DREW & NAPIER

COMPETITION LAW
QUARTERLY UPDATE

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In this issue

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WELCOME MESSAGE

In this issue we take a look back at some of the major developments in competition law from the second quarter of 2015.

Competition law in the ASEAN region continues its forward march, with nine of the ten ASEAN countries having passed general competition laws, albeit that the laws have yet to take effect in a number of jurisdictions. In this issue, we take a fuller look in particular, at the competition law introduced in the Philippines.

Our feature article this month examines the treatment of product-hopping under competition laws, and the circumstances under which a dominant entity may be found to have abused its dominant position by engaging in such practices. The article takes an in-depth look at the recent case of *People of the State of New York v Actavis plc, Forest Laboratories LLC.*

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

IN THE NEWS: AT A GLANCE

SINGAPORE

CCS issues proposed infringement decision against ten financial advisory companies

On 28 May 2015, the Competition Commission of Singapore ("**CCS**") issued a proposed infringement decision ("**PID**") against ten financial advisory companies ("**FAs**"). CCS announced that the PID related to an anti-competitive agreement between the FAs to pressurise iFAST Financial Pte Ltd ("**iFAST**"), to withdraw its promotional 50% rebate offer on life insurance products offered through its Fundsupermart.com website. For more details, please click **here**.

Cordlife removes exclusive arrangements with baby fair organisers and hospitals following investigation by CCS

The Competition Commission of Singapore has ceased its investigation into Cordlife Group

Limited's ("**Cordlife**") exclusive arrangements with baby fair organisers and hospitals, following voluntary commitments by Cordlife. For more details, please click **here**.

AROUND THE WORLD

The Philippines passes new competition legislation

On 21 July 2015, the Philippines Competition Act was enacted into law. The new legislation penalises anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.

The implementation of the law is subject to a transitional period of two years to allow affected parties time to renegotiate agreements or restructure their business to comply with the new law. For further details, please click **here**.

Hong Kong Competition Commission issues six guidelines under Competition Ordinance

On 27 July 2015, the Hong Kong Competition Commission ("**HKCC**"), together with the Communications Authority ("**CA**"), published six guidelines under the Competition Ordinance (Cap. 619), as part of the lead up to the full commencement of the Competition Ordinance on 14 December 2015. The guidelines outline how the HKCC and the CA intend to interpret and apply the provisions of the Ordinance. For more details, please click **here**.

MyCC issues Non-Infringement Finding in respect of alleged egg cartel

In May 2015, the Malaysia Competition Commission issued a Finding of Non-Infringement in relation to the conduct of My Egg Consortium Sdn Bhd, after its investigation into allegations that the company colluded with members of the Federation of Livestock Farmers' Association Malaysia to reduce the supply, and raise the price, of eggs in Malaysia. For more details, please click **here**.

MyCC issues provisional decision relating to price fixing by container depot operators

On 19 June 2015, the Malaysia Competition Commission ("**MyCC**") issued a proposed decision, provisionally finding four container depot operators, and an information technology service provider to the shipping and logistics industry in the Penang area, to have engaged in price fixing. MyCC has yet to issue its final determination. For more details, please click **here**.

Booking.com's "best price" clauses under the microscope in Germany

Germany's Federal Cartel Office ("**FCO**") has issued a statement of objections to Booking.com, the online hotel booking portal, in respect of its "best price" clauses. The FCO rejected Booking.com's proposal to settle the case by making changes to its clauses (despite the proposal being accepted by the French, Italian and Swedish competition authorities). For more details, please click **here**.

Information exchange confirmed as an offence by "object"

On 19 March 2015, in dismissing an appeal by Dole Food Co against a €45.6m (S$72.2m) fine levied against it by the European Commission ("**EC**"), the European Court of Justice determined that the exchange of commercially sensitive information is a restriction of competition by object. This means that for such conduct, the EC would not be required to determine whether an anti-competitive effect has actually arisen before it can make an infringement finding. For more details, please click **here**.

Cement merger receives conditional approval in North America

On 4 May 2015, Holcim and Lafarge, two of the biggest international cement producers, received conditional approval from the US Federal Trade Commission and Canada's Competition Bureau to move ahead with their proposed merger. For more details, please click **here**.

European Commission conducts e-Commerce sector inquiry

In May 2015, the European Commission commenced a competition inquiry into the e-Commerce sector in the European Union to identify possible competition concerns affecting European e-Commerce markets. For more details, please click **here**.

Competition law and intellectual property: Product-hopping and the effort to extend the lives of dominant patents

This feature article examines the treatment of product-hopping under competition laws, exploring the concept in further detail and the circumstances under which a dominant entity may be found to have abused its dominant position by engaging in such practices. The article takes an in-depth look at the recent case of *People of the State of New York v Actavis plc, Forest Laboratories LLC*. 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	**50**	**49**	**1**
Infringement Decisions	**10**	**10**	**0**
Appeals	**11**	**10**	**1**

Table 1: Singapore Competition Law Watch Scoreboard (Accurate as at 21 Aug 2015)

ARTICLES & COMMENTARIES: UPDATES FROM AROUND THE WORLD

REGULATORY UPDATES

The Philippines passes new competition legislation

On 21 July 2015, President Benigno Aquino III signed into law the Philippine Competition Act ("**PCA**"), officially known as *An Act providing for a national competition policy prohibiting anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, establishing the Philippine Competition Commission and appropriating funds therefore*. The PCA is a landmark piece of legislation which introduces a general competition law in the Philippines.

