



**Commonalities and Differences across
Competition Laws in ASEAN
and
Areas Feasible for Regional
Convergence**

Second Edition

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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Catalogue-in-Publication Data

Study on Commonalities and Differences across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence – Second Edition
Jakarta, ASEAN Secretariat, July 2022

381.34059

1. ASEAN – Competition Laws – Policy
2. Cartel – Merger – Anti-Competitive

ISBN 978-623-5429-07-6 (EPUB)



Disclaimer: The Study is the product of professional research based on materials available to the author as of June 2021. The opinions and conclusions expressed are those of the author and do not necessarily represent the opinion of the AEGC or its Members, nor the official position of any staff members. The AEGC and its Members are not responsible for any errors or omissions.

With the support of:



This publication was prepared with the support of the “Promotion of Competitiveness within the Framework of the Initiative for ASEAN Integration” (COMPETE), which is implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and funded by the Federal Ministry for Economic Cooperation and Development (BMZ) of Germany.

ASEAN: A Community of Opportunities for All

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ACRONYMS

ACAP	ASEAN Competition Action Plan
ACCC	Australian Competition and Consumer Commission
ACEN	ASEAN Competition Enforcers Network
AEC	ASEAN Economic Community
AEGC	ASEAN Experts Group on Competition
AMS	ASEAN Member States
ASEAN	Association of South East Asian Nations
CAB	Competition Appeal Board (Singapore)
CCCS	Competition and Consumer Commission of Singapore
CPL	Competition Policy and Law
KPPU/ICC	Komisi Pengawas Persaingan Usaha (Indonesia Competition Commission)
MmCC	Myanmar Competition Commission
MyCC	Malaysia Competition Commission
OECD	Organisation for Economic Co-operation and Development
OTCC	Office of Trade Competition Commission (now TCCT)
PCC	Philippine Competition Commission
RCF	Regional Cooperation Framework
SOE	State Owned Enterprises
TCCT	Trade Competition Commission Thailand (formerly OTCC)
TFEU	Treaty on the Functioning of European Union
VCC	Vietnam Competition Commission
VCCA	Vietnam Competition and Consumer Authority

ASEAN POLICY DOCUMENTS

ACAP	ASEAN Competition Action Plan 2025
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PART I: EXECUTIVE SUMMARY

Background

By the time this updated Study was completed, all ten AMS had enacted ten different competition laws and nine competition authorities established.

The AEC Blueprint 2016-2025 refers to both harmonisation and convergence of ASEAN competition laws. 'Convergence' may be considered a softer approach to achieving consistency, compared with the stricter approach required by 'harmonisation'. This Study concludes that much can be achieved through a softer approach and therefore focusses on 'convergence'.

Convergence of laws in the ASEAN region is critical to assessing cross-border cartels and mergers (which will continue to grow in number). In addition, many of the ASEAN competition laws apply extra-territorially which means more than one AMS law may apply to any one fact situation, requiring a coordinated solution.

Scope and methodology

Against this background, this Study is intended to fulfil ACAP Outcome 5.1.1 of assessing "commonalities and differences in competition legislations" and Outcome 5.2.1 of developing "a strategy paper on areas reasonable for regional convergence". The Study:

- (i) Provides a comprehensive overview of the commonalities and differences of the competition rules (substantive and procedural) in ASEAN;
- (ii) Reaches initial conclusions on commonalities and differences in each topic area considered and identifies possible areas to prioritise for convergence and supporting arguments; and
- (iii) Makes initial recommendations on strategic options regarding the way forward, for consideration of the AEGC.

The Study was completed predominantly as a **desk review** of the **substantive and procedural provisions** of the AMS laws, current to 30 June 2021¹. The Study includes an initial benchmarking of the AMS laws against the **2010 Regional Guidelines**², existing Regulations and relevant Guidelines published by the competition authorities in the region. In

¹ Significant changes were introduced to the Indonesian competition law by the Omnibus Law No. 11 of 2020 on Job Creation, Government Regulation No. 44 of 2021 on Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition and Supreme Court Regulation Number 3 Year 2021. Although the Regulations implementing the Omnibus Law came into effect after 30 June 2021, substantial amendments have been referenced in this Study at the request of the ICC.

² The 2020 Regional Guidelines were published just prior to approval of the Report by the AEGC. References to the updated Guidelines have been included in the Recommendations only.

addition, the Study considers the **institutional arrangements** of the AMS competition regulators and the **legislative provisions that support regional convergence**. These latter provisions are important as key steps towards convergence can be achieved through soft law (such as guidelines on a regional or national level), cooperation and coordination between the AMS competition regulators.

The pandemic did not allow for face-to-face (or phone) interviews with AMS regulatory staff to discuss the desk review outputs (which would have been the preferred approach). However, members of the AEGC have had an opportunity to read the Study and identify areas where their own understanding does not equate with the findings. Comments and clarifications received have been incorporated into the final version of the Study. The Study has also been checked against the results of the **Self-Assessment** completed by the AMS regulators, and any inconsistencies noted.

Area feasible for convergence

The Study found that much regional convergence can be achieved through converging policy objectives, the development of soft law (such as guidelines), and coordination and cooperation between the AMS regulators. However, further research will be required to determine how some of the provisions are working in practice, in order to bring more alignment.

Policy objectives will influence the interpretation and application of competition laws on a day to day basis. The AMS have all chosen to adopt **more than one policy objective**, with considerable consistency amongst the AMS laws. The concern from an implementation perspective is two-fold – multiple policy objectives may present difficulties for the individual AMS to determine which policy objective should apply in any one situation; and there is less likelihood of convergence as the AMS are more at risk of prioritising different policy objectives.

The Study finds considerable **similarity at a macro level** between the AMS laws covering cartels, anti-competitive agreements (horizontal and vertical), abuse of dominance and mergers. Exceptions are the exclusion of vertical agreements from the prohibition against anti-competitive agreements by Brunei Darussalam and Singapore and the absence of regulation of anti-competitive mergers in Malaysia. Amendments to Malaysia's law are being proposed to address mergers.

Commonalities at the macro level need to be considered in light of **existing potential differences at a micro-level**. Many of the differences (terminology such as 'per se', 'object' and 'effect', whether the laws will apply to 'concerted practices' and differences in **merger notification thresholds** (a mix of mandatory and voluntary, pre- and post-merger requirements) may be addressed to a considerable extent by **soft law, cooperation and coordination** between the AMS competition regulators. A failure to achieve consistency in the interpretation and application of the laws in these areas would present a risk to convergence.

Institutional structures across the AMS differ considerably with varying budgets and resources which impacts on the ability to employ an adequate number of appropriately skilled staff. This in turn will have a potential impact on the number and types of cases each regulator can pursue. Many regulators have appointed **Commissioners that hold other government positions**, which affects the time available to focus on competition issues and the perceived

autonomy of the institution. The potential overlaps in competition jurisdiction with **sector regulators** could result in divergent interpretations within the jurisdiction and therefore increases the likelihood of divergence across the region.

The national legislative provisions to support regional convergence need to be considered. Although many of the AMS have the power to cooperate with foreign competition agencies, there are barriers to **sharing confidential information**. The benefits and risks associated with cross-border sharing of information will need to be addressed as a priority, if cooperation and coordination is to be achieved.

Comparison of the **procedural provisions** highlight more potential for divergence across the AMS. Procedural matters are often linked to matters outside the control of the competition authorities (such as other national legal requirements covering legal privilege, appeals processes, and natural justice principles) or that would require legislative amendment (such as timelines for merger review) which may make convergence more difficult. The Study recommends that the AMS gain a good understanding of the areas of potential divergence in procedural matters through **training** and convene **workshops to discuss potential practical solutions**.

In addition, the development of **guidelines** by each of the AMS on their own procedural matters will help with transparency and understanding and may **guide the younger agencies** to adopt similar (international best practice) approaches, thereby increasing the potential for convergence. Topics that could be covered by guidelines include investigation and enforcement powers, decision-making processes, penalties and sanctions, leniency.

The Study identifies **4 Key Recommendations** and **26 Recommendations** addressing substantive and procedural issues arising from the commonalities and differences across the competition legislation in ASEAN. The Key Recommendations, which potentially will have the greatest impact on convergence, can be summarised as:

- (1) The creation of **Regional Guidelines on Cooperation** to help facilitate cooperation in relation to cross-border mergers and cartels. The Guidelines could address the internal policies and procedures needed by each of the AMS to enable regional cooperation. They could also address important questions such as confidentiality and include a **regional pro-forma confidentiality waiver** and common conditions to be imposed on any sharing of information, for example, how information should be treated by the receiving party.
- (2) The AMS could consider establishing **regular meetings** between representatives of the AMS competition authorities designated with achieving regional cooperation. **ACEN** may provide the most appropriate forum for these meetings. A new ACAP deliverable was included following the Mid-Term Review of conducting meetings of Head of Competition Agencies in ASEAN from 2021.
- (3) **Training on the commonalities and differences** in the ASEAN competition laws will be vital to achieving greater cooperation between the AMS as this will increase the knowledge and understanding of the competition laws in the region. A training activity has been suggested in the ASEAN Regional Capacity Building Roadmap 2021-2025.

