Policy and Regulatory Report

PaRR Coverage: Asian Competition Forum's 9th Annual Conference in December, Hong Kong

9 December 2013

Consolidation of China's antitrust agencies not ruled out but not imminent – MOFCOM official

China could consolidate its three antitrust agencies eventually, but there is no immediate plan for that, said Zhu Zhongliang, a division chief at the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM).

China has three enforcement agencies, namely MOFCOM, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC).

Consolidating the three agencies into one will require a significant revision in the law and there is so far no timetable set for such an amendment, Zhu said. Zhu was speaking to PaRR on the sidelines of Asian Competition Forum's 9th Annual Conference titled "Regional Economic Integration: The Role of Competition" in Hong Kong on Monday (9 December).

Responding to queries on the background of China's three antitrust enforcement agencies, Zhu told the conference, during the drafting of the Anti-Monopoly Law (AML), some people had proposed having one agency. But, prior to the AML, which came into being in 2008, China already had various related laws in place, such as the Anti-Unfair Competition Law that was established in 1993. The SAIC has been the main government agency enforcing the Anti-Unfair Competition Law, where some articles deal with antitrust issues.

Similarly, the NDRC, established in 1998, has been a key enforcement agency of China's Price Law, which also includes some antimonopoly provisions.

Consolidation of these agencies would have involved the need to revise these existing laws, which, Zhu said, would have been time-consuming. Hence it was thought best to have the three agencies, each with separate responsibilities, to overlook different aspects of antitrust enforcement, he said.

MOFCOM is charged to handle merger reviews, while the abuse of market dominance and other antitrust cases are jointly looked into by the NDRC and the SAIC, he added.

The number of agencies depends on history and the legal culture of a country or region, Zhu said, citing how the United States has two agencies, namely the Department of Justice (DoJ) and the Federal Trade Commission (FTC).

In the future, it is possible for the three antitrust agencies in China to unify under the same system, Zhu said.

Some of China's prominent antitrust scholars, including Huang Yong and Wang Xiaoye, who are also key members of the Expert Advisory Board of the State Council Anti-monopoly Commission, have been advocating consolidation of China's three antitrust agencies. They also suggested that a unified antitrust agency should have a higher status and be elevated to the ministry level.

They said China needs a more powerful and independent antitrust regulator to be able to enforce the law effectively and to tackle large Chinese and foreign companies, especially China's state-owned enterprises.

By Freny Patel in Hong Kong and Joy C. Shaw in Shanghai

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Australia/New Zealand FTA shows benefit of integrating competition law with anti-dumping regulations, panelist says

- Trade law protects national interest while competition law is “nationality blind”
- No anti-dumping between countries for 20 years
- Free trade objectives should not be undermined by anticompetitive practices

While Australia and New Zealand successfully replaced anti-dumping laws with competition regulations, it can be difficult for other governments to follow suit, according to Allan Fels, a professor at the Australia and New Zealand School of Government. Rather, it is easier to push for convergence instead and integrate the two laws, he added.

Australia and New Zealand replaced their anti-dumping laws with competition regulations through a series of free trade agreements (FTA) in the 1980s and 1990s. Since then, there has not been an anti-dumping case between the two countries, Fels said in a presentation to the Asian Competition Forum's (ACF) 9th Annual event in Hong Kong on 9 December.

Speaking on the sidelines of the conference, Stanley Wong, who heads Stanley Wong Global, a law firm which advises and represents enforcement agencies worldwide, told PaRR that the experience of Australia and New Zealand needs to be watched closely.

Whether other countries follow suit will depend on their political will, Wong said. This is because trade law is designed to protect national interests while competition law is usually "nationality-blind", he said.

Mark Williams, executive director of the Asian Competition Forum, agreed with Wong, telling PaRR that replacing trade law with competition law is more of a political issue. When import duties are imposed, it artificially increases the cost of products to protect the interest of domestic manufacturers, Williams said.

