RAJAH & TANN | *Asia*

CLIENT UPDATE
2016 OCTOBER

REGIONAL COMPETITION

Competition Bites – ASEAN & Beyond

Introduction

Welcome to the latest edition of our quarterly regional competition update! As always, our aim is to provide a high-level roundup of the more interesting happenings around the globe from a competition law perspective to aid businesses in understanding what they should be doing within their own spheres so as to avoid competition law violations. Competition law is very much a business law and affects all types of businesses regardless of which industries you operate in, and whether small or large.

Despite a seeming slowdown in the economic conditions globally, there has not been an abatement of investigations. There have been multiple infringement decisions issued across different regulators as well as fresh investigations being launched in a varied range of industries. On merger notifications, we note an increased number of cases where regulators have either blocked or cleared deals only subject to conditions. Additionally, the Philippine Competition Commission has cleared its first merger under the recently passed Competition Act, whilst the Hong Kong Competition Commission just issued for consultation its Block Exemption Order in relation to liner shipping agreements.

We cannot emphasise enough how important it is for businesses to remember that compliance with competition laws is a critical part of operating their businesses, and that a failure to comply results in substantial financial burdens, amongst other consequences.

We further take this opportunity to announce that C&G Law, a leading full-service law firm in the Philippines, will be joining Rajah & Tann Asia, Southeast Asia's largest legal network, with effect from 1 January 2017. We have been working with the competition team at C&G Law and are pleased to have them officially as part of our Rajah & Tann Asia Regional Competition & Antitrust and Trade Practice! With C&G on-board, the Rajah & Tann Competition & Antitrust and Trade Practice is effectively able to provide local law advice across ASEAN/South East Asia. We will include the contact details of our Philippines colleagues from our next issue; but do feel free to touch base with us in the meanwhile if you require assistance in the Philippines.

As always, if you do have quick queries or would like to discuss any of the updates here or other issues, please do not hesitate to get in touch with us. Our contact details appear at the end of this Update.

ASEAN

SINGAPORE

CCS Partially Concludes Investigations Into Supply Of Lift Spare Parts

The Competition Commission of Singapore ("**CCS**") on 14 July 2016 announced that it was investigating restrictive industry practices in the supply of lift spare parts required for the maintenance of lifts installed in Housing and Development Board ("**HDB**") estates in Singapore. The investigations were triggered by a complaint suggesting that third-party lift maintenance contractors may have encountered difficulties in obtaining branded spare parts from lift manufacturers and installers, which would have resulted in the town councils running the HDB estates to favour the appointment of the original lift installer to undertake such lift maintenance rather than using a more competitive alternative. Under Section 47 of the Competition Act (Cap. 50B), it is illegal for a dominant supplier to refuse to supply certain essential products or services that cannot otherwise be obtained. As a reminder, vertical restraints are excluded from the prohibition of anti-competitive agreements in Singapore. This means that certain restrictive practices can only be reviewed by the CCS under Section 47 of the Competition Act which prohibits the abuse of a dominant position.

The CCS had also announced publicly earlier in the year that one supplier of BLT branded lift spare parts, namely EM Services, had offered commitments to sell BLT lift spare parts to third-party lift maintenance

contractors in Singapore requesting such parts. The CCS found that the commitment provided sufficiently addressed the identified competition concerns and has, therefore, closed its investigation into EM Services' conduct.

CCS Investigation Into The Online Food Delivery Industry

On 25 August 2016, the CCS concluded its investigation into the online food delivery industry in Singapore. CCS started its investigation after receiving complaints on an alleged anti-competitive conduct by an online food delivery provider in Singapore. The investigation revealed that the online food delivery provider had entered into exclusive agreements with various restaurants. Following a thorough review, the CCS closed its investigation, concluding that competition had not been harmed in the relevant market. Interestingly, CCS noted that after it began its investigation, a delivery provider discontinued introducing exclusive agreements with restaurants, but at the same time other providers have been using such agreements to gain market share. It is important to highlight that exclusive agreements are not prohibited in Singapore unless they are entered into by a dominant player and effectively result in market foreclosure. Several of the investigations commenced by the CCS against allegedly dominant players have all focussed on exclusivity as a key aspect of the abuse.

CCS Clears The Acquisition Of GAPL Pte. Ltd. By Heineken International B.V.