The PCA is considered the longest-running legislative measure before the Philippines Congress, and has reportedly taken 25 years to be passed into law. The Philippines' Senate approved a draft version of the PCA on 15 December 2014, which was ratified by the House of Representatives on 10 June 2015.

One of the objectives of the PCA is to enhance economic efficiency and promote free and fair competition. In this regard, the PCA penalises all forms of anti-competitive agreements, abuse of a dominant position, and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.

The PCA provides for the establishment of an independent quasi-judicial body, the Philippine Competition Commission ("**PCC**"), under the Office of the President, to implement a national competition policy.

Anti-competitive agreements

The PCA prohibits anti-competitive agreements between or among competitors. Specifically, the PCA distinguishes between two categories of anti-competitive agreements.

The first category relates to agreements, between or among competitors, which are *per se* prohibited, namely agreements that:

(a) restrict competition as to price, or components thereof, or other terms of trade; or

(b) fix price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation.

The second category relates to agreements, between or among competitors which have the object or effect of substantially preventing, restricting or lessening competition, namely agreements that:

(a) set, limit, or control production, markets, technical development, or investment; or

(b) divide or share the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means.

One exception to this prohibition relates to agreements which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits.

Abuse of dominance

The PCA prohibits dominant entities from abusing their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition.

"Dominant position" is defined by the PCA to mean a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following competitors, customers, suppliers or consumers.

There is a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least 50%, unless a new market share threshold is determined by the PCC for that particular sector.

Examples of behaviour that may constitute an abuse of dominance include selling goods or services below cost with the object of driving competition out of the relevant market; imposing barriers to entry against competitors; setting prices or other terms and conditions that discriminate unreasonably between customers or sellers of the same goods or services.

Merger control

In relation to merger control, merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services are prohibited under section 20 of the PCA.

Notification to the PCC is compulsory in a situation where the value of the transaction exceeds 1bn Pesos (S$30.1m). The PCC has the ability to set other notification thresholds, which it is expected to do in due course.

Penalties

With regard to penalties, the PCC can impose fines of up to 100m Pesos (S$3m) for the first offense and 250m Pesos (S$7.5m) for the second offense for anti-competitive agreements and abuses of dominant position. In determining the quantum, the PCC may have regard to both the gravity and duration of the violation.

Moreover, if the violation involves certain basic necessities and prime commodities, the fine imposed shall be tripled.

Criminal sanctions are also provided for under the PCA. The courts may impose criminal penalties of imprisonment from two to seven years and a maximum penalty of 250m Pesos (S$7.5m) for anti-competitive agreements between competitors. The penalty of imprisonment will be imposed upon responsible officers and directors of the entity, who are knowingly and wilfully responsible for the violation.

Other features

The PCC also sets out the powers of the PCA in the course of investigations, provides the basis for a leniency programme, and establishes a right of private action for any person who suffers direct injury by reason of any violation of the PCA (which arises after the PCC has completed its preliminary inquiry).

A transitional period of two years is provided for in order to allow affected parties time to renegotiate agreements or restructure their business to comply with the new law.

Hong Kong Competition Commission issues six guidelines under Competition Ordinance

On 27 July 2015, the Hong Kong Competition Commission ("**HKCC**"), together with the Communications Authority ("**CA**"), published six Guidelines under the Competition Ordinance (Cap. 619) ("the **Ordinance**"). The Guidelines outline how the HKCC and the CA intend to interpret and apply the provisions of the Ordinance.

The six Guidelines are:

(a) Guideline on Complaints;

(b) Guideline on Investigations;

(c) Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders);

(d) Guideline on the First Conduct Rule;

(e) Guideline on the Second Conduct Rule; and

(f) Guideline on the Merger Rule.

The publication of the Guidelines is a result of successive rounds of consultation with a wide range of stakeholders since mid-2014. In total, the HKCC reviewed 64 submissions from trade associations, Chambers of Commerce, political parties, public bodies, professional advisory bodies, private organisations and individuals.

Following the first draft Guidelines which were released in October 2014, the revised draft Guidelines were published on 30 March 2015 and presented to the Legislative Council for consultation.

Along with the revised draft Guidelines, the HKCC and the CA also published a *Guide to the Revised Draft Guidelines Issued under the Competition Ordinance* summarising the HKCC and CA's approach to preparing the Guidelines and how the key issues raised in submissions from stakeholders were addressed.

The Guidelines provide further guidance on specific areas, in particular:

(a) Anti-competi tive exchanges of information: The Guidelines help businesses distinguish between legitimate commercial negotiations and anti-competitive exchanges of information, whether direct or indirect, particularly with regard to commercially sensitive information.

(b) Resale price maintenance ("**RPM**"): While the starting point is that RPM arrangements may have an inherent potential to harm competition in Hong Kong and/or amount to serious anti-competitive conduct, the Guidelines also recognise there are circumstances where a specific RPM arrangement does not have the object of harming competition because of its context and the purpose pursued by the arrangement. In such a case, the HKCC will assess whether the RPM causes harm to competition by way of its effects on the market.

(c) Joint ventures: Additional guidance is provided on certain types of joint ventures, namely, joint selling, distribution and marketing agreements and joint tendering arrangements.

