October 2012

In this issue

Singapore Competition Law Watch ........................................1
Regulatory Updates ...................................................3
Industry News ..........................................................4
  – Anti-Competitive Agreements ..........4
  – Abuse of Dominance .................7
  – Merger Regulations .................9
  – Procedural Matters and others ....14
Feature Article ......................................................15

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SINGAPORE COMPETITION LAW WATCH

Score Board

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Concluded</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notified Agreements or Conduct</td>
<td>11</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Notified Mergers or Anticipated Mergers</td>
<td>33</td>
<td>32</td>
<td>1</td>
</tr>
<tr>
<td>Infringement Decisions</td>
<td>7</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Appeals</td>
<td>7</td>
<td>5</td>
<td>2</td>
</tr>
</tbody>
</table>

CCS ISSUES PROPOSED INFRINGEMENT DECISION AGAINST 13 MOTOR VEHICLE TRADERS

On 7 September 2012, the Competition Commission of Singapore (“CCS”) issued a Proposed Infringement Decision (“PID”) against 13 motor vehicle traders for an alleged infringement of section 34 of the Competition Act (Cap. 50B), which prohibits agreements or arrangements that prevent, restrict or distort competition in Singapore.

According to CCS’s media release, the alleged infringement involves bid-rigging by the following motor vehicle traders through an agreement to suppress bids at public auctions of motor vehicles:

1. Pang’s Motor Trading;
2. Auto & Carriage Engineering;
3. Gold Sun Motor Vehicle Charter & Rental;
4. Hup Lee Second Hand Auto Parts;
5. Kang San Trading Company;
6. Kiat Lee Scrap Vehicle Centre Pte Ltd;
7. Kiat Lee Machinery Pte Ltd;
8. Minsheng Agencies;
9. PKS Scrap Vehicle Centre;
10. Seng Guan Auto Parts;
11. Seng Hup Huat Second Hand Auto Parts;
12. Tim Bock Enterprise; and
13. Yong Soon Heng Auto Parts.

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This is potentially CCS’s third bid-rigging case, after its decisions against companies performing electrical and building works in 2010, and against pest control companies in 2008.

Bid-rigging is generally seen as a serious breach of competition law, and is considered by CCS to be a “hard-core” offence in Singapore. This means that it is considered to be a breach of competition law without CCS having to demonstrate the actual adverse effects of the collusion. Accordingly, a detailed economic effect analysis is not usually necessary before CCS takes enforcement action in such cases.

While CCS has not announced the level of financial penalties it is contemplating in this case, the maximum penalty that CCS can impose is capped at 10% of the turnover of the undertakings in Singapore, for up to three years (depending on the length of the infringement).

All parties who have been issued the PID were given an opportunity to submit their arguments to CCS and provide any other information for CCS’s consideration, by 18 October 2012. The final infringement decision remains pending.

The media release of CCS’s Proposed Infringement Decision is available here.

**CCS fines two ferry operators for unlawful price information exchange**

On 18 July 2012, the Competition Commission of Singapore (“CCS”) fined Batam Fast Ferry Pte Ltd (“Batam Ferry”) and Penguin Ferry Services Ltd (“Penguin Ferry”) S$172,906 and S$113,860 respectively, for an infringement of section 34 of the Competition Act (Cap. 50B).

CCS found that the parties had engaged in concerted practices that had the object of preventing, restricting or distorting competition within Singapore, by exchanging sensitive and confidential pricing information, which included prospective fare increases for travel agents and corporate clients in the Singapore market.

Notably, CCS characterised the present case as involving a “concerted practice” between the parties, which can be established where parties knowingly substitute competition with co-operation, even if they do not reach a formal or informal agreement.

CCS also made clear that, a recipient of unilateral provision of strategic information will be presumed to be liable for participating in a concerted practice, unless active steps are taken to distance itself from the conduct. The steps taken must be shown to have had the effect of pronouncing its disagreement to the other parties involved in the meeting or anti-competitive arrangements – silent disagreement would not suffice to absolve a party from liability.

Drew & Napier’s Legal Update on this article can be found [here](#).

**Singapore releases revised merger procedure guidelines**

The Competition Commission of Singapore (“CCS”) published its revised Merger Control Procedures Guidelines (“revised Guidelines”) in July 2012, following a public consultation in the first quarter of this year on its proposed revisions to the merger notification procedures in Singapore.

The revised Guidelines took effect on 1 July 2012 and incorporated, amongst other things, a reminder that whilst merger notification in Singapore is voluntary, CCS will keep “markets under review to ascertain which mergers and acquisitions are taking place”.

The revised Guidelines included many of the key amendments proposed and discussed in CCS’s public consultation, such as:

(a) new turnover guidelines for small businesses which provide that CCS is unlikely to investigate a merger situation involving small businesses where:

(i) the turnover in Singapore of each of the merger parties in the financial year preceding the transaction is below S$5m; and

(ii) the combined worldwide turnover in the financial year preceding the transaction of all of the merger parties is below S$50m.
(b) a new process to obtain advice from CCS for confidential mergers. This is a welcome change for confidential mergers, particularly those involving listed companies, as the advice from CCS, whilst qualified (i.e., the advice is not binding on CCS), will provide comfort to merger parties on whether the merger is likely to give rise to competition concerns in Singapore.

The revised Guidelines contained a revised merger form M1 to be used for merger notification to CCS. The revised form M1 fine-tunes the information required to be submitted to CCS and places a stronger focus on information relating to the Singapore operations of the merger parties and the competitive structure of the relevant market(s).

The objective of the revision was to cut down on the number of information requests from CCS, so as to lower the likelihood of any delay in the assessment process and to “make [the merger notification process] more efficient from a business perspective”.

The revised Guidelines can be found on CCS’s website here.