At the same time, companies could receive "hidden" financing from governments through subsidies or could even be part of an export cartel, Williams said. Such uncompetitive behaviour affects true market pricing, he added.

Trade liberalisation, while generally good for competition, does give rise to new forms of anticompetitive restrictions, said Fels, citing the example of global cartels.

Trade policy generally complements competition policy, but at the same time can be frustrated by anticompetitive arrangements especially in importing countries, Fels said. This is because firms that have experienced trade liberalisation tend to enter into anticompetitive practices, he added.

It is increasingly common for FTAs to include a clause dealing with matters concerning competition law or policy, Fels said. Australia has included competition chapters in all of its bilateral free trade agreements (FTAs) with Singapore, Thailand, Malaysia, the US and Chile.

The most common rationale is to ensure that free trade objectives are not undermined by anticompetitive practices, and thereby ensure market access, Fels pointed out.

While competition clauses in FTAs are fairly popular, some countries choose not to use these clauses. The reasons for doing so can vary from a lack of coherence, the absence of an independent competition agency, procedural differences or a lack of trust, Fels said.

Nevertheless, there is a trend in large countries to include competition clauses in FTAs because it can help curtail interference by "other" parties, Fel concluded.

By Freny Patel in Hong Kong

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Hong Kong may reinstate statutory merger control provisions, competition chief says

The Hong Kong Competition Commission may ask the territory's government to reinstate merger control provisions into the Competition Ordinance three years down the line, Competition Commission chairperson Anna Wu told the 9th annual conference of the Asian Competition Forum in Hong Kong.

Wu was speaking on Tuesday at this year's event, entitled "Regional Economic Integration: The Role of Competition".

Merger control measures had been part of the draft Competition Ordinance, but the government scrapped them in a "compromise" amid opposition to such rules.

As a result, Wu said, the territory's merger control regime has been "suspended in operation, with the exception of the telecommunications sector".

Hong Kong's Competition Ordinance has been in force since in June 2012.

The commission will now need to look into what changes are required and ask the government to review the law, Wu said.

Wu, who says merger rules should be included in the ordinance, is not the only regulator in Asia facing a dysfunctional merger control system.

The Malaysia Competition Commission (MyCC) is considering the introduction of a merger control regime as deal activity in the country has increased, MyCC head Shila Dorai Raj previously told PaRR.

As the consequences of global M&A deals are felt in Indonesia, the country's competition authority – the Komisi Pengawas Persaingan Usaha (KPPU) – plans to revise its merger control laws and replace the current practice of post-merger notification with pre-merger filing, said KPPU chair Muhammad Nawir Messi.

In Hong Kong, the Competition Commission can only look at market concentration if a merging entity meets market dominance thresholds. It does not have formal powers to review mergers more generally, Wu told PaRR in October.

By Freny Patel in Hong Kong

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Hong Kong competition chair advocates cooperation among regional competition authorities

- Cooperation necessary to tackle potential 'jurisdiction interface issues'
- Authority executives to be appointed in 1Q14

Greater collaboration among regional competition authorities is necessary as international conglomerates are present in multiple jurisdictions, Hong Kong's Competition Commission (HKCC) Chairperson Anna Wu said.

Internet and electronic transactions facilitate the movement of goods globally, Wu said, addressing participants of the Asian Competition Forum's 9th annual conference in Hong Kong last week.

Hong Kong is an import-export hub, accounting for almost 3% of global trade, noted the chairperson. Thus the competition enforcer may have to deal with cases entailing defendants whose activities stretch beyond the territory of Hong Kong.

Hong Kong's competition watchdog may, for example, need to address how regional export cartels affect the territory, continued Wu. The regulator could thus run into "jurisdiction interface issues", Wu added.

Collaboration with Mainland China will obviously be important, Mark Williams, executive director of the Asian Competition Forum told PaRR.

Kelvin Kwok, assistant professor of Law at the Hong Kong University, echoed the need for greater cooperation between the competition authorities in Hong Kong and the People's Republic of China. One party may request another party to take action, he suggested, speaking at the same conference.

