DREW & NAPIER

September 2013

In this issue

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COMPETITION LAW QUARTERLY UPDATE

SINGAPORE COMPETITION LAW WATCH

Score Board	Number	Status	
		Concluded	Pending
Notified Agreements or Conduct	11	9	2
Notified Mergers or Anticipated Mergers	36	36	0
Infringement Decisions	8	8	0
Appeals	7	7	0

Table accurate as at 5 September 2013

SINGAPORE CLEARS EMIRATES-QANTAS ALLIANCE WITH CONDITIONS

In March 2013, the Competition Commission of Singapore ("**CCS**") cleared the proposed alliance between Emirates and Qantas Airways ("**Qantas**"). Under the alliance, which took effect from 1 April 2013, Emirates and Qantas would co-ordinate their network, scheduling, pricing, marketing, purchasing, customer services, frequent flyer programmes and resourcing decisions for their passengers and freight operations globally for an initial term of ten years.

As part of the notification process, Emirates and Qantas made a voluntary undertaking to address CCS's concerns relating, in particular, to the price and capacity co-ordination between the parties on the Singapore – Melbourne and Singapore – Brisbane routes.

According to CCS, Qantas and Emirates have provided a voluntary undertaking to:

(a) provide a combined total of 8,246 seats weekly on each of the Singapore – Melbourne and Singapore – Brisbane routes;

(b) increase seat capacities if the two airlines' load factors and route profitability cross a certain threshold for any given 12-month period; and

(c) appoint an independent auditor, at their own costs, to monitor their compliance with the undertaking.

CCS reserved its right to investigate the alliance should Emirates and Qantas fail to comply with their undertaking.

The undertaking increases the number of seats supplied by Emirates and Qantas flying to and from Singapore along the two routes. CCS has assessed that the state of competition on these two routes will be preserved and any concern that the proposed alliance may reduce seat capacities is alleviated. CCS concluded that the alliance will result in net economic benefit in Singapore.

The Emirates-Qantas alliance is the eighth airline alliance approved by CCS. It is also the second set of voluntary undertakings accepted by CCS in 2013 addressing its competition concerns, after Coca-Cola's undertaking to amend its supply agreements to remove potentially anti-competitive provisions.

The alliance between Emirates and Qantas has also been cleared by the Australian Competition & Consumer Commission with a minimum seat capacity condition for Trans-Tasman routes.

REGULATORY UPDATES

MYCC TOUCHES ON ASSOCIATIONS AND THE MALAYSIAN COMPETITION ACT

On 20 May 2013, a Malaysian local newspaper published an article by the Malaysian Competition Commission's Chief Executive Officer ("**MyCC CEO**") concerning associations and the Malaysian Competition Act 2010 ("**CA**").

Although it was acknowledged that associations could provide benefits to its members such as providing competition law training and assisting members on industry-wide issues, the MyCC CEO highlighted two potential areas of non-compliance by associations which are of particular concern to MyCC:

(a) sharing commercially sensitive information; and

(b) price-fixing.

The MyCC CEO noted that many associations commonly collect and disseminate industry data and statistics for their members. Where such information is commercially sensitive (for example, information on retail sales and market shares of members) and is disaggregated such that they can be easily attributed to specific members, competition law issues are likely to arise as such dissemination reduces the uncertainty that would normally exist in a competitive market. By comparison, if the information disseminated is historical (*eg the* information cannot influence future market behaviour), it is less likely to breach the CA.

The MyCC CEO also highlighted that an agreement to fix prices is a serious breach of the CA. Although it has been a common practice in Malaysia for members to look to their associations for direction or, at the very least, guidance on what prices should be charged, the MyCC CEO emphasised that such activity is now illegal under the CA. Instead, the MyCC CEO recommended that associations and their members adopt the best practice of not discussing prices or any pricing-related matters.

The MyCC CEO further suggested that associations could put in place a compliance policy that is available to all their present and potential members, which includes:

(a) reviewing their rules of admission, standard terms and conditions, codes of conduct and certification schemes to remove, for instance, conditions that have the effect of excluding players from the market and are therefore anti-competitive;

(b) creating lists of "dos" and "don'ts" to govern association meetings, to make clear to members what can or cannot be discussed; and

(c) requiring their members to complete competition law training.

The MyCC CEO indicated that MyCC would be looking to publish guidelines for associations in future, and in the meantime, recommended that associations seek independent legal advice when in doubt as to the way the CA applies to their activities.

In August 2013, MyCC stated that it had finalised the results of its study on the price-fixing and fee scales by associations and professional bodies, and would be publishing these on its website in due course.