Please access our Legal Update on CCS’s public consultation on the proposed revisions to the merger control procedures in Singapore which took place earlier this year, here.

Drew & Napier’s Legal Update analysing the changes in the revised Guidelines and its impact on businesses is available here.

The most significant feature of the new guidelines is the increase in the maximum imposable fine from 10% of relevant turnover to 30%. The guidelines specify that the OFT will use a minimum starting point of 25% for the most serious competition law violations (such as price-fixing). However, fines will still remain subject to an overall cap of 10% of group worldwide sales.

The guidelines were revised after a lengthy public consultation, with the increase in the maximum fines seen as more appropriate with regard to the need for deterrence. Indeed, the guidelines outline an additional specific step in the OFT’s penalty calculations that relates to considering the need for deterrence.

The guidelines also indicate that fines might be adjusted for factors including, the need for fines to be proportional, and that persistent and repeated unreasonable behaviour will be an aggravating factor in the calculation of penalties. On the other hand, reductions in fines might arise from adjustments for leniency applications, settlement arrangements, and possibly modest mitigating reductions for the existence of a compliance programme.

In Singapore:

In Singapore fines are limited by the Competition Act to 10% of the turnover of the relevant undertaking in Singapore. To date, the Competition Commission of Singapore’s ("CCS") practice has been to impose fines based on a percentage “relevant turnover” (being turnover derived from the sale of products or services to which the infringement related), rather than total turnover.

Financial penalties have been subject to a number of appeals to the Competition Appeal Board (“CAB”), and in one case CAB reduced the financial penalties imposed by 90%. This will no doubt be an area where CCS will continue to refine its approach, but there are no public announcements relating to the revision of CCS’s Guidelines on the Appropriate Amount of Penalty at this point.
INDUSTRY NEWS

ANTI-COMPETITIVE AGREEMENTS

E-book settlement in the EU and the US


During the course of the investigation, the DoJ and the EC co-operated closely with frequent contact between staff and senior officials.

It was further alleged that the publishers were unhappy that competition among e-book sellers had reduced e-book prices, which could lead to lower wholesale prices for e-books and print books. This ultimately lead to them entering into an agreement with Apple, which through changing the business model of how e-books were sold, ultimately curtailed retail price competition. The business model prior to the alleged conspiracy was based on a “wholesale model” whereby publishers sold books to retailers, and retailers had the freedom to establish the retail prices. However, the new “agency model” allowed publishers to take direct control of retail pricing.

Apple’s role in this agreement was to facilitate this transition by allowing publishers to set the price and sell their e-books with Apple’s iBookstore at a higher price than that which was currently sold by other e-book retailers in exchange for a 30% commission to Apple. It was also alleged that certain other requirements by Apple (in particular the imposition of a most-favoured-nation clause) would further lead to anti-competitive outcomes.

Three of the publishers, Hachette, HarperCollins and Simon & Schuster, moved to settlement with the DoJ in April 2012. Under the proposed settlement agreement, the publishers agreed to amongst others, terminate their agreements with Apple and other e-book retailers. The publishers were also prohibited for two years from entering into new agreements that constrain retailers’ ability to offer discounts or other promotions to consumers to encourage the sale of the publisher’s e-books.

In contrast to the US, all four publishers (investigated by the EC) and Apple offered commitments to the EC last September. The EC announced that it intended to declare the commitments proposed be binding, subject to market testing. The commitments offered included, termination of the agency agreements for the sale of e-books.

In Singapore:

In Singapore, agreements that have the object or effect of fixing prices are considered to be hardcore restrictions, which would likely be in breach of the section 34 prohibition, by their very nature.

CCS does not have a formal settlement procedure specified in its guidelines, and the ability for a similar outcome to arise in the absence of an enforcement proceeding is untested to date.

Taiwan LCD cartelists and officers dealt stiff penalties

The United States Department of Justice (“DoJ”) announced in September that Taiwan Liquid Crystal Display (“LCD”) manufacturer, AU Optronics (“AUO”), and its officers, were dealt stiff penalties for conspiring to fix prices of LCD panels.

In the indictment, AUO was charged with conspiring with other manufacturers to fix the prices of LCD panels sold in the US. The arrangements were discussed and agreed through monthly meetings in various locations throughout Taiwan, which started in 2003. The agreement affected some of the largest computer manufacturers in the world, including Apple, Dell and Hewlett Packard.

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The US District Court fined AUO US$500m (S$610m), the highest fine in US antitrust history, while sentencing two of its officers to a three year prison term and US$200,000 (S$245,000) fine.
each. Unusually, AUO was also ordered to print advertisements in three major trade publications acknowledging its convictions and punishments and the remedial steps it has taken.

AUO and its subsidiary, AU Optronics Corporation America, were also both placed under three years’ probation, and required to adopt an antitrust compliance programme, including the appointment of an independent corporate compliance monitor. Such additional sanctions are novel in antitrust cases.

The monitor will have full access to the companies’ documents and data and can hold meetings and conduct interviews with any and all the companies’ employees, including executives. The monitor must then report any violations to the court and the DoJ.

While AUO’s punishment is severe, it falls short of the DoJ’s recommendations for a fine of around US$1bn (S$1.23bn) and a jail term of around ten years for each of the two executives.

**In Singapore:**

*Competition violations in Singapore are not criminal offences, and financial penalties are limited to 10% of an undertaking’s revenue in Singapore, for each year of an infringement, up to a maximum of three years. The Competition Commission of Singapore (“CCS”) also has the ability to impose other directions under section 69 of the Competition Act, which might enable CCS to require the appointment of a compliance officer.*

To date, the highest penalty imposed by CCS for a competition violation is S$989,000.

**LCD industry under intense scrutiny**

Sharp Corp. (“Sharp”) has agreed to a settlement of US$199m (S$250m) in a lawsuit filed by Dell Inc (“Dell”) and two other companies accusing Sharp and four other liquid crystal display (“LCD”) monitor makers of inflating the prices of monitors as part of an anti-competitive agreement.