The CCS on 19 July 2016 cleared the acquisition by Heineken International B.V. ("**HIBV**") of the entire issued and outstanding ordinary share capital of GAPL Pte. Ltd ("**GAPL**") which HIBV did not already hold through its subsidiary, Heineken Asia Pacific Pte. Ltd. The CCS assessed that the acquisition would not result in a substantial lessening of competition in the supply of ale, lager and stouts in Singapore. In finding that the acquisition was above board, the CCS placed heavy emphasis on the fact that the distribution of beer brands such as ABC Extra Stout and Guinness Stout in Singapore was already undertaken by Asia Pacific Breweries, a wholly-owned subsidiary of the Heineken Group before the merger, with GAPL only holding the brand licenses for these beers in Singapore. Therefore, the acquisition did not result in an addition of beer brands to the Heineken Group's portfolio. As a result, the transaction did not result in an increase of the Heineken Group's bargaining power vis-à-vis its customers.

CCS Clears Proposed Joint Venture Between Airbus Services Asia Pacific And SIA Engineering Company Limited

On 1 August 2016, the CCS cleared the proposed joint venture ("**JV**") between Airbus Services Asia Pacific Pte Limited and SIA Engineering Company Limited to provide heavy maintenance services to Airbus A380, A350 XWB and A330 Aircrafts. The CCS concluded that the proposed JV was unlikely to substantially lessen competition for supply of heavy maintenance services to commercial aircrafts in Singapore, given, inter alia, the global scope of the market, the strong bargaining power of the parties' customers (i.e. major airlines operating in Singapore) and the presence of a number of alternative providers of heavy maintenance services.

CCS Approves Tullett Prebon's Acquisition Of ICAP's Wholesale Broking Business

On 20 July 2016, the proposed acquisition by Tullet Prebon PLC ("**TP**") of ICAP's global wholesale broking business was cleared by the CCS. In Singapore, TP offers wholesale intermediary and broking services and is also engaged in the data sales and risk management services businesses, whilst ICAP provides wholesale intermediary services and data sales. ICAP also owns Fusion, a proprietary platform that provides an all-day Indication of Interest screen in support of the hybrid broking business. TP and ICAP do provide wholesale intermediary/broking services in relation to some overlapping products. The CCS cleared the merger, having found that the parties' customers are able to switch easily to other wholesale intermediaries and, further, have strong bargaining power. In the UK, the merger was cleared only after the parties offered commitments to the competition regulator.

CLIENT UPDATE
2016 OCTOBER

REGIONAL COMPETITION

CCS Approves Of Samwoh Premix's Acquisition Of Ley Choon's Manufacturing Site And Plant

On 24 August 2016, the CCS cleared the proposed acquisition by Samwoh Premix Ptd. Ltd. ("**SWPPL**") of one Ley Choon Constructions and Engineering Ptd. Ltd. ("**LCCE**")'s building and asphalt premix manufacturing plant. Whilst the transaction only involved the transfer of asphalt premix production capacity, i.e. assets, and did not involve the transfer of goodwill or employees, the CCS nevertheless concluded that it amounted to a merger under Section 54(2)(c) of the Competition Act as the transaction placed SWPPL in a position to replace LCCE in the part of the asphalt production business attributable to the assets being disposed of. Further, the CCS concluded that the transaction between SWPPL and LCCE was unlikely to substantially lessen competition in the market for the production of asphalt premix in Singapore, taking into account in particular the fact that the parties will continue to compete in the market post-merger, low switching costs for customers and extra-capacity in Singapore market.

Competition Appeal Board Publishes Its Appeal Decision In Ball Bearings Case

In May 2014, the CCS issued an Infringement Decision ("**ID**") against four Japanese ball bearings manufacturers and their Singapore subsidiaries for contravening section 34 of the Competition Act by engaging in anti-competitive agreements and unlawful exchanges of information in respect of the price and sale of ball and roller bearings to aftermarket customers in Singapore. Financial penalties totalling S$9.3 million were imposed on the undertakings involved, with one of them, Nachi-Fujikoshi Corporation and its Singapore subsidiary Nachi Singapore Pte Ltd ("**Nachi**"), receiving the largest penalty of S$7.5 million. Nachi subsequently appealed against the quantum of the financial penalty imposed on them by the CCS, contending that the CCS had incorrectly calculated its relevant turnover, thus leading to a higher financial penalty being wrongly imposed on them. The Singapore Competition Appeal Board's ("**CAB**") decision in this appeal was published on 1 September 2016. The decision by the CAB on each of the two grounds of appeal by Nachi is as follows:

1) **Nachi's argument that the CCS had utilised the relevant turnover figures of Nachi for the incorrect financial year** – The CCS Guidelines on the Appropriate Amount of Penalty ("**Penalty Guidelines**") state that the CCS's financial penalty calculations will be based on the infringing undertaking's relevant turnover in the last business year preceding the date on which the decision of the CCS is taken, or, if figures are not available for the business year, the one immediately preceding it. The wording used by the CCS in the Penalty Guidelines mirrors that in the Competition (Financial Penalties) Order ("**Financial Penalty Order**") which defines the applicable turnover (i.e. the overall turnover of the undertaking in Singapore) that must be used for calculating the maximum financial penalty that can be imposed on an infringing party under the Competition Act. The key contention in this ground of appeal was whether the phrase "decision of the CCS" in the Penalty Guidelines and in the Financial Penalty Order refers to the ID only, or could also include a Proposed Infringement Decision ("**PID**"). This distinction was pertinent as the financial penalty in the PID issued in December 2013 to Nachi was calculated based on Nachi's relevant turnover figures for FY2012; however, in the interim period between the PID and the issuance of the ID in May 2014, Nachi's figures for FY2013 (with a relevant turnover much lower than for FY 2012) had been released and provided to the CCS. In its decision, the CAB examined the relevant statutory framework governing the CCS's investigation and enforcement procedures, and determined that the PID is merely a notice by the CCS informing the concerned parties of its proposal to make an infringement decision against them and is not a "decision". As such, the CAB held that "decision of the CCS" as mentioned in the Financial Penalty Order and the Penalty Guidelines strictly refers to IDs only, and the CCS was, therefore, required to utilise Nachi's relevant turnover figures for FY2013 in determining the amount of penalty imposed on Nachi.

2) **Nachi's argument that the CCS should have discounted from its calculations the turnover generated from products that were ultimately exported out of Singapore by Nachi's Singaporean third-party distributor** – The CAB rejected Nachi's attempts to argue that its infringement had a reduced impact in Singapore as a portion of the goods it sold to its third-party distributor would subsequently be exported out of Singapore, noting that Nachi's distributor was a Singaporean entity. The fact that Nachi's competitors had chosen to sell directly from Singapore to foreign countries rather than through a local distributor – which meant that the

turnover relied on for the purpose of calculating the financial penalty of Nachi's competitors was much lower compared to Nachi's - did not weigh at all in the CAB decision. For the CAB, the fact that the goods were subsequently exported out of Singapore by the Singapore distributor was irrelevant: the impact on Singapore stemmed from the third-party distributor suffering damage from the anti-competitive agreement and 'bearing the full brunt of it'.

The 2nd point discussed above is a position that the CCS has consistently taken and now clearly articulated without doubt by the CAB. What this means is that harm to Singapore can be established even where Singapore is seen as a mere transit hub potentially.

INDONESIA

KPPU Investigates Alleged Price-Fixing By Local Subsidiaries Of Yamaha And Honda

PT Astra Honda Motor and PT Yamaha Indonesia Motor Manufacturing are being investigated by the Business Competition Supervisory Commission ("**KPPU**") for allegedly fixing the prices of automatic scooters. This allegation, if proven by the KPPU, would be a breach of Article 5 of Law No. 5, 1999 which prohibits business operators from making agreements with business competitors to fix the price of goods to be paid by consumers. The KPPU cited a document indicating that PT Astra Honda Motor and PT Yamaha Indonesia Motor Manufacturing had exchanged emails to coordinate price adjustments of their scooters. On 22 August 2016, the KPPU announced that the investigation has entered the stage of an Advanced Examination.

KPPU Establishes A Team of Economic Experts

The KPPU recently formed a dedicated economic team to anticipate the increasingly rapid and complex business dynamics. The KPPU must ensure that all of its assessments, decisions, advices or recommendations are supported by the facts of the case and a comprehensive economic analysis. The economic team established by the KPPU will further strengthen the KPPU's role in advising and making recommendations to the Government. It will also further assist the KPPU in assessing the existence of possible market distortions arising from business behaviour or Governmental policies. The KPPU economic team consists of a Chief Economist and two other economists, all of whom were instrumental in a number of cartel cases, including the tire cartel case which was won by KPPU at the Supreme Court.

MALAYSIA

Containerchain Malaysia Provides Undertaking To MyCC

On 1 June 2016, the Malaysia Competition Commission ("**MyCC**") issued an infringement decision against four Container Depot Operators ("**CDOs**") and an IT service provider, Containerchain (M) Sdn Bhd ("**Containerchain**") for fixing depot gate charges including applicable rebates in Penang. Specifically, Containerchain was found liable for facilitating, through its IT platform, the price fixing activities between the CDOs. On 30 June 2016, Containerchain gave MyCC an undertaking to reconfigure its system to ensure the platform can no longer be used by the CDOs as a conduit for the exchange of price information and as a means to fix charges and related rebates. In particular, CDOs will now be responsible to publish their own depot gate charges without the involvement of Containerchain's staff. Additionally, Containerchain's system will no longer administer the rebates granted by CDOs to their customers.

