DREW & NAPIER

COMPETITION LAW QUARTERLY UPDATE

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In this issue

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WELCOME MESSAGE

In this bumper issue, the Drew & Napier Competition Law and Regulatory Practice Group brings you the most notable events in the competition law world in the second half of 2014.

Looking ahead into 2015, we will soon be issuing an updated version of our ASEAN competition law handbook. Myanmar, the Philippines, and Brunei look set to introduce their competition laws soon, and 2015 marks a significant date in the ASEAN Economic Community Blueprint calendar, with a number of countries targeting to have their competition law introduced by the end of this year.

Also in the pipeline is the second edition of the Singapore Academy of Law's "Competition Law and Policy in Singapore", co-written by our own Mr Cavinder Bull, SC and Mr Lim Chong Kin, along with the renowned expert in competition law Emeritus Professor Richard Whish.

Drew & Napier's MNC Legal Update series on 29 January 2015 will kick-off a series of seminars which we will be organising in 2015. We look forward to seeing you at our subsequent seminars, which we will be sure to keep you updated on as further details become available. In the meantime, please do not hesitate to provide feedback on topics you wish to learn more about in 2015.

For more details on the Drew & Napier Competition Law and Regulatory Practice, please click **here**.

IN THE NEWS: AT A GLANCE

SINGAPORE

CCS gives conditional clearance to proposed acquisition of JobStreet Singapore by SEEK Asia Investments Pte. Ltd.

The Competition Commission of Singapore ("**CCS**") has cleared the acquisition of the online recruitment business operated by JobStreet Corporation Berhad by SEEK Asia Investments Pte. Ltd. following its acceptance of behavioural and structural commitments offered by the parties. For more details, please click **here**.

CCS fines 10 freight forwarders for price-fixing

CCS has imposed financial penalties amounting to a total of S$7,150,852 on 10 freight forwarding companies for collectively fixing certain fees and surcharges, and exchanging price and customer information in relation to the provision of air freight forwarding services for shipments from Japan to Singapore. For more details, please click **here**.

AROUND THE WORLD

MyCC grants conditional block exemption for liner shipping agreements

On 4 July 2011, the Malaysian Competition Commission ("**MyCC**") granted a conditional block exemption order ("**BEO**") to liner shipping agreements under section 8 of the Malaysian Competition Act. The BEO took effect from 7 July 2014. For more details, please click **here**.

Infringers face bigger penalties in Vietnam

Taking effect on 15 September 2014, Vietnam has introduced stiffer penalties for competition law violations in Vietnam. Decree 71 specifies that infringing parties could be subject to fines up to 10% of relevant turnover in respect of hardcore competition violations and in respect of infringing (or unnotified) mergers. For more details, please click **here**.

Hong Kong Competition Commission's consultation on guidelines closed

The consultation period following the Hong Kong Competition Commission's issuance of its draft guidelines has ended, and reactions have been a mix of praise and criticism. It remains to be seen whether the Commission will take the feedback on board as it gears up for the full commencement of the Competition Ordinance in 2015. For more details, please click **here**.

Philippines competition legislation close to enactment

The Fair Competition Act 2014 has cleared all but two stages of the legislative process in the Philippines, and will form the basis of a general competition law regime on its enactment. For more details, please click **here**.

Global shipping alliance blocked by China's MOFCOM

In June 2014, the Chinese Ministry of Commerce announced its decision to block the P3 alliance, a global shipping alliance between the three largest global shipping lines, on the grounds that the alliance had the effect of eliminating or restricting competition in the Asia-Europe container liner shipping service. For more details, please click **here**.

China's MOFCOM reviews 80 industries for potential anti-competitive practices

China's Ministry of Commerce has commenced an industry-wide review of potential anti-competitive practices across 80 major business sectors, including automobiles, pharmaceuticals and alcoholic beverages. For more details, please click **here**.

Goldman Sachs appeals Single Economic Entity finding by the European Commission

Investment company Goldman Sachs appeals against the European Commission's finding that, as a previous owner of Prysmian, it was jointly and severally liable for Prysmian's competition law infringement. For more details, please click **here**.

UK's Lloyds Banking Group agrees to pay US$83m criminal penalty for LIBOR

On 28 July 2014, the Department of Justice fined Lloyds Banking Group plc US$83m (S$108m) for the manipulation of LIBOR submissions to benefit their own trading positions or the trading positions of others between May 2006 and June 2009. For more details, please click **here**.

CMA clears medical equipment manufacturing assets acquisition on exiting firm argument

In August 2014, the UK's Competition and Markets Authority cleared Alliance Medical Group Limited's acquisition of IBA Molecular UK Limited's medical assets in the UK on the basis that the latter's business would have exited the market without the acquisition. For more details, please click **here**.

MyCC accepts undertakings from shipping companies

On 1 October 2014, MyCC closed an investigation against two major shipping companies in relation to exclusive agreements between both companies and their customers, following the undertakings given by both companies to amend the same. For more details, please click **here**.

Criticism of Google's commitments to the EC for alleged abuse of dominance

The acceptance by the EC of the third package of commitments offered by Google to address allegations of abuse of dominance in the online search engine market has triggered widespread criticism from various stakeholders. For more details, please click **here**.

SINGAPORE COMPETITION LAW WATCH

Score Board	Number	Status	
		Concluded	Pending
Notified Agreements or Conduct	15	14	1
Notified Mergers or Anticipated Mergers	48	42	6
Infringement Decisions	10	9	1
Appeals	10	9	1

Table 1: Singapore Competition Law Watch Scoreboard (Accurate as at 23 Jan 2015)

ARTICLES & COMMENTARIES: UPDATES FROM AROUND THE WORLD

REGULATORY UPDATES

MyCC grants conditional block exemption for liner shipping agreements

On 4 July 2011, the Malaysian Competition Commission ("**MyCC**") granted a conditional block exemption order ("**BEO**") to liner shipping agreements under section 8 of the Malaysian Competition Act ("**Act**"). The BEO took effect from 7 July 2014.