KPPU seeks to strengthen co-operation with other Indonesian law enforcers

In July 2013, it was reported that Indonesia's Commission for the Supervision of Business Competition ("**KPPU**") had signed a memorandum of understanding with the Indonesian Attorney-General's Office ("**AGO**"), in a bid to strengthen competition law enforcement.

The move by KPPU would allow the two agencies to share resources and exchange information, and better co-operate to enforce the country's competition laws from the investigatory stage to prosecution stage.

This is significant because Indonesia's Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition only allows KPPU to impose administrative sanctions on companies. The powers to impose criminal sanctions on cartel practices and bid-rigging are vested with the National Police and the AGO.

The dichotomy in these powers of enforcement has long proven to be a challenge, as different law enforcement agencies may have varying interpretations of the law.

In this regard, KPPU has expressed that an integrated justice system uniting all of Indonesia's law enforcement agencies including the AGO, the National Police, the Corruption Eradication Commission and the Indonesian Financial Transactions Reports and Analysis Center could achieve a more effective interaction between the country's criminal laws and competition laws, and lead to better enforcement of Indonesian competition law.

In 2011, KPPU had signed a memorandum of understanding with the National Police which covers information exchange and capacity building relating to unfair business competition.

Proposed amendments to New Zealand's competition law underway

In May 2013, the New Zealand Commerce Select Committee ("**Committee**") reported its recommendation for Parliament to pass the Commerce (Cartels and Other Matters) Amendment Bill ("**Bill**"), along with certain amendments.

The Bill purports to amend New Zealand's Commerce Act 1986 ("**Commerce Act**"), which contains New Zealand's competition laws.

Background

The Bill was first introduced in October 2011, and was read for the first time in New Zealand's Parliament in July 2012, before it was referred to the Committee.

In making its recommendations to Parliament, the Committee had considered and reviewed submissions from NZCC as well as competition law practitioners, law firms, private sector companies and professional and trade associations from various sectors including the aviation, shipping, engineering and telecoms sectors.

Prior to its enactment into law, the Bill will need to be subject to two further parliamentary readings.

Key proposed amendments

The main amendments sought to be made through the Bill are as follows.

Cartel provisions

The Committee has proposed to replace the current prohibition on price-fixing with a new prohibition on cartel conduct which includes agreements which have the purpose, effect or likely effect of price-fixing, output restriction or market allocation. Notably, the Committee has recommended against the inclusion of bid-rigging as a "hard-core" cartel prohibition.

Firstly, it is proposed that transitional provisions are to apply in relation to existing arrangements that contain price-fixing elements entered into before the enactment of the Bill, such that there would be no proceedings under the revised law against existing arrangements for nine months from the commencement date of the new provisions. The existing price-fixing provisions would apply to these agreements during that period.

Secondly, the Bill provides that an exemption from the cartel provisions could apply to allow firms to engage in pro-competitive collaborative activity (which has been proposed to mean an enterprise, venture, or other activity, in trade, that is carried on in co-operation by two or more persons and is not carried on for the dominant purpose of lessening competition between any two or more of the parties). Another exception from the cartel provisions is proposed to apply in relation to vertical supply contracts (such as contracts entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier).

Thirdly, the new amendments to the Commerce Act propose to criminalise "hard-core" cartel conduct. Under the Bill, an individual who is convicted of a "hard-core" offence relating to cartel prohibition (*ie* price-fixing, output restriction or market allocation) may be liable to a prison term of up to seven years. Non-individuals may be liable on conviction to a fine of NZ$10m (S$10m), three times the value of any commercial gain resulting from the contravention, or 10% of the company's turnover in each accounting period in which the contravention occurred.

Fourthly, an honest belief defence for cartel-related offences is proposed to be introduced. In relation to criminal offences involving cartels, the Committee made recommendations for an honest belief defence which may be used by a person who has an honest belief that the cartel provision in the contract was reasonably necessary for the purpose of a collaborative activity.

To establish this defence, the Committee explained that it was necessary to show that there was an exercise of judgment in which the person could make an honest mistake. Accordingly, a person would not be able to invoke such defence in situations involving joint buying and promotion agreements, as the Committee considered that these situations do not require an exercise of judgment.

Amendments to merger control regime

A second key area of proposed amendments relates to merger control.

Firstly, the Bill seeks to amend the authorisation process to allow companies to apply to the New Zealand Commerce Commission ("**NZCC**"), which is New Zealand's primary competition authority, for an assessment on whether a proposed collaboration would raise competition concerns and might therefore be prohibited under New Zealand's competition laws. This would help companies reduce the associated risk and cost in relation to planned collaborations/mergers.

Secondly, the Bill proposes to introduce a new regime to regulate overseas acquisitions with adverse competition effects in a market in New Zealand. Under this regime, an overseas person seeking to acquire a "controlling interest" in a New Zealand company through an acquisition of assets or shares outside of New Zealand would be required to seek NZCC's approval for such proposed acquisition. The Bill also purports to amend the definition of such "controlling interest" from a 50% threshold of the voting rights, issued shares or dividend entitlements, to 20%.