MyCC Allowed To Challenge CAT's Decision To Set Aside Fine On AirAsia, Malaysian Airlines

On 4 February 2016, the Competition Appeal Tribunal ("**CAT**") set aside MyCC's decision imposing a RM 10 million fine on each of Malaysia Airlines and Airasia respectively for entering into a market-sharing agreement over certain routes within Malaysia.

On 25 July 2016, the High Court of Malaya granted the MyCC's application for judicial review to challenge the decision of the CAT. The twists and turns created by this case are significant in nature as the

decision by the High Court will go a long way in assisting businesses in understanding the correct interpretation of section 4 of Malaysia Competition Act which prohibits anti-competitive agreements.

PHILIPPINES

Clarification Notes Issued By The Philippine Competition Commission On Merger Notification

In September 2016, the Philippine Competition Commission ("**PCC**") issued two clarification notes ("**Notes**") regarding the compulsory notification requirements for mergers. The Notes were issued as a guide to the public in the interpretation of the implementing rules and regulations ("**IRR**") of the Philippine Competition Act (Republic Act No. 10667).

Note No. 16-001 on "Definitive Agreements and Binding Preliminary Agreements in Mergers and Acquisitions" clarifies the timing of a notification as well as which documents are acceptable for the purpose of notifying a merger to the PCC. It states that the compulsory notification of a merger may be submitted on the basis of a binding preliminary agreement upon its execution. Alternatively, if there is no binding preliminary agreement or the parties do not wish to notify at that stage, notification to the PCC must be made (a) prior to the execution of the definitive agreement or agreements relating to the merger or acquisition; or (b) prior to the execution of the definitive agreement or agreements involving the Philippine aspect of the merger or acquisition, where the merger or acquisition is a global transaction requiring notification in multiple jurisdictions, i.e., three (3) or more jurisdictions outside the Philippines. For (a), the terms and conditions of the most recent draft of the definitive agreement or agreements shall be the basis of the notification. For (b), the terms and conditions of the agreement or the most recent draft of the definitive agreement or agreements relating to the Philippine aspect of the transaction, or both, where appropriate, shall be the basis of the notification. The Note also indicates what preliminary and definitive agreements refer to or contain.

Note No. 16-002 on "Coverage of Compulsory Notification" clarifies that an internal restructuring within a group of companies is exempt from notification if the acquiring and acquired entities have the same ultimate parent entity. It also indicates that notwithstanding the foregoing, mergers or acquisitions are not considered purely internal and, therefore, do not qualify for exemption, if the restructuring leads to a change in control.

Philippine Court Of Appeals Issues An Injunction Against PCC Review Of Telco Deal; Initial Findings Are Deal Is Anti-Competitive

On 26 August 2016, the Philippine Court of Appeals issued a writ of preliminary injunction temporarily prohibiting the PCC from reviewing the PHP69.1 billion (approximately SGD1.9 billion) acquisition by Philippine Long Distance Telephone Company ("**PLDT**") and Globe Telecom ("**Globe**") of San Miguel Corporation's ("**SMC**") telecommunications business. According to the Court of Appeals, the injunction was issued in order to prevent any impairment of PLDT's and Globe's rights while the Court heard their petitions assailing the PCC's investigation of the transaction (which PLDT and Globe claim were deemed approved under the PCC's pre-IRR transitory rules on merger notification). The PCC investigation was questioned by PLDT and Globe under two separate petitions which were later consolidated by the Court of Appeals.

One day prior to the Court of Appeals' injunction, or on August 25, 2016, the Mergers and Acquisitions Office ("**MAO**") of the PCC issued a "Preliminary Statement of Concerns" on the PLDT-Globe-SMC transaction. The MAO indicated that it "currently believes that the Transaction is likely to substantially prevent, restrict or lessen competition within the relevant market(s) in the Philippines." Thus, the "MAO considers that it is under a duty to proceed to a more detailed review of the Transaction that will allow the MAO to further examine and analyse the competitive effects of the Transaction in the relevant market(s), and make a more conclusive recommendation" to the PCC.

First PCC Approval Of An Acquisition

On 1 September 1 2016, the PCC issued what appears to be its first known approval of a merger. The PCC website published the PCC's decision on the acquisition by Kinnevik Online AB of the shares of Global

REGIONAL COMPETITION

Fashion Group S.A. The one-page decision cites Sections 16 and 20 of the Philippine Competition Act and Section 1, Rule 4 of the IRR, and indicates that in view of the recommendation of the MAO, on the basis of information obtained from the parties and third parties, the acquisition "does not result in a substantial lessening of competition in the relevant market, there being no overlap of the products or services of the acquiring and acquired parties." The PCC said that it would take no further action with respect to the transaction.

