

The thing about ...

Brent Snyder

The chief executive of Hong Kong's Competition Commission (HKCC) discusses his new role and the evolution of the city's competition landscape.

Asian-Mena Counsel: Now that you've had a few months in the new role, what do you see as your primary goals during your term?

Brent Snyder: First and foremost, my goal is to work to ensure that the residents of Hong Kong receive the many benefits that flow from competition, including better, cheaper and more innovative products and services. That is why I am in this line of work. Achieving that will require a strong and effective HKCC.

We are still a new and developing agency. As a result, our internal focus is on consolidation, developing and retaining experience, and continued capacity and expertise building. We will become a more effective agency with greater experience.

Locally, we continue to investigate and bring cases that address competitive abuses. Our primary focus will remain hardcore cartels – price-fixing, bid-rigging, market sharing and output restrictions – which are the cardinal sins of competition law, although we will not ignore other anti-competitive agreements or abuse of market power that we uncover through our investigations. We will also partner with the government to ensure that its programs and initiatives are safeguarded from collusion and that its regulations and ordinances take into account any impact on competition.

There is also a significant international component to competition law enforcement. International liaison plays a vital role for competition agencies not only on the law enforcement front but also in terms of capacity building. We are and will remain actively engaged internationally.

AMC: What do you think will be the biggest challenges?

Snyder: In my last position at the US Department of Justice, Antitrust Division, I often said that the career staff was the backbone of the organisation and the key to its success. The same is equally true here. The Commission's success in carrying out its mission to promote and enforce competition will be the result of our staff, which makes developing and retaining an experienced staff a key priority and challenge. Much has already been done by the Commission, but it will continue to be a point of focus for me.

Similarly, properly prioritising our enforcement and policy work to maximise our resources and obtain results that benefit the greatest number of consumers and address the most significant competitive concerns is a challenge. I believe that the Commission has made very effective decisions about priorities to date, and this approach will continue to guide our work in the future.

Finally, getting results for consumers in a timely fashion while also managing expectations regarding the complexity of our work and the time and evidence needed to advance investigations to a resolution is important. I recently read that the average abuse of dominance investigation in the EU takes over three years, and I know that many US cartel investigations use all of the five-year statute of limitation. Against that measuring stick, the Commission's first two cases moved very quickly through the investigative process and to litigation, but not all investigations will, especially those presenting more complex issues of competition analysis.

AMC: What are some of the biggest differences you've noticed compared to your experience with the US system?

Snyder: Although there are differences in the substance of the laws between the two jurisdictions, the similarities are greater than the differences. For example, there are significant similarities in the conduct prohibited in both jurisdictions, and the US and Hong Kong each have a prosecutorial approach to their respective competition law regimes.

As for the major difference, the US has an old and well established antitrust regime dating back to 1890, and the competition law there has been interpreted so often that one can find court decisions on virtually all aspects of the law, which aids in interpretation and understanding. By contrast, the Hong Kong Competition Ordinance is new and largely is yet to be interpreted. There is precedent from other jurisdictions on issues relevant to the interpretation of the Ordinance, but that precedent does not bind the court so there is at least some uncertainty until we begin to have a well-developed body of rulings.

AMC: Anti-competitive behaviour still isn't a criminal offence in Hong Kong – would you like to see tougher sanctions under the Competition Ordinance?

Snyder: It is premature for me to say whether tougher sanctions are needed in Hong Kong until we have seen what penalties are imposed in the Commission's enforcement actions and whether they appear sufficient to have a deterrent effect. Although I was in charge of criminal antitrust prosecutions in the US before coming to Hong Kong, I don't necessarily believe that criminal sanctions are necessary for effective enforcement if other penalties are available to create adequate deterrence.

I am, however, a strong believer that effective deterrence requires holding both culpable companies and individuals accountable for competition misconduct. Upon familiarising myself with the Ordinance, I was pleased to see it allows for both. Under the Ordinance, there are pecuniary penalties for companies as well as individuals participating in cartel violations or serious anticompetitive conduct. The Commission can also seek disqualification of individuals who are at a sufficiently high level of the companies if they have been sufficiently involved and knowledgeable about the cartel activity. These are useful tools that can have individual serious consequences for cartelists. I will prioritise making use of these remedies and assessing their effectiveness here before I begin thinking about whether more severe sanctions would be a useful or necessary deterrent.

AMC: What about a general merger control regime – is that something you would expect Hong Kong to adopt?

Snyder: I know there were debates about that issue in connection with the passage of the Ordinance, and the competition regimes of most jurisdictions include merger control, but I have not been here long enough to draw any

conclusions about whether Hong Kong needs it. I understand that the government intends to review aspects of the Ordinance after a period of time, so I will be giving thought to the issue.

AMC: How do you think the relationship between the ICAC and the Competition Commission will develop? It seems as though there could be overlap between some types of anti-competitive behaviour and corruption...

Snyder: The ICAC has been very supportive of the Commission during its initial phase, including by providing training, for which the Commission is appreciative. Additionally, a number of the Commission's investigators were previously with the ICAC, so the Commission also is benefiting from ICAC expertise in that way.