In Dell’s lawsuit, it was alleged that the five LCD manufacturers had discussed and agreed on prices of thin film transistor (“TFT”) LCD panels to be sold to Dell and the other two plaintiffs, as well as exchanged sales information for the purposes of monitoring and enforcing adherence to the agreed-upon prices. Such price-fixing agreements inevitably affected Dell’s business through the substantial overcharges.

In December 2011, Sharp agreed to pay a settlement of US$115.5m (S$141m) for a class action lawsuit brought by indirect purchasers of its LCD products.

In 2008, Sharp agreed to pay a US$120m (S$147m) fine after admitting, under a United States Department of Justice (“DoJ”) investigation, that it had colluded with several Asian LCD manufacturers. In contrast, Taiwan’s AU Optronics challenged the charges brought against them as a result of the investigations carried out by the DoJ, and received a US$500m (S$610m) fine (as well as jail terms for two of its executives).

The investigation by the DoJ is part of a global crackdown on international LCD cartels, following probes by regulators in South Korea and Japan. Ten of the world’s leading flat panel makers from South Korea, Japan and Taiwan have recently been fined a total of KRW194bn (S$215m) by the Korean Fair Trade Commission for price-fixing.

Sharp was also subject to a ¥261m (approximately S$4m) fine by the Japan Fair Trade Commission for its part in fixing the prices of TFT-LCD modules used for display screens in hand-held Nintendo gaming consoles.

**In Singapore:**

The exchange of sensitive commercial information between competitors will be caught under section 34 of the Competition Act. Arguments that the exchange of information has not led to effective co-ordination between rivals or impacted market conditions are very unlikely to be accepted as a credible defence. Agreements and cartel activity entered into or carried out overseas are also potentially subject to Singapore competition law, if such conduct has an impact on a Singapore market for goods and services.

**Bread cartel executives prosecuted**

In August 2012, several bread producers and their executives had criminal proceedings brought against them by the Israeli Antitrust Authority.
IAA (“IAA”) for allegedly colluding to divide the bread market, and fix the price of price controlled Challah and white bread.

IAA began its investigations in May 2010, with a succession of dawn raids, followed by the arrest of six executives from the accused bread producers.

The charges brought against the bread producers were two-fold. First, the IAA alleged that the bread producers had agreed to divide the non-price controlled bread market, and secondly, without the threat of competition, agreed to cease giving special discounts on price-controlled Challah and white bread, thus effectively raising the regulated prices of these breads.

IAA alleged that the agreement between the bakeries was reached through various meetings held in different locations.

The targeted companies and executives deny any wrong-doing, and instead suggest that the bread market in Israel is one of the most competitive.

Under section 47 of the Israeli Restrictive Trade Practices Law 1988, the executives face three years imprisonment and a maximum fine of NIS 673,000 (S$ 211,000), and an additional NIS 13,000 (S$4,076) for each day after the offence continues, with the corporations facing double the fines. Under aggravated circumstances, the executives may face up to five years imprisonment.

In Singapore:

Participation in cartel activity in Singapore does not give rise to personal criminal liability. However, criminal liability does arise in respect of certain conduct such as refusing to provide information to CCS, obstructing a CCS officer, destroying or falsifying information, etc.

The maximum penalty for such conduct is a 12 month prison sentence, a S$10,000 fine or both. To date, CCS has not publicly announced any instance of anyone being charged for such an offence since the introduction of competition law in 2006.

Global cartel investigation in the auto parts industry

Over the last two years, the European Commission (“EC”), the United States Department of Justice (“DoJ”) and authorities in Canada and Japan launched parallel investigations into the auto parts industry. From the scale of the investigation, it is predicted that the DoJ may net the largest criminal fines and jail sentences of any investigation in US antitrust history, with currently around eight companies and 11 individuals charged, and more than US$785m (S$958m) fines collected. The then-DoJ’s Assistant Attorney General, Sharis A. Pozen remarked in her speech delivered in Washington D.C. on 30 January 2012 that “...the auto parts investigation is the largest criminal investigation the Antitrust Division has ever pursued...”.

News reports indicate the broad scope of the investigation which includes wire harness and electric components, safety equipment, alternators and starters, automotive electronics and electrical system, auto lights, and automotive ball bearings. The scale of the investigation is partly attributed to the success of the leniency system which includes the application of the Leniency Plus program as applied by both the US and the United Kingdom. Under the Leniency Plus program, a business entity under investigation for cartel activity in one market may seek immunity in respect of a second market where they are involved in a completely separate cartel activity in that secondary market, subject to conditions. This program creates a snowball effect as it encourages leniency applications while alerting competition authorities to cartel activities in other markets within the auto parts industry.

The auto parts industry is particularly vulnerable to competition investigations due to the nature of the industry and the procurement process. The industry suppliers are generally vertically integrated companies and frequently customise products and buy products from their competitors. Due to the multi-tiered supply structure of the industry, competitors may bid jointly or bid at different tiers, or compete against each other depending on the tender. In addition, there is usually a high concentration of credible suppliers who know each other well, high barriers to entry, as well as opportunities for contacts between competitors such as through collaborative
development at the research and development phase.

Recent developments in the global cartel investigation of the auto parts industry include:

(a) the vice chairman of Eagle Eyes Traffic Industrial Co. Ltd. ("Eagle Eyes"), Homy Hong-Ming Hsu, pleaded guilty to price-fixing of aftermarket auto lights, where he faces a maximum penalty of ten years in prison and a US$1m (S$1.23m) criminal fine. Eagle Eyes’ chairman Yu-Chu Lin and Eagle Eyes’ US subsidiary company, E-Lite Automotive Inc., were also indicted;

(b) Japanese auto parts company Nippon Seiki pleaded guilty for its role in a conspiracy to fix prices of meters and gauges installed in cars sold in the US. The company agreed to pay US$1m (S$1.23m) criminal fine and pledged to co-operate with the DoJ in its ongoing investigation;

(c) the EC has opened formal investigations of several companies that make wire harnesses and car parts that supply electricity across vehicle components; and

(d) the EC conducted raids of companies in the manufacture of car thermal systems which include air conditioning and engine cooling products.