- (4) Where differences arise in the regimes, it will be necessary to consider how best to deal with those differences in practice (recognising that legislative change may be unlikely and, in any case, will not be timely). **ACEN** may provide the most appropriate forum within which to conduct workshops to discuss **potential practical solutions**.

The AMS are already finding ways to work together under the ACEN, RCF and the Virtual ASEAN Competition Research Centre, demonstrating that there is great potential for regional convergence.

Proposed next steps

Advantage needs to be taken of the rare (and potentially limited) opportunity to influence government, the judiciary, lawyers, academics, business and consumers in relation to their views on competition law.

This Study should be considered as the **beginning of the discourse on regional convergence in ASEAN** which should continue as a priority. Proposed next steps are:

- (1) Continue to test the Study findings against the working practices, developments in law and understanding of the AMS regulators.
- (2) A conference dedicated to discussing convergence (and potential divergence), attended by representatives from each jurisdiction (regulators, academics, lawyers, economists). This would be highly beneficial to further research.
- (3) Consider the preparation of a publication that explains the similarities (whilst acknowledging the differences) between the AMS laws, as a first step to reassuring businesses operating in the region.

PART II: INTRODUCTION

As part of their commitments under the AEC, the AMS have already enacted dedicated competition laws (with Cambodia the most recent to enact its law in October 2021). However, the national competition regimes in ASEAN are at varying stages of maturity.

The introduction of multiple separate laws on competition gives rise to inevitable differences which need to be understood. The AEGC has recognised the necessity and benefits of aligning competition rules across the region³. Initiative 5.1 of ACAP is to “identify commonalities and differences across national competition laws in ASEAN” with Outcome 5.1.1 being to assess “commonalities and differences in competition legislations”. Further, ACAP Initiative 5.2 is to “develop a strategy for regional convergence on CPL matters” with Outcome 5.2.1 being the development of a “strategy paper on areas feasible for regional convergence”.

This Study on Commonalities and Differences of ASEAN Competition Laws (“the Study”) is intended to enable the AEGC to gain a clearer picture of the scope of existing substantive and procedural laws and how the gradual convergence of these laws could be initiated.

1. Competition law from a regional perspective – why convergence matters

Strategic Goal 5 set out in ACAP is “Moving towards greater harmonization of competition policy and law in ASEAN”. It states:

“...Greater harmonization of competition policy and law in ASEAN is expected to create a seamless policy environment for goods, services and capitals to move around freely and without barriers; while companies could operate and allocate their resources in the most efficient ways possible. It would also contribute to enhancing the transparency and predictability of the investment climate. Finally, greater harmonization would certainly serve to facilitate regional cooperation with regard to the competition law enforcement (under goal no. 3).”

The creation of the AEC, and the desired free flow of goods, services and capital, risks being hampered if there are multiple inconsistent competition laws and policies operating in the region. Multiple inconsistent laws risk deterring investment and the benefits of removing trade barriers can be undone where effective competition law enforcement is not available. There is a risk that the removal of regulatory trade barriers is not as effective as it may be hoped if

³ This is expressly stated in Strategic Goal 5 of the ACAP: ‘Moving towards greater harmonisation of competition policy and law in ASEAN.’ This strategic goal is in turn based on the strategic measures referred to at page 13, paragraph 27(v) of the ASEAN Economic Community (AEC) Blueprint 2025 under Component B.1 (Effective Economic Policy): “Achieve greater harmonisation of competition policy and law in ASEAN by developing a regional strategy on convergence.”

anticompetitive behaviours creating barriers to entry are not effectively regulated. These adverse consequences can be reduced where convergence is achieved.

Although Strategic Goal 5 refers to harmonisation, the implementation of the initiatives and outcome indicators all refer only to “convergence”, not “harmonisation”. The following excerpts from the ACAP are insightful [emphasis added]:

- Preamble of the ACAP – Page 4: “Both deliverables [i.e. the ASEAN Regional Guidelines on Competition Policy and the Handbook on Competition Policy and Law in ASEAN for Business] could form the basis for a more comprehensive comparative review of competition regimes in ASEAN, and subsequently for charting the course for enhanced regional cooperation and **convergence**.”
- Commentary under Strategic Goal 3: Regional Cooperation arrangements on CPL are in place (page 10) “The external factors driving this [i.e. regional cooperation] are worldwide trends towards increased **convergence** of competition rules on the one hand, and international, case-related coordination efforts among jurisdiction on the other.”
- Commentary under Strategic Goal 5: Moving towards greater harmonisation of competition policy and law in ASEAN (page 13): “...whilst recognising that one size does not fit all and differences might continue to exist for a number of valid reasons, the ASEAN is also committed to promoting similarities and **convergence** and eliminating contradictions.”
- Initiative 5.2 – Develop a strategy for regional **convergence** on CPL matters. Outcomes 5.2.1 – “Strategy Paper on areas feasible for regional **convergence** developed by 2018” (page 13).
- Under the Implementation Schedule of the ACAP (page 31) Strategic Goal 5 (supra),
 - Initiative 5.1: Identify commonalities and differences across national competition laws in ASEAN.
 - Outcome 5.1.1: Commonalities and differences in competition legislations assessed by 2017.
 - Outcome 5.1.2: Recommendations on substantive as well as procedural standards in CPL enforcement for ASEAN by 2018.
This indicator serves to substantiate the discussion on the **possible convergence** of competition legislations across ASEAN.
 - Initiative 5.2: Develop a strategy for regional convergence on CPL matters.
 - Outcome 5.2.1: Strategy paper on areas feasible for **regional convergence** developed by 2018.

Convergence may be considered a softer approach to achieving consistency, compared with the stricter approach required by ‘harmonisation’. ASEAN would benefit from further discussion on the different outcomes intended (if any) by the use of these differing terms.

1.1 International perspective

From an international viewpoint, there has been a marked increase in cross-border mergers and cartels around the world. A 2014 OECD study confirms that the number of cross-border mergers has been increasing, with “an average of 3,513 per year over the five years from 1995-1999 to 7,523 per year over the five years from 2007-2011”⁴. A more recent OECD report noted that in the period between 2010 and 2016, “a record 75 new hardcore cartels were uncovered each year”⁵. This increase is also likely to be seen across the ASEAN region, especially with the forecast economic growth. The ability to effectively deal with these cross-border competition issues will depend heavily on cooperation and coordination between the AMS competition regulators. Cooperation and coordination will be substantially easier where regional convergence in key areas can be achieved and differences understood.

International best practices continue to develop in competition law, often resulting in greater alignment around the world on key matters relating to merger and cartel enforcement. This has the effect of creating greater convergence in international competition laws. If the AMS are able to align their own laws with international best practices, regional convergence is more likely.

Both these points warrant further research and consideration.

1.2 Regional perspective

ASEAN has chosen not to adopt a supra-national competition regulator to regulate and enforce a regional competition law and policy. This has the result that ten separate competition regulators will be separately enforcing ten separate competition laws and policies. In some AMS, there are also sector regulators that have jurisdiction over competition matters.

Convergence in the interpretation and application of the competition laws across the region will be vital to ensuring a robust ASEAN competition regime. A robust regime will provide greater legal certainty for business, give less opportunity for forum shopping and allow an ‘ASEAN-approach’ to competition law to emerge.

1.3 Extra-territorial application of the laws

There will be substantial overlaps between the operation of the competition laws across the region because of cross-border issues, as well as the application of the extra-territoriality provisions contained in the national laws.

Six of the AMS laws contain express provisions that make it clear their laws operate extra-territorially (Brunei Darussalam, Cambodia, Malaysia, Philippines, Singapore and Vietnam)⁶.

⁴ OECD, *Challenges of International Cooperation in Competition Law Enforcement*, 2014, OECD: Paris. Available at <https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm>, accessed 20 July 2019.

⁵ OECD, *Review of the Recommendation concerning Effective Action against Hard Core Cartels*, 2019, DAF/COMP(2019)13, p 5

⁶ Section 10 Brunei law; Art 2 Cambodia law; Section 3(2) Malaysia law; Section 3 Philippines law; Section 33 Singapore law; Art 1 Vietnam law

Indonesia is able to apply its law extra-territorially if the foreign company conducts economic activities in Indonesia⁷. Lao PDR also focusses on operations in the jurisdiction⁸. The laws in Myanmar and Thailand are silent on this issue.

