



# ASEAN Regional Guidelines on Competition Policy and Law 2020



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The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The Member States are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. The ASEAN Secretariat is based in Jakarta, Indonesia.

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#### ASEAN: A Community of Opportunities for All

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## Foreword

The publication of the ASEAN Regional Guidelines on Competition Policy and Law 2020 could not be more timely. Given the unprecedented Covid-19 Pandemic which has significantly shifted both businesses and consumer transactions online, the 2020 Regional Guidelines contains new section on dealing with emerging economic crisis and the digital economy to help competition agencies cope with the new realities in implementing effective competition policies and laws in ASEAN.

The launch of the first ASEAN Regional Guidelines on Competition Policy, in 2010, was conceived to support the implementation of Competition law and policy in ASEAN. This is achieved by serving as a reference for AMS drafting their competition laws, as they pursue Strategic Goal 1 of the ASEAN Competition Action Plan (ACAP) 2025 to establish effective competition regimes in ASEAN. Since then, many positive developments have taken place in this region.



Amongst others, there are now 9 AMS with nation-wide competition laws (with the exception of Cambodia, likely to launch theirs by 2021/2) compared to 4 AMS having competition laws in force in 2010. Thailand and Vietnam have even proceeded to amend their Laws substantively in 2017 and 2018 respectively. AMS, including Cambodia have now established their respective competition agencies, whether as a standalone division or in combination with other functions, such as consumer protection.

As such, an update of the 2010 Regional Guidelines, as mandated under Strategic Goal 5 of the ACAP, to move towards greater harmonization of competition law and policy in ASEAN, was appropriate. This is to meet the needs and development of competition agencies that have evolved from young or new agencies to mature ones.

More mature agencies are expected to deal with more compelling challenges such as enforcement and legislative changes to assimilate other functions, such as consumer protection. Whereas new or young agencies would focus more on work related to advocacy and developing the basic competition framework to introduce competition laws and policy.

Compared to the 2010 Guidelines which has 14 chapters, the updated Guidelines is restructured into six parts comprising of 16 Chapters and has an additional 20 pages of content from the previous 54-page Guidelines. Some of the chapter titles have also been changed. Many of these chapters also contain recommendations for AMS and are shown in boxes.

The revised Guidelines include references to ASEAN documents and a Glossary of Terms, which retained the terms as defined in the 2010 Guidelines. The two additional chapters are on “Responding to Current Issues” and the “Modalities for Cooperation”.

The 2020 Regional Guidelines reemphasize the importance of not only international but also regional cooperation, given the increase of cross border competition cases in ASEAN. In this regard, various regional cooperation were highlighted.

Regional cooperation in ASEAN is facilitated by the ASEAN Experts Group on Competition (AEGC), the ASEAN Regional Cooperation Framework (ACRF), and the ASEAN Competition Enforcers Network (ACEN). Regional cooperation will no doubt be further expanded once the Regional Comprehensive Economic Partnership (RCEP) comes into effect.

The 2020 Regional Guidelines will enhance further the process of economic integration of the ASEAN Economic Community as envisaged under the competition strategic measures of the AEC Blueprint 2025.

Last but not least, I would like to extend my appreciation to GIZ for their support in making this initiative possible and I would like to thank the consultants, the AEGC and the relevant ministries of the AMS and the Competition and Consumer Protection Division of the ASEAN Secretariat for their respective contribution as well.



**DATO LIM JOCK HOI**  
Secretary General of ASEAN

## Contents

<b>PART I: INTRODUCTION</b>	<b>1</b>
<b>Chapter 1: Objectives of Regional Guidelines</b>	<b>1</b>
1.1 Background	1
1.2 Purpose, Objectives and Benefits of Regional Guidelines	3
1.3 Different Stages of Competition Law and Authority Development in ASEAN	4
<b>PART II: LEGAL FRAMEWORK and ENFORCEMENT</b>	<b>7</b>
<b>Chapter 2: Objectives and Benefits of Competition Policy and Law in ASEAN</b>	<b>7</b>
2.1 Definition of Competition Policy and Law	7
2.2 Objectives and Benefits of Competition Policy and Law	7
2.3 Competition Policy Objectives of ASEAN laws	9
<b>Chapter 3: Scope of Competition Policy and Law</b>	<b>11</b>
3.1 Application of Competition Law	11
3.2 Prohibition of Anti-competitive Agreements	12
3.3 Prohibition of Abuse of Dominant Position	15
3.4 Prohibition of Anti-competitive Mergers	17
3.5 Exemptions and Exclusions	20
<b>Chapter 4: Legislation and Guidelines</b>	<b>23</b>
4.1 Relevant Legislation and Guidelines for Competition Policy and Law	23
4.2 Review of New or Existing Legislation	24
4.3 Review of Competition Laws and Guidelines	24
4.4 Phased Implementation of Competition Law	25
<b>Chapter 5: Enforcement</b>	<b>26</b>
5.1 Different Enforcement Regimes	26
5.2 Investigation Powers	26
5.3 Evidence gathering	28
5.4 Commitments	29
5.5 Settlement	30
5.6 Interim Measures	31
5.7 Sanctions	31
5.8 Calculation of Fines	32

5.9 Leniency.....	33
5.10 Private Enforcement and Action for Damages .....	35
5.11 Extra-Territoriality.....	36
<b>Chapter 6: Due Process .....</b>	<b>38</b>
6.1 Importance of Due Process.....	38
6.2 Transparency.....	38
6.3 Accountability.....	39
6.4 Impartiality and timeliness .....	39
6.5 Natural Justice .....	39
6.6 Confidentiality .....	40
6.7 Privilege against self-incrimination.....	40
6.8 Legal privilege.....	41
6.9 Decisions and administrative review .....	41
6.10 Internal processes.....	41
6.11 Judicial review.....	42
<b>PART III: INSTITUTIONAL FRAMEWORK.....</b>	<b>44</b>
<b>Chapter 7: Gradual Development of National Competition Regimes and Exchange of Experiences .....</b>	<b>45</b>
7.1 ASEAN Peer Reviews and Self Assessments.....	45
7.2 Design of Competition Institutions.....	46
7.3 Institutional Design of Competition Authorities in ASEAN.....	46
7.4 Change in Institutional Design.....	47
<b>Chapter 8: Roles and Responsibilities of Competition Authorities.....</b>	<b>49</b>
8.1 Mandates of Competition Agencies in AMS.....	49
8.2 Prioritisation .....	50
8.3 Interaction between Competition and Consumer Law.....	52
<b>Chapter 9: Balancing Sectoral Regulation with National Competition Policy.....</b>	<b>53</b>
9.1 Role of competition regulator and sector regulator.....	53
9.2 Addressing the risk of overlapping jurisdictions.....	53
9.3 Advocating to Sector Regulators.....	55
<b>Chapter 10: Advocacy and Outreach.....</b>	<b>57</b>
10.1 Advocacy.....	57
10.2 Achieving the Objectives of Competition Policy and Law .....	57

10.3	Resources required for Advocacy and Outreach .....	58
10.4	Advocating to Government .....	59
10.5	Advocating to Judiciary .....	60
10.6	Advocating to Business .....	60
10.7	Advocating to Consumers.....	61
10.8	Communication Strategies.....	61
10.9	Interaction between Advocacy and Enforcement.....	62
<b>PART IV: CAPACITY DEVELOPMENT .....</b>		<b>64</b>
<b>Chapter 11: Technical Assistance and Capacity Building.....</b>		<b>65</b>
11.1	Strengthening Capacities of Competition Authorities in ASEAN .....	65
11.2	Guiding Principles on Technical Assistance and Capacity Building .....	65
11.3	Meeting Needs through Technical Assistance & Capacity Building Programmes.....	66
11.4	Key Practices .....	69
<b>PART V: COOPERATION .....</b>		<b>71</b>
<b>Chapter 12: Regional Cooperation .....</b>		<b>72</b>
12.1	Regional Cooperation Objectives .....	72
12.2	Benefits of cooperation .....	73
12.3	The ASEAN Experts Group on Competition (AEGC).....	73
12.4	ASEAN Regional Cooperation Framework (ARCF).....	74
12.5	ASEAN Competition Enforcers Network (ACEN).....	74
<b>Chapter 13: International Cooperation .....</b>		<b>76</b>
13.1	International Cooperation Objectives .....	76
13.2	International Cooperation Principles .....	76
13.3	Benefits of cooperation .....	77
13.4	Involvement in International Competition Organisations .....	77
13.5	Factors to be considered when Negotiating Free Trade Agreements (FTAs) .....	77
<b>Chapter 14: Modalities for Cooperation .....</b>		<b>79</b>
14.1	Foundations for Cooperation .....	79
14.2	Cooperative mechanisms .....	79

<b>PART VI: EMERGING TRENDS AND CHALLENGES .....</b>	<b>82</b>
<b>Chapter 15: Responding to Current Issues .....</b>	<b>83</b>
15.1 The Digital Economy .....	83
15.2 The Informal Economy .....	84
15.3 Responding to Economic Crises .....	85
15.4 Sustainability and Competition Law .....	88
<b>Chapter 16: Competition Policy and Law Research .....</b>	<b>92</b>
16.1 Research engagement .....	92
16.2 Virtual ASEAN Competition Research Centre (VACRC) .....	92
16.3 Market studies and policy papers .....	92
<b>Glossary of Terms.....</b>	<b>95</b>

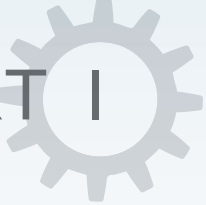


## ABBREVIATIONS

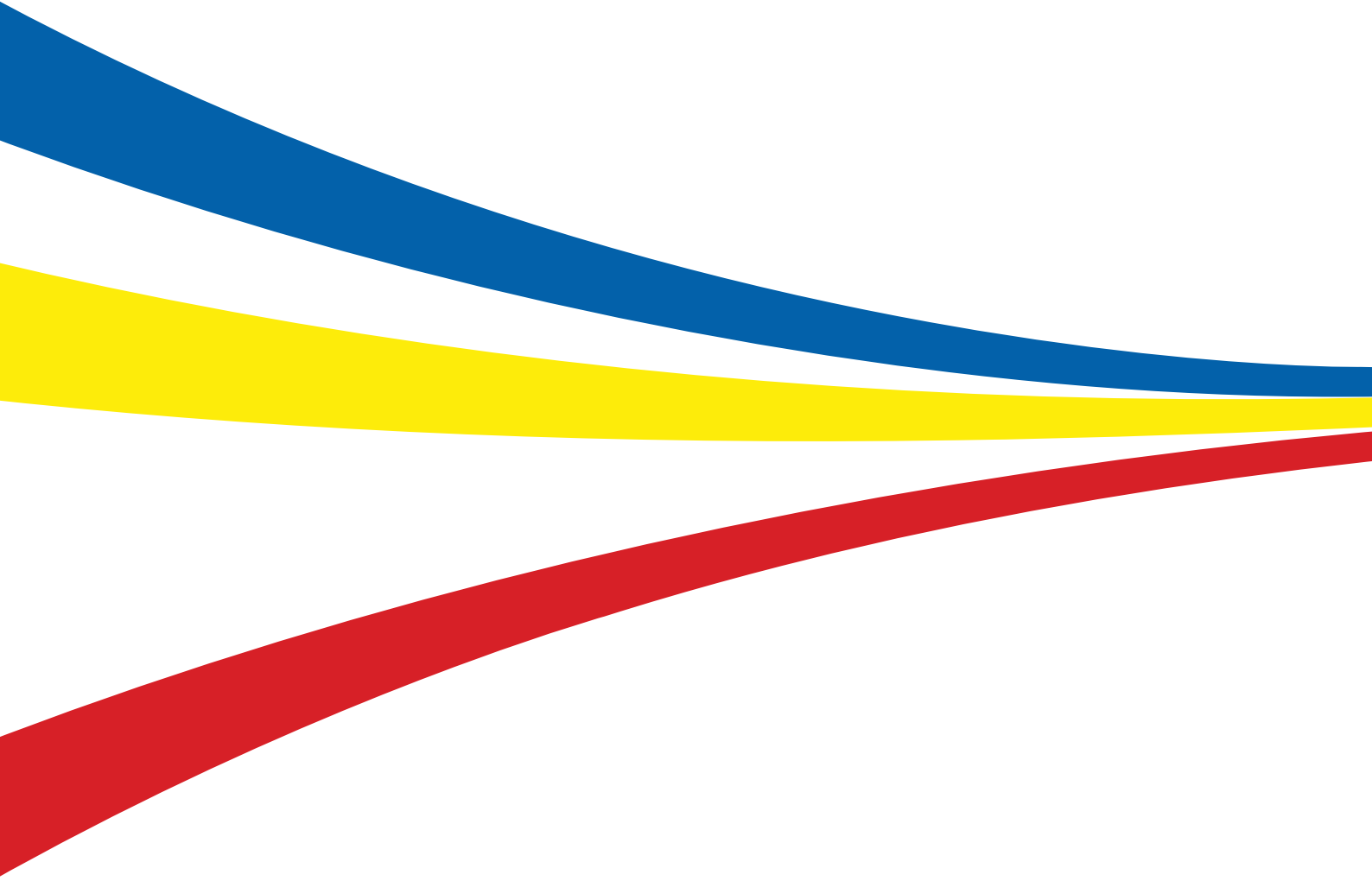
ACCC	Australian Competition and Consumer Commission
ACEN	ASEAN Competition Enforcers Network
AEC	ASEAN Economic Community
AEGC	ASEAN Experts Group on Competition
AEM	ASEAN Economic Ministers
AMS	ASEAN Member States
ASec	ASEAN Secretariat
CCBD	Competition Commission Brunei Darussalam
CCF	The Consumer Protection, Competition and Fraud Repression Directorate General
CCCS	Competition and Consumer Commission of Singapore
CPL	Competition Policy and Law
EU	European Union
ICC	Indonesia Competition Commission (KPPU)
ICN	International Competition Network
ICN AEWG	ICN Agency Effectiveness Working Group
MmCC	Myanmar Competition Commission
MyCC	Malaysia Competition Commission
OECD	Organisation for Economic Cooperation and Development
OTCC	Office of Trade Competition Commission
PCC	Philippine Competition Commission
SLC	Substantial Lessening of Competition
UNCTAD	United Nations Conference on Trade and Development
VCCA	Vietnam Competition and Consumer Authority

## LIST OF TABLES and DIAGRAMS

Table 1:	Status of Competition Law and Establishment of Competition Agency in AMS ..	5
Diagram 1:	Relationship between competition and economic growth .....	8
Table 2:	AMS Policy Objectives .....	10
Table 3:	Structure of Competition Institutions in ASEAN .....	47
Table 4:	Regulatory Authorities in the AMS with competition enforcement powers .....	54

PART I 

INTRODUCTION



## PART I: INTRODUCTION

### Chapter 1: Objectives of Regional Guidelines

#### 1.1 Background

##### *ASEAN Economic Community (AEC) Blueprint 2015*

1.1.1 In the Singapore Declaration on the ASEAN Economic Community Blueprint (AEC Blueprint) in November 2007, the ASEAN Leaders agreed to the establishment of an AEC by 2015. This included the transformation of ASEAN into a single market with free movement of goods, services, investment, skilled labour, and freer flow of capital:

*“...The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy...”*

1.1.2 To fulfil the goal of becoming a highly competitive economic region, all AMS agreed to endeavour to introduce competition policy by 2015. In addition, the AEC Blueprint required the development of regional guidelines on competition policy. This was achieved in 2010. The Regional Guidelines were based on country experiences and international best practices with the view to creating a fair competition environment.

1.1.3 The AEC 2015 has been substantially achieved. To continue the process of regional economic integration, a new AEC Blueprint 2025 was developed maintaining the overall vision of, but building upon, the AEC Blueprint 2015.

##### *AEC Blueprint 2025*

1.1.4 The 2025 Blueprint charts the direction for ASEAN from 2016 to 2025, focusing on strengthening ASEAN unity and consolidating and deepening regional integration, towards a politically cohesive, economically integrated, socially responsible, and a truly rules-based, people-oriented and people-centred AEC. Under the AEC Blueprint 2025, ASEAN remains committed to intensifying its economic cooperation by creating:

- a) a deeply integrated and highly cohesive regional economy;
- b) a competitive, innovative and dynamic community that sustains high economic growth and robust productivity;
- c) an enhanced connectivity and sectoral cooperation;
- d) a more resilient and inclusive community that engenders equitable development and inclusive growth; and

- e) a global ASEAN that fosters a more systematic and coherent approach in external economic relations.
- 1.1.5 In this context, the competition segment in the AEC Blueprint 2025 highlights the need for effective competition regimes, with strengthened capacities, a more competition-aware region and regional arrangements on competition. Strong and enforceable competition laws are expected to support the formation of a more competitive and innovative region by providing a level playing field for all enterprises, especially the micro, small and medium enterprises.
- 1.1.6 The strategic measures on competition in the AEC Blueprint 2025 are further expanded in five strategic goals and key actions set out in the ASEAN Competition Action Plan (ACAP) 2016-2025. The five strategic goals under the ACAP 2025 correspond to the strategic measures in the AEC Blueprint 2025. These are:
- a) effective competition regimes are established in all AMS;
  - b) capacities of competition-related agencies are strengthened to effectively implement CPL;
  - c) regional cooperation arrangements on CPL are in place;
  - d) fostering a competition-aware ASEAN region; and
  - e) moving towards greater harmonisation of competition policy and law in ASEAN.
- 1.1.7 Strategic Goal 5 includes an update of the Regional Guidelines on Competition Policy to be endorsed by the ASEAN Economic Ministers (AEM) by 2020.
- 1.1.8 Together, the AEC Blueprint 2025 and the ACAP 2025 guide the AMS in their implementation of competition law and policy until 2025.

#### *The ASEAN Experts Group on Competition*

- 1.1.9 In August 2007, the AEM endorsed the establishment of the ASEAN Experts Group on Competition (AEGC) as a regional forum to discuss and cooperate on competition policy and law (CPL). The AEGC is an official ASEAN body comprising representatives of the AMS competition authorities. It coordinates competition policies in ASEAN as well as the implementation of the tasks and activities determined in the AEC Blueprint and ACAP.
- 1.1.10 The AEGC has focussed on strengthening legislative regimes in AMS, building competition-related policy capabilities and best practices among AMS. Through this body, a number of activities have been organised in cooperation with development partners to strengthen competition authorities and to build enforcement competencies. The AEGC has successfully steered the implementation of the AEC Blueprint 2015 goals for competition, and continues to steer implementation of the activities designated in AEC Blueprint 2025 and ACAP 2025.

## 1.2 Purpose, Objectives and Benefits of Regional Guidelines

- 1.2.1 The Regional Guidelines which were published in 2010 served as a reference for those AMS that were in the process of drafting or introducing competition law for the first time. This revised version reflects the current status of competition law and competition authorities in ASEAN. Nine out of 10 AMS have already introduced their law and established a competition authority while the progress in Cambodia is ongoing with the law expected to be passed soon.
- 1.2.2 The revised Regional Guidelines serve as a general framework for the AMS as they continue to introduce, implement, enforce and develop CPL in accordance with the specific legal and economic context of each AMS. These Guidelines provide guidance on both enforcement and administrative issues and set out different policy and institutional options for consideration of the AMS.
- 1.2.3 The Regional Guidelines should not be read as a stand-alone document. AMS can also refer to guidelines published by competition authorities in the region and around the world. The ICN, OECD and UNCTAD have also published documents that will provide assistance to the competition authorities.
- 1.2.4 To assist the AMS, recommended practices and specific guidelines on a relevant topic are provided. These recommendations and practices have been adopted from international best practice, experiences from AMS, as well as studies which have been carried out by ASEAN. A number of toolkits which are available on the ASEAN competition website have also been used as references.
- 1.2.5 The Regional Guidelines are not binding on the AMS. The guidelines act as a common reference guide for the implementation and enforcement of CPL and for future cooperation between AMS. The recommendations reflect both international and regional best practice.
- 1.2.6 The competition laws in the AMS have been drafted to meet their national objectives. While the three main pillars of competition law (anti-competitive practices, mergers and acquisitions and abuse of dominant position) are commonly found in the laws, there are diversities in the legislation as well as in the design of the competition authorities. The commonalities and differences have been identified in the *Study on Commonalities and Differences across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence*.
- 1.2.7 As competition authorities develop and gain experience in their investigation techniques, any shortcomings in their policies, processes or laws may become evident. AMS may have an opportunity to amend the laws and procedures and the Regional Guidelines provide a useful roadmap for this exercise. As enforcement in the region continues to develop, further opportunities for cooperation and consultation, particularly in relation to cross-border issues, that will arise. Ongoing dialogue in this area will assist in achieving Strategic Goal

5 of “moving towards greater harmonisation of competition policy and law in ASEAN”.

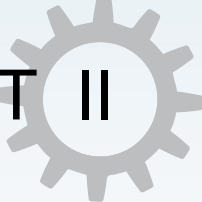
### **1.3 Different Stages of Competition Law and Authority Development in ASEAN**

- 1.3.1 The Regional Guidelines take into account the varying stages of CPL development and implementation in the AMS. The ASEAN region first established competition authorities in Indonesia and Thailand in 1999. Gradually the other AMS have introduced their regimes. The competition regimes can be categorised as mature (15-20 years), young (10-14 years) or new (1-9 years). The more mature agencies have undergone varying degrees of development, with some having amended their laws and assimilated other functions such as consumer protection within their jurisdiction.
- 1.3.2 The current status of competition law and the establishment of competition authorities among the AMS is set out in the table below.

**Table 1: Status of Competition Law and Establishment of Competition Agency in AMS**

Jurisdiction	Law passed	Law in force	Competition Agency established	Enforcement commenced
<b>Brunei Darussalam</b>	✓ (2015)	✓ (2017) (phased)	✓ (2017) Competition Commission Brunei Darussalam	✓
<b>Cambodia</b>	✗	✗	✓ (2020) The Consumer Protection, Competition and Fraud Repression Directorate General (CCF)	✗
<b>Indonesia</b>	✓ (1999)	✓ (2000)	✓ (1999) Indonesia Competition Commission (ICC/KPPU)	✓
<b>Lao PDR</b>	✓ (2015)	✓ (2015)	✓ (2018) Lao Business Competition Commission	✗
<b>Malaysia</b>	✓ (2010)	✓ (2012)	✓ (2011) Malaysia Competition Commission (MyCC)	✓
<b>Myanmar</b>	✓ (2015)	✓ (2018)	✓ (2018) Myanmar Competition Commission (MmCC)	✓
<b>Philippines</b>	✓ (2015)	✓ (2016/2018) (phased)	✓ (2016) Philippine Competition Commission (PCC)	✓
<b>Singapore</b>	✓ (2004)	✓ (2006) (phased)	✓ (2005) Competition & Consumer Commission of Singapore (CCCS) (previously the Competition Commission of Singapore)	✓
<b>Thailand</b>	✓ (1999/2017)	✓ (1999/2017)	✓ (2019) Office of Trade Competition Commission (OTCC) (previously established in 1999 under the Department of Internal Trade)	✓
<b>Vietnam</b>	✓ (2004/2018)	✓ (2005/2019)	✓ (2018) Vietnam Competition and Consumer Authority (VCCA) (previously established in 2004 and formerly known as VCA & VCC)	✓

Source: Study on Commonalities and Differences across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence; Updated 2020

PART II 

LEGAL FRAMEWORK and ENFORCEMENT





## **PART II: LEGAL FRAMEWORK and ENFORCEMENT**

### **Chapter 2: Objectives and Benefits of Competition Policy and Law in ASEAN**

#### **2.1 Definition of Competition Policy and Law**

- 2.1.1 Competition policy is a broad based policy which cuts across all sectors. Most of the competition authorities in the AMS have the mandate to enforce a competition law, but are not responsible for the overall competition policy. However, many authorities do have the mandate to advise the government on policy issues that impact on competition law.
- 2.1.2 In these Guidelines, the term 'competition policy' is used to refer to the broader policy issues and the term 'competition law' is used when referring expressly to competition legislation enacted in the AMS.