The BEO exempts Vessel Sharing Agreements ("**VSA**") and Voluntary Discussion Agreements ("**VDA**") made within Malaysia or having an effect on the liner shipping services market in Malaysia from the prohibition on horizontal and vertical agreements contained in section 4 of the Act. However, it does not exempt parties from the prohibition against the abuse of a dominant position contained in section 10 of the Act. Parties must adhere to certain conditions in order to qualify for the exemption, and the exemption does not extend to any inland carriage of goods occurring as part of through transport, nor does it extend to agreements involving elements of price-fixing or price recommendation imposed by parties on transport users.

The BEO was issued by MyCC following the application submitted by the Malaysia Shipowners Association, the Shipping Association of Malaysia and the Federation of Malaysian Port Operators Council. In reaching the decision to grant the BEO, MyCC took into account industry studies, consultations with relevant governmental agencies such as the Ministry of Finance, the Ministry of International Trade and Industry and the Economic Planning Unit, and the results from a nationwide public consultation on the issue. MyCC concluded that it was appropriate to grant the BEO after finding that there are significant identifiable efficiency benefits that would offset any potential impact on competition. Moreover, MyCC also found that limiting the scope of the exemption under the BEO by imposing certain conditions would prevent liner operators from eliminating competition entirely.

The BEO will be in force for three years from its gazetted date. MyCC will conduct a review of the BEO two years after its date of commencement.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") first granted a similar liner shipping agreement BEO in 2006, which was subsequently extended in 2010 and will be in force until 31 December 2015. CCS's BEO is broader than MyCC's BEO in several aspects. For instance, while the MyCC BEO excludes inland carriage of goods occurring as part of through transport from the ambit of its BEO, CCS expressly includes such inland carriage of goods in its BEO. Further, while*

MyCC's BEO does not extend to cooperation on rates and tariffs, such pricing coordination is permissible under the CCS BEO. CCS is currently conducting a review of its BEO to determine if it should be further extended beyond 31 December 2015.

Infringers face bigger penalties in Vietnam

As part of a complete review of Vietnam's competition law, a new decree, Decree 71, came into force on 15 September 2014, bringing about changes to how competition law infringements will be penalised under the law. In essence, infringers will be looking at stiffer penalties.

Decree 71 sets out that maximum penalties can be up to 10% of turnover in the relevant market, and factors like the loss caused by the violation and the duration of the infringement will be considered when the penalties are set. Such penalties are applicable to hardcore violations of competition law such as price-fixing, bid-rigging, abuse of a dominant market position and for mergers that contravene competition law, or mergers that have not been notified as required under the law.

Under Article 5 of Decree 71, maximum fines for violations are specified as VND100m for individuals (S$6,000), and VND 200m (S$12,000) for businesses.

Decree 71 also specifies that depending on the nature and severity of the violations, the infringing party could have its Certificate of Enterprise revoked. The undertaking could also be subject to a wide range of remedial measures including, *inter alia*, revisions of contracts, or the restructuring of business activities.

In Singapore:

The maximum penalty that can be imposed in Singapore for a competition law violation is capped at 10% of a company's turnover in Singapore for each year of infringement, up to a maximum of three years. In setting penalties, the Competition Commission of Singapore takes a number of considerations into account, such as the seriousness of the infringement, the duration of the infringement, and any mitigating or aggravating circumstances.

Hong Kong Competition Commission's consultation on guidelines closed

Hong Kong's Competition Commission ("**HKCC**") issued a set of six draft guidelines in October 2014 for the administration and enforcement of its fledgling competition regime. To date, the Competition Ordinance has been enacted, but has yet to come into force. Three of the guidelines concern specific aspects of substantive competition law: the Guidelines on the First Conduct Rule ("**FCR Guidelines**"), which deals with the prohibition of anti-competitive agreements and concerted practices; the Guidelines on the Second Conduct Rule, which deals with abuse of market power; and the Guidelines on the Merger Rule. The other three guidelines are concerned with procedural matters: the Guidelines on Complaints; the Guidelines on Investigation; and the Guidelines on Exclusions and Exemptions.

The guidelines are intended to set out how HKCC and the Communications Authority ("**CA**") intend to interpret and give effect to the relevant provisions in the Competition Ordinance. Notably, as is reflective of the development of competition law in Hong Kong from sectoral regulation, section 159 of the Competition Ordinance provides for the CA to have concurrent jurisdiction with HKCC. The CA may perform the functions of HKCC where the undertakings concerned are licensees under the Telecommunications Ordinance or the Broadcasting Ordinance.

HKCC had called for feedback on the draft guidelines, which were met with a somewhat lukewarm response. The general sentiment appears to be that, while HKCC has provided significant guidance and clarification through the guidelines, concerns remain over some areas.

For instance, the FCR Guidelines state that HKCC will deem resale price maintenance ("**RPM**") to be an infringement of the First Conduct Rule by object. Where certain conduct is presumed to be anti-competitive by object, the burden of proof becomes, in effect, reversed. It is not open, under such circumstances, to the undertaking(s) concerned to argue that the conduct does not restrict competition. Instead, the onus shifts to the undertaking(s) in question to demonstrate that their behaviour can be justified on grounds such as efficiency. The question, therefore, is whether or not RPM is a class of activity which is so inimical to the competitive process that such a presumption ought to stand against it.

Commentators have also called for more information on procedural issues such as the investigative process, specific timelines, and details on how HKCC will assess cases before it. Calls have also been made for HKCC to adopt a clear position on whether or not foreign jurisprudence will be persuasive when reviewing compliance with the First Conduct Rule, and in assessing the availability of an exclusion under Schedule 1 of the Competition Ordinance. That being said, it has been acknowledged that the procedural guidelines have generally fared well in providing guidance on technical aspects, such as HKCC's investigative powers and how they will be exercised.