This analysis is supported by the Self-Assessment⁹ with the exception that Thailand indicates in its Self-Assessment response that its laws do apply extra-territorially. This was subsequently identified as incorrect.

It is understood that the current changes proposed to the law in Indonesia seek to amend the definition of ‘business actor’ so that it applies to agreements or conduct by a foreign company outside Indonesia which doesn’t have any economic activity in Indonesia but effects the Indonesian domestic market (the ‘effects’ doctrine).

1.4 Steps towards regional cooperation

In 2018, important steps towards regional cooperation were taken in the form of the ASEAN Regional Cooperation Framework (‘ARCF’), establishment of the ASEAN Competition Enforcers Network (ACEN) and creation of the Virtual ASEAN Competition Research Centre¹⁰.

The ARCF, endorsed by the ASEAN Economic Ministers but not binding on the AMS, sets out general objectives, principles and possible areas of cooperation in relation to the development, application and enforcement of competition laws. The ACEN was created to “facilitate cooperation on competition cases in the region and to serve as a platform to handle cross-border cases” and the Virtual Research Centre acts as a repository for research articles on ASEAN Competition Law, profiles of researchers and academics with interests in competition law and policy in the region and research collaboration opportunities on competition in ASEAN¹¹.

2. A closer look at the ASEAN competition landscape

2.1 ASEAN competition policy objectives

The desire to introduce competition law across ASEAN by 2015 was first set out in the AEC Blueprint 2008-2015. Nine out of the ten AMS achieved this goal ahead of the establishment of the AEC in December 2015. The AEC Blueprint 2016-2025 then emphasised the need for operational and effective competition law and policy (CPL). The strategic measures set out in the Blueprint included:

⁷ Art 1 Para 5, Indonesia Law

⁸ Article 6 Lao PDR law

⁹ A self-assessment questionnaire was completed by the nine existing AMS during 2019. The results of this self-assessment are not publicly available.

¹⁰ See post entitled “ASEAN establishes Competition Enforcers’ Network, Regional Cooperation Framework, and Virtual Research Centre at <https://asean.org/asean-establishes-competition-enforcers-network-regional-cooperation-framework-virtual-research-centre/?highlight=asian%20establishes%20competition%20enforcers%20network>, accessed 13 January 2020

¹¹ AEGC Media Release: <https://asean-competition.org/read-news-asean-establishes-competition-enforcers-network-regional-cooperation-framework-and-virtual-research-centre>, accessed 21 January 2020

- (a) Effectively implementing CPL in all AMS based on international best practices and agreed upon ASEAN guidelines;
- (b) Achieving greater harmonisation of CPL in ASEAN by developing a regional strategy on convergence¹²; and
- (c) Continuing to enhance CPL in ASEAN taking into account international best practices¹³.

Subsequently, ACAP 2025 was adopted. ACAP recognises that convergence can only be achieved after the introduction, and enforcement, of competition laws and policies¹⁴. Importantly, it also recognises that the laws across the AMS are different (and may remain different for many valid reasons). Nevertheless, ACAP commits to promoting the 'similarities and convergence and eliminating contradictions'¹⁵.

The benefits of harmonisation are noted to include creating a seamless policy environment for goods, services and capital to move around freely without barriers; allowing companies to operate and allocate their resources in the most efficient ways possible; enhancing transparency and predictability of the investment climate; and facilitating regional cooperation with regard to competition law enforcement (under Strategic Goal 3)¹⁶.

2.2 Competition law development and implementation across ASEAN

The stages of development of the AMS competition laws and competition regulators are varied, with a rapid increase in both laws and regulator establishment since 2010, and particularly in the last 5 years.

¹² The terminology 'harmonisation' and 'convergence' are used in the ASEAN Economic Blueprints. The terms are not synonyms and are not intended to be used interchangeably. The AEGC seeks to achieve regional convergence, not harmonisation, at this point in time which is consistent with the ACAP and its Implementation Schedule.

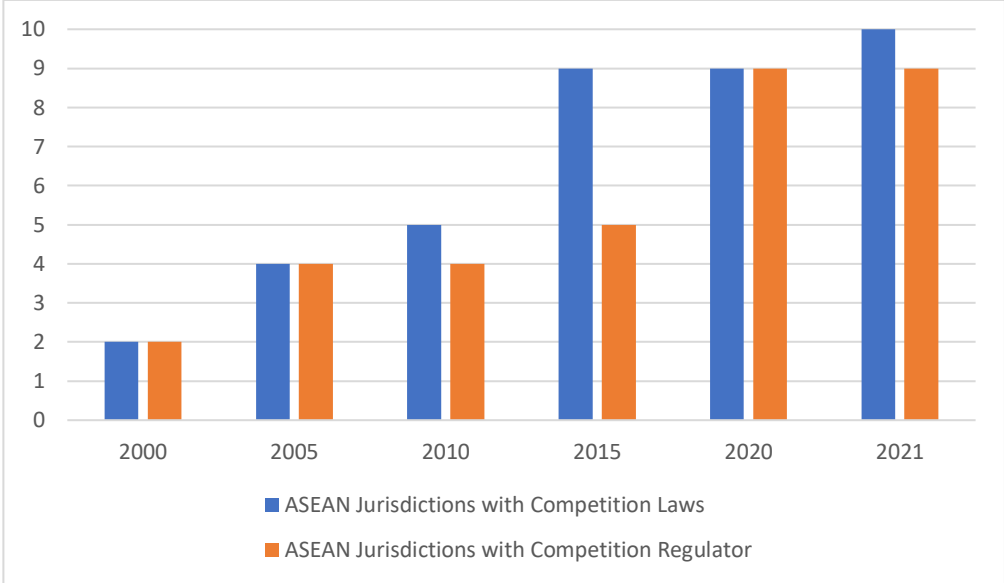
¹³ ASEAN Secretariat, *ASEAN Economic Community Blueprint (2015-2025)*, Jakarta: ASEAN Secretariat, 2015, paragraph B1, pp 12-13.

¹⁴ ASEAN Secretariat, *ASEAN Competition Action Plan 2016-2025*, Jakarta: ASEAN Secretariat, 2015, p 8

¹⁵ Id.

¹⁶ Id.

Figure 1: Introduction of ASEAN Competition Laws and Regulators



Source: Rachel Burgess, ACCC/NZCC CLIP Competition Law Training Programme, 2019, Updated 2021

The current status of the competition law and regulator establishment is set out in the table below.

Table 1: Status of Competition Law and Regulator Development

Jurisdiction	Law passed	Law in force	Competition Agency established	Enforcement commenced
Brunei Darussalam	✓	✓	✓ (2017) Competition Commission of Brunei Darussalam	✓ (Anti-Competitive Agreements and its related provision commencing 1 January 2020)
Cambodia	✓	✓	✗ Competition Commission of Cambodia (CCC)	✗
Indonesia	✓	✓	✓ (2000) Indonesia Competition Commission (ICC)	✓
Lao PDR	✓	✓	✓ (2018) Lao Competition Commission	✗
Malaysia	✓	✓	✓ (2011) Malaysia Competition Commission (MyCC)	✓
Myanmar	✓	✓	✓ (2018) Myanmar Competition Commission (MmCC)	✓
Philippines	✓	✓	✓ (2016) Philippine Competition Commission (PCC)	✓
Singapore	✓	✓	✓ (2005) Competition & Consumer Commission of Singapore (CCCS)	✓
Thailand	✓	✓	✓ (2019) Office of Trade Competition Commission (OTCC) Now the Trade Competition Commission Thailand (TCCT)	✓
Vietnam	✓	✓	✓ (2005) Vietnam Competition and Consumer Authority (VCCA) Now the Vietnam Competition Commission (VCC)	✓

Source: Compiled by Rachel Burgess and Dominique Ogilvie (ACCC) for presentation at ANU Law and Justice Community of Practice from various sources based on best information available as at November 2018. Updated by Rachel Burgess, 2021.

3. Aim, structure and methodology of the Study and Strategy Paper (“the Study”)

3.1 Aim

As outlined in the Terms of Reference, the Study is intended to serve the following purposes:

- (i) Firstly, provide a comprehensive overview of commonalities and differences of the prevalent competition rules in ASEAN;
- (ii) Secondly, identify possible areas to be prioritised for convergence and outline the main arguments supporting the suggestions;
- (iii) Thirdly, make initial recommendations on strategic options regarding the way forward, for consideration by the AEGC.