On 27 April 2015, the HKCC stated that it will prepare and release policies such as a Leniency Policy and an Enforcement Policy, in addition to other publications (*eg* leaflets and booklets for small and medium enterprises and trade associations) and self-assessment tools to assist businesses to comply with the new law.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") has similarly issued non-legally binding guidelines to state its policy on the administration and enforcement of the Competition Act (Cap. 50B), for example, guidelines on the three main prohibitions; market definition; the powers of investigation; enforcement; leniency; the treatment of intellectual property rights; and the appropriate amount of penalty.*

The various guidelines are not binding statements of law, nor do they set a limit on the investigation and enforcement activities of CCS.

ANTI-COMPETITIVE AGREEMENTS

CCS issues proposed infringement decision against ten financial advisory companies

On 28 May 2015, the Competition Commission of Singapore ("**CCS**") issued a proposed infringement decision ("**PID**") against ten financial advisory companies ("**FAs**"). CCS announced that the PID related to an anti-competitive agreement between the FAs to pressurise iFAST Financial Pte Ltd ("**iFAST**"), to withdraw its promotional 50% rebate offer on life insurance products offered through its Fundsupermart.com website.

The ten FAs named in CCS's media release are:

(a) Cornerstone Planners Pte Ltd;

(b) Financial Alliance Pte. Ltd.;

(c) First Principal Financial Pte Ltd;

(d) Frontier Wealth Management Pte. Ltd.;

(e) IPP Financial Advisers Pte. Ltd.;

(f) JPARA Solutions Pte. Ltd.;

(g) Professional Investment Advisory Services Pte Ltd;

(h) Promiseland Independent Pte. Ltd.;

(i) RAY Alliance Financial Advisers Pte. Ltd.; and

(j) WYNNES Financial Advisers Pte. Ltd.

CCS's concern focused on a specific meeting between the FAs and iFAST, on 2 May 2013. It was alleged that pressure was placed on iFAST at the meeting to withdraw its promotional rebate offer, which it subsequently did on 3 May 2013. The PID is currently not public, and was only disclosed to the FAs involved. It is unclear at this juncture whether CCS considered the conduct in question to be a restriction of competition by "object" or "effect".

The FAs were provided six weeks from the receipt of the PID to make representations to CCS. CCS has yet to issue a final infringement decision.

Cordlife removes exclusive arrangements with baby fair organisers and hospitals following investigation by CCS

On 17 June 2015, the Competition Commission of Singapore ("**CCS**") issued a press release stating that it has ceased its investigation into Cordlife Group Limited's ("**Cordlife**") exclusive agreements with baby fair organisers and hospitals. Cordlife is a provider of cord blood and cord lining banking services.

CCS had commenced an investigation in June 2014 in relation to Cordlife's exclusive agreements to determine if they constituted an abuse of dominance, in contravention of section 47 of Singapore's Competition Act (Cap. 50B). Exclusive agreements can in certain circumstances constitute abusive conduct if entered into by dominant undertakings, and where they have the effect of significantly foreclosing competition in a market.

To address CCS's concerns, Cordlife provided CCS with voluntary commitments to: (a) remove the existing exclusive arrangements that were the subject of the investigation; and (b) ensure that it does not enter into exclusive arrangements with any baby fair or private maternity hospital in Singapore in the future. Cordlife is also required to provide CCS with confirmation that the affected baby fair organisers and hospitals have been informed of the change in Cordlife's business practices.

The decision of CCS to cease its investigation is similar to the decision taken in respect of an investigation involving Coca-Cola Singapore Beverages ("**CCSB**") in 2013. In that case, after receiving a complaint that CCSB's supply agreements with its on-premise retailers contained restrictive provisions such as exclusivity conditions and conditional rebates, CCS opened an investigation into the matter. However, after offering similar voluntary undertakings with regard to its supply arrangements, CCS ceased its investigations in January 2013.

CCS has indicated that it will continue to monitor market practices in the cord blood bank industry, and may reopen investigations should the commitments be breached.

MyCC issues Non-Infringement Finding in respect of alleged egg cartel

In May 2015, the Malaysia Competition Commission ("**MyCC**") issued a Finding of Non-Infringement in relation to the conduct of My Egg Consortium Sdn Bhd ("**My Egg Consortium**").

The My Egg Consortium was established in February 2010 by the Federation of Livestock Farmers' Association Malaysia ("**FLFAM**") to assist some egg producers in Malaysia to export their eggs overseas.

The Finding of Non-Infringement follows a MyCC investigation that was initiated in November 2012 into the conduct of the My Egg Consortium after MyCC received a number of anonymous complaints and following a related news report. The complaints and news report allegedly gave rise to the suspicion that the My Egg Consortium may have infringed section 4(2) of the Malaysia Competition Act 2010 (which prohibits anti-competitive agreements), by colluding with FLFAM members to reduce the supply of eggs (and thereby raise their price) in the domestic market by exporting eggs and culling layer hens.

Amongst others things, the complainants alleged that the My Egg Consortium procured "huge quantities" of eggs from major producers representing more than 75% of the total production of eggs in West Malaysia, for export to international markets. The chairman of the FLFAM was also reported to have said in October 2012 that farmers had been culling "up to 10% more hens… [to] balance supply and demand".

