USSFTA: IMPACT ON SINGAPORE'S GOVERNMENT ENTERPRISES, MONOPOLIES AND ANTITRUST LEGISLATION

There is a growing recognition that anticompetitive business practices in general do not benefit a country's economy. Unregulated, businesses could engage freely in anticompetitive conduct. Monopolies and oligopolies would be entitled to use their dominant positions to ensconce themselves in the relevant market through various means, including the acquisition of smaller competitors and obtaining control of essential facilities so as to exclude potential competitors. Incumbent market players may act in concert by entering into price-fixing agreements, to the detriment of consumers. Potential competitors in different markets may enter into reciprocal non-aggression agreements to ensure that they do not encroach on each other's market. The negative effects of anticompetitive conduct are manifold, and include the suppression of competition, market stagnation and impediment of international trade and investment.

Hence, there is keen interest at an international level in the subject of competition policy and its impact on trade, as evidenced by the studies undertaken by various organizations, including the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC).

In Singapore, there is as yet no general antitrust legislation, although competition legislation and regulations specific to certain sectors exist. For instance, telecommunications services are regulated by the Code of Practice for Competition in the Provision of Telecommunication Services, and electricity supply by the Electricity Act. However, the recently signed US-Singapore Free Trade Agreement ("USSFTA") promises to change Singapore's antitrust landscape.

Under Chapter 12 of the USSFTA, Singapore committed to the enactment of general competition legislation by January 2005, and conjunctively, the establishment of an authority responsible for enforcement of measures to proscribe anticompetitive business conduct. Apart from such general obligations, the USSFTA does not prescribe the provisions to be incorporated into the slated legislation. Thus, Singapore's intended approach in this regard is anyone's guess.

In the arena of mergers and acquisitions for instance, the stringency, method, and other aspects of regulation vary from country to country. In the U.S., the Hart-Scott-Rodino Antitrust Improvements Act of 1976 imposes pre-merger filing requirements on all transactions valued at over $200 million and those transactions between $50 million and $200 million wherein the acquirer or the target company has sales or assets of at least $100 million and the other party must have sales or assets of at least $10 million. In contrast, the threshold in the U.K. for review by the Office of Fair Trading under the Enterprises Act 2002 is that the turnover in the UK of the target company exceeds £70m or the merger creates or increases a 25% share in a market for goods or services in the UK or a substantial part of it. In any case, it is anticipated that Singapore's general competition policy will contain restrictions on mergers, although there is no certainty of that.

Moving forward, Chapter 12 of the USSFTA pragmatically allows certain concessions to its general thrust against anticompetitive business conduct. Singapore is entitled to designate monopolies, as well as to organize and maintain "government enterprises". However, the USSFTA makes it clear that "government enterprises" do not escape the purview of the general anticompetitive legislation to be enacted, and subjects both government enterprises and designated monopolies to certain restrictions and obligations.

In respect of designated monopolies, Singapore has the obligation to ensure that they do not undermine USSFTA, do not use their status as monopolies to engage in anticompetitive practices, act solely "in accordance with commercial considerations" when buying/selling monopoly goods/ services in relevant market, and provide non-discriminatory treatment to relevant transactions. For purposes of the USSFTA, being "in accordance with commercial considerations" entails consistency with normal business practices of privately-held enterprises in the relevant business or industry.

As for government enterprises, some explanation of the term is in order before discussing the restrictions imposed on such entities by the USSFTA. The term is defined by the USSFTA in relation to Singapore as an enterprise in which the Singapore government has "effective influence". "Effective influence" exists where the Singapore government and its government enterprises own more than 50% of voting rights of an entity in aggregate, or has the combined ability to exercise substantial influence over board composition or the management or operation of entity in question. The USSFTA creates a rebuttable presumption of effective control where the total stake of the government and its government enterprises exceeds 20% but not 50%, and constitutes the largest block of voting rights of such entity.

Turning to the limitations prescribed by the USSFTA in respect of Singapore's government enterprises, Singapore has undertaken to ensure that:

- o acts of government enterprises having governmental authority must not be inconsistent with Singapore's USSFTA obligations

- o government enterprises must not directly or indirectly enter into agreements with competitors for restraint of competition on price/output or allocation of customers, unless there is plausible efficiency justification

- o government enterprises do not engage in exclusionary practices to reduce competition in Singapore that disadvantage consumers, and must act solely "in accordance with commercial considerations" when buying/selling goods/services

- o it will not influence decisions of its government enterprises except in a manner consistent with USSFTA

- it will continue to reduce and, with a view to eliminating, interests conferring "effective influence" in entities established under Singapore laws

- it will make available to the public a consolidated report for each "covered entity" which details its interest and involvement in that entity (whether directly or through government enterprises), as well as the entity's annual revenue or total assets. "Covered entity" refers to (a) an entity established under Singapore laws having an annual revenue or total assets in excess of SGD50mil, and in which effective control exists or is presumed by the USSFTA to exist; or (b) an entity established under Singapore laws, in which the Singapore government has a special voting share with veto rights relating to certain significant matters. The term expressly excludes Temasek Holdings (Pte) Ltd, and any government enterprise which sole purpose is investing government reserves in foreign markets or holding such investments.

Additionally, Singapore has agreed to accede to any request by the US in respect of any enterprise that is not a covered entity for such details as would be contained in a consolidated report for a "covered entity"; and the US is entitled to publicize such details. Significantly, there is also express recognition in the USSFTA regarding the importance of transparency of competition policy and of transparency obligations.

It is clear that the USSFTA's name belies its impact on Singapore's legal framework and economy, which extends far beyond US-Singapore trade. Not only has it galvanized the introduction of a general competition law, but it also paves the way towards greater transparency regarding the Singapore government's participation in trade and heralds further liberalization of the economy. In doing so, it has created the potential for greater economic growth through higher volume of investment and trade from US and other countries, greater competitiveness between market players in various industries, and lower costs for consumers.

Whether such potential will be realized remains to be seen, and depends variously on the nature and efficacy of the antitrust measures implemented by way of the anticipated general antitrust legislation, and the rigorousness with which it is enforced and the continued commitment of Singapore and the US to their obligations under the USSFTA, among other factors. Nevertheless, there can be little dispute that the USSFTA is a step in the right direction.

Kelvin Chia Partnership
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Contact details:

CHEAH Swee Gim
Email: cheah.sweegim@kcpartnership.com
DID: (65) 6332 9349

Roy NEO
Email: roy.neo@kcpartnership.com
DID: (65) 6332 9389