3.2 Structure

To achieve these Aims, the substantive part of the Study is structured as follows:

- (i) The Study begins with an outline of the policy objectives identified in the ASEAN Regional Guidelines and the individual national competition laws¹⁷. All references to the Regional Guidelines should be read as a reference to the 2010 ASEAN Regional Guidelines unless otherwise stated.
- (ii) The analysis then proceeds on the basis of the three pillars of competition law – anti-competitive agreements (including cartels, other horizontal agreements and vertical agreements), abuse of dominance and merger control. Each of these pillars is considered by comparing and contrasting the text of the laws, as well as any recommendations set out in the Regional Guidelines. The Self-Assessment¹⁸ responses provided by the AMS are also incorporated to the extent relevant.
- (iii) The institutional arrangements and powers in each of the AMS are considered by reference to both the competition regulator and any sector regulators with competition law jurisdiction. This section includes a discussion of the investigation and enforcement powers, due process, timeframes for investigation, decision-making processes and provisions to support convergence. The text of the laws, regulations and available guidelines is compared to the extent that they address procedural issues, together with any recommendations set out in the Guidelines. The Self-Assessment¹⁹ responses provided by the AMS are also incorporated to the extent relevant.
- (iv) The procedural provisions in the ASEAN Competition Laws are then compared with a focus on sanctions, leniency, the treatment of confidential information, legal privilege and self-incrimination, standards and burdens of proof, appeals processes and private

¹⁷ The ASEAN Regional Guidelines were developed in 2010 and were reviewed in 2020, especially in light of advancement in the digitalisation of economies of AMS and the adoption of Competition Laws by almost all the AMS and increasing cross-border issues emanating over the last ten years.

¹⁸ A self-assessment questionnaire was completed by the nine existing AMS during 2019. The results of this self-assessment are not publicly available.

¹⁹ A self-assessment questionnaire was completed by the nine existing AMS during 2019. The results of this self-assessment are not publicly available.

actions. The text of the laws, regulations and available guidelines is compared to the extent that they address procedural issues, together with any recommendations set out in the Guidelines. The Self-Assessment²⁰ responses provided by the AMS are also incorporated to the extent relevant.

- (v) Initial conclusions are reached as to the commonalities and differences between the ASEAN competition laws in each area of analysis.

3.3 Methodology

The Study is intended as the first step towards a regional discourse on competition law convergence in ASEAN. The Study has been completed primarily as a **desk study** and includes an initial benchmarking against the 2010 Regional Guidelines. It focusses on the three pillars of competition law but excludes an assessment of any unfair trading provisions. It will be important to continue to update this Study as the laws are amended, regulations passed and guidelines issued by the competition authorities. The laws on which the desk study has been undertaken are set out below. The Study also had regard to existing Regulations and Guidelines issued by the AMS. The 2022 Study is based on laws, regulations and guidelines as at 30 June 2021²¹.

The pandemic did not allow for face-to-face (or phone) interviews with AMS regulatory staff to discuss the desk review outputs (which would have been the preferred approach). The Study has been checked, wherever possible, against the results of the **Self-Assessment** by the AMS regulators, and any inconsistencies noted. Members of the AEGC have had an opportunity to review the Study findings and identify areas where their own understanding does not equate with the findings. Comments or clarifications received have been incorporated into the final version of the Study.

Recommendations are made for further research work that can be undertaken to enhance the Study and support further discussions on regional convergence.

²⁰ A self-assessment questionnaire was completed by the nine existing AMS during 2019. The results of this self-assessment are not publicly available.

²¹ Significant changes were introduced to the Indonesian competition law by the Omnibus Law No. 11 of 2020 on Job Creation, Government Regulation No. 44 of 2021 on Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition and Supreme Court Regulation Number 3 Year 2021. Although the Regulations implementing the Omnibus Law came into effect after 30 June 2021, substantial amendments have been referenced in this Study at the request of the ICC.

Table 2: Laws Reviewed during Study

Jurisdiction	Title	Version
Brunei Darussalam	Competition Order 2015	Enactment version
Cambodia	Law on Competition of Cambodia 2021	Enactment version, English translation
Indonesia	Law No. 5 of 1999 Concerning The Prohibition of Monopolistic Practices and Unfair Business Competition	Enactment version, English Translation
Lao PDR	Law on Competition No. 60/NA	Enactment version, English Translation
Malaysia	Competition Act 2010	Enactment version (English)
Myanmar	The Myanmar Competition Law	Enactment version, English Translation
Philippines	Philippine Competition Act	Enactment version (English)
Singapore	Competition Act 2004	Version in force from 16/5/2018
Thailand	Trade Competition Act B.E.2560	Enactment version, translated into English by the TCCT
Vietnam	Law No: 23/2018/QH14	Enactment version, English Translation



PART III: COMPARATIVE ANALYSIS OF SUBSTANTIVE PROVISIONS IN ASEAN COMPETITION LAWS

1. Goals of competition laws

1.1 ASEAN Regional Guidelines²²

The Guidelines make key statements about the policy objectives that can be achieved through the introduction of competition law:

“The most commonly stated objective of competition policy is the promotion and the protection of the competitive process. Competition policy introduces a ‘level-playing field’ for all market players that will help markets to be competitive. The introduction of a competition law will provide 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 competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare.”²³

The Guidelines then go on to explain the concepts of economic efficiency, economic growth and development, and consumer welfare:

“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.” (paragraph 2.2.1.1)

“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... Competition may bring about greater economic growth and development through improvements in economic efficiency...” (paragraph 2.2.1.2)

“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...” (paragraph 2.2.1.3)

²² Section 1.1 has been adapted from Maximiano, Burgess and Meester, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges* Kluwer Publishing, 2019, pp 233-262

²³ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*, Jakarta: ASEAN Secretariat, 2010, paragraph 2.2.1

Other possible policy objectives that can be achieved by competition policy are noted to include:

“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 welfare of particular consumer groups.²⁴

The Regional Guidelines note that “each AMS may decide which objectives it wishes to pursue, taking into account its own national competition policy needs” (paragraph 2.2.5).

1.2 Policy Objectives in AMS Competition Laws

Most of the AMS contain competition policy objectives in their laws (Singapore and Thailand do not). The main objectives identified in the Regional Guidelines – promotion and protection of competition, fair competition, economic efficiency, economic growth and development, and consumer welfare feature prominently (see Table 3). Additional policy objectives identified by each of the AMS are reflective of their stages of economic development (for example, Article 4 Lao PDR law sets out the ‘State Policy on Competition’ and includes the State creating conditions for and enhancing the capacity of SMEs to participate in fair competition).

The policy objectives will have an impact on the way in which the laws are interpreted on a daily basis and, therefore, will be critical to convergence. The objective of consumer welfare is well recognised as a key objective of competition law internationally and, together with the promotion and protection of competition, is the most common of the objectives identified in the AMS laws. A point of distinction between the AMS is that Indonesia refers only to people’s welfare, while Vietnam recognises both consumer interests and social welfare. Lao PDR sets the objective of protecting the State, business and consumers.

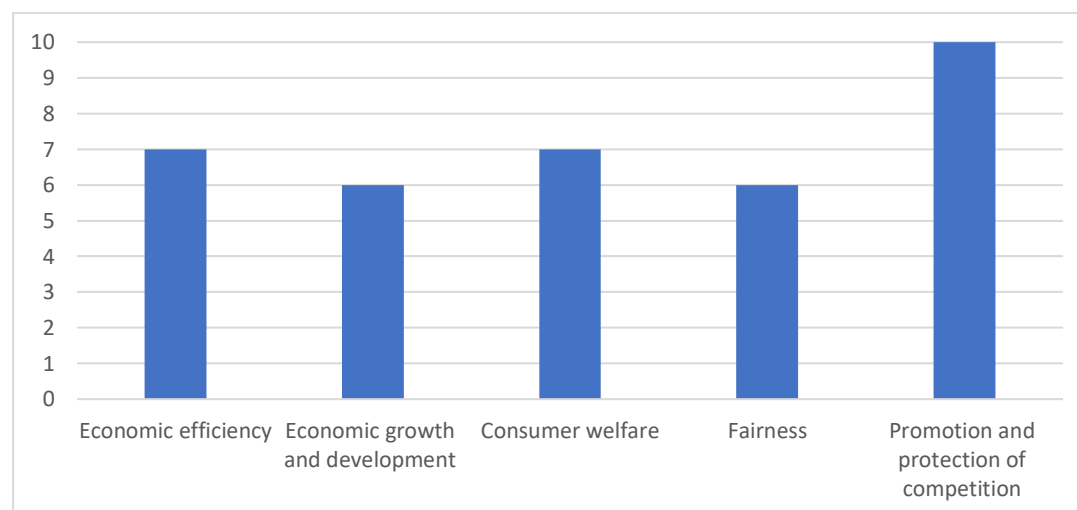
²⁴ Ibid., paragraph 2.2.3

Table 3: AMS Policy objectives²⁵

	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: Author's analysis based on review of laws and input from AMS

Figure 2: AMS Policy Objectives



²⁵ Prepared based on the policy objectives contained in the AMS laws. In the case of Singapore and Thailand, the table has been completed based on its response on this issue in the Self-Assessment.