Following its investigation, MYCC concluded that there was no evidence that the My Egg Consortium had infringed the Malaysia Competition Act 2010. In particular, MyCC found that there was an excess supply of eggs before and after the establishment of the My Egg Consortium, and that domestic egg prices fell in the year that the allegation was made. No evidence was found that FLFAM members collectively agreed to reduce the supply of eggs in the domestic market by exporting or dumping them through the My Egg Consortium, or that they coordinated the culling of chickens.

In Singapore:

*Anti-competitive agreements are prohibited under section 34 of the Singapore Competition Act ("**Section 34 Prohibition**"). Companies that enter into agreements with others to limit production of goods and services which have the effect of restricting competition in Singapore could be in breach of the Section 34 Prohibition.*

The current practice of CCS is not to issue a public report where it determines not to take action in respect of a particular matter.

MyCC issues provisional decision relating to price fixing by container depot operators

On 19 June 2015, the Malaysia Competition Commission ("**MyCC**") issued a proposed infringement decision, provisionally finding that four container depot operators and an information technology service provider to the shipping and logistics industry in the Penang area had engaged in price fixing. The container depot operators are: Ayza Industries Sdn. Bhd./Ayza Logistics Sdn. Bhd.; ICS Depot Services Sdn. Bhd.; E.A.E. Depot & Freight Forwarding Sdn. Bhd.; and Prompt Dynamics Sdn. Bhd., and the information technology service provider is Containerchain (M) Sdn. Bhd. ("**Containerchain**").

The container depot operators were provisionally found to have engaged in price fixing practices that were deemed to have the object of significantly preventing, restricting or distorting competition in the market for the provision of empty container storage maintenance and handling services, within a five to 15 km radius of the Penang Port.

Containerchain was provisionally found to have "engaged in concerted practices with the container depot operators", leading to an increase in depot gate charges that the container depot operators levied on customers, from RM5 to RM25 (S$1.80 to S$9). The container depot operators were also provisionally found to have collectively offered a RM5 rebate to haulers on the agreed depot gate charges.

The concerned parties in the proposed infringement decision were given 30 days to submit representations. MyCC has yet to make a final determination on the matter.

In Singapore:

Section 34 of the Competition Act (Cap. 50B) prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore. The key difference between a concerted practice and an agreement is that a concerted practice may exist where there is informal cooperation, without any formal agreement or decision. A concerted practice would be found to exist if parties, even if they did not enter into an agreement, knowingly substituted the risks of competition with practical co-operation between them.

Booking.com's "best price" clauses under the microscope in Germany

On 21 April 2015, French, Italian and Swedish competition authorities accepted commitments offered by Booking.com, one of the leading online travel agencies ("**OTA**"), to abolish some of its "best price" clauses (also known as "price parity clauses"). This follows the German Federal Cartel Office's ("**FCO**") rejection of the same offer, in a statement of objections issued on 2 April 2015.

In examining Booking.com's clauses, the FCO was influenced by the Dusseldorf Higher Regional Court's earlier judgment on 9 January 2015, which prohibited the use of "best price" clauses by Hotel Reservation Service ("**HRS**"), another OTA. In particular, the FCO reasoned that, given that HRS had ceased its use of "best price" clauses, it was necessary to prohibit the continued use of "best price" clauses by Booking.com, in order to "establish homogenous competitive conditions".

"Best price" clauses used in agreements between hotels and OTAs (such as Booking.com) typically require the hotels to offer the OTA the same or better room prices as the hotel makes available on all other online and offline platforms (including what the hotel would offer on its own).

Generally, the concerns expressed by the respective national competition authorities in relation to "best price" clauses are that they would allow an OTA to raise its commission rates, without the risk that hotels will reflect this increase by offering higher room prices to the OTA than they would offer on other platforms (with lower or no commission rates applicable). The implication would be that competition between OTAs with respect to commission rates would be dampened. Accordingly, whilst "best price" clauses appear to guarantee consumers the lowest prices, in the long run, these clauses may restrict competition between OTAs, and hinder new booking platforms (which may be able to offer lower commission rates) from entering the market.

The commitments offered to the French, Italian and Swedish competition authorities prevent Booking.com from requiring hotels to offer better or equal room prices via Booking.com than they do via competing OTAs. In addition, Booking.com cannot prevent hotels from offering discounted room prices provided that these are not marketed or made available to the general public online. In other words, hotels would be able to offer discounted prices via offline channels (*eg* via direct emails, telephone and walk-in bookings), or online to members of the hotel's loyalty scheme.

Further to the acceptance of the commitments, the French, Italian and Swedish competition authorities have each closed investigations against Booking.com. Investigations concerning Expedia continue in all four countries, while France is continuing an investigation involving HRS.

In Singapore:

*"Best price" clauses may well be considered "vertical arrangements" because they involve agreements between parties that operate at different levels of the production or distribution chain, eg hotel booking portals and hotels. Accordingly, and given that vertical arrangements are excluded from consideration under section 34 of the Singapore's Competition Act (Cap. 50B) ("**Act**"), such clauses may not give rise to concerns under Singapore competition law. However, the Competition Commission of Singapore ("**CCS**") has not made any public statement with regard to how "best price" clauses are to be considered, and the CCS Guidelines do not discuss the approach to the assessment of such clauses.*

Information exchange confirmed as an offence by "object"

On 19 March 2015, the European Court of Justice ("**ECJ**") delivered its judgment in relation to Dole Food Co.'s appeal of a €45.6m (S$72.2m) fine levied against it by the European Commission ("**EC**") for being involved in a cartel involving the fixing of the prices of bananas.

