CCS Issues Infringement Decision against Employment Agencies

On 30 September 2011, the Competition Commission of Singapore (“CCS”) released an infringement decision against 16 employment agencies in Singapore for breaching section 34 of the Competition Act (“Act”). Section 34 of the Act prohibits, among other things, price fixing activities.

The 16 agencies were fined a total of S$152,563, with fines for individual agencies ranging from S$5,000 to over S$42,000. The agencies were found to have participated in a meeting to restrict competition by fixing the monthly salaries of new Indonesian foreign domestic workers (“FDW”s) in Singapore.

The CCS commenced investigations on 20 January 2011, a day after reports came out in the Today newspaper and Channel NewsAsia (“CNA”) that 17 major employment agencies in Singapore were going to increase the monthly salaries for new Indonesian FDWs to S$450. On 21 January 2011, the CCS conducted simultaneous inspections at the premises of some of the agencies, and over the next week, conducted interviews with key personnel from the 16 agencies.

In its media report, the CCS stated that it “does not take a view on what should be the appropriate level of monthly salaries for new Indonesian FDWs...”
What is prohibited under the Act is the attempt by competitors to collectively fix the monthly salaries...” The infringement decision was preceded by a proposed infringement decision (“PID”) released by the CCS on 13 May 2011. However, neither the PID nor the level of fines, were made public at that time.

REGULATORY UPDATES

The 6th East Asia Conference on Competition Law and Policy in Singapore

The 6th East Asia Conference on Competition Law and Policy, jointly organised by the CCS and the Asian Development Bank (“ADB”) was held on 16 September 2011.

The conference was attended by government officials, business leaders, competition professionals and academics from various East-Asian jurisdictions, including China, Japan, South Korea, Vietnam, Taiwan, Malaysia, the Philippines, Mongolia and host, Singapore.

Topics discussed ranged from the growth and direction of competition laws and policies in the mature competition law jurisdictions in East-Asia, e.g., South Korea’s experience in enforcing competition laws and the Japanese authority’s view on competition law policies in Japan, to the experiences of younger jurisdictions such as Vietnam, Singapore and China, which have implemented generic competition laws in the last decade (in 2005, 2006 and 2008 respectively), to, finally, the jurisdictions in which competition laws will come into force/be enforced in the near future (e.g. Malaysia and the Philippines).

The conference helped shed light on key topics such as:

(a) the cooperation and allocation of cases between China’s three competition/ antitrust enforcement agencies: the State Administration for Industry and Commerce (“SAIC”) which is responsible for overseeing non-price-related infringements, the National Development and Reform Commission (“NRDC”) which is tasked with regulating price-related infringements and the Ministry of Commerce (“MofCom”) which oversees merger regulation, under China’s Anti-Monopoly Law;

(b) the Philippines’ steps towards establishing a new generic competition law regime, including the recent designation of a new competition authority in the Philippines and discussions on establishing a system to address the endemic exploitative practices of monopolies; and

(c) Malaysia’s new competition law framework. Interestingly, the Chief Executive Officer of Malaysia’s newly established Malaysian Competition Commission (“MyCC”) indicated that the MyCC has already started receiving complaints, even before Malaysia’s Competition Act comes into force on 1 January 2012.

Drew and Napier’s Competition Law Practice Group co-head, Mr Lim Chong Kin, was invited to give a presentation on “Competition Law in New Jurisdictions, Trends and Challenges from a Business Perspective” at the conference. In his presentation, Mr Lim spoke on challenges faced by businesses when seeking to comply in jurisdictions with newly introduced competition law. He also spoke in favour of greater harmonisation across regional trading blocs such as ASEAN and East Asia, as a way to ensure that businesses can continue to operate with some measure of certainty on a regional basis.

US Antitrust Agencies enter into Cooperation Memorandum of Understanding (“MOU”) with Chinese Counterparts

On 27 July 2011, the United States (“US”) Department of Justice’s (“DoJ”) Antitrust Division and the US Federal Trade Commission (“FTC”) signed an Antitrust Cooperation MOU with three Chinese antitrust agencies – MofCom, NRDC, and SAIC, establishing a framework for enhanced cooperation amongst the agencies.

The MOU between the US and Chinese agencies provides for periodic, high-level consultations among all five agencies as well as separate
communications between individual agencies on specific avenues for cooperation, including, among other things:

(a) keeping each other informed of significant competition policy and sharing enforcement developments and experiences in their respective jurisdictions;
(b) cooperating on training and enhancing each agency’s capabilities;
(c) providing comments on proposed changes to competition laws, regulations, rules and guidelines;
(d) exchanging experiences in raising companies’, other government agencies’ and the public’s awareness of competition policy and law.

Crucially, the MOU acknowledges that insofar as information communicated to the agencies is concerned, the recipient agency should, to the extent consistent with its laws, maintain the confidentiality of any such information communicated to it in confidence.

In Singapore:

The CCS is empowered, under the Act, to enter into cooperation agreements with foreign competition authorities. The Act also deals with the issue of the communication of information between the CCS and the foreign authorities. Specifically, with the consent of the Minister of Trade and Industry, the CCS may enter into arrangements with any foreign competition body whereby each party to the arrangement may furnish to the other information in its possession if the information is required by that other party for the purpose of performance by it of any of its functions.

China’s New Merger Guidelines

On 5 September 2011, China’s new guidelines on the Assessment of the Competitive Effects of the Concentration of Business Operators ("Merger Guidelines") took effect. Released by MoFCm, the agency in charge of merger regulation under the Anti-Monopoly Law of China, the Merger Guidelines clarify the approach MoFCm would take in its assessment of concentrations (mergers).

According to the Merger Guidelines, MoFCm would adopt a two-tier approach in evaluating concentrations. First, MoFCm would evaluate whether the concentration could unilaterally exclude or restrict competition. Second, where the companies operate in different markets, MoFCm would focus on whether the concentration would restrict competition in surrounding markets.

In assessing whether the concentration could restrict or exclude competition, MoFCm will take the following factors (among others) into consideration:

(a) the market share of the merging business operators in the relevant market and competitive state of the market;
(b) the substitutability of the products and/or services offered by the merging entities;
(c) production capacities of the remaining competitors in the relevant market and the degree of substitutability of products and/or services between them and the merging entities;
(d) the ability of the merging entities to control the downstream sales and/or the upstream procurement markets;
(e) the ability of customers of the merging entities to switch to alternative suppliers;
(f) the financial strength and technical capabilities of the merging entities;
(g) the purchasing power of downstream customers; and
(h) the possibility, timeliness and adequacy of entry into the relevant market.

When assessing market concentration, MoFCm has indicated that it will use the Herfindahl-Hirschman Index ("HHI") and the Concentration Ratio Index ("CRn") as methods of calculating market concentration levels. The HHI equals the sum of squared market shares of each individual business operator in the relevant market and the industry CRn is the combined market share of the n-largest business operators in the relevant market.
Significantly, the Merger Guidelines have also set out positive factors or “defences” which MofCom would take into consideration when assessing a merger. These include public interest, economic efficiency, the failing firm defence and the presence of countervailing buying power.