1.3 AMS Self-Assessment

As noted, Singapore and Thailand do not have policy objectives stated in their legislation. In the Self-Assessment questionnaire, Singapore listed its objectives as:

“to regulate the competitive process, to regulate and/or prohibit anti-competitive practices and to promote economic efficiency.”

Thailand listed its objectives as:

“to promote consumer welfare, to safeguard the competitive process, to regulate and/or prohibit anticompetitive practices, to promote economic efficiency, to ensure the competitiveness of enterprises”.

1.4 Initial Conclusions on Commonalities and Differences: Policy Objectives

Gerber (2013) argues:

“Goals are the focal point of the convergence strategy. If all competition law systems move towards acceptance of the same set of goals, convergence at this level can be expected to lead towards convergence in outcomes and thereby generate an increasingly uniform normative framework for global competition. Statements of goals perform symbolic functions, and they are an important part of the convergence picture. Nevertheless, the official statements about the goals of competition law often do not represent the objectives actually pursued by decision makers.”²⁶

It is positive that the AMS have adopted largely common goals and policy objectives for the implementation of competition law. However, it is likely that the adoption of multiple policy objectives (rather than only one) by each of the AMS will create some difficulties for the AMS competition regulators. If faced with a question about priorities, or appropriate remedies, which policy objective will take priority? Convergence in this area may also be more difficult as, with so many potentially competing policy objectives, there is a risk that each jurisdiction will take a different view on which policy objective should take priority.

This is an area where ongoing discourse between the AMS competition regulators will be important. AMS could continually stress the commonality of the stated goals of competition law and work towards a consistent application (and potential narrowing) of these policy goals in practice. Practical steps could include:

- (1) Establishment of informal ASEAN-wide competition policy goals;
- (2) Collaborative working on enforcement priorities to ensure common policy objectives;
- (3) Collaborative working on proposed remedies for cross-border cases, where possible.

²⁶ Gerber, David. *Asia and Global Competition Law Convergence*, (2013). Available at http://scholarship.kentlaw.iit.edu/fac_schol/211, p 45

2. Cartel enforcement in ASEAN

2.1 Why focus on cartels?

Cartels represent the most serious breaches of competition law, as they do the most harm to competitive markets and ultimately consumers:

“Economic harm from cartels is very substantial. Between 1990 and 2016, nominal affected sales by international hardcore cartels exceeded USD 50 trillion. Gross cartel overcharges exceeded USD 1.5 trillion.”²⁷

For the AMS, the introduction of competition laws that prohibit cartels represents an opportunity to sanction cartel behaviour in a way that has previously not been available. It comes at a time when the formation of the AEC and lowering of trade barriers is intended to increase cross-border trade, which is a positive step for economic development. However, as noted by Burgess and Dorai Raj:

“this increase in cross-border trade will inevitably lead to an increase in both cross-border cartels and cross-border mergers.”²⁸

In addition to the likely increase in cross-border cartels, the extra-territorial application of the ASEAN competition laws will result in more than one ASEAN competition law applying to a particular case:

“This is especially so as many competition laws apply an ‘effects test’ which widens the application of the laws to conduct that takes place outside of their jurisdiction, but has an *effect* in the jurisdiction. The incidences of this occurring will increase as trade across ASEAN increases.”²⁹

It will be important that all AMS are ready to address these cross-border cartels in a consistent manner.

2.2 ASEAN Regional Guidelines

The Guidelines recommend that the AMS:

“should consider prohibiting horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the AMS’ territory, unless otherwise exempted.” (paragraph 3.2.1)

The Guidelines go on to recognise that some types of horizontal agreements are more harmful to competition than others:

“AMS may consider identifying specific ‘hardcore restrictions’, which will always be considered as having an appreciable adverse effect on competition (e.g., price fixing,

²⁷ OECD, Review of the Recommendation concerning Effective Action against Hard Core Cartels, 2019, DAF/COMP(2019)13, p 5

²⁸ Burgess, R and S. Dorai Raj. Towards an ASEAN Regional Cooperation Agreement on Competition Law, paper presented at ASEAN 2025: Towards Increased Trade, Investment and Competition Policy and Law in the Southeast Asia Region conference, Universitas Pelita Harapan, Indonesia, 25 July 2019 (publication forthcoming)

²⁹ Id.

bid-rigging, market sharing, limiting or controlling production or investment) which need to be treated as *per se* illegal.” (paragraph 3.2.2).

The recognition of price fixing, bid-rigging, market sharing and limiting or controlling production or investment as hardcore restrictions accords with international best practice. The OECD *Recommendation concerning Effective Action against Hard-Core Cartels* defines ‘hardcore’ cartels to be:

“an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.”³⁰

Paragraph 3.2.2 of the Regional Guidelines then defines what is meant by ‘price fixing’, ‘bid-rigging’, ‘market sharing’ and ‘limiting or controlling production or investment’ for the purposes of Chapter 3 of the Guidelines:

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

‘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.

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

‘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.” (paragraphs 3.2.2.1- 3.2.2.4)

2.3 ASEAN Cartel Provisions

All AMS competition laws include a prohibition against cartels and all of the jurisdictions expressly include price fixing, market sharing and limiting or controlling production, and all (except Singapore) specifically list bid-rigging (see Table 4). Although Singapore does not expressly include bid-rigging in its law, it has been recognised in its Guidelines on Section 34 Prohibition and by the Competition Appeal Board as being conduct that is a ‘by object’ breach of section 34³¹.

³⁰ Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels, as approved by Council on 25 March 1998 C(98)35/FINAL – C/M(98)7/PROV. Available at <http://www.oecd.org/daf/competition/2350130.pdf> (accessed 11 February 2019). Confirmed as still appropriate in OECD (2019), *Review of the 1998 OECD Recommendation concerning effective action against hard core cartels*, available at <http://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf>, accessed 2 October 2019, page 14

³¹ CCCS, Guidelines on the Section 34 Prohibition 2016, paragraph 3.2; Re Pang’s Motor Trading v Competition Commission of Singapore, Appeal No. 1 of 2013 [2014] SG CAB 1, at [30]. See also Infringement of the Section 34 prohibition in relation to bid-rigging of tenders in relation to the Formula 1 Singapore Grand Prix, 28 November 2017, Case number: CCS 700/003/15, at [127]

The AMS do not adopt the same wording when defining ‘price fixing’, ‘bid-rigging’, ‘market sharing’ and ‘limiting or controlling production’ as set out in the Guidelines, however common elements appear and the overall intention is largely consistent with those definitions.

Table 4: ASEAN Cartel Provisions

	Price fixing	Bid-Rigging	Market Sharing	Limiting or controlling production
Brunei Darussalam	Section 11(2)(a)	Section 11(2)(f)	Section 11(2)(c)	Section 11(2)(b)
Cambodia	Art 7(1)	Art 7(5) ³²	Art 7(3) and (4)	Art 7(2)
Indonesia	Art 5	Art 22	Art 9	Art 11
Lao PDR	Art 21(1)	Art 21(8)	Art 21(2)	Art 21(3)
Malaysia	Section 4(2)(a)	Section 4(2)(d)	Section 4(2)(b)	Section 4(2)(c)
Myanmar	Section 13(a)	Section 13(g)	Section 13(e)	Section 13(f)
Philippines	Section 14(a)(1)	Section 14(a)(2)	Section 14(b)(2)	Section 14(b)(1)
Singapore	Section 34(2)(a)	No express provision	Section 34(2)(c)	Section 34(2)(b)
Thailand	Section 54(1)	Section 54(3)	Section 54(4)	Section 54(2)
Vietnam	Art 11(1)	Art 11(4)	Art 11(2)	Art 11(3)

Source: Author’s analysis based on review of laws

The adoption of common hardcore cartel provisions is an important step in consistency between the AMS in relation to cartel enforcement. However, there are a number of key differences that will impact convergence.

2.3.1 Scope of application of the law

The Regional Guidelines state:

“Competition policy should be an instrument of general application, i.e., applying to all economic sectors and to all businesses engaged in commercial economic activities (production and supply of goods and services), including State-owned enterprises, having effect within the AMS’ territory, unless exempted by law. The concept of commercial economic activities refers to any activity that could be performed in return for payment and normally, but not necessarily, with the objective of making a profit.” (paragraph 3.1.2)

The AMS use different terminology to determine to whom their respective competition laws apply. Brunei Darussalam and Singapore use ‘undertaking’³³; Lao PDR, Malaysia and

³² Note that Cambodian law only covers bid rigging in the context of private procurement contracts.
³³ Defined in section 2 of Brunei Darussalam and paragraph 2(1) of Singapore law as capable of carrying on commercial or economic activities relating to goods or services.