The deadlines for consultation have since elapsed, in November and December 2014, for procedural guidelines and substantive guidelines respectively. The Competition Ordinance is expected to come into force in 2015.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") has similarly relied on the issuance of guidelines to state its policy on the administration and enforcement of the Competition Act (Cap. 50B). CCS has also published less technical documents, targeted at smaller enterprises without access to in-house legal advice, as well as consumers.*

Philippines competition legislation close to enactment

The Fair Competition Act 2014 ("**Fair Competition Act**") in the Philippines, as of 17 December 2014, was pending in the House of Representatives, having been passed by the Senate of the Philippines. To be enacted as law, the Fair Competition Act needs to be returned to the Senate for the production of what is known as its final enrolled form, which will then be submitted for the President's assent.

The Philippines does not presently have a general competition regime, relying instead on sectoral regulation to safeguard the competitive process in key industries such as energy and telecommunications.

The Fair Competition Act includes prohibitions, with provision for criminal sanctions, on anti-competitive agreements and abuses of dominant position, merger regulation, and provides for its implementation and enforcement with the creation of "an independent quasi-judicial body", the Fair Competition Commission ("**FCC**").

The FCC will have investigative or inquisitorial powers, and may apply such remedies as, *inter alia*, "the imposition of price controls, issuance of injunctions, requirement of divestment, and disgorgement of profits", or impose "sanctions, fines or penalties for any non-compliance with or breach of" the Fair Competition Act. The Office for Competition ("**OFC**"), under the Department of Justice, will retain "exclusive authority for the criminal enforcement" of the Fair Competition Act, and "shall seek to advance the antitrust jurisprudence" in the Philippines "through its litigation and participation in the activities of the Executive Branch and in regulatory and legislative processes." The Fair Competition Act, at this point in time, does not set out the circumstances under which parties will be prosecuted, and therefore how the powers of the FCC and the OFC will be separated in practice.

Entities found to have violated the Fair Competition Act will be imposed with fines of between ten million Pesos (S$299,300) and fifty million Pesos (S$1.5m) for natural persons, and between two hundred and fifty million Pesos (S$7.5m) and seven hundred and fifty million Pesos (S$22.4m) for legal entities such as, but not limited to, companies. Non-compliance with FCC orders, and/or the supply of incorrect of misleading information, will attract fines of not less than ten million Pesos (S$299,300) for each violation. Criminal penalties include fines of up to seven hundred and fifty million Pesos (S$22.4m), or imprisonment of up to ten years, or both, at the discretion of the court. Criminal liability may arise from both non-compliance with the substantive provisions of the Fair Competition Act, and non-cooperation or obstruction during the course of investigation by either the FCC or the OFC.

In Singapore:

Violations of the Competition Act (Cap. 50B) do not give rise to criminal liability, although obstruction of officers from the Competition Commission of Singapore in the course of their investigations could constitute a criminal offence.

ANTI-COMPETITIVE AGREEMENTS

CCS gives conditional clearance to proposed acquisition of JobStreet Singapore by SEEK Asia Investments Pte. Ltd.

On 13 November 2014, the Competition Commission of Singapore ("**CCS**") published its grounds of decision for the proposed acquisition by SEEK Asia Investments Pte. Ltd. ("**SEEK Asia**") of 100% of the online recruitment business owned by JobStreet Corporation Berhad ("**JobStreet**").

SEEK Asia and its parent company SEEK Ltd. (collectively, "**SEEK**") offer online recruitment advertising services through JobsDB Singapore Pte. Ltd., operating under the portal JobsDB.com.sg ("**JobsDB**"), whilst the Singapore JobStreet entity provides nearly identical services through JobStreet.com Pte. Ltd. ("**JobStreet Singapore**"). The parties overlap in the provision of online recruitment advertising services, specifically the posting of recruitment advertisements on centralised platforms and resumé database search services.

In its decision, CCS found that although there might be a substantial lessening of competition in the market for online recruitment advertising services in Singapore, in consideration of the implementation of and compliance with behavioural and structural commitments offered by SEEK, the proposed acquisition will not infringe section 54 of the Competition Act (Cap. 50B).

The acquisition had proceeded to a Phase 2 review as CCS was initially unable to conclude that the merger would not raise competition concerns. Subsequently, two market consultations were carried out regarding the behavioural and divestiture commitments proposed by SEEK in August and October 2014 respectively.
As a behavioural commitment, SEEK has agreed not to enter into exclusive agreements with recruitment customers looking to advertise on its JobsDB website. This will give employers, recruiters and jobseekers the choice of using other online recruitment advertising platforms. It will help to keep barriers to entry and expansion low and preserve competition in the market.

In addition, SEEK also committed to maintain the current pricing of its services capped at present day rate, allowing for inflation. This is to address fears that the merged entity may be able to increase its prices post-merger in the absence of close competition between the merger parties. The term of these commitments will be three years from the date of completion of the proposed acquisition.

For the structural commitment, SEEK agreed to divest, as a going concern, its ownership of the online recruitment aggregator site, jobs.com.sg, including the domain name **http://www.jobs.com.sg**. As part of the divestiture commitment, SEEK consented to find a purchaser for the sale of jobs.com.sg within six calendar months, failing which it will appoint one or more independent persons to sell jobs.com.sg at no minimum price. The divestiture was designed to preserve the competitive environment post-merger by allowing smaller job portals to compete more effectively with larger portals.

Following conclusion of the two market consultations and taking into consideration the feedback received, CCS was of the view that the behavioural and divestiture commitments would sufficiently address the competition concerns.

CCS fines ten freight forwarders for price-fixing

On 11 December 2014, the Competition Commission of Singapore ("**CCS**") issued an infringement decision against 11 freight forwarding companies and their Singapore subsidiaries/ affiliates for infringing section 34 of the Singapore Competition Act (Cap. 50B) ("**Competition Act**") by collectively fixing certain fees and surcharges, and exchanging price and customer information in relation to the provision of air freight forwarding services for shipments from Japan to Singapore.

The 11 parties are:

(a) Deutsche Post A.G.; DHL Global Forwarding Japan K.K.; DHL Global Forwarding Management (Asia Pacific) Pte. Ltd. and its subsidiary, DHL Global Forwarding (Singapore) Pte. Ltd.