#### **2.2 Objectives and Benefits of Competition Policy and Law**

##### *Competition Policy*

- 2.2.1 On a macro level, competition policy is beneficial to developing countries. Due to worldwide deregulation, privatisation and liberalisation of markets, developing countries need a competition policy in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.
- 2.2.2 Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of the welfare of particular consumer groups. In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring job creation by new efficient competitors.
- 2.2.3 Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial

policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth. Regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anti-competitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximizing the benefits of foreign investment.

- 2.2.4 More competitive markets result in higher productivity growth and policies that lead to markets operating more competitively (such as enforcement of competition law and removal of regulations that hinder competition) will result in faster economic growth as illustrated in Diagram 1 below.<sup>1</sup>

**Diagram 1: Relationship between competition and economic growth**



### *Competition Law*

- 2.2.5 One of the most commonly stated objectives of competition law is the promotion and the protection of the competitive process. Competition law introduces a “level-playing field” for all market players that will help markets to be competitive. The introduction of a competition law provides the market with a set of “rules of the game” that protects the competition process itself, rather than competitors in the market. In this way, the pursuit of fair or effective

<sup>1</sup> <https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf>

competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare.

## 2.3 Competition Policy Objectives of ASEAN laws

- 2.3.1 To assist with the introduction of competition policy and law by each AMS by 2015 (as committed to in the AEC Blueprint), the ASEAN Regional Guidelines on Competition Policy were published in 2010 with the following objective:

*“The Guidelines on Competition Policy is a pioneering attempt to achieve the stated goal of ensuring ASEAN as a highly competitive economic region as envisaged in the ASEAN Economic Community (AEC) Blueprint, in particular the introduction of nation-wide Competition Policy and Law by 2015.*

*This Guidelines are based on country experiences and international best practices with the view to creating a fair competition environment in ASEAN. It seeks to enhance and expedite the development of national competition policy within each ASEAN Member State.”*

- 2.3.2 The AMS competition laws have policy objectives which are closely aligned to this broad policy goal. The main objectives of promotion and protection of competition, fair competition, economic efficiency, economic growth and development, and consumer welfare are found in the AMS' competition laws (see Table 2)<sup>2</sup>.
- 2.3.3 All of the AMS laws state multiple policy objectives including the basic objective of promoting and protecting competition. The priority and weight given to each of the objectives by the AMS may vary, based on their own development needs. Multiple policy objectives within one competition law can present additional challenges for competition authorities as they attempt to prioritise actions based on consistent policy goals. It may increase the risk of conflicts and attempts to influence as different stakeholders put pressure on the authority. It is recommended that competition authorities determine their policy priorities and publish statements to ensure transparency. It will also ensure certainty for businesses and accountability to the public sector.<sup>3</sup>
- 2.3.4 In addition to the publication of guidelines, well-reasoned decisions with well-drafted press releases explaining the policy behind the decisions will assist with transparency and help to develop the expertise of the competition authority.

<sup>2</sup> In the case of Singapore and Thailand (where the objectives are not in the body of the law), the responses were provided directly. The objectives of the Singapore law were stated in the Second Reading Speech.

<sup>3</sup> <http://www.oecd.org/daf/competition/2486329.pdf> -OECD Global Forum on Competition, The Objectives of Competition Law and Policy, 29 Jan 2003

**Table 2: AMS Policy Objectives**

	Economic efficiency	Economic growth and development	Consumer welfare	Fairness	Promotion and protection of competition
Brunei Darussalam	✓	✓	✓	-	✓
Cambodia	✓	-	✓	✓	✓
Indonesia	✓	-	People's welfare	✓	✓
Lao PDR	-	✓	✓ Protect interests of State and businesses as well as consumers	✓	✓
Malaysia	-	✓	✓	-	✓
Myanmar	-	✓	✓ Public interests also considered	✓	✓
The Philippines	✓	✓	✓	✓	✓
Singapore	✓	-	-	-	✓
Thailand	✓	✓	✓	✓	✓
Vietnam	✓	✓	Consumer interests and social welfare	✓	✓

*Source: Study on Commonalities and Differences across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence*

## Chapter 3: Scope of Competition Policy and Law

### 3.1 Application of Competition Law

- 3.1.1 The three commonly recognised pillars of competition law are the prohibition of anti-competitive (horizontal and vertical) agreements; abuse of dominant position (abuse of market power) and anti-competitive mergers. Most of the AMS laws include all three pillars. Some also provide for an express prohibition of unfair trade practices.
- 3.1.2 Competition law should be an instrument of general application, i.e., applying to all economic sectors and to all engaged in economic activities, including State-owned enterprises, having an effect within the AMS territory, unless exempted by law. Those engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality, transparency, consistency and non-discriminatory treatment under the law.
- 3.1.3 The concept of an economic activity refers to any activity involving the offering of goods or services on a market. It is not necessary for the activity to have a profit motive. Many of the AMS laws apply to the broader concept of economic activities rather than the narrower concept of 'commercial activities'. Where the law is not clear as to how it applies, the AMS may wish to clarify their position in applicable guidelines or policy statements.
- 3.1.4 Competition laws in the AMS apply to juridical or legal persons and also commonly extend to cover natural persons who authorise, engage in or facilitate restrictive practices prohibited by competition law, whether acting in a private capacity as owners, or as managers or employees of the business. This allows the law to sanction or penalise individuals as well as the businesses involved in the prohibited activities. A mix of administrative, civil and criminal sanctions are provided for across the AMS competition laws.
- 3.1.5 Some AMS have expressly stated that the prohibitions do not apply to the Government, statutory bodies or any person acting on their behalf. For example, Government officials and statutory bodies exercising prerogatives arising from their public powers or acting for the fulfilment of public service objectives, or any persons acting on their behalf, may be excluded from the prohibitions. These exemptions apply insofar as the Government activities are connected with the exercise of sovereign power and not where the activities are economic in nature.

## 3.2 Prohibition of Anti-competitive Agreements

- 3.2.1 All AMS have laws that prohibit horizontal agreements between enterprises that prevent, distort or restrict competition (that is, anti-competitive agreements) in the AMS territory, unless otherwise exempted. Horizontal agreements are agreements between enterprises that operate at the same level of the production or distribution chain. Most AMS have also prohibited vertical agreements that prevent, distort or restrict competition. Vertical agreements are agreements between businesses that operate at different levels of the production or distribution chain.
- 3.2.2 Any horizontal or vertical agreement between enterprises might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is anti-competitive. Many AMS have included provisions that expressly allow for an agreement to be evaluated by reference to its object or effects. In those cases, only agreements that have the *object or effect* of preventing, restricting or distorting competition are prohibited.
- 3.2.3 For those AMS that apply the ‘object or effect’ threshold, consideration should be given to how ‘object’ is to be interpreted. In the EU, restrictions of competition by object are those that, by their very nature, are injurious to the proper functioning of normal competition<sup>4</sup>. If the anti-competitive object can be established, it is not necessary to show an anti-competitive effect. The object is to be determined by reference to the provisions of the agreement between the parties, the objectives it seeks to achieve and its economic and legal context<sup>5</sup>. It is not necessary to prove the subjective intention of the parties although, if this can be established, this can be used as evidence. It is still possible (although rare) for the parties to establish that the agreement leads to efficiencies that would outweigh its anti-competitive object. If efficiency arguments are not available in an AMS, the ‘object’ threshold will operate, in practice, in the same manner as a ‘per se’ threshold (see 3.2.4).

*It will be beneficial for the business community if AMS could clarify their position on the interpretation of the object threshold in national guidelines. Consistency amongst the AMS on this issue will assist with regional convergence.*

- 3.2.4 By contrast, a few AMS prohibit certain types of horizontal agreements, such as price fixing and bid rigging, ‘per se’. Where an agreement is prohibited ‘per se’, it is not incumbent on the competition regulator to prove that the agreement has either an anti-competitive object or effect. Instead, the competition regulator simply needs to establish the existence of the agreement which is

<sup>4</sup> *Expedia Inc v Autorite de la Concurrence*, Case C-226/11 EU:C:2012:795, para 36

<sup>5</sup> 519/06 P *GlaxoSmithKline* [2009] ECR I-9291, paragraph 58

then automatically treated as anti-competitive. Agreements are treated as ‘per se’ illegal on the basis that their very existence causes harm to competition.

- 3.2.5 Some AMS have identified specific “hardcore restrictions” which will always be considered as anti-competitive (e.g., price fixing, bid-rigging, market sharing, limiting or controlling production or investment). These prohibitions are either treated as ‘by object’ or ‘per se’ illegal by the AMS.

*Where the competition law in a jurisdiction does not expressly identify hardcore restrictions as being ‘by object’ or ‘per se’ illegal, AMS may consider clarifying their position in national guidelines.*

- 3.2.6 With the exclusion of hardcore restrictions which are commonly treated as ‘per se’ or ‘by object’ illegal, many AMS laws analyse horizontal and vertical anti-competitive agreements by applying an “effects” test. That is, the effect of the agreement on the relevant market needs to be determined to assess whether it is anti-competitive. This analysis is commonly undertaken by a forward-looking analysis that compares the competition in the market **with** the agreement and the competition in the market **without** the agreement. This is commonly known as the ‘counterfactual’. When applying the counterfactual, the market structure should be considered. This includes an assessment of actual competition (market shares), potential competition (barriers to entry or expansion), countervailing buyer power and power of suppliers.
- 3.2.7 Even where competition in the market is affected by the agreement, agreements may only be prohibited where there is a substantial (or appreciable or significant) effect on competition. This is often referred to as an ‘appreciability’ threshold. Some of the AMS laws expressly include an ‘appreciability’ threshold. Where the law does not, AMS may consider including a threshold in guidelines. An example can be seen in Singapore’s *Guidelines on the section 34 Prohibition* where the CCCS states:

*“The section 34 prohibition applies where the object or effect of the agreement is to prevent, restrict or distort competition within Singapore. Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is prohibited. CCCS does not adopt such a narrow approach and will assess an agreement in its economic context. An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the **appreciable** prevention, restriction or distortion of competition unless it is excluded or exempted.” (paragraph 2.21) (emphasis added)*

- 3.2.8 AMS may also consider whether ‘safe harbour’ thresholds could be set to provide additional certainty for business. For example, the AMS may decide that an agreement between enterprises, which together control less than a stated percentage of any relevant market affected by the agreement, is unlikely to have a substantial effect on competition. Current examples can be seen in

Malaysia's *Guidelines on Chapter I Prohibition* (paragraph 3.4) and Singapore's *Guidelines on the section 34 Prohibition* (paragraph 2.25).

*Safe harbour thresholds may be set in Guidelines.*

- 3.2.9 In some AMS, the prohibition of anti-competitive agreements expressly covers decisions by associations of undertakings. Trade associations are the most common form of association of undertakings. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, enterprises participating in such associations may, in some instances, collude and coordinate their actions which could infringe the law. The association itself may also make certain decisions or perform actions which could infringe the law. A decision by an association may include the constitution or rules of an association or its recommendations.

*Guidance could be provided to businesses on the application of competition law to the activities of trade associations.*

- 3.2.10 Some AMS have expressly included a prohibition against 'concerted practices' in their competition law. 'Concerted practices' is generally understood to mean any form of coordination between enterprises which does not reach the stage where an agreement properly so called has been concluded but knowingly substitutes practical cooperation for the risks of competition<sup>6</sup>.

*The ability to apply the law to concerted practices can be important in the context of cartels as cartelists may destroy direct evidence of the agreement. Where an AMS has not expressly used the term 'concerted practice' in its law, it may wish to clarify whether its law will apply to both explicit and implicit agreements. AMS may also wish to distinguish concerted practices from parallel behaviour (sometimes referred to as 'tacit collusion') which may not be prohibited. Clarification could be achieved in guidelines published by the competition authority.*

- 3.2.11 AMS may also wish to consider providing guidance to business on the circumstances where horizontal agreements may not be harmful to competition, or where such harm is outweighed by its benefits. For example, collaboration agreements between small and medium sized enterprises (SMEs) may result in a new product reaching the market that could not have been developed otherwise. Although there may be some anti-competitive restrictions in this type of agreement (such as an agreement on the price at which the product

<sup>6</sup> *ICI v Commission* Case 48/69 EU:C:1972:70. Further guidance on the meaning of concerted practice can be found in the *EC Guidelines on Horizontal Cooperation Agreements*, MyCC Guidelines on Chapter 1; CCCS Guidelines on Section 34 Prohibition



should be sold), those restrictions may be outweighed by the consumer benefit in the development of a new product.

*Guidance on horizontal agreements that are unlikely to raise competition concerns would provide reassurance to businesses in the region and form part of the jurisprudence of the competition authority.*

- 3.2.12 Most AMS have extended the prohibition against anti-competitive agreements to cover vertical agreements. Although vertical agreements are generally considered less restrictive of competition than horizontal agreements, they can give rise to significant competition law concerns, for example, where the manufacturer of a product imposes a minimum resale price on its distributors (known as resale price maintenance). Other vertical agreements may have pro-competitive benefits in addition to potential anti-competitive harm, for example, exclusive distribution agreements.

*The competition authority may wish to publish guidance on the types of vertical agreements that are unlikely to cause anti-competitive concerns because the pro-competitive benefit outweighs the anti-competitive harm.*

### 3.3 Prohibition of Abuse of Dominant Position

- 3.3.1 All AMSs prohibit the abuse of a dominant position. As with anti-competitive agreements, the policy objective of abuse of dominance provisions should be to protect competition in the market, not to protect individual competitors. Some AMS have provided an illustrative list of such conduct, which includes both exploitative and exclusionary behaviour.
- 3.3.2 Exploitative behaviour occurs where the market power held by the player with a dominant position is *exploited* to the detriment of consumers. Examples include excessive or unfair purchase or sales prices. Exclusionary behaviour involves conduct on the part of the dominant enterprise that *excludes* competitors from the market. Examples include predatory pricing, margin squeeze, refusal to supply and limiting production, markets or technical development to the prejudice of consumers. Some conduct may be both exclusionary and exploitative, for example, tying and price discrimination<sup>7</sup>.
- 3.3.3 Abuse types are commonly categorised as 'price based' or 'non-price based'. Price based abuses include predatory pricing, price discrimination, margin squeeze and monopoly pricing. Non-price based abuses include bundling and tying, rebates, exclusive dealing, refusing to supply and limiting outputs.

<sup>7</sup> Exclusionary abuse types are further explained in guidance from the European Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

- 3.3.4 Predatory pricing occurs when a dominant player sells at a loss for a period of time with the intention of damaging one or more competitors. When the competitors/s have withdrawn from the market, the dominant player is free to raise prices to recover its losses (known as 'recoupment').
- 3.3.5 Price discrimination occurs when a dominant player charges different customers different prices for the same product or service, without any objective justification.
- 3.3.6 Margin squeeze occurs when a dominant player charges a high price for inputs that hurts its downstream competitors by reducing (squeezing) their margin, thereby making it difficult for the downstream competitor to compete. The margin squeeze prevents the 'as efficient' competitor from competing on the merits.
- 3.3.7 Monopoly pricing occurs when the dominant entity charges an excessively high price that it is only able to charge because it does not face any competition.
- 3.3.8 Bundling occurs when two separate products are only sold as a bundle. Tying occurs when one product (the tying product) is sold only with the second product (the tied product). The second product can be sold separately but not the first.
- 3.3.9 Exclusive purchase occurs when there is an obligation to purchase only from the dominant supplier. This is often achieved through loyalty rebates, through which discounts are offered for exclusive purchasing.
- 3.3.10 Refusal to supply occurs when the dominant player refuses to supply a product or service (usually to a competitor) without objective justification.
- 3.3.11 Limiting outputs occurs when a dominant player limits its own outputs to restrict supply to the market. This is usually to force an increase in demand (and therefore price).
- 3.3.12 AMS may wish to consider whether certain types of abuses should be treated as abusive 'by object', with no obligation on the competition authority to establish an anti-competitive effect (as is the case with anti-competitive agreements). This could be the case, for example, with discrimination against suppliers from another AMS as such discrimination would oppose integration of the ASEAN Economic Community.
- 3.3.13 Where AMS choose not to apply an object threshold, the effect of the conduct on the market will need to be considered. The AMS may wish to consider taking action in cases where the conduct of the dominant player is such as to *foreclose* competitors from the relevant market. In price-based cases, this can be assessed by applying the 'as-efficient' competitor test. Would a 'competitor as-

efficient-as the dominant firm' be excluded from the market? This is the test applied in the EU<sup>8</sup>.

- 3.3.14 Some AMS include a presumption of dominance above a certain market share threshold. A current example can be seen in Malaysia's *Guidelines on Chapter 2 Prohibition* (paragraph 2.2) where the MyCC states that:

*"In general, the MyCC will consider a market share above 60% to be indicative that an enterprise is dominant."*

- 3.3.15 Other AMS include a market share threshold that must be exceeded before an enterprise can be considered dominant. This threshold operates as a pre-requisite to a finding of dominance. A current example can be seen in Vietnam where a market share of 30% is required (see Article 24 Vietnam law) and Indonesia where a market share of 50% is needed (Article 25(2) Indonesia law).
- 3.3.16 The consequence of different pre-requisites and thresholds for dominance applying across ASEAN is that an entity with a dominant position in one AMS may not hold a dominant position in another AMS.
- 3.3.17 Some international jurisdictions recognise the defence of 'reasonable commercial justification' in relation to allegations of abuse of dominance. Cambodia, Malaysia and the Philippines expressly recognise this defence (Art 10 Cambodia law; Section 10(3) Malaysia law; Section 26(e) Philippines law). Other AMS may wish to consider whether this defence will be available and, if so, explain it in applicable Guidelines. A current example can be seen in Singapore's *Guidelines on the section 47 Prohibition* (paragraph 4.5).

### **3.4 Prohibition of Anti-competitive Mergers**

- 3.4.1 Mergers constitute legitimate commercial transactions between economic operators. However, competition concerns can arise when mergers lead to a substantial lessening of competition (SLC) or significantly impede effective competition in the relevant market.
- 3.4.2 Most of the AMS laws allow the competition authority to regulate anti-competitive mergers and acquisitions. Merger laws commonly apply to the acquisition of shares and the acquisition of assets. Merger laws may also apply to joint ventures that result in the creation of an independently functioning new entity. Some of the AMS laws contain provisions that expressly apply their merger laws to joint ventures. Where the law is not express, the AMS may wish to consider the circumstances in which joint ventures may be subject to review as mergers and provide guidance to the business community accordingly. For

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<sup>8</sup> See EC guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

example, the Philippines has published *Guidelines on Notification of Joint Ventures*.

- 3.4.3 Some AMS laws provide for voluntary (ex-ante or ex-post) notification and some provide for mandatory (ex-ante and ex-post) notification. Ex-ante regimes require the merger to be notified and cleared before the merger is consummated. Ex-post regimes allow a merger to be notified after it has been completed. Mergers that are notified ex-post pose particular challenges for remedies as mergers, once completed, can be difficult to unwind. Remedies may therefore be limited to financial penalties and behavioural remedies.
- 3.4.4 In order to filter out mergers with no significant impact, some AMS have set notification thresholds, above which a merger must be notified to – and approved by – the competition authority. It is common for merger laws to have two notification thresholds. Firstly, the merger must meet the legislative threshold for a ‘merger’. This commonly requires some change in ‘control’. For example, in Brunei Darussalam and Singapore, the law requires there to be a ‘decisive influence’ over the activities of the enterprise. The second threshold commonly relates to the size of the transaction (asset values or sales) or the size of the parties (market shares) or a combination of both criteria. Mechanisms for adjusting these thresholds may be necessary to take account, for example, of increases in the GDP deflator index.
- 3.4.5 Mergers may be classified as horizontal (a merger between competitors), vertical (a merger between non-competitors) or conglomerate (a merger between complementary businesses). The risk of harm in a horizontal merger are coordinated or unilateral effects. Coordinated effects arise where there is an increased likelihood of coordination between the enterprises that remain in the market (as there is a reduced number). Unilateral effects assess the likelihood of an enterprise’s unilateral market power increasing as a result of the merger. This assessment should involve a consideration of the broader constraints that may impede the freedom of the merged entity, such as new entrants, imports or countervailing power.
- 3.4.6 Vertical and conglomerate mergers (‘non-horizontal mergers’) are generally regarded as less harmful to competition than horizontal mergers. Vertical mergers are likely to create efficiencies as upstream and downstream markets are integrated. Likewise, as conglomerate mergers often involve related markets, efficiencies in the form of better integration, increased convenience and reduced transaction costs can result. However, anti-competitive effects may still arise. The main risk of harm in non-horizontal mergers is anti-competitive foreclosure of the market. This is most likely where the merged enterprise has market power. In the case of a conglomerate merger, market power in one market may be leveraged into another, resulting in foreclosure.
- 3.4.7 The assessment of whether a merger is anti-competitive commonly relies on the application of one of two tests: dominance or substantial lessening of

competition (SLC). The SLC test is most commonly used, including in ASEAN. The application of the SLC test requires consideration of competition in the market **with** the merger and competition in the market **without** the merger. Usually the level of competition in the market before the merger will be the counterfactual without the merger. The factors that are relevant to determining whether a proposed merger will substantially lessen competition include:

- a) market concentration, that is the number and size of participants based on value of sales, volume of sales or capacity. Following calculation of market shares, application of a concentration ratio such as the CRA or the Herfindahl-Hirschman Index (HHI) can be applied to determine the actual increase;
- b) barriers to entry (assessing whether new entrants are able to enter the market) may arise from legal or regulatory requirements (e.g. licences), structural barriers (e.g. sunk costs, economies of scale or scope) or strategic barriers (e.g. retaliatory action by the incumbent);
- c) buyer (countervailing) power;
- d) import competition; and
- e) availability of substitutes.

3.4.8 The assessment of the effects of a merger may also take into consideration commonly recognised arguments to support the merger:

- a) failing firm – the firm will leave the market whether the merger occurs or not as it will fail;
- b) efficiencies – the merger will generate efficiencies that cannot be otherwise achieved.

3.4.9 The competition authority may prohibit the merger, or, as part of the clearance, impose conditions on, or require commitments from, the merging enterprises to address any competition concerns arising from the merger. The conditions or commitments may involve structural or behavioural remedies. Structural remedies involve an alteration of the market structure, while behavioural remedies involve an alteration of the behaviours of the merged entity, to seek to address the competition concerns.

3.4.10 Some AMS also have jurisdiction to impose a procedural penalty for a failure to notify a merger.

3.4.11 The competition authority may implement a simplified filing system for cases that, at first sight (based on turnover and/or market share thresholds) do not raise serious competition concerns. A simplified filing system generally requires a shorter waiting period and the submission of less information in the notification, thereby reducing time and costs for the enterprises filing the notification. To date, a small number of the AMS have adopted this type of filing system.