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**Abuse of Dominance**

Allegations of abuse of dominance against Telecom Italia dropped

Italy’s Antitrust Authority (“Authority”) has closed its abuse of dominance investigation into Telecom Italia, after the telecoms giant proposed remedies to address the authorities’ concerns. Telecom Italia had previously submitted a set of remedies that were rejected.

The Authority’s investigation focused on Telecom Italia exploiting its capabilities as a vertically-integrated operator to restrict access to critical information that telecommunications rival Fastweb S.p.A. ("Fastweb") required for the formulation of offers for certain tenders.

The tenders to Consip S.p.A. and Enel S.p.A. were worth a combined total of €1.54bn (S$2.62bn). Success in the tender would have placed a competitor in a good position to compete in the market with Telecom Italia.

The allegations were part of a complaint levelled against Telecom Italia in 2010 by telecommunications rivals Fastweb and Wind Telecomunicazioni S.p.A., which also included accusations of aggressive pricing policies in areas operated by competitors as compared to policies they applied in less competitive regions.

The first proposal Telecom Italia submitted to the Authority in early 2011 to remedy their actions was provisionally accepted. However, the proposal was subsequently rejected after failing a market test, with participants commenting that it mostly rehashed regulation already in place.

In November 2011, Telecom Italia then committed to further remedies, which were accepted by the Authority in June 2012 after it completed a second market test. These remedies will remain in place “as long as Telecom Italia holds a dominant position in the wholesale access markets”.

Telecom Italia’s second set of proposed remedies include, expanding the data set and services offered by Telecom Italia to its competitors to allow equal footing when bidding for tenders fielded by large public and private customers. The remedies also include supplying various new guarantees for equal treatment both internally and externally and increasing access to information about Italy’s telecommunications network.

Telecom Italia has had run-ins with the Authority before. In August 2007, it was fined €20m (S$41m) for abuse of dominance in the wholesale market for termination on their network. The fine imposed was increased because Telecom Italia had, even previously, “already been the subject of a number of findings regarding its dominant position”. 

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**BUSE OF DOMINANCE**

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The Authority’s investigation is interesting as it suggests that a dominant undertaking withholding information might constitute abusive conduct.

In Singapore:

Abuse of dominance concerns in Singapore will usually arise where conduct forecloses a rival from being able to compete effectively. Whilst the Competition Commission of Singapore (“CCS”) has not publicly disclosed details of any cases relating to the withholding of information, such actions could give rise to in-principle concerns in some cases.

In Singapore, the telecommunications industry is regulated by the Infocomm Development Authority, and does not fall under the jurisdiction of the CCS.

UK Competition Appeal Tribunal awards damages for the first time

On 5 July 2012, the Competition Appeal Tribunal (“CAT”) handed down its judgment in the Cardiff Bus case, awarding damages in a “follow-on” claim for the first time. This is also the first case in which exemplary damages for a breach of competition law have been awarded by CAT.

In January 2011, 2 Travel brought a claim against Cardiff Bus following a 2008 decision by the Office of Fair Trading (“OFT”) which found that, by engaging in predatory conduct, Cardiff Bus had infringed the Competition Act by abusing a dominant position in the market. In particular, when 2 Travel Group (“2 Travel”) launched a no-frills bus service, Cardiff Bus introduced its own no-frills service on the same routes and at similar times of the day, with exclusionary and predatory intent. Shortly after 2 Travel’s exit from the market, Cardiff Bus withdrew its own no-frills services.

In its claim before the CAT, 2 Travel claimed for losses under a number of heads including loss of profits, loss of capital asset, loss of commercial opportunity, wasted staff and management time, and liquidation costs. 2 Travel also claimed exemplary damages, whose purpose is to “punish and deter” the defendant in addition to compensatory damages that might be awarded. While the CAT dismissed most of 2 Travel’s claims it awarded damages for loss of profits (of £33,818.79 (S$66,247.53) plus interest) and also exemplary damages of £60,000 (S$117,533.82).

Notwithstanding the low value of the damages awarded, this was a landmark judgment and shows the willingness and ability of the CAT to deal with complex issues of causation and quantification of losses in the context of damages claims in competition cases.

It should be noted that although 2 Travel’s claim was before the CAT, the circumstances in which it considered exemplary damages to be appropriate are likely to apply equally to competition claims before the High Court.

The fact that damages were awarded on an exemplary basis is particularly noteworthy. While the primary purpose of a damages award is to compensate a claimant’s loss, exemplary damages can be awarded where compensatory damages alone would be insufficient to punish the defendant for its conduct including, as in this case, when the defendant was or should have been aware that its conduct was probably illegal.

The CAT also stated that when exemplary damages are considered they should have some bearing to the compensatory damages awarded, in this case, awarding exemplary damages about twice the size of the compensatory award. They should also have regard to the economic size of the defendant which should be “of an order of magnitude sufficient to make the defendant take notice”.

While the CAT concluded that it was “under no illusions that this judgment is likely to incentivise the bringing of claims for exemplary damages in competition cases”, in reality it is unlikely that they will be awarded in many cases. Therefore, while this landmark judgment is no doubt good news for potential claimants considering competition-based damages actions in the UK.

