Competition Law Bites – August 2008

We are pleased to circulate our latest review of recent developments in competition law from around the world. This review covers developments in August 2008.

The purpose of this review by the Rajah & Tann Competition Law Team is to highlight key developments in competition law globally that, in our view, could be of interest in the Singapore context. Please note that this is not an exhaustive overview of all the cases or new legislations that are developing worldwide, nor are the summaries comprehensive. Please do not hesitate to contact the Competition Law Team at competitionlaw@rajahtann.com if you would like more information.

ASIA PACIFIC

Singapore

Anti-Competitive Agreements

• The Competition Commission of Singapore (‘CCS’) advised the Institute of Estate Agents (‘IEA’) that its Professional Fees / Commission Guidelines were likely to infringe the Singapore Competition Act. The IEA was advised to remove its recommendation on fees and fee structures.

[Editor’s Note: The use of trade associations as a vehicle for collusion between members is strictly prohibited. Although recommendations (and other guidelines) by trade associations are not strictly prohibited, where such recommendations / guidelines enable or are likely to lead to, for example, price convergence of industry players, they can have an adverse effect on competition in the market.]

Australia

New Zealand

Russia

South Korea

Taiwan

EUROPE

European Union

Poland

Slovak Republic

Spain

Switzerland

United Kingdom
**Mergers**

- The acquisition of Singapore Computer Systems Ltd (‘SCS’) by NCS Pte Ltd (‘NCS’) through Computer Systems Holdings Ltd (‘CSH’), a wholly-owned subsidiary of NCS was notified to the CCS for clearance.

- The acquisition by WC Heraeus GmbH ‘WCH’ (through Heraeus Materials Singapore Pte Ltd) of the bonding wire business of Kulicke and Soffa Industries, Inc was notified to the CCS for clearance.

- The proposed merger between The Manitowoc Company, Inc (through its wholly-owned subsidiary, MTW County Ltd) and Enodis Plc was notified to the CCS for clearance.

**Australia**

**Mergers**

- The Australian Competition and Consumer Commission (‘ACCC’) has given clearance to the proposed A$18.2 billion takeover of St George Bank Ltd by Westpac Banking Corp. The ACCC concluded that the merger was unlikely to substantially lessen competition in the market. According to ACCC chairman Graeme Samuel, ‘In particular, the ACCC considered that competition in retail banking markets provided by the other major banks and regional banks along with credit unions, building societies and niche players, would be sufficient to constrain the merged firm after the acquisition.’

**New Zealand**

**Anti-Competitive Agreements**

- Auckland International Airport Limited (‘AIAL’) has entered into an undertaking with the New Zealand Commerce Commission (‘NZCC’) to abandon plans to reduce the number of duty-free store operators from two to one following a warning from the NZCC that it risked breaching the Commerce Act. The NZCC issued a statement saying that if AIAL’s plans were carried out, consumers would have less choice and will not be able to benefit from price competition between duty-free store operators.

[Editor’s Note: See Competition Bites, April 2008.]
Mergers

- New Zealand's Court of Appeal overturned a High Court decision to allow either the Foodstuffs supermarket chain or Australia's Woolworths group to acquire 128 variety and discount stationery stores of The Warehouse, which had begun building hypermarkets and diversifying into food sales. The NZCC rejected takeover applications by both groups in June 2007, but the High Court overruled the NZCC decision in November 2007. The NZCC appealed against the High Court's ruling in April 2008 arguing that more competition is necessary in the supermarket sector in New Zealand and the presence of The Warehouse had the potential to increase the level of competition in the sector. The Court of Appeal agreed.

Russia

Abuse Of Dominance

- The Russian Federal Anti-Monopoly Services ('FAS') has fined the Mechel Group EUR22 million and ordered the company to lower its coal concentrate prices by 15% from 1 September 2008. The group was found to have abused its dominant position by, amongst other things, creating discriminatory conditions for individual consumers; economically and technologically unfounded refusal to enter into a product supply contract and fixing; and maintaining monopolistically high prices.

- The FAS in the Komi Republic has commenced proceedings against LUKOIL-Komi Ltd for abusing its dominant position by allegedly obstructing the transportation of petroleum-associated gas to a processing plant following a complaint by Nobel Oil Company CJSC.