Thirdly, the new provisions in the Bill would empower NZCC to revoke a clearance after a material change of circumstances and after parties with an interest in the arrangement are given a reasonable opportunity to make submissions to NZCC regarding the revocation.

Removal of the current exemption in relation to international shipping

Another aspect of the proposed amendments under the Bill relates to the removal of the current exemption in relation to international shipping under the Commerce Act. This is proposed to take effect two years from the date which the amendments under the Bill are passed.

Currently, the international shipping sector has been excluded from the application of the general competition law regime.

INDUSTRY NEWS

ANTI-COMPETITIVE AGREEMENTS

AB InBev and Grupo Modelo deal completed, US business sold

In June 2013, Anheuser-Busch InBev SA/NV ("**ABI**") and Grupo Modelo S.A.B. de C.V ("**Modelo**") successfully completed their merger after months of wrangling with the US Department of Justice ("**DoJ**").

In January 2013, the DoJ filed an antitrust law suit against ABI and Modelo alleging that their original proposal, *ie* ABI's US$20.1bn (S$25.7bn) acquisition of the remaining interest in Modelo, would substantially lessen competition in the market for beer in the US market. The DoJ alleged that the transaction would result in consumers paying more for beer and limit innovation in the beer market. To address these concerns, ABI and Modelo pledged to divest to beer, wine and spirits maker, Constellation Brands, Inc. ("**Constellation**") the following:

(a) Piedras Negras brewery;

(b) perpetual and exclusive licenses of the Modelo brand beers – Corona Extra, Corona Light, Modelo Especial, Negra Modelo, Modelo Light, Pacifico and Victoria, Pacifico Light, Barrilito and Leon - for distribution and sale in the US;

(c) Modelo's interest in Crown – the joint venture established by Modelo and Constellation; and

(d) other assets, rights and interests necessary to ensure that Constellation is able to compete in the US beer market using the Modelo brand beers, independent of a relationship to ABI and Modelo.

The settlement also required Constellation to expand the capacity of the Piedras Negras brewery in order to meet current and future demand for the Modelo brands in US. ABI was required to enter into interim supply and transition services agreements with Constellation. These agreements are time-limited to ensure that Constellation will become an independent, fully integrated and economically viable competitor to ABI as soon as possible.

Unlike the original proposal, where Modelo would supply Modelo beer to Constellation to import, which left Constellation with no brewing assets and beholden to ABI for the supply of beer, the proposed settlement ensures that Constellation, or an alternative purchaser, will have independent brewing assets and the ownership of the Modelo beer brands for sale in US.

In Singapore:

*Commitments offered to the Competition Commission of Singapore ("**CCS**") must be necessary and sufficient to remedy, mitigate or prevent the competition concerns raised. Merger parties are encouraged to proactively propose appropriate commitments in response to concerns identified by CCS. They can do so at any time during the review process, before CCS makes a final decision. Where CCS considers that the commitments proposed are a suitable remedy, CCS will subject the remedies to public consultation. After obtaining third party views, CCS will decide whether the commitments are appropriate and may be accepted.*

If CCS does not accept the commitments proposed by the merger parties and deem that a merger has infringed or that an anticipated merger if carried into effect will infringe section 54 of the Competition Act, CCS may give directions. Section 69 of the Competition Act provides that the directions may consist of a prohibition of the merger, or an order that the parties take certain steps to address the competition concerns.

World's largest oil companies under scrutiny

On 14 May 2013, the European Commission ("**EC**") carried out dawn raids at the offices of several oil companies in two European member states over concerns that the companies had colluded in reporting distorted prices to a price reporting agency, to manipulate the published prices for a number of oil and biofuel products. There were also concerns that the companies may have prevented others from participating in the price assessment process, with a view to distorting published prices.

Among the companies raided were three of the world's largest oil companies, BP plc ("**BP**"), Royal Dutch Shell plc ("**Shell**") and Statoil ASA ("**Statoil**").

The EC's investigations are also reported to involve Platts, a unit of McGraw Hill Financial Inc. and a leading global provider of energy, petrochemicals, metals and agriculture information.

Traders such as BP, Shell and Statoil regularly report prices of their commodities transactions to pricing agencies such as Platts. Using these reported prices, Platts will publish the prices which serve as benchmarks for trade in the physical and financial derivative markets for a number of commodity products in Europe and in the multi-trillion dollar global crude market.

Among the concerns expressed by the EC was that even small distortions of assessed prices could have a huge impact on the prices of crude oil, refined oil products and biofuels purchases and sales, and this could result in potential harm to final consumers. If the alleged activities are established, they may amount to a breach of Articles 101 and 102 relating to prohibitions against anti-competitive agreements and an abuse of dominance.