In Singapore:

The CCS has published Guidelines on the Substantive Assessment of Mergers (“Merger Assessment Guidelines”) which, similarly, provide the CCS’ approach to merger assessment in Singapore. The considerations within the CCS’ Merger Assessment Guidelines are relatively similar to those in MofCom’s Merger Guidelines, reflecting the increasing harmonisation of competition principles among competition authorities around the world.

Duma Adopts Third Amendment Package to Russian Antitrust Law

On 9 September 2011, the State Duma of the Russian Federation approved the “third anti-monopoly package” – the amendments to its antitrust laws that govern, among other things, horizontal conduct and mergers between foreign companies.

The “third anti-monopoly package” increases the general pre-filing notification thresholds for mergers from three to seven billion Russian roubles (from S$123 million to S$287 million). Also, acquisitions by a foreign company that has supplied goods, services or works to Russia need only be notified to the Federal Anti-monopoly Service (“FAS”) if they exceed 1 billion Russian roubles (S$41 million). In addition, agreements between financial organisations will no longer have to be notified to the FAS.

The amendments also clarify other aspects of competition law in Russia. In addition to giving clearer definitions of what constitutes cartel behaviour and the types of coordinated economic activities that are prohibited, the amendments also reduce the list of per se violations, to comprise only horizontal agreements (cartels).

Under the amendments, cartels are defined as agreements between competitors which lead or may lead to the:
(a) setting or maintaining of prices at a certain level;
(b) manipulation of prices during the bidding process;
(c) division of a market based on territorial criteria, sale/purchase volumes, or the assortment of available buyers/sellers;
(d) reduction/termination of the production of certain goods; and
(e) refusal to deal with certain buyers/sellers.

The amendments also provide for consideration of mitigating and aggravating circumstances of legal entities for violating the anti-monopoly law.

The amendments have been put in place to increase the efficiency of competition regulations and improve the quality of the FAS’ functions.

In Singapore:

The CCS does not make a distinction between mergers entered into by a foreign or local company. Merger filings are voluntary, and will only give rise to concerns if they have the effect of substantially lessening competition in a market in Singapore. To assist the process of self-assessment, the CCS has also set out certain market share and concentration thresholds, beyond which a merger will likely be considered by the CCS to give rise to competition concerns.

INDUSTRY NEWS

Anti-Competitive Agreements

US DoJ Investigating US$4.5 Billion Purchase of Nortel Patents

The US DoJ’s antitrust division is reportedly investigating the rationale behind a far-higher-than-expected bid price paid by a patent bidding
consortium, Rockstar Bidco, for thousands of patents from telecom maker Nortel Networks Corporation.

The members of Rockstar Bidco, a consortium of six technology companies including Apple, Microsoft and Research in Motion (Blackberry), control three of the four largest wireless operating systems in the US. The other, Android, is controlled by Google.

Google made a bid of US$900 million (S$1.145 billion) before being outbid by Rockstar Bidco, which paid US$4.5 billion (S$5.7 billion) for the patents, an amount that stunned industry observers and raised concerns that the patents could be misused to stifle rivals or demand high-tech ransom payments.

According to the Wall Street Journal, the more than 6000 patents include rare wireless technology patents such as new Long Term Evolution, and fourth-generation wireless networks, which attracted particular interest from mobile telephone and computing companies.

In particular, the US DoJ is reportedly investigating the possibility that the consortium colluded to unfairly stifle the growth of the Android system. Such a conspiracy could constitute a per se violation of section 1 of the Sherman Act.

The division of the patents within the consortium is currently unknown. What the consortium plans to do with the patents is also unknown.

**In Singapore:**

Generally, joint purchasing can be pro-competitive for buyers, and ultimately consumers, if it leads to economies of scale and cost savings. However if joint purchasing is used by buyers with market power to fix prices, or limit competition in the market (for example, by refusing to deal with certain sellers), such conduct could infringe section 34 of the Act. This principle would similarly apply to the procurement of intellectual property ("IP") rights. More information can be found in the CCS' Guidelines on the section 34 prohibition, and the CCS' Guidelines on the Treatment of Intellectual Property Rights.

**Tesco Defends against Dairy Fines**

On 10 August 2011, Supermarket chain Tesco announced that it would fight a £10 million (approximately S$22 million) fine imposed on it by the United Kingdom ("UK") Office of Fair Trading ("OFT") for its alleged role in a 2002 and 2003 dairy price-fixing scandal.

The OFT began investigating claims that supermarkets in the UK engaged in price-fixing of milk and cheese in 2002 and 2003 after it was alerted by Arla, a Swedish supermarket. According to the OFT, it had identified three instances of price-fixing of dairy products involving Arla, Asda, Dairy Crest, McLelland, Safeway, Sainsbury's, The Cheese Company, Wiseman, and Tesco. Not all the companies were involved in each of the infringements. This coordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors — so called A-B-C information exchanges. The OFT had fined the four UK supermarkets and five dairy companies involved nearly £50 million (approximately S$110 million) for the infringements.

Tesco, denying its involvement in the price-fixing saga, has made statements to the British press stating that it will defend its position. Besides Tesco, all the other companies have admitted to the infringements. They have received lower fines for agreeing to an early resolution while Arla has been given total immunity from fines for being the first to whistle-blow on the cartel.

**Economics 101:**

Indirect information exchanges, or “A-B-C” information exchanges, are arrangements between parties to exchange information via a third party. In such situations, the exchange of information is used to facilitate a pre-existing cartel arrangement.

For example, a retailer may “signal” a move to increase prices to another retailer by informing their common distributor of its anticipated price increase, which is then conveyed to the other retailer by the distributor.
Other methods of “signalling” can include the publishing of prices on a common third party platform, such as a trade industry webpage, or the provision of sensitive commercial information to a data collection agency, which subsequently disseminates the specific and unaggregated information to competitors of the entity providing such information.

ACCC Proposes Authorisation for Qantas and American Airlines Alliance

On 22 August 2011, the Australian Competition and Consumer Commission ("ACCC") issued a draft decision proposing to grant authorisation for a Joint Business Agreement ("JBA") between Qantas and American Airlines. The JBA permits the airlines to coordinate their sales and marketing operations on routes between Australia, New Zealand and the US ("Trans-Pacific routes"). Qantas and American Airlines do not currently compete directly on any routes, but have code sharing arrangements (which allow them to sell seats on one another’s flights) for 54 destinations in the Americas.

The ACCC was of the view that the JBA would not lead to anti-competitive effects, but would instead be likely to lead to new and enhanced products and services, including improved schedules and connectivity, lower fares and efficiency savings.

The authorisation from the ACCC will last for five years, after which the airlines will have to apply for a new authorisation if they intend to continue the arrangement. Authorisation provides immunity from court action for conduct that might otherwise raise concerns under the competition provisions of the Australian Competition and Consumer Act 2010.

Previously, the ACCC had approved a number of similar agreements between airlines in the past, including Virgin Australia and Delta Airlines in 2009, Qantas and British Airways in 2010, and Virgin Blue and Etihad Airways earlier this year. However, the regulator has rejected some partnerships where the carriers were significant competitors on key routes. In 2009, the ACCC did not grant authorisation for a JBA between Air New Zealand and Air Canada as they were two out of the four main carriers plying the route between Australia and Canada.