Rest of Asia-Pacific

AUSTRALIA

Expedia And Booking.com Amends Contracts With Australian Hotels

Further to an investigation by Australian Competition and Consumer Commission ("**ACCC**") Expedia and Booking.com, one of the largest online travel sites used in Australia for Australian accommodation, have agreed to amend their price and availability parity clauses in their contracts with Australian hotels and accommodation providers. Specifically the online travel sites have agreed they would no longer require accommodation providers in Australia to:

(i) Offer room rates that are equal to or lower than those offered on any online travel agent;

(ii) Offer room rates that are equal to or lower than those offered on an accommodation provider's offline channels;

(iii) Make all remaining room inventory available; or

(iv) Offer the same number and same type of rooms offered to any other online travel agent.

This is in line with similar undertakings provided by the same parties to various regulators in the EU. For more information on such parity clauses, please refer to our Client Update [Mid-year Competition Law Update: Most-Favoured Nation Clauses and Anti-Competitive Rebates].

Pleading Guilty To Australia's First Criminal Cartel Charge

Nippon Yusen Kabushiki Kaisha ("**NYK**"), a global shipping company based in Japan, has pleaded guilty to criminal cartel conduct in Australia's Federal Court on 18 July 2016 for its participation in an alleged cartel in relation to the transportation of vehicles, including cars, trucks, and buses, to Australia. This is the first criminal cartel charge that was ever brought against a company since the cartel offense was enacted in Australia in 2009.

CHINA

Beer Megadeal Between AB InBev And SABMiller Approved By MOFCOM, Subject To Conditions

The Ministry of Commerce of the People's Republic of China ("**MOFCOM**") has cleared Anheuser-Busch InBev SA/NV ("**AB InBev**") proposed acquisition of SABMiller plc ("**SABMiller**"), subject to conditions. As a result of the acquisition, AB InBev would have obtained joint-control over China Resources Snow Breweries Limited ("**CR Snow**"), previously 49% owned by SABMiller. The combined market share of AB InBev and CR Snow in China in 2014, based on their sales volumes, amounted to more than 40% in the 'popular' beer market and more than 50% in the 'premium' beer market. Given this, MOFCOM took the preliminary view that the merger would significantly lessen competition in the beer markets in China. To alleviate the identified competition concerns, and further to a number of rounds of discussions with MOFCOM, the parties have undertaken to sell SABMiller's 49% stake in CR Snow to a third party, China Resources Beer (Holding) Company Limited. Given this, MOFCOM conditionally cleared the transaction. It is interesting to note that an additional condition imposed by MOFCOM on the parties is for the closing of the abovementioned divestment to be completed within 24 hours after completion of acquisition of shares of SABMiller by AB InBev.

CLIENT UPDATE
2016 OCTOBER

REGIONAL COMPETITION

Hotel Megamerger Finally Cleared by MOFCOM

The billion-dollar megamerger between Marriott International and Starwood Hotels & Resorts has finally received approval by MOFCOM, after the regulator had extended the timeline for its review for a further 60 days on 9 August 2016.

MOFCOM's approval issued in mid-September was the only outstanding clearance from competition authorities. Over the last months, the merger obtained approval from regulators throughtout the globe, including from the European Commission (in June 2016) and from the US and Canada competition authorities (in March 2016).

HONG KONG

Hong Kong Competition Commission Consults On A Proposed Block Exemption Order For Liner Shipping Agreements

On 14 September 2016, Hong Kong Competition Commission ("**CompComm**") published for consultation a proposed block exemption order ("**BEO**") for certain liner shipping agreements. The BEO follows from an application by the Hong Kong Liner Shipping Association ("**HKLSA**") to exempt from the prohibition of anti-competitive agreements vessel sharing agreements ("**VSA**") and voluntary discussion agreements ("**VDA**"). Unlike Singapore, the proposed BEO does not cover VDAs, which in the CompComm's view, do not result in Net Economic Benefit. Rather, under the proposed BEO only VSAs would be excluded from the prohibition of anti-competitive agreements, provided that:

(i) The parties to the VSA do not collectively exceed a market share threshold of 40%;

(ii) The VSA does not authorise or require shipping lines to engage in cartel conduct; and

(iii) Shipping lines must be free to withdraw from the VSA without incurring a penalty on giving reasonable notice.

The proposed duration of the BEO is five years. Interested parties have until 14 December 2016 to submit their views to the CompComm.