In the US:

On 22 May 2013, Prime International Trading, Ltd., a US commodities house, filed a class action complaint in the US District Court for the Southern District of New York against BP, Shell and Statoil.

The complaint filed in the US District Court alleged that the three oil companies deliberately reported inaccurate, misleading and false information regarding North Sea Brent Crude Oil prices to Platts, and thereby manipulated and restrained trade in both the physical Brent Crude oil market and the Brent Crude Oil futures market.

EC investigates smart card chips cartel

In April 2013, the European Commission ("**EC**") issued statements of objections to a number of suppliers of smart card chips on suspicions that they might have participated in a cartel, in breach of Article 101, which prohibits anti-competitive agreements.

In 2008, the EC raided these companies over suspicions that they were engaged in price-fixing, customer allocation and exchanging commercially sensitive information in order to keep prices up. The parties initially entered into negotiations but failed to reach a settlement agreement which would give the companies a 10% reduction in any potential fines in return for co-operation with the EC's investigation. The normal antitrust procedure will now run its course.

In Singapore:

*Cartel activities infringe section 34 of the Competition Act (Cap 50B) ("**Competition Act**") and cartelists are liable to a financial penalty of up to 10% of their turnover in Singapore for each year of infringement, up to a maximum of three years.*

At this point in time, Singapore does not have a formal process allowing CCS to settle with cartelists on a fast-track basis in exchange for a reduction in penalty. It is understood that CCS is looking at the feasibility of introducing such a process in the near future.

OFT accuses GSK of pay-for-delay deals

In April 2013, the United Kingdom's Office of Fair Trading ("**OFT**") issued a Statement of Objections, alleging that GlaxoSmithKline ("**GSK**") concluded anti-competitive agreements with Alpharma Limited, Generics (UK) Limited and Norton Healthcare Limited, to delay effective competition in the UK supply of paroxetine, a prominent antidepressant medicine.

OFT alleged that the generic companies were attempting to introduce a less expensive, generic version of Seroxat, GSK's branded paroxetine drug, and GSK had challenged them with allegations that their generic products would infringe GSK's patents.

To resolve these disputes, each of the generic companies concluded one or more agreements with GSK. OFT's provisional view was that these agreements which included substantial payments from GSK in return for their commitment to delay their supply of paroxetine independently, was likely to be anti-competitive.

OFT considered that the delay could have denied the National Health Service, patients and taxpayers of substantial cost savings, as generic medicines tend to lead to strong competition on prices.

In Singapore:

An agreement which limits output or controls production, in the form of fixing production levels or quotas may, constitute an infringement of Section 34 of the Competition Act (Cap 50B). Financial penalties can go up to 10% of the turnover of the business in Singapore for each year of infringement, up to a maximum of three years.

European Commission accepts commitments from airline joint venture parties

The European Commission ("**EC**") has, in May 2013, allowed a proposed revenue-sharing joint venture between United, Air Canada and Lufthansa ("**the parties**") to go through after accepting commitments that the parties made in December 2012.

The joint venture was first proposed in June 2008 and involved co-operation between Air Canada, Lufthansa, United and Continental (the last two airlines have since merged) on capacity, price, schedules and marketing. The EC commenced investigations into the joint venture in 2009 on fears that it would result in higher prices for premium passengers (defined as those travelling in the first, business and flexible economy classes) on the Frankfurt-New York route. It was also concerned that other competitors would be unable to expand and enter the route to compete against the parties because of the high barriers to entry involved in the form of slot shortages at the airports.

In response, the parties highlighted the efficiencies that the joint venture created, both on the Frankfurt-New York route, and also on other related routes which involved a Frankfurt-New York connection (*eg* the Prague-Frankfurt-New York route). Notably, the EC was willing to broaden the test for efficiencies and agreed to consider efficiencies generated by routes outside the Frankfurt-New York route, but only if there was "considerable commonality between passenger groups travelling on the route of concern and these related routes." The condition was meant to prevent a situation where the EC had to weigh the detriment suffered by one group of customers against the benefits accrued by another group of customers.

However, even under the broadened test, the EC determined that the efficiencies created did not outweigh the anti-competitive effects of the joint venture on the Frankfurt-New York route. To assuage the EC's concerns, the parties offered commitments in the form of making available to other market players take-off and landing slots at the Frankfurt and New York airports. They also offered to allow competitors to sell tickets on their flights to address the disadvantage that competitors would face in terms of having less frequent flights. Finally, the parties committed to give the EC regular data on the joint venture to allow the EC to evaluate its effect on the markets over time.