South Korea

Anti-Competitive Agreements

- The South Korean Fair Trade Commission ('KFTC’) has fined 24 insurance companies a total of US$24.5 million for participating in a price-fixing cartel. The insurance companies which included, amongst others, Samsung Life Insurance and Kyobo Life Insurance, fixed the prices of corporate insurance products between them and rigged bids for public-servant insurance from July 2004 to March 2008.
Taiwan

*Abuse Of Dominance*

- Taiwan’s Fair Trade Commission (‘TFTC’) has launched an investigation into an alleged abuse of a dominant position by Microsoft. The allegations against Microsoft stem from complaints that consumers are ‘forced’ to purchase / upgrade to the Windows Vista operating systems when Microsoft ended sales of its Windows XP operating system in most computers from June 2008.

**EUROPE**

**European Union**

*Anti-Competitive Agreements*

- Scandinavian Airlines (‘SAS’) is being sued by several major Swedish companies including Ikea and Hennes & Mauritz (‘H&M’) for losses resulting from SAS’ participation in a price-fixing cartel on air freight services. SAS admitted to violating United States (‘US’) antitrust laws and agreed with the US Department of Justice (‘DoJ’) to pay US$52 million in fines for its cargo subsidiary’s participation in the cartel. A separate investigation is being carried out by the European Commission (‘EC’).

  [Editor’s Note: The Singapore Competition Act provides for the right of private action for losses resulting from anti-competitive conduct. It should be noted that in Singapore, however, the right of private action may only be commenced following an infringement decision.]

- The EC has initiated a probe into a revenue-sharing deal between British Airways PLC (‘British Airways’), American Airlines and Spain’s Iberia SA (‘Iberia’). The carriers plan to cooperate commercially on flights between the US, Mexico and Canada, and the European Union (‘EU’), Switzerland and Norway. BA and AA had previously failed to gain clearance for antitrust immunity in the US for similar cooperation deals as the airlines held a high combined percentage of slots on the London Heathrow – New York route. BA, AA and Iberia had earlier announced plans to seek immunity for the deal from Competition / Antitrust Authorities worldwide.

  [Editor’s Note: See United States, page 8 below.]
Mergers

• The EC has approved the proposed acquisition of Northwest Airlines by Delta Airlines, both US air carriers, after concluding that the acquisition would not significantly impede competition in the European Economic Area (‘EEA’).

• The EC has cleared the joint venture Capacity Allocation Service Company for Central Western Europe (‘CASC’) for the allocation of power transmission capacities on borders between Belgium, France, Germany, Luxembourg and the Netherlands. The proposed notified joint venture is taking place between CEGEDEL Net SA, ELIA System Operator SA / NV, EnBW Transportnetze AG, E.ON Netz GmbH, TRY EDF Transport SA, RWE Transportnetz Strom GmbH and TenneT TSO BV, all of which are electricity transmission system operators. The EC found that there were no horizontal overlaps between the transmission networks of the joint venture parent companies and that the limited size and scope of the joint venture would not likely increase the risk of coordinated behaviour between the parent companies.

Poland

Abuse Of Dominance

• The Polish Office of Competition and Consumer Protection (‘OCCP’) has found that the sale of notebooks with pre-installed Microsoft software may restrict competition. The OCCP found that although manufacturers do not have any obligation to install Microsoft products, cooperation terms are so attractive that manufacturers sell notebooks with the Microsoft operating system only. Further, the OCCP noted that it is difficult or very unlikely for consumers to opt out of the pre-installed software, because, eg, they cannot be reimbursed for its price. The arrangement between Microsoft and the manufacturers has the effect, therefore, of limiting competition amongst software providers. The OCCP has referred the case to the EC.

Slovak Republic

Abuse Of Dominance

• The Slovak Antimonopoly Office (‘Office’) has imposed a fine of EUR 29 million on Slovak Telecom (‘ST’) for abusing its dominant position by refusing its competitors access to local telecommunication lines, ie access to an essential facility. The fine is the largest imposed by the Slovak authority. According to the Office, ‘the vertically integrated company seriously damaged its rivals acting in the retail markets. It restricted their possibility to apply the most modern..."
technologies independently on already offered ST’s products and also it completely closed the market for the potential rivals intending to act in newly opened markets.’