South African telecom giant faces abuse of dominance allegations

In August 2012, the South African Competition Tribunal (“SACT”) imposed a ZAR449m (S$62.8m) penalty on Telkom SA Limited (“Telkom”) for abusing its dominance in the telecommunications market from 1999 to 2004.
The case was referred to SACT by the Competition Commission of South Africa (“SACC”) in 2004, after the SACC received a complaint from the South African Value-Added Network Service (“VANS”) Association and 20 other internet service providers (“ISP”) alleging that Telkom had refused to supply essential access facilities to the independent VANS providers, unless they had acceded to certain conditions, which would expand Telkom’s exclusivity of services.

Among the conditions allegedly imposed by Telkom, VANS providers were forced to enter into agency agreements to manage the facilities on Telkom’s behalf. Downstream customers would face higher costs and administrative burdens, which would make the independent VANS providers less appealing in comparison to Telkom’s VANS subsidiary, Telvans, which was able to offer better deals with less hassle.

Telkom’s defence was that the VANS providers were illegally trespassing on exclusivity rights set out in the Telecommunications Act, which was the basis for its refusal to provide the essential facilities.

SACT found that “Telkom leveraged its upstream monopoly in the facilities market to advantage its own subsidiary.”

Telkom filed its notice of appeal on 30 August 2012 against SACT’s decision, but could possibly face a stiffer fine as the SACC cross-appealed in September. The SACC is cross-appealing that Telkom should be found guilty of excessive pricing and price discrimination, allegations which failed before SACT, and is asking that Telkom be fined a figure closer to the ZAR3bn (S$420m) originally prayed for, being 10% of Telkom’s total turnover for 2004.

In Singapore:

Competition in the telecommunications industry is governed by the Telecom Competition Code (“TCC”) and it is administered by the Infocomm Development Authority of Singapore. In this regard, the sector is carved out from the general authority of CCS.

A refusal to supply essential equipment would fall under clause 8.2.1.2 of the TCC, which prohibits a dominant company from engaging in price squeezes.

Merger regulations

UPS/TNT proposed merger faces objections from the European Commission

In November 2012, United Parcel Service, Inc. (“UPS”) and TNT Express N.V. (“TNT”) confirmed that they received a Statement of Objections (“SO”) from the European Commission (“EC”) on the proposed acquisition by UPS of TNT, which was notified to the EC on 15 June 2012.

UPS, a US-based global provider of specialised transport and logistics services, is active in small package delivery services, air cargo, freight forwarding and contract logistics. TNT, based in the Netherlands, is active in the global logistics sector, where it provides small package delivery services, air and ground freight, freight forwarding and contract logistics.

On 20 July 2012, the EC announced, in a press release, that it opened an in-depth investigation into the proposed transaction, thus moving the transaction into a Phase II investigation stage.

The SO reportedly reiterates the concerns of the EC highlighted in its July 2012 press release, that in the markets for small parcel delivery services (in particular international express services) in numerous European Union (“EU”) member states, the parties would have very high combined market shares and the proposed transaction would reduce the number of “integrators” operating in Europe from four to three, thus significantly increasing market concentration. “Integrators” are delivery service companies that control a comprehensive air and road small package delivery network, in this case, throughout Europe and beyond, which are capable of offering the broadest portfolio of such services.

According to a press release on the TNT website, UPS and TNT have stated that they will respond to the EC to address its concerns, emphasising that the companies “intend to preserve the...
confidentiality of the [SO] and discussions [with the EC] in line with common practice.”

In a joint presentation on the proposed transaction released by UPS and TNT, the companies have stated that they believe that the proposed merger will help provide stronger global solutions for customers, increase US and Europe connectivity with Asia-Pacific, China and other emerging markets and enhance network density and optimisation, resulting in increased operational performance.

In Singapore:

In August 2012, CCS cleared the proposed acquisition by UPS of TNT in Phase I of its evaluation, in contrast to the EC which had announced in July, that it had opened a Phase II investigation into the transaction.

As the relevant geographic market for CCS’s assessment was confined to Singapore, CCS’s decision was not subject to the same competition concerns that affect the EU.

In the case before CCS, CCS found that whilst post-merger market concentration was significant and the barriers to entry high for the international small packages services segment for Singapore, countervailing buyer power, existing players’ significant market shares and ability to expand, and the use of private contracts would likely constrain the parties’ market power and limit co-ordinated effects post-merger.

EMI sale gets US and EC clearance

The United States Federal Trade Commission (“FTC”) and the European Commission (“EC”) have cleared the takeover of EMI Group (“EMI”) by Universal Music Holdings Limited (“Universal”) and a Sony Corporation-led joint venture (“Sony”).

Universal will acquire EMI’s recorded music business for US$1.9bn (S$2.4bn) while Sony will acquire EMI’s music publishing arm for US$2.2bn (S$2.8bn).

The FTC gave unconditional clearance to Sony’s acquisition of EMI Music Publishing (“EMI Music”) in June 2012. This comes after the EC ended its review of the deal in April 2012, with the demand that Sony divest the rights to four catalogues and twelve musical artists, including the Virgin Records catalogue.

The deal gives Sony the rights to a hefty catalogue of music held by EMI and its completion will make the company the largest music rights holder in the world, with Universal the second. Sony will also hold the biggest market share in music publishing at approximately 30%.

Universal’s acquisition of EMI Music will see its market share in the recorded music industry increase from 27% to around 40% worldwide. In some countries, its market share will be even higher, with it likely holding 50% in France.

In light of the potential reduction in competition, the EC has allowed Universal’s purchase, provided it sells its Parlophone, Sanctuary and Co-Op labels, as well as EMI’s Chrysalis, Mute and Classics labels.

Following the EC’s announcement of its decision, the FTC approved the deal without imposing any conditions, echoing its stance taken with Sony’s acquisition of EMI’s publishing arm.

The approval of the deals have come with mixed reactions from smaller players in the music industry, some see them as a strengthening of a duopoly, while others have lauded the EC’s decision to impose commitments.