Broadly, the ACCC may grant an authorisation when it is satisfied that the public benefit from the conduct outweighs any public detriment. However, scope for further ventures will depend on existing alliances and whether there is current competition on the routes in question.

The ACCC’s clearance for the alliance will pave the way for American Airlines’ first foray into the Trans-Pacific routes after its exit more than two decades ago. Qantas, which holds an estimated 40 percent of the Trans-Pacific market, also said that it will pursue plans to hook-up with Malaysia Airlines and AirAsia, currently Asia’s leading budget carrier.

The ACCC is seeking further submissions on its determination before making a final decision.

In Singapore:

Closer to home, Virgin Australia and Singapore Airlines are seeking authorisations from the CCS and the ACCC for a proposed alliance in relation to international passenger transport services. The proposed “Alliance Framework Agreement”, includes:

- freesale codeshare agreements
- a special pro-rated agreement
- reciprocal frequent flyer and lounge agreements

The alliance will allow Virgin Australia and Singapore Airlines to fully cooperate on all aspects of their Australia-Singapore services and any international and domestic connecting routes, including joint pricing, scheduling, marketing and sales. The airlines will also cooperate in relation to the marketing of services to corporate and government accounts, including joint bidding and joint pricing.

At this point, the parties do not intend to share revenues, but will possibly implement metal neutral policies - meaning that each airline is indifferent to which aircraft is used to carry passengers, to ensure more equal sharing of revenues - if the airlines begin operating any overlapping routes in future or agree to jointly deploy new services.
The matter is currently under consideration by both authorities. Most recently, the ACCC indicated that it will likely grant authorisation for the alliance in its draft decision on 13 October 2011. The ACCC was of the view that the alliance was likely to lead to enhanced products and services, as well as increased online connectivity for passengers. The ACCC is seeking submissions from the applicants and interested parties in relation to its draft determination prior to making a final decision.

US DoJ Nabs Auto Lights Price-Fixing Cartelists

Two companies and their executives have pleaded guilty for engaging in a continuing cartel agreement to fix the prices of aftermarket auto lights.

Aftermarket auto lights are lights incorporated into an automobile after its original sale, usually as repairs following a collision, but also as accessories and upgrades. Lighting components include items such as headlights, taillights, turn and brake signals, and reflectors.

According to the US DoJ’s antitrust division, the cartel involved three parties, two of which agreed to plead guilty between August and September 2011. The two companies are Maxzone Vehicle Lighting Corp., the wholly owned subsidiary of a Taiwanese-based aftermarket auto lights manufacturer Depo Auto Parts Industrial Co. Ltd., and Sabry Lee (U.S.A.) Inc., a US affiliate of a Taiwanese car lights manufacturer.

Maxzone participated in the conspiracy from about April 2000 to about September 2008, while Sabry Lee was involved in the conspiracy for two years, from September 2003 until about September 2005.

Among other things, the US DoJ found that the parties participated in meetings, conversations, and communications in Taiwan, the United States, and elsewhere to (i) discuss the prices of aftermarket auto lights, (ii) agree to charge prices of aftermarket auto lights at certain predetermined levels, (iii) issue price announcements and price lists in accordance with the agreements reached, and (iv) institute monitoring and enforcement mechanisms to ensure adherence to the agreed-upon prices. The parties also took steps to conceal the conspiracy.

Subject to court approval, Maxzone has agreed to pay a $43 million (S$53 million) criminal fine, and Sabry Lee a US$200,000 (S$252,000) fine. Both parties will also assist the US DoJ in its on-going investigation into the aftermarket auto lights industry.

Three individuals have also been charged. The former president and chief executive officer of Maxzone, entered his guilty plea on March 29, 2011, and was sentenced to 180 days in prison and to pay a $25,000 (S$31,500) criminal fine. The former executive vice president of Sabry Lee, pleaded guilty to his participation in the conspiracy and is currently scheduled to be sentenced in December 2011. A third executive was arrested at Los Angeles International Airport in July 2011, and indicted.

It is understood that the US DoJ is also investigating against cartel activity involving wide-ranging auto parts that are distributed directly to manufacturers.

In Singapore:

The CCS may issue directions and impose financial penalties for violations of the Act. To date, the highest penalty on an individual company imposed by the CCS in relation to cartel activities is S$518,167 for price fixing in the operation of express bus services from Singapore to Malaysia and Southern Thailand. This fine was later reduced to S$303,472 on appeal, but even after the reduction, it remains the highest single fine imposed for cartel activities in Singapore.

UK OFT Will Continue to Pursue Criminal Cartels

Despite the much publicised failure of the OFT in their attempts to convict four British Airways ("BA") executives for price-fixing, the OFT’s Chief Executive was of the view that the agency has been successful enough in relation to its aims for its criminal cartel programme.

The OFT’s criminal case against the BA executives for fixing fuel surcharges between 2004 and 2006, failed due to procedural errors. The
omission of electronic material (largely comprising emails) by Virgin from its leniency application only came to light after the start of the trial, despite a four-year investigation by the OFT. Although the OFT claimed that an initial review of the material indicated that almost all of the emails were of no relevance to the case and that the omission did not fundamentally undermine its case, the OFT nonetheless decided to withdraw its criminal proceedings after realising that it would have to delay the trial to consider the new evidence.

While the OFT acknowledged its responsibility in the oversight, it said in its press release on the matter that the oversight occurred “at a time when the UK criminal cartel regime was still relatively new and the OFT’s approach to the handling of leniency applications in the context of parallel criminal and civil investigations was still evolving”.

The OFT maintained that it had consistently applied a two-stage test, based on the Code for Crown Prosecutors, in its consideration of whether to bring the criminal case to trial: first, it had assessed the evidence and whether it provided a realistic prospect of conviction, and second, it had evaluated whether prosecution is in the public interest.

The OFT’s Chief Executive highlighted that criminal cases “have a high risk”, and that “the media has to get used to the idea that we are going to do a lot of criminal cases and not all of them are going to go to court.”

In Singapore:

Cartel cases are not subject to criminal penalties in Singapore. The prosecution of cartels in Singapore is handled by the CCS. Complaints are first evaluated to see if there are sufficient grounds to justify an investigation. The CCS has vast investigative powers and can impose financial penalties of up to 10% of the turnover of a violating business during each infringing year, for up to a maximum of three years.

AstraZeneca Pays to Settle Class Action Lawsuit on Tropol XL.

Drug maker AstraZeneca has agreed to pay US$20 million (S$25.2 million) to settle a class action lawsuit in relation to its heart disease medication Toprol XL. The parties filed an unopposed motion in September 2011 asking the US District Court in Delaware to approve the settlement.

The long running lawsuit was brought against AstraZeneca in 2006 by a group of direct purchasers, including individuals, health and benefit funds, employee benefit trust fund, and pension funds. The parties claimed AstraZeneca “improperly manipulated patent filings and filed baseless patent infringement lawsuits in an effort to prevent generic versions of the drug Toprol-XL from entering the market”. Among other things, this prevented end-payers access to competing generic drugs that would have cost an estimated 30 percent to 40 percent less than Toprol-XL.

AstraZeneca argued that the delay was the result of the statutory scheme governing generic entry, not its own conduct. The court rejected this claim, leading to a year of intensive discovery involving the review of more than a million pages of documents and 12 depositions. AstraZeneca continues to deny the claims, and the settlement is not an admission of liability.