Vietnam use 'enterprise'³⁴, the Philippines uses 'entity'³⁵; Cambodia uses 'persons'³⁶; Indonesia uses 'business actors'³⁷; Myanmar uses 'businessman' (although Article 13 applies only to 'person')³⁸ and Thailand uses 'business operator'³⁹.

The difference in terminology used will not be as important as the difference in interpretation of those terms. In particular, it will be important to distinguish between the jurisdictions that apply their law to the wider concept of 'economic' activities (such as sporting associations or trade associations who do not normally seek a profit) and those that limit the application of their laws to 'commercial' (profit-making) activities only. This will have an impact on the ability of jurisdictions to prosecute cartels.

The wider notion of economic activities is used in the competition laws in Brunei Darussalam, Indonesia, Singapore, Vietnam and the Philippines. The Cambodian law makes reference to 'carrying on business activities regardless of whether profit or non-profit' which would also seem to capture the broader notion of economic activities. As noted, Malaysia's laws is limited to commercial activities. The scope of the Myanmar law is 'economic activities', suggesting a wide interpretation will be applied. The position is not yet clear in Lao PDR or Thailand.

2.3.2 Agreement and/or concerted practice

The Regional Guidelines state:

"AMSs may also apply the prohibition to concerted practices, which mean any form of coordination or implicit understanding or arrangement between undertakings, but which do not reach the stage where an agreement properly so called has been reached or concluded." (paragraph 3.2.5)

Some of the AMS jurisdictions have elected to expressly extend the application of their competition laws to 'concerted practices': Brunei Darussalam⁴⁰, Malaysia⁴¹, Philippines⁴², Singapore⁴³. Cambodia has included a definition of agreement that would seem intended to include the concept of 'concerted practice'⁴⁴. The laws in the remaining jurisdictions (Indonesia, Lao PDR, Myanmar, Thailand and Vietnam) do not include any reference to concerted practices. Vietnam defines 'agreement in restraint of competition' to mean 'an act of agreement

³⁴ Not defined in Lao PDR law; Defined in section 2 Malaysia law as any entity carrying on commercial activities relating to goods or services and includes a single economic entity; Not defined in Vietnam law but see Article 2 for definition of 'Applicable Entities'.

³⁵ Defined in section 4(h) Philippines law with link to those engaged directly or indirectly in economic activity and expressly includes 'those owned or controlled by government'.

³⁶ Defined in Art 3(11) Cambodia law by reference to carrying on 'business activities regardless of profit or non-profit, registered or non-registered'.

³⁷ Defined in Art 1 Indonesia law as "business actors shall be any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the state of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the field of economy".

³⁸ Businessman is defined in Art 2 Myanmar law to include organisations. MmCC advised that person will also include an organisation or entity

³⁹ Defined in section 5 Thai law by reference to sellers, producers and buyers

⁴⁰ Section 11 Brunei law applies to concerted practices, which is defined in section 2

⁴¹ Section 2 Malaysia law defines agreement to expressly include 'concerted practices'

⁴² Section 4(b) Philippines law defines agreement to expressly include 'concerted action'

⁴³ Section 34 Singapore law expressly applies to 'concerted practices'

⁴⁴ Art 3(2) Cambodia law refers to direct or indirect coordination where that coordination has the object or effect of influencing the conduct of one or more persons in a market or disclosing a course of conduct which a person has decided to adopt or is contemplating adopting.

between the parties in any form⁴⁵ and in practice, the VCC has VCC advised that the law is enforced against all anti-competitive agreements (both implicit and explicit ones).

The inclusion or otherwise of ‘concerted practices’ across the AMS laws will have an impact on convergence. The experience in Australia has been that conduct that would arguably have constituted a ‘concerted practice’ under European law did not satisfy Australia’s requirement of an ‘agreement, arrangement or understanding’⁴⁶. This has resulted in a recent amendment to Australia’s cartel laws to include ‘concerted practices’. Across ASEAN, cross-border conduct that may not amount to an agreement may escape liability in those jurisdictions that do not have a prohibition against ‘concerted practices’.

2.3.3 Per se versus object and effect

As noted above, the Regional Guidelines recognise hardcore restrictions that the AMS may always consider “as having an appreciable adverse effect on competition... which need to be treated as *per se* illegal” (paragraph 3.2.2). To date, the AMS have taken a varied approach to the treatment of hardcore restrictions. In particular, there is a distinction between those that have adopted a ‘per se’ approach, and those that have adopted an ‘object or effect’ threshold.

The words ‘per se’ are expressly used in the Philippines legislation (in relation to price fixing and bid rigging only)⁴⁷. A number of other jurisdictions use the ‘object or effect’ terminology (Singapore, Brunei Darussalam, Malaysia⁴⁸ and the Philippines in relation to market sharing and limiting production). As noted by Maximiano, Burgess and Meester (2019), “[i]t is not clear whether the ‘object’ component is intended to apply as equivalent to a ‘per se’ (as in the US) or more akin to the European standard”⁴⁹.

Vietnam has advised that it treats the hardcore cartel offences (bid rigging⁵⁰, price fixing, market sharing and limiting production) as *per se* illegal.

In the remaining jurisdictions, neither the words ‘per se’ nor ‘object or effect’ are used. Indonesia and Thailand have informally advised that the ‘per se’ test is applied to cartels (in the case of Indonesia, only to price fixing) but the legislative drafting in the remaining jurisdictions (Cambodia, Lao PDR and Myanmar) leaves the question entirely open as to which standard will be applied⁵¹. Nonetheless, Cambodia and Myanmar have confirmed the position as indicated in Table 5.

⁴⁵ Article 3(4) Vietnam law

⁴⁶ See, for example, *ACCC v Australian Egg Corporation* [2017] FCAFC 152

⁴⁷ Section 14(a) Philippine law

⁴⁸ Note Section 4(2) Malaysia law *deems* cartels to have the object of significantly preventing, restricting or distorting competition

⁴⁹ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 240

⁵⁰ Both horizontal and vertical bid rigging agreements

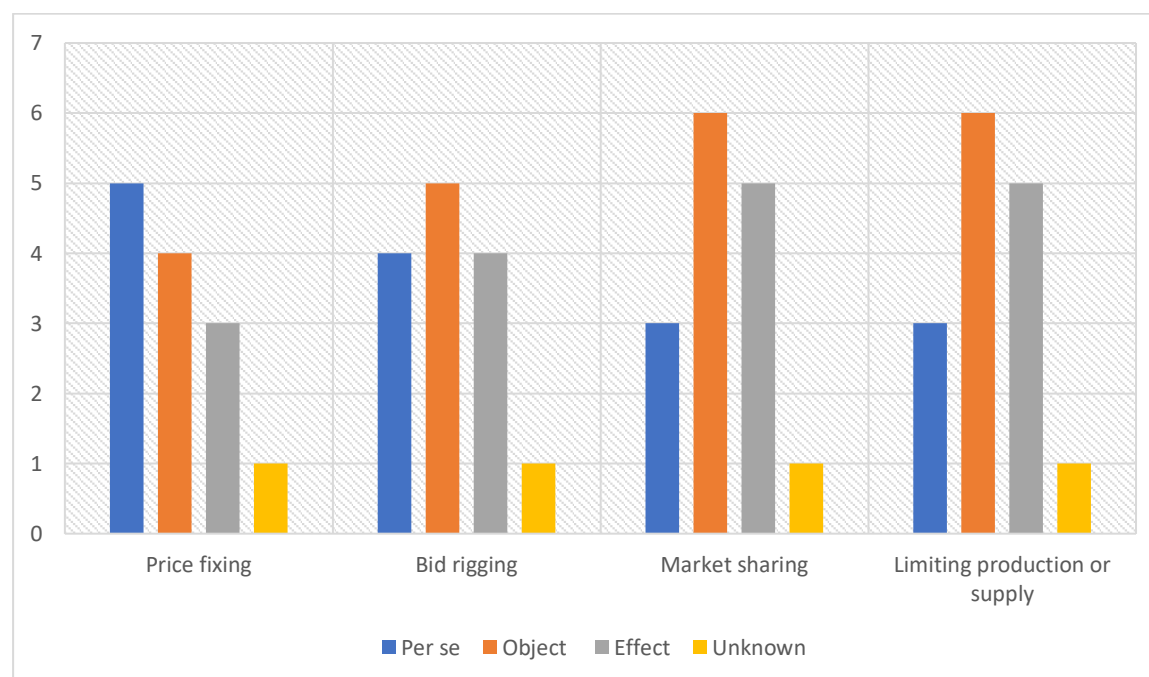
⁵¹ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 240