These commitments were accepted by the EC and were made legally binding on the parties for a period of ten years.

In Singapore:

*To date, the Competition Commission of Singapore ("**CCS**") has issued seven decisions allowing proposed joint venture agreements between airlines to go through. In the proposed alliance between Emirates and Qantas Airways, the airlines provided CCS with a voluntary undertaking to increase seat capacity on specific routes to allay CCS's concern over the state of competition on these routes.*

Former UBS executives sentenced in municipal bonds bid-rigging case

On 24 July 2013, three former UBS AG executives were sentenced by the US District Court for the Southern District of New York to serve prison terms ranging between 16 to 27 months and ordered to pay criminal fines of between

US$300,000 (S$380,000) to US$1m (S$1.26m) for their participation in frauds related to bidding for contracts for the investment of municipal bond proceeds and other municipal finance contracts.

The prison sentences meted out by the US District Court were significantly shorter than that requested by the US Department of Justice ("**DOJ**") Antitrust Division, which had requested that the executives serve a minimum of 132 to 234 months in prison.

The three executives were convicted in August 2012 and found guilty of a total of eight counts of conspiracy to commit wire fraud and three counts of substantive wire fraud.

Evidence presented by the US DOJ showed that, during the time that they were acting as brokers assisting public entities seeking to invest money from a variety of sources, primarily the proceeds of municipal bonds that they had issued to raise money for public projects, amongst others, the executives had arranged for UBS to receive kickbacks in exchange for manipulating the bidding process and steering investment agreements to certain providers. The US DOJ also presented evidence that the trio, while acting as providers, had conspired with other providers and with a broker to corrupt the bidding process in order to increase the number and profitability of investment agreements awarded to UBS.

Earlier, in May 2011, UBS had entered into an agreement with the US DOJ to resolve anti-competitive activity in the municipal bond investments market, agreeing to pay a total of US$160m (S$202m) in restitution, penalties and disgorgement to US federal and state agencies. As part of its agreement with the US DOJ, UBS also admitted, acknowledged and accepted responsibility for illegal, anti-competitive conduct by its former employees.

Shipping giants join forces

On 26 June 2013, three of the world's largest shipping companies announced that they are in talks to co-ordinate their activities on Asia-Europe, Trans-Pacific and Trans-Atlantic routes. Maersk, Swiss Mediterranean Shipping Company and CMA-CGM, have reportedly begun talks with various competition authorities in respect of the proposed co-ordination.

The proposed alliance would provide the parties with the capacity to carry 2.6m containers annually, with a combined fleet of 255 vessels. The alliance is said to be driven out of a general industry decline, falling freight rates, and a desire to find efficiencies to allow the parties to compete with smaller, more fuel-efficient, rivals.

Whilst efficiencies are the driver for the collaboration, the relevant question for competition authorities will likely be whether it restricts competition that might otherwise exist in its absence. Given the international dimension of the services provided, the collaboration would likely be subject to the competition regimes of multiple jurisdictions.

In Singapore:

*Liner shipping agreements in Singapore fall under a Block Exemption issued by the Competition Commission of Singapore ("**CCS**") in 2006 (the effect of which was extended in 2010 until 31 December 2015). This generally means that such agreements will not fall for consideration under the substantive provisions of the Singapore Competition Act (Cap.50B).*

This Block Exemption requires parties with an aggregate market share of above 50% to file their agreements with CCS, and to comply with certain other conditions and obligations in the Block Exemption. Such parties are also required to provide to CCS (on request), and to transport users in some circumstances documents, details and information relating to: (a) any tariff; and (b) the structure and service level of the liner shipping services. CCS may also request details on other aspects of the liner shipping services.

ABUSE OF DOMINANCE

Google's business practices continue to attract competition regulators' scrutiny

In Europe:

In Europe, investigations by the European Commission ("**EC**") into alleged abuses of dominance by Google Inc. ("**Google**") are well underway. The EC recently started looking into a complaint filed against Google over allegations regarding its Android mobile operating system. Meanwhile, the investigations in relation to Google's online search and search advertising continue as the commitments offered by Google fail to address the competition regulator's concerns.

Fresh complaint filed against Google over its Android mobile operating system

On 25 March 2013, FairSearch.org ("**FairSearch**"), an industry association representing a coalition of 17 specialised search and technology companies such as Microsoft, Nokia, Expedia, Oracle and Twenga, lodged a complaint with the EC alleging that Google is locking out competition in the mobile market by imposing anti-competitive restrictions on device makers seeking to use its dominant Android software.

FairSearch claimed that the Android mobile operating system has managed to dominate the mobile marketplace as Google has been engaging in predatory "below cost" distribution of the system and compelling Android device makers to pre-load a suite of Google mobile services and to give them prominent default placement on the device. It alleged that this creates a disadvantage for rival mobile operating system providers who are not able to recoup investments in competing with the dominant Android platform.

