in Asia: Is there a need for convergence?”.

Laurence Idot: In April 2015 the JFTC Regulation on Opinion Hearings pertaining to Cease-and-Desist Orders and Other Measures (‘the Regulation’) took effect on the same day as the new AMA entered into force. Could you explain the main changes?

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Laurence Idot: In April 2015 the JFTC Regulation on Opinion Hearings pertaining to Cease-and-Desist Orders and Other Measures (‘the Regulation’) took effect on the same day as the new AMA entered into force. Could you explain the main changes?

Hiroyuki Odagiri: For the past ten years, the JFTC has been raising its enforcement capacity and at the same time, reviewing its procedure with a view to promoting due process. As a part of it, the amendment of the Antimonopoly Act that took effect on April 1, 2015 set up the procedure for hearing prior to finalizing an administrative order. Even before the amendment, the JFTC had implemented the procedure which provided defendant companies with opportunities to know the contents of the draft orders, to see evidence and to present their views prior to finalizing an administrative order. The new procedure was developed from the perspective of further enhancing due process. The differences from the previous procedure are, for example, as follows: First, in the previous procedure, explanations of the expected content of the cease and desist order as well as the evidence relevant to the facts found by the JFTC were given by the investigator only to those who requested such explanation from among the recipients of notification prior to final administrative order. In contrast, after the amendment hearings will be held with all recipients of the notification of the hearing procedure. In addition, the companies may submit a request to the JFTC to inspect or copy the evidence providing the facts found by the JFTC between the time when initiation of the procedure is notified and the time when the procedure is concluded. Second, in the previous procedure, the hearing had been held between the investigator and the defendant companies. In the new hearing procedure, a hearing officer designated by the JFTC who is independent from the Investigation Bureau conducts a hearing of opinions. Under the initiative of a hearing officer, the investigators for the case explain the contents of the draft orders, the facts found by the JFTC, and the main evidence supporting them to the defendant companies at the beginning of the first date of the hearings. The defendant companies may attend the hearings, present its opinions and submit evidence as well as put questions to investigators with the permission of the hearing officer. After the date of the hearing, the hearing officer will prepare a written record describing the progress of the presentation of opinions by the party attending the hearings and a report that lists the points of the case pertaining to the hearings, for submission to the JFTC.

Laurence Idot: The JFTC has been vigorously tackling cartels. Do you consider that your leniency program is efficient?

Hiroyuki Odagiri: The JFTC launched the leniency program in January 2006. The primary purpose of the introduction of the leniency program was to give enterprises an incentive to report their violations, aiming at uncovering cartels and bid rigging. At the background of the introduction of the leniency program was the difficulty of detecting cartels and bid rigging because they were done behind closed doors, leaving very little evidence. Furthermore, before the introduction of the leniency program, even a company maintaining a sufficient compliance system to find out violations such as cartels and having stopped them voluntarily was not immune from surcharge payment when the JFTC files a complaint, which gave the company no benefits or incentives to report the violations to the JFTC.

Since January 2010, the number of leniency applicants who are to receive the exemption or the reduction of surcharges has been raised from 3 to 5 (Up to 3 applicants after the investigation commencement date.). In addition, if a company makes an application together with its subsidiaries and/or affiliated companies, they are taken as a single application by one company group and the same leniency treatment is applied to these companies submitting the application. Since its introduction and amendment, many companies have been making good use of the leniency program. The leniency program was used in 109 cases out of 136 cases to which leniency program can be applicable between 2006 and the end of March 2016. This shows the effectiveness

of the leniency program in detecting cartels. Furthermore, in order to enforce the AMA more efficiently and effectively, the JFTC formed the "Anti-Monopoly Act Study Group" (launched on February 10, 2016) composed of experts from several fields, which is currently making a study on the future framework of the surcharge system.

Laurence Idot: When and how does the JFTC closely work with other agencies in international cartel cases? A cooperation agreement with the European Union was signed in 2003 but what about the cooperation with other East Asian authorities?

Hiroyuki Odagiri: The JFTC has worked with other competition agencies under three types of frameworks for international cooperation, namely, Governmental Cooperation Agreements, Competition Chapters of FTA or EPAs, and inter-agency MOUs.

In these frameworks, mainly the provisions regarding notification, cooperation and coordination of the enforcement activities are stipulated. The JFTC cooperates with other authorities by notifying its enforcement activities, exchanging information and coordinating the investigation proceedings when it is needed.