(b) Hankyu Hanshin Express Co., Ltd. and its subsidiary, Hankyu Hanshin Express (Singapore) Pte. Ltd.

(c) "K" Line Logistics, Ltd. and its subsidiary, "K" Line Logistics (Singapore) Pte. Ltd.

(d) Kintetsu World Express, Inc. and its subsidiary, KWE-Kintetsu World Express (S) Pte. Ltd.

(e) MOL Logistics (Japan) Co., Ltd. and its subsidiary, MOL Logistics (Singapore) Pte. Ltd.

(f) Nippon Express Co., Ltd. and its subsidiary, Nippon Express (Singapore) Pte. Ltd.

(g) Nishi-Nippon Railroad Co., Ltd. and its subsidiary, NNR Global Logistics (S) Pte. Ltd.

(h) Nissin Corporation and its subsidiary, Nissin Transport (S) Pte. Ltd.

(i) Vantec Corporation and its former subsidiary, Vantec World Transport (S) Pte. Ltd.

(j) Yamato Holdings Co., Ltd. and its subsidiaries, Yamato Global Logistics Japan Co., Ltd. and Yamato Asia Pte. Ltd.

(k) Yusen Logistics Co., Ltd. and its subsidiary, Yusen Logistics (Singapore) Pte. Ltd.

DHL Global Forwarding escaped financial penalties as it had made a leniency application to CCS.

The anti-competitive agreements involved certain surcharges applied to shipments between Japan and Singapore. CCS found that discussions of these fees and surcharges among the parties took place in meetings of the Japan Aircargo Forwarders Association ("**JAFA**").

CCS found that the parties had exchanged their views on surcharges; decided collectively what action they would take; fixed the prices they would charge customers; and discussed the implementation of the charges, including how successful they were in collecting these fees and surcharges from customers.
The infringing conduct was carried out by both the Japan and related Singapore companies, acting as a single economic entity. As a result, both the Japan and related Singapore companies were found to be jointly and severally liable for the infringement.

Financial penalties amounting to a total of S$7,150,852 were imposed on ten out of the 11 freight forwarding companies, with DHL Global Forwarding qualifying for full immunity under CCS's leniency programme. Four others, namely Hankyu Hanshin, Kintetsu World Express, NNR and Vantec, received a discount for leniency.

In mitigation, several parties argued that they should receive a further reduction of the penalty on the account of their compliance programmes. However, CCS noted that their compliance programmes were only implemented after the investigation by the Japan Fair Trade Commission and, as such, did not qualify as a mitigating factor.

While the JAFA meetings took place over the period of November 2002 to November 2007, financial penalties were calculated from 1 January 2006 onwards, being the date that the section 34 prohibition took effect in Singapore.

This is the second infringement decision issued by CCS with an international dimension and arising from a leniency application, the first being the infringement decision against four Japanese bearings manufacturers and their Singapore subsidiaries for engaging in anti-competitive agreements and unlawful exchange of information in respect of the price and sale of ball and roller bearings sold to aftermarket customers in Singapore. Please click **here** for more details.

Global shipping alliance blocked by China's MOFCOM

In June 2014, the Chinese Ministry of Commerce ("**MOFCOM**") announced its decision to block the P3 alliance – a global shipping alliance between the three largest global shipping lines: Maersk Line, Mediterranean Shipping Company and CMA CGM. Amongst other things, the alliance would have authorised the parties to share vessels with one another and to enter into cooperative working arrangements on key shipping routes.

MOFCOM noted that the P3 alliance would have significantly enhanced the parties' market power by giving them a substantial 46.7% market share of the Asia to Europe container liner shipping route. Further, MOFCOM noted that the competitive environment on the Asia-Europe route would become highly concentrated and undergo a significant change in market structure. It also observed that the alliance would increase barriers to entry in the international container liner shipping service market. Ultimately, MOFCOM blocked the alliance on the basis that it had the effect of eliminating or restricting competition in the Asia-Europe container liner shipping service.

During the review period, MOFCOM entered into negotiations with the parties and considered several remedy proposals. However, MOFCOM ultimately found that these remedies were insufficient to address the anti-competitive concerns raised by the alliance.

MOFCOM's decision comes after the European Commission decided not to investigate the P3 alliance in early June 2014. The US Federal Maritime Commission ("**US FMC**") had also previously approved the alliance in March 2014.

Notably, this is only the second time that MOFCOM has prohibited a merger, the first being the proposed Coca-Cola/Huiyuan merger that was blocked in 2009.

Shortly after MOFCOM's rejection of the P3 alliance, Maersk Line and Mediterranean Shipping Company announced in July 2014 that it would be cooperating on a 10-year vessel sharing agreement on the Asia-Europe, transatlantic and transpacific routes.

In Singapore:

*Liner shipping agreements in Singapore fall under a block exemption issued by the Competition Commission of Singapore ("**CCS**") in 2006 (the effect of which was extended in 2010 until 31 December 2015). Subject to certain notification requirements, such agreements will generally not fall for consideration under the substantive provisions of the Singapore Competition Act (Cap. 50B). The continued application of the Block Exemption Order after 31 December 2015 is subject to an on-going study conducted by CCS.*

China's MOFCOM reviews 80 industries for potential anti-competitive practices

In June 2014, China's Ministry of Commerce ("**MOFCOM**") launched an industry-wide review of potential anti-competitive practices across 80 industries, including automobiles, pharmaceuticals and alcoholic beverages. According to a statement from the China Automobile Dealers Association, MOFCOM sent requests for information to several major trade associations in an anti-monopoly survey.

The enforcement of anti-monopoly law in China is shared by three regulators, namely, the National Development & Reform Commission ("**NDRC**"), the State Administration for Industry and Commerce ("**SAIC**") and MOFCOM, with NDRC responsible for enforcing the rules against price-related infringements, SAIC responsible for non-price related infringements and MOFCOM responsible for merger control.