The lawsuit is one of several antitrust lawsuits involving AstraZeneca’s remaining use of the Toprol XL patents.

AstraZeneca faces an on-going lawsuit brought in 2010 by Walgreen, The Kroger Company, Safeway and other retail pharmacies, who also sued the drug maker for its alleged scheme to block the entry of generic versions of Toprol XL. The pharmacies claim that AstraZeneca’s alleged scheme allowed it to charge supracompetitive prices, raising their costs for the drug.

In Singapore:

Singapore competition law does not provide for class actions or the recovery of treble damages, as in the US. A party may only bring a private right of action after a final infringement decision has been issued, and within two years after the expiry of any appeal period. To date, we are unaware of any private claims brought against parties for infringement of competition law in Singapore.

As the competition regime in Singapore matures further, we expect to see more activity in this area, and further clarifications through case law on the issue of private rights of action.
South Africa Probes Anti-Competitive Conduct in the Media Industry

Two of South Africa’s biggest media houses are under investigation for anti-competitive behaviour. South Africa’s Competition Commission confirmed that it is investigating Media24, a subsidiary of publisher Naspers, for predatory pricing in newspapers advertisements. The Commission is also investigating Avusa for alleged market allocation in the cinema industry.

Berkina Twintig (Pty) Ltd ("Berkina"), which published a newspaper called Goldnet News, lodged a complaint with the Commission against Media24 alleging that Media24 had abused its dominant position in the market by selling local and national advertising space at a highly discounted rate. Goldnet News, a weekly local newspaper, had competed for advertising with Vista and Forum, two publications owned and managed by Media24. Berkina alleged that in 2004 to 2005, Media24 cut its advertising rates for Vista and Forum to rates that were below the costs of production, forcing Berkina to close down Goldnet News in April 2009. Media24 subsequently closed down Forum in January 2010.

The second probe relates to alleged market allocation in the cinema sector, between Primedia, which has the biggest share of the cinema market, and with the second-largest share. The two companies have been known to engage in vigorous price wars in the past.

The case arose following a leniency application from Avusa. According to a spokesperson from the Commission, the application was made in relation to an agreement between the companies not to show selected movies in certain cinemas according to their geographical location, and thereby refrain from competing for customers.

Although both investigations were initiated approximately this time last year, the Commission had kept the investigations under wraps “to avoid jeopardising the investigations and causing unnecessary reputational harm.”

In Singapore:

The media industry is generally under the purview of the Media Development Authority of Singapore ("MDA"). Competition issues such as anti-competitive agreements and abuse of dominance are governed by the Media Market Code of Conduct ("MMCC"), and enforced by the MDA.

Abuse of Dominance

The Netherlands: Injunction against Rewards Marketing Strategy

A District Court in the Netherlands has granted an injunction, which was taken out by Nestlé against confectionary company Mars, from further rolling out its rewards programme, ruling that Mars’ rewards programme may constitute an abuse of dominance. The injunction will hold until the court reaches a judgment on the merits of the actual case in question.

Mars’ rewards programme offers incentives in the form of products and vouchers to petrol stations to display Mars products more prominently on their shelves and product displays. Under the rewards programme, these petrol stations are not required to sell Mars products exclusively.

The District Court took the preliminary view that the Mars’ rewards programme has anti-competitive effects and may foreclose competitors, such as Nestlé, from the market.

Under the injunction, Mars may continue its current incentive arrangements but may not extend the programme to other petrol stations. It is understood that Mars’ rewards programme extends to slightly more than ten percent of petrol stations in the Netherlands. Such reward programmes are common in the fast moving consumer goods sector.

Economics 101:

In Singapore, dominant firms are prohibited from leveraging on their dominance to engage in abusive practices which lead to the foreclosure of the relevant market to other market players. While the number of petrol stations involved in this case appears to be low as a percentage of all petrol stations in Netherlands (i.e., 10 percent), the actual foreclosure effect will depend on the relevant geographic market. If the petrol stations involved are all located within a specific geographic location, the foreclosure effect may be
This case highlights the importance of the definition of the relevant market in a competition assessment.

**BSkyB found to Restrict Competition in UK Pay-TV Film Market**

On 19 August 2011, the UK Competition Commission ("CC") provisionally found that the leading pay-TV provider in the UK, broadcaster British Sky Broadcasting Group Plc ("BSkyB"), is restricting competition between pay-TV providers as a result of its control over pay-TV movie rights in the UK. The CC found that BSkyB’s behaviour has led to higher prices, and reduced innovation and choices for subscribers.

BSkyB’s long-running exclusive contracts to purchase the first subscription pay-TV window rights ("FSPTW") of movies from all six major Hollywood studios were deemed to present a considerable obstruction to entry for potential competitors such as BT and Virgin Media. The CC revealed that as access to the latest movies is important to many pay-TV subscribers, BSkyB’s control of such content enables it to attract more pay-TV subscribers than its rivals. The CC found that BSkyB’s (Sky Movies) large subscriber base — which is reportedly twice the size of all other traditional pay-TV retailers combined — and its incumbency in the pay-TV market prevent competitors from successfully challenging BSkyB for the pay-TV film rights, as would-be rivals are unable to bid successfully against BSkyB for these rights. The CC also concluded that consumers do not consider alternative sources for watching movies (e.g. via the internet) as close substitutes to Sky Movies.

Despite the fact that BSkyB supplies its Sky Movies channels to some other pay-TV retailers, the CC has provisionally found that this supply has not enabled these retailers to compete effectively with BSkyB for movie channel subscribers. As a result of the lack of competition, industry sources estimated that consumers are paying up to £60 million (S$120 million) more than they should per year for BSkyB’s Sky Movies channels.

The CC commenced its investigation last August, following a market referral from UK telecoms regulator Ofcom. In March 2010, Ofcom issued an order requiring BSkyB to sell its sports channels to rivals at a 20 percent reduction in price, to increase downstream retail competition in the sports pay-TV market.

The CC has proposed several potential remedies in its provisional ruling. These include restrictions on the number of Hollywood studios from which BSkyB can purchase recent movie rights, altering the nature of the rights purchased to make the rights for different distribution methods available to competitors, and employing “must retail” measures, which require BSkyB to offer its rivals’ recent movie content to its subscribers.

The Competition Commission will publish its final decision on 3 August 2012.

**In Singapore:**

In March 2010, the MDA imposed the cross-carriage measure to address its concerns in the pay-TV market in Singapore, which arose as a result of competition centred around exclusive carriage arrangements. The cross-carriage measure, which was implemented on 1 August 2011, is intended to widen the distribution of exclusive content by requiring pay-TV retailers who have acquired any exclusive content on or after 12 March 2010 to make the same content available to subscribers through the set-top boxes of other pay TV retailers.

India’s Largest Fine against Abuse of Dominance

On 16 August 2011, the Competition Commission of India ("CCI") fined DLF, the country’s largest real estate developer, for abusing its dominant position. The penalty comprised 7% of DLF’s average turnover for the last three years, and amounted to Rs6.3 billion (S$163 million), the largest penalty in the CCI’s short history. The CCI imposed the fine, using what it called “a deterrent approach”, on DLF for exploitative abuse of its dominant position following the inclusion of unfair conditions in agreements it concluded with a number of flat buyers.