For example, on the international cartel cases of automotive parts such as wire harnesses, the JFTC coordinated the investigation commencement date with other competition authorities including the USDOJ.

Regarding the cooperation agreement with the European Union (EU), Japan and the EU have decided to commence preparatory works for negotiation on an amendment of this agreement in order to allow their competition authorities to facilitate the exchange of information obtained during the course of an investigation.

In relation to cooperation in East Asian region, Japan has signed FTAs/EPAs which contain the provisions related to competition policy with nine jurisdictions, including the Trans-Pacific Partnership (TPP) agreement signed on February 4 this year. Besides, in the negotiations for FTA among China, Japan and Korea and Regional Comprehensive Economic Partnership (RCEP), putting the provisions related to competition policy is currently discussed, with a view to establishing a comprehensive and cooperative relationship among competition authorities in the East Asian region. In addition, to develop cooperative relationship with foreign competition authorities, the JFTC has been actively negotiated MOUs whose implementation is not obliged but is based on voluntary initiative of both parties. So far, the JFTC concluded MOUs with five competition agencies in East Asia. ■

"A FINANCIAL PENALTY SERVES TWO OBJECTIVES, NAMELY TO REFLECT THE SERIOUSNESS OF THE INFRINGEMENT AND TO DETER UNDERTAKINGS FROM ENGAGING IN ANTI-COMPETITIVE BEHAVIOUR."

HAN LI TOH

NOAH BRUMFIELD
> Concurrences Review, April 2016

Han Li Toh (Competition Commission, Singapore) was interviewed by Noah Brumfield (White & Case). They will participate in the panel "Leniency, transparency and procedural rules in competition law enforcement in Asia: Is there a need for convergence?"

Noah Brumfield: Singapore's Competition Commission has been involved in at least one highly publicized investigation and charges involving auto parts, collaborating with enforcers from Australia, Japan, China, Korea, Canada, the US, and the EU. How frequently are you coordinating investigations with your counterparts in different jurisdictions and do you tend to work more on a regional basis or across different regions?

Han Li Toh: Just as commerce is increasingly cross border in a globalised world, anti-competitive conduct has also cross had jurisdictional effects. It is therefore imperative that competition agencies work closely together to obtain evidence which reside in other jurisdictions. With growing maturity, CCS will tackle more complex and cross-border cases. In that respect, the close ties that CCS shares with other competition agencies become all the more important.

In cross border competition law cases, CCS regularly cooperates with other competition law enforcement agencies. Depending on the facts and circumstances of the case, cooperation with the relevant competition law enforcement agencies, either in the region or globally, may take place at various stages of investigation.

Noah Brumfield: What are the formal and informal mechanisms in which the Competition Commission of Singapore exchanges information with its counterparts within the region to identify potential violations, in conducting an investigation, and in deciding to bring an enforcement action?

Han Li Toh: CCS conducts regular dialogue with key counterparts, such as ACCC, NZCC and various competition agencies in ASEAN. Such dialogue, involving key competition enforcement officers, engenders trust and allow for the sharing of enforcement priorities, strategies and cases of interest. In addition, for specific cases, CCS will engage in dialogue with counterparts, to exchange information and strategies. The information sharing will be conducted within the permissible limits of the law.

Noah Brumfield: Some would say there needs to be greater harmonization among jurisdictions in their approach to fines for cartel and other competition law violations. How does your agency approach how fines should be determined and what is your view on the need for harmonizing the approach to fines?

Han Li Toh: A financial penalty serves two objectives, namely to reflect the seriousness of the infringement and to deter undertakings from engaging in anti-competitive behaviour. In levying the financial penalties, CCS would take into account the nature of the infringement and the circumstances under which the infringement was committed, duration of the infringement, aggravating and mitigating factors, as well as representations made by the companies under investigation. A percentage starting point would be applied to each company's relevant turnover to determine the base penalty for each company. A multiplier would then be applied for the duration of infringement and that figure is then adjusted to take into account factors such as deterrence and aggravating and mitigating considerations. Further reductions in financial penalties would also be given if they parties are the leniency applicants. In granting the further reductions in financial penalty, CCS will take into account:

- The stage at which the undertaking comes forward;

- The evidence already in the CCS's possession; and

- The quality of the information provided by the undertaking.

The penalty calibration approach adopted by CCS is generally in line with those in other established administrative competition law jurisdictions, such as the EU and UK.. ■

> "…BEHAVIORAL REMEDIES MAY BE CAPABLE OF ENTIRELY ELIMINATING COMPETITION CONCERNS ARISING FROM OTHER MERGERS, SPECIFICALLY NON-HORIZONTAL MERGERS."