As MOFCOM generally concerns itself with mergers and acquisitions and the regulation of concentrations of undertakings, the present industry-wide review is being led by MOFCOM's Market Order Department via MOFCOM's general powers of inquiry, rather than its Anti-Monopoly Bureau.

This review is part of a campaign that was initiated in December 2013 aimed at tackling practices which hinder free market competition, for example, the setting up of protectionist policies against companies from other Chinese cities and provinces and the granting of unfair subsidies. However, an official spokesperson from MOFCOM's Market Order Department has clarified that the anti-monopoly survey is not targeted at any specific industry in particular but is intended to crackdown on anti-competitive behaviour in all sectors.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") may issue formal notices to businesses and other organisations to provide specified documents or information to CCS. Section 61A notices are issued if CCS has reasonable grounds for suspecting that a feature, or combination of features, of a market in Singapore prevents, restricts or distorts competition, whilst section 63 notices are issued if CCS has reasonable grounds for suspecting an infringement of the Competition Act* (Cap. 50B) *by the undertaking(s).*

Goldman Sachs appeals single economic entity finding by the European Commission

In April this year, the European Commission ("**EC**") handed down fines totalling €302m (S$495m) on 11 producers of underground and submarine high voltage power cables used to connect generation capacity to the electricity grid or to interconnect power grids in different countries.

According to the EC, the cable producers infringed Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") by operating a cartel for almost a decade from 1999, in which the cartel participants shared markets and allocated customers amongst themselves on an almost worldwide scale. The cable producers included most of the world´s largest high voltage power cable producers, namely ABB, Nexans, Prysmian (previously Pirelli), J-Power Systems (previously Sumitomo Electric and Hitachi Metals), VISCAS (previously Furukawa Electric and Fujikura), EXSYM (previously SWCC Showa and Mitsubishi Cable), Brugg, NKT, Silec (previously Safran), LS Cable and Taihan.

What is most significant in this case is the EC's finding that the investment company Goldman Sachs, the former owner of Prysmian, was also liable for Prysmian's competition law infringements as a parent company which exercised decisive influence over its subsidiary (Prysmian). The EC found Goldman Sachs jointly and severally liable for a €37.3m (S$62m) portion of the fine imposed on Prysmian. Former owner Pirelli was held jointly and severally liable with Prysmian for a further penalty of €67.3m (S$110m). According to reports, Goldman Sachs bought Prysmian from Pirelli in 2005 and floated the company in 2007, leaving Goldman Sachs with a minority holding in Prysmian. By 2010, Goldman Sachs had sold out its stake in Prysmian.

Where a parent owns 100% of the capital of the subsidiary, there is a rebuttable presumption of decisive influence. This rebuttable presumption under European competition law forms the basis of the EC's finding of joint liability on Goldman Sachs' part for Prysmian's competition law infringements.

The appeal by Goldman Sachs will be closely watched as it will examine the issue of whether a financial investor parent can be made jointly liable for competition law infringements by companies in their asset portfolio or whether and how financial investors may rebut the presumption of decisive influence in cases where the investor holds 100% of the capital of the subsidiary.

In Singapore:

In Singapore, liability may also be attributed to a parent company exercising decisive influence over its subsidiary which infringes the provision prohibiting anti-competitive agreements in the Competition Act (Cap. 50B)*. See, for example, CCS case number 700/002/11 Infringement of the Section 34 Prohibition in relation to the Supply of Ball and Roller Bearings.*

Similarly, in CCS case number 400/002/12 Decision on the Notification by Qantas Airways and Jetstar Airways, CCS stated that there is a presumption that a parent company would have total control of, and, consequently, decisive influence over the affairs of a wholly-owned subsidiary.

However, whether a private equity firm may be held liable for the competition law infringements of a company in its asset portfolio in Singapore is yet to be tested.

UK's Lloyds Banking Group agrees to pay US$83m criminal penalty for LIBOR

On 28 July 2014, Lloyds Banking Group plc ("**Lloyds**") reached a deferred prosecution agreement with the Department of Justice ("**DoJ**") to pay a US$83m (S$108m) penalty for the manipulation of submissions for the London Interbank Offered Rate ("**LIBOR**") between May 2006 and June 2009.

The LIBOR is an average interest rate, calculated based upon submissions from contributing banks and reflecting the rates those banks believe they would be charged if borrowing from other banks. LIBOR serves as the primary benchmark for short-term interest rates globally and is used as a reference rate for many interest rate contracts, mortgages, credit cards, student loans and other consumer lending products.

Lloyds was charged with wire fraud for the manipulation of the Dollar LIBOR, Yen LIBOR and Pound Sterling LIBOR. It was alleged that Lloyd's traders submitted LIBOR contributions intended to benefit their own trading positions or the trading positions of others. It was further alleged that this manipulation, along with that of other banks, allowed Lloyds' traders to increase their profits.

In addition to this fine by the DoJ, Lloyds also has to pay US$105m (S$136m) to the Commodity Futures Trading Commission and US$178m (S$231m) to the UK Financial Conduct Authority for criminal and regulatory penalties arising out of the same conduct. This brings the total amount of fines to be paid by Lloyds to approximately US$370m (S$480m).

Lloyds is the fifth major financial institution that has admitted to LIBOR manipulation and paid a criminal penalty. On a wider scale, the LIBOR investigations involve a multi-jurisdictional probe by competition authorities in the EU, Canada, Brazil, Japan and Switzerland into several major international banks which have been allegedly involved in the rigging of the LIBOR. For more background information on the LIBOR cartel investigations, please see our quarterly update **here**.