In dismissing the appeal, the ECJ held that the exchange of commercially sensitive information, where such information is inherently anti-competitive (or in competition parlance an "infringement by object"), and accordingly the EC did not have to prove that the conduct actually has anti-competitive effects.

The case in question involved an alleged price fixing cartel between four banana importers between 2000 and 2002. On a weekly basis, the companies involved would send their price quotations for the following week to each other, and also held phone calls to discuss price trends *etc*. The EC found that the cartel affected eight European Union countries, and it imposed fines totalling €60m (S$95.3) on the companies involved.

Dole had attempted to argue that the communications only contained quotation price trends, and that actual quotation prices were indeed much different from actual prices. In dismissing this argument the ECJ found that there had been a restriction of competition by object, and that there would be no need to show a connection between the prices exchanged and the actual prices charged.

In Singapore:

*In CCS 500/006/09 Infringement of the Section 34 Prohibition in relation to the price of ferry tickets between Singapore and Batam, 18 July 2012, the Competition Commission of Singapore ("**CCS**") determined that the exchange of sensitive and confidential price information would constitute a restriction of competition by object. More generally, CCS noted that "whether the exchange of price information has the object of preventing, restricting or distorting competition depends on the facts and circumstances of each case and must be analysed in its legal and economic context". The CCS Guidelines on the Section 34 Prohibition state that price fixing, bid rigging, market sharing and the limitation or controlling of production are also considered to be (by their very nature) regarded as restrictive of competition to an appreciable extent.*

MERGERS & ACQUISITIONS

Cement merger receives conditional approval in North America

On 4 May 2015, Holcim and Lafarge, two of the biggest international cement producers, received conditional approval from the US Federal Trade Commission ("**FTC**") and Canada's Competition Bureau ("**CCB**") to move ahead with their proposed merger.

As a condition of approval, the authorities required the companies to undertake significant divestments of assets across North America, including the sale of cement terminals and distribution assets, as well as a number of cement plants.

The FTC and CCB's approval cleared the final barriers in a long journey towards merger, after receiving shareholder approval in May 2014. The deal also received conditional approval from the Competition Commission of India in March this year, and conditional clearance from the European Commission in December last year. Should the merger go through, the combined company will have an extensive global reach, with operations in 90 countries, total sales of €32bn (S$50.7bn), and an annual production capacity of more than 400 million tons.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") was notified of the proposed merger on 11 July 2014. CCS cleared the merger on 4 September 2014, being of the view that a substantial lessening of competition would not result in a Singapore market as a result of the merger, due to the presence of strong competitors and countervailing buyer power in the local cement market.*

OTHER NEWS

European Commission conducts e-Commerce sector inquiry

In May 2015, the European Commission ("**EC**") commenced a competition inquiry into the e-Commerce sector in the European Union to identify possible competition concerns affecting European e-Commerce markets.

According to the EC's press release, the sector inquiry will focus particularly on potential barriers erected by companies to cross-border online trade in goods and services where e-Commerce is most widespread such as electronics, clothing and shoes, as well as digital content.

The inquiry was launched as a complement to the framework of the Digital Single Market Strategy, which was also adopted in May 2015. According to the EC, the Digital Single Market Strategy focuses on:

(a) better access for consumers and businesses to digital goods and services across Europe (making sure the internal market is ready for the digital age with rapid actions, and helping to ensure a "single" digital market by removing barriers that hold back cross-border e-Commerce);

(b) creating the right conditions, level playing field and environment for digital networks and content services to flourish (actions to create the right conditions for infrastructure investment, ensuring a level playing field between market players and improving the European basis for the digital economy); and

(c) maximising the growth potential of the digital economy (actions with far-reaching effects on European industrial competiveness, investment in Information and Communication Technology infrastructures and technologies such as Cloud computing and Big Data, research and innovation as well as inclusiveness and skills).

The EC expects to publish a preliminary report for consultation in mid-2016. The final report is expected in the first quarter of 2017.

In Singapore:

*The Competition Commission of Singapore ("**CCS**") is also undertaking a study of the e-Commerce sector to help CCS understand the e-Commerce space and competition issues in a "broad base" of industries. According to Minister S Iswaran who was speaking at the CCS 10th anniversary dinner at the end of July 2015, "As a market regulator, it is essential that CCS has a nuanced and sophisticated grasp of the impact of new business modalities and strategies, such as e-Commerce and what is broadly termed the sharing economy, on market structures and dynamics. Earlier this year, CCS commissioned a study to examine various aspects of e-Commerce, including shifts in the structure of value-chains, the roles of domestic and overseas players, and the impact of e-Commerce business models on market efficiencies. The findings will help CCS better understand the market practices in key e-Commerce sectors, detect anti-competitive behaviour, and propose policies to maintain level playing fields. As a thought leader and to benefit a larger audience, CCS will be sharing the findings of the study with stakeholders, including sectoral regulators and competition authorities in other jurisdictions such as those in ASEAN*."

FEATURE ARTICLE

COMPETITION LAW AND INTELLECTUAL PROPERTY: PRODUCT-HOPPING AND THE EFFORT TO EXTEND THE LIVES OF DOMINANT PATENTS

This feature article presents a case update on the treatment of product-hopping under antitrust/competition laws, a practice which is discussed in Drew & Napier's guide to *Emerging Issues in Intellectual Property & Competition Law* by Professor Michael S. Jacobs. In particular, this article provides an elaboration on the concept of product-hopping and the circumstances under which a dominant entity may be found to have abused its dominant position by engaging in such practices.