In Singapore:

For the Competition Commission of Singapore (“CCS”) to clear a merger or an anticipated merger, parties must demonstrate that the merger will not or will not be expected to result in a substantial lessening of competition within any market in Singapore.

In issuing clearance, CCS has the ability to impose structural or behavioural remedies, if it considers that these are necessary to address actual or potential concerns. To date, no merger clearances in Singapore have been subjected to any such remedies.

Swissport merger approved with remedies

The Belgium Competition Council (“BCC”) has approved Swissport International Limited’s
(“Swissport”) proposed acquisition of Flightcare Belgium (“Flightcare”) from FCC Versia. Swissport provides landside ground-handling services (being services within airports), whilst Flightcare provides both landside and airside ground-handling services (being services between airports and aircraft).

In granting its approval, BCC imposed two conditions, to address vertical competition concerns that it considered might arise as a result of the merger.

BCC’s concerns arose from the fact that the merger would likely give Swissport significant market power, and that this might lead to conduct which raised barriers to entry and reduced competition. BCC was particularly concerned with the ability for Swissport to bundle airside and landside services, or offer rebates and discounts in such a way that would prevent effective competition from arising. Airside services are regulated at Brussels Airport and limited to two licence holders, which gave BCC further cause for concern that competition issues could arise, and thus the need to impose conditions.

Accordingly, one condition imposed by BCC is that Swissport is prevented from offering discounts through the bundling of its services. This condition would remain until the Belgian Government appoints an airside service provider similarly commitment-bound and vertically integrated as the second licencee, or decides to licence more than two airside service providers.

BCC’s other condition prohibits Swissport, or its affiliates, from concurrently holding both airside services licences at Brussels Airport.

In Singapore:

CCS has the ability to impose directions in the context of granting clearance to a merger under section 69 of the Competition Act, to remedy any adverse effects that it considers might arise from the merger. Such directions might be structural or behavioural in nature.

CCS has cleared 32 merger notifications since the merger notification regime began in 2007. CCS has not yet imposed directions in any of its decided cases.

Court confirms German media JV prohibition

The German Higher Regional Court in Düsseldorf has rejected the appeal by RTL Group (“RTL”) and ProSiebenSat.1 Media (“ProSiebenSat.1”) against the German Federal Cartel Office’s decision to prohibit the joint venture between the two broadcasters for the creation and operation of an online video-on-demand platform.

RTL is the biggest broadcaster in Europe, while ProSiebenSat.1 is the largest private broadcaster in Germany and also owns Maxdome, Germany’s biggest pay video-on-demand platform. The companies have agreed to create a central website for all internet television content in Germany and Austria.

In March, the Federal Cartel Office prohibited plans for the joint venture citing the dominance of the companies in the TV advertising market, and the potential for anti-competitive co-ordination through the joint venture.

The Federal Cartel Office was mindful of the potential benefit to consumers with an increased range of video-on-demand offers and simplified navigation through content of the platform. However, with the companies failing to agree to open the platform against limited access and restrictions on the availability and quality of the content, the Federal Cartel Office felt that the agreement would not be pro-competitive.

It remains to be seen if the companies will appeal against the court’s decision.

In Singapore:

Joint ventures may be considered under section 34 of the Competition Act (on anti-competitive agreements) or section 54 of the Competition Act (on anti-competitive mergers), depending on the nature of the joint venture. A “full-function” joint venture, which performs all the functions of an autonomous economic entity on a lasting basis, will be reviewed under section 54 of the Competition Act.
European Commission clears mobile wallet joint venture

Despite concerns that a joint venture between the UK’s four largest mobile operators may block future competitors in the mobile payment system market or degrade the quality of competition, the European Commission ("EC") has approved the joint venture between Vodafone, Telefónica UK and Everything Everywhere Limited (a joint venture between T-Mobile United Kingdom and Orange UK) to create a mobile wallet system for managing payments and displaying advertisements on smartphones.

The new mobile payment operating system allows customers to use their smartphones to make payments, instead of using the traditional methods.

In April 2012, the EC announced in a press release that it had opened in-depth investigations into the proposed joint venture. While it was in favour of developing the European mobile commerce sector and providing consumers with a new and innovative payment and interactive advertising experience, it said it was keen to ensure that competition grows, so that consumers could continue to benefit from further incentives and innovations offered by competitors. Drew & Napier’s article on the EC’s investigation can be found here.

Through its investigations, the EC concluded that the joint venture would unlikely lead to “a significant impediment to effective competition” even though its system works though a mobile SIM card provided by the mobile operators, as a number of alternatives already exist and many more may emerge (potentially from Google, Apple or other online giants such as Facebook). Other technical methods of bypassing the access of a mobile SIM card also exist, providing further competition to the joint venture.

The EC’s intention of approving the joint venture was made clear by the Commission Vice-President, “The Commission is keen on promoting innovation in this area and ensuring that the markets remain open so that a number of competing solutions can emerge without undue obstacles, to the benefit of consumers.”

In Singapore:

As discussed in Drew & Napier’s corresponding article above, agreements between competitors to jointly develop standards and services will not infringe the section 34 prohibition, if they ultimately generate net economic benefit.

However, undertakings should be aware that in the event of an investigation by the Competition Commission of Singapore (“CCS”), it will be for the undertaking to prove that the agreement has a net economic benefit in accordance to CCS’s requirements. Undertakings are encouraged to seek consultation with CCS if there is any uncertainty.

Merger of battery makers unwound

The United States (“US”) Eleventh Circuit Court of Appeals (“Court of Appeal”) has upheld the US Federal Trade Commission’s (“FTC”) decision to unwind Polypore International, Inc’s (“Polypore”) acquisition of Microporous L.P. (“Microporous”).