JEAN-YVES ART

KEN CHIA
> Concurrences Review, April 2016

Jean-Yves Art (Microsoft) was interviewed by Ken Chia (Baker & McKenzie). They participated in the panel "Cross-border mergers in Asia: Survivor Showcase Session".

Ken Chia: Do you think relevant market definition and calculation of market share is an appropriate filter for mergers in fast-changing and dynamic industries such as the IT sector?

Jean-Yves Art: The goal of merger control is to distinguish mergers that do not significantly restrict competition from those that do, to approve the first ones and to address the anticompetitive effects of the second. Market shares generally provide a useful indication of the merged entity's ability and incentive to restrict competition, though they rarely are definitive evidence of the existence or absence of market power. This point is made clear in the ICN Recommended Practices for Merger Analysis (see RP III). Because market shares offer useful - albeit not determinative - guidance to differentiate mergers that are likely to have anticompetitive effects from those that are not, many jurisdictions rely on market share thresholds as a filter to identify mergers requiring close attention.

The use of market share thresholds as a filter to identify potentially anticompetitive mergers raises particular challenges with respect to mergers in dynamic industries. The profound changes that regularly disrupt those industries combined with the prospective nature of merger control limit the evidentiary value of market share thresholds, certainly more so than in mature industries. Think for instance at the speed with which mobile devices such as tablets and smartphones have grown and are being used to conduct activities that were previously

(and to some extent still are) conducted on PCs, such as to watch videos, find directions, read and answer emails, or browse the web. Think at the extent to which computing as a service – which was largely underdeveloped three years ago – is replacing the purchase of software, especially in the enterprise space. Think about the growth of VOIP services at the expense of PSTN calls. Think about the development of "sharing economy" services such as Uber or Airbnb and their impact on traditional businesses such as taxis and hotels. Consider the on-going investments in virtual reality and in artificial intelligence, and how they promise to change the way we work, communicate and live in the coming years.

All those examples point to the fluidity of market boundaries and thus market shares in dynamic industries. The same applies to the emergence and growth of players within the same industry. WhatsApp, the consumer communications app, was first released in 2010; in 2016, it had reportedly grown to 1 billion users, overtaking established (or former) rivals such as Messenger, Skype or Google Hangouts. Conversely, Nokia's share of the global smartphone market exceeded 50% in 2008; two years later, it still amounted to 40%; in 2012, it was below 5%. Such rapid endogenous growth or fall is less frequent in mature industries.

Those features of dynamic markets considerably limit the evidentiary value of market shares in the assessment of mergers in those markets. Yet, it is worth pausing and considering their implications. Insofar as merger review – and competition law generally – is concerned with sustained as opposed to transient market power, competition law enforcement in dynamic markets should primarily focus on preserving the contestability of market boundaries and market positions, more than the holding of market power at any point in time. Put it another way, in those markets, obstacles to innovation within and outside the existing value network are much more harmful than the acquisition of a large market share in and of itself. The question that the community of competition specialists then needs to consider is whether there are factors which generally are conducive, or on the contrary create obstacles, to innovation in dynamic markets and which could be regarded as filters to distinguish presumptively pro- from presumptively anti-competitive mergers. Maybe there is no such factor; maybe there are and they vary depending on the type of innovation considered – maybe large market shares are not conducive to disruptive innovation but maybe they are when it comes to sustaining innovation. Economists have been debating those questions since Schumpeter and they have not yet found answers supported by strong empirical evidence. It is a topic that would greatly benefit from exchanges of experience between competition agencies.

Ken Chia: Do you think behavioral remedies can ever be appropriate to remedy potential anticompetitive concerns of a proposed transaction?

Jean-Yves Art: The fundamental principle governing the design of remedies in merger control is that the remedy should eliminate entirely and effectively the competition concerns raised by the proposed merger and lead to the conclusion that the proposed merger does not significantly impede effective competition.

In the vast majority of (the relatively limited number of) mergers raising competition concerns, those concerns directly result from the fact that the merger entails the elimination of a market actor that exerted a significant and unique competitive constraint over one or the other merging party pre-merger. Structural remedies – that is, remedies that in and of themselves modify the structure of the market as it would result from the proposed merger, for instance by creating a new market actor capable of exerting the same competitive constraint – are more capable of addressing the competition concerns raised by those mergers than behavioral remedies – that is, remedies that require or prohibit certain conduct by the merging parties and/or third parties.