[Editor’s Note: Refusal of competitors’ access to essential facilities may constitute a breach of Competition Laws in Singapore.]

Spain

Abuse Of Dominance

- The Spanish Comisión National de Competencia (‘CNC’) has commenced an investigation into intellectual property rights associations Artistas Intérpretes, Sociedad de Gestión and Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España following a formal complaint by digital television companies Sogecable, SA, Canal Satélite Digital, SL and Distribuidora de Televisión Digital. The television companies allege that the associations abused their market power by fixing certain general tariffs and that such tariffs resulted in discrimination against television companies.

Switzerland

Mergers

- The Swiss Competition Commission, Wettbewerbskommission Commission de la Concurrence (‘Weko’), granted unconditional clearance to the planned acquisition of brewery Eichhof by beer company Heineken. The merger review had gone into the second, more detailed, review phase as concerns were raised that the merger may result in the collective dominance of the Heineken and Carlsberg brewery groups in the beer market. Weko, however, found that barriers to entry into the beer market were relatively low and that regional breweries would nevertheless be able to compete effectively following the merger.

[Editor’s Note: In Singapore, there are Phase I and Phase II processes for merger review, depending on the complexity of the case and the concerns raised. The Phase I review in Singapore takes a maximum of 30 days and the Phase II review an additional 120 days for the CCS to complete.]

United Kingdom

Anti-Competitive Agreements

- Four British Airways (‘BA’) executives have been charged by the United Kingdom (‘UK’) Office of Fair Trading (‘OFT’) for their alleged
role in a scheme to fix fuel surcharges between August 2004 and January 2006 under the UK Enterprise Act. If convicted, they face a maximum sentence of five years in prison and unlimited fines. BA has been fined £270 million in total for its role in the cartel after a joint investigation by the OFT and the US DoJ. Virgin Atlantic, which had whistle-blowed on the price-fixing scheme, avoided a fine.

[Editor’s Note: Individuals participating in cartels or price-fixing schemes can be criminally prosecuted in some jurisdictions such as the UK, US and Ireland, where such schemes have an impact on any market within these jurisdictions. Singapore has not criminalised cartel participation, although individuals may be liable for failure to provide information to the CCS when requested or for providing false or misleading information to the CCS.]

Abuse Of Dominance

- The British telecommunications watchdog, Ofcom, has opened an investigation into British Telecom (‘BT’) after receiving complaints from Gamma Telecom (‘Gamma’) and THUS alleging that BT has abused its dominant position in the telecommunications market. Gamma and THUS allege that BT’s pricing of wholesale end-to-end voice calls to resellers from April 2005 amounts to an abusive margin squeeze under UK and EU competition laws. Specifically, the complaints allege that BT’s pricing may be below cost, is aimed at eliminating or weakening competition in the provision of wholesale end-to-end voice calls to resellers by reducing the margin available to Carrier Pre-Selection Operators (‘CPSO’s’) when they sell their services to resellers, and will result in the inability of CPSOs to compete profitably in the market.

- The UK Competition Commission has recommended the sale of airport operator BAA Ltd’s Gatwick and Stansted airports. BAA has 91% share of the air passenger / airport market in Southeast England through its ownership of Heathrow, Gatwick, Stansted and Southampton airports; and 84% market share in Scotland, through its ownership of the Edinburgh, Glasgow and Aberdeen airports. According to the UK Competition Commission, BAA’s domination and limited competition in the air passenger / airport market has led to a shortage of capacity and poor customer service resulting in crowded concourses and flight delays.

[Editor’s Note: See Competition Bites, April 2008 issue.]

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THE AMERICAS

Canada

- Canada’s Competition Bureau has commenced a review into Google and Yahoo’s proposed tie-up for search advertising amid concerns that the deal may cause prices to rise for internet advertisers in Canada. Approximately 80% of internet searches in Canada are conducted on Google.

[Editor’s Note: For information on US investigations into the proposed Google-Yahoo tie-up, see Competition Bites, July 2008 issue.]

United States

Anti-Competitive Agreements

- British Airways, American Airlines and Iberia have announced plans to notify the US Department of Transport (‘DoT’) and other competition authorities worldwide about a proposed revenue-sharing tie-up between the three carriers. BA and AA had previously failed to gain clearance for antitrust immunity in the US for similar cooperation deals as the airlines held a high combined percentage of slots on the London Heathrow – New York route. The proposed tie-up is currently being reviewed by the EC.