To request for a softcopy of Drew & Napier's guide to *Emerging Issues in Intellectual Property & Competition Law* by Professor Michael S. Jacobs, please contact: complaw@drewnpaier.com.

New York v Actavis

On 22 May 2015, the United States ("**US**") Court of Appeals for the Second Circuit ("**CA**") in *People of the State of New York v Actavis plc, Forest Laboratories LLC* ("***New York v Actavis***"), affirmed a preliminary injunction barring Actavis plc and its wholly-owned subsidiary, Forest Laboratories, LLC (collectively, "**Actavis**") from restricting access to its drug, Namenda IR, prior to generic entry.

In particular, the CA took the view that there was a substantial likelihood that Actavis' withdrawal of Namenda IR, which had expiring patent exclusivity, from the market and its introduction of a new drug, Namenda XR, would constitute "*conduct by a monopolist to perpetuate patent exclusivity through successive products, commonly known as 'product-hopping'*", in violation of antitrust laws.

Brief background on relevant drug laws

In the US, the Food, Drug and Cosmetic Act requires drug manufacturers to submit a New Drug Application ("**NDA**") and obtain approval from the US Food and Drug Administration ("**FDA**") before it may bring a new drug to market. As highlighted in the CA's judgment, these NDA-approved drugs, which are also generally referred to as "brand name drugs" or "brand drugs", "enjoy a period of patent exclusivity in the market at the end of which one or more generic drugs, which exhibit the same characteristics as the brand drug, may enter the market at a lower price to compete with the brand drug".

Drug substitution laws enacted in all 50 states and the District of Columbia either permit or require pharmacists to dispense a therapeutically equivalent, lower-cost generic drug in place of a brand drug, in the absence of express direction from the prescribing physician that the prescription must be dispensed as written. A generic drug is the bioequivalent to a brand drug "if the rate and extent of absorption" of the active ingredient is the same as that of the brand drug (21 U.S.C.S. § 355(j)(8)(B)(i)).

In the US, product-hopping practices have generally been challenged under section 2 of the Sherman Act, which prohibits the acquisition or maintenance of monopoly power through improper means. Specifically, section 2 of the Sherman Act provides that it is unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations […]".

Facts of the case

In *New York v Actavis*, the State of New York brought an antitrust action against Actavis alleging that, as Actavis' twice-daily drug designed to treat Alzheimer's disease, Namenda IR, neared the end of its patent exclusivity period, Actavis introduced a new once-daily version of the drug, Namenda XR, to maintain its monopoly power through successive patents.

Namenda IR and Namenda XR occupied the entire memantine-drug market. Namenda IR and Namenda XR, which are both drugs used to treat Alzheimer's disease, have the same active ingredient and therapeutic effect. According to the CA, the relevant medical difference between the two is that Namenda IR, which is released immediately into the bloodstream, is taken twice a day, while Namenda XR, which is released gradually, is taken once a day. Additionally, Namenda IR and Namenda XR have different dosage forms. All other Alzheimer's disease treatments are administered once a day. Actavis' patents on Namenda IR prohibited any manufacturer from marketing a generic version of Namenda IR until after 11 July 2015, while Actavis' patents on Namenda XR expire in 2029.

When Actavis brought Namenda XR to the market in 2013, they initially sold both Namenda IR and XR. However, Actavis subsequently stopped actively marketing Namenda IR. According to the CA, Actavis spent "substantial sums of money promoting XR to doctors, caregivers, patients and pharmacists. They also sold XR at a discounted rate, making it considerably less expensive than Namenda IR tablets, and issued rebates to health plans to ensure that patients did not have to pay higher co-payments for XR than for IR". In early 2014, concerned that they would be unable to convert a significant percentage of Alzheimer's patients dependent on memantine therapy from Namenda IR to Namenda XR, Actavis decided on a more direct approach and announced that they would discontinue Namenda IR.

According to the State of New York, as Namenda IR neared the end of its patent exclusivity period, Actavis introduced Namenda XR to extend its patent, then sought to withdraw Namenda IR in order to force patients to switch to Namenda XR.

At the time of the CA's decision, five generic versions of Namenda IR had tentative FDA approval to enter the market on 11 July 2015 and seven others may possibly enter the market from as early as October 2015. However, because Namenda XR has a different strength and daily dosage regimen to Namenda IR, the generic IR versions that were poised to enter the market were therapeutically equivalent under FDA regulations to Namenda IR but not to Namenda XR. Accordingly, pharmacists are prohibited from substituting generic Namenda IR for Namenda XR under most, if not all, state drug substitution laws.

To establish monopolisation in violation of section 2 of the Sherman Act, a plaintiff must show not only that the defendant possessed monopoly power in the relevant market, but that it wilfully acquired or maintained that power "as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident" (*Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP* (2004), quoting *United States v Grinnell Corp* (1966)).

The decision

The CA found that Actavis' patents on Namenda IR "indisputably grant them a legal monopoly in the US memantine-drug market until July 11, 2015". In next considering whether Actavis' conduct was anti-competitive, the CA stated that it was well-established in case law that product redesign is anti-competitive when it: (a) coerces consumers; and (b) impedes competition.