INDIA

Competition Commission Of India Imposes Penalties On A Pharmaceutical Company, Their Trade Association And Their Office Bearers For Restraining Pharmaceutical Companies From Appointing Stockists And Refusal To Supply

The Competition Commission of India ("**CCI**") has imposed on the Karnataka Chemists & Druggists Association ("**KCDA**") and the pharmaceutical company Lupin Ltd. ("**Lupin**") penalties of approximately S$17,400 and approximately S$14.7 million respectively for violating the generic prohibition of anti-competitive agreements in the Competition Act, 2002. In this case, Lupin had refused to supply drugs to a stockist who had not obtained a No Objection Certificate ("**NOC**") from the KCDA. Three officers of the KCDA and two officers of Lupin were also fined at 10% and 1% of their incomes respectively, given their active involvement in the anti-competitive conduct.

This is not the first time that the CCI has assessed that the requirement by chemists and druggists associations that pharmaceutical companies can only appoint new stockists who have obtained a NOC from the association is anti-competitive. It is, however, interesting to note the statement by the CCI that by cooperating with the associations to implement their anti-competitive decisions, the pharmaceutical companies become 'equally complicit in the anti-competitive effect of such practice' as 'perpetrators of such anti-competitive practice'.

CLIENT UPDATE
2016 OCTOBER

REGIONAL COMPETITION

CCI Imposes Penalties On Cement Companies For Colluding

On 31 August 2016, the CCI imposed fines of close to S$1.3billion on ten cement companies and their trade association, the Cement Manufacturers Association ("**CMA**"), for cartel conduct. This came further to a complaint by the Builders Association of India. The CCI concluded that the cement companies had through the CMA, engaged in a wide ranging information exchange in relation to prices, capacity utilisation, production and supplies in the market. CCI noted that the exchange of information between the cement companies using CMA as a platform went far beyond the acceptable limits of information sharing and resulted in competitors colluding on prices and volumes. In addition to imposing financial penalties, the CCI also required CMA to 'disengage and disassociate itself from collecting wholesale and retail prices through member cement companies or otherwise' and 'from collecting and circulating the details relating to production and dispatch by cement companies' to its members.

SOUTH KOREA

SK Telecom-CJ HelloVison Deal Blocked By the Korea Fair Trade Commission

The Korea Fair Trade Commission ("**KFTC**") announced on 18 July 2016 that it had decided to block the proposed acquisition of CJ HelloVision ("**CJH**") by SK Telecom ("**SKT**") and the related merger between SK Broadband ("**SKB**") and CJH. After an extensive review, the KFTC concluded that the proposed complex transaction would result in a substantial lessening of competition in the Pay TV, the retail and the wholesale telecom markets and would, in fact, give rise to the creation of a monopolistic or an oligopolistic market structure which will be irreversible. Given this, the KFTC further concluded that no behavioural nor structural remedies could possibly alleviate the identified competition concerns, i.e. the merger could not be approved subject to conditions.

JAPAN

Electric Power Security Communication Equipment Distributors Fined For Bid-Rigging

The Japan Federal Trade Commission ("**JFTC**") issued a cease and desist order, and fined Fujitsu Ltd. ("**Fujitsu**") and Oi Electric Co. ("**Oi Electric**") ¥285.1 million (approx. S$$3.85 million) and ¥117.81 million (approx. S$1.59 million) respectively, for repeated bid-rigging. The JFTC found that over the span of at least 3.5 years, Fujitsu, Oi Electric and NEC Corp. ("**NEC**"), which manufacture and distribute electric power security communication equipment, discussed and agreed which company will supply such equipment to tenders by Tokyo Electric Power Company Holdings, Inc. NEC was exempted from the fine as it voluntarily reported its involvement to JFTC under JFTC's leniency programme.

EUROPE

The European Commission Sends Two Statements Of Objections To Google On Alleged Abuses Of Dominance

On 14 July 2016, the European Commission ("**EC**") sent two Statements of Objections ("**SO**") to Google. According to the press release issued by the EC, the first SO supplements the SO addressed to Google and its parent company in April 2015 and sets out additional evidence gathered by the EC that Google may have abused its dominant position in the general Internet search services market by treating its own comparison shopping service more favourably than the similar services offered by its competitors.

The second SO relates to an alleged abuse by Google in the online search advertising market. In this case, the EC has taken the preliminary view that restrictions imposed by Google on its partners (i.e. third party websites), including exclusivity clauses and an obligation 'to obtain Google's approval before making any change to the display of competing search ads' amount to an abuse of dominance.

Google and Alphabet (the parent company of Google) have until 13 and 26 October to respond to the two SOs.