Nevertheless, behavioral remedies may be capable of entirely eliminating competition concerns arising from other mergers, specifically non-horizontal mergers. Non-horizontal mergers may harm competition where they create (or strengthen) the ability and the incentive of the merged entity to adopt post-merger certain conduct – such as refusal to supply key input or to provide access to critical outlets – which has the effect of excluding rivals. Behavioral remedies that effectively prevent the adoption of such conduct may of course be an adequate solution. This is the case where the foreclosure strategies are clearly identified and the proposed behavioral remedies comprehensively address those strategies and are precisely formulated so that compliance can be easily monitored. For instance, in Intel/McAfee, the European Commission was concerned that the chip maker would bundle its CPUs and chipsets with McAfee security solutions, a practice which could marginalize McAfee's rivals and significantly impede competition in the market for security solutions. In order to address those concerns, the parties offered – and the Commission accepted – a combination of behavioral commitments which put vendors of competing security solutions in the same position as McAfee when it comes to access to technical information about, and operation of rival solutions with, Intel's CPUs and chipset and which enable users of those CPUs and chips to disable McAfee's security solutions bundled with Intel's products and replace them with competing solutions. The set of commitments offered by Intel regarding its future conduct vis-à-vis vendors of security solutions and users of chips maintains competition in the market for security solutions while enabling the merging parties and their clients to benefit from the efficiencies brought by the merger – an outcome which structural remedies were unlikely to achieve.

Ken Chia: Do you think that merger control agencies cooperate sufficiently when reviewing global merger deals to avoid the risk of confusing and/or unworkable national remedies being pursued?

Jean-Yves Art: Inter-agency cooperation has gone through major, positive developments in recent years. The launch of the ICN in 2001 was the catalyst of those developments. They have since been encouraged not only by the ICN but also by other multilateral organizations such as OECD and UNCTAD as well as in regional and bilateral context.

Merger review is one of the areas where inter-agency cooperation has become common practice. This is true at both policy and case level. Companies participating in mergers subject to review in several jurisdictions nowadays are well advised to facilitate and actually promote a dialogue between the competent agencies not only by issuing the necessary confidentiality waivers but also by sharing the list of reviewing agencies and the contact details of the officials in charge, by encouraging bilateral and multilateral contacts and, importantly,

by scheduling merger filings so as to enable an effective dialogue between the competent agencies at the most important stages in their individual review process.

Despite those developments, there is scope for further cooperation, including on remedies. While agencies regularly discuss remedies offered by the merging parties with the goal of ensuring a consistent approach in the design and implementation of those remedies, some agencies go further and, in appropriate circumstances, rely on remedies accepted by other agencies to clear the proposed merger unconditionally. For instance, the Canadian Bureau of Competition has taken that approach in Thermo Fisher / Life Technologies and, more recently, GSK / Novartis. All agencies may not be able to do the same due to the particular regulatory requirements under which they operate but obviously, this is an approach that generates major efficiencies and agencies should be encouraged to adopt it to the whole extent possible.

At a policy level, the ICN could usefully build on the experience gained by member agencies in working together on the design and implementation of remedies in specific cases and draw up recommended practices on that topic. It is noteworthy that the ICN has adopted recommended practices for merger notification and review procedures and for merger analysis but has not yet done so for remedies, even though the risk of inconsistent remedies in merger control has been identified from the start as one of the main reasons for, and main benefits of, inter-agency cooperation in merger cases. Agencies around the world have accumulated a lot of experience in this area. There is much to be gained in sharing that experience and the release of recommended practices would foster further convergence across jurisdictions. ■

> “ACTUALLY, CHINESE ANTIMONOPOLY LAW WAS NOT ONLY APPLIED TO SOME FOREIGN COMPANIES, BUT WAS ALSO APPLIED TO LOTS OF DOMESTIC COMPANIES, EVEN SOES.”

XIAOYE WANG

WENDY NG
> Concurrences Review, April 2016

Xiaoye Wang (Chinese Academy of Social Sciences) was interviewed by Wendy Ng (Melbourne University). They participated in the closing discussion dedicated to “Standard essential patents and antitrust issues in China”.

Wendy Ng: The Chinese competition authorities have substantially increased their activities in the past 3 to 4 years, both in terms of the enforcement actions taken and the development of the regulations supporting the Anti-Monopoly Law. What are the main reasons for this shift, and what further improvements do you think should be made to implement the Anti-Monopoly Law?

