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**REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES
- Contribution from Singapore**

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Regional Competition Agreements: Benefits and Challenges

-- Singapore --

1. Introduction

1. Established in 2005, the Competition and Consumer Commission of Singapore (“CCCS”) administers and enforces the Competition Act (“**the Act**”) in Singapore. 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. The CCCS also acts internationally as the national body representative of Singapore in respect of competition and consumer matters.¹

2. This paper describes CCCS’ experience in international cooperation, particularly in relation to the various types of regional cooperation agreements (“**RCAs**”) that CCCS has entered into. Further, this paper will discuss the factors that CCCS considers when entering into RCAs, the perceived benefits of RCAs, and the challenges that CCCS has encountered in establishing RCAs.

2. Background

3. Section 88 of Singapore’s Competition Act provides that the Commission may, with the approval of the Minister, enter into a cooperation arrangement for the reciprocal provision of information and/or assistance with a foreign competition body. The Act allows CCCS to enter into arrangements whereby each party may, *inter alia*, provide assistance and furnish to the other party information required by the other party for the purpose of performing its functions. The Act also provides that CCCS shall not furnish any information to a foreign competition body pursuant to such arrangements *unless* that foreign competition body undertakes in writing that it will comply with the terms concerning disclosure of the information specified by CCCS.

4. In addition, CCCS is required to consider the following factors in deciding whether or not to disclose confidential information² to a foreign competition body:

- The need to exclude information which would be contrary to public interest if disclosed;
- The need to exclude commercial information or information relating to the private affairs of an individual which might significantly harm the legitimate business interests of the undertaking to which it relates or the individual’s interests if disclosed; and
- The extent to which the disclosure is necessary for the purpose proposed.³

¹ Section 6(1)(e) of the Competition Act (Cap. 50B).

² Regulation 2 of the Competition (Regulations) 2007.

³ Section 89(6) of the Act.

3. Types of RCAs and Singapore's Experience

3.1. Non-competition specific RCAs

5. Non-competition specific instruments refer to free trade agreements (“FTAs”) initiated based on political or trade considerations and negotiated at the national level. The scope of such agreements is generally broader and is not specific to competition. However, parties can agree to include a competition chapter or provisions on competition cooperation within the FTA.

6. A competition chapter of a FTA may include a requirement for parties to establish or enforce competition law, to put in place measures to ensure transparency and due process⁴, mechanisms for cooperation and coordination on competition enforcement and other matters, among others.

7. Currently, Singapore has about 15 FTAs which include a competition chapter. Those established on a bilateral basis include the Singapore-Australia FTA, Singapore-Peru FTA, and Singapore-United States FTA, while those established on a multilateral basis include the Australia-New Zealand-ASEAN FTA, the Comprehensive and Progressive Trans-Pacific Partnership Agreement (“CPTPP”) and the on-going Regional Comprehensive Economic Partnership Agreement (“RCEP”).

8. In 2018, Singapore entered into the CPTPP with 10 other partners (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru and Vietnam).⁵ The competition chapter in the CPTPP highlights the importance of cooperation in fostering effective competition law enforcement. It further provides a platform for enforcement cooperation through mutual notification of cases, consultations and information exchange. Parties are also encouraged to share with each another any updates pertaining to competition policy and law among their respective jurisdictions.

3.2. Competition-specific RCAs

9. Competition-specific agreements refer to standalone agreements between competition authorities. Such agreements are generally termed Memorandums of Understanding (“MOU”) or Memorandums of Cooperation (“MOC”) and they offer a direct way for competition authorities to enter into a formal agreement with one another. In CCCS's experience, a MOU/MOC provides greater flexibility and can come in effect more quickly due to the direct engagement between the competition authorities.