Polypore, through its subsidiary, Daramic, manufactures and sells Polyethylene (“PE”) lead-acid battery separators (“separators”). Microporous (formerly known as Amerace), manufactured and sold PE separators and rubber separators, prior to the merger.

In February 2008, Polypore acquired Microporous in a US$76m (S$93.8m) deal, but did not notify the FTC as the value of the deal fell below the pre-merger notification threshold under the Hart-Scott-Rodino Antitrust Improvements Act.

In September 2008, the FTC challenged the merger and filed a complaint charging, among other things, that the deal substantially lessened competition or tended to create a monopoly in four North American markets: deep-cycle batteries; motive batteries; starter, lighting and ignition (“SLI”) batteries; and uninterruptible power source (“UPS”) batteries.

The Chief Administrative Law Judge (“ALJ”) decided in favour of the FTC, finding that the deal would create a monopoly in the deep-cycle and motive markets, and a duopoly in the SLI market. The ALJ also found that, prior to the merger, Microporous had intended to enter the SLI market (then monopolised by Daramic), and that the
merger effectively removed this potential competition. In addition, the ALJ also found evidence in the form of office memos of the anti-competitive intent of the deal. The ALJ ordered that all acquired assets, including an Austrian plant owned by Microporous, be divested.

In its appeal, Polypore had claimed that the FTC failed to prove that:

(a) the four battery markets are separate and distinct;
(b) the relevant geographic market was North America;
(c) that there was any actual anti-competitive effects as it contended that Microporous was not a competitor in the SLI and UPS markets; and
(d) that divesting Microporous’ Austrian plant was overboard and punitive.

The Court of Appeal found that the FTC had failed to prove that Microporous was a participant in the UPS market, but affirmed the AJL’s finding of liability in the other three markets. The Court of Appeal also upheld the ALJ’s order for Microporous’ Austrian plant to be divested in order to restore the competition eliminated by the acquisition.

In Singapore:

Singapore has a voluntary merger notification regime, but the Competition Commission of Singapore (“CCS”) can investigate mergers on its own initiative if they are not notified. When it does so and finds that a merger leads to a substantial lessening of competition, CCS has the power to give directions to remedy the situation, including a direction to unwind the merger.

CCS is unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5m and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S$50m.

French meat processor fined €1m for breaching commitments

French meat processor, the Bigard Group (“Bigard”) was fined €1m (S$1.6m) by the French Competition Authority (“Authority”) for failing to fulfill its commitments as part of its approved takeover of rival Socopa Viandes (“Socopa”).

In 2009, France’s Ministry of the Economy (“Ministry”), which was previously tasked with monitoring mergers before the responsibility was transferred to the Authority, approved the merger, subject to several conditions. Bigard was prohibited from providing “range” discounts and was required to divest itself of some of its assets, including the sale of five slaughterhouses or processing plants and licensing beef brand Valtéro to a competitor.

Imposing the conditions was meant to counterbalance Bigard’s strong position in the marinated meat market, and ensure to that the market remained competitive after the merger.

However, it was alleged that between 2009 and 2010, Bigard pasted stickers on its Valtéro products alerting consumers that the brand would change to Socopa. Bigard also adopted packaging for Socopa that was similar to Valtéro’s brand packaging, including using the same heart graphic character and the same visual and gen code. In the Authority’s view, Bigard’s actions devalued the Valtéro brand and discouraged candidates interested in the brand license.

The Authority described Bigard’s act as having “stripped an important commitment of the authorisation decision, whose purpose was to drive competition on the meat-processing market and in supermarkets, of its substance” and justified the penalty as Bigard’s infringement was “all the more egregious as it was implemented on a large scale”, especially in light of Bigard’s experience in the industry and the fact that it only ceased after repeated warnings.
The Authority has previously taken a tough stance on breach of commitments. In 2011, it handed down a €30m (S$52m) fine for non-compliance to Canal Plus, a French premium pay television channel.

In Singapore:

The Competition Commission of Singapore (“CCS”) has the ability to impose directions or accept commitments as part of any merger clearance.

In the event of non-compliance, CCS can and may revoke its decision of approval. CCS may review the effectiveness of commitments which it has accepted and may at any time accept a variation, substitute or release of the commitment. To date, CCS has not imposed directions or accepted commitments as part of any merger clearance decision.

PROCEDURAL MATTERS AND OTHERS

Europe and China strengthen competition ties

In September 2012, the European Commission (“EC”) signed a Memorandum of Understanding (“MOU”) with China’s National Development and Reform Commission (“NDRC”) and State Administration of Industry and Commerce (“SAIC”). Having signed a similar MOU with China’s Ministry of Commerce (“Mofcom”) in May 2004, the MOUs could lead to a strengthened relationship between the EC and all three of China’s anti-monopoly enforcement authorities.

The enforcement of anti-monopoly law in China is shared by NDRC, SAIC and Mofcom, with NDRC responsible for enforcing the rules against price-related infringements, while SAIC is responsible for non-price related infringements. Mofcom is responsible for merger review.

The MOU will create a framework that will increase mutual understanding and awareness of current and forthcoming trends and expected developments in competition legislation and its enforcement in their respective jurisdictions, and will cover legislation, enforcement and technical co-operation regarding cartels, other restrictive agreements and the abuse of dominant market positions.

The MOU will allow for the exchange of non-confidential information and the exchange of views and experiences on activities concerning related matters.

In Singapore:

CCS can co-operate with foreign competition bodies, pursuant to the procedures set out in section 88 of the Competition Act. In short, CCS requires the approval of the Minister of Trade and Industry, and is required to take certain steps to preserve the confidentiality of any information to be shared.

Whilst the precise extent to which CCS co-operates with foreign competition authorities is unclear, CCS has co-ordinated the execution of dawn raids with the United States Department of Justice in at least one case.