Substantively, there is some overlap in our mandates as both organisations have responsibility for bid-rigging, although in different forms. The Commission has been and will continue to work closely with the ICAC (as well as other law enforcement agencies where appropriate) to ensure a coordinated and effective approach to tackling such conduct.

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AMC: Since you joined we've seen the Commission launch a set of TV and radio ads on market-sharing cartels and publish model "non-collusion clauses" for procurement practitioners. Can you explain some of the background to this campaign and what you're hoping it will achieve?

Snyder: Market-sharing cartels can occur in any industry or sector. It may not be as commonly known in Hong Kong as some other forms of anticompetitive conduct such as bid-rigging, but it does exist, often in combination with other types of collusive conduct. For instance, bid rigging is often a means of carrying out a market-sharing cartel. Market-sharing cartels inflict serious harm on consumers and businesses. The Commission's second case before the Competition Tribunal alleges market sharing and price fixing in the provision of renovation services for a public rental housing estate, and it is a classic example of market sharing.

Our initial enforcement cases have attracted significant public interest – especially our second case because it involves the housing sector, which is of great concern to most Hong Kong consumers. To capitalise on the public interest in market sharing from the filing of the second case, the Commission launched a "Combat Market Sharing Cartels" campaign in November 2017, comprising TV and radio

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announcements, publications, educational videos, targeted seminars and a roving exhibition across the territory to better educate both the business community and general public about what market sharing is and why it is harmful. It has been very well received. For instance, the Commission's "A Bite of Conspiracy" education video, which is available on our website and on YouTube, has received more than 1 million views to date, which far exceeds the average government public education video.

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As a further initiative, the Commission published a model "non-collusion clause" and certificate in December 2017. The aim of the models is to provide easily accessible exemplars for procurers to use to strengthen their defence against cartel conduct and other types of conduct that can distort competition in tender arrangements.

Through our advocacy efforts, we hope to raise public awareness of the different types of market sharing, call for compliance, give tips on how to detect it and encourage members of the public to report suspected cases to the Commission. The campaign has been effective in fostering a compliance culture and bringing suspected cartel conduct to our attention. This is reflected by a notable increase in the number of complaints received as well as growing requests for seminars since the launch of the campaign.

AMC: Are there any current cases that you can talk about? What is your outlook for enforcement actions?

Snyder: The Commission currently has two cases before the Tribunal. The Commission's first case was filed in March 2017, alleging that five technology companies rigged their bids in a tender related to the supply and installation of a new IT system for a social service organisation. In August 2017, the Commission brought its second case to the Tribunal, which, as mentioned, alleges that 10 construction and engineering companies engaged in market sharing and price fixing in the provision of renovation services for a public rental housing estate. Both cases are slated for trial next year, and they will serve an important role in developing precedent that will guide conduct of the business community as well as the Commission's future enforcement efforts.

The Commission will continue to prioritise matters that have the greatest potential consumer impact, with the pursuit of cartels being central to its enforcement efforts. However, I am also cognisant of the importance of pursuing other contraventions, such as abuse of dominance, where the facts support it, so that we can begin to develop the jurisprudence related to our entire Ordinance. I resist setting goals for particular numbers of cases, but we have some promising

investigations and expect to bring enforcement actions in the coming months.

AMC: How important are in-house counsel to the work of the Commission?

Snyder: I was delighted to be asked for this interview. I am always eager for opportunities to engage directly with in-house counsel because they are on the front lines of the issues for which the Commission is responsible, and they are likely to be among the first to learn if there are competition problems. In companies fortunate to have them, in-house counsel play perhaps the most important day-to-day role in developing and monitoring compliance programmes, identifying risks, detecting potential anticompetitive conduct, making decisions about whether to seek leniency or cooperate with an investigation and generally helping to facilitate a culture of compliance. These are not easy tasks, and I know these tasks can sometimes be viewed as obstacles in some organisations, but prevention is always better than cure.

For that reason, advocacy to in-house counsel has been a focus of the Commission's work. We strongly encourage in-house counsel to take competition compliance seriously and to develop a compliance culture in their organisations. This can be done by internal training, regular assessments, as well as the adoption of policies and programmes to prevent organisations from running afoul of the Ordinance. However, this important work should not fall solely to in-house counsel. Proactive and vocal support and involvement by senior management is critical to the success of any efforts to instil a culture of compliance in any company.

AMC: What is your hinterland – what are your interests? And what has been your experience of living in Hong Kong?

Snyder: Pretty much anything you can do in the mountains – hiking, backpacking, mountaineering, ice climbing, etc. In fact, the Chinese name I have been given at work reflects that because it includes the name of a great mountain in China (Lun). I have already done quite a bit of hiking here and, along with my wife and dogs, am enjoying the many beautiful trails all over the territory. Hong Kong is a very beautiful place. Now, if it just had a glacier or two...

Brent Snyder was appointed to the position of chief executive officer of the Competition Commission in September 2017.

Prior to joining the Commission, Snyder served in the antitrust division of the US Department of Justice from 2003 until 2017, first as a trial attorney prosecuting division criminal matters, and as deputy assistant attorney general for criminal enforcement from 2013 until 2017, in which he was responsible for all criminal antitrust enforcement in the US. Prior to joining the government, Snyder practised law at Paul Hastings in Los Angeles and Perkins Coie in Seattle, where he was a partner.