Table 5: Per Se versus Object and Effect

	Price fixing			Bid-Rigging			Market Sharing			Limiting or controlling production		
	Per se	Object	Effect	Per se	Object	Effect	Per se	Object	Effect	Per se	Object	Effect
Brunei Darussalam		✓	✓		✓	✓		✓	✓		✓	✓
Cambodia	✓			✓			✓			✓		
Indonesia⁵²	✓				✓	✓		✓	✓		✓	✓
Lao PDR	?			?			?			?		
Malaysia		Deemed			Deemed			Deemed			Deemed	
Myanmar		✓	✓		✓	✓		✓	✓		✓	✓
Philippines	✓			✓				✓	✓		✓	✓
Singapore		✓	✓		✓	✓		✓	✓		✓	✓
Thailand⁵³	✓			✓			✓			✓		
Vietnam	✓			✓			✓			✓		

Source: Author's analysis based on review of laws and input from AMS

Figure 3: Per se versus object/effect



Source: Rachel Burgess, ACCC/NZCC CLIP Competition Law Training Programme, 2019; Updated 2020

The question in practice will be whether there is any real distinction between the ‘per se’ and the ‘object’ threshold as they are applied in the AMS. In Europe, Article 101 of the TFEU applies an ‘object’ test. In that context, object restrictions have been applied to mean:

⁵² Based on Indonesia's review of the draft Study. (The author had been previously informally advised by KPPU during informal discussions in July 2019 that bid rigging was also considered ‘per se’.)
⁵³ As advised by OTCC staff during informal discussions, September 2019

“that an agreement is presumed to be anti-competitive unless the cartelists can demonstrate efficiencies. This burden is extremely high, so the object test can be argued to be in effect similar to a per se test”⁵⁴.

The ultimate question then is whether the ‘object’ restrictions will be treated as ‘per se’ breaches on the basis that there is rarely (if ever) an efficiencies argument in favour of hardcore cartel activity.

For those jurisdictions where the object/effect tests have been included, there is an opportunity for additional clarity around how those tests will be applied to be outlined in guidelines. For example, will efficiencies be relevant to the object test or is it to be treated as equivalent to a ‘per se’ breach? For those jurisdictions whose laws are less clear, consideration could be given to developing guidelines that outline the intended approach which, in the interests of convergence, should be as consistent as possible with the other AMS.

2.3.4 Sanctions: Cartels

Many jurisdictions with competition law around the world now impose both civil and criminal sanctions for cartel breaches.

The Regional Guidelines state that the AMS:

“may provide a whole range of sanctions, punitive and non-punitive coercive measures, whether criminal, civil or administrative, to ensure compliance with the law.” (paragraph 6.7.1)

It goes on to give examples of the types of sanctions, which include:

“administrative financial penalties, civil financial penalties, periodic penalty payments, criminal sanctions, corrective orders, and contempt orders.” (paragraph 6.7.4)⁵⁵.

Across ASEAN, the approach taken to sanctions for breaches of the cartel provisions has been mixed. In most cases, the sanctions are civil or administrative, with only a few regimes seeking to impose criminal penalties (see Table 6). The provisions in Myanmar appear to impose criminal sanctions on a wide range of conduct that goes well beyond hardcore cartels. Further research should be undertaken on the level of sanctions imposed in relation to cartels in comparable jurisdictions to those in ASEAN.

⁵⁴ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 240

⁵⁵ Those terms are then defined in paragraphs 6.7.4.1-6.7.4.6 *Regional Guidelines*

Table 6: Sanctions for Cartels

	Civil or administrative sanctions	Criminal sanctions
Brunei Darussalam	✓ Section 42	✗
Cambodia	✓ Articles 34-37	✓ Article 38
Indonesia	✓ Article 47	✗
Lao PDR	✓ Articles 73, 76, 87, 88, 90, 91	✓ Articles 92, 93
Malaysia	✓ Section 40	✗
Myanmar	✓ Section 34	✓ Section 39
Philippines	✓ Sections 29, 37, 41	✓ Section 30, 41
Singapore	✓ Section 69	✗
Thailand	✓ Section 72	✓ Section 72
Vietnam	✓ Chapter IX	✓ Article 217, Vietnam Criminal Code (Law No.100/215/QH13)

Source: Author's analysis based on review of laws and input from AMS

2.4 AMS Self-Assessment

Question 6 of the Self-Assessment (the only question directly relevant to cartels) asks “Which of the following conducts are per se prohibited by the competition law?”. In response to this question, Brunei Darussalam, Malaysia, Singapore, and Thailand listed ‘price fixing, market sharing, bid rigging and limiting or controlling production’ as per se prohibited. Vietnam listed horizontal price fixing, output restriction, market sharing; and any type of bid rigging, and foreclosing competitors. This suggests that Brunei Darussalam and Singapore are treating ‘object’ as ‘per se’ in relation to hard core cartels. The Philippines listed only ‘price fixing and bid rigging’ as ‘per se’ offences, which accords with their legislation. Indonesia lists ‘price fixing’ only as being a ‘per se’ offence. The remaining jurisdictions did not answer this question.

2.5 Initial Conclusions on Commonalities and Differences: Cartel Provisions

The AMS laws regulate hardcore cartels in a relatively consistent manner. Although there are subtle differences between the definitions of price fixing, market sharing, bid rigging and limiting or controlling production, the foundations are laid for convergence in this area. The approach taken in the laws to date seems intended to reflect international best practice. If the AMS continue to follow international best practice, this will also help to achieve regional convergence.

That said, there are a few key points of difference that need to be considered. If addressed in the early years of operation, these differences can be managed so as not to result in a

divergent approach. In some cases, convergence in the policy approach should be able to achieve the consistency required, while in other cases there may be a need for legislative changes. Cooperation and coordination between the AMS competition authorities will be key to achieving greater convergence:

- (1) Consistency regarding the application of the law to ‘economic’ activities rather than only commercial activities. Applying the law to the wider notion of economic activities will give more scope for associations, not-for-profit organisations, and SOEs to be subject to the laws.
- (2) Considering the application of the law to ‘concerted practices’ in those jurisdictions that do not expressly provide for this. In some cases, legislative change may not be required if the terminology used in the law can be interpreted by the courts widely enough to capture ‘concerted practices’. Further research could also provide more guidance on the intended meaning of the terminology used.
- (3) Clarity around the ‘object’ standard that is applied in some jurisdictions to determine whether it is equivalent to a ‘per se’ standard (as in the US) or whether it will be applied subject to an efficiencies defence (as in the EU)⁵⁶.
- (4) Clarity around the standard that will be applied to cartels in the jurisdictions that are currently silent on this issue.

3. Other anti-competitive horizontal agreements

3.1 ASEAN Regional Guidelines

The Regional Guidelines recommend that the AMS:

“should consider prohibiting **horizontal** and vertical agreements between undertakings that prevent, distort or restrict competition in the AMS’ territory, unless otherwise exempted.” (paragraph 3.2.1) (emphasis added)

3.2 ASEAN Prohibitions against Anti-Competitive Horizontal Agreements

All AMS include a prohibition/s against anti-competitive horizontal agreements, other than cartels, either as the main prohibition (Brunei Darussalam, Singapore and Malaysia), a catch-all provision (Cambodia, the Philippines, Vietnam) or as separately identified prohibitions (Indonesia, Lao PDR, Myanmar, Thailand).

⁵⁶ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 240

Table 7: Anti-competitive horizontal agreement prohibitions

Prohibition against anti-competitive horizontal agreements	
Brunei Darussalam	Section 11(1)
Cambodia	Article 77
Indonesia	Article 6, 7, 10, 13, 15 & 16
Lao PDR	Articles 20, 25, 26, 27, 28
Malaysia	Section 4(1)
Myanmar	Section 13(b), (d)
Philippines	Section 14(c)
Singapore	Section 34(1)
Thailand	Section 55
Vietnam⁵⁷	Articles 11 and 12(1)-(3)

Source: Author's analysis based on review of laws and input from AMS

3.2.1 Agreement and concerted practice

The discussion above in relation to the potential application of the AMS laws to 'concerted practices' is also relevant to anti-competitive horizontal agreements generally. A good example of where there may be a need for a prohibition against an anti-competitive concerted practice can be found in the recent CCCS decision *Infringement Decision against the Exchange of Commercially Sensitive Information between Competing Hotels*⁵⁸.