Striking right balance

Managing public expectations will be one of the key challenges for the new Hong Kong's regulator, noted Wu. The authority should not become either too intrusive to the "normal" economic transactions under Hong Kong's laissez-faire regime, or be "just a toothless tiger", she added.

Over-regulation at the regional level is not the answer to the current challenges in Asia, echoed Hassan Qaqaya, head of the UNCTAD Competition and Consumer Policies Branch, speaking at the same conference. Integrated regional market and competition policies should safeguard the fundamental market principles without undue rigidities and carefully harmonise different policy areas, he suggested.

Identifying the first case that "could help the authority win the trust of the people will be a major challenge", one of the members of the HKCC told PaRR on the sidelines of the conference.

While the competition watchdog cannot be going after the "very low hanging fruit", it would not necessarily have the bandwidth to take on large cases, the member said.

Though members of the HKCC were appointed in May 2013, the top executives, including the chief executive officer, and other directors are only likely to be appointed in the first quarter of 2014, Wu told participants.

The authority's key priority is currently finalising draft guidelines on practices that could be exempted from competition rules. But they will be "dotted lines at best," Wu said.

"We need to strike balance between providing good and informed guidance to businesses yet not tying the hands of the Commission unnecessarily," she explained.

The Competition Ordinance, though enacted, has not come into full operation, said Wu. The phased implementation of the law was deliberate. It has taken nearly three years, 38 Bill Committee meetings and 5 full days of the whole Legislative Council meetings to turn the draft into a law, Wu said.

Competition law in Hong Kong was first discussed in 1994, when the Consumer Council commenced a series of studies on business competitiveness. These studies included bank deposit interest rates, supermarkets, fuel, broadcasting, telecommunications and residential property, she said.

By Freny Patel in Hong Kong

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Hong Kong's freewheeling construction industry faces competition law compliance challenge

- Construction sector accounts for 7.8% of Hong Kong's employment market
- Absence of competition law leaves courts powerless in face of widespread anti-competitive conduct
- Some construction companies appoint legal counsel to advise on competition law

Hong Kong's construction sector is facing major challenges in complying with new competition legislation as those in the industry openly discuss which tenders will be manipulated, said Christopher To, executive director of the Construction Industry Council (CIC).

Despite rampant anti-competitive conduct in the construction industry – including bid-rigging, price-fixing and market sharing. Hong Kong courts have been unable to take any action in the absence of a competition law, To told delegates at the two-day Asian Competition Forum's 9th Annual Conference, entitled "Regional Economic Integration: The Role of Competition", in December in Hong Kong.

To cited the example of Hong Kong's stainless steel gate supply cartel, a conspiracy that took place between 2 April 1997 and 13 September 2000 that defrauded the Housing Authority by neutralizing competition in a closed market of approved stainless steel gate suppliers to the authority's housing projects.

To said members of the cartel fixed minimum prices for tenders to be submitted to main contractors for the Housing Authority. When a main contractor called a tender, the members of the cartel would designate one of their number as the potential supplier and submit a bid at the minimum price. Other members would submit bids at higher prices and the profits collected through the cartel arrangement would be distributed to members equally, To said.

On 26 July 2010, The Court of First Instance in its judgment said it was unable to take any action in the absence of an antitrust law. However, it said: "This kind of cheating is against the public interest and should be discouraged in strong terms".

Such anticompetitive conduct is common in the construction industry, a sector that To described as one of the major pillars of Hong Kong's economy, contributing 3.3% to the territory's gross domestic product and accounting for 7.8% of the employment market. As of December 2103, there were around 1,600 active construction sites, he added.

Once competition law is enforced, such conduct will not be tolerated, To told the conference delegates. Unfortunately, firms in the construction industry fail to see the harm their actions inflict upon society, he added. Concerned by such misconduct, the CIC is advising its members to change their business practices and adopt compliance programs.

"We do not want to be seen as a bad apple," To said.

