Developing a Regional Competition Law Regime in the ASEAN Economic Community: A Bottom-up Perspective?

By:

Burton Ong

August 18, 2021

Introduction

As a regional grouping, the Association of South East Asian Nations (ASEAN) developed an economic blueprint for its ten member states to establish the ASEAN Economic Community (AEC) in 2015, consisting of a series of action plans to implement its regional economic integration agenda. The principal characteristics of the AEC have been identified by ASEAN member states (AMSs) as:

(i) A highly integrated and cohesive economy

(ii) A competitive, innovative and dynamic ASEAN

(iii) Enhanced connectivity and sectoral cooperation

(iv) A resilient, inclusive, people-oriented, and people-centered ASEAN

(v) A global ASEAN

Competition law and policy play a significant role in implementing the AEC's objectives, particularly towards achieving objective (ii) above. In paragraph 26 of the AEC Blueprint 2025, the significance of having an "[e]ffective competition policy" for the region is articulated in the following terms:

> "For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective. The fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base, as well as to support the formation of a more competitive and innovative region."

In furtherance of these goals, AMSs have pursued various strategic measures relating to competition law and policy via the ASEAN Experts Group on Competition (AEGC), a transnational working group comprising of representatives from the national competition authorities of the 10 AMSs and the ASEAN Secretariat. These strategic measures include ensuring the establishment of effective competition regimes in each AMS, building institutional enforcement capacity, and achieving "greater harmonization of competition policy and law in ASEAN by developing a regional strategy of convergence". Consequently, the AEGC adopted the ASEAN Competition Action Plan (ACAP) 2025, which provides more detailed initiatives and outcomes aimed at translating the AEC Blueprint's competition law and policy goals into reality.

A regional competition regime for the AEC: What lies ahead?

By 2021, nine of the ten AMSs have enacted their national competition law regimes, with Cambodia still in the drafting process. Given the extremely diverse socio-economic and geo-political circumstances of the individual AMSs, it is not a surprise that their respective national competition laws are relatively diverse in their scope and specific features as well.

The following table presents a snapshot of some of these divergences:

ASEAN Member State	Current National Competition Law	Merger Regulation?	Exemptions for SOEs or SMEs?	Cartel leniency programme?
Brunei	Since 2015	Yes, Voluntary		Yes
Cambodia	TBC	In progress[1]	SMEs	Yes
Indonesia	Since 1999	Yes, Voluntary[2]	SMEs/SOE[3]	No
Lao PDR	Since 2015	Yes, Mandatory[4]	SMEs/SOEs[5]	Yes[6]
Malaysia	Since 2010	No		Yes
Myanmar	Since 2017	Yes, Details pending	SMEs[7]	Yes
Philippines	Since 2015	Yes, Mandatory		Yes
Singapore	Since 2006	Yes, Mandatory		Yes
Thailand	Since 2017	Yes, Madatory	SOEs	No (Settlements possible)
Vietnam	Since 2004	Yes, Mandatory	SMEs (until 2018 revised law) [8]	Yes [9]

Source: Author, 2021

Three constraining factors will shape future developments in the field of competition law and policy in these AMSs and, at a regional level, across the

AEC.

Firstly, no supranational legal regime is contemplated; this is in line with the "ASEAN approach" towards prioritizing state sovereignty and preserving the autonomy of each state to design national legal frameworks that are tailored to suit domestic priorities and socio-economic conditions.

Secondly, the differences between the political systems that characterize the various AMSs – from free-wheeling democracies to single-party governments, from absolute monarchies to military-run states – mean that there will always be significantly divergent views about how "freely" markets should be allowed to operate, with follow-on ramifications on how their respective national competition law frameworks ought to be implemented and enforced.

Thirdly, the consensus-based traditions of the ASEAN grouping translate into a preference for non-binding guidelines and "soft laws" rather than conventional international legal treaties between all the member states of the AEC.

Taken together, these factors suggest that the regional competition law framework of the AEC is highly unlikely to evolve into a set of common legal norms embodied within a binding international agreement between AMSs. Neither is it likely for there to be any supranational institution or supervisory authority to coordinate or review the competition enforcement activities of national competition authorities. What, then, can be done to facilitate the common market aspirations of the AEC that are underpinned by the convergence and harmonization goals of ASEAN's regional competition law and policy framework?

Prospects for harmonization and convergence: Modest, targeted, and issue-specific reforms to competition-related rules and procedures

In light of the geo-political realities sketched out above, any effort to advance the "harmonization and convergence" agenda in the sphere of ASEAN's regional competition law and policy framework will more likely than not take place on a more modest scale. Rather than trying to formulate a comprehensive set of treaty provisions covering a broad swathe of competition-related matters that have to be approved by the law-making bodies of ten different jurisdictions, *a far more practical way forward would be to work on*

achieving greater substantive and procedural alignment between the AMSs on specific competition law issues that arise in cross-border compliance cases.

This entails identifying specific areas of competition law and policy that, if common rules or processes were introduced, would produce tangible benefits for stakeholders dealing with the national competition law frameworks of two or more AMSs. The range of possible candidates for such harmonization efforts is obviously quite wide, but focusing on one or a few of them makes it easier for consensus and concrete reform outcomes to be achieved within a shorter timeframe.

