



CPI Antitrust Chronicle

February 2013 (1)

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I. INTRODUCTION

It is a good time to reflect on competition outreach and capacity building activities in the Association of Southeast Asian Nations (“ASEAN”). The start of 2013 brings ever closer the 2015 deadline for the ten ASEAN Member States² to introduce nationwide competition laws and policy. That deadline is an integral part of a broader commitment to establish the ASEAN Economic Community (“AEC”) by 2015. The AEC will be a single market with free movement of goods, services, investment, skilled labor, and a freer flow of capital.

The start of the year has also seen a new ASEAN Secretary-General take the helm. Mr. HE Le Luong Minh, the first Vietnamese Secretary-General of ASEAN, will serve a 5-year term. His inaugural speech made specific mention of the need for enhanced technical assistance to help ASEAN Member States meet their 2015 goals.

II. HALF WAY THERE—BUT SOME WAY TO GO

When its Competition Act came into force on January 1, 2012, Malaysia joined Indonesia, Singapore, Thailand, and Vietnam to bring to five the number of ASEAN Member States with comprehensive and enforceable competition laws in place.

Of the remaining five Member States, the Philippines may be the next to cross the line. Although a comprehensive competition law in the Philippines is yet to be passed, 2012 saw the first full year of operation of the Office for Competition, an office within the Department of Justice charged by Presidential Decree with responsibility for competition matters. Competition bills have been before the Philippines Congress for some time but have received little attention. There are, however, positive signs with recent media reports indicating that the bill may receive urgent attention early in 2013.

The other four Member States are further behind. Lao PDR has a competition decree in place, but it has never been implemented. It is, however, along with Brunei Darussalam, Cambodia, and Myanmar, in the process of drafting a comprehensive competition law to meet the 2015 target.

III. REGIONAL VERSUS NATIONAL APPROACH

The 2015 goals necessarily bring ASEAN nations together on the issue of competition law and policy. This has been formalized with the ASEAN Economic Ministers establishing the ASEAN Experts Group on Competition (“AEGC”) in 2007. The AEGC is made up of

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² Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

representatives from competition authorities and agencies responsible for competition policy in the ASEAN Member States.

In 2010 the AEGC launched two publications: the *ASEAN Regional Guidelines on Competition Policy* and the *Handbook on Competition Policy and Law in ASEAN for Business*.

The Regional Guidelines are not binding on Member States. Rather, the Regional Guidelines are a reference tool bringing together best practices and international experiences. In fact the Regional Guidelines have deliberately been drafted to take into account the specific and differing conditions in the various Member States. As a result, despite their regional nature, they do not in fact advocate a single common approach for the region.

The establishment of the AEGC and the existence of the Regional Guidelines mean that for some the lack of uniformity in the region comes as a surprise. Even among the five Member States with competition laws in place, there are some significant differences in approach. The following are examples of particular Member States diverging from the practices of their fellow ASEAN members (and from international best practices):

- Indonesia's competition law (Law Number 5 of 1999) lacks a *per se* prohibition on cartels;
- Malaysia's Competition Act 2010 has not provided for merger control; and
- Vietnam's competition law includes a provision deeming a company to be dominant if it holds a market share of 30 percent or more.

The extent to which competition laws are enforced in these five Member States also varies dramatically. Compare the high levels of activity of the Singapore Competition Commission with that of its Thai counterpart. Since its inception the Thai Trade Competition Commission has done very little in the way of enforcement. But change may be in the wind with the new director general of the Internal Trade Department, Viboonlasana Ruamraksa, announcing in late 2012 that the Commission will look to investigate and finalize a number of pending cases, including a ten-year old investigation into Honda.

It remains to be seen how those Member States yet to pass competition laws will fare. It is reasonable to conclude, however, that significant differences within ASEAN will remain well into the future, and well past 2015. The dramatic contrast between highly developed Singapore and developing countries such as Myanmar, Cambodia, and Lao PDR cannot be disregarded. Not only will their differing levels of wealth impact on the resources that they can devote to competition law enforcement, but also their very different political histories will undoubtedly lead to a variety of different legislative and enforcement outcomes.

IV. CURRENT OUTREACH ACTIVITIES

It is no surprise that the competition community has been engaging extensively with ASEAN Member States as they move towards the 2015 deadline. With a population of approximately 600 million, ASEAN has almost twice the population of the United States and is larger than the European Union. As its economic significance increases, so too does the desire of many to ensure that its Member States develop coherent and consistent competition laws and enforce them accordingly.