[Editor’s Note: See Europe, page 4 above.]

- The US House Transportation and Infrastructure Committee and the House Judiciary Committee will review United Parcel Service Inc’s (‘UPS’) plans to take over Deutsche Post AG’s (‘DHL’) US air shipments. UPS is the world’s largest package delivery company and DHL has reportedly been losing money in its US air shipments business. Air Transport Services group Inc (‘Air Transport’) has been handling DHL’s US flights. Both committee panels have expressed concern that the transaction would eliminate competition in the overnight package delivery services.

Mergers

- The US Federal Trade Commission (‘FTC’) announced that it would re-open investigations into the merger between two organic grocers, Whole Foods Inc and Wild Oats Markets, which took place in October 2007. The announcement followed a Federal Appeals Court judgment overturning a federal judge’s decision to block the FTC’s attempt to prevent the merger. The FTC had previously found that the merger
would significantly lessen competition in the organic foods market.

- Following reports of an FTC challenge, Sun Pharmaceutical Industries Ltd (‘Sun’) announced that the FTC has granted early termination of the antitrust waiting period under the Hart-Scott-Rodino Act for the previously announced tender offer by Alkaloida Chemical Company Exclusive Group (a subsidiary of Sun) for Taro Pharmaceutical Industries. The FTC had expressed concerns that the proposed transaction would lead to higher prices for three distinct generic formulations of carbamazepine, an anticonvulsant drug, in the US. Sun entered into a commitment with the FTC to sell all rights and assets to the three drugs to Torrent Pharmaceutical Limited (‘Torrent’) to alleviate competition concerns.

Brazil

Anti-Competitive Agreements

- Brazil’s Justice Ministry has commenced an investigation into possible breaches of competition law by large mobile companies Tim, Vivo, America Movil and Telenorte following complaints by small landline operators. The large mobile companies control more than 95% of the mobile phone market in Brazil. The smaller operators allege that the large mobile companies colluded on high interconnection tariffs to squeeze rivals out of the market and to set up barriers to entry into the market.

Colombia

Mergers

- The Colombian antitrust agency, Superintendencia Industria y Commercio (‘SIC’), blocked the acquisition by Mexican chemical company Mexichem SA (‘Mexichem’) of Colombian salt processor Productos Derivados de la Sal SA (‘Prodesal’), which is controlled by Peruvian group Quimpac SA (‘Quimpac’). According to the SIC, the acquisition would unduly restrict free competition in the market of sodium hypochlorite (ie bleach) by raising barriers of entry for potential competitors to enter the bleach market.

(Editor’s Note: The vertical integration of firms, such as the acquisition by a dominant firm of a key supply of raw material, may be anti-competitive and increase barriers to entry of potential competitors where such competitors will not be able to effectively secure an alternate source of raw material.)
AFRICA

Egypt

- 20 cement company executives were fined US$1.9 million each by a Cairo court for colluding to raise prices for cement and market-sharing in Egypt. The Egyptian Competition Authority (‘ECA’) reported the existence of a cartel among cement companies that monopolised the market, conspired to raise prices, and restricted production of cement. Further, according to the ECA, local cement producers agreed on prices and how to divide up the market for Portland cement in 2005 and 2006. The nine cement companies involved were fined an additional US$1.9 million each.

[Editor’s Note: Under Singapore’s Competition Laws, executives taking part in anti-competitive practices are not personally liable for their participation in such activities, although they can be liable for failure to provide to the CCS requested information or providing false information to the CCS. In some jurisdictions such as the US, UK and Ireland, individuals can be criminally liable for participating in cartels. See United Kingdom, page 6 above.]

CONCLUDING WORDS

If you would like more information on the above, please contact Kala Anandarajah, Andrew Ong or Dominique Lombardi whose contact details appear on the left of page 3, or contact the Competition & Trade Law Team at competitionlaw@rajahtann.com, and we would be happy to assist you.

Rajah & Tann LLP is one of the largest law firms in Singapore, with a representative office in Shanghai. It is a full service firm and given its alliances, is able to tap into resources in a number of countries.

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