In the case, the CA was of the view that Actavis' "hard switch" of combining the introduction of Namenda XR into the market and effectively withdrawing Namenda IR, forced Alzheimer's patients depending on memantine therapy to switch to Namenda XR (to which generic Namenda IR is not therapeutically equivalent) and would likely impede generic competition by precluding generic substitution through state drug substitution laws.

According to the CA, "there was a substantial likelihood that a pharmaceutical company's withdrawal from the market of a type of drug with expiring patent exclusivity and introducing a new drug of the same type under a new patent violated antitrust laws, since the company sought to perpetuate patent exclusivity through successive products and such conduct had anti-competitive effects of coercing patients to switch to the new drug and impeding competition for the drug which was being withdrawn by generic drugs which could soon be substituted for the withdrawn drug".

It is of note that Actavis had argued, amongst other things, that its conduct was not anti-competitive because preventing "free-riding" (*ie* generic substitution by pharmacists following the end of Namenda IR's exclusivity period) is a legitimate business purpose. However, the CA pointed out that such generic substitution is the explicit goal of state substitution laws and, moreover, "furthers the goals of the Hatch-Waxman Act by promoting drug competition […] and […] preventing the practical extension of [brand drug manufacturers'] monopoly […] beyond the expiration of their patents".

Further, the CA dismissed all of the pro-competitive justifications put forth by the defendants for their conduct as "pretextual", rebutting these arguments on the basis that "[t]he record is replete with evidence showing that Defendants were, in the words of the Defendants' own CEO, "trying to […] put up barriers or obstacles" to generic competition".

Relevant considerations in other US/EU product-hopping cases

The position adopted by the CA in *New York v Actavis* is broadly consistent with the general position adopted in earlier US District Court cases on product-hopping, insofar as the introduction of a new product has been held not to be anti-competitive per se.

That said, the analysis in the previous US District Court cases had tended to focus on the elimination of consumer choice, as opposed to the dual effects of customer coercion and impeding competition, which were key factors in *New York v Actavis*. Therefore, the cases appear to view product-hopping as anti-competitive only where such practices involve a withdrawal of the previous product.

In *Walgreen Company v AstraZeneca Pharmaceuticals LP*, AstraZeneca had ceased to promote its prescriptive heartburn drug Prilosec, and had aggressively promoted its newly FDA-approved equivalent Nexium, and its newly FDA-approved over-the-counter version of Prilosec. However, it did so without withdrawing the prescriptive version of Prilosec from the market. The District Court of Columbia held that such conduct was not anti-competitive as there was no elimination of consumer choice. On the contrary, the introduction of the new products was found to have added to consumer choice.

This may be distinguished from the cases of *Abbott Laboratories v Teva Pharmceuticals* ("***Abbott v Teva***") and *Re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation* ("***Re Suboxone***"). In the former case, Abbott had on multiple occasions: introduced new formulations of its product TriCor; repurchased and stopped selling the old formulations of the drug; and took other steps to preclude generic companies from availing themselves of the state drug substitution laws. Such conduct was held to be anti-competitive. In *Re Suboxone*, Reckitt Benckiser had, in addition to switching from sublingual Suboxone tablets to a sublingual Suboxone film, threatened to remove Suboxone tablets from the market and allegedly falsely disparaged the Suboxone tablet through fabricated safety concerns, and ultimately removed Suboxone tablets from the market. Such conduct was held to be anti-competitive, even though Reckitt Benckiser had not taken additional steps to preclude generic drug substitution (as was the case in *Abbott v Teva*).

In the EU, such practices have mainly been investigated as alleged abuses of a dominant position contrary to Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**").

In *AstraZeneca v Commission*, the introduction of a new formulation of a product coupled with the withdrawal of the original formulation was held by the European Court of Justice ("**ECJ**") to be incapable of producing anti-competitive effects per se. According to the ECJ, such behaviour did not depart from "competition on the merits", since these acts were not such as to raise the legal barriers to entry capable of delaying or preventing the introduction of generic products and parallel imports. A dominant company's strategy to minimise erosion of its sales and to enable it to deal with competition from generic products is considered part of the normal competitive process and therefore legitimate.

Notwithstanding, the ECJ held that AstraZeneca's deregistration of the marketing authorisations for the original formulation of the product in Denmark, Norway, and Sweden was an abuse of dominance in violation of Article 102. The ECJ reasoned that, since AstraZeneca no longer had the exclusive right to make use of the results of the pharmalogical and toxicological tests and clinical trials, its conduct, designed to prevent generic companies from benefiting from such results, was not based on the legitimate protection of an investment which came within the scope of competition on the merits.

Pertinently, the ECJ stated in this regard that, while a dominant undertaking is not deprived of its entitlement to protect its own commercial interests, it cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors to the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits, or in the absence of objective justification.

The ECJ's analysis in *AstraZeneca v Commission* was relied upon by the United Kingdom ("**UK**") Office of Fair Trading ("**OFT**") (now known as the Competition and Markets Authority ("**CMA**") in its Reckitt Benckiser (Gaviscon) decision, where the OFT concluded that the withdrawal of Reckitt Benckiser's Gaviscon Original Liquid ("**GL**") from the market, combined with the delisting of GL from the UK's National Health Service ("**NHS**") prescription channel, was anti-competitive and contrary to Article 102 TFEU and its equivalent provision under the UK Competition Act 1998. The delisting of GL resulted in the NHS system not being able to generate the cheaper generic version of GL, and pharmacists would consequently be referred to Reckitt Benckiser's new patent-protected formulation Gaviscon Advance Liquid, for which there was no generic equivalent, thereby hindering the development of full generic competition.