Apart from confirming that it had received the complaint and was looking into the issues raised, the EC has declined to comment further.

Google asked to propose better remedies to address search dominance concerns

The remedies submitted by Google to the EC to address competition concerns regarding four areas of Google's business practices involving online search and search advertising have been criticised by the search company's rivals as well as the European Union ("**EU**") competition commissioner.

As part of its ongoing investigations brought on by 17 formal complaints regarding Google' business practices, the EC had raised competition concerns over four specific types of business practices which Google has been engaging in, which the EC preliminarily considered may amount to a violation of Article 102 of the Treaty on the Functioning of the European Union prohibiting an abuse of a dominant position. These business practices relate to:

(a) the way in which Google's specialised search services ("vertical" search) are displayed within general search results ("horizontal" search) as compared to services of competitors;

(b) the way Google may use and display third party content on its vertical search services;

(c) exclusivity agreements for the delivery of Google search advertisements on other websites; and

(d) restrictions in the portability of AdWords advertising campaigns.

In April 2013, the EC published the commitments offered by Google for market testing. Google's proposed commitments, which would cover the European Economic Area ("**EEA**") and which were offered for a period of five years, sought to address the EC's competition concerns by the following means:

(a) to label promoted links to Google's own specialised search service so that users can distinguish them from natural web search results;

(b) to offer all websites the option to opt-out from Google's specialised search services, while ensuring that any opt-out does not unduly affect the ranking of those web sites in Google's general web search results;

(c) to no longer include in its agreements with publishers any written or unwritten obligations that would require them to source online search advertisements exclusively from Google;

(d) to no longer impose obligations that would prevent advertisers from managing search advertising campaigns across competing advertising platforms; and

(e) to have an independent Monitoring Trustee advise the EC in overseeing the proper implementation of the commitments.

While Google's proposed commitments to the EC have gone further in some aspects than the voluntary commitments that it had provided to, and had been accepted by, the US Federal Trade Commission ("**FTC**") earlier in January 2013, they have been criticised by some complainants as being inadequate because they do not include any changes to Google's search algorithm, which is understood to promote Google's products ahead of its rivals.

Prior to the closing of the market test period, the EU competition commissioner publicly expressed his doubts over the adequacy of Google's proposal, hinting that the search giant could be faced with a Statement of Objections if a settled outcome could not be reached. The EC has since asked Google to come back with better or improved proposals.

Once the commitments satisfactorily address the EC's competition concerns, the EC could then adopt a decision to make them legally binding on Google under Article 9 of the EU's antitrust Regulation 1/2003, without a finding of infringement of EU antitrust rules. A breach of any of these commitments, however, may mean that the company could face a fine of up to 10% of the company's annual worldwide turnover.

Google has had a market share of well over 90% for its general web search service in the EEA for a number of years. Accordingly, web sites are more heavily reliant on traffic from Google in Europe, as compared to other regions such as the US.

In the US:

In the US, Google may be facing a fresh inquiry by the FTC following alleged complaints by its rivals that the tech giant is abusing its market dominance in the online display advertising market.

The FTC has yet to formally announce an inquiry into Google's practices in this regard, though the FTC had, earlier in 2007 in relation to its decision to approve Google's acquisition of Internet advertising server, Doubleclick, Inc., noted that "*[t]he markets within the online advertising space continue to quickly evolve … [and the FTC] will closely watch these markets and, should Google engage in unlawful tying or other anticompetitive conduct, the Commission intends to act quickly*".

The rumoured inquiry comes just months after the FTC's decision in January 2013 to close investigations into alleged anti-competitive conduct by Google for "search bias" practices, after the FTC accepted certain voluntary commitments offered by Google to change some of its business practices.

MERGER REGULATIONS

European Commission looks to simplify merger procedures

The European Commission ("**EC**") has started on a Merger Simplification Project ("**Project**") to simplify its merger procedures.

The Project aims at reviewing the Commission Notice on a simplified procedure for treatment of certain concentrations as well as updating and streamlining the required notification forms in order to further streamline the merger notification process for unproblematic cases. According to the EC, this Project is a technical reform within the existing framework as defined by the Merger Regulation EC No. 139/2004. According to the Directorate General for Competition, an additional 10% of merger cases may now be qualified for the simplified procedure should the revised rules go through, making a total of 70% of all notified mergers qualifying for the simplified procedure.

The Project proposes to:

(a) increase the relevant market share thresholds for mergers with limited horizontal overlaps or vertical relationships from less than 15% and 25% to 20% and 30% respectively; and

(b) introduce a possibility for simplified treatment of horizontal mergers with very small increments in line with the "safe harbours" established in the EC Horizontal Merger Guidelines.