10. Further, a MOU or MOC offers the flexibility of establishing an agreement with a country that share a common interest in competition law enforcement but which Singapore is not currently pursuing a trade agreement with. The process of negotiating and

⁴ Including but not limited to ensuring that relevant persons have a reasonable opportunity to be heard/present evidence, for adoption and maintenance of written procedures in relation to competition law investigations; for adoption and maintenance of rules of procedure and evidence, for opportunity to seek review any sanction or remedy imposed and for protection of confidential information.

⁵ The CPTPP has been ratified by Australia, Canada, Japan, Mexico, New Zealand and Singapore and will enter into force for these countries on 30 December 2018.

establishing the MOU/MOC also allows both parties to gain a greater understanding of each other's competition law regimes, setting the base for deeper cooperation.

11. In terms of scope and structure, a MOU/MOC is similar to the competition chapter in a FTA, although there may be some differences given the greater flexibility that competition authorities have in negotiating a MOU/MOC. In particular, a MOU/MOC is likely to include greater detail on cooperation provisions. For example, a MOU/MOC may include provisions to encourage consultation between competition authorities. In a competition chapter of a FTA, consultations where provided for, would generally be taken up by a broader committee overseeing the implementation of the FTA.

12. To date, CCCS has entered into two MOU/MOCs – the first with the Japan Fair Trade Commission (“**JFTC**”) in July 2017, and the second with Indonesia's Commission for the Supervision of Business Competition (“**KPPU**”) in August 2018. The agreements aim to strengthen the long-standing relationship between CCCS and the two competition authorities. The MOU/MOCs encourage greater cooperation through mutual notification of enforcement activities, provide an avenue for exchange of information and coordination of enforcement activities, while recognising the need for each authority to comply with its domestic laws.

13. Apart from the standard RCAs, with the deepening of the Association of Southeast Asian Nations (“**ASEAN**”) economic integration, the ASEAN Economic Ministers have also endorsed a regional cooperation framework (“**ARCF**”) in 2018, which serves as a set of guidelines for ASEAN Member States to cooperation on competition cases. The ARCF sets out the general objectives, principles, and possible areas of cooperation among ASEAN Member States that may be undertaken on a bilateral, multilateral, sub-regional or regional approach, and on a voluntary basis, in relation to the development, application and enforcement of competition laws. As part of ASEAN, Singapore utilises the ARCF as a basis for cooperation with the other nine member states of ASEAN.

14. The ARCF also goes hand-in-hand with the ASEAN Competition Enforcers' Network (the “**ACEN**”) which was established and recently launched in October 2018. The ACEN serves as an important platform among competition authorities in ASEAN for exchange of information, sharing of experiences and best practices, cooperation on competition enforcement for cross-border cases, as well as capacity building. Singapore was pleased to play host to the first meeting of ACEN at the side-lines of the 22nd ASEAN Experts Group on Competition (AEGC) meeting held in October 2018 in Singapore.

4. Factors to consider when entering into a RCA

15. The decision to enter into a non-competition specific RCA is made at the national level and it takes into consideration factors beyond the immediate scope of a competition authority. For competition RCAs, CCCS has a greater scope and flexibility to decide on which competition agencies to enter into cooperation agreements with.

16. In general, when deciding whether or not to enter into a RCA with a specific partner, CCCS will consider the economic activity between the two jurisdictions as this would impact the likelihood of cross-border competition cases that may arise. Of particular importance is the likelihood of overlap / concurrent competition assessments and investigations with the overseas competition agency so as that both competition authority will be able to maximise any potential cooperation opportunities and gains. CCCS will also

consider the bilateral relationship and prior cooperation experience with the partner competition authority.

5. Benefits of RCAs

17. RCAs strengthen the relationship between competition authorities and allow for deeper cooperation, particularly in terms of exchanging information during enforcement and investigations of specific cases. Non-competition specific RCAs may also prove useful in deepening regional economic integration or achieving greater harmonisation in competition regimes or convergence of competition law and procedures. Competition-specific RCAs may allow for greater flexibility and customisation of scope of cooperation between competition authorities based on their development stage and needs.

