Competition Law in the ASEAN Economic Community

Lim Chong Kin (Drew & Napier LLC)[1]

ASEAN has seen tremendous growth over the years. In 2014, it emerged as the third-largest economy in Asia, and the seventh largest in the world. Its progress was further facilitated by the establishment of the ASEAN Economic Community in 2015, or AEC for short, to realise the region's goal of becoming a single market and production base.

There is much value in ASEAN becoming an integrated economic region. From a macro-economic perspective, the presence of a unified production base would enable the region to attract foreign direct investments ("**FDIs**"). In 2016 alone, FDIs in the region totaled $96.7 billion, with intra-ASEAN investments totaling $24 billion. From the perspective of businesses, an integrated economy will provide a level playing field for businesses and ensure that they have easy access to the market.

A unified economy cannot be attained without having effective competition policies and laws implemented on both the national and ASEAN level. Perhaps, the importance of effective and consistent competition regulations may be better illustrated by the impact that businesses might suffer in their absence.

In countries without effective competition laws, access to markets might be affected due to, for instance, the anti-competitive practices of dominant domestic enterprises aimed at raising barriers to entry or driving smaller competitors out of the market.

On an ASEAN level, the cost of compliance increases with companies having to comply with varied and inconsistent competition laws across ASEAN Member States ("**AMS**"). ASEAN's appeal as an attractive FDI destination may thus be affected.

Accordingly, AMS should keep up with its efforts in implementing, refining and streamlining competition polices and regulations. This will not only create a level playing field for businesses in ASEAN, but also create and preserve business incentives to invest in the region. This is a virtuous cycle, which will help to pave the way for integration into global networks, which will help create more jobs and income in the ASEAN region.

Looking back, several initiatives have been put in place to promote the effective implementation of competition laws and policies. In August 2007, the ASEAN Experts Group on Competition (also known as the AEGC) was established, to serve as a forum for discussing and coordinating competition policies, with the goal of promoting a healthy competitive environment in the region.

The ASEAN Regional Guidelines on Competition Policy was also launched, which sets out different policy and institutional options that expedites the development of national competition policy within each member state. The Guidelines encourage every AMS to provide clarity, transparency and certainty to businesses on how prohibitions and exemptions in competition law will be enforced.

For the business community, the Competition Compliance Toolkit for Businesses in ASEAN was launched in 2017, to provide guidelines on implementing an internal Competition Compliance Programme in the ASEAN context. This was effected in tandem with the revision of the Handbook on

[1] Delivered at The ASEAN Law Conference (13th ASEAN Law Association General Assembly) in Singapore on 27 July 2018.

Competition Policy and Law in ASEAN for Business 2017, which provides an overview of the substantive and procedural competition law in AMS.

To date, 9 out of 10 AMS have national competition laws. AMS with implemented national competition laws have also sought great initiative in amending their competition laws to be in line with international best practices. At the ASEAN level, the focus has generally shifted from the enactment of competition law to the *effective* enforcement and harmonisation of it.

Moving forward, the AEC Blueprint 2025 provides broad directions for the AEC from 2016 to 2025, with a vision for remaining AMS that do not have competition laws to put in place competition laws, and effecting the implementation of national competition laws in all AMS based on international best practices and agreed-upon ASEAN guidelines.

Flowing from these strategic measures is the wider vision set out in the ASEAN Competition Action Plan 2016-2025, which seeks to create a progressive competition regime with strengthened capacities to be built in the region. What remains to be seen is operationalising the term "effectiveness" and developing a methodology to adequately assess the system.

So far, there is much to be said about the achievements by the national competition authorities and the policymakers involved in creating a principled approach to competition law implementation in the ASEAN region, as well as the milestones reached in the greater vision of establishing a dynamic ASEAN market and production base. However, challenges are still faced by businesses whose continued growth is integral to the development of a unified region.

Based on my experience as a competition law practitioner, I have broadly categorised the practical challenges faced by businesses into 2 categories, namely: (a) the lack of consistent competition law enforcement throughout the region; and (b) differences in the practical implementation of competition laws in AMS, for example, in respect of the availability of leniency programmes, notification systems and settlement procedures.

Starting with inconsistent competition law enforcement in the region, owing to a myriad of factors, such as capacity issues or the lack of political resolve or support, competition laws have not been consistently enforced across the region.

From a business perspective, divergences among competition regimes can be problematic. First, where businesses carry on operations in more than one country, their conduct is potentially subject to regulation by more than one competition regime. Lack of uniformity becomes problematic when various competition law regimes reach different conclusions on the legality of the same conduct.

The lack of consistent competition law enforcement and corresponding legal and compliance uncertainty increases barriers to entry to the region as a whole by decreasing investor confidence in the very legal structures that were meant to ensure a conducive environment for businesses to grow and compete in.

Whilst the implementation of competition laws in the AMS represents a first step towards a competitive, innovative and dynamic ASEAN, ultimately, political commitment to promoting competition and ensuring the independence of competition authorities are crucial to the effective enforcement of competition legislation.