*Given the likelihood of increased cross-border mergers in the ASEAN region, AMS may wish to consider taking steps to better understand each other's merger regimes and identify practical ways in which differences can be managed in practice. For example, AMS with mandatory regimes could inform AMS with voluntary regimes of a notified merger (of which the latter may be unaware) and a proforma merger waiver could be developed to allow confidential information to be shared among the competition authorities.*

### **3.5 Exemptions and Exclusions**

3.5.1 The implementation of competition law should not prevent AMS from pursuing other legitimate policies that may require derogations from competition policy principles. The key rationale for granting exemptions or exclusions from competition law provisions to specific industries or activities include strategic and national interest, security, public, economic and/or social considerations. For example, some AMS laws provide that:

- a) Prohibitions may not apply to any enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise, such as guaranteeing universal access to various types of quality services at affordable prices.
- b) Prohibitions may not apply to agreements or conduct to the extent to which such agreements or conduct are made in order to comply with a legal requirement, i.e., any requirement imposed by or under any written law or the judicial authority.
- c) Prohibitions may not apply to agreements or conduct, when their application may result in a conflict with international obligations.
- d) Prohibitions may not apply to agreements or conduct based on specific public policy grounds.
- e) Prohibitions may not apply to the collective bargaining of workers over wages and conditions.

*AMS should apply exemptions as narrowly as possible to ensure the benefits of CPL apply across the economy and across the region.*

#### *Efficiencies Arguments: Assessing Net Economic Benefit*

3.5.2 Some AMS have set up a procedure to consider granting exemptions or exclusions to anti-competitive agreements and abusive conduct which have significant countervailing benefits (generally in the form of efficiencies), such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair

share of the resulting benefit. The exemptions may be allowed only to the extent that is appropriate and indispensable to reach their intended aims, and do not afford the enterprises concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

- 3.5.3 Assessing whether a proposed arrangement or conduct offers a net economic benefit should be undertaken by balancing the pro-competitive benefits with its anti-competitive effects. Accordingly to international best practice, the efficiencies achieved must be objective and directly linked to the agreement or conduct. The parties must be able to establish the likelihood and size of the efficiencies so that this can be weighed against the anti-competitive effects. Generally both the agreement or conduct itself and the individual restrictions must be reasonably necessary to attain the efficiencies. If there is a requirement of consumer benefit, the benefit may apply to either direct or indirect users. When assessing whether competition in the market has been substantially eliminated, AMS should consider the extent to which competition (actual or potential) will be reduced as a result of the agreement or conduct. If competition is already weak, it is more likely that the agreement or conduct will eliminate competition substantially. This assessment should include an assessment of market power including buyer power and entry barriers.<sup>9</sup>

#### *Block Exemptions*

- 3.5.4 The laws in some AMS expressly provide for block exemptions to exempt particular categories of agreement that satisfy certain conditions. Malaysia and Singapore have already published block exemptions in relation to liner shipping agreements. Examples of other categories of agreements which may be granted block exemptions include research and development cooperation and intellectual property rights.

#### *Exemptions for small and medium-sized enterprises*

- 3.5.5 A few AMS have provided for the potential to exclude or exempt small and medium-sized enterprises (SMEs) from the application of competition law, in order to enhance their competitiveness in the market and to improve their market opportunities when competing against large companies/enterprises. AMS should consider applying this exemption sparingly. A cartel entered into by SMEs can have a significant effect on competition in the market. A case example can be found in Malaysia where the SME members of the *Cameron Highlands Floriculturist Association* (CHFA) agreed a price increase which resulted in harm to consumers<sup>10</sup>. Likewise, a SME may hold a dominant position in its market (particularly in the digital context) which can be abused. An example can be found in Singapore where *Sistic* abused its dominant position in the ticketing market by requiring all events held at venues across Singapore to use *SISTIC* as the sole ticketing service provider. This had the

<sup>9</sup> European Commission, *Guidelines on the application of Article 81(3) of the Treaty*, 2004/C 101/08

<sup>10</sup> MyCC, *Infringement of Section 4(2)(a) of the Competition Act 2010 by Cameron Highlands Floriculturist Association*, 6 December 2012

effect of excluding other ticket providers and restricting the choices of venue operators, event promoters and ticket buyers<sup>11</sup>.

- 3.5.6 An alternative approach to an exclusion for SMEs could be the setting of 'safe harbour' thresholds which can provide some legal certainty for SMEs (paragraph 3.2.8). Guidelines on pro-competitive cooperation agreements could also be useful (paragraph 3.2.11).

*Guidance from competition authorities*

- 3.5.7 Some AMS have provisions in their law which allow the competition authorities to provide for an agreement or conduct to be examined by the competition authority and a view to be given regarding its compliance with the law (see, for example, section 42 Singapore's Competition Act). The AMS that do not have such a provision in their law may wish to consider it as an amendment to the law in the future.

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<sup>11</sup> CCS/600/008/07, *Abuse of a Dominant Position by SISTIC.com Pte Ltd*, 4 June 2010



## Chapter 4: Legislation and Guidelines

### 4.1 Relevant Legislation and Guidelines for Competition Policy and Law

- 4.1.1 Competition laws have been passed in all but one AMS, where the passing of the law is in progress at the time of preparing the Regional Guidelines. Most laws are now also in force and enforcement has commenced. A summary of the position is set out in Table 1.
- 4.1.2 Secondary legislation has been introduced in some of the AMS, either by the government or the competition authority. Examples include the *Rules and Regulations to Implement the Provisions of Republic Act No. 10667 (Philippine Competition Act)* and *Vietnam's Decree No.35/2020/ND-CP* which provide further details on the respective competition laws. It is likely that further secondary legislation will be required in a number of AMS. For transparency and legitimacy, public consultations on proposed regulations and guidelines is encouraged, even if not a strict legal requirement.
- 4.1.3 Many of the AMS have also published guidelines which provide additional detail on how the competition laws will be interpreted and applied in practice. These guidelines are available on the competition regulator websites.
- 4.1.4 To the extent that the AMS have not done so already, consideration may be given to publishing guidelines on the following topics. AMS may wish to focus initially on guidelines for the main prohibitions, or based on any phased implementation. The priorities are likely to differ from AMS to AMS:
- a) Substantive guidance on the prohibition against anti-competitive agreements;
  - b) Substantive guidance on the prohibition against abuse of dominance;
  - c) Substantive guidance on the prohibition against anti-competitive mergers and acquisition;
  - d) Substantive guidance on market definition;
  - e) Procedural guidance on anti-competitive mergers and acquisition;
  - f) Procedural guidance on the operation of the leniency regime;
  - g) Procedural guidance on the manner in which financial penalties are calculated;
  - h) Procedural guidance on the investigation powers of the competition regulator;
  - i) Procedural guidance on the complaints process.
- 4.1.5 Other topics that may be considered by more mature competition authorities include the application of competition law to intellectual property rights, to the

digital economy, to SMEs, to trade associations, the application of exemptions and other topics which may be deemed to be important for clearer interpretation of the law.

- 4.1.6 Clarifications provided in guidelines can provide one means of achieving greater consistency in the interpretation of competition laws across ASEAN. For example, all AMS may take the view that hardcore cartels are ‘per se’ or ‘by object’ prohibited (see Chapter 3) and can use national guidelines to create consistency on this issue.

*Newer authorities should focus on issuing plain language guidelines and publications to businesses and consumers on CPL provisions.*

*Guidelines on substantive issues must only be published once the competition authority understands the interpretation of their own laws thoroughly and internal policy issues have been discussed and agreed. In the meantime, newer agencies can focus on advocacy to the key stakeholders.*

## **4.2 Review of New or Existing Legislation**

- 4.2.1 The AMS may continue to consider whether new or existing legislation is compatible or consistent with CPL.
- 4.2.2 Some of the AMS laws expressly allow the competition authorities to:
- a) review any new or existing legislation that imposes significant restrictions on competition as a key part of its function.
  - b) review competition-related legislation (e.g., price control arrangements, if any) in order to determine whether competition concerns can be addressed by potentially less restrictive means (e.g. price monitoring).
  - c) provide advice to its government on the impact of other government policies on CPL.
- 4.2.3 Where AMS do not have these express powers, competition authorities may nonetheless use their advocacy and policy making powers to educate government departments on the benefits of competition policy and law and seek to ensure new policies and laws do not, inadvertently, create anti-competitive effects.

## **4.3 Review of Competition Laws and Guidelines**

- 4.3.1 The AMS are likely to identify areas where the competition law requires amendment, either to keep pace with regional or international developments, or to clarify and/or improve their own law. A process for reviewing the

competition law should therefore form part of the regular activities of the competition authority.

- 4.3.2 There will be an ongoing need for competition authorities to amend existing, or publish new, guidelines, either because a new demand has arisen, jurisprudence has developed or because the competition law or policy has changed. A current example can be seen in Singapore, which completely updated its suite of Guidelines in 2016 and Indonesia, which updated its Case Handling Procedures in 2019 to provide the opportunity of behavioural changes to the businesses (Commitment Decision).

#### **4.4 Phased Implementation of Competition Law**

- 4.4.1 Some of the AMS have elected to adopt a phased implementation of competition law. For example, the Philippines commenced enforcement of its merger provisions immediately while enforcement of its prohibitions against anti-competitive agreements and abuse of dominance commenced only after expiration of its transitional period. Brunei Darussalam commenced a phased implementation of its law in 2017. The date of the passing of the ASEAN competition laws and the date those laws came into force is set out in Table 1.

## Chapter 5: Enforcement

### 5.1 Different Enforcement Regimes

- 5.1.1 The effective enforcement of competition law is an important factor in the establishment of a robust competition regime in the territory of the AMS. AMS should continue to provide the necessary human, financial, legal and other resources to the competition authority to support effective enforcement, together with an effective advocacy programme (see Chapter 10).
- 5.1.2 All of the AMS have included enforcement powers and sanctions in their competition laws, to deter potential offenders through the detection of actual offences, the prosecution thereof as may be allowed by law, and the imposition of adequate penalties and remedies to act as a deterrence.
- 5.1.3 In some AMS, there can be administrative, civil and criminal sanctions for a violation of competition law. In other AMS, a violation of competition law is only an administrative and civil offence, with no criminal liability.
- 5.1.4 Most of the AMS have established administrative systems, under which the competition authority is empowered to determine both liability and the appropriate penalty or remedy. In most cases, the law expressly provides that the decision of the administrative body is subject to review by the courts or a specialised body.
- 5.1.5 In one AMS jurisdiction, an adversarial system has been adopted, under which the competition authority investigates the case and brings enforcement proceedings before the courts to determine both liability and sanction.
- 5.1.6 In the context of a criminal investigation, liability and sanctions may be determined by judicial authorities, or subject to judicial review. For those AMS that currently have criminal sanctions, the investigation is generally undertaken by a body separate to the competition authority, although it is likely that the competition authority will be involved, at least in the initial stages.
- 5.1.7 Many of the AMS have provisions in their competition laws that permit private enforcement (see 5.12 below). This can be a useful additional enforcement tool for competition authorities, especially in the more mature regimes.

### 5.2 Investigation Powers

#### *Power to require the production of documents and information*

- 5.2.1 Most of the AMS laws provide the competition authority with investigative powers, such as the power to require any natural or legal person to provide information and documents, written answers to questions, or oral testimonies,

that it considers relates to any matter relevant to an investigation. This power commonly includes:

- a) The right to take original or copies of, or extracts of, documents, or make reproductions.
- b) Requiring the person to provide an explanation of the document.
- c) Requiring the person to state to the best of that person's knowledge or belief (whether under oath or affirmation or not), where the document can be found.
- d) Requiring the person (whether under oath or affirmation or not), to provide specified information that is not already in a recorded form.

5.2.2 Some of the AMS have specifically included powers to search and seize digital information and to obtain the assistance of the business to understand and interpret the data, where required. This is recommended.

5.2.3 Many AMS have also granted the competition authority power to enter and search premises, land and means of transport with or without warrant.

*Power to enter and search business premises without warrant*

5.2.4 Many of the AMS have given their competition authority (or other authorised officer) the power to enter premises for inspection without a Court warrant. The power to enter without a warrant may be dependent on there being an urgent need, the premises being or having been occupied by an enterprise under investigation or there being a belief that evidence will otherwise be destroyed. Where this is not the case, a reasonable notice of entry is usually required. In addition to the powers to require a person to produce and explain the documents (e.g., accounting records, diaries, minutes or notes of meetings, records and copies of correspondence, personal memoranda, electronic data and email records) that the competition authority considers as relating to any matter relevant to the investigation, it may take steps which appear necessary in order to preserve the documents or prevent interference with them, such as sealing the premises, offices, files and cupboards for such time as is reasonably necessary to enable the inspection to be completed.

*Power to enter and search business and private premises, land and means of transport, under warrant*

5.2.5 Most AMS have also granted the competition authority power to make an application to the judicial authority for a warrant to enter and search any business premises, land and means of transport, where there is a reasonable suspicion that evidence related to the subject matter of the investigation is kept. In limited circumstances, this may extend to domestic premises used in connection with the business. Commonly, the investigators can enter the premises, land and means of transport specified in the warrant using such force as is reasonably necessary and search any person on the spot, if there are reasonable grounds for believing that the person has in their possession any

document which has a bearing on the investigation, and search the premises, land and means of transport and take originals or copies of or extracts of documents, or remove from the places for examination any equipment or article which relates to any matter relevant to the investigation, e.g., computers or any recording devices.

#### *Tipping off, threat of reprisal*

- 5.2.6 A small number of the AMS have express provisions in their laws that prohibit tipping off and the threat of reprisal. Future legislative amendments could consider including similar provisions in the laws of those AMS that do not contain these provisions.

#### *Obstruction*

- 5.2.7 Some AMS have express provisions in their laws that prohibit the obstruction of officers or employees of the competition authority, with criminal sanctions. Future legislative amendments could consider including similar provisions in the laws of those AMS that do not contain these provisions.

*To assist with effective enforcement across the region, those AMS that may not yet have granted their competition authorities with search and seizure powers, may wish to do so. Even where the AMS have granted search and seizure powers, AMS may wish to publish guidelines that could be used to clarify procedural matters. These guidelines would also assist in ensuring due process is followed:*

- a) the circumstances in which a warrant is (or is not) required;*
- b) the powers of a competition authority, with or without a warrant;*
- c) the rights of the enterprise being searched;*
- d) the right of the parties to have legal representation, to claim self-incrimination or to claim legal professional privilege;*
- e) the use of the information and documents obtained during the search;*
- f) confidentiality rules applicable to the information and documents obtained during the search.*

### **5.3 Evidence gathering**

- 5.3.1 The burden of proving that an enterprise has infringed competition law normally rests on the competition authority. Where an enterprise seeks to rely on an available defence (for example, that the agreement results in efficiencies that outweigh anti-competitive harm), the party relying on the defence normally bears the burden of proof. The standard of proof will differ between AMS, based on national laws and depending on whether it is an administrative, civil or criminal prosecution. These differences will need to be taken into account

by a competition authority during the evidence gathering process. The requirements could be explained in both internal processes (SOPs) and in any guidelines published by the competition authority.

- 5.3.2 AMS may consider establishing dedicated cartel detection units, which may employ forensic and IT experts to retrieve data for evidential purposes. Where AMS do not have the resources or capacity to employ these experts, assistance may be sought from other departments or agencies within the jurisdiction that may have the required expertise. Alternatively, AMS with more mature agencies may be able to loan staff to provide this expertise in cartel investigations. AMS with experience in dealing with large volumes of data and/or digital markets could share their knowledge on how to manage the data, techniques for determining where the data is located prior to commencing an inspection and other strategies key to managing investigations with large volumes of digital information.
- 5.3.3 Direct evidence of a cartel may be difficult to obtain, particularly where young competition authorities do not have, or are inexperienced in using, investigation powers. Further, as awareness of competition law increases in jurisdictions, cartelists are likely to become more discreet and not record meetings or discussions in writing. In these cases, competition authorities may need to rely on circumstantial evidence to prove the existence of a cartel. Circumstantial evidence is accepted and relied upon by courts in many international jurisdictions.

*AMS may wish to refer to the Competition Primers for ASEAN Judges for further information on the use of circumstantial evidence in competition law cases.*

## 5.4 Commitments

- 5.4.1 Some of the AMS have provisions in their law that acknowledge that, in the course of proceedings which might lead to an agreement or conduct or merger being prohibited, enterprises may offer commitments to meet the competition authority's competition concerns as expressed in its preliminary assessment. If accepted, the competition authority may empower the ~~competition authority~~ to adopt ~~decisions making those commitments binding on the enterprises concerned~~, without a finding of infringement and without imposing a penalty. In some cases, the AMS refer to these commitments as 'undertakings' or 'consent orders'.
- 5.4.2 Even where AMS have provisions in the law regarding commitments, AMS may wish to add further details either in amendments to the law or in guidelines to address the following:

- a) Commitments may be adopted for a specified period and may conclude that subject to these commitments being in place, there are no longer grounds for action by the competition authority, without issuing a formal prohibition decision.
- b) The competition authority may, upon request or on its own initiative, be allowed to reopen the proceedings where it has reasonable grounds to believe that:
  - (i) there has been a material change in any of the facts on which the decision was based;
  - (ii) the enterprises concerned breached their commitments; or
  - (iii) the decision was based on incomplete, incorrect or misleading information provided by the enterprises.
- c) The competition authority may, at any time when a commitment is in force, accept a variation of the commitment or another commitment in substitution.
- d) The competition authority may release a commitment where it has reasonable grounds to believe that the commitment is no longer necessary or appropriate for the purpose.
- e) Before accepting, varying, substituting or releasing a commitment, the competition authority may consult with such persons as it thinks appropriate.

## 5.5 Settlement

5.5.1 To date, few AMS have a settlement procedure in their laws. As competition authorities develop, AMS may wish to consider introduction of a settlement procedure which has significant benefits in terms of reductions in investigation time, thereby freeing up valuable resources.

5.5.2 Settlements differ from commitments in a number of important ways:

- a) a settlement normally follows a finding of infringement
- b) a settlement normally requires the enterprise to admit an infringement
- c) a settlement still involves imposition of a (reduced) fine, whereas a commitment normally does not involve a pecuniary sanction;
- d) in many jurisdictions, a settlement is only applicable to cartels, whereas a commitment applies more widely<sup>12</sup>.

5.5.3 Transparent enforcement procedures and penalty guidelines within the jurisdiction will be needed to encourage settlements. An enterprise under investigation is more likely to consider a settlement if it is aware of the benefits

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<sup>12</sup> OECD, COMMITMENT DECISIONS IN ANTITRUST CASES, DAF/COMP(2016)7



of settling the case (which should include an understanding of the risks of not settling)<sup>13</sup>.

- 5.5.4 Where settlements are allowed, AMS should not preclude the possibility that proceedings are reopened where the parties do not comply with the terms of the settlement and the non-complying party or parties are subject to sanctions by the competition authority.

## 5.6 Interim Measures

- 5.6.1 Some of the AMSs have provided their competition authority with the power to adopt interim measures or injunctions before it has completed its investigation when it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.
- 5.6.2 Even where AMS have provisions in the law authorising interim measures, AMS may wish to consider adding further details either in amendments to the law or in guidelines to address the following:
- a) interim measures may also be imposed for the purpose of preventing any action that may prejudice or obstruct the investigations or the competition authority's ability to impose remedies (e.g., a merger that is likely to infringe the law is carried into effect).
  - b) interim measures may be in the form of prohibition orders that prohibit the continuation of the illegal conduct (cease and desist orders), or of orders that impose the elimination of the unlawful situation by way of positive act (injunctions).
  - c) interim measures adopted by a competition authority may be subject to judicial review.

## 5.7 Sanctions

- 5.7.1 The AMS have provided a range of sanctions, punitive and non-punitive coercive measures, whether criminal, civil or administrative, to ensure compliance with the law. AMS should ensure that the right to appeal a decision includes the right to appeal the sanction itself.
- 5.7.2 Sanctions have been provided for substantive infringement of the law, such as infringements of the prohibition against anti-competitive agreements, the prohibition against abuse of a dominant position and the prohibition against anti-competitive mergers.

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<sup>13</sup> OECD, Policy Roundtables *Experience with Direct Settlement in Cartel Cases*, 2008

- 5.7.3 Sanctions have also been provided for procedural infringements of the law, such as failure or refusal to provide information, destroying or falsifying documents, failure to comply with decisions or orders, persuading or instructing others not to cooperate or obstructing investigations.
- 5.7.4 Examples of sanctions provided in the AMS laws include:
- (i) financial penalties – administrative, civil or periodic penalty payments;
  - (ii) criminal sanctions – imprisonment and/or fines;
  - (iii) cease and desist orders;
  - (iv) disqualification of directors or officers;
  - (v) compensation orders (to compensate for the damage caused);
  - (vi) education measures; and
  - (vii) revocation of business licences.

## **5.8 Calculation of Fines**

- 5.8.1 AMS may establish the method of calculation and the amount of financial penalties (i.e., fines) to be imposed. In this regard, AMS may consider elaborating on the basic principles for setting the amount of fines, such as:
- a) The seriousness (gravity) and duration of the infringement and its impact on the relevant market. It is likely that fines will be more severe in respect of cartel activities, e.g., in price fixing, or bid-rigging (collusive tendering) as these are the most serious breaches of competition law.
  - b) The turnover of the enterprise(s) involved.
  - c) Any aggravating circumstances (e.g., repeated infringements, refusal to cooperate, role as leader or instigator of infringement, adoption of retaliatory measures or other coercive measures aimed at ensuring the continuation of the infringement).
  - d) Any mitigating factors (e.g., passive role, acting under duress or pressure, non-implementation or partial implementation of the infringement, cooperation which enables the enforcement process to be concluded more effectively and/or speedily).
  - e) Restitution or disgorgement principles.
  - f) Possibility of imprisonment for individuals.
  - g) Other relevant factors (e.g. deterrent value).
- 5.8.2 Some of the AMS have established a method for calculating fines in guidelines, rather than stipulating the method in the law itself. Most AMS have included a fine up to a specified maximum amount or up to a certain percentage of the

enterprise's annual turnover in previous fiscal years. The threat of high fines can act as a deterrent to discourage infringements. A limited number of jurisdictions provide that a financial penalty can only be imposed if the infringement has been committed intentionally or negligently.

5.8.3 Decisions on the level of penalty to be imposed by the competition authority should be subject to judicial review. All AMS have some review either to applicable courts or to a tribunal and AMS should ensure that the appeal includes a right to review the penalty.

5.8.4 Where AMS laws have not included express provisions for calculating fines, information could be published in guidelines specifically dealing with financial penalties. Some of the AMS have already published guidelines. This can work well as it ensures both transparency and enables the Guidelines to be updated more easily as competition law develops.

## 5.9 Leniency

5.9.1 Most AMS have a mechanism in their competition laws to introduce a leniency programme targeted at enterprises who have participated in cartel activities (and therefore are liable for infringing the prohibition against anti-competitive agreements) but who would nevertheless like to come clean and provide the competition authority with evidence of the cartel.

5.9.2 A leniency programme is an effective enforcement tool. Due to the difficulty in obtaining evidence as a result of the secret nature of cartels, leniency programmes provide enterprises with an incentive to come forward and report on the cartel's activities. Otherwise, these enterprises may be deterred from coming forward and "blowing the whistle" for fear that they may expose themselves to hefty financial penalties for their own involvement in the cartel.