The Project also proposes to update and streamline forms for notifying mergers to the EC, thus reducing the information burden required in both the standard and simplified notification procedure.

The consultation on this Project ended on 19 June 2013.

In Singapore:

*The Competition Commission of Singapore ("**CCS**"), states that a merger is unlikely to give rise to* *competition concerns and CCS is unlikely to investigate unless the merged entity has/will have a market share of 40% or more; or the merged entity has/will have market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% of more.*

CCS is also unlikely to investigate a merger situation involving companies with less than S$5m turnover and combined turnover of less than S$50m. Unproblematic mergers will generally be cleared within the 30 working days under a Phase 1 review, while problematic mergers may proceed to the 120 working days Phase 2 review.

Glencore-Xstrata merger receives Chinese approval

In April 2013, Glencore International plc ("**Glencore**") and Xstrata plc ("**Xstrata**") successfully completed their merger. China's Ministry of Commerce ("**MOFCOM**") issued its approval with conditions after more than a year, making this deal the longest MOFCOM procedure on record since the Anti-Monopoly Law came into effect in 2008. In July 2013, Glencore Xstrata plc commenced the process of sale of its entire interest in the Las Bambas copper mine project in Peru to fulfill MOFCOM's condition for its approval.

Amongst other things, MOFCOM was concerned that the merger would increase the amount of copper resources controlled by Glencore, strengthen Glencore's integration of the copper supply chain, increase barriers to entry and weaken the bargaining power of Chinese downstream enterprises, thus potentially harming consumer interests in the copper concentrate market. MOFCOM was also concerned with Glencore's increase of controlling power in the zinc and lead concentrate markets. While the incremental market share in China post-merger was insignificant, MOFCOM was concerned over China's reliance on imports and perceived weakness in bargaining power on the side of the Chinese customers. MOFCOM's clearance was given with the following conditions:

(a) Structural remedy:

(i) Glencore will divest the Las Bambas copper mine in Peru before June 2015. If the divestiture cannot be completed by then, MOFCOM will designate another copper mine to be auctioned without reserve.

(b) Behavioural remedies:

(i) Glencore will supply Chinese customers with a long-term contract offer of no less than the minimum quantity of copper concentrate from 2013 to 2020 at or by reference to an annual benchmark price;

(ii) provide Chinese customers with long-term contracts and spot contracts;

(iii) offer zinc and lead concentrates and reasonable rates consistent with those in the international market; and

(iv) keep the offer in line with prevailing international market terms by taking into account product quality, number of cross-deliveries, payment terms, buyer credit and other relevant factors.

The Glencore-Xstrata deal had received clearance from Australia and the European Union in 2012, and South Africa cleared the deal subject to employment commitments in January.

In Singapore:

*In choosing the appropriate remedy, the Competition Commission of Singapore ("**CCS**") assesses the proposed remedies' ability to restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. Given that the effect of the merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be more favoured by CCS. CCS has indicated that it may impose more than one type of remedy.*

The CCS Guidelines on the Substantive Assessment of Mergers states that CCS considers that structural remedies are preferable to behavioral ones, as they tend to address the competition concerns created by the merger more directly and also require less monitoring.

Green light given to Virgin/Delta merger

The proposed merger between Virgin Atlantic ("**Virgin**") and Delta Airlines ("**Delta**") was given a major push on 21 June 2013, with both the European Commission and the US Department of Justice giving their all-clear to the merger. Both competition authorities gave their approval without conditions.

The merger involves Delta buying a 49% equity stake in Virgin, and is focused on routes between North America and the United Kingdom. As competition from other carriers is strong on these routes, this would have helped in securing favorable clearance from the authorities. Delta has publically stated that the merger will help it to expand its access to London Heathrow Airport.

The US Department of Transportation, on 3 September 2013, had also assessed the merger and stated that it would promote competition and provide benefits to consumers in the North America-United Kingdom market. If no objections are received by the Department of Transportation within 14 days, then the provisional findings become final, and the merger will receive antitrust immunity.

In Singapore:

Agreements and arrangements between airlines have so far been subject to the prohibition in the Singapore Competition Act (Cap.50B) against anti-competitive agreements (the "section 34 prohibition").

*To date, there have been eight notifications made to the Competition Commission of Singapore ("**CCS**") relating to potential airline alliances, joint ventures, and collaborative arrangements. CCS has given a positive decision in respect of all eight of these notifications, though it required an undertaking from the parties in one case with regard to the provision of a particular level of seat capacity on certain routes between Singapore and Australia.*

In general, CCS will usually consider the extent to which the parties overlap in their flight operations in order to assess the likely effect on competition that would arise from an alliance or merger. Even where competition may potentially be affected, parties could still receive a positive decision from CCS if they are able to demonstrate to CCS that the arrangement as a whole will give rise to net economic benefit.

