

Unclassified**English - Or. English****30 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution
from Singapore****- Session II -****5 December 2019**

This contribution is submitted by Singapore under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.cd/cpta.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03455575

Competition Provisions in Trade Agreements

- Contribution from Singapore -

1. Introduction

1. Established in 2005, the Competition and Consumer Commission of Singapore (“CCCS”) administers and enforces the Competition Act (Cap. 50B) (“the Act”) and the Consumer Protection (Fair Trading) Act (Cap. 52A) in Singapore.¹ Under the Act, CCCS is empowered to investigate and adjudicate anti-competitive activities, issue directions to stop and/or prevent anti-competitive activities and impose financial penalties. Besides being the adviser to the Singapore Government and other public authorities on competition and consumer protection matters, CCCS also acts internationally as the national body representative of Singapore in respect of these matters.

2. This paper describes CCCS’s experiences in international cooperation, taking reference from the various Free Trade Agreements (“FTAs”) that CCCS was involved in negotiating. This paper will provide background on the FTAs containing competition provisions to which Singapore is a party, and elaborate on the effects of competition provisions within the Association of Southeast Asian Nations (“ASEAN”) region.

2. Background

3. In 2003, the Economic Review Committee, which was established in 2001 to review Singapore’s development strategy, recommended that a generic competition law be enacted to create a level playing field for businesses to compete on an equal footing so as to create a more conducive environment for businesses in Singapore. In 2003, Singapore and the USA signed the United States-Singapore FTA (“USSFTA”) which committed Singapore to enact a generic competition by January 2005. Article 12.2 of the USSFTA states:

1. Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.
2. Each Party shall establish or maintain an authority responsible for the enforcement of its measures to proscribe anticompetitive business conduct. The enforcement policy of the Parties’ national authorities responsible for the enforcement of such measures includes not discriminating on the basis of the nationality of the subjects of their proceedings. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a domestic court or independent tribunal.

¹ The CCCS also administers the Consumer Protection (Fair Trading) Act (Cap. 52A).

4. On 21 September 2004, the Competition Bill, which was intended “to make provision about competition and the abuse of dominant position in the market and to establish the Competition Commission of Singapore”, was read for the first time in the Singapore Parliament. The Competition Bill was passed by the Singapore Parliament on 19 October 2004, and less than three months later, on 1 January 2005, the CCCS (then known as the Competition Commission of Singapore), was established to enforce the Act.

5. Section 88 of the Act provides that CCCS may enter into cooperation arrangements with foreign competition bodies with the approval of the Minister (Trade & Industry). The cooperation arrangements are for reciprocal provision of information and/or assistance that will facilitate the competition authorities’ performance of their functions. For CCCS to furnish any information to a foreign competition body pursuant to such cooperation arrangements, the foreign competition body must provide a written undertaking that it will comply with the terms of disclosure of the information as specified by CCCS. CCCS’s provision of information is subject to statutory provisions under the Act that require CCCS to maintain confidentiality of certain information in its possession.²

3. Singapore’s Experience with FTAs

6. FTAs are treaties which make trade and investment between two (2) or more economies easier. They traditionally cover three areas – trade in goods, trade in services and investment. In recent years, the scope of FTAs have expanded to include more issues of interest to businesses, including e-commerce, intellectual property rights, government procurement, dispute settlement and of course, competition.³

7. Singapore is a party to approximately fifteen (15) trade agreements (including the USSFTA) with competition provisions that have entered into force. The trade agreements established on a bilateral basis include the Sri Lanka-Singapore FTA, the Turkey-Singapore FTA, the Costa Rica-Singapore FTA and the China-Singapore FTA (“CSFTA”). On 12 November 2018, Singapore and China signed the Upgrade Protocol which resulted in the inclusion of several new chapters in the CSFTA (which came into force on 1 January 2009), including a competition chapter.

8. Singapore is also party to several trade agreements established on a multilateral basis. These include the ASEAN-Australia-New Zealand Free Trade Area (“AANZFTA”) agreement, the Singapore-European Free Trade Association agreement, the Comprehensive and Progressive Agreement for Trans Pacific Partnership, and the Eurasian Economic Union-Singapore FTA (which is pending ratification). Singapore is also currently in the advanced stages of negotiation for the Regional Comprehensive Economic Partnership and the Pacific Alliance Singapore FTA. For both of these multilateral FTAs, negotiations for the competition chapters have been completed.

9. The objectives of the competition provisions in FTAs Singapore is party to range from promoting economic efficiency and consumer welfare to restricting conduct that discourages bilateral trade and investment. While the objectives may vary from FTA to FTA, the crux of the competition provisions remains to promote efficient markets and ensure a level playing field for businesses. At the minimum, competition provisions in

² Section 89 of the Act.

³ <https://www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/overview>

FTAs may require signatories to enact laws to proscribe specified anti-competitive activities, and to set up or maintain competition agencies. They may also have requirements that signatories implement measures ensuring transparency and due process, such as the publication of decisions.

10. FTAs contribute to strengthening relationships between competition authorities of the signing parties and facilitate cooperation between authorities. Cooperation measures in FTA competition provisions can be divided into two categories. The first relates to cooperation between competition authorities in matters related to enforcement, usually in the course of investigations into cross-border mergers and cartels. The second type of cooperation measures relate to technical assistance.