The CIC has been proactive in addressing issues of conduct since September 2011, when it set up a competition law task-force to solicit views from industry stakeholders on the Competition Bill and examine its potential implications for the construction industry. The Council submitted views and concerns from firms in the construction industry to the Legislative Council's Bills Committee on the Competition Bill in March 2012.

The CIC hopes to help inform construction industry stakeholders, small and medium-sized enterprises in particular, of the key provisions of the Competition Ordinance, of some practical steps to avoid infringing the new law, and of the reform process in the sector, To said.

To previously told PaRR that the CIC has been liaising with the chairperson of the Competition Commission, Anna Wu, on further planning and whether to formulate guidelines on what commercial information can or cannot be shared.

In its recommendations to construction businesses, the CIC identified nine key points to look out for in detecting anticompetitive conduct, To said. They included:

- Unexplained identical prices or terms;
- Different bidders making the same unusual mistakes;
- Bids containing less detail than expected;
- Unexplained price increases over and above original bids;
- The subcontracting of work by a successful bidder to other bidders;
- The same bidder always winning, or certain bidders never winning;
- Bidders taking turns to win in a rotating pattern;
- Bidders making unnecessary joint bids;
- Bidders meeting privately, including in the context of trade associations.

Some personnel from construction companies have told PaRR that they have appointed legal counsel to advise them on whether they need to modify their day-to-day operations to ensure compliance with the territory's new competition law.

By Freny Patel in Hong Kong

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National priorities challenge ASEAN setting up regional supranational competition authority

The national priorities of member states of the Association of Southeast Asian Nations (ASEAN) pose a challenge to harmonizing national competition policy and law in the region, according to Dr Burton Ong, an associate professor at the National University of Singapore. Political reform, social upheaval and recovery from natural disasters are some of the factors that result in competition law and policy being sidelined, he added.

Ong also said a lack of consensus among ASEAN states as to what the goals of competition law should be, and the fact that national authorities have varying levels of technical expertise, resources and political support, were hampering efforts to align legal arrangements. Ong was speaking at the two-day Asian Competition Forum's 9th Annual Conference, entitled "Regional Economic Integration: The Role of Competition", in December in Hong Kong.

Hassan Qaqaya, head of the United Nations Conference on Trade and Development's Competition and Consumer Policies Branch, spoke at the same conference and said that in the absence of a regional supranational competition authority, ASEAN members must keep communication channels open and ensure that competition policy is continuously reviewed to keep up with economic changes.

Qaqaya said national competition authorities are responsible for reviewing corporate mergers that often affect more than one ASEAN member state, but that without a supranational regulator, national regulators were unable to consult one another on competition matters. That could discourage foreign direct investment and impose additional costs on young competition agencies, he said.

Qaqaya said in his presentation that supranational regulation could help remove barriers between states that reduce trade flows. All ASEAN countries have competition laws that prohibit restrictive agreements such as cartels and abuses of dominant position, but that some offer state aid and other forms of support to state-owned enterprises, which distorts competition and is detrimental to the common interest.

Speaking at the 3rd ASEAN Competition Conference in Singapore on 4 July 2013, Hng Kiang Lim, Singapore's Minister for Trade and Industry, said inconsistent competition rules among countries may increase uncertainties and impose additional transaction and compliance costs on international businesses, Lim, also supported the creation of competition rules at the regional level to oversee increasingly complex and cross-border business activity and to provide effective protection against restrictive anti-competitive practices among transnational firms.

Qaqaya said many sectors of the ASEAN economy have yet to be opened up to competition, notably the electricity, gas, financial services/banking and rail industries. He said that was being done gradually by way of privatization because in most ASEAN states, those sectors had typically been dominated by single national providers.

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Even though setting up a regional supranational competition regulator may remain a distant dream, the ASEAN Expert Group on Competition (AEGC) launched a competition policy and law portal [www.aseancompetition.org] for member states last November, aimed at promoting the benefits of competition regulation and at providing a platform for co-operation between national competition authorities.

By Freny Patel in Hong Kong