The proposed formation of the ASEAN enforcers' network is a note-worthy development in the right direction. Announced during the Global Competition Review (GCR) Live 2018 by Chief Executive of the Competition and Consumer Commission of Singapore, Mr. Toh Han Li, the network is focused on fighting cross-border cartels and improving coordination on merger reviews for countries that have merger regimes. The network will set the stage for exchange of information on cases and mergers, and will allow ASEAN to move to the next phase of building capacity and enforcement.

In my view, further practical measures can also be taken by each competition authority to assist businesses, namely, (a) publishing enforcement decisions and translating them into English; (b) issuing harmonised guidelines to ensure a consistent approach to the enforcement of competition laws in the region and to help businesses understand how the law will be enforced; (c) implementing consultation processes to gather regular feedback from businesses across the region; and (d) providing clear regulatory timelines.

By and large, AMS should constantly update and strengthen their legislative framework, drive capacity building initiatives and align their competition law enforcement approach with international standards.

Next, we move on to address the second challenge faced by businesses operating in the region, which concerns differences in the practical implementation of competition laws in AMS, for example, in respect of the availability of leniency programmes, notification systems and settlement procedures.

Divergence in leniency, particularly the fact that some jurisdictions have no leniency programmes, acquires a practical significance when cartels involving multiple AMS are involved. This is because whistleblowers of cartels having a multinational dimension would face different levels of exposure to liability in different jurisdictions. The current situation brings about practical consequences for multinational cartel participants. First, multinational cartel participants would be less willing to blow the whistle in jurisdictions that do not offer them lenient treatment. Second, and more significantly, multinational cartel participants may be ambivalent about coming forward at all, even in jurisdictions that do have leniency programmes. This is because they may inadvertently increase their exposure to liability in jurisdictions without leniency programmes.

Moving forward, harmonisation for leniency programmes should, ideally, be available in all ASEAN jurisdictions, where immunity be offered on similar terms. This would allow businesses some degree of certainty, and this may even tip the scale in favour of whistleblowing cartel participants stepping forward for leniency.

Similarly, inconsistencies arise in the settlement procedures present amongst the AMS. For the sake of procedural efficiency, competition regimes may allow undertakings to accept liability for the conduct for which they are being investigated in exchange for a reduction in the penalty to which the undertaking would otherwise have been subjected. This discount on the penalty imposed is a reward for undertakings to settle, rather than to protract the investigation which may be costly and time-consuming, both for the undertakings concerned and for the competition authority. To date, Singapore, Myanmar, the Philippines and Thailand have had in place formal settlement procedures.

Accordingly, if a business chooses to settle in some jurisdictions, it may face challenges in defending itself in other jurisdictions as settlements may involve an admission of guilt or infringement. However, if the business chooses not to settle in some jurisdictions, then it risks suffering from being involved in

protracted investigations and proceedings, as well as the full penalty in the event it is ultimately found liable for infringement.

Moving forward, the availability of settlement procedures in all competition law frameworks in AMS would greatly assist businesses and AMS in the effective enforcement of competition law.

Lastly, we turn to consider the variations in the notification systems for (a) anti-competitive agreements and (b) merger notifications. Notification for the former system is absent in several AMS, while divergence in the latter system lies in its mandatory and voluntary notification divide. For instance, Brunei and Singapore have voluntary notification frameworks, whilst the Philippines, Thailand and Vietnam have mandatory pre-merger notification frameworks. Then we have mixed regimes like Indonesia, which adopt a hybrid system comprising both voluntary and mandatory networks.

The challenge posed to ASEAN businesses arises from the absence of formal notification systems in some AMS. Without the possibility of a formal notification and clear direction from the authority, businesses may be less willing to enter into agreements or engage in conduct that, while prima facie infringing the competition prohibitions, are nonetheless worthy of exemption.

While the idea of a common merger filing platform has been raised, regard must also be had to the differences in business environments and operations in each AMS, which would require different information for the assessment of a merger.

Therefore, a common filing platform may be more useful as a one-stop-shop in respect of an information depository at the commencement of a merger notification where the merger may impact on two or more AMS to avoid duplication of filing efforts, although it is envisaged that more often than not, merger reviews may take on different a complexion in each AMS affected.

Separately, and more important to the efficient administering of a merger review programme is the suggestion for the relevant authorities to come up with reasonable and harmonised merger review timelines and adopt a consistent and transparent economic testing in merger reviews.

In closing, whilst we recognise that this is a difficult area to reform as competition law is often national in application and national policies may diverge depending on the stages of economic development of each AMS economy; growth drivers of each AMS; and the maturity of competition regimes, central to the solutions proposed is the belief that harmonisation should be achieved by way of consensus building and soft law arrangements, or as we better know it, “The ASEAN Way”.

A harmonised approach to implementing competition law principles in the ASEAN region can be achieved by establishing working groups to identify key analytical areas for harmonisation, with bilateral and multi-lateral approaches to be considered first. A central set of guidelines could be developed to harmonise enforcement of competition laws in AMS. Regular AEGC sessions should also be conducted with business involvement, to provide a common platform for consultation and dialogue between the agencies and the businesses.

By working together in the true spirit of ASEAN, we can continue to prevail as a dynamic, innovative and competitive region.