Concluding remarks: How such product-hopping cases may be considered in Singapore

To date, there have not been any reported decisions by the Competition Commission of Singapore ("**CCS**") on product-hopping or the impediment of the generic entry of pharmaceuticals, or on abuses of dominance in the pharmaceutical sector in general.

That said, CCS's Guidelines on the Treatment of Intellectual Property Rights set out how CCS is likely to view the operation of the Competition Act in relation to agreements and conduct which concern intellectual property rights ("**IPRs**"). While the practice of product-hopping is not specifically mentioned, the Guidelines discuss CCS's considerations in assessing, inter alia, conduct involving IPRs within the context of section 47 of the Singapore Competition Act ("**Section 47 Prohibition**").

In this regard, the Guidelines state that the ownership of an IPR does not create a dominant position per se, and that whether or not an IPR holder enjoys dominance in the relevant market will depend on the extent to which there are substitutes for the technology, product, process or work to which the IPR relates.

Furthermore, the Guidelines also indicate that CCS will, in determining whether an IPR holder's conduct constitutes an abuse, consider the extent to which it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. "[C]onduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit" would constitute an abuse of dominance.

Currently, the test for an abuse of dominance in Singapore is as stated in the Competition Appeal Board's ("**CAB**") decision in the case of *SISTIC.com Pte Ltd v Competition Commission of Singapore* (the "**SISTIC case**"). In the SISTIC case, CAB adopted the legal test for abuse of dominance as established where it can be shown that the dominant undertaking's conduct has, or is likely to have, an adverse effect on the process of competition. Accordingly, it would be sufficient for CCS to demonstrate a likely effect, as opposed to an actual effect on the process of competition.

Notwithstanding, the dominant undertaking may adduce evidence to demonstrate that such conduct produces countervailing benefits so that it has a net positive impact on welfare. In this regard, the onus is on the dominant undertaking to establish such an objective justification.

Although it remains to be seen how product-hopping would be considered in the context of the Section 47 Prohibition, it is envisaged that the analysis in the US/EU case law and enforcement decisions may potentially be of guidance or be persuasive in Singapore. That said, a nuanced approach would certainly be required in transposing any conclusions from the US/EU case law on product-hopping to the Singapore context, in order to take into account the peculiarities of the regulatory framework in the Singapore pharmaceutical industry.

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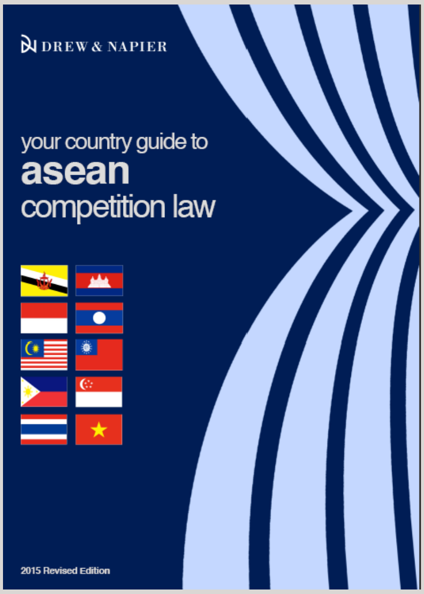

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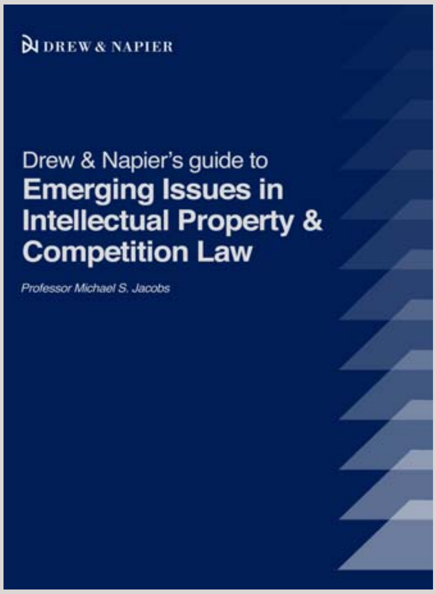

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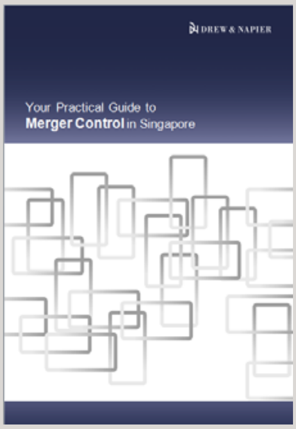

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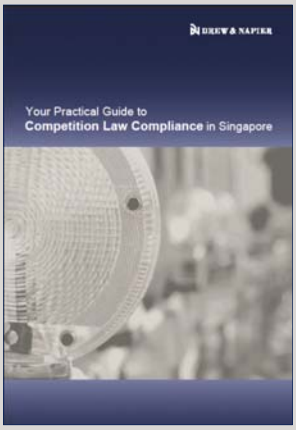

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