*AMS who do not have a legislative basis for a leniency programme may wish to consider advocating for this amendment to their competition law.*

5.9.3 Those AMS that have established leniency programmes have designed programmes that contain many of the following features. The features are either covered in the law or in published Guidelines:

- a) Makes leniency available both:
- (i) where the competition authority is unaware of the cartel and
  - (ii) where the competition authority is aware of the cartel but does not have sufficient evidence to proceed to adjudicate or prosecute.

Whether or not leniency is granted in such cases will depend on the quality of the information submitted by the applicant. As a minimum, the information provided by the enterprise must be such as to provide the

competition authority with a sufficient basis for taking forward a credible investigation or to add significant value to the competition authority's investigation.

- b) Grants leniency to the first eligible applicant who self-reports its involvement and
  - (i) provides all the information, documents and evidence available to it regarding the cartel activity.
  - (ii) maintains continuous and complete co-operation throughout the investigation and until the conclusion of the investigation/enforcement action. To ensure cooperation throughout, AMS may wish to specify that the investigation/enforcement action is not concluded until all potential appeal avenues have been exhausted.
  - (iii) refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the competition authority unless otherwise directed.
  - (iv) must not have been the one to initiate or to play a leading role in the cartel.
  - (v) must not have taken any steps to coerce another enterprise to take part in the cartel activity.
- c) Keeps the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver or the competition authority is required by law to disclose the information. The waiver may be required to enable communication and coordination of investigations between competition authorities.

5.9.4 Those AMS that have published additional details on their leniency programme have extended lenient treatment to second and subsequent applicants, provided that they submit evidence that adds significant value to the investigation. To encourage a “rush to the door” to contact the competition authority, the first eligible applicant (before an investigation has begun) may be granted automatic and complete immunity from financial penalties and the other subsequent eligible applicants may be granted a reduction up to a certain percentage of the financial penalties imposed on the cartel. Any reduction must reflect the actual contribution of the enterprise, in terms of quality and timing, to the establishment of the infringement.

5.9.5 Most of those AMS that have additional details on their leniency programme have introduced (or will introduce) a “marker” system or “reservation” system that protects an enterprise's place in the queue for a given period of time and allows it to gather the necessary information and evidence to perfect their application for leniency prior to the competition authority determining the first eligible applicant. This provides certainty and clarity for potential applicants and encourages a race to contact the authority.

5.9.6 In AMS where different authorities are responsible for the investigation and prosecution of cartels (for example, as between administrative and criminal

prosecution), AMS should ensure that the leniency policies are consistent. An individual or an enterprise is unlikely to seek leniency from a competition authority if there are concerns that the individual or enterprise will still face criminal sanction.

- 5.9.7 Where AMS have either not introduced a leniency programme or have not yet confirmed its details, the competition authorities may wish to consider adopting the approach outlined above. Many AMS have already incorporated these aspects into their regimes and the approach taken by other AMS as a consistent approach to leniency will be of great benefit to addressing cross-border enforcement.

## **5.10 Private Enforcement and Action for Damages**

- 5.10.1 Many of the AMS have provisions in their competition laws that allow an applicant to bring a claim before the appropriate judicial authorities for breaches of competition law, in order to recover the damages suffered.
- 5.10.2 By allowing damage claims for breaches of competition law, the AMS not only strengthen the enforcement of competition law, but also make it easier for applicants who have suffered damages from an infringement of competition law to seek redress and recover their losses.

### *Timing of action*

- 5.10.3 The AMS should consider whether private enforcement actions can be commenced only after the finding of a violation or infringement by the competition authority or whether an action can be commenced at any time. If the action is to be commenced only after a finding of infringement, the AMS should consider whether the finding by the competition authority will be binding on the courts. That is, is the finding sufficient proof of the breach so that the applicant does not need to establish the infringement and instead need only demonstrate the loss suffered?

### *Time limits*

- 5.10.4 Time limits: The AMS should consider the time limit within which a private enforcement action can be commenced. Regard should be had to when the time limit commences. For example, it may be when the applicant first becomes aware of the loss or damage or it may be once the enforcement proceedings have been completed (including any appeal periods).

### *Evidence requirements*

- 5.10.5 AMS may establish that, where an applicant(s) has presented reasonable evidence of the fact that they may have been harmed by an infringement of competition law and they are unable to produce further conclusive evidence, the competent judicial authority may order evidence to be disclosed by other

parties, provided that disclosure is not disproportionate, taking into account the legitimate interests of the parties involved and the protection of confidentiality.

5.10.6 The AMS should consider whether information provided to the competition authority in connection with a leniency application should be exempt from disclosure to an applicant in a private damages action. There are important policy considerations to take into account as a leniency applicant may be less willing to come forward if they fear their evidence could be used against them in a private damages action.

5.10.7 The AMS should consider whether information held on the file of the competition authority could be the subject of an order for disclosure. There may be important policy considerations for not allowing complete disclosure of a competition authority's file.

#### *Calculating damages*

5.10.8 AMS could include provisions specifying the calculation methods and the amount of damages that can be claimed by affected parties. The amount of damages awarded may:

- a) be designed and applied in a manner that ensures full compensation of the damage and of the reasonable expenses that the affected party incurred as a result of the infringement. Full compensation may include compensation for actual loss, loss of profit and payment of interests from the time the damage occurred to the time it has been compensated;
- b) be designed as a deterrent such as a multiple of the actual losses suffered as compensation, plus legal costs; or
- c) be independent from the actual imposed by the competition authority or other law enforcement body or judicial authority.

#### *Class action*

5.10.9 AMS may establish that two or more injured parties, who suffered harm from the infringement of competition law, can bring a joint action for damages before the competent judicial authority. AMS may also allow other injured parties, who suffered harm from the same infringement, to join the group action already lodged, provided that this is not impaired by the state of the proceedings and does not jeopardise the rights of the defendant(s).

### **5.11 Extra-Territoriality**

5.11.1 A number of the AMS laws contain express provisions that apply their laws extra-territorially. This means that agreements or conduct that take place outside a jurisdiction are within the jurisdiction of the competition authority in its jurisdiction. To ensure a sufficient 'nexus', many of the relevant provisions

require that the agreement or conduct in question has an 'effect' on markets in the jurisdiction.

- 5.11.2 The extension of the AMS laws in this manner will result in more potential overlaps in jurisdiction between the competition authorities, as more than one law may apply. This will increase the need for regional cooperation.

*AMS may wish to consider protocols for identifying cases where more than one ASEAN competition law may apply which could include sharing knowledge of cross-border cases.*

## Chapter 6: Due Process

### 6.1 Importance of Due Process

- 6.1.1 A sound institutional framework and due process are fundamental to ensuring the effective implementation and application of competition law. In particular, procedures should be transparent, consistent, impartial, ensure accountability and not be unduly burdensome or prohibitive. Due processes support the credibility of the competition authority and lead to robust, well-reasoned and credible decisions, thereby reducing the risk of adverse findings on appeal.
- 6.1.2 Where the competition authority is, at the same time, the investigating, adjudicating and enforcing authority, greater transparency in the adjudication process will be needed to ensure due process. For example, the enterprise under investigation should have access to the investigation evidence gathered by the competition authority, with the exception of documents or other information which are purely internal to the competition authority or classified as confidential. This enables the enterprise to be able to protect its legal rights and have an opportunity to properly answer the case against it.
- 6.1.3 Even where AMS have procedural fairness protections in their laws, it is recommended that the competition authority prepare internal SOPs and issue guidelines that explain, in clear terms, the procedural safeguards in place.

### 6.2 Transparency

- 6.2.1 Competition law proceedings should be transparent and predictable. The transparency of the competition authority's policies, practices and procedures may be strengthened by the publication of procedural and enforcement guidelines which will promote consistency in the competition authority's decision making, increase stakeholder understanding and encourage compliance. Likewise, publication of the competition authority decisions will increase the understanding of the manner in which the authority is interpreting and applying its own law. This will raise awareness and knowledge of CPL in the jurisdiction (thereby fulfilling an advocacy role) and build a body of national jurisprudence.
- 6.2.2 Where possible, competition authorities should translate published documents into English as this will contribute towards building knowledge across the region and internationally on CPL in ASEAN.



### **6.3 Accountability**

- 6.3.1 AMS laws should include processes supporting the accountability of its activities, such as obligations to report on a regular basis to a Minister(s) and/or the national legislative body, and/or the Head of State.
- 6.3.2 In addition, the competition authority should publish annual reports/plans that will provide transparency of its activities.

### **6.4 Impartiality and timeliness**

- 6.4.1 Investigations should be conducted in accordance with principles of impartiality and objectivity and carried out in an effective and time-efficient manner, avoiding unnecessary costs and burdens.
- 6.4.2 Some AMS laws require the competition authority to comply with legislative pre-determined time periods for the handling of cases. Even where timelines are not proscribed, the competition authority should have internal procedures, such as timeline projections, in order to ensure that decisions are not unduly delayed, or consider having a set of case screening criteria. Case screening can remove cases which are unlikely to raise competition concerns, ensuring valuable resources can be allocated to more important cases.

### **6.5 Natural Justice**

- 6.5.1 Rules of natural justice, such as informing people of the case against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule) give stakeholders confidence in the competition authority.
- 6.5.2 The competition authority should have regular, meaningful and genuine engagement with the investigated parties and third parties with a legitimate interest throughout the proceedings. Investigated parties should be provided with complete and detailed information on the allegations of anti-competitive conduct against them – the type of matter, the fact that an investigation has been opened, the authority's concerns and the evidence against them. For example, the UK CMA generally provides case updates to businesses under investigation to keep parties informed of the nature and scope of the investigation and the next steps<sup>14</sup>.
- 6.5.3 Investigated parties should have the right to be heard. For example, in Malaysia, a party has a right to make an oral representation following the issue of a proposed decision (section 37).

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<sup>14</sup> Guidance on CMA's Investigation Procedures

## **6.6 Confidentiality**

- 6.6.1 All AMS recognise the importance of maintaining the confidentiality of information received during the course of an investigation. Confidential information is usually obtained by a competition authority from:
- a) A party to a merger or under investigation as part of the enforcement process;
  - b) Third parties upon request (for example, as part of the competition authority's investigation into a merger) or voluntarily (for example, to support a complaint);
  - c) From other government agencies or authorities, including competition authorities in other jurisdictions.
- 6.6.2 In addition to the information being confidential, the identity itself of those providing the information may also be confidential.
- 6.6.3 Most AMS have provisions in their law that protect confidential information. Information may relate to the business, commercial or official affairs of any person. Most of the AMS provide that the information shall not be disclosed, unless disclosure is necessary for the performance of the function or duty or is lawfully required or permitted under any written law.
- 6.6.4 The protection of confidentiality will help persons providing information to the competition authority avoid the risk of harm to their legitimate business interests or individual interests, e.g., through economic retaliation. The persons providing confidential information should identify and explain, to the competition authority, the reasons why the information should be treated as confidential.
- 6.6.5 In some jurisdictions, sanctions are expressly stated to apply to staff of competition authorities for breach of the confidentiality provisions.
- 6.6.6 Some of the AMS have provided safeguards to protect the confidentiality of information acquired during the course of a search or to protect the identity and interest of a company ("whistle blower" or "informant") that informs the competition authority of the existence of an anti-competitive practice, such as a cartel. If these protections are found in other laws within the jurisdiction, the competition regulator may wish to identify and explain the safeguards in relevant guidelines.

## **6.7 Privilege against self-incrimination**

- 6.7.1 Self-incrimination privilege allows a person to refuse to answer any question, or produce any document, if the answer or the document would tend to incriminate the person. The exercise of investigation powers by the AMS competition regulators gives rise to questions about the risk of self-incrimination for the individuals involved. Some AMS have expressly confirmed that the

privilege against self-incrimination does not prevent disclosure of information or documents. However, a person can claim self-incrimination and that evidence then becomes inadmissible in criminal proceedings. Many AMS remain silent on this issue. As a matter of due process, the competition authorities may wish to state the position in relation to self-incrimination in relevant Guidelines (for example, guidelines dealing with their powers of investigation).

## **6.8 Legal privilege**

6.8.1 Legal privilege commonly arises in two scenarios – communications between a lawyer and client in relation to contemplated or ongoing litigation; and advice provided by a lawyer to a client. In both cases, the communications and advice are protected by legal professional privilege. A few AMS specifically mention legal privilege in their competition laws but most AMS do not. These protections may be found in other laws within the jurisdiction. As a matter of due process, the competition authorities may wish to state the position in relation to legal professional privilege in relevant Guidelines (for example, guidelines dealing with their powers of investigation).

## **6.9 Decisions and administrative review**

6.9.1 Enforcement actions, infringement decisions and remedial measures should respect proper jurisdictional limitations. Remedies must be limited to rectifying harm on the relevant domestic markets.

6.9.2 AMS may allow the competition authority to review its own decisions, when circumstances prompting the decision have changed or have ceased to exist.

## **6.10 Internal processes**

6.10.1 Competition authorities should strive to develop efficient, effective, fair and transparent internal procedures for the internal processes of the organisation, known as Standard Operating Procedures (SOPs). Application of SOPs ensures consistency, predictability, due process and robust and independent decision making.

6.10.2 SOPs are step by step instructions for employees that act as guidelines for work processes. They can be in the form of numbered steps or in the form of flow charts. SOPs should be complete, clearly written and based on inputs from employees who do the job. New competition authorities can benefit from the experience of the more mature authorities to develop SOPs.

6.10.3 SOPs and Practice Manuals are important to ensure due process are put in place, however, these must be done after understanding the procedures that are necessary to carry out an investigation or for managing an institution.

Assistance from more mature authorities within the ASEAN region would be a good option for new and young authorities. The SOPs and Practice Manuals are also necessary to ensure that the line of authorities are clearly established and understood.

- 6.10.4 The ICN has published a list of documents useful for authority operations including *Strategic Plan & Prioritisation, Effective Project Delivery and Knowledge Management*<sup>15</sup>. AMS' may refer to these documents for further guidance.

*The key SOPs that a competition agency should prepare include:*

- a) an Enforcement Manual setting out all the SOPs to cover internal processes prior to, during and after, an investigation;*
- b) Complaint Procedures setting out the internal processes from the time of receipt of a complaint to when it is closed or sent for further investigation;*
- c) administrative SOPs for General Administration, Human Resource Management and Finance.*

## **6.11 Judicial review**

6.11.1 Investigated parties (and interested parties) should have the right to a full judicial review on the merits of their case, either in the context of a court's review of the competition authority's claims or in the context of an appeal against the competition authority's decision. In the latter case, there should be a possibility for the enforcement of the decision to be suspended during the appeal. Judicial redress should also be available for failure to comply with procedural safeguards.

6.11.2 AMS should recognise the role of the judiciary in the enforcement of competition law, including both direct access to the judicial authority and review of administrative decisions. The AMS laws currently allow for at least one of the following systems:

- a) Appellate Body: There should be recourse for infringing parties to at least one appellate body, independent from the competition authority and the government. Ideally, this body should have competition expertise with members who are highly qualified in competition law and economics. Where this cannot be achieved, the appellate body (e.g., a court, tribunal or committee) that hears the appeals should have access to recognised experts on competition law and economics. Four of the AMS have appellate bodies in place.

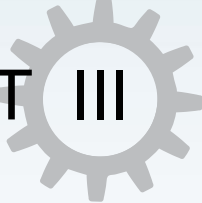
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<sup>15</sup> Available at <https://www.internationalcompetitionnetwork.org/working-groups/agency-effectiveness/agency-operations/>. AMS may want to refer to these documents when preparing internal SOPs.

- b) Judicial review: AMS may make decisions of the competition authority subject to judicial review, providing any natural or legal person with the possibility of appealing within a specified time limit (e.g., two months) to the appropriate judicial authority, against the whole or any part of the competition authority's decision, on any substantive or procedural point of law. All of the AMS competition laws have allowed for this process.
  - c) Specialised Courts: AMS may also consider setting up specialised courts (or specialised sections within courts) which are granted exclusive jurisdiction to hear competition cases. This will allow judges to develop specific experience and know-how in the application of competition law. Only two of the AMS have these specialised courts.
- 6.11.3 AMS may consider allowing the competition authority to submit written comments or to appear in court (as "amicus curiae") in order to clarify technical issues that are important for the consistent and effective application of competition law.

*For further guidance in this area, AMS may wish to refer to:*

- a) *The International Chamber of Commerce (ICC) document entitled 'Effective Procedural Safeguards in Competition Law Enforcement Proceedings' which provides fundamental overarching principles of due process that should apply in competition enforcement proceedings.*
- b) *The Competition Enforcement Strategy Toolkit for ASEAN Competition Agencies provides a detailed discussion on Due Process and Procedural Fairness.*

PART  III

INSTITUTIONAL FRAMEWORK

## PART III: INSTITUTIONAL FRAMEWORK

### Chapter 7: Gradual Development of National Competition Regimes and Exchange of Experiences

#### 7.1 ASEAN Peer Reviews and Self Assessments

Peer reviews and self-assessments support Strategic Goal 1 in ACAP 2025 in “establishing effective competition regimes in all ASEAN Member States which builds on the commitment of ASEAN to endeavour to introduce competition policy in all Member States by 2015”.

##### *Peer Reviews*

- 7.1.1 The *ASEAN Competition Law and Policy Peer Review: Guidance Document*<sup>16</sup> outlines the steps that an AMS can take when subjecting itself to a peer review which is on a voluntary basis, flexible and inclusive.
- 7.1.2 Peer reviews undertaken in accordance with ACAP will take place as part of the AMS process of reviewing their existing competition regimes, in light of their enforcement experiences, changing market dynamics and in accordance with international best practices.

##### *Self-Assessments*

- 7.1.3 The *Self-Assessment Toolkit on Competition Enforcement and Advocacy*<sup>17</sup> has been developed to assist the AMS improve their regulatory regimes.
- 7.1.4 AMS are expected to undertake self-assessments on a regular basis as determined by the AEGC. This includes collecting and collating quantitative as well as qualitative data on the scope and strength, developments, progress and gaps in the national competition regimes. The Toolkit provides a useful resource for competition authorities when reviewing their institutional structure.
- 7.1.5 The Toolkit looks at four broad areas: legal framework and enforcement, institutional and cooperative arrangements, advocacy and resources and capacity development.

*When undertaking peer reviews and self-assessments, the competition authorities may wish to have regard to the following issues on competition authority design, generally and across ASEAN.*

<sup>16</sup> [https://asean-competition.org/file/post\\_image/\[FINAL\]%20ASEAN%20Peer%20Review%20GD%20.pdf](https://asean-competition.org/file/post_image/[FINAL]%20ASEAN%20Peer%20Review%20GD%20.pdf)

<sup>17</sup> [https://asean.org/wp-content/uploads/2012/05/ASEAN-Self-Assessment-Toolkit-ver-Upload\\_3May17.pdf](https://asean.org/wp-content/uploads/2012/05/ASEAN-Self-Assessment-Toolkit-ver-Upload_3May17.pdf)

## 7.2 Design of Competition Institutions

- 7.2.1 *The Handbook of Competition Enforcement Agencies* published annually by the Global Competition Review gives an insight to the different structures, functions, powers and funding of competition authorities around the world. It shows that there is 'no one size fits all' model.
- 7.2.2 Several factors influence the design of a competition authority. These include the legal systems (common law vs civil), enforcement (civil or criminal), number of enforcement agencies or bodies within a particular jurisdiction, availability of private actions, and sources of funding. All competition authorities evolve and develop over time. The gaps in the design of the institution as well as in the legislation (if any) will surface as the authority enforces the law. These can be addressed through amendments to the law or modifications to the structure of the competition authority.
- 7.2.3 Good institutional design is a critical component of good competition policy and competition law enforcement. Initially, the design of an institution will inevitably focus on the task of establishing a functioning competition regime. As the law is enforced and the policy environment and conditions change, so would the design of the institution especially when there are shortcomings in the legislation and the way the institution was planned.
- 7.2.4 Already in ASEAN, reforms have been undertaken by the mature competition authorities. Indonesia has reformed its organisational structure four times, the latest was in 2019 to have more efficient enforcement, Singapore restructured its agency in 2018 as it took on an additional function of administering consumer protection law, Thailand established an independent competition authority with its own budget (following amendments in 2017) and Vietnam consolidated its dual agency system of investigation and enforcement into one pursuant to the Vietnam Competition Law 2018.

*AMS may want to refer to the book written by Eleanor M Fox and Michael J. Trebilcock on the Design of Competition Law Institutions which provides an in-depth study of competition authorities where the authors are of the opinion that institutions play a great role in the application of the law.*

## 7.3 Institutional Design of Competition Authorities in ASEAN

- 7.3.1 The institutional design of the competition authorities set up in the AMS to enforce competition law differs from one jurisdiction to another.
- 7.3.2 Some authorities are statutory bodies with their own independent internal administrative structures while others are within the administrative capture of the line Ministries. Some have autonomous decision-making powers, while others are dependent on the judiciary for decisions. Each authority has



succeeded in its own way, working within the confines of its design. For the more mature authorities, restructuring has occurred, according to the changing needs and objectives, as they have developed and progressed.

7.3.3 Table 3 below reflects the current standing of competition authorities in the AMS. Most report to their respective line Ministries.

**Table 3: Structure of Competition Institutions in ASEAN**

Jurisdiction	Authority	Commissioners (Part Time/Full Time)	Representation of Commissioners	Status of Agency	Line Ministry
<b>Brunei Darussalam</b>	Competition Commission Brunei Darussalam	Part Time	Mainly civil servants, private and 1 academia	Independent Agency	Ministry of Finance and Economy
<b>Cambodia</b>	Consumer Protection, Competition and Fraud Repression	-	-	Government Department	Ministry of Commerce
<b>Indonesia</b>	Indonesia Competition Commission (KPPU)	Full time	Private sector/academia/legal practitioners	Independent Agency	n/a
<b>Lao PDR</b>	Business Competition Commission	Part time	Civil servants	Government Department	Ministry of Industry and Commerce
<b>Malaysia</b>	Malaysia Competition Commission	Part time	Civil servants, private/academia/legal practitioners	Statutory Body	Ministry of Domestic Trade and Consumer Affairs
<b>Myanmar</b>	Myanmar Competition Authority	Part time	Civil servants/private/academia	Government Department	Ministry of Commerce
<b>Philippines</b>	Philippine Competition Commission	Full time	Civil servants, Private and academia	Independent quasi-judicial body	Office of President
<b>Singapore</b>	Competition and Consumer Commission Singapore (formerly known as Competition Commission of Singapore)	Part time	Civil servants, private and academia	Statutory Body	Ministry of Trade and Industry
<b>Thailand</b>	Trade Competition Commission	Full time	Public and private sectors and academia	Independent Agency	n/a
<b>Vietnam</b>	National Competition Commission	Mix of Full time and Part time	Civil servants, experts and scientists	Body affiliated to the Ministry	Ministry of Industry and Trade

Source: *Commonalities and Differences across Competition Legislations in ASEAN and Areas Feasible for Regional Convergence*. Updated August 2020

## 7.4 Change in Institutional Design

7.4.1 Identifying an optimal institutional design may be an uphill task as there are various criteria to consider. As authorities mature, some functions may be aborted to achieve further independence and some may be added to make them multi-functional, such as adding a consumer protection mandate, sectoral regulation or other economic functions.