CLIENT UPDATE
2016 OCTOBER

REGIONAL COMPETITION

EC Imposes Its Highest Fine Ever On Truck Manufacturers For Cartel Behaviour

On 19 July 2016, the EC fined truck producers MAN, Volvo/Renault, Daimler, Iveco, and DAF a record fine of €2.93 billion for fixing the wholesale prices for medium and heavy trucks in the European Economic Area and for agreeing on passing on to their customers the costs associated with compliance with new European emission standards. The investigation revealed that for 14 years, the five manufacturers discussed both the timing of the adoption of new technologies in line with the new emission standards and the passing-on of the associated costs to their customers. As the whistle-blower, MAN benefitted from a total immunity from fines under the EC's leniency programme.

EC Approves Seven Mergers Subject To Conditions Over The Last Three Months

Over the last 3 months, the EC cleared seven mergers subject to commitments provided by the parties. The high proportion of conditional approvals is unusual.

Amongst these seven mergers, six were cleared subject to the divestment of assets or businesses:

(i) Two in the pharmaceutical industries – the acquisition of Boehringer Ingelheim's consumer health business by Sanofi and the acquisition of Meda by Mylan – where the mergers were authorized subject to the divestment of one of the parties' business(es) relating to certain drugs in various markets;

(ii) Two in the telecommunications sector – the creation of a joint venture by Hutchison and VimpelCom in Italy and the creation of a joint venture by Vodafone and Liberty Global – where the EC obtained in one case the divestment by the parties of sufficient assets to allow a new entrant to become the fourth mobile network operator in Italy and in the other case the divestment by Vodafone of its retail customer fixed line business in the Netherlands;

(iii) One in the automotive parts sector – acquisition of an automotive component business of Faurecia by Plastic Omnium – and one in the crane and container handling business – Konecranes' acquisition of Terex's crane and container handling business. In both cases, the EC cleared the transaction subject to divestment of either manufacturing plants or parts of the businesses.

The last merger to be cleared subject to conditions is the acquisition of Arianespace by Airbus Safran Launchers ("**ASL**"), a joint-venture between Airbus and Safran. In this case, the EC was primarily concerned with the potential flow of information between Airbus and Arianespace that could result from the transaction, and in particular the (i) flow of information from Arianespace to Airbus about other satellite manufacturers; and (ii) flows of information from Airbus to Arianespace about other launch service providers. To ease the EC's concerns, the companies have offered to implement firewalls between Airbus and Arianespace to prevent the sharing of information about third-parties and to put in place measures restricting employees' mobility between the companies. The concerns highlighted by the EC are a good illustration of the competition issues that can come up where the parent companies of a JV, or a JV and one of its parent companies, have overlapping or complementary businesses. In such case, the exchange of business sensitive information may be seen by competition authorities as anti-competitive and measures must be taken to avoid such risk.

UNITED KINGDOM

CMA Opens In-Depth Merger Investigations In Diebold Incorporated's Acquisition of Wincor Nixdorf

On 15 August 2016, Diebold, Incorporated ("**Diebold**") announced that it had completed its US$1.8 billion acquisition of Wincor Nixdorf AG ("**Wincor**"). A few days later on 19 August 2016, the UK Competition and Markets Authority ("**CMA**") announced that its investigation of the transaction would proceed to a Phase II, unless Diebold offered commitments sufficient to address the competition concerns the CMA had identified. Diebold and Wincor are amongst the leading manufacturers of ATM machines. In the UK, they both supply their ATMs to banks and independent installers. The CMA preliminary view

was that the merger would lead to a substantial lessening of competition ("**SLC**") in the supply of ATMs in the UK as, post-merger, only one credible competitor to the merged entity would remain in the market. On 26 August 2016, Diebold informed the CMA that it will not be offering commitments. The CMA has, therefore, opened an in-depth investigation into the merger. Further, the CMA has issued an Initial Enforcement Order which requires the parties to hold their businesses separate and to ensure that no substantive organisational change is made to their businesses, until the investigation is completed.

It is worth highlighting that in the UK, as in Singapore, notification of a merger to the competition authority is voluntary: parties are not, therefore, prevented from closing their deal until a clearance decision has been issued. A decision not to notify a merger to the competition regulator and to close the deal is, however, at the risks of the parties as illustrated by this case.

It is also noteworthy that this merger had been cleared in a number of jurisdictions, such as Brazil and Poland, without facing significant hurdles. However, the CMA has stressed that the fact that the merger did not raise concerns in those countries did not mean that the same applied in the UK, given the specificities of the UK market and the position of the parties therein. Again, this is something that can be transposed to Singapore: the fact that a merger does not raise concerns outside of Singapore does not mean that it will not result in a SLC in Singapore.