The complainant, the Belaire Owners’ Association, argued that DLF had imposed "arbitrary, unfair and unreasonable conditions" on the buyers that
had been allocated apartments for the Belaire housing complex. Belaire Owners’ Association had contracted DLF to build a new apartment block on the outskirts of New Delhi. After considering the various factors and replies from the parties concerned, the CCI held that DLF Ltd had contravened section 4(2)(a)(i) of India’s Competition Act by directly or indirectly imposing unfair or discriminatory condition in the sale of services, as it had:

- commenced the project without approval;
- increased the number of floors after commencement;
- increased the floor area ratio and density per acre;
- delayed completion;
- possessed and forfeited payments; and
- included clauses in the agreement that were heavily biased in favour of itself and against consumers.

The decision is the CCI’s second abuse of dominance decision, and the first time in India that competition law has covered exploitative abuse. The decision also overlaps with the well-defined concepts of “unfair trade practice”, which have till now been reserved for consumer disputes. The judgment also shows that the CCI continues to rely on international case law when it makes its decisions. However, practitioners have questioned the lack of transparency in how the CCI determined the fine.

This is only the third instance in which the CCI has issued fines. The CCI issued its first fine of 10 million rupees (S$258,000) to Kingfisher Airlines in December 2010, for failing to provide information over its alliance with Jet Airways. In June 2011, the CCI fined the country’s National Stock Exchange 55.5 million rupees (S$1.43 million) for abuse of dominance in the currency derivatives trading market.

DLF confirmed that it will be filing an appeal with India’s Competition Appellate Tribunal against the fine.

In Singapore:

To date, the largest fine imposed by the CCS against a single undertaking was against SISTIC.com, for abusing its dominance in the ticketing services market. SISTIC appealed against the S$989,000 fine, and the Competition Appeal Board heard the appeal in September 2011. The appeal is currently pending the Board’s decision.

Google under Siege

According to news reports, search engine giant Google’s offices in South Korea were raided on 6 September 2011 by the Korean Fair Trade Commission (“KFTC”) over concerns raised that Google restricted Korean competitors’, NHN Corp and Daum Communication Corp, access to its Android smartphone operating system, thus hindering them from gaining a foothold in the mobile search market.

The KFTC acted on complaints from Google’s competitors that Google’s Android smart phones come with Google’s search service installed as the default, making it difficult for consumers to switch to a rival search provider.

In June this year, Google published a statement on its official blog, which stated that it had received formal notification from the US FTC that the FTC had begun a review of Google’s business. The blog did not elaborate on the subject(s) or the focus of the FTC’s investigations.

But Google’s troubles do not end there. In September 2011, the company’s practices were also under scrutiny from the US Senate Judiciary antitrust subcommittee. Yelp, a business review website, had testified at a hearing before the antitrust subcommittee that Google is “cooking” its search results to promote its own review service, Google Places, while suppressing Yelp’s reviews. Travel global distribution system (“GDS”) Expedia, has similarly alleged that Google “has an incentive to steer users to its own web pages and away from competing websites to enable it [Google] to increase its revenues”, and “reinforces its search dominance” by making it harder for competitors to be found on Google”. By doing so, Expedia alleges that Google forces competitors to buy advertising space on its search results pages,
which additionally, increases Google's profits and its competitors’ costs.

Google’s hearings before the antitrust committee follow the European Commission’s press announcement in November 2010 that the European Commission is investigating whether Google has abused its dominant market position in the online search market by “allegedly lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as price comparisons (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services. The [European] Commission [is] also looking into allegations that Google lowered the ‘Quality Score’ for sponsored links of competing vertical search services. The Quality Score is one of the factors that determine the price paid to Google by advertisers.”

US Airways accused Sabre of abusing its dominance in the airline ticket distribution market by offering incentives to travel agencies that use its services, thereby preventing travel agents from booking tickets directly from US Airways. It claimed Sabre’s practices raised barriers to entry and prevented US Airways from competing against those incentives.

US Airways also claimed Sabre conspired with other distribution systems and threatened to give preference to competitors – a practice that would have caused a loss of sales for US Airways as Sabre handles more than 35 percent of the airline’s bookings.

Two complaints remain, in relation to horizontal and vertical agreements that allegedly restrict competition. US Airways has been ordered to file an amended complaint “to set out sources of information and bases of belief”.

The lawsuits are part of a larger dispute between US carriers and the companies that aggregate and distribute flights and bookings – the GDS. The airlines want greater control over dissemination of their data, including the ability to provide their data directly to agencies used by consumers to plan and buy travel packages.

In Singapore:

In Singapore, the CCS regularly initiates investigations based on complaints from industry players or consumers. To encourage aggrieved companies or individuals to “speak up” or lodge complaints to the CCS, the CCS would endeavour to keep the complainant’s identity confidential as far as possible where requested to do so. Additionally, to assist complainants in lodging complaints, the CCS has provided complaint forms on its website (www.ccs.gov.sg) for (a) general complaints on anti-competitive agreements and abuse of dominance; and (b) complaints with respect to mergers which substantially lessen competition in any market in Singapore.

Sabre Wins Dismissal of Antitrust Claims from US Airways

Sabre Holdings Corp., which was sued by US Airways Group Inc. (“US Airways”) over its system for distributing data to travel agents, won dismissal of two of the four antitrust claims against it on 13 September 2011. Sabre is the largest airfare distributor in the US, and it acts as an intermediary between airlines, online ticket sellers, and travel agents by providing airlines’ flight information to the ticket sellers and booking information to the airlines.

The European Commission Scrutinises E-Payments

The European Commission (“EC”) opened an antitrust investigation into the standardisation process for online payments undertaken by the European Payments Council (“EPC”).
The EPC is the coordination and decision-making body of the European banking industry for payments.

In principle, the EC welcomes the development of standards for e-payments and the role of standardisation in promoting economic integration. However the EC also states that it is examining the EPC’s standardisation process to ensure that competition in the online payments market is not unduly restricted. Foreclosure of new players or non-bank payment providers from the online payments market could result in higher prices for web merchants and ultimately consumers. This could constitute a breach of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and Article 53 of the European Economic Area (“EEA”) Agreement, against restrictive business practices.

The EC has received a complaint which will form part of the investigation. The opening of proceedings does not prejudge the outcome of the investigation. Rather, it means the EC treats the case as a matter of priority and will gather the necessary information to take a final position.

Individuals, BAL holds about 0.29 percent of the market share while BAG holds about 1.30 percent. Due to the high number of market players in the insurance sector, the insignificant market shares of BAL and BAG and the fact that RIL is a comparatively new entrant to the market, the CCI concluded that the post-merger entity was unlikely to cause an “appreciable adverse effect on competition within the relevant market in India” and approved the transaction.

Please see Drew & Napier’s 2011 Q3 Competition Law Quarterly Update for more information on India’s merger control framework.

In Singapore:

Mergers that substantially lessen competition in any market in Singapore for goods or services are prohibited. Merging parties have the option of notifying the CCS in circumstances where there is a risk that the anticipated merger, if carried into effect, may be prohibited under the Act. There is no positive obligation, however, on merging parties to file a notification with the CCS. Instead, parties are encouraged to “self-assess” the potential competition law implications of a proposed merger, and contemporaneously assess the necessity for a notification.