*When considering changes to their competition authority, the AMS may want to consider the following:*

- a) Gradually moving towards a more independent competition authority vis-à-vis the government.*
- b) Having independent full time Commissioners who have no obligations to the line Ministries would assist with independent decision making, avoid political influence as well as ensure dedication.*
- c) Steering away from concurrent jurisdiction for competition law enforcement with a sector regulator to avoid the risk of divergent application of competition policy.*
- d) Having sufficient financial resources and autonomy where possible. These are essential to pursue effective enforcement activities.*
- e) Protecting the 'inner core' of its independence, i.e. putting in place mechanisms to avoid interference in decisions on case initiation, enforcement and high level strategic steer (i.e. instructions from respective governments or ministers).*
- f) Keeping a record of conflicts or inconsistencies, as well as political influence, in decision making. This could support recommendations for revising or removing some of the objectives (in cases where there are multiple objectives).*

## Chapter 8: Roles and Responsibilities of Competition Authorities

### 8.1 Mandates of Competition Agencies in AMS

- 8.1.1 The mandate of the competition authorities in the AMS is set out in their respective laws. In addition, competition authorities should be aware of the policies or actions of other parts of government and provide advisory services where necessary so as to align the wider government policies with CPL.
- 8.1.2 The competition authorities in the AMS have mandates that include some or all of the following:
- a) Implement and enforce national CPL;
  - b) Interpret and elaborate on CPL;
  - c) Advocacy ;
  - d) Investigate unfair competition;
  - e) Enforce consumer policy and law;
  - f) Provide advice on CPL to the legislature and the Government;
  - g) Act as the national body representative of the country in international competition matters.
- 8.1.3 Newer agencies may strive to achieve some of the mandates progressively, or as and when necessary. As a priority, newer competition authorities should ensure a sound understanding of their own law.
- 8.1.4 The competition authority should be equipped with the necessary resources and legal powers, as well as having appropriate processes and procedures in place, to carry out their responsibilities. This includes a process for filing complaints, lodging applications to the competition authority (e.g., for exemptions, anonymity, confidentiality, or leniency), participation of interested parties, the handling of evidence, publication of decisions and the appeals process.
- 8.1.5 Where appropriate, the competition authority may seek public feedback and launch consultations on general issues (e.g., new or existing CPL provisions, implementing measures or guidelines), specific cases (e.g., notification for exemptions or merger notifications) and results of market studies before it makes any decision on the next steps. This ensures that due process is followed and provides transparency of the steps and procedures that the competition authority is taking.

## 8.2 Prioritisation

8.2.1 Establishing prioritisation criteria and the subsequent prioritisation of projects lends credibility to an organisation. It also provides transparency and helps stakeholders understand the way the authority functions.

8.2.2 The ICN AEWG defines prioritisation as:

*“Prioritisation is the process of translating strategic objectives into operational priorities. It essentially involves deciding which projects or types of projects not to do and which projects or types of projects to do. Through prioritisation, agencies direct resources, time, and energy to those projects that are deemed most relevant to achieving the objectives laid out in the agency’s strategic plan.”*

8.2.3 The competition authority should have a Strategic Plan which will encompass Enforcement Priorities, an Advocacy Strategy and a Communications Strategy Plan. These plans will provide the competition authority with oversight of the utilisation of its resources.

### *Strategic Plans*

8.2.4 The ICN AEWG defines strategic planning as a periodic decision-making process. It takes place in phases that extend over years. The AEWG<sup>18</sup> highlights the following benefits of strategic planning:

- a) It can increase the likelihood of an agency successfully achieving its objectives by clearly identifying those objectives and providing a basis for an agency to measure and assess its progress in achieving them.
- b) It facilitates effective resource allocation and activity prioritisation, which is particularly important given the scarcity of resources available to agencies.
- c) It allows competition authorities to be more proactive when developing their work programs.
- d) It can facilitate communication and accountability, and enhance public understanding of the agency’s purpose and functions.
- e) It can motivate and guide staff members<sup>19</sup>.

8.2.5 For new agencies, having a Strategic Plan to set priorities in the initial stage of its establishment is important in order to effectively utilise its limited resources, and to ensure optimum allocation of those resources to its priorities. CPL may be new to the society, experienced or qualified personnel may be limited and financial resources to enforce its law effectively and efficiently may also be limited. A Strategic Plan allows these limited resources to be matched with the responsibilities given to the authority to enforce the law.

8.2.6 A Strategic Plan should set out a vision and mission statement, the core values of the organisation, the strategic initiatives/objectives and the implementation

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<sup>18</sup> [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG\\_APMStrategicPlanning.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf)

<sup>19</sup> For more information and guidance on Strategic Planning and Prioritisation please refer to the ICN AEWG document referenced above.

plans. The actions should be clearly identifiable and achievable, supported by budget allocations available. The implementation plan must be reviewed quarterly to ensure it is progressing and any shortfalls can be attended to immediately.

8.2.7 The duration of the Plan can be short term (annual though this may be a constraint as the outcome or evaluation of the previous plan may not yet be obvious), medium term (2-3 years) or long term (3-5 years). Ideally a 3 year plan works well for both financial as well as human resource planning.

8.2.8 A Strategic Plan will ensure that the authority is focussed and not distracted by external influences. It will also assist the authority to seek technical and financial support to carry out its plan where necessary, and in this way ensures it is not constrained by the limited financial and human capacity.

8.2.9 The following extract from the Agency Effectiveness Project: A Report by the Competition Policy Implementation Working Group: Sub group 1 (2008)<sup>20</sup> sums up the importance of having a strategy and priority setting:

*“The success of a competition agency depends heavily upon its skill in selecting priorities and designing a strategy for applying its authority. Competition agencies, new and old alike, should create effective, forward-looking mechanisms for choosing goals and devising ways to achieve them. The need for strategic planning stems from several considerations. To a large degree, the imperative to set priorities is a function of resources. No competition agency enjoys unlimited funds, and the scarcity of resources demands choices among a range of possible applications of the agency’s powers. Society has a vital stake in having the agency make these choices in a manner that most improves economic performance. Without a conscious process of setting priorities and ranking possible activities according to their legal and economic significance, the competition authority is less likely to focus on what truly matters. Without a strategy, the agenda of the competition authority is prone to be governed entirely by external impulses in the form of complaints from consumers, requests for action by business operators, or queries from legislatures and other government ministries. These impulses sometimes might channel a competition agency’s efforts toward matters of the greatest significance, but this is not invariably or even routinely the case. Lest it merely respond to the random ordering of external events, even the most humble, least funded competition agency must strive to establish criteria for deciding which of the matters brought to its attention is worthy of further scrutiny”.*

8.2.10 The Competition Enforcement Strategy Toolkit for ASEAN Competition Agencies as well as the Toolkit for Competition Advocacy for ASEAN are documents which can guide AMS when drafting a strategic plan. These are available on the ASEAN website.

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<sup>20</sup> OECD Global Forum on Competition Eighth Meeting, 19-20 February 2009 Challenges Faced by Young Competition Authorities Session Documents  
<http://www.internationalcompetitionnetwork.org/http://www.internationalcompetitionnetwork.org/media/library/CPI/C>

### 8.3 Interaction between Competition and Consumer Law

- 8.3.1 The AEC Blueprint 2025 includes in the key elements of a competitive, innovative and dynamic ASEAN both competition policy and consumer protection policy. Following the discussion on the need for an effective competition policy, the Blueprint calls for “comprehensive and well-functioning national and regional consumer protection systems enforced through effective legislation, redress mechanisms and public awareness” (B2, paragraph 28).
- 8.3.2 Some AMS have chosen to combine the mandate for competition and consumer policy in the one agency. Other AMS have responsibility for these two policy areas in different agencies, either under the same or different ministries.
- 8.3.3 Competition and consumer policies can be regarded as two sides of the same coin. Competition policy seeks to address the consequences of market power that may increase prices and reduce choices for consumers. On the other hand, consumer policy seeks to prohibit conduct that prevents consumers from making fully informed decisions<sup>21</sup>.
- 8.3.4 Coordination between those responsible for enforcement of competition and consumer laws and policies will be essential to ensuring economic growth in the region and meeting the goals of AEC 2025. In times of crisis, such as during the Covid-19 pandemic, complaints from consumers highlight potential areas of concern in the market which could require action from both a competition and consumer perspective. Increased communication and cooperation between those responsible for these policy areas will ensure the most appropriate way of responding to the concerns can be determined.

Even where competition and consumer policies are administered through different agencies, coordination can be achieved through:

- a) jointly advising government on policies that impact on competition and consumer laws and enforcement;
- b) staff exchanges between the different agencies or within the different disciplines within the same agency (where it exists);
- c) completing joint market studies that look at both the demand (consumer) and supply (competition) side of the market;
- d) getting the consumer agency involved in the process of policy formulation

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<sup>21</sup> Caron Beaton-Wells, *Interface between competition and consumer protection policies*, Policy Digest 7, ASEAN-Australia Development Cooperation Program Phase II.

## Chapter 9: Balancing Sectoral Regulation with National Competition Policy

### 9.1 Role of competition regulator and sector regulator

- 9.1.1 The need for sector-specific regulation generally arises in cases of natural monopolies such as infrastructure service industries (water, energy and telecommunications). These market failures require specific intervention to ensure that consumers are protected.
- 9.1.2 Sector specific regulation may comprise technical regulation which is generally regarded as ex-ante (such as setting and monitoring product and process standards so as to ensure compatibility as well as to address privacy, safety and environmental protection), access regulation (ensuring non-discriminatory access to necessary inputs such as network infrastructures), economic regulation (to control terms of sale, granting and policing licenses, oversight over advertising) and competition protection (controlling anti-competitive conduct and mergers).
- 9.1.3 In contrast, competition regulators are tasked with ensuring markets are functioning efficiently and distortions in the markets are addressed through the enforcement of a competition law (ex post).
- 9.1.4 While the regulators commonly have different regulatory mandates, they share a common goal of protecting and enhancing social/economic welfare. Yet they have different legislative mandates and their outlook regarding competition matters may be different. For this reason, the risks of inconsistent application of CPL should be managed.

### 9.2 Addressing the risk of overlapping jurisdictions

- 9.2.1 Where there are overlapping jurisdictions (among the AMS there are a number of jurisdictions which have overlapping powers) there are a number of approaches which can be used to ensure policy coherence between the two authorities. These are<sup>22</sup>:-
- (a) Allowing the competition authority to deal with competition law issues such as prohibition of anti-competitive practices and merger control while the sector specific authority deals with technical and economic regulation;
  - (b) Combining technical and economic regulation with some or all traditional competition law aspects in the sector specific regulation;
  - (c) Combining technical and economic regulation with some or all traditional competition law aspects in the sector specific regulation but ensuring the

<sup>22</sup> [https://unctad.org/en/Docs/trbpcconf7L7\\_en.pdf](https://unctad.org/en/Docs/trbpcconf7L7_en.pdf)

sector regulator performs its function in coordination with the competition authority, which means any action taken by the sector regulator must be done together with the competition regulator;

- (d) Separating technical regulation and economic regulation whereby the former is under the jurisdiction of the sector regulator while the latter comes under the jurisdiction of the competition regulator.

9.2.2 Table 4 below lists the sector specific regulatory bodies with competition enforcement powers among the AMS. Some have concurrent powers whilst others have exclusive powers.

**Table 4: Regulatory Authorities in the AMS with competition enforcement powers**

Jurisdiction	Sector specific Regulatory Authorities with competition enforcement powers	Numbers
<b>Brunei Darussalam</b>	None	None
<b>Cambodia</b>	None	None
<b>Indonesia</b>	None	None
<b>Lao PDR</b>	Sector specific authorities have powers to regulate disruptive behaviours. These may include anticompetitive behaviours but so far there is no precedent	None
<b>Malaysia</b>	Yes	3
<b>Myanmar</b>	Yes	1
<b>Philippines</b>	Yes	2
<b>Singapore</b>	Yes	3
<b>Thailand</b>	Yes	2
<b>Vietnam</b>	Yes	2

*Source: Handbook on Competition Policy and Law in ASEAN for Business 2017. Updated 2020*

9.2.3 There are a number of AMS which have allowed the sector regulators to maintain their competition enforcement powers. In this case, channels of consultation, coordination or informal arrangements for the purposes of engagement and consistent application of competition functions across all the sectors have been established. AMS may be required to strike the right balance between sector-specific rules and competition law, in order to avoid conflicts of laws.

9.2.4 The competition authority may also establish a regular inter-agency forum or platform with the relevant stakeholders to enable the authority and sector-specific regulators to work together. For example Singapore has established a



Community of Practice for Competition and Economic Regulations (COPCOMER) while Malaysia has the Special Committee Meeting on Competition which meets biannually and comprises members of all sector regulators.

9.2.5 The inter-agency forum or platform can:

- a) ensure that best practices and expertise are shared between the competition authority and the sector-specific regulators;
- b) create a programme of work to coordinate all concurrent functions of the competition authority and sector-specific regulators with a view to ensuring that the application of all of these functions is consistent and reflects best practice (e.g., allocating responsibility for dealing with particular complaints);
- c) determine whether specific inquiries would be best conducted by a joint team in relevant cases; and
- d) reduce the risk of divergent interpretations between regulators and the potential for forum shopping.

9.2.6 Memoranda of Understanding (MoU) and Memoranda of Agreements (MoA) can also be signed with sector regulators as a form of bilateral agency arrangements. These will contain provisions which will allow both parties to enter into discussions to resolve any potential conflicts or deal with cases which may affect the jurisdictions of either party. To date, the MyCC has signed an MoU with the Central Bank of Malaysia, the PCC has signed 12 MoAs with its sector regulators since its establishment, and the ICC has signed 18 MoUs with its ministries and sector regulators.

### **9.3 Advocating to Sector Regulators**

9.3.1 Competition authorities should seek to engage with sectoral regulators at an early stage, putting in place formal or informal channels of communication that allow for exchange of information on a regular basis and technical assistance.

9.3.2 Open and active dialogues between the two agencies on a regular basis will help build consensus for competition principles.

9.3.3 The competition authority must get involved in the legislative process whereby opportunities to comment on draft regulation or to submit an opinion on proposed guidelines, reforms and projects are available.

9.3.4 Linking advocacy and enforcement activities is an important and effective way to avoid strong opposition from sector regulators. For example, if there is a potential merger in a sector which is regulated, the competition authority could provide its assessment with regard to the effect on competition in the market.

9.3.5 Where there are training programmes and other advocacy activities such as conferences/seminars/workshops and discussions on the interface between

competition regulation and sector regulation, the competition authority should engage sector regulators to enable them to have a clearer and deeper understanding of the overlapping issues.

*When advocating to sector regulators, the AMS may want to consider the following:*

- a) Where there remain concurrent jurisdictions with other sector regulators, competition authorities that have not established formal inter agency platforms may want to do so, in order to have a systematic approach towards dealing with concurrent competition issues.*
- b) Competition authorities may also want to consider having bilateral arrangements in the form of MoUs or MoAs which can contain clauses on how to deal with cross cutting or overlapping competition issues.*
- c) Cooperation between regulators and competition authorities is important and AMS are recommended to foster a consistent application of competition rules and to ensure a common regulatory strategy based on competition law principles.*
- d) Have a constant dialogue between the competition authority and regulators in order to get the balance right as both regulators are regarded as parallel and not competing processes. For example, Singapore established an inter-agency platform for government agencies.*
- e) The AMS may want to consider the approaches listed in para 9.2.1 above when discussing amendments to their laws. Most countries use a combination of the approaches.*

## Chapter 10: Advocacy and Outreach

### 10.1 Advocacy

10.1.1 The *Toolkit for Competition Advocacy for ASEAN* is a comprehensive guide for AMS with practical guidance, tools and templates to develop and deliver advocacy activities for CPL. These Guidelines supplement the material in the Toolkit.

10.1.2 The ICN's definition of advocacy is:

*“Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition”.*

10.1.3 The ICN recognises that the first part of the definition covers practically all activities of the competition authority that are not related to enforcement. The second part defines two main branches of advocacy:

- a) activities directed at other public authorities in charge of regulation or rule making; and
- b) activities directed at all constituencies of the society with the aim of raising their awareness of the benefits of competition and of the role competition policy can play in the promotion and protection of competition.

### 10.2 Achieving the Objectives of Competition Policy and Law

10.2.1 Competition authorities are in a position to act proactively to ensure government policies which are anti-competitive in nature are not introduced or are eliminated. In addition, competition authorities can provide advisory services on national needs and policies related to competition matters.

10.2.2 Competition advocacy is seen as a soft power in promoting competition and liberalisation measures to improve the performance of market based economies. In particular, regulatory barriers to competition resulting from economic and administrative regulation should be subjected to a transparent review process prior to adoption. This should include an assessment by the competition authority from a competition perspective.

10.2.3 Participation in the legislative or regulatory process is seen as the most important component of competition advocacy as it has a direct impact on the competitive landscape. When a competition authority is mandated with these

powers, it is important to ensure that it is used whenever necessary and effectively in interventions.

- 10.2.4 AMS should also use advocacy and outreach as an effective means for achieving the objectives of competition policy by educating key stakeholders. These will include businesses, legal profession, judges, public prosecutors, other government agencies, academia, civil societies and consumers. This helps to create a culture of compliance. Effective use of such programmes can yield significant compliance and deterrence benefits and help competition authorities determine the degree of priority of cases, and manage its enforcement costs, e.g., by confining litigation resources to the prosecution of priority cases.
- 10.2.5 Building a culture of competition should be the first task for a newly established institution, while ensuring the culture of competition is deeply embedded in society will be the continuing task for established institutions.
- 10.2.6 While most AMS have the mandate to carry out advocacy activities explicitly stated in their respective laws, the definition by ICN above in paragraph 10.1.2 means that even without an explicit mandate, all the activities except for enforcement carried out by a competition authority amount to advocacy activities.

### **10.3 Resources required for Advocacy and Outreach**

- 10.3.1 The competition authorities could utilise the talents of specialist legal and economic staff with communications, marketing and media relations specialists are needed to assist in the writing of guidelines, media releases and decisions. These documents should be made publicly available, e.g., in pamphlets, websites, in order to garner maximum publicity and outreach.
- 10.3.2 Targeted and specific articles/information booklets/guidelines and other publications which meet the needs of various sectors of stakeholders can also be produced.
- 10.3.3 In the early years of its existence, the competition authority will not be able to make itself available to all requests for briefings and engagements on the law. The 'Train the Trainers' methodology will allow business associations, chambers and other similar organisations to be engaged in training so as to enable them to carry out training courses for their members.
- 10.3.4 Sufficient staff and budget to carry out effective advocacy campaigns and activities is needed.

## 10.4 Advocating to Government

- 10.4.1 Government refers to the three branches of government, namely executive, legislature and judiciary. Assistance and advice about competition matters can be provided to all three branches. Government policies cover all types of economic policies as well as regulations which have a tendency to restrict markets. Government action may, unintentionally or otherwise, have an adverse effect on competition in a variety of ways.
- 10.4.2 Advocacy activities to government should clarify and explain the advantages of pro-market reforms and that competition law is a cornerstone of overall economic policy. Regulatory capture, domestic barriers to international trade, prioritisation of industrial policies which can lead to more concentration and less competition, granting exclusive rights and concessions where open market competition can be introduced as well as procurement policies which hinder open and transparent bidding can all contribute to a market which is not competitive.
- 10.4.3 Where there is a substantial distinction between the central or federal government level and the regional, municipal or local government level, advocacy efforts must similarly address the activities of all divisions of government. This is so as to avoid, for example, the re-imposition by local government of restraints eliminated from central government regulation.
- 10.4.4 These problems may have to be dealt with in a strategic manner so as not to be authoritative in the approach. High quality policy advice, timing of provision of advice, being impartial when giving advice, adding value and analysis to an issue being discussed are some of the ways where advocacy can result in a positive outcome for both the competition authority as well as the government.

*When advocating to Government, the AMS may want to consider the following:*

- a) Continuously advocate to other government entities, the judicial system, economic agents and the public at large on the benefits of competition and the role CPL can play in promoting and protecting welfare enhancing competition wherever possible.*
- b) Have continuous engagement with government entities to ensure timely advice is given when new policies and regulations are being drafted.*
- c) Identify and establish effective and frequent channels of communication*
- d) New and young competition authorities must reach out and make policymakers aware of the possible synergies and/or tensions that may arise from certain policy measures, including, but not limited to, the creation and/or protection of national champions.*

## 10.5 Advocating to Judiciary

- 10.5.1 Competition advocacy with regard to the judicial branch is quite limited and restricted to the provision of training to judges in competition law and economics, and the submission of amicus curiae briefs in cases concerning significant competition issues. Since competition law is complex in nature and requires in-depth understanding, it is crucial to provide judges with training on the substantive provisions of competition law. More information is available in the *Toolkit for Competition Advocacy for ASEAN*.
- 10.5.2 The Competition Primers for ASEAN Judges<sup>23</sup> are also available and aims to provide practical and informative guides for matters relevant to CPL including the treatment of circumstantial evidence and economics for judges.

## 10.6 Advocating to Business

- 10.6.1 To inspire a fair competition culture and promote compliance, AMS should consider the development and publication of guidance to businesses to provide clarity, transparency and certainty to the market participants on how the prohibitions, exemptions and other elements (like unfair trade practices) in the competition law will be enforced. Guidance could be provided both in the form of “soft law” (e.g., guidelines on the application of competition law) and by means of handbooks or other similar publications which do not constitute statements of law. The guidance to businesses should be regularly updated and be easily accessible to the public.
- 10.6.2 A number of more mature competition agencies in the region have published guidelines and publications that are available on their respective web sites. These could be used as precedents. However, each AMS should ensure that any publications which they produce reflect their laws and business culture.
- 10.6.3 Businesses are a key stakeholder in the competition eco-system. They can become partners in a competition agency’s enforcement and advocacy initiatives. Communications between the two can also help raise the profile of CPL and promote compliance with the law.
- 10.6.4 Understanding businesses and helping them understand the law are key to the successful implementation of the law. Regular communication and open channels of communication can help develop trust and good relationships.
- 10.6.5 AMS may want to seek some guidance from ICN’s Advocacy Working Group Benefit’s Project Explaining the Benefits of Competition to Businesses<sup>24</sup> which offers tips for effectively carrying out advocacy activities when planning such activities.

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<sup>23</sup> [https://asean.org/?static\\_post=competition-primers-asean-judges](https://asean.org/?static_post=competition-primers-asean-judges)

<sup>24</sup> [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_ExplainingBenefitstoBuisnesses.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_ExplainingBenefitstoBuisnesses.pdf)

10.6.6 The *Competition Compliance Toolkit for Businesses in ASEAN*<sup>25</sup> is a useful reference document for businesses. The competition authorities should encourage the business community to refer to it when developing compliance toolkits or frameworks for their respective organisations.

## 10.7 Advocating to Consumers

10.7.1 Consumers are key to building up a competition culture. They must be made aware of the substantive prohibitions, relevant complaint and redress mechanisms available under the jurisdiction of the competition authority.

10.7.2 Easily understandable materials that explain the law and its benefits, maintaining effective and understandable websites that explain their mandate to the general public in simple terms, partnerships with radio and television, showcasing particular enforcement successes, are some of the ways where the competition authority can build the relationship with consumers.

## 10.8 Communication Strategies

10.8.1 An effective communication strategy is a powerful tool for a competition authority as it will ensure that the advocacy efforts undertaken by the authority bear fruit. Harnessing support for the efforts will mean ensuring sufficient publicity as well as pitching the campaign appropriately. A more positive and less antagonistic approach will bear fruits. The use of different forms of media will ensure that competition culture in the society is established, maintained and promoted. AMSs may want to refer to section 2 of the *Toolkit for Competition Advocacy for ASEAN* for further guidance on drawing up strategies for communication.