18. RCAs provide scope of co-operation between competition authorities in cross-border mergers and cartels. For cartel investigation, the benefits of co-operation will include joint co-ordination of raids to obtain evidence and sharing or finding evidence located in another jurisdiction especially when there is no leniency applicant. For merger assessment, the benefits include sharing of information provided by the merging parties to better understand the effects of the likely remedies that may be imposed to address the underlying competition concerns. In a recent case involving Grab's acquisition of Uber in Southeast Asia, CCCS exchanged information with other jurisdictions such as Malaysia, Philippines and Vietnam which were also looking into the case.⁶ Through the use of confidentiality waivers, CCCS also worked with foreign competition authorities in a number of merger reviews such as the proposed merger between Essilor International and Luxottica Group⁷ and the proposed acquisition by Wilhelmsen Maritime Services AS of Drew Marine's technical solutions, fire, safety and rescue businesses⁸.

6. Challenges of RCAs

19. The negotiation process of a multilateral RCA can be an onerous and time-consuming process. Considerable differences can exist among partner countries in terms of their socio-economic developments, political and governance systems, legal and economic frameworks and institutions, as well as exposure to and reliance on international trade and investments. The immediate implication of such diversity is that there is no such thing as a uniform, 'one-size-fits-all' competition policy and law for all countries. Accordingly, while the core principles of competition policy and law may be similar, their design and implementation, capacity-building requirements and institutions will need to take into account these differences. Against this backdrop, we can thus expect significant

⁶ CCCS 500/001/18: "Acquisition of Uber's Southeast Asian business by Grab and Uber's acquisition of a 27.5 per cent stake in Grab" <https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger>

⁷ CCCS 400/006/17: "Proposed Merger of Essilor International (Compagnie Generale d'Optique) S.A. and Luxottica Group S.p.A." <https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-merger-of-essilor-and-luxottica>

⁸ CCCS 400/004/17: "Proposed Acquisition by Wilhelmsen Maritime Services AS of Drew Marine" <https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-acquisition-by-wilhelmsen-maritime-services-as-of-drew-marine>

differences in the administration and enforcement of competition laws to arise mainly due to specific national conditions.

20. For example, competition authorities may be at varying stages of competition law development and may not be prepared to negotiate provisions which may influence their way that their competition laws should be enforced/implemented. In such a situation, competition authorities will need to strike a balance between being able to conclude the agreement and maintaining provisions with a sufficiently high level of ambition. Multilateral negotiations could also have the effect of lowered commitment level, as all parties would need to meet the obligation set out in the FTA and it is often the case that the “lowest common denominator” is adopted.

21. In terms of MOU/MOCs, CCCS has only established its RCAs over the past two years and cooperation is still at a nascent stage. One potential challenge is that CCCS’s current MOU/MOCs do not provide for the exchange of confidential information. However, CCCS is able to share non-public information such as theories of harm and other general types of information within its possession. In circumstances involving the exchange of confidential information, CCCS will first have to obtain a substantive confidentiality waiver from the business undertaking or person that provided CCCS with that information.⁹ This will permit CCCS to disclose such information in discussions with agency staff from overseas competition agencies.¹⁰

7. Conclusion

22. CCCS depended primarily on informal cooperation with foreign competition authorities in its early stages of formation. As the authority matures, CCCS has moved on to adopting RCAs to complement informal cooperation. Differing legal regimes may pose a challenge for international cooperation especially in the area of information sharing for case enforcement. However, with the right balance of informal cooperation, RCAs, and confidentiality waivers, CCCS is able to achieve an optimal outcome in terms of international cooperation with foreign competition authorities. Moving ahead, CCCS will identify more partners that it can enter into RCAs with.

⁹ A confidentiality waiver is consent from an entity to waive, within the limits set out in the consent, the confidentiality protections afforded to it by the applicable confidentiality rules in the jurisdiction of the investigating competition agency.

¹⁰ Section 89(5)(a) of the Act.