Netherlands: NMa Opens Review of Telecoms Merger

The Dutch Competition Authority (“NMa”), has completed its preliminary investigation in the notification phase of the merger between KPN, the leader in copper wire telecoms in the Netherlands, and rival Caiway, a regional fibre optics cable provider.

The NMa concluded that the merger would lessen competition in the market and had concerns that the deal would impact on consumer choice for television services, internet services and telephone packages as it would lead to both copper wire and fibre optic cables being owned by the same company.

The NMa had observed that in the recent years, competition between KPN and cable companies had led to companies to make substantial investments in upgrading their networks which, in turn, led to better services, faster download speeds and new television...
services. Cable companies such as Caiway, also started to offer internet and telephony services, while KPN launched its own television services. Among the NMa’s concerns are that competitors of Caiway and KPN, such as Tele2 and Online, may not be able to offer the range of different services and exert enough competitive pressure. Further, the competitors depend on access to KPN’s infrastructure to be able to offer consumers television services, internet access, and telephony services.

As a commitment to alleviate the NMa’s concerns, KPN has pledged to guarantee third-party access to the telecoms networks after the merger is complete. According to the NMa, Caiway’s current owner, CIF, has imposed an obligation on KPN to make its current cable network and optic-fiber network (current and future) available to other companies that want to and are able to offer their services on both infrastructure networks. However, the NMa voiced doubts about whether potential clients, i.e., competitors of KPN and Caiway, will be interested in the offer and whether KPN will make the offer sufficiently attractive to competitors.

In light of the above, the NMa has indicated that it will extend its investigation into the merger.

In Singapore:

In Singapore, mergers in the telecommunications and media industries fall under the supervision of sectoral regulators, the MDA and the Infocomms Development Authority of Singapore (“IDA”), each of which have established relevant competition frameworks to review mergers in their respective industries.

Sony, Hitachi and Toshiba in Government-Backed Display Joint Venture

Japanese electronic giants, Sony, Hitachi and Toshiba have announced that they will be forming a joint venture with the government-backed investment fund, Innovation Network Corporation of Japan (“INCJ”), to stake a claim on the rapidly growing small and medium-sized display global market.

The new company, Japan Display K. K. (“JDKK”), will be operated by INCJ, which will have a 70 percent share in the company. Sony, Hitachi and Toshiba, which will be integrating their display businesses, will each have a 10 percent stake in JDKK.

According to news reports, Sony, Hitachi and Toshiba had been loss making in small panels until last year, although they were expected to pull into the black in the current financial year. The Japanese government has encouraged Japan’s electronics manufacturers to consolidate as a way to increase their presence in global markets and compete more effectively with rivals such as South Korea’s Samsung Electronics. The venture, which could create the world’s biggest maker of liquid-crystal-display screens (“LCD’s”) for mobile phones and cameras, must gain approval from antitrust regulators in Japan, but authorities in Japan have been supportive of the Japanese government’s push to consolidate Japanese industry.

Globally, the venture may be watched closely by the US and European antitrust enforcers, especially in a LCD market which has faced intense scrutiny in recent years. The European Commission fined six LCD manufacturers a total of €648 million (approximately S$1.14 billion) in December 2010 for alleged price-fixing, while the US DoJ has to-date issued more than US$900 million (approximately S$1.15 billion) in fines against companies that have pleaded guilty to price-fixing on LCD panels.

In Singapore:

The Singapore Government, any statutory body, any person acting on behalf of the Government or that statutory body, or any undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, are excluded from the ambit of the Act. However, the commercial activities of government-linked or government-backed companies in Singapore insofar as they do not perform services of general economic interest or having the character of a revenue-producing monopoly are still subject to competition law scrutiny.
Dismissal of Challenge to Nestlé Ice Cream Merger

On 1 September 2011, the US Court of Appeals affirmed a lower court’s summary judgment, dismissing a claim by Sterling Merchandise ("Sterling") that merger between Nestlé Puerto Rico ("Nestlé PR") and ice cream distributor Payco Foods Corp. ("Payco") violated section 2 of the Sherman Act. The long-running case also involved the purchase by Nestlé S.A., Nestlé PR’s parent company, of controlling interest in Dreyer in 2006, which produces Edy’s, the most popular ice-cream in Puerto Rico.

Payco had been Sterling’s competitor in the Puerto Rican ice cream distribution market. Sterling had, and still has, an exclusive distribution agreement with Dreyer to sell Edy’s ice-cream.

The Nestlé mergers were conditionally cleared by the Puerto Rico Office of Monopolistic Affairs ("PROMA"). The conditions imposed on Nestlé, which continue to be effective included, among others, a stipulation that Nestlé may not transfer distribution rights to Edy’s to another distributor without PROMA’s approval unless Sterling had acquired distribution rights to either Breyer’s or Blue Bunny ice-cream.

Sterling alleged that Nestlé PR had intended to monopolise the Puerto Rican ice cream distribution market through the mergers. The lawsuit also claimed that post-merger, Nestlé PR and Payco used exclusionary contracts with large grocery stores to harm competition in the ice-cream market in Puerto Rico. Another key bone of contention with the mergers was the reduction of Dreyer’s discount from 75 cents to 60 cents on the discount it once gave to Sterling on the wholesale price before the mergers.

In June 2010, the District Court found that Sterling was unable to sufficiently prove any injury, nor could it prove any antitrust injury (i.e. that it was injured by anti-competitive injury, which was "sufficiently direct, non-speculative, and measurable to the extent that causality is not in doubt") as a result of the Nestlé acquisitions. For example, the District Court had found that shortly after the 2003 merger, Sterling acquired exclusive rights to distribute ice cream products to two Puerto Rico retailers which were Payco customers prior to the merger. Additionally, in 2007, the largest seller of ice cream in Puerto Rico and previously a retail customer of Payco, signed exclusivity agreements with Sterling and others.

Sterling appealed the District Court’s decision on the grounds that Sterling would have “done better for itself than it has were it not for the merger” and that in the counterfactual (i.e. the situation where the merger did not take place) purchasers would have been offered more choices in more locations at more competitive prices and Sterling would have gained more market share than it had already.

The Appeals Court, dismissing Sterling’s appeal, found that Sterling had once again failed to evidence any antitrust injury and had in fact failed to demonstrate that it had standing to bring an antitrust action.

According to the Appeals Court, “[w]hat the undisputed facts demonstrate is that, together, Payco and Nestlé PR had an 85 percent share of the distribution market at the time of their 2003 merger, but that the market share of the merged entity has since fallen to 70 percent. This was not surprising; Nestlé PR’s ice cream distribution division had been suffering heavy losses, and hoped the merger would give it viable ice cream distribution business. Still, a 70 percent market share is considerable. Nevertheless, we conclude, as did the district court, that Sterling has not shown the market has suffered a reduction in output or an increase in consumer prices. It has not shown an impairment of competition or antitrust injury from the sum of its theories… in fact, the evidence suggests that, if anything, consumer prices decreased during the relevant period… the lack of evidence of antitrust injury in the form of either increased consumer prices or reduced output is consistent with the lack of evidence that Sterling itself has been negatively affected by Nestlé PR’s purported violations.”