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<sup>25</sup> [https://asean-competition.org/file/post\\_image/Competition%20Compliance%20Toolkit%20for%20Businesses%20in%20ASEAN.pdf](https://asean-competition.org/file/post_image/Competition%20Compliance%20Toolkit%20for%20Businesses%20in%20ASEAN.pdf)

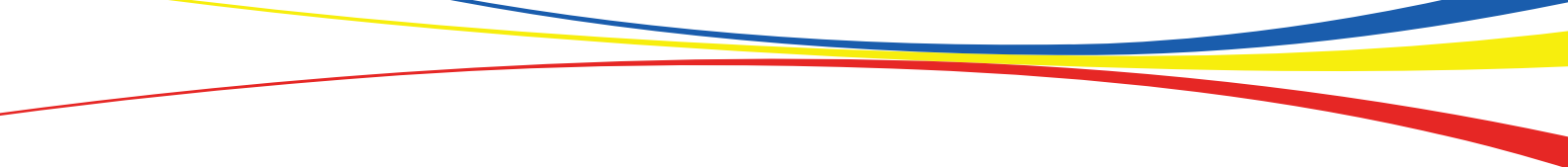
*When designing advocacy activities, the AMS may want to consider the following:*

- a) An Advocacy Strategy plan will be helpful to manage the advocacy activities as well as the resources needed for the agency. The plan can cover a period of 1 – 3 years*
- b) Exercise good judgement in selecting advocacy activities/projects and this should be based on how much economic impact it would have, political viability and mileage, uses limited resources and has a reasonably good chance of success.*
- c) Evaluation of effectiveness of advocacy activities will be useful. The evaluation can take the form of questionnaires or surveys completed at the end of each advocacy activity and/or undertaken in a wider manner. For example, Singapore conducts a biannual Stakeholders' Perception Survey while the Philippines conducts an annual survey.*


## **10.9 Interaction between Advocacy and Enforcement**

- 10.9.1 The focus of new agencies is usually on advocacy activities as the authority needs to educate its stakeholders of the newly implemented law and its implications. Investigations which result in positive outcomes make good and convincing material for advocacy events. For example, one AMS had to deal with a merger issue even when it was in its very early stage of setting up the institution and the merger guidelines were still not drawn up yet. Nevertheless, it had to intervene as the merger had several repercussions and impact on some stakeholders.
- 10.9.2 Young authorities would have to continue with advocacy activities as awareness of the law and its implication may still be low. The more mature agencies in AMS are still conducting advocacy events but are more targeted. For example Singapore is adopting new strategies which are more targeted, and Indonesia designs specific advocacy programmes based on the priorities of the Commission.
- 10.9.3 Advocacy and Enforcement are mutually reinforcing and complement each other. Competition advocacy should not replace enforcement even in part, and vice versa—the full implementation of competition rules and their enforcement cannot be achieved without successful advocacy. In many ways these activities are interdependent and complementary.
- 10.9.4 Constant and continuous efforts are needed throughout the lifespan of the institution. For example, the Australian Consumer and Competition Commission in spite of being in existence for more than 40 years, is still carrying out advocacy activities to continue educating and reminding its stakeholders on the implications of breaching the law.

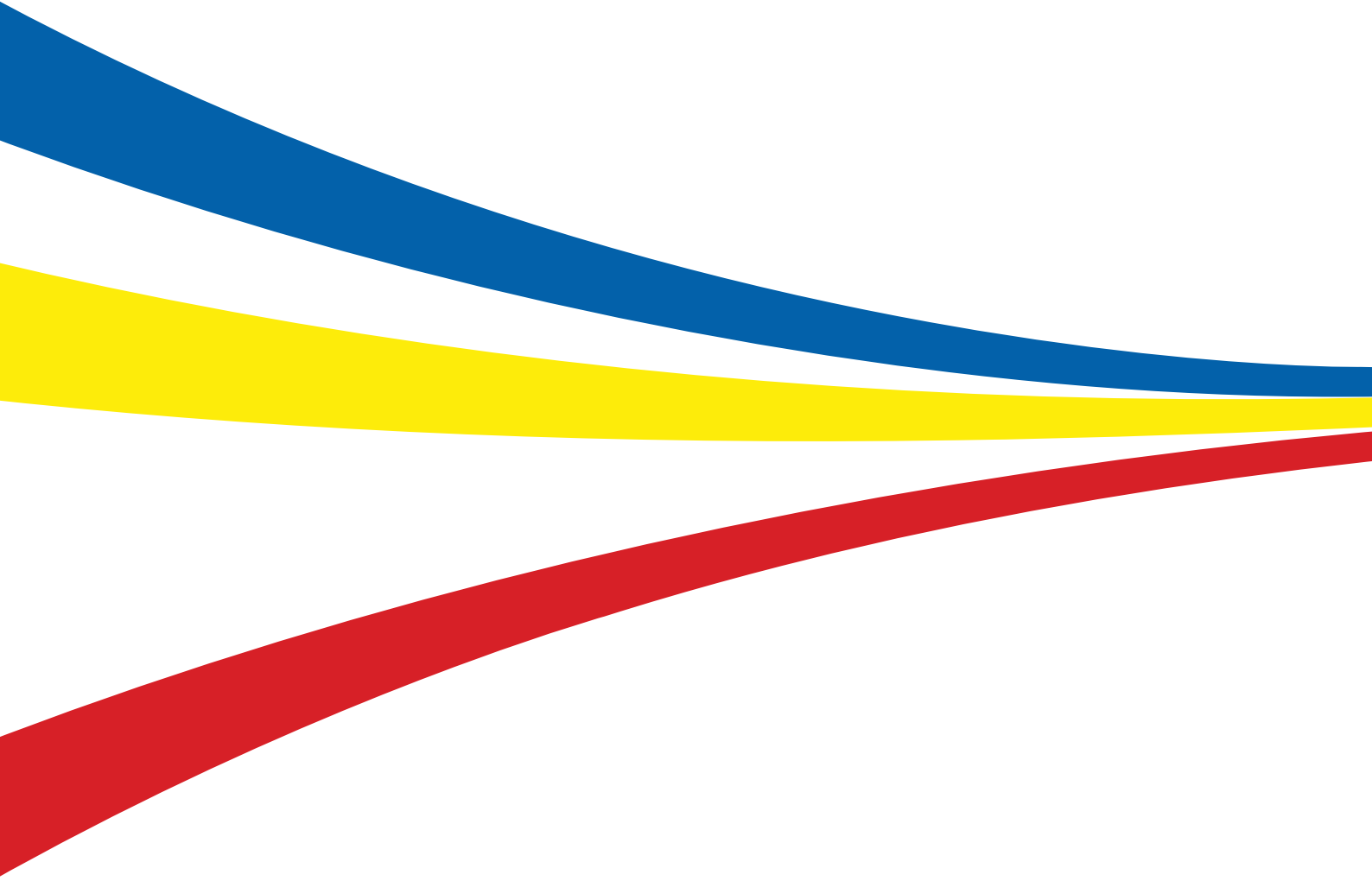




*AMSs may want to consider the balance between focussing on advocacy and enforcing the law as they progress and allocate sufficient resources, both human and financial appropriately. Selecting and pursuing cases which have impact on consumers will be imperative for the authority which will then enhance its advocacy activities.*

PART IV 

CAPACITY DEVELOPMENT



## PART IV: CAPACITY DEVELOPMENT

### Chapter 11: Technical Assistance and Capacity Building

#### 11.1 Strengthening Capacities of Competition Authorities in ASEAN

11.1.1 One of the characteristics and elements of the AEC Blueprint 2025 is to have a competitive, innovative and dynamic ASEAN. The key elements include having an effective competition policy with one of the strategic measures being to strengthen capacities of competition-related agencies in the AMS by establishing and implementing institutional mechanisms necessary for effective enforcement of national competition laws, including comprehensive technical assistance and capacity building.

#### 11.2 Guiding Principles on Technical Assistance and Capacity Building

- a) Ensure that the recipient countries are in a position to influence the outcome of the initiatives so that their needs and interests are met and acquire a sense of ownership in the resulting process.<sup>26</sup>
- b) Map out a detailed local needs' analysis, addressing the most pressing needs of the AMS first.
- c) Design the programmes based on the particular features of the recipient competition authority.
- d) Involve other competition authorities, both international and regional as it will help improve the quality or effectiveness of technical assistance.
- e) Involvement of other agencies within a country to introduce them to principles of competition law and policy which will assist the competition authority when carrying out their mandate. For example, if there is a conference or seminar being conducted in the country, invitations to the central agencies like the Economic Planning Ministries (for other development policies), the Finance Ministries (for procurement issues) or the agencies which deals with recruitment into the public service (for recruitment and retention policies).
- f) Programmes should be tailored to (and proportionate to) the level of CPL development of the beneficiaries, in order to facilitate the beneficiaries' capacity to assimilate new programmes and procedures.
- g) Follow through programmes are essential as it helps in building the expertise, knowledge and professionalism of the individual.

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<sup>26</sup> Technical assistance and capacity building, lessons learned from experiences and the way forward Dr. A. Rohan Perera, P.C., Legal Advisor Ministry of Foreign Affairs, Sri Lanka  
<https://www.oecd.org/daf/inv/internationalinvestmentagreements/36055317.pdf>

## 11.3 Meeting Needs through Technical Assistance & Capacity Building Programmes

11.3.1 The needs of the AMS and its competition authorities that could be met through technical assistance and capacity building include:

### *Training on competition law*

- a) Building core knowledge of competition law and economics for Commission members, staff, media and relevant line Ministry staff.
- b) Building technical (legal, economic and investigative) skills necessary for the establishment and implementation of national competition law. For example, technical assistance to build skills in legislative drafting, formulating guidelines and resources needed to promote a culture of compliance, investigative techniques, economics skills and building capacity of judiciary to handle competition cases.
- c) Improving the capacity to advocate to government officers and the general public on the objectives, scope and benefits of CPL and to foster a culture of competition: For example, building capacity to conduct a detailed assessment of the net benefits that are likely to be derived from a national competition policy regime in conjunction with other existing policy instruments; providing advice on how competition policy can help achieve other government policy objectives and conducting effective outreach sessions targeting appropriate audiences.
- d) Cross training for lawyers and economists so that each understands the principles of competition law and economic issues, arguments and the evidence required to establish an infringement of competition law.
- e) Assistance on practical, day-to-day matters relating to running a competition authority and investigations. Ensure that training programmes are designed in keeping with the skill levels necessary for discharging the job functions.

### *Training for Judges<sup>27</sup>:*

- a) The role for the judiciary across ASEAN varies with some jurisdictions requiring judges to make first instance decisions (e.g. Myanmar), some hearing appeals from decisions from the competition authority (e.g. Philippines, Indonesia) and others hearing appeals from specialist tribunals (e.g. Malaysia). In all cases, judges will need to understand the competition and economic principles.
- b) Targeting training may be challenging in jurisdictions where the general courts hear competition cases as the number of judges to be trained may be substantial. However, training could be achieved through:
  - (i) a local training school for the judiciary (if available, for example in Malaysia there is the Judicial and Legal Training Institute, in Indonesia it is the Judicial Training Centre while in the Philippines it is the Judicial Academy) where the trainers will be trained for on-demand training.

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<sup>27</sup> Study on judges' training needs in the field of European competition law  
<https://ec.europa.eu/competition/publications/reports/kd0416407enn-esen.pdf>

- (ii) targeting training for judges dealing with judicial review of the NCA (this would need some discussions and collaboration with the body in charge of the administration of the judiciary)

*Training on economic analysis<sup>28</sup>:*

- a) Since economics underpins competition law, this area of training for the legal profession and the judiciary is important especially when the need arises for this segment of the profession to deal with competition cases. UNCTAD and OECD has carried out some training programmes for the judiciary in a number of economies. AMS may want to liaise with these agencies to carry out such training programmes.
- b) Training on market analysis. Understanding how the market works helps in assisting the competition agency enforce the law effectively. The Trainers' Guide to Market Studies<sup>29</sup> available on the ASEAN website provides a useful primer on how to conduct (competition) market studies.
- c) Providing training for newer agencies which have yet to acquire the knowledge and the tools and data which more mature agencies would have is a good investment. ICN online training modules are available but a face to face training, nationally or regionally provides additional opportunities for deeper discussions and interaction between authorities.
- d) Basic concepts in competition economics such as market definition and unilateral and co-ordinated effects of mergers should be covered.

*Soft Skills*

- a) While building capacity on investigation techniques and economic analysis are the focus of most capacity building programmes, attention should also be given to soft skills such as personal effectiveness, leadership skills, communication skills, teamwork, critical thinking, social skills, adaptability and interpersonal communication which are important for both entry level staff and investigators and for senior management.
- b) These skills are important for any organisation to help it progress, deliver results successfully, manage projects smoothly and build relationships both within and outside the organisation.
- c) Training for translators is also important so that the meaning of any translated documents is not lost during the process. This area of training is particularly important for countries where the native language is other than English as many competition law terms do not have equivalents in non-English languages.

*Human Resource Management and Knowledge Management*

- a) "Knowledge management is the acquisition and use of resources to create an environment in which information is accessible to individuals and in which individuals acquire, share and use that information to develop their own knowledge and are encouraged and enabled to apply their knowledge for the benefit of the organization."<sup>30</sup>

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<sup>28</sup> ICN Training on Demand <https://www.internationalcompetitionnetwork.org/training/>

<sup>29</sup> [https://asean-competition.org/file/post\\_image/Trainers%20Guide%20to%20Market%20Studies.pdf](https://asean-competition.org/file/post_image/Trainers%20Guide%20to%20Market%20Studies.pdf)

<sup>30</sup> Harman C and Brelade S (2007). Managing human resources in the knowledge economy. United Nations Seventh Global Forum on Reinventing Government. June.

- b) There is a growing trend internationally to use an integrative approach between human resource management and knowledge management, where one reinforces and supports the other in enhancing organisational effectiveness and performance. Two of the competition authorities in the AMS have successfully implemented this approach while others have a strong interface between the two. However, as most agencies in the AMS are relatively new, this integrated approach may take a longer time to implement as the key will be to have HRM and KM strategies that will result in better organisational learning, organisational innovation and knowledge management capability. All three will lead to better organisational performance.
- c) UNCTAD<sup>31</sup> identified knowledge-management and human-resource issues as part of the pillars of an effective competition agency and states that the effectiveness of a competition agency depends on the appropriate use of internal resources. Further, the design of the human resource functions and other capabilities of the agency influence the effectiveness of the agency's decisions and its ability to fulfil its mandate.
- d) The *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN*<sup>32</sup> recommends that competition authorities set up a knowledge management system. In the context of staff turnover, it is important that as much individual staff expertise (such as know-how and experience) is turned into an accessible, institutional asset now and in the future. Expertise acquired in previous cases should be available to other current and future staff. This institutional knowledge management requires the development of tools facilitating easy access to precedents (in particular by junior staff), while ensuring confidentiality of information where necessary. The Guidelines recommend the following features for a knowledge management system:
- (i) an Intranet;
  - (ii) electronic document management and document-flow systems (all the case documents are entered and registered);
  - (iii) specific applications to facilitate storing, retrieving and sharing large volumes of data (e.g., in the framework of an investigation or for merger control purposes).
- e) Kovacic<sup>33</sup> observed that in a number of new competition authorities, the first generation of leaders and staff have moved on to private sector jobs in which they appear before the competition authority or the courts on behalf of business clients. As personnel can change frequently, it is therefore important to develop manuals to ensure that valuable institutional know-how does not "leave the competition authority" with management and staff resignations.
- f) Some of the competition authorities in the AMS have already established some form of a knowledge management system which assists in the retrieval of information and data. AMS which have not introduced a knowledge management system may

<sup>31</sup> Foundations of an effective competition agency, available at [https://unctad.org/meetings/en/SessionalDocuments/ciclpd15-rev1\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpd15-rev1_en.pdf)

<sup>32</sup> Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN [https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version\\_revP5.pd](https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pd)

<sup>33</sup> William E Kovacic (1997) Getting Started: Creating New Competition Policy Institutions in Transition Economies <https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/>

want to consider implementing one as it assists in capturing institutional memory and demonstrates a step towards digitalisation.

## 11.4 Key Practices

11.4.1 In managing capacity building programmes for staff of the competition authority, AMS may consider the following guidelines to ensure progressive and continuous programmes:

- a) Having a dedicated unit or section (which is usually under the Human Resource Development division) with the responsibility of ensuring training and capacity building will ensure continuity, effectiveness and organisation of training and capacity building programmes. For authorities which are under the purview of a Federal Ministry, dedicated personnel could be assigned for this role.
- b) Preparation of a training calendar which will help in facilitating an orderly capacity building programme throughout the financial year.
- c) Identification of training needs which will assist in filling the gaps in training and capacity building. Both heads of departments and the employees themselves could identify the types of training needed as well as the benefits.
- d) Use of both structured and unstructured sessions which could include internal discussions on recent international developments, publications and case studies. These sessions would help build familiarity with literature and international practices, as well as support transfer of knowledge amongst staff.
- e) Supporting learning outside the authority where external online or part-time programmes are utilised to support staff in acquiring subject specific skills. Other learning opportunities could arise through interaction with international counterparts and organisations, for example, opportunities to share experiences or organise joint training events.
- f) Evaluating effectiveness of programmes as it will provide feedback on the outcome of a programme and needs for improvement, if any. This could be conducted through questionnaires or informal discussions and should be discussed with the training provider.

11.4.2 The ICN has identified practices that have been found to be useful across agencies<sup>34</sup> which the AMS could use as a useful guide when determining training needs<sup>35</sup>.

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<sup>34</sup> International Competition Network, Agency Effectiveness Working Group Project, Competition Agency Staff Training Programmes, [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG\\_APMTraining.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMTraining.pdf)

<sup>35</sup> See [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG\\_APMTraining.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMTraining.pdf)

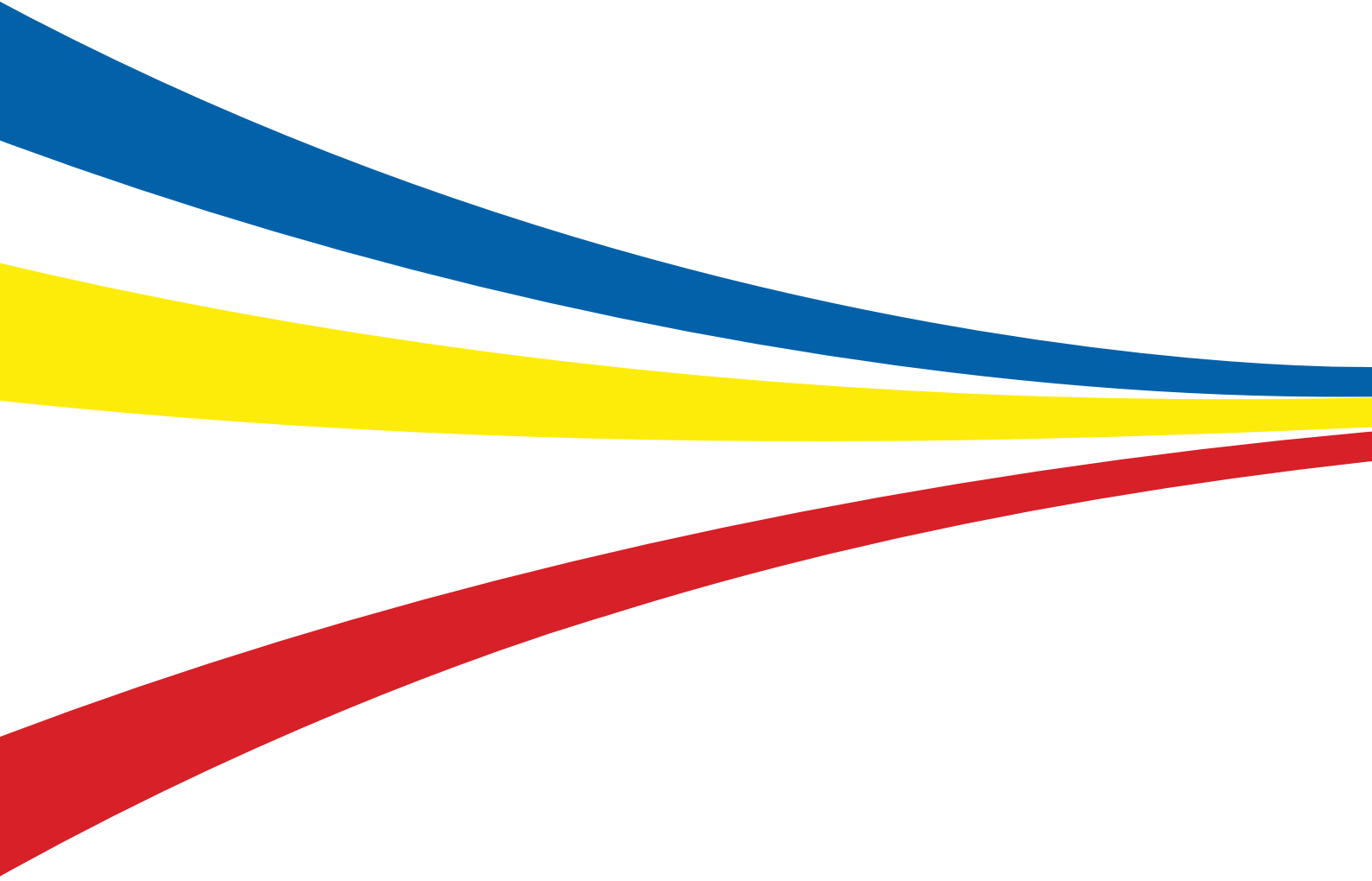
*When designing capacity building programs, the AMS may want to consider the following:*

- a) Training programmes need to be continuous and progressive to ensure an effective agency. This will cover new employees, periodic specific training, progressive training and on the job training among others.*
- b) Training must be categorised into general training (competition law, competition economics) and practical training (case studies)*
- c) in setting up filing systems or knowledge management systems. The central agency which recruits staff for the government departments could assist in human AMS may consider engaging internal agencies within their own country to assist in training officers of the competition authority especially in investigative techniques. For example, the Police Force, the Attorney General's Office or Forensics Departments. Other departments such as the National Library could assist resource management.*
- d) Identify and collaborate with national universities who can assist in capacity building as well as provide research needs for the CAs*
- e) Local training colleges can be utilised to provide management training, for example Singapore utilises the Civil Service College for the areas of organisational excellence, strategic thinking, coaching, counselling and mentoring, and leadership development.*
- f) Newly established authorities may want to focus on basic training on competition law and economics for staff of the commission while young and mature organisations may want to identify specific areas of training for staff but retaining basic training for new recruits.*
- g) Young and new agencies may want to tap on the resources available in the mature organisations in the region if they are available.*



PART V 

COOPERATION



## PART V: COOPERATION

### Chapter 12: Regional Cooperation

#### 12.1 Regional Cooperation Objectives

- 12.1.1 The ASEAN Blueprint 2025 (2025 Blueprint) recognises that for ASEAN to be a competitive region with well-functioning markets, rules on competition need to be operational and effective.
- 12.1.2 Regional cooperation will be a key contributor to ensuring effective competition laws and policies across the ASEAN region. To this end, the Strategic Goals in the 2025 Blueprint specifically recognise the need to establish regional cooperation arrangements on competition policy and law to deal with cross-border transactions. The Strategic Goals also recognise the need to achieve greater harmonisation of competition policy and law in the ASEAN region.
- 12.1.3 Increased cooperation between the AMS will provide opportunities for competition authorities to meet regularly and exchange views and strategies not only on enforcement but other areas of the law. It will also assist in improving the mutual understanding of laws and practices across the region and overcoming challenges faced in cross-border investigations, which will benefit enforcement.
- 12.1.4 Achieving extensive regional cooperation will be a gradual process. Complex issues regarding differences in procedural issues (for example, merger threshold levels, sanctions, the protection of commercially sensitive information and differences in due process) will need to form part of ongoing dialogue. In addition, issues of national sovereignty, ethnic, religious and cultural diversity and current domestic political and economic systems will need to be taken into account.
- 12.1.5 The benefits of cooperation are clear and initial positive steps toward regional cooperation have already been taken. With cross border cases emerging in the region, cross border arrangements have materialised. For example, the Grab-Uber merger was investigated by several ASEAN competition authorities, namely the CCCS, the ICC, the MyCC, the PCC and the VCCA. This involved exchanges of information between authorities to assist them to investigate the case in their own jurisdictions.
- 12.1.6 At the bilateral level, the CCCS and the ICC concluded an MoU to facilitate cooperation on competition enforcement between the two agencies in August 2018.