FEATURE ARTICLE

DG COMP WORKING ON WAIVERLESS INFORMATION-SHARING AGREEMENTS

In April 2013, the European Commission announced that its Directorate-General for Competition ("**DG Comp**") was working on at least two second-generation co-operation agreements with its peer antitrust agencies. The agreement is termed "second-generation" because unlike the "first generation" of existing agreements, where sharing of information is only allowed where the companies under investigation consented, it allows the authorities to exchange confidential information without needing waivers from the parties.

In May 2013, the first second-generation antitrust co-operation agreement was signed between the European Union ("**EU**") and Switzerland. The agreement will enter into force once it has been approved by the European and Swiss Parliaments. Once in force, the agreement would allow the Swiss Competition Commission ("**COMCO**") and DG Comp to share information obtained in on-going investigations and new, subsequent cases that both authorities are investigating. The agreement will enable the respective antitrust authorities to:

(a) discuss any information concerning their antitrust enforcement;

(b) transmit information in their possession to each other with the investigating party's consent;

(c) mutually notify and co-ordinate enforcement activities *eg* dawn raids;

(d) upon request, even without the investigating party's consent, transmit information for use as evidence, subject to the following safeguards:

    (i) both competition authorities are investigating the same or related matters;

(ii) request is made in writing, including certain details of the subject matter and nature of the investigation; and

(iii) the authority receiving such request determines, in consultation with the requesting authority, what information in its possession is relevant and may be transmitted.

The agreement also contains non-binding provisions on conflict avoidance and the possibility of requests to initiate enforcement activities. The exchange is limited to information already in possession of the local authority, and is not a basis for the collection of information solely on behalf of the foreign authority.

The fact that the EU has labelled the agreement as the first of a “second-generation”, indicates that the EU is inclined to apply a similar approach to future bilateral and multilateral co-operation agreements. Companies involved in any investigation in more than one jurisdiction may face higher risk exposure arising from such “waiverless information-sharing” arrangements, given information provided or obtained in one country could be shared with other investigating jurisdictions that have signed on to such co-operation agreements. In-house counsels will have to consider carefully the implications of such co-operation arrangements as they consider their strategies in handling any investigations involving their companies.

DO YOU KNOW?

BRUNEI LOOKING TO INTRODUCE COMPETITION LAW IN 2013

Brunei has indicated that it has formally started the process of drafting its general competition legislation, the Brunei Competition Order (“**Order**”), in May 2012.

Brunei currently does not have any general competition legislation, and competition laws are only enforced in certain sectors of the economy by sector specific regulators (*eg* telecommunications and broadcasting sector, energy sector, banking and finance sector).

The provisions of the Order mirror best practices in overseas jurisdictions, including prohibitions against anti-competitive agreements, abuse of dominance, and anti-competitive mergers. The Order is waiting to be submitted for approval and is expected to be passed by the end of 2013, after which a phased implementation approach is expected.

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 2013* states that Cavinder is a "rising star, going from strength to strength", while *Asia Pacific Legal 500 2012/2013* recognises Cavinder as a "first-rate lawyer".

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Lim Chong Kin ● Director (Corporate Transaction & Advisory)

Chong Kin practices corporate law with a strong emphasis in the specialist area of competition law. Chong Kin also plays a key role in the development of sectoral competition regulation in the telecommunications, media and postal industries in Singapore. He regularly advises large international clients on competition law, and was instrumental in the first merger notification filing to CCS in 2007. *The International Who's Who of Competition Lawyers 2008-2013* and *the International Who's Who of Regulatory Communications Lawyers 2008-2013* all recognise Chong Kin for his strength in regulatory and competition advisory work. *Practical Law Company's Which Lawyer Survey 2011/2012* describes Chong Kin as a highly recommended lawyer in Competition/Antitrust. *The Guide to the World's Leading Competition & Antitrust Lawyers/Economists 2010 (9th Edition) and 2012 (10th Edition)* nominates Lim Chong Kin as a leading antitrust lawyer in Singapore. *Asia Pacific Legal 500: 2013* recognises him as a competition and regulatory expert. *Chambers Asia 2013* also recognises Chong Kin's achievements, describing him as "an outstanding lawyer who is savvy, intelligent and quick, and possesses excellent business judgement". Chong Kin is listed in *Best Lawyers* for Antitrust Law in Singapore.

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

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 – 2013* and the *Guide to the World's Leading Competition & Antitrust Lawyers/Economists 2010 (9th Edition) and 2012 (10th Edition)*. Ee-Kia is recently featured in Global Competition Review's 2013 edition of Women in Antitrust which profiles 100 successful women in the field of competition law.

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