A list of possible issues and areas that could be the subject of concerted efforts by AMSs to achieve greater alignment between their national competition law regimes might include, for example, consensus on:

(i) How economic concepts are used to define the scope of legal prohibitions;

(ii) How relevant markets are defined and used for the purposes of estimating the market power of undertakings;

(iii) The formulation of legal standards to identify multi-party or unilateral conduct that is most likely to be regarded as serious forms of infringing conduct;

(iv) The scope of legal exemptions available to exclude the operation of national competition laws;

(v) Multi-state or regional frameworks for notifying conduct for approval by competition authorities, including merger review clearance;

(vi) Multi-state or regional frameworks to align national cartel detection and leniency programmes implemented by national competition authorities.

By focusing on issue-specific opportunities to achieve closer alignment between the legal and procedural frameworks of the AMSs, the likelihood of achieving

successful law reform outcomes is more likely to materialize than pursuing a grander unification project. To investigate the possibility of moving towards greater “harmonization and convergence” through a series of smaller steps that focus on the coordinated efforts of two or more AMSs willing to participate in such efforts, a research project was initiated in 2019 by the EW Barker Centre for Law and Business, at the National University of Singapore, to gather empirical data from competition law stakeholders in the region about their own compliance-related experiences dealing with the national competition authorities of the AMSs.

The ASEAN Competition Compliance Experience Survey-Study (ACCESS) attracted slightly over a hundred respondent-participants who expressed strong support for law reform efforts that narrowed the substantive and procedural divergences between the national competition law frameworks of the AMSs. Many of the respondent-participants noted from their experience in handling cross-border competition law issues that closer alignment between the approaches taken by national competition authorities within the ASEAN region would reap efficiency-enhancing benefits for businesses operating in multiple ASEAN jurisdictions.

Subsequent ACCESS-related workshops have been run in 2021 with representatives from the AEGC, as well as legal practitioners and academics, to refine the findings and recommendations of this project. Moving forward, we hope to lay the foundations for future consultations between the stakeholder-users of the ASEAN competition law frameworks and the ASEAN national competition authorities to identify potential areas of competition law compliance that might be prioritized for concrete “harmonization and convergence” efforts between AMSs.

Conclusion

While there is consensus about the importance of regional competition regimes towards realizing the economic benefits associated with regional market agreements, there are certainly multiple pathways that may be taken towards the regionalization of competition law and policy in any particular regional grouping. The exact path chosen will inevitably be led by the specific economic and geo-political circumstances in which the member states of the regional

grouping operate.

In the case of the ASEAN Economic Community, it is submitted that the most practical way forward is to take a “bottom-up” approach with two or more member states taking the lead to establish common ground in specific areas of competition law practice, particularly those that are of greater significance in cross-border transactions and investigations. The success of such smaller initiatives might encourage other members of the regional grouping to follow suit and, hopefully, participate in other “harmonization and convergence” reform efforts that will help ASEAN advance its single market aspirations.

---

[1] No merger control regulation currently in force, though the Article 15 of the Draft Law on Competition of Cambodia provides that "business combinations" which have or may have the effect of significantly restricting or distorting competition in a market in Cambodia are unlawful. However, Sub-Decree No. 83 on the Organization and Functioning of the Ministry of Commerce, dated 16 March 2020, appears to have established a ministerial department with the authority to grant approval for mergers.

[2] Article 29(1) of the Indonesian Law No. 5 of 1999 provides for compulsory post-closing notification of mergers and acquisitions. However, pre-closure notification is voluntary. A pre-merger consultation does not prevent the post-merger assessment.

[3] Article 50(h) of the Indonesian Law No. 5 of 1999 (The Prohibition of Monopolistic Practices and Unfair Business Competition) excludes "business actors of the small-scale group" from the provisions of this law, while Article 51 declares that State-Owned Enterprises and government institutions are permitted to engage in monopoly or concentration activities "related to the production and or marketing of goods and or serviced affecting the livelihood of society at large as well as branches of production of strategic importance to the state".

[4] Article 39 of the Lao PDR Law on Business Competition 2015 (No. 60/NA) exempts combinations between SMEs from pre-merger notifications, but requires post-merger notifications to the Business Competition Control Commission.

[5] Article 45 of the Lao PDR Law on Business Competition 2015 (No. 60/NA) provides for an exemption for anti-competitive agreements that "[strengthen] the competitiveness of SMEs". Article 46 allows the government to consider exemptions, on a case by case basis, for conduct that amounts to an "abuse of a dominant market position and market monopoly practices... if those practices are contributing to the national socio-economic development or due to national strategy and security reasons."

[6] Article 62 of the Lao PDR Law on Business Competition 2015 (No. 60/NA).

[7] Section 8(b) of the Myanmar Competition Law (The Pyidaungsu Hluttaw Law No. 9, 2015) empowers the Myanmar Competition Commission to exempt "businesses essential for the benefit of the State and small and medium enterprises, if necessary" from compliance with the competition law prohibitions in that statute.

[8] Under the revised law, SMEs are no longer exempted from the competition law prohibitions. Article 31(1)(b) does, however, mention that the promotion of SMEs is a positive criterion in the assessment of notified mergers.

[9] Article 112 ("Leniency Policy"), Law No. 23/2018/QH14, Vietnam Law on Competition 2018 (Effective July 1st 2019).

View online: Developing a Regional Competition Law Regime in the ASEAN Economic Community: A Bottom-up Perspective?

Provided by Afronomicslaw