11. Cooperation between competition authorities in enforcement activities predominantly involves the exchange of information between competition authorities investigating into the same cross-border cartels or mergers. For example, a competition authority may share information obtained within its jurisdiction in the course of its investigation with a foreign competition authority under the auspices of an FTA. Where circumstances are appropriate (e.g. if the competition authorities are in the same time zone), competition authorities may co-ordinate inspections to obtain evidence. One of the benefits of co-ordinated inspections is that they reduce the possibility of destruction and/or concealment of evidence by the investigated undertakings, as their premises in multiple jurisdictions are raided simultaneously.

12. Technical assistance cooperation measures under FTAs usually involve the more experienced competition authorities sharing their experiences with younger competition authorities to help the latter with capacity building. Such technical assistance can have an impact on shaping the competition laws and processes of younger competition authorities, and lead to greater harmonisation of competition regimes and convergence of laws and procedures. An example is the Competition Law Implementation Programme (“CLIP”) implemented under ASEAN-Australia-New Zealand Free Trade Area (“AANZFTA”), which is explored in detail in the next section.

4. Impact of FTA Competition Provisions on ASEAN: AANZFTA and CLIP

13. AANZFTA came into force on 1 January 2010. There are 12 parties to AANZFTA, namely, Australia, Myanmar, Brunei Darussalam, New Zealand, Cambodia, Philippines, Indonesia, Lao PDR, Thailand, Malaysia, Vietnam and Singapore (collectively, the “Parties”).

14. AANZFTA aims to facilitate, promote and enhance trade and investment opportunities amongst its Parties. The promotion and enforcement of competition law and policy, and the contributions of competition law to establishing a level playing field for businesses, play critical roles in meeting AANZFTA’s objectives. In 2010, the AANZFTA Economic Cooperation Support Programme (“AECSP”) was established to assist the Parties in operationalising AANZFTA and maximise the benefits that the Parties obtain from the said FTA. AECSP has been supporting CLIP since 2014, working to strengthen the enforcement of competition law and policy in ASEAN.

15. CLIP is a multi-year programme implemented by the Australian Competition and Consumer Commission to help ASEAN members meet competition law commitments under AANZFTA. It provides targeted capacity building and technical assistance to ASEAN countries. At present, CLIP has three key objectives:

- For all ASEAN member states to introduce improved competition laws and institutions, including laws which incorporate effective mechanisms for implementation and institutional frameworks that support core regulatory functions,
- For the national competition authorities of ASEAN member states and their staff to improve their enforcement practices to identify and enforce contraventions of national laws, and use those outcomes to support advocacy efforts and deter future anti-competitive conduct, and
- For case-specific enforcement cooperation to take place amongst competition agencies within the AANZFTA region.

16. Under CLIP, ASEAN member states receive training, mentoring and other forms of support from more experienced competition authorities and international experts to introduce and implement competition law and procedures. Initiatives under CLIP include workshops, secondments, expert placements, study visits and development of e-learning tools, among others. In the first half of 2019 alone, CLIP delivered three workshops, four resident adviser/expert placements, two e-learning modules, an Investigations Management Toolkit, a secondment programme to New Zealand, and also contributed to training delivered to ASEAN by both Japan and the OECD.

17. When CLIP first started, only five⁴ of the ten ASEAN member states had a national competition law. Today, nine of ten ASEAN states have a national competition law, all of which have formally set up a national competition commission and two⁵ have pursued significant reform of their national competition law.

18. Given Singapore's status as an early adopter of competition law within ASEAN, besides learning about international best practices from experts facilitating the CLIP events, CCCS's representatives also contribute as presenters and observers by sharing our competition enforcement experiences and perspectives. More importantly, CCCS gains from a deepened understanding of the region through its exchanges with other ASEAN member states at CLIP events.

5. Role of the Competition Authority in FTA Negotiations

19. As the national body representative of Singapore in relation to competition and consumer protection matters, CCCS leads the negotiations in relation to competition provisions in trade agreements. The key benefit of CCCS being involved in trade negotiations is that CCCS is able to draw from its experiences as the national competition law enforcer when determining the competition-related obligations Singapore can commit to under the FTA. For example, the prohibition against anti-competitive agreements in the Act does not apply to vertical agreements, with the exception of those that the Minister specifies by order. As the lead negotiator, CCCS representatives will be aware of the limits of its statutory powers when considering whether Singapore can commit to proscribing such activities without caveats. At the same time, the CCCS representatives, knowing the capabilities and processes of CCCS, will also be able to assess if Singapore is able to

⁴ The five ASEAN member states were Indonesia, Malaysia, Singapore, Thailand and Vietnam.

⁵ The two ASEAN member states that introduced new laws following a review of their respective competition laws are Vietnam and Thailand.

commit to particular obligations or if particular obligations would require subsequent changes in domestic legislation.

20. Further, as the competition enforcer, CCCS is more aware of what competition provisions would enhance the negotiating parties' ability to take enforcement action against competition law infringements. For example, CCCS's experience in cartel investigations and merger assessments highlighted that there is much value in exchanging information with other jurisdictions investigating the same conduct. It allows the parties exchanging information to verify if certain leads are worth pursuing, and if others are dead ends. In the absence of an agreement between parties, the exchange of confidential information can only take place pursuant to a waiver given by parties notifying a merger or a leniency applicant. There is therefore much value in agreements that would allow the exchange of confidential information, if there are sufficient safeguards to preserve the secrecy of such information.