Xiaoye Wang: What you said is correct. Since 2013, Chinese antimonopoly agencies have substantially increased their activities, for example the National Development and Reform Commission (NDRC) investigated the Qualcomm case, the State Administration for Industry and Commerce (SAIC) is currently investigating Microsoft, and the Chinese People’s Court dealt with the case of Huawei v. IDC. In particular, there were many cases in the automobile industry where lots of famous car manufacturers were fined. Lots of Chinese companies were also investigated and punished, inclusive of some State-owned Enterprises (SOEs). Additionally, we have seen more and more cases related administrative monopoly.

For the development of the regulations supporting the Anti-Monopoly Law, I would like to mention the various guidelines for implementing AML, for example the Guidelines on Leniency Policies in Horizontal Monopoly Agreement Cases prepared by the NDRC, the Guidelines on Prohibiting the Behavior of Abusing Intellectual Property Rights to Restrict or Eliminate Competition prepared by the NDRC and SAIC.

In my view, there are at least the following three reasons for this shift:

Firstly, Chinese economic reform is going forward in the direction of marketization. In this case, Chinese policymakers and the antimonopoly law enforcers should do more to protect competition order. Secondly, the AML has already been implemented for almost 8 years. Compared with the starting years, the enforcement agencies have more experience and a better understanding of the AML, which leads to more confidence on how to deal with the cases. Thirdly, as you know, there are also a lot of antitrust cases in the world, for example against Microsoft, Google, Apple in the EU, and the cartel case against Japanese car spare parts manufacturers in the US. In these cases, Chinese antitrust enforcement agencies have opportunity to learn from the experiences of their counterparts aboard and do something based on their own responsibility.

Wendy Ng: There have been concerns voiced about the way that the Anti-Monopoly Law has been enforced, especially as it applies to foreign companies. What are your views on this issue?

Xiaoye Wang: I just talked about some cases involving foreign companies. As I mentioned above, Microsoft, Google, and Apple have been investigated in the EU, and of course, there are also many foreign companies investigated in the US, for example four Chinese companies that manufacture Vitamin C were involved in antitrust litigation in the US. Because China is a huge market in the world, and there are so many mega companies doing business in China, in my view, it is totally normal that there are many antitrust cases involving foreign companies. If there were no antitrust cases involving foreign companies in China, that would be not normal.

Actually, Chinese antimonopoly law was not only applied to some foreign companies, but was also applied to lots of domestic companies, even SOEs. In recent years, more and more cases also dealt with administrative monopolies. It means that some governmental bodies have been investigated. Of course, ordinary people hope also very much that there should be more big SOE investigated and punished for AML violation. In my view, if SOEs violated the AML, they must also accept the liability accordingly. But the SOEs, for example Sinopec and PetroChina, are normally regulated, and in this case, the antimonopoly enforcement in these sectors is more complex. A good example is the NDRC case against China Unicom and China Telecom in 2011. In this regard, the "Break Monopoly" reform is more expected in the monopoly industries.

Wendy Ng: The 13th Five-Year Plan was recently approved by the National People's Congress in its annual sitting in March. How might the reforms and goals outlined in the plan affect competition law and policy in China over the next few years?

Xiaoye Wang: The 13th Five-Year Plan is a very important document for Chinese economic and social development. This plan aims at deepening reform and stimulating the economy and sets out many targets in many areas. Of course, there are lots of targets related to competition law and policy, for example advancing the reform of SOEs or deepening the reform of monopoly industries. Obviously, the most important goal of these reforms is to let market play the decisive role for the resource allocation. That means also that the "break monopoly" reform is expected to further accelerate in 2016 and later on, and competition should be in a larger extent introduced for example in sectors like Oil, telecommunications, railway and many other monopoly industries. This is good news for the consumers. ■

TESTIMONIALS

SPEAKERS

The conference definitely covered actual and practical topics (no theoretical ones) while addressing a real pulse on Asia's Antitrust/Competition landsca”

DAVID BLANCO
Assistant General Counsel, Monsanto

It was a pleasure to attend and speak at this very interesting conference which while focusing on ASEAN, managed to pull in a very good mix of regulators, practitioners and academics from around the world. I look forward to attending next year’s conference which will be held around the ICN in Singapore and to hear how much ASEAN Competition Law & Policy has changed one year on.”