In Singapore:

*An infringement of sections 34 (anti-competitive agreements), 47 (abuse of dominance) or 54 (anti-competitive mergers) prohibitions in the Competition Act (Cap. 50B) ("**Act**") gives rise to civil penalties payable to the Competition Commission of Singapore ("**CCS**") but does not give rise to any criminal offences on its own. Criminal offences only arise under the Act in respect of obstruction offences, committed during the course of an investigation carried out by CCS.*

*On 29 July 2014, the Monetary Authority of Singapore ("**MAS**") proposed a new regulatory framework to deter and penalise attempts to manipulate any financial benchmark. Under the proposed framework, the manipulation of any financial benchmarks in Singapore will be made liable to criminal and civil sanctions under the Securities and Futures Act. In addition, administrators and submitters of key financial benchmarks designated by MAS, eg the Singapore Interbank Offered Rate ("**SIBOR**") and Swap Offered Rates ("**SOR**"), will be subject to regulation, including licensing requirements. The public consultation for comments on these changes closed on 29 August 2014.*

These amendments follow the conclusion of MAS's investigations in June 2013 into the alleged rigging of the SIBOR, SOR and Forex spot benchmarks for non-deliverable forwards, where 20 banks were found to have deficiencies in the governance, risk management, internal controls and surveillance systems for their involvement in benchmark submissions and 133 traders were found to have engaged in several attempts to inappropriately influence the benchmarks from 2007 to 2011. MAS ultimately concluded that no criminal offence under Singapore law appeared to have been committed, but censured those banks and directed them to adopt measures to address their deficiencies and set aside additional statutory reserves with MAS at zero interest for a period of one year. As of November 2014, MAS has since returned the statutory reserves, totalling S$10bn, to the banks.

CMA clears medical equipment manufacturing assets acquisition on failing firm argument

In August 2014, the UK's Competition and Markets Authority ("**CMA**") published its final report, clearing Alliance Medical Group Limited's ("**Alliance**") acquisition of IBA Molecular UK Limited's ("**IBA Molecular**") assets in the UK that were used to produce 18F-Fluorodeoxyglucose ("**FDG-18**"), a radioactive tracer used in PET-CT scans ("**IBA's PET Business**"). The acquisition was completed earlier between the parties on 16 September 2013.

In determining if the acquisition would lead to a substantial lessening of competition, CMA considered the exiting firm scenario as its counterfactual. As part of this inquiry, CMA considered whether the firm would have exited (through failure or otherwise), and, if so:

(a) whether there would have been an alternative purchaser for the firm or its assets to the acquirer under consideration; and

(b) what would have happened to the sales of the firm in the event of its exit.

Under this assessment, CMA noted that IBA's PET Business "had been consistently loss-making since it started producing FDG-18 in 2007 and that its financial losses would have significantly worsened in 2013 as a result of the loss of a substantial contract." Accordingly, CMA was of the view that IBA Molecular's majority shareholder since early 2012, SK Capital, would have directed IBA's PET Business to exit the market. Further, CMA noted that it was unlikely that an alternative purchaser would have purchased IBA's PET Business assets due to challenges involved in improving business performance, amongst others. Finally, CMA noted that while the majority of IBA's PET Business assets would have been redistributed between two alternative suppliers in the event of its exit, CMA could not conclude who the majority of the assets would have gone to.

Comparing the competitive process following the transaction with the competitive process under the counterfactual, CMA concluded that the transaction was not expected to have an adverse effect on the competitive process. On this basis, CMA cleared Alliance's acquisition of IBA's PET Business assets.

The transaction leaves two commercial suppliers of FDG-18 in the UK – Alliance and PETNET Solutions Inc. Several hospitals and research institutions in the UK also have the capacity to produce FDG-18 for their own use.

In Singapore:

*In Singapore, mergers and acquisitions that lead to a substantial lessening of competition within any market in Singapore for goods or services are an infringement of section 54 of Singapore's Competition Act (Cap. 50B). However, the failing firm argument may be used as a defence against a possible finding of substantial lessening of competition. To qualify for the failing firm defence, a party has to show that (a) the firm is in such a dire situation that without the merger/acquisition, the firm and its assets would exit the market in the near future; (b) the firm must be unable to meet its financial obligations in the near future and there must be no serious prospect of re-organising the business; and (c) there is no less anti-competitive alternative to the merger/acquisition (eg there is no possibility that a realistic buyer would acquire the failing firm and use its assets to produce a more competitive outcome). The Competition Commission of Singapore ("**CCS**") considered the failing firm defence in its assessment of Singapore Airlines Limited's proposed acquisition of Tiger Airways Holdings Limited ("**Tigerair Holdings**"). CCS, in clearing the acquisition, determined that "on balance …the Proposed Transaction would be less detrimental to competition in Singapore as compared to the scenario where Tigerair Holdings exits its operations".*

MyCC accepts undertakings from shipping companies

On 1 October 2014, the Malaysian Competition Commission ("**MyCC**") accepted undertakings offered by Giga Shipping Sdn Bhd ("**Giga**") and Nexus Mega Carriers Sdn Bhd ("**Nexus**") to address MyCC's competition concerns in respect of their alleged infringement of sections 4 and 10 (which prohibit anti-competitive agreements and abuses of dominance, respectively) of the Malaysian Competition Act 2010 ("**CA**"). This is the first time MyCC has accepted commitments in an abuse of dominance investigation.

Both companies are major providers of logistic and shipment services by sea for motor vehicles from ports in the Malaysian Peninsular to ports in Sabah, Sarawak and Labuan. Since 2010, Giga and Nexus entered into agreements with vehicle manufacturers, distributors and retailers containing clauses appointing them as exclusive service providers for up to three years, in consideration for lower prices based on the volume of business generated by such agreements.

While maintaining that these agreements did not infringe the CA, both companies have undertaken to cease to include any such exclusivity clause(s) in their agreements with existing or prospective customers. In addition, both companies have committed to the continued implementation of their respective competition law compliance programmes for as long as the undertakings are in effect.