## **12.2 Benefits of cooperation**

12.2.1 The benefits of cooperation on the implementation and enforcement of competition laws across the ASEAN region include:

- a) Promoting a culture of competition in the ASEAN region;
- b) Providing AMS competition authorities with an avenue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the ASEAN region;
- c) Building an effective legal framework to enforce competition policy against businesses that engage in cross-border business practices which restrict competition;
- d) Improving the efficiency and effectiveness of national competition authorities through the sharing and exchange of non-confidential information, knowledge and resources; and
- e) Developing agreements on the basic elements of a common framework for national competition policy within the ASEAN region.

12.2.2 A number of competition authorities within the AMS have included clauses in their legislation that expressly permits entry into cooperation agreements with any regulatory authority within their jurisdictions, as well as with any foreign competition agencies, to facilitate coordination, consistency and cooperation.

## **12.3 The ASEAN Experts Group on Competition (AEGC)**

12.3.1 The ASEAN Experts Group on Competition (AEGC) was endorsed by the ASEAN Economic Ministers in 2007 as the forum for discussing and coordinating competition policies, with the goal of promoting a healthy competitive environment in the ASEAN region.

12.3.2 The AEGC continues to play a fundamental role in facilitating regional cooperation. Relevant to cooperation, it:

- a) Exchanges information among AMS on competition issues such as amendments to laws, enforcement, and anti-competitive practices as well as new and emerging issues which impact on competition;
- b) Facilitates networking among officials responsible for competition issues in AMS;
- c) Deepens competition policy dialogue with relevant ASEAN agencies and sectoral bodies responsible for competition issues and enhance engagement with ASEAN dialogue partners and other trading partners;

- d) Strengthens cooperation towards an enhanced ability to address anti-competitive behaviours and agreements that have effects in more than one ASEAN jurisdiction.

#### **12.4 ASEAN Regional Cooperation Framework (ARCF)**

12.4.1 In 2018, the AMS endorsed the ASEAN Regional Cooperation Framework which sets out high level principles for cooperation between the competition authorities of the AMS. The ARCF is inclusive and non-binding.

12.4.2 Areas for potential cooperation are:

- a) Sharing general competition regulator information;
- b) Sharing case-related information, subject to confidentiality obligations;
- c) Technical assistance and capacity building;
- d) Cooperation in relation to enforcement of cross-border cases, subject to confidentiality obligations;
- e) Cooperation in relation to cross-border mergers, subject to confidentiality obligations.

12.4.3 Cooperation is recognised as being important for:

- a) Competition regulators as it will assist in ensuring consistent outcomes, and improve knowledge and understanding of laws in all ASEAN jurisdictions; and
- b) The business community as consistent outcomes across the region will create greater certainty for investment in the region.

12.4.4 The ARCF also recognises that varying stages of development, as well as resource constraints, have an impact on the readiness of the competition authorities across the AMS to cooperate. It may also be that some AMS cannot fully benefit from cooperation.

#### **12.5 ASEAN Competition Enforcers Network (ACEN)**

12.5.1 The ASEAN Competition Enforcers Network (ACEN) was established in 2018 as a key step towards regional cooperation in relation to merger and competition law enforcement.

12.5.2 The objectives of ACEN are:

- a. To bring together case handlers (in anti-trust and/or merger) from ASEAN competition authorities to discuss, and exchange views on best practices and experiences in international anti-trust and merger cases;
- b. To share best practices and learn modern and effective methods of investigation, prosecution/filing, and merger assessment;

- c. To build networks in a confidential environment that allows case handlers to discuss on-going challenges of cross-border cases;
- d. To share experiences on cross-border cooperation and provide updates on these activities to the AEGC;
- e. ~~To assist AEGC in developing a study on recommended procedures for joint investigation and decision on cross-border cases in ASEAN;~~
- f. To provide AEGC with regular updates on enforcement cooperation activities and merger developments;
- g. To assist AEGC in developing the capacity of their national competition authorities in anti-trust enforcement and merger analysis; and
- h. To engage non-ASEAN enforcers as appropriate to exchange best practices and build up extra-regional networking.

*In recognition of the success of the AEGC, ARCF and ACEN and the importance of ongoing cooperation between the competition authorities, the AMS should continue to discuss opportunities to enhance and expand existing cooperation mechanisms. Options could include:*

- a) developing protocols for the exchange of information between competition authorities.*
- b) entering into formal bilateral or multilateral agreements to facilitate not only the sharing of confidential information but to develop protocols for cooperation in cross-border merger and anti-trust enforcement.*
- c) encouraging informal cooperation through networking forums and voluntary peer reviews, between working members of the competition authorities.*
- d) signing Memoranda of Understanding or Memoranda of Agreement to facilitate cooperation in case-related matters.*

## Chapter 13: International Cooperation

### 13.1 International Cooperation Objectives

- 13.1.1 The increase in globalisation of businesses together with the increased number of competition authorities around the world has resulted in a rise in the need for international cooperation between competition agencies, particularly in relation to international cartels and mergers.
- 13.1.2 International cooperation may take many forms – formal and informal. At one end of the spectrum, competition agencies may informally cooperate by sharing experiences and views during bilateral meetings, capacity building activities and phone conversations; at the other end of the spectrum, formal cooperation may take place under specific bilateral cooperation agreements, with a range of cooperation initiatives in between.
- 13.1.3 AMS may wish to engage in both formal and informal cooperation arrangements with competition agencies outside the ASEAN region.

### 13.2 International Cooperation Principles

- 13.2.1 The Recommendation of the OECD Council concerning International Cooperation on Competition Investigation and Proceedings recommends a number of initiatives that will facilitate international cooperation. The AMS may wish to consider implementing some or all of these recommendations:
- a) Minimise direct or indirect obstacles to cooperation, for example, legislation or regulations that may restrict cooperation between competition agencies;
  - b) Provide transparent information regarding their substantive and procedural rules, including the treatment of confidential information. This enables other agencies to better understand ASEAN competition laws and could be achieved in guidelines published by the competition authority;
  - c) Seek to minimise inconsistencies in leniency programs that could adversely affect cooperation. As many AMS do not yet have published guidelines for their leniency programs, AMS may wish to align their leniency program with international best practices;
  - d) Consult with other competition agencies where it is believed that anti-competitive practices or mergers under investigation in other jurisdictions have an impact in its own jurisdiction;
  - e) Notify other competition agencies where an anti-competitive agreement or merger under investigation in its jurisdiction affects another jurisdiction;
  - f) Offer investigatory assistance, where possible, when requested by another competition authority. This assistance is offered on a voluntary basis, and subject to available resources;

- g) Endeavour to coordinate investigations where the agencies are investigating the same anti-competitive practice or merger, where the agencies agree that it is in their interests to do so.

### **13.3 Benefits of cooperation**

13.3.1 The benefits of cooperation with competition agencies outside the ASEAN region include:

- a) Raising awareness, knowledge and understanding of ASEAN competition laws outside the ASEAN region, as well as building awareness, knowledge and understanding of non-ASEAN competition laws within the region;
- b) Improving the efficiency of ASEAN/non-ASEAN cross-border investigations;
- c) Reducing the risk of inconsistent outcomes in investigations which can be harmful to business and ongoing investment;
- d) Drawing on experience of peers in the international environment and seeking assistance in investigation techniques;
- e) Facilitating convergence of laws and practice;
- f) Establishing a network of contacts with competition agencies outside the ASEAN region, which will enhance the ASEAN understanding and awareness of key international competition law developments and best practices; and
- g) Tapping into available funding for capacity building activities.

### **13.4 Involvement in International Competition Organisations**

13.4.1 The work of UNCTAD, the OECD and the ICN has been instrumental in developing cross-border cooperation on competition law and policy in the last few decades.

13.4.2 Wherever possible, AMS shall endeavour to participate in competition events supported by these organisations as a means of promoting awareness and understanding of its own competition law and attaining knowledge of current issues and international best practices.

### **13.5 Factors to be considered when Negotiating Free Trade Agreements (FTAs)**

13.5.1 An increasing number of FTAs include express competition related provisions or dedicated competition chapters.

13.5.2 AMSs with a history of cooperation with negotiating partners usually have a more comprehensive chapter with more substantive obligations, but most of the

AMSs have competition chapters which are confined to cooperative activities only.

- 13.5.3 When negotiating FTAs, AMSs will endeavour to include competition related provisions that support competition policy and the objective of creating a dynamic, competitive and innovative ASEAN region. This may include provisions that promote competition, adopt or maintain competition laws, regulate monopolies and SOEs, and establish competition cooperation and coordination mechanisms.
- 13.5.4 AMSs must also ensure that there is consistency between domestic rules, regulations and principles when negotiating clauses for the competition chapter.
- 13.5.5 Some of the common provisions which AMSs could include in their bilateral FTA negotiations would be transparency rules, consultations in the event that some disagreements arise, periodic review of the agreement and cooperation in developing technical and economic expertise. Provisions for dispute settlement mechanisms established under the agreement should not apply to a competition chapter mainly to ensure that the judgements arrived at by any competition authority is not challenged internationally.
- 13.5.6 AMSs should have the flexibility to make its own judgement on the best approach for developing competition provisions in a FTA that are in line with the developmental goals of their economy and which do not contradict with the overarching competition policy and law objectives of the ASEAN Economic Community.



## Chapter 14: Modalities for Cooperation

### 14.1 Foundations for Cooperation

- 14.1.1 The AEC Blueprint 2025 envisages a region which is highly integrated, cohesive, competitive, innovative and dynamic with enhanced connectivity and cooperation.
- 14.1.2 While the AMS have varying forms of competition laws and legal systems, the objective towards enforcing the law for the benefit of consumers and ensuring markets function efficiently for the benefit of the country is commonly shared.
- 14.1.3 The foundations for cooperation are premised upon common goals, objective, purpose or shared vision, and a mutual interest.
- 14.1.4 Among the competition authorities in the AMS, there will be many common goals including eliminating cross-border cartels, wanting to share (and gain) experience in investigations or market studies and establishing common platforms for the mutual exchange of ideas, knowledge and experience.
- 14.1.5 There will be areas of cooperation which may be complicated as they will involve consideration of domestic policies, such as exchange of confidential information or addressing multi-jurisdictional mergers which may be more focussed and require specific types of cooperation.

### 14.2 Cooperative mechanisms

- 14.2.1 Cooperation with other agencies can be achieved either internally (within each AMS) or between competition authorities across the region and internationally. Internal cooperation can be established with sector regulators or other government agencies which can assist the competition authority in achieving its objective.
  - 14.2.2 Cooperation can be achieved through formal or informal channels:
    - (i) Memoranda of Understanding;
    - (ii) Memoranda of Agreement;
    - (iii) Joint committees, working groups, taskforces on special issues relating to competition;
    - (iv) Joint market studies/Joint projects; and
    - (v) Informal exchange
- (i) *Memoranda of Understanding (MoU)*

An MOU is a nonbinding agreement between two or more parties outlining the terms and details of an understanding, including each parties' requirements and responsibilities. The MoU will usually contain the intention of the document, areas for cooperation, modes of addressing potential issues, the responsibilities of each party to the MOU and any financial implication that may arise. Cooperation with sector regulators is commonly undertaken through an MOU (see Chapter 9).

MoUs can be signed between two or more parties within the AMS. For example, when the competition authority wants to enter into a cooperation agreement with sector regulators that have competition enforcement powers, it will be important to include provisions that require parties to notify each other of potential infringements and cooperate if there are overlapping issues. MoUs can also be signed with other competition authorities within the AMS on a bilateral or multilateral basis to address enforcement cooperation as well as technical assistance and capacity building.

For example, the Australian Consumer and Competition Authority has signed a MoU with China to enhance cooperation in the areas of competition law and policy including enforcement. It has also signed a number of MoUs with other countries for similar cooperation activities. Similarly, amongst the AMS, CCCS has signed MoUs with ICC and also with the Competition Bureau of Canada to facilitate cooperation in the enforcement of competition (and consumer) issues.

(ii) *Memoranda of Agreement (MOA)*

A MOA is a written document describing a cooperative relationship between two parties. It is a legal document and therefore legally binding and describes the terms and details of the partnership agreement. A MOA is more formal than a verbal agreement, but less formal than a contract.

The PCC has signed several MOAs with some of their sector regulators which include provisions for the delineation of roles with respect to investigations of unfair business conduct, abuse of dominance and anti-competitive transactions in the respective sectors. These MOAs also provide for coordination and collaboration mechanisms such as sharing of information and coordinating investigation efforts.

(iii) *Joint committees, working groups, taskforces on special issues relating to competition*

Joint committees, working groups and taskforces can be useful platforms for cooperation when there is mutual interest. These platforms can be permanent or ad hoc, as and when the need arises. It is recommended that Terms of Reference are established to define the roles of each member, to outline composition of the committees, working groups or task forces, the decision making mechanisms and financing. These platforms help to pool and share resources.

The platforms can also either be established within the competition authority or within the region. The ASEAN Competition Enforcers Network is one such platform involving all AMS in the region.

Working groups/committees established within each competition authority are also useful to pool resources and knowledge. Members of the working groups/committees can be drawn also from available resources outside of the agency and this indirectly assists in establishing cooperation and also acts as an additional advocacy tool.

(iv) *Joint market studies/Joint projects*


AMS can also establish cooperation through joint market studies/joint projects addressing mutual interests arising from common issues/problems. These platforms must facilitate the recognition of respective decisions and also share financial resources. For example among the AMS, a joint market study could be undertaken on the pharmaceutical sector where the big pharmaceutical companies operate to establish if they are dominant and analyse competition and consumer issues which may warrant further investigation. Within a national economy, joint market studies can be carried out to study cross-cutting issues between the competition authority and other agencies.

(v) *Informal exchanges*

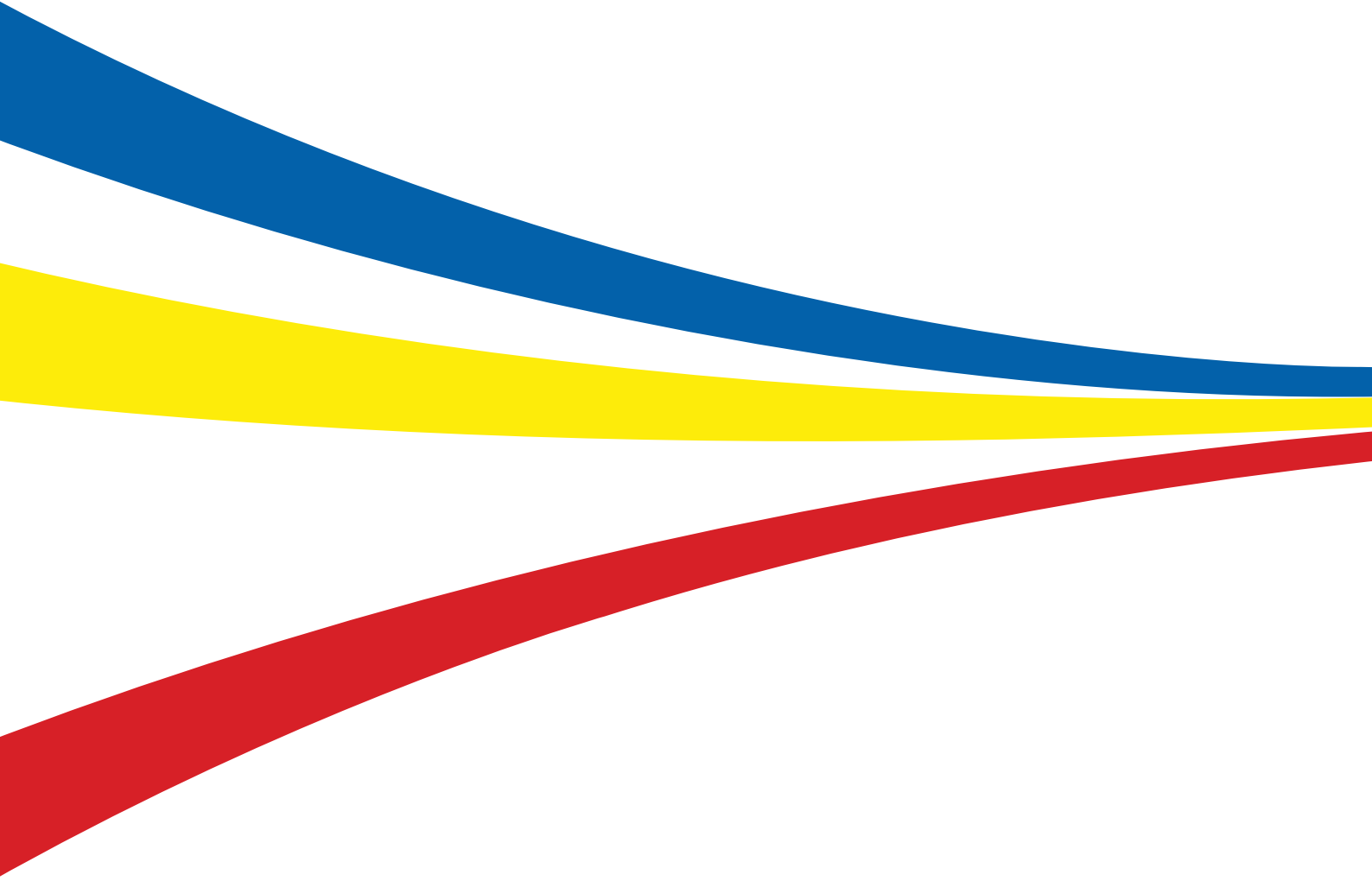
Cooperation in cross border anti-competitive cases can also be done on an informal basis. In this regard, informal exchanges or cooperation is defined as unofficial, casual, daily, friendly and unconstrained collaboration between competition agencies<sup>36</sup>. Networking during formal occasions can build up trust and close working relationships which can lead to informal agency relationships. Seeking information and guidance on general competition issues as well as on specific investigation issues can be achieved through such informal means (through phone calls or emails).

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<sup>36</sup> Informal cooperation among competition agencies in specific cases, Intergovernmental Group of Experts on Competition Law and Policy Fourteenth session Geneva, 8–10 July 2014, Note by the UNCTAD Secretariat [https://unctad.org/meetings/en/SessionalDocuments/ciclpd29\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf)

PART VI 

EMERGING TRENDS AND CHALLENGES



## PART VI: EMERGING TRENDS AND CHALLENGES

### Chapter 15: Responding to Current Issues

Competition law and policy needs to flexibly adapt to changing business and social environments. In recent years, changing circumstances in the global world have forced competition authorities to consider how CPL should apply and, in fact, whether it is adequate to respond. Areas that have been under discussion include the digital economy, the informal economy, the global financial crisis, and, most recently, the COVID-19 pandemic. Ideas for how the AMS may wish to continue approaching these difficult issues are set out in this Chapter.

#### 15.1 The Digital Economy

- 15.1.1 Digitalisation has reshaped competition in traditional markets and has led to the creation of many new ways of doing business. This has created challenges for competition law and policy. Platform-based business models, multi-sided markets, network effects, non-price competition and economies of scale, have all resulted in a questioning of whether existing competition tools are adequate. New forms of digital misconduct, such as algorithmic pricing, may also emerge. Further, high rates of investment and innovation in digital markets have led to rapid change and disruption in established, and often regulated, markets.
- 15.1.2 Recognising the difficulties inherent in defining the 'digital economy'; UNCTAD identified three main components of the digital economy:
- a) *Core aspects* which comprise fundamental innovations (semiconductors, processors), core technologies (computers, telecommunication devices) and enabling infrastructures (Internet and telecoms networks).
  - b) *Digital and information technology (IT) sectors*, which produce key products or services that rely on core digital technologies, including digital platforms, mobile applications and payment services. The digital economy is to a high degree affected by innovative services in these sectors, which are making a growing contribution to economies, as well as enabling potential spillover effects to other sectors.
  - c) *A wider set of digitalizing sectors*, which includes those where digital products and services are being increasingly used (e.g. for e-commerce). These components are being used in various ways as a basis for measuring the extent and impact of the digital economy.
- 15.1.3 Many of the mature and young competition authorities in AMS have already dealt with cases involving the digital economy and could share lessons learned with newly established authorities in the region. Recommendations emanating

from the more developed competition law jurisdictions could be applied by the AMS as follows<sup>37</sup>:

- a) The practices adopted by the technology companies touch upon some of the least developed aspects of competition law and economics, such as the relationship between innovation and competition, oligopoly competition, collective dominance, hub-and-spoke agreements, concerted practices and exploitative abuse. The AMS could engage the academia to undertake research in these areas in order to develop well informed policies to address these issues. AMS could consider completing market studies and market investigations. The Singapore competition authority uses market studies as one of the tools to monitor developments in the digital economy while the ICC has already completed a study on the digital economy in Indonesia. Policy papers have also been prepared by a number of other authorities for their internal reference.
- b) The issues of competition on digital markets are intertwined with issues of consumer protection. It is important to educate and empower consumers when dealing with the digital economy. Competition authorities in the AMS with consumer enforcement powers should make full use of them; those without should either seek to obtain them or to work with the agencies with these powers.

15.1.4 The *Handbook on E-commerce and Competition in ASEAN* provides reference for competition authorities when assessing anti-competitive conduct related to e-commerce.

## 15.2 The Informal Economy<sup>38</sup>

15.2.1 The informal economy refers to economic activity which is not fully compliant with laws and regulations. (In some cases, it can refer to economic activity which is itself illegal such as smuggling or selling illegal drugs). Businesses operating in the informal economy may fail to comply with business registration requirements, or rules and regulations related to taxation, labour, health and safety, product safety, intellectual property, environment, consumer, or sector specific laws. Some firms may operate in partial compliance with the law, for example by reporting and paying tax on some transactions, while allowing other transactions to go unreported.