In Singapore:

In Singapore, any person who suffers loss or damage directly as a result of an infringement of the prohibitions in the Act has a right of action for relief in civil proceedings in a court against any undertaking, which has at the material time been a party to such infringement.
Although, to date, no civil claim has been brought in the Singapore courts, any plaintiff claiming against an infringing undertaking will likely be required to prove not only that he has suffered damage, but that the damage suffered has arisen directly as a result of the infringing undertaking’s anti-competitive activity.

**PROCEDURAL MATTERS**

**Microsoft & US DoJ’s Joint-lawsuit to Recover Antitrust Documents**

In a strange turn of events, Microsoft and the US DoJ have filed a joint lawsuit to compel the return of confidential antitrust documents from third party consultants. The parties are also seeking to reaffirm the confidentiality order regarding the documents.

The antitrust documents were used in a landmark abuse of dominance case that began in 1998 which saw the US DoJ, along with 19 US states and the District of Columbia, sue Microsoft for engaging in anti-competitive conduct to eradicate threats to its Windows operating system software monopoly. The parties agreed on a settlement in November 2002, the terms of which expired in May 2011.

Now Microsoft and the US DoJ, along with nine US states, are seeking to recover documents from two unnamed consultants, who were part of the technical committee overseeing Microsoft’s adherence to the terms of the settlement. The parties assert that the consultants “refused to return materials relating to their work for the committee”, lending credence to the assumption that the consultants anticipate some future use or disclosure of the documents.

**In Singapore:**

Section 89 of the Competition Act seeks to protect the confidentiality of all communication undertaken under the Act, including all matters relating to the business, commercial or official affairs of any person. The Act requires Commission officers, and other parties appointed by the Commission, to preserve and aid in the preservation of secrecy. Any person who fails to comply is guilty of an offence.

**Potash Price-Fixing Case: US Court of Appeals rules on application of US Foreign Trade Antitrust Improvements Act**

On 23 September 2011, the US Court of Appeals dismissed a lawsuit brought by purchasers who sought injunctive relief and damages from seven major producers they accused of fixing the price of potash, a naturally occurring water-soluble mineral and an essential ingredient in fertilizer.

The complaint, filed in 2008 against the producers who control approximately 70% of the potash market, claimed violations of the US Foreign Trade Antitrust Improvements Act ("FTAIA"), which extends the reach of American antitrust law to foreign anti-competitive conduct that affects US imports.

The majority of the business conducted by the seven potash makers – including Agrium Incorporated, Potash Corporation of Saskatchewan, JSC Silvinit and the Mosaic Company – was done in Russia, Canada and Belarus, where most of the world’s potash is mined.

The direct and indirect purchasers alleged the 600% increase in US potash prices from 2003 to 2008, was the effect of an agreement among the seven producers to limit production and raise prices overseas. They claimed that potash prices established overseas served as benchmarks for prices in the US, so any conspiracy overseas would have forced up prices in the US.

In its decision, which overturned a November 2009 decision made by a lower court, the Court of Appeals found that the purchasers did not do enough to prove that pricing patterns of potash makers operating in Russia, Canada and other overseas markets affected the price of the fertiliser component in the US. Specifically, the Court said the purchasers failed to show a plausible “direct, substantial and reasonably foreseeable” link between the foreign anti-competitive conduct and a surge in potash prices in the United States.

Under the FTAIA, agreements struck between foreign companies fall under US law only when those agreements have a direct effect on US commerce, specifically through imports sold into the US market.
In Singapore:

The Competition Act applies to conduct or agreements that prevent, restrict, or distort competition in any market in Singapore, notwithstanding that the conduct/agreement takes place outside Singapore or that any party to the conduct/agreement resides outside Singapore. However, it must be noted that the CCS’ ability to reach parties outside of Singapore by applying the extra-territorial jurisdiction of the Act is as yet untested, and likely to be a significant practical challenge.

€2 Million Fine for Raid Obstruction

Spain’s Competition Commission, the Comisión Nacional de la Competencia (“CNC”), has fined Compañía Trasmediterránea, S.A. (“Trasmediterránea”), a ferry operator, and its subsidiary, Europa Ferrys, S.A. (“EF”), more than €2 million (approximately S$3.5 million) for obstructing its investigations into alleged price-fixing by ferry operators operating routes between Spain and North Africa. The penalty imposed on Trasmediterránea and EF is one of the largest issued fines to-date for obstructing a commission investigation.

According to the CNC, Trasmediterránea had, amongst other things:

(a) submitted incomplete documents requested and delayed the provision of the required documents for three hours;

(b) made it difficult for CNC to access the company’s emails and electronic information for an hour as a result of a “sudden” breakdown in the company’s information technology (“IT”) systems and the absence of the person(s) responsible for the system; and

(c) failed to locate its Regional Director despite the repeated requests of the CNC officers to enable the CNC access to the documents stored on the Director’s computers and to enable the CNC to interview the Director.

The case is not the first, which highlights the importance of cooperation and non-tampering with evidence by companies in an investigation process. Globally, antitrust authorities have punished offenders with stiff penalties.

In Singapore:

The obstruction of the CCS’ investigations and a failure to provide documents or information requested by the CCS can constitute a criminal offence under the Act.

FEATURE ARTICLE

DEMYSTIFYING MERGER NOTIFICATIONS – PROCEDURES AND PRACTICAL TIPS

How can competition law affect a merger transaction? Section 54 of the Act prohibits mergers that have resulted or may be expected to result in a substantial lessening of competition (“SLC”), unless they are excluded or exempted by law. A merger which results in SLC is objectionable as it is likely to result in higher prices, lower quality, and/or reduced choices for consumers.

It is therefore important for companies, especially those that are frequently involved in merger transactions, to be familiar with the requirements under competition law and to understand how to go about seeking merger clearance from the relevant authority.
Which authority should I seek clearance from?

The Act will apply to any merger that substantially lessens competition in Singapore, notwithstanding that the merger takes place outside Singapore or that any party to the merger resides outside Singapore. However, the Act also provides for certain carve-outs and exemptions, including mergers that:

- result in economic efficiencies that outweigh the adverse effects of the transaction in Singapore;
- is approved by any minister or any regulatory authority where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, section 54 also does not apply where the requirement for approval is imposed by instruments issued under written law); or
- is under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition. This includes sectors such as telecommunications, media, post, gas and electricity.

What is considered a merger under the Act?

The Act sets out specific definitions of what constitutes a merger that will fall within its purview. Besides applying to merger transactions between two or more undertakings which were previously independent of each other, the Act will also apply in these two instances:

- where one or more persons or other undertakings acquire direct or indirect control of the whole or part of another undertaking; or
- where one undertaking acquires the assets (including goodwill), or a substantial part of the assets, of another undertaking, such that the acquirer replaces or substantially replaces the acquired undertaking in the business (or the part concerned of the business).

More importantly, it should be noted that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity, also constitutes a merger under the Act.

What are my obligations under the Act?

It is worthwhile noting that unlike some jurisdictions, merger notification is voluntary in Singapore. Parties are encouraged to conduct a self-assessment and obtain their own legal advice as to whether their merger is likely to result in a substantial lessening of competition in the relevant market, and therefore whether a notification for decision to the CCS will be necessary.