In exchange for the undertakings given by both companies, MyCC has agreed to conclude its investigations on the matter and refrain from commencing proceedings against both companies.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") does not currently have a formalised procedure in place for parties under investigation for section 34 and section 47 infringements to offer commitments in lieu of a decision.*

*Notwithstanding, CCS has previously demonstrated its willingness to consider commitments offered by investigated parties. In 2013, CCS ceased investigations into Coca-Cola Singapore Beverages Pte. Ltd.'s ("**CCSB**") supply agreements with its on-premise retailers, following CCSB's voluntary amendment of its supply agreements to remove potentially anti-competitive provisions and its undertaking to refrain from imposing exclusivity restrictions or conditions on its on-premise retailers.*

ABUSE OF DOMINANCE

Criticism of Google's commitments to the EC for alleged abuse of dominance

In November 2010, the European Commission ("**EC**") launched a formal investigation into Google, Inc., ("**Google**") in response to complaints that Google was allegedly abusing its dominance in the online search engine market and had breached Article 102 of the Treaty of the Functioning of the

European Union ("**TFEU**"). In particular, the EC raised four competition concerns:

(a) the prominent display of Google's own specialised web search services as compared to competing specialised web search services;

(b) the usage by Google without consent of original content from third party websites in its own specialised web search services;

(c) the signing of agreements that oblige third party websites to obtain all or most of their online search advertisements from Google; and

(d) the entering into contractual restrictions on the transferability of online search advertising campaigns to rival search advertising platforms and the management of such campaigns across Google's Adwords and rival search advertising platforms.

The EC considered these four practices to be harmful to the consumers by limiting their choices and stifling innovation in the fields of specialised search services and online search advertising.

In March 2013, the EC reached the preliminary conclusion that Google was dominant in both web search and search advertising in the European Economic Area ("**EEA**"). In response, Google proposed detailed commitments to address the four competition concerns on 3 April 2013. However, after the EC sought feedback from stakeholders on these commitments through a market test launched on 25 April 2013, it informed Google that additional improvements to its commitments were required to adequately address the EC's concerns. Google had to revise its commitments twice before its third proposal was finally accepted by the EC on 5 February 2014.

Reactions to the EC's acceptance of Google's commitments have been strong. Two members of the European Parliament have called on the EC to reconsider their decision as Google's commitments were arguably not in the best interest of consumers. Further, it was argued that the EC should have taken the complainants' concerns more seriously and have allowed for there to be a real exchange of views instead of allowing the commitments to become a "false front". Antitrust specialists too have voiced their concerns over Google's commitments, stating that the scope of the proposal is too small to tackle the key problems the complaints brought up.

In contrast, Commissioner Joaquín Almunia has said that he is satisfied with the commitments Google has proposed and that they are capable of addressing the EC's competition concerns. Further, the concessions extracted from Google are far-reaching and have the clear potential to restore a level-playing field in the relevant markets. The commitments, which will last for a term of five years and three months and apply only in the EEA, will include, *inter alia*, the following:

(a) Google will guarantee that whenever it promotes its own specialised search services on its page, the services of rivals will also be displayed in a comparable way, e.g. when Google promotes one of its own specialised search services, there will be three rival services also displayed prominently on the page, in a way that is clearly visible to users;

(b) Google will give content providers an extensive opt-out from the use of their content in Google's specialised search services if they so wish, without fear of retaliation (previously, Google was able to copy content from rivals without restriction);

(c) Google will remove exclusivity requirements in its agreements with publishers for the provision of search advertisements;

(d) Google will remove restrictions on advertisers being able to run their search advertising platforms across Google's and competing search advertising platforms; and

(e) Google's compliance with the package of commitments will be supervised by an independent monitoring trustee who will play an active role in advising the EC on the implementation of these commitments.

Another criticism is that the entire Google commitments process was drawn out for too long a period of time, with the initial complaints filed as early as 2009 and the EC's acceptance of the commitments taking place only in 2014. This is in spite of the fact that the settlement procedure was supposed to be a quick alternative to the long and costly process of going before the EC.

Article 9 of the EU's Antitrust Regulation (Regulation 1/2003) allows the EC to end antitrust proceedings by making commitments offered by a company legally binding. Such a decision does not conclude on whether antitrust rules have been infringed but legally binds the company to respect the commitments. If the company breaches these commitments, the EC can impose a fine of up to 10% of the company's annual worldwide turnover, without having to find an infringement of Articles 101 or 102 of the TFEU.

Separately, the US Federal Trade Commission ("**FTC**") has also investigated the way in which Google displayed links to its specialised search services in its web search results and concluded that there was no competition issue. This was due to the differences in the factual and legal environment in the US and EU. In the US, Bing and Yahoo represent a substantial alternative to Google, with a combined market share of about 30%. In contrast, Google has held market shares well above 90% in most European countries for a number of years. Websites therefore rely on more traffic from Google in Europe than in the US. Given the resulting commercial significance of Google for specialised search services, the way Google presents its web search results therefore has a much more significant impact on users and on the competitive process in Europe than it does in the US.

In recent developments, the European Parliament passed a non-binding vote on 27 November 2014 urging the EC to consider "proposals aimed at unbundling search engines from other commercial services", sparking concerns that this could potentially force a break-up of Google – in particular the separation of Google's main search engine services from its other commercial businesses.

While not explicitly making reference to Google, the resolution, which was part of broader proposals on the digital economy, emphasised the importance of non-discriminatory online search, declaring that "indexation, evaluation, presentation and ranking by search engines must be unbiased and transparent". To this end, the EC was called upon to initiate further investigations into search engine practices and to enforce EU rules decisively "to prevent any abuse in the marketing of interlinked services by operators of search engines".

Although the resolution does not carry legal weight, the concern is that it will exert political pressure on the EC to adopt tougher antitrust action against Google. This further underscores a wider dialogue regarding the appropriate level of involvement for the European Parliament in competition cases. In particular, several members of the United States Congress had previously written to European Members of Parliament urging against the initiative.

In Singapore:

*At present, there is no formal settlement procedure available for parties under investigation in Singapore. However, this is currently being reviewed by the Competition Commission ("**CCS**") of Singapore. Notwithstanding, CCS has accepted voluntary undertakings by parties (notably Coca Cola), in lieu of undertaking further investigations.*

FEATURE ARTICLE

INTEL CASE CLARIFIES POSITION ON ANTI-COMPETITIVE REBATES... OR DOES IT?