Online Seller Agreed To Accept Fine After Cartel Behaviour On Amazon UK

On 21 July 2016, Trod Limited admitted to colluding with one of its competitors on the Amazon UK Marketplace, GB Eye Limited ("**GB Posters**"). The parties sold licenced pop culture related merchandise on products such as posters, stickers and mugs, with licenced images of athletes, entertainers, and video games, amongst other categories. The agreement was that, as competitors in the online sales business, they would not undercut each other's prices for posters and frames which were sold on the Amazon website. They did this by using automated repricing software, which is used to monitor a competitor's products and reprices products according to price fluctuations. It offers other services such as minimum price calculations and the optimal sale prices.

The timeframe of collusion spanned from around 24 March 2011 to 1 July 2015. Trod Limited has agreed to accept a fine of £163,371 (approx. S$285,000) for being in a cartel. A 20% discount has been awarded as Trod Limited admitted to the cartel activity and co-operated with the CMA's investigations, which saved the CMA's resources and costs. As GB Posters had reported the cartel behaviour, they will not receive a fine as long as they continue to co-operate with the CMA, in accordance with the CMA's leniency policy.

Other Jurisdictions

UNITED STATES

Hitachi Automotive Systems Agrees To Plead Guilty To Involvement In Anti-Competitive Practices

On 9 August 2016, the US Department of Justice announced that 'Hitachi Automotive Systems Ltd. has agreed to plead guilty and to pay a criminal fine of at least US$55.48 million for its role in a conspiracy to allocate markets, fix prices and rig bids for shock absorbers installed in automobiles sold to U.S. consumers'.

Tokyo-based Hitachi Automotive Systems and its co-conspirators agreed to coordinate and collude on price adjustments requested by the vehicle manufacturers. They strived to keep their illicit conduct secret by using code names and meeting in remote locations. By keeping prices high, they were allowing themselves to earn more, at the expense of their consumers.

In 2013, Hitachi pleaded guilty and paid a US$195 million fine for fixing the price of starters, alternators and other electrical automotive components. At the time, Hitachi received credit for substantially aiding the investigation. However, it was subsequently discovered that Hitachi had also conspired to fix the price of shock absorbers. Therefore, the division recommended a substantial increase in Hitachi's criminal fine

and also that the court place Hitachi on probation for three years. Hitachi Automotive Systems has agreed to cooperate with the division's ongoing investigation. The plea agreement is subject to court approval.

Justice Department Sues To Prevent Merger Between Monsanto And Deere

On 31 August 2016, the Department of Justice announced it had filed an antitrust lawsuit to block the proposed merger of Precision Planting LLC, a subsidiary of Monsanto Company, with Deere & Company. Deere & Company and Precision Planting are the two biggest providers of high-speed precision planting systems in the United States – accounting for at least 86% of all United State sales.

The proposed merger is alleged to restrict or eliminate competition in the market for high-speed precision planting systems in the United States. Due to the intense competition between Deere and Precision Planting since 2014, farmers have directly gained from aggressive discounts and promotions, lower prices and innovative product offerings. According to the Department of Justice, clearing this acquisition would allow Deere to regulate almost all methods which American farmers can buy effective high-speed precision planting systems and manipulate prices, output, quality and product features without being restrained by market competition.

SOUTH-AFRICA

ArcelorMittal South Africa Limited Accused Of Cartel Conduct

The Competition Commission and South African steel producer, ArcelorMittal South Africa Limited ("**ArcelorMittal**"), have agreed to settle six complaints against ArcelorMittal in what is the largest agreed administrative penalty imposed in South Africa. Allegations of price fixing and market allocation were brought against ArcelorMittal, in what was termed by the Competition Commission as, the "steel cartel". In terms of the agreement, ArcelorMittal admitted to having been involved in the long steel and scrap metal cartels, and agreed to pay an administrative penalty of R1.5 billion (approx. S$149 million). In addition to the illicit cartel conduct, the Competition Commission also instituted a complaint alleging the dominant steel manufacturer had engaged in excessive pricing to the detriment of consumers. In July 2011, the Competition Commission initiated a complaint into ArcelorMittal's pricing policy for its flat steel products based on a complaint by the Department of Trade and Industry. The investigation pertained to ArcelorMittal allegedly charging excessive prices for its flat steel products in contravention of the Competition Competition Act. The Commission has not made a finding in this matter.

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CLIENT UPDATE
2016 OCTOBER

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Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community ("**AEC**") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com/.

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CLIENT UPDATE
2016 OCTOBER

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CLIENT UPDATE
2016 OCTOBER

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