Significant resources continue to be devoted to competition outreach and capacity building activities in ASEAN by national governments, competition agencies, and international organizations. Competition outreach, technical assistance, and capacity building work in ASEAN takes many forms. A significant proportion of the activities are coordinated through the AEGC and the ASEAN Secretariat; others take place independently. Many workshops and other activities are dedicated to ASEAN Member States collectively. Some have a broader Asia-Pacific focus, while others are specifically directed towards an individual Member State or agency.

Key sponsors or providers of competition outreach activities in ASEAN include (in no particular order) the Australian Competition and Consumer Commission (“ACCC”), the United States Department of Justice, the United States Federal Trade Commission, Japan’s Fair Trade Commission (“JFTC”), Korea’s Fair Trade Commission, the New Zealand Commerce Commission (“NZCC”), the Organisation for Economic Co-operation and Development (“OECD”) (both on its own and through the OECD/Korea Policy Centre Competition Programme), the German government (through GIZ), the Asian Development Bank, and the European Commission. This list is certainly not exhaustive but is rather illustrative of the interest in promoting competition law and policy in the ASEAN region.

The very nature of ASEAN as a regional block has enabled it to benefit from specific outreach activities. For example in 2012 the OECD/Korea Policy Centre Competition Programme, in recognition of the 2015 deadline, held its first ever dedicated workshop for ASEAN Member States.

The signing of regional free trade agreements has also opened doors. The ASEAN-Australia-New Zealand Free Trade Agreement is a good example, with funding stemming from that agreement enabling the ACCC and NZCC to jointly provide workshops for ASEAN Member States on implementing and enforcing competition law.

V. TAILORING OUTREACH AND CAPACITY BUILDING ACTIVITIES

Despite the ongoing enthusiasm and work being done, there are challenges involved in ensuring that ASEAN Member States are provided with high quality and appropriate capacity building and technical assistance in the field of competition.

The most significant challenge comes with the need to strike the right balance between outreach activities directed to the region as a whole and those targeted at specific Member States. There is a risk that the impressive efforts of the AEGC to form a cohesive and cooperative group could lead to too much focus on ASEAN as a whole, with insufficient attention being directed to individual Member States and their unique needs.

There is no question that bringing the ASEAN Member States together to work on competition law and policy is essential. This will drive further effective cooperation and coordination with the region.

On the other hand, outreach and capacity building efforts in ASEAN need to recognize that the different Member States are progressing at very different speeds and have divergent needs. While it may be very relevant for the Competition Commission of Singapore to hear about sophisticated economic analysis being carried out in merger cases in Europe, representatives of

Cambodia and Brunei Darussalam will likely be far more interested in hearing about the different options for establishing a new competition authority.

This is a difficulty often faced by the OECD/Korea Policy Competition Programme in designing workshops for participants from a wide range of Asia-Pacific nations, often with very different levels of knowledge and expertise. Careful selection of topics and participants helps to alleviate this difficulty. But such workshops cannot replace the benefits of training or other assistance that is specifically targeted towards a specific agency, particularly when an agency is being established or considering reform. This type of assistance is being provided in the region. Vietnam is a good example. In recent years the Vietnam Competition Authority has benefitted from dedicated support from the U.S. Federal Trade Commission and the recent review of its competition law was done with the assistance of Japan (through the Japan International Cooperation Agency and the JFTC).

Another challenge for ASEAN Member States and for sponsors of outreach activities in ASEAN is to ensure that the assistance provided is truly tailored to the region and indeed to the specific Member States. On occasion technical assistance can be too focused on the practice and procedure of the home jurisdictions of those presenting, and does not sufficiently take into account the legal and economic circumstances in the target country. This does, of course, require greater levels of investment on the part of sponsors.

A final challenge is the coordination of the capacity building efforts being directed at ASEAN. The ASEAN Secretariat and the AEGC certainly play an important role in coordinating the activities in which they are involved, but greater coordination for work outside those auspices would be valuable to ensure that efforts are not duplicated, and that ASEAN Member States receive the assistance they need as 2015 approaches, and beyond.

VI. THE CHALLENGES AHEAD

The ability of the ASEAN Member States to work together on competition law and policy is something that many other regional organizations have struggled to achieve. That regional cohesiveness may, however, come at a cost. It is important that it does not detract from the need for individual ASEAN Member States to receive the appropriate assistance for their stage of development.

In short, competition outreach on a pan-ASEAN level is important, but should not come at the expense of country-specific assistance. The AEGC, and the individual Member States, should make the most of the wealth of opportunities on offer by ensuring that outreach activities are tailored to their specific needs and coordinated in such a way as to maximize the benefit to the relevant agencies.