On 12 June 2014, the European General Court ("**GC**") dismissed the appeal of Intel Corporation ("**Intel**") against an infringement finding by the European Commission ("**EC**"), which had levied a penalty of €1.06bn (S$1.6bn), against the chip-making giant. The GC's decision is seen as a landmark (albeit controversial) case with regard to abuse of dominance, and more particularly with regard to how rebate and discount structures offered by dominant companies ought to be assessed.

The decision of the EC was originally handed down in 2009, and took issue with two practices Intel engaged in.

First, the EC alleged that Intel gave wholly or partially hidden rebates to certain computer manufacturers (such as Dell and Lenovo) on the condition that they bought all, or almost all, of a particular type of computer processing unit ("**CPU**") from Intel. Intel also allegedly made direct payments to one personal computer manufacturer, on condition that it only stocked this particular type of CPU.

Secondly, the EC alleged that Intel made direct payments to other computer manufacturers to stop or delay the launch of specific products containing Advanced Micro Devices' ("**AMD**") rival CPU, and to limit the sales channels available to these products.

In handing down its judgment, the GC made a distinction between three types of rebates:

(a) quantity rebates *ie* those which are linked to the volume of purchases made from the dominant firm (and based on efficiencies);

(b) rebates conditional on the customer purchasing "all or most" of its purchases of the relevant product from the dominant firm; and

(c) "other" rebate systems where the rebate is not directly linked to a condition of exclusive or near-exclusive supply.

The GC determined that the first type of rebates were generally not problematic, the second type were "by their very nature" problematic (with no further effects-based analysis required), and the third type needed to be assessed on a case-by-case basis. In relation to Intel's rebates, these were classified as "type 2", and thus found to be anti-competitive.

The GC also stated in relation to the case that "exclusivity rebates granted by an undertaking in a dominant position are, by their very nature, capable of restricting competition and foreclosing competitors from the market. It is thus not necessary to show that they are capable of restricting competition on a case by case basis in the light of the facts of the individual case".

The decision of the GC has been seen by some commentators as a backward step for the implementation of an "effects-based" approach to competition law analysis. An effects-based approach is one whereby the actual effects of conduct on the market in question should be brought to the fore, rather than simply condemning a practice based simply on the type of conduct in question (which is known as a "form-based" assessment).

The case has now been appealed to the European Court of Justice, and as such will likely not be concluded for many years. The appeal also challenges a number of procedural elements regarding the treatment of evidence, as well as substantive competition law questions.

In Singapore:

*The Competition Commission of Singapore's ("**CCS**") Guidelines on the section 47 Prohibition ("**Guidelines**") outline that, in certain circumstances, discounts or rebates could give rise to competition issues. In particular, the Guidelines state that CCS will consider a range of factors in assessing such discounts, including whether the discount simply reflects competition to secure orders from valued buyers. The Guidelines continue to state that a key question is whether the discount scheme will have an exclusionary effect on competition, which might arise where the discount arrangement amounts to a "fidelity discount" or where it involves the tying of other products. The Guidelines also state that it is necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.*

Ultimately, there have been no cases in Singapore to date relating to discount structures being abusive, and accordingly there is no further guidance on the precise parameters of permissible rebate arrangements.

The Drew & Napier Competition Law Team

For more information on the Competition Law Practice Group, please click **here**.

Cavinder Bull, SC • Director (Dispute Resolution)

Cavinder handles complex litigation spanning a wide area of corporate and commercial matters. Cavinder has successfully defended companies being investigated for abusing a dominant position in Singapore, and filed the first appeal to the Competition Appeal Board in respect of a CCS infringement decision. Cavinder previously practised antitrust law in New York, working on cases like the Microsoft antitrust litigation and obtaining US Department of Justice's approval for the merger between Grand Metropolitan and Guinness, one of the world's largest mergers then. Cavinder graduated from Oxford University with First Class Honours in Law. He clerked for the Chief Justice of Singapore as a Justices' Law Clerk. Cavinder also has a Masters in Law from Harvard Law School which he attended on a Lee Kuan Yew Scholarship. Cavinder is consistently recognised as one of the leading litigators in Singapore. *Chambers Asia 2014 lists Cavinder as a leading individual, "Excellent when it comes to litigation matters: very sharp, very reliable and very reassuring"*.

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Chong Kin played a key role in the development of competition regulation in the telecommunications, media and postal industries in Singapore, before moving on to undertake general competition work when the Competition Act was enacted in 2005. His diverse client portfolio spans the Competition Commission of Singapore, the sectoral competition regulators, and private sector companies. He undertakes a whole range of competition law matters including cartel investigations, merger filing, decisions and guidance, complex market studies, drafting competition legislation and enforcement work. Chong Kin has been widely acknowledged as the leading competition law expert in Singapore by major ranking publications. *Chambers Asia-Pacific 2014* ranks Chong Kin as a Band 1 Competition/Antitrust lawyer. *Asia Pacific Legal 500: 2015* recognises him as a competition and regulatory specialist. *AsiaLaw Profiles 2014 recognises* Chong Kin for his expertise in Competition Law. *The International Who's Who of Competition Lawyers 2008 – 2014, Regulatory Communications Lawyers 2008 – 2013* and *Telecoms 2014* all recognise Chong Kin for his strength in regulatory and competition advisory work.

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Scott is the Deputy Head of Drew & Napier's Competition and Regulatory Practice Group. Scott has extensive experience in all areas of competition law, including anti-competitive agreements, abuse of dominance, and mergers and acquisitions. Scott recently assisted SISTIC.com Pte. Ltd. in its appeal before the Competition Appeal Board in relation to the first and only abuse of dominance infringement finding made to date by CCS, and secured a 20% reduction in the financial penalty imposed. Scott was previously a senior investigator with the New Zealand Commerce Commission and was involved in leading investigations and analysing competition law and economic issues, including leading a number of high profile investigations into mergers and acquisitions. Scott was also involved in numerous investigations involving electricity matters. Scott was a key member of the team commissioned by the ASEAN Secretariat to conduct a review of competition law and policy in the ASEAN region and to propose best practices for the implementation of competition law in ASEAN.

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