KEN CHIA
Principal, Baker & McKenzie Wong & Leow, Singapore

Extremely interesting conference. A great opportunity to capture the essence of what's happening on the antitrust front in the region.”

DOMINIQUE LOMBARDI
Lecturer, Sorbonne-Assas International Law School

ATTENDEES

The ASEAN Antitrust Conference was a unique opportunity to hear and meet the top Competition Officials from ASEAN. To hear first hand from these top officials their views on the interpretation and implementation of the Competition Laws in their respective countries was very enlightening.”

EDMUND CHAN
General Counsel, ExxonMobil Asia Pacific

It is always insightful to hear how the regulators think in their approach to anti-trust enforcement as you cannot read this stuff off publications or the Internet.””

CHONG JIN NG
Assistant General Counsel, Asia Pacific, GlaxoSmithKline

The conference provided the ideal platform for academic and practitioner dialogue, based on the worldwide experience of panelists. The outcome was interesting and thought provoking, for a region with an infant competition regime.”

MARK PEACOCK
Senior Managing Consultant, ICF International

I look forward to the next conference. It was a well-organized conference with a great selection of speakers.”

FRENY PATEL
Asia Editor, PaRR

Controversial topics covered - quite engaging.”

DAREL WEE
Senior Associate, Lee & Lee

An excellent conference with quality speakers and a well structured programme. Well done!”

BENG CHAI TAY
Partner, Tay & Partners

The Concurrences Singapore conference 2015 stood out for the diverse mix of attendees in an accessible format, including prominent representation from regulators, practitioners and academia."

BEN CLANCHY
Foreign Legal Consultant,
Makarim & Taira S., Singapore

The Concurrences event in Singapore was a rare opportunity to meet regulators and top practitioners from Southeast Asian and from Europe at the same time. In an ideal setting, I enjoyed the level of the discussions and the topics selected for the different panels."

KNUT FOURNIER
Chairperson, Hong Kong Competition Association

Stars of the competition firmament and quality discussions in a sleek modern venue. Had a marvelous time!"

MEL MARQUIS
Professor, European University Institute

I am enjoying the chance to attend the conference and to keep sharing what I am learning about the ASEAN competition law and policy and am thankful that Concurrences Journal makes things easier than ever. Hearing the prominent speakers is like attending a master class in practical reasoning. The leading experts also show inspiringly how we must go together in the world of dynamic market reform and address main questions of regional cooperation. The conference has capacity to act as catalyst for adapting policy approaches to current realities. In so doing, it would facilitate coordination on stronger regional competition rules and principles."

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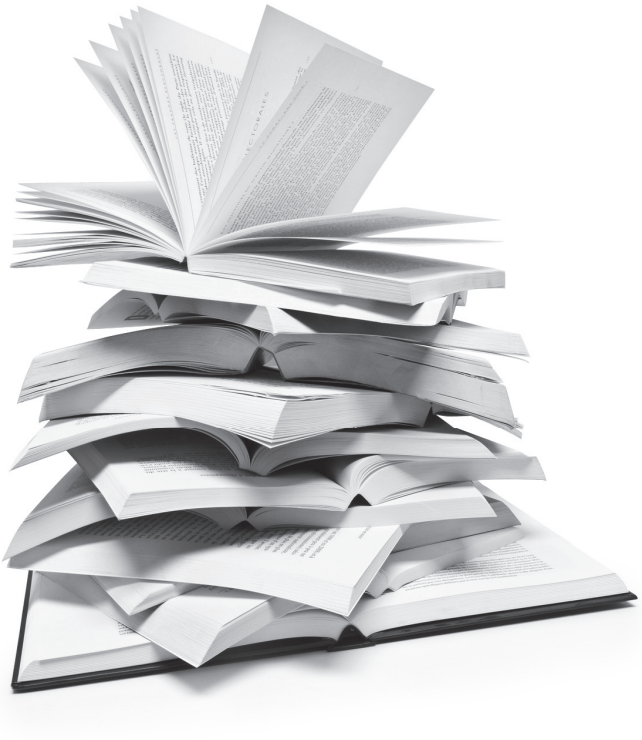

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The Antitrust Writing Awards Editorial Committee is currently selecting papers for the 2017 Awards. Eligible papers need to be published or accepted for publication in 2016. To submit a paper, email a pdf version or a link to the article to awards@concurrences.com. Deadline for submission is December 31, 2016. Results will be announced at the occasion of the Gala Dinner to take place on March 29, 2017 in Washington, DC.

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