The CCS has set out indicative market share thresholds for when a merger is likely to raise concerns. Mergers which are above the indicative thresholds are encouraged to notify the CCS for a decision.

While bypassing notification to the CCS is not an offence, parties do so at their own risk. The CCS may impose fines and/or block the merger (if it has not taken place) or unravel the merger (if it has been completed), if a merger has been found to result in SLC. Generally, the CCS is unlikely to intervene in a merger situation unless:

- the merged entity has or will have a market share in the relevant market of at least 40%; or
- the merged entity has or will have a market share in the relevant market of between 20% and 40% AND the post-merger combined market share of the three largest firms (“CR3”) is at least 70%.

It must be noted that the above thresholds will hinge on the definition of “the relevant market”, a concept fundamental to the assessment of market power and the determination of whether there is SLC under competition law.

Can I approach the CCS informally?

Prior to filing, parties can approach the CCS for informal guidance through pre-notification discussions (“PND’s”). Merger parties seeking a PND should submit a request to the CCS in writing, and include details of the merger situation such as a brief description of the relevant market(s) and sector(s) involved, and a general description of the likely impact of the merger on competition in those markets.
and sectors. If the CCS agrees to the PND, a draft form M1 should be provided prior to the discussion.

The PND can help merger parties to identify information needed for filing, as well as allow parties to engage with the CCS to get a sense of whether the merger is likely to raise any potential concerns.

However, as the CCS will not have complete information and will not seek the views of market participants based on a PND, any guidance provided at this stage will only be indicative and in no way conclusive of the CCS’ position on the matter. Also, the CCS will not entertain speculative or hypothetical transactions.

**Practical considerations**

(a) **How do I notify?**

By submitting all information as requested for in the CCS-prescribed filing form, Form M1, together with the prescribed filing fee (see below for fees).

(b) **When should I notify?**

As the CCS will seek third party input (e.g. from competitors, suppliers and customers) as part of the review process, notifications of mergers which have not been announced publicly will not be accepted.

(c) **What information will I need to provide to the CCS?**

Parties seeking to file with the CCS will need to submit a complete response to Form 1, which sets out the information the CCS will require to assess the merger. Information required in Form 1 include:

- description of the nature of the notified merger, including the structure of the merger (e.g. an acquisition of sole or joint control, a full-function joint venture, etc.);
- the areas of activity and turnover of the merging parties worldwide and in Singapore for the last financial year; and
- the markets on which the merger will have an impact, and the estimated pre and post merger market shares of the parties involved in each of these markets.

(d) **How much will it cost me?**

Fees payable by Small to Medium Enterprises (“SME”s), as defined in the Competition Regulations, will be S$5,000. In all other situations the following fees will apply:

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<thead>
<tr>
<th>Merger scenario</th>
<th>Notifying fees payable to the CCS</th>
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<tr>
<td>If turnover of the target or turnover attributed to the acquired asset is equal to or less than S$200 million</td>
<td>S$15,000</td>
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<tr>
<td>If turnover of the target or turnover attributed to the acquired asset is S$200 - S$600 million</td>
<td>S$50,000</td>
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<tr>
<td>If turnover of the target or turnover attributed to the acquired asset is above S$600 million</td>
<td>S$100,000</td>
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(e) **How long will it take?**

Upon receipt of a complete Form M1, the CCS will conduct a straightforward Phase 1 assessment which is expected to be completed within 30 working days.

If the CCS is unable to conclude that the merger does not raise competition concerns in Phase 1, it will proceed to conduct a more detailed assessment (Phase 2). At this stage, the CCS will request that the parties submit their responses to Form 2, containing more detailed information about the merger. A Phase 2 review is expected to be completed within 120 working days.

On 11 November 2011, Drew and Napier will be holding a seminar titled “Merger Notification: Know What You Are Doing”. The seminar will be in the format of a practical workshop, and topics covered will include understanding the risks under a voluntary merger regime in Singapore, how to conduct a merger self-assessment, and when and how to go about notifying a transaction to the CCS. The seminar is for in-house counsel only and will be by-invitation. To learn more about the merger regime in Singapore, please email events@drewnapier.com to register your interest.
DO YOU KNOW?

The Singapore Economic Review Conference 2011

The Singapore Economic Review Conference 2011 was held on 4-6 August 2011 in Singapore. Organised by the Singapore Economic Review, a leading journal in economics in Asia, the Conference was host to approximately 350 economists and attendees from 40 countries.

Ng Ee-Kia, the Head of the Competition and Regulatory Economics of the Competition Law Practice Group, was an invited speaker at this year’s conference.

Ee-Kia’s topic “Airline Alliances: Flying Through the Clouds of Competition Law” covered the evolution of airline alliances over the past decade and introduced the types of airline alliances commonly seen today. Using past decisions made by the CCS on airline alliances as examples, she explained why airline alliances may potentially run foul of competition law and the economic efficiencies that the CCS has considered as part of its assessment. She also offered some suggestions on Singapore’s competition policy approach towards cooperation between airlines.
The Drew & Napier Competition Law Team

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

Cavinder Bull, SC • Director (Disputes)

Cavinder handles complex litigation spanning a wide area of corporate and commercial matters. One of his areas of particular focus is competition law where he has represented various clients in investigations by competition law regulators both in Singapore and overseas. 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 practiced 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. He was recently awarded the title of “Lawyer of the Year” for 2011 in Antitrust Law by Best Lawyers. For the 4th consecutive year, he was endorsed in The Practical Law Company Which Lawyer? Cross Border Handbook 2011/2012. The Guide to the World’s Leading Competition & Antitrust Lawyers/Economists 2010 nominated him as a Leading Antitrust Lawyer in Singapore. Chambers Asia 2009 states that Cavinder is a “rising star, going from strength to strength”, while Asia Pacific Legal 500 2008/2009 recognises Cavinder as a “first-rate lawyer”.

Tel: +65 6531 2416 • Fax: +65 6533 3591 • Email: cavinder.bull@drewnapier.com

Lim Chong Kin • Director (Corporate Transaction & Advisory)


Tel: +65 6531 4110 • Fax: +65 6535 4864 • Email: chongkin.lim@drewnapier.com

Ng Ee-Kia, Joy, Head (Competition & Regulatory Economics)

Ee-Kia was previously the Director of Economics in the Policy and Economic Analysis Division in the CCS. She was responsible for developing policy frameworks and guidelines in relation to the Competition Act as well as conducting economic analysis in competition cases. Ee-Kia had worked on a wide range of regulatory and competition issues in the telecommunications industry while she was with the telecommunications regulators in Singapore and Hong Kong. In addition to her economics training, Ee-Kia has a Postgraduate College Diploma in EC Competition Law & Economics for competition law respectively as well as a Master of Laws. Ee-Kia has been recognized as one of the leading competition economists in Singapore by The International Who’s Who of Competition Lawyers & Economists 2010 and 2011 and the Guide to the World’s Leading Competition & Antitrust Lawyers/Economists 2010.

Tel: +65 6531 2274 • Fax: +65 6535 4864 • Email: eekia.ng@drewnapier.com