Australia re-looks essential facilities doctrine

On 14 September 2012, the High Court of Australia (“HCA”) ruled that the Australian Competition Tribunal (“Tribunal”) should review the decision to declare railway lines owned by Rio Tinto Ltd, and BHP Billiton as essential facilities, and thus allowing access to them by other mining companies in Australia. Fortescue Metals Group Limited had previously been allowed partial access to the railway lines on the basis that they would be uneconomical to replicate.

The essential facilities doctrine is a common feature of many competition law regimes, and its application is usually not without controversy. Whilst most companies have full autonomy to determine who they may provide services or inputs to, competition law recognises that where a certain input is “essential” to be able to compete in a downstream market, access to that input should be allowed on fair and non-discriminatory terms.

The HCA found that when conducting an inquiry into whether a facility should be considered essential, the test to be applied is that of whether it would be “privately profitable” to replicate, rather than the “natural monopoly” test that was
employed by the Tribunal. This ultimately means that whilst it might be more efficient for there to be one provider of the facility (ie the natural monopoly test), if it is privately profitable for an undertaking to replicate the facility, then this suggests that access should not be mandated on account of the essential facilities doctrine.

The decision will likely have some more far reaching implications than the case in question. The shift from the natural monopoly test to the essential facilities test will likely make it harder for third parties to invoke the essential facilities doctrine to gain access to resources.

**In Singapore:**

In Singapore, the essential facilities doctrine is discussed in CCS's Guidelines on the section 47 prohibition but is yet to be formally recognised or invoked in a CCS decision to date. In considering the application of the doctrine, it is likely that CCS would have regard to whether it can be demonstrated that access to the facility is indispensable in order to compete in the relevant market and whether duplication is impossible or extremely difficult.

Use of the doctrine in Singapore would likely be reserved for rare cases, and it is noted that some industry sectors (such as telecommunications) are already subject to specific regulation that contains access regimes.

**FEATURE ARTICLE**

**BRUNEI TO IMPLEMENT COMPETITION LAW BY 2015**

According to local news reports, Brunei will implement a national competition law by 2015. It was reported that the key objectives of the law are likely to provide a regulatory framework that protects the competitive process as well as consumers.

The implementation of Brunei’s competition law is in line with the further development of the Association of South-East Asian Nations ("ASEAN") and the ASEAN Economic Community ("AEC"). The AEC is a commitment made by the ASEAN member states towards the creation of a regionally integrated single market and production base with a free flow of goods, services, investments and skilled labour, with the target realisation date of 2015.

Brunei currently does not have a general competition law regime in place. Whilst Brunei does have a Monopolies Act (enacted in 1932) to prevent the establishment of monopolies without the consent of the Sultan of Brunei, it is considered outdated and has never been enforced. Some sectoral competition regulation does exist in Brunei but only in the telecommunications sector, and the regulatory authority (Authority for Info-communications Technology Industry of Brunei Darussalam ("AITI")) has the ability to impose certain conditions relating to restrictive agreements, abuse of market power, and anti-competitive mergers, through the relevant telecommunication licence framework. A Telecommunications Competition Code is expected to be introduced in the near future to streamline the regulation and management of competition in both the telecommunications and broadcasting sectors.

Regionally, Brunei currently holds the chairmanship for the ASEAN Experts Group on Competition ("AEGC") pursuant to Brunei’s commitment to the AEC. The AEGC is a body formed to oversee the development of competition policy and law in ASEAN in accordance with the AEC goals. Recently, Brunei played host to the tenth AEGC Meeting, at which various competition matters were discussed including the implementation progress of the AEC Blueprint, the ASEAN-Giz Project on Competition Policy and Law, and the Work Group on Developing Regional Core Competencies on Competition Policy and Law. The AEC Blueprint is a master framework that outlines the economic integration measures to be implemented including the introduction of competition policy in all ASEAN member states by 2015.

To put the developments in Brunei in context, only five ASEAN member states have implemented competition laws so far, namely, Malaysia, Vietnam, Singapore, Thailand and Indonesia.
Singapore and Indonesia are currently viewed as having the more established competition law regimes, with an active enforcement environment. The authorities in Singapore and Indonesia have pursued a number of cases and complaints, and both regularly hold public advocacy initiatives.

Malaysia, as the country to have most recently introduced competition law in the ASEAN region, has also shown positive signs that it will grow to become an active competition jurisdiction. The Malaysian Competition Commission has indicated recently that it intends to make its first infringement decision against the Cameron Highlands Floriculturist Association for price-fixing, pending representations of the parties involved. Such signs are encouraging for an authority that has been in place for less than a year.

Vietnamese competition law has been continually growing since its implementation in 2004. Recently, the Vietnam Competition Authority ("VCA") released a report on its study of Vietnam’s current competition law regime. The report assessed the current shortcomings of the Vietnamese competition law and looked at all areas to improve the detection, prevention and cessation of anti-competitive behaviour, drawing from the experiences the VCA has gained since the inception of its competition law.

In Thailand, despite the introduction of the Thai Trade Competition Act in 1999, the Thailand Trade Competition Commission has yet to proceed to make an enforcement finding. However, there has been a new impetus pushing to conclude these cases which may stem from impending limitation deadlines with regard to certain cases, the appointment of a new Director-General of the Thai International Trade Department, and more generally, ASEAN-wide initiatives to ramp up the importance and enforcement of competition law.

Cambodia and the Philippines are currently at various stages of drafting and putting in place their respective national competition regime.
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 (9th Edition) and 2012 (10th Edition) 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”.

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Ee-Kia was previously the Director of Economics in the Policy and Economic Analysis Division in 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 recognised as one of the leading competition economists in Singapore by The International Who’s Who of Competition Lawyers & Economists 2010, 2011 & 2012 and the Guide to the World’s Leading Competition & Antitrust Lawyers/Economists 2010 (9th Edition) and 2012 (10th Edition).

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