15.2.2 All countries have an informal sector and it often comprises a substantial share of Gross Domestic Product and employment. The OECD estimates that the informal economy is large in many developing countries, often amounting to more than 50% of their GDP as compared to 15% in industrial countries. Trade between formal and informal firms can be significant and competition between

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<sup>37</sup> Akman, Pinar, *An Agenda for Competition Law and Policy in the Digital Economy*, Journal of European Competition Law & Practice, 2019, Vol. 10, No. 10

<sup>38</sup> The contents of this section are adapted from the 2009 OECD Policy Roundtable, *Competition Policy and the Informal Economy*, available at <https://www.oecd.org/daf/competition/44547855.pdf>

formal and informal firms can reduce the market power of some firms in the formal sector.

15.2.3 While competition law has jurisdiction over all economic activities, there are some significant issues in applying it to the informal sector:

- a) informal firms tend to be small and highly mobile. There may be difficulty in serving legal notices. Even when prosecuted, these firms are less likely to have significant assets to pay any penalty and, in any case, may simply start up a new business elsewhere. In some countries organised crime is a component of the informal sector. Some competition authorities consider it too dangerous for their staff to prosecute anti-competitive behaviour by the mafia.
- b) the informal sector creates issues for defining the relevant market and the computation of market shares because it is difficult to obtain reliable information on the output of informal firms.
- c) it is also difficult to collect information from the sector as market players may be reluctant to reveal their transactions for fear of alerting the authorities to their businesses.

*A number of AMS have already conducted investigations in the unregulated services sector and could share lessons learned with younger authorities in the region.*

*In order for both the digital economy and the unregulated services sector to operate legitimately and contribute further to the growth of the economy, competition authorities in the AMS may want to consider some broader policy options that could be recommended to the government such as:*

- i) Identifying existing regulations that unnecessarily restrict competition so that more businesses will be ready to compete openly;*
- ii) Helping policy makers design new regulations that can achieve the policy goals without adversely affecting competition in the market;*
- iii) Governments can encourage participants in the informal sector to become more visible and increase productivity in markets by removing burdensome regulations such as making it easier for businesses to comply with regulations and participate in the economy without incurring excessive costs;*
- iv) Conducting advocacy programmes for businesses aimed at communicating the benefits of operating in the formal markets and for consumers the potential adverse implications of dealing with the informal sector.*

### **15.3 Responding to Economic Crises**

15.3.1 Global economic crises in the past 10 years (for example, the 2008 financial crisis and the COVID-19 pandemic) have temporarily and sometimes permanently changed the economic landscape of countries. Businesses were

forced to adapt quickly to the changed environment, resulting in increased merger and takeovers. In many cases, cross border cooperation became essential to address issues. While trying to manage the economic dilemmas, governments are often faced with the difficult balance between government intervention and maintaining free and open market competition.

- 15.3.2 During a crisis, this disruption in the way businesses and markets function needs to be carefully managed by competition authorities: markets may need consolidation and businesses may need to cooperate to survive and meet consumer demand. Ultimately, competition authorities need to work to ensure that competition can be retained as far as possible as this will be vital to subsequent economic recovery.
- 15.3.3 For example during the recent Covid19 pandemic, the AEGC issued a statement advocating the ongoing implementation of competition law in times of crisis<sup>39</sup>. Guidance was also provided by UNCTAD<sup>40</sup> and the OECD<sup>41</sup>.
- 15.3.4 While most businesses will act responsibly, some businesses might respond with anti-competitive conduct, e.g., by cartelizing or abusing a dominant position. It is important to ensure that products and services remain available at competitive prices, especially those that are essential to the current situation, for example, during COVID-19 it was medical supplies and equipment.
- 15.3.5 Being able to conduct the business of the competition authority online is likely to be important for the future operations of the authorities in the ASEAN region. For example, taking steps that would enable online merger notifications and the online lodgement of complaints will increase efficiencies, and may take on additional significance in times of crisis.

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<sup>39</sup> <https://www.asean-competition.org/file/Press%20Release/AEGC%20Joint%20Statement%20in%20Response%20to%20COVID-19%20-%209June20%20FINAL.PDF>

<sup>40</sup> <https://unctad.org/news/defending-competition-markets-during-covid-19>

<sup>41</sup> [https://read.oecd-ilibrary.org/view/?ref=130\\_130807-eqxgnyo7u&title=OECD-competition-policy-responses-to-COVID-19](https://read.oecd-ilibrary.org/view/?ref=130_130807-eqxgnyo7u&title=OECD-competition-policy-responses-to-COVID-19)



*When responding to a crisis, a competition authority may want to consider:*

- a) *Establishing a taskforce or crisis management team that is focussed on monitoring and responding to current market conditions. The team should be vigilant about what is happening in the market, such as reports of possible mergers, conduct of firms or unfair trade practices and should closely monitor key markets to ensure product or service availability, if necessary, through temporary prices caps. For example in Malaysia and Thailand, price caps were imposed on face masks to protect the health of consumers during the COVID-19 pandemic.*
- b) *Being able to conduct the business of the competition authority online is likely to be important for the future operations of the authorities in the ASEAN region. Taking steps that would enable online merger notifications and the online lodgement of complaints will increase efficiencies, and may take on additional significance in times of crisis.*
- c) *Establishing a dedicated link on the authority's website to provide information relevant to the crisis. Many competition authorities included a 'COVID-19' link on their websites during the pandemic through which businesses and consumers could directly access information published by the authority.*
- d) *Advocating to businesses and consumers (where relevant, with consumer agencies) to educate:*
  - a. *business on the expectations of the competition authority in the time of crisis. What rules still apply? What rules may be relaxed? The Philippines competition authority issued Interim Guidelines on the Operations of the Mergers and Acquisitions Office during the COVID-19 pandemic.*
  - b. *consumers on their rights during times of crisis. For example, to encourage reporting of unfair business practices.*
- e) *Adapting its merger notifications and clearance procedures to enable prioritisation or expediting of applications as in times of crisis standards may have to be relaxed due to pressure from the government. Competition authorities will need to carefully balance these pressures with the need to ensure competition in the post-crisis market.*
- f) *Working alongside government to ensure competition law and policy continues to be recognised as important, despite the need to respond to important short term economic policies and goals.*
- g) *Vigorously enforcing competition law against companies that take advantage of the crisis by creating cartels or abusing their market power.*
- h) *Ensuring that all measures taken by a competition authority during a crisis are transparent and clear and published in a timely manner. Flexibility, creativity and innovation is needed to enforce the law in a manner which does not impede business but at the same time adheres to the principles of competition law.*
- i) *Additional efforts to coordinate at the regional level may be required. For example, if there is a need for an urgent merger between companies in different jurisdictions, timing and sharing of information may be crucial.*
- j) *Allowing cooperation arrangements which are temporary in nature to ensure the supply and distribution of affordable products to all consumers to prevent a shortage of essential products. During the COVID-19 pandemic, the ACCC was able to grant interim authorisations to permit businesses to cooperate to ensure continuity of supply of key consumer items. The Australian competition law already contained an interim authorisation process that allowed this efficient response (sometimes within days). The Singapore authority issued a guidance note on collaborations between competitors during this exceptional period.*

## 15.4 Sustainability and Competition Law

15.4.1 In 2015, the United Nations Member States adopted the 2030 Agenda for Sustainable Development, which included 17 Sustainable Development Goals (SDGs). The preamble to the 2030 Agenda states a determination to:

“protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations.”<sup>42</sup>

15.4.2 All ten AMS are signatories to the 2030 Agenda, evidencing a commitment to the SDGs. The 2015 ASEAN Charter<sup>43</sup> states that one of the purposes of ASEAN is to “ensure the protection of the region’s environment [and] the sustainability of its natural resources” and the ASEAN Economic Blueprint 2025 includes Sustainable Economic Development (B.8) as a key element of a “competitive, innovative and dynamic ASEAN”, alongside effective competition policy.

15.4.3 In a recent ASEAN study undertaken by the ISEAS-Yusof Ishak Institute<sup>44</sup>, 93.6% of respondents considered that the private sector plays an important role in addressing climate change. Activities that the private sector could engage in to support sustainability were suggested to include green supply chain practices, harnessing technology, and investing in research and development.<sup>45</sup>

15.4.4 The AMS competition authorities recognise that solutions to achieve sustainability will require consideration from a competition law and policy perspective. For example, businesses may need to collaborate or cooperate to achieve sustainable outcomes. Industry participants may need to find an industry-wide solution that can only be achieved through the sharing of commercially sensitive information and a change to market behaviour. Dominant entities may argue that they are acting anti-competitively for pro-sustainability reasons or potentially anti-competitive mergers may need to be assessed against the backdrop of sustainability goals. All these potential competition issues will need detailed discussion and debate.

15.4.5 Several competition authorities have commenced the debate in this area. Consideration is being given to issues such as whether existing guidelines are adequate to address emerging sustainability issues. During a recent review of its Horizontal Guidelines, a study commissioned by the European Commission found that “one of the main gaps ... is the lack of guidance on agreements

<sup>42</sup> United Nations, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (accessed 25 June 2021)

<sup>43</sup> *The ASEAN Charter*. Jakarta: ASEAN Secretariat, February 2015

<sup>44</sup> Available at <https://www.iseas.edu.sg/wp-content/uploads/2020/12/Southeast-Asia-Climate-Outlook-2020-Survey-Report.pdf> (accessed 1 July 2021)

<sup>45</sup> Seah, S. et al., *Southeast Asia Climate Outlook: 2020 Survey Report*. Singapore: ISEAS-Yusof Ishak Institute, 2020, p 1

aiming at achieving sustainability goals<sup>46</sup>. The Horizontal Guidelines will be reviewed to ensure they remain fit for purpose<sup>47</sup>. The AMS may have regard to the ongoing debate in Europe regarding the application of competition policy to sustainability issues, but recognize that the same debate may require different approaches in the ASEAN region.

15.4.6 Competition authorities should also be aware of the potential for businesses to seek to use sustainability goals as an unjustifiable excuse for anticompetitive behavior. In Indonesia, the KPPU acted to prevent a proposal for key business actors in the palm oil industry to adopt the Indonesian Palm Oil Pledge (IPOP). The IPOP required the parties to adopt different standards of good environment criteria for oil palm plantations. If implemented, the IPOP would have acted as a barrier to entry for other market participants that did not meet these environmental standards. KPPU raised its competition concerns and the IPOP was subsequently disbanded.

15.4.7 The ICC<sup>48</sup> has encouraged all competition authorities to:

- a) Adopt clear, practical and consistent guidance on the types of cooperation arrangement which do not typically give rise to concerns under competition laws.
- b) Adapt their procedures to be ready to provide timely advice, for example, in the form of comfort letters or individual decisions in relation to arrangements that require a greater degree of legal certainty in order to proceed; and
- c) Set out clear enforcement priorities with respect to arrangements designed to meet sustainability objectives.

15.4.8 Businesses in the ASEAN region should continue to have regard to the Competition Compliance Toolkit for Businesses in ASEAN<sup>49</sup> for guidance on competition compliance when deliberating on cooperation arrangements or agreements which relate to sustainability issues.

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<sup>46</sup> European Union. *Evaluation support study on the EU competition rules applicable to horizontal cooperation agreements in the HBERs and the Guidelines - Final report* Luxembourg: Publications Office of the European Union, 2021, available at [https://ec.europa.eu/competition-policy/public-consultations/2019-hbers\\_en](https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en) (accessed 25 June 2021)

<sup>47</sup> European Commission. *Press Release: Antitrust: Commission publishes findings of the evaluation of rules on horizontal agreements between companies*, 6 May 2021, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2094](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2094) (accessed 25 June 2021)

<sup>48</sup> International Chamber of Commerce, *Competition Policy and Environmental Sustainability*, 26 November 2020. International Chamber of Commerce, Paris. Available at <https://iccwbo.org/media-wall/news-speeches/making-competition-law-part-of-the-solution-to-the-climate-challenge/> (accessed 26 June 2021)

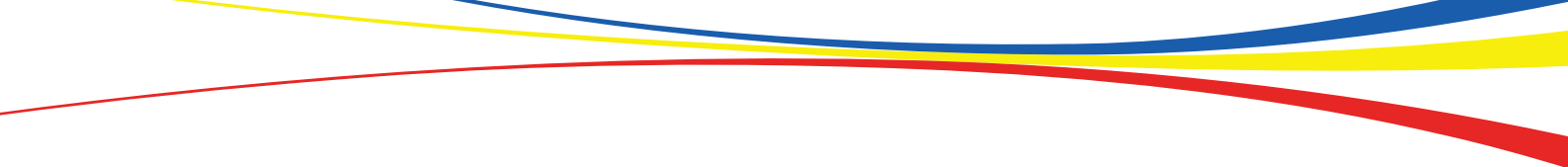
<sup>49</sup> ASEAN Secretariat, *Competition Compliance Toolkit for Businesses in ASEAN*, Undated, ASEAN Secretariat: Jakarta. Available at [https://asean-competition.org/file/post\\_image/Competition%20Compliance%20Toolkit%20for%20Businesses%20in%20ASEAN.pdf](https://asean-competition.org/file/post_image/Competition%20Compliance%20Toolkit%20for%20Businesses%20in%20ASEAN.pdf) (accessed 1 July 2021)

*Consideration should be given to the application of competition laws and policies on agreements designed to achieve SDGs. Discussions will need to take place between competition authorities and other relevant stakeholders and policy areas, including environment, industrial and agricultural policies.*

*Individual AMS competition authorities may wish to consider:*

- (a) The relevance or existence of public interest considerations or policy objectives that may be taken into account when assessing mergers or anti-competitive conduct. That is, to what extent can sustainability goals be taken into account?*
- (b) Exemptions or exclusions in the competition laws and how they may apply (if at all) to facilitate sustainability agreements. Overly restrictive approaches to exemptions may stifle development in green issues.*
- (c) Whether existing guidelines require amendment to provide clarity on the competition policy approach to sustainability agreements. Alternatively, separate guidelines or policy notes could be provided. The competition authority may be able to identify the types of collaboration agreements that do not restrict competition (and therefore will be permitted). The competition authority may also be able to provide guidance on the manner in which the exemption criteria may apply to sustainability agreements<sup>50</sup>.*
- (d) The advocacy message that is needed to prevent business from using sustainability arguments to restrict the level of competition in the market while ensuring that cooperation in relation to joint research and development and eco-innovation activities is not discouraged by concerns about legal risk.*
- (e) Engaging with relevant national stakeholders to discuss how competition law and policy can support sustainable development. For example, competition authorities can help policymakers ensure that regulations or policies aimed at supporting sustainable development are implemented in a way that limits the impact on competitive markets.*
- (f) Engaging with government to issues regulations on sustainability which can provide parameters within which the competition authority can assess the applicability of available exemptions under their competition law.*
- (g) Supporting SDGs in enforcement priorities sectors.*
- (h) Training for staff of the competition authorities to strengthen and widen their capacities, given that sustainability is broad and evolving. Enhance exchanges amongst competition authorities and international organizations dealing with competition policy on the nexus between competition and sustainability are encouraged.*

*On a regional level, the AEGC may wish to look into building capacity and knowledge to better understand the implications of sustainability issues on competition policy and law.*



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<sup>50</sup> The draft guidelines produced by the Dutch Competition Authority may provide some assistance. See Autoriteit Consument and Markt, Guidelines - Sustainability agreements - Opportunities within competition law, Draft, available at <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> (accessed 25 June 2021)

## Chapter 16: Competition Policy and Law Research

### 16.1 Research engagement

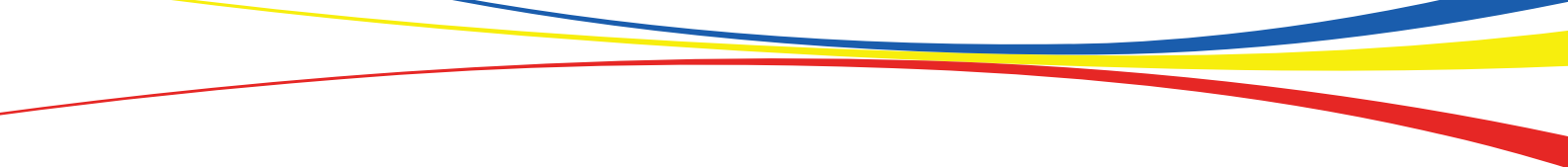
- 16.1.1 AMS recognise the importance of developing a body of research on competition law, policy and economics in the ASEAN region. This will be important both at a national and regional level and will be a vital contributor to the AMS being ready to respond to emerging trends and challenges.
- 16.1.2 AMS may engage with universities (particularly the law and economics faculties) and policy think tanks within their jurisdictions to promote competition law, policy and economics research. Engagement may take many forms, including inviting academics and policy experts to conduct research, or conduct joint seminars or workshops, on topics of current interest. Some AMS have a research grant programme made available to encourage research in competition policy and law.
- 16.1.3 Research is required in relation to competition law, competition policy and competition economics. Other areas of research interest may include the overlap between competition law and policy with sector regulation.

### 16.2 Virtual ASEAN Competition Research Centre (VACRC)

- 16.2.1 The Virtual ASEAN Competition Research Centre (VACRC) was established in 2018 as a platform to stimulate research on competition issues in ASEAN. It acts as a repository of relevant research materials, a database of researchers with an interest in competition policy and law in ASEAN and identifies research collaboration opportunities in the region.
- 16.2.2 The AMS will promote the VACRC to its universities (law and economics faculties), think tanks and policy centres to raise awareness and encourage greater participation, for the benefit of research on ASEAN CPL.

### 16.3 Market studies and policy papers

- 16.3.1 The AMS recognise the importance of conducting research on key markets, either in the form of a market study conducted by the competition authority or by universities, think tanks or independent research bodies.
- 16.3.2 Competition agencies in the AMS are encouraged to utilise policy papers to advocate competition law issues, particularly where competition law has a potential impact in other policy areas.
- 16.3.3 Competition agencies may wish to collaborate with academics, government policy makers, think tanks and research organisations to develop policy papers



on areas of mutual interest. In addition to their advocacy role, these policy papers can become part of the jurisprudence of the competition authority.





## Glossary of Terms

**“Abuse”** of a dominant position occurs where the dominant enterprise, either individually or together with other undertakings, exploits its dominant position in the relevant market or excludes competitors and harms the competition process. It is prudent to consider the actual or potential impact of the conduct on competition, instead of treating certain conducts by dominant enterprises as automatically abusive.

**“Administrative financial penalties”** refers to financial penalties or fines imposed on a natural or legal person for breach of laws administered by an administrative agency. The power to impose administrative sanctions may be vested either in the competition authority or the judicial authority; or it may be shared between them.

**“Agreement”** has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral; it also includes so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls, or by any other means. All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.

**“Behavioural commitments”** means commitments to change the commercial behaviour, e.g., to terminate existing exclusive agreements.

**“Bid-rigging”** includes cover bidding to assist an undertaking in winning the tender. An essential feature of the tender system is that tenderers prepare and submit bids independently.

**“Civil financial penalties”** refers to financial penalties or fines imposed by a judicial authority during civil proceedings initiated by an administrative agency against a natural or legal person for breach of the laws administered by such administrative agency.

**“Commitments”** includes undertakings, consent orders or any other agreement reached between a competition authority and the offending party to address competition concerns;

**“Consumer Welfare”**: Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.

**“Criminal sanctions”** refers to fines or imprisonment as a result of application of criminal law by a judicial authority.

**“Dominant position”** refers to a situation of market power, where an undertaking, either individually or together with other undertakings, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s), e.g., able to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. AMSs may consider whether the competition law should contain a market share threshold test, whether prescriptive or indicative.

**“Economic efficiency”** refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.

**“Economic growth and development”** Economic growth—the increase in the value of goods and services produced by an economy – is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.

**“Horizontal agreement”** means an agreement entered into between two or more enterprises operating at the same level in the market (e.g., an agreement by two manufacturers to fix the selling price of a product is a horizontal agreement).

**“Limiting or controlling production or investment”** involves agreements which limit output or control production, by fixing production levels or setting quotas, or agreements which deal with structural overcapacity or coordinate future investment plans.

**“Mandatory notification”** prevents the undertakings from implementing the transaction until they have received merger clearance from the competition regulatory body. This helps to avoid a situation where anti-competitive mergers have to subsequently be subject to difficult and costly de-concentration measures imposed by the competition regulatory body.

**“Market share”** refers to the quantity or value of the relevant products or services sold or purchased by one or more undertakings in the relevant market, as a percentage of the total quantity or value of those products or services in the relevant market.

**“Market sharing”** involves agreements to share markets, whether by territory, type or size of customer, or in some other ways.

**“Mergers”** refers to situations where two or more undertakings, previously independent of one another, join together. This definition includes transactions whereby two companies legally merge into one (“mergers”), one firm takes sole control of the whole or part of another

(“acquisitions” or “takeovers”), two or more firms acquire joint control over another firm (“joint ventures”) and other transactions, whereby one or more undertakings acquire control over one or more undertakings, such as interlocking directorates.

“**Periodic penalty payments**” refers to daily fines in order to compel an undertaking to put an end to an infringement, comply with an order, or to submit to investigative measures.

“**Prevent**”, “**distort**” or “**restrict**” refer, respectively, to the elimination of existing or potential competitive activities, the artificial alteration of competitive conditions in favour of the parties of the agreement, and the reduction of competitive activities. They are meant to include all situations where competitive conditions are adversely affected by the existence of the anti-competitive agreement. This terminology is used in some AMS laws. In other laws, similar terminology has been adopted, for example, ‘reduce, distort and/or prevent’, ‘reduce or hinder’, ‘prevent, distort or lessen’, ‘monopolise, reduce or restrict’ and ‘exclude, reduce, mislead or prevent’.

“**Price fixing**” involves fixing either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

“**Relevant market**” refers to the product range and the geographic area where competition takes place between undertakings. Defining the relevant market is a key tool to identify the boundaries of competition between undertakings and to analyse the practical effects of their behaviour on the competitive environment. The relevant market is identified with reference to the particular product/service or class of products/services and its substitutes amongst which competition takes place in a given geographic area. The relevant market definition takes into account a number of factors, such as the reactions of economic operators to relative price movements, the socio-cultural characteristics of demand and the presence or absence of barriers to entry, such as transport costs.

“**Relevant geographic market**” is defined as the area in which the enterprises concerned are involved in the supply and demand of the relevant products or services, which customers view as interchangeable or substitutable, and in which the conditions of competition are sufficiently homogeneous and can be distinguished from those of neighbouring areas because the conditions of competition are appreciably different than in those areas. The relevant geographical market can be local, national, international or even global, depending on the particular product under examination, the nature of alternatives in the supply of the product, and the presence or absence of specific factors (e.g., transport costs, tariffs or other regulatory barriers and measures) that prevent imports from counteracting the exercise of market power domestically.

“**Relevant product market**” (reference to product includes services) is the first element to take into account for determining the relevant market. It is defined by identifying the range of products or services which are regarded as interchangeable or substitutable by the customers, by reason of their characteristics, price and intended use.

**“Structural commitments”** means commitments to divest business or to sell shares.

**“Type 1 errors”** occur when a restraint that benefits consumers is found to be anti-competitive;

**“Type 2 errors”** occur when a restraint is not found to be anti-competitive but it should be.

**“Undertaking”** means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit making organisations, whatever their legal and ownership status (foreign or local, government or non-government), and the way in which they are financed.

**“Vertical agreement”** means an agreement entered into between two or more enterprises, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (e.g., distribution agreements, agency agreements and franchising agreements are vertical agreements).

**“Voluntary notification”** allows businesses to do their own merger self-assessment, to decide if they should notify the competition regulatory body to clear the merger. It helps to reduce business costs while not impeding competition regulatory body's authority to investigate any merger which raises competition concerns.