3.2.2 Object and effect

The Regional Guidelines state:

"AMS should evaluate the [potential anti-competitive] agreement by reference to its object and/or its effects where possible. AMSs may decide that an agreement infringes the law only if it has as its object or effect the appreciable prevention, distortion or restriction of competition." (paragraph 3.2.2)

In a number of AMS jurisdictions, the words 'object or effect' are expressly used in relation to the prohibition against non-cartel horizontal agreements (Brunei Darussalam, Cambodia, Malaysia, Philippines, Singapore) however the remaining jurisdictions do not use this terminology at all. Vietnam has advised that it applies a 'substantial restriction of competition' test for anti-competitive agreements, other than cartels. The discussion above in relation to the meaning of the word 'object' is also relevant to anti-competitive horizontal agreements generally.

⁵⁷ Article 11(7)-(10) of the Vietnam law contains prohibitions that extend beyond hardcore cartels. Article 11(11) contains a catch all provision that covers 'other agreements causing impacts or likely to cause impacts on restraint of competition'. Article 12(3) makes it clear that agreements in restraint of competition between enterprises in the **same** relevant market (i.e. a horizontal agreement) in relation to Article 11(7), (8), (9), (10) and (11) are prohibited where they cause impact or are likely to cause significant impacts on restraint of competition in the market.

⁵⁸ Available at https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/id-against-hotels?type=public_register

In relation to 'effect', the test or standard for determining effect will be important in achieving consistency across the AMS. International best practice tests 'effect' based on an assessment of the market 'with' and 'without' the agreement, conduct or merger.

3.2.3 Preventing, restricting or distorting competition

The Regional Guidelines recommend that the AMS:

“should consider prohibiting horizontal and vertical agreements between undertakings that **prevent, distort or restrict competition** in the AMS' territory, unless otherwise exempted.” (paragraph 3.2.1) (emphasis added)

The Guidelines then explain the words 'prevent, distort or restrict' as referring:

“... 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.” (paragraph 3.2.1.5)

This terminology is expressly adopted in a number of the AMS: Brunei Darussalam (section 11), Cambodia (Article 7), Malaysia (section 4(1)) and Singapore (section 34). Similar terminology is used in Lao PDR (reduce, distort and/or prevent competition)⁵⁹, Myanmar (reduce or hinder the competition)⁶⁰, the Philippines (prevent, restrict or lessen competition), Thailand (monopolizes, reduces or restricts competition)⁶¹ and Vietnam (excluding, reducing, misleading or preventing competition)⁶². By contrast, Indonesia does not use this type of terminology at all, but instead uses the terminology “that may cause monopoly practices and unfair competition”.

3.2.4 Appreciability threshold

Not all agreements that have an effect on the relevant market should be treated as breaching competition law. Instead, only those that have a 'substantial' or 'significant' or 'appreciable' effect on competition should be prohibited. This is recognised in the Regional Guidelines:

“AMSs may decide that an agreement infringes the law only if it has as its object or effect the **appreciable** prevention, distortion or restriction of competition.” (paragraph 3.2.2)

In the AMS to date, a divided approach has been taken: four jurisdictions expressly include an appreciability threshold in their law (Cambodia, Malaysia, the Philippines and Vietnam⁶³), Singapore remains silent in its law but has adopted an 'appreciability' threshold in its *Guidelines on section 34 Prohibition*, while the remaining jurisdictions do not include a threshold at all (Brunei Darussalam, Indonesia, Lao PDR, Myanmar and Thailand).

⁵⁹ Article 18. Note that Article 20 uses the different terminology of 'reduce, distort and/or impede the business competition' which may be a translation issue.

⁶⁰ Article 2(g) Myanmar law

⁶¹ Sections 54, 55 Thai law

⁶² Article 3(3) definition of 'effects of restraint of competition' Vietnam law

⁶³ Cambodia, Malaysia and Vietnam use 'significant' while the Philippines uses 'substantial'

3.2.5 Safe harbours

In addition to applying an appreciability threshold, some competition law jurisdictions establish 'safe harbours' which provide businesses with an indication of the regulators view of 'appreciability'. For example, the European Commission states that agreements between competitors are unlikely to appreciably restrict competition where the agreement is between competitors (actual or potential) and the combined market share of the parties is less than 10%. Where the agreement is between non-competitors, the agreement is unlikely to appreciably restrict competition where each of the parties holds a market share of less than 15%⁶⁴.

To date in ASEAN, the regulators in Malaysia, Singapore, and Vietnam have indicated their views on when an agreement is likely to appreciably (Singapore) or significantly (Malaysia, Viet Nam) restrict competition in their respective Guidelines. Malaysia and Singapore jurisdictions have set a combined market share threshold of 20% for agreements between competitors and individual markets shares of 25% for agreements between non-competitors⁶⁵. Vietnam has set a combined market share threshold of 5% for agreements between competitors and individual markets shares of 15% for agreements between non-competitors⁶⁶.

3.2.6 Efficiencies defence

An important consideration for the development of the law in this area in ASEAN will be the extent to which parties can claim efficiencies defences to excuse agreements that may otherwise '[appreciably/significantly/substantially] prevent, restrict or distort' competition.

The Regional Guidelines are silent on this point but, internationally, many jurisdictions do allow exemptions for conduct that creates efficiencies (see, for example, Article 101(3) TFEU).

Many of the AMS competition laws recognise a defence that includes efficiency arguments: Brunei Darussalam, Cambodia, Malaysia, Philippines, Singapore, Thailand, although there is divergence as to whether consumer benefit is required. Vietnam has prescribed that exemptions are granted based on consumer benefit and satisfaction of one of the stated conditions which include promoting technical or technological progress or improving the quality of goods and services; and increasing the competitiveness of Vietnamese enterprises in the international market.⁶⁷; promoting the single application of quality standards and technical norms of product categories; agreeing on conditions for contract performance, goods delivery and payment, which are not related to prices and price elements.⁶⁸ In the case of Lao PDR and Myanmar, the exemptions do not clearly refer to efficiencies but may be interpreted widely enough to allow efficiencies to be taken into account. The provisions in Indonesia do

⁶⁴ European Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=EN)

⁶⁵ See MyCC's Guidelines on Chapter 1 Prohibition, available at https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition001_1.pdf, accessed 28 January 2020; See CCCS's *Guidelines on the Section 34 Prohibition 2016*, para 2.25, available at <https://www.ccs.gov.sg/legislation/competition-act>, accessed 13 February 2020

⁶⁶ Article 11, (3), Decree 35 of 2020, Vietnam

⁶⁷ As prescribed in Article 14 of Vietnam Competition Law

⁶⁸ As prescribed in Article 14 of Vietnam Competition Law

not appear to consider efficiencies as being relevant when assessing anti-competitive agreements.

3.2.7 Sanctions: Anti-competitive horizontal agreements

Across ASEAN, the approach taken to sanctions for breaches of the (non-cartel) horizontal anti-competitive agreements provisions are varied, but contain common key elements.

All jurisdictions allow for the imposition of financial penalties⁶⁹, many with a cap of 10% of turnover (Brunei Darussalam, Cambodia, Indonesia, Malaysia, Singapore, Thailand, Vietnam). Other common sanctions include:

- (a) orders directing agreements or conduct be modified or terminated (Brunei Darussalam, Cambodia, Indonesia, Malaysia, Philippines, Singapore)
- (b) disposition of operations, assets or shares (Brunei Darussalam, Cambodia, Philippines, Singapore)
- (c) revocation or withdrawal of business registration (Cambodia, Indonesia, Lao PDR, Myanmar, Vietnam).

Some jurisdictions include a provision for compensation for the financial harm suffered: Cambodia (which includes a provision for returning unlawful profits or giving them to a social organisation), Indonesia, Lao PDR, the Philippines (disgorgement of profits) and Vietnam (confiscation of the profits earned from the violation). These compensation provisions would appear to also apply to cartels. This will be of additional benefit in obtaining redress for those harmed by a competition law breach.

3.3 AMS Self-Assessment

The Self-Assessment did not ask any questions specific to (non-cartel) horizontal agreements.

3.4 Initial Conclusions on Commonalities and Differences: Horizontal Agreements

The AMS laws all regulate non-cartel anti-competitive horizontal agreements. This is important for convergence as there are a range of agreements that can be harmful to competition without amounting to a hardcore cartel (a good example is an exchange of commercially sensitive information).

Some of the issues raised in relation to cartels also apply in relation to anti-competitive horizontal agreements:

- (1) Consistency regarding the application of the law to 'economic' activities rather than only commercial activities.
- (2) Considering the application of the law to 'concerted practices' in those jurisdictions that do not expressly provide for this.

⁶⁹ In the case of Brunei Darussalam and Singapore, it is expressly stated that the breach needs to be intentional or negligent in order for financial penalties to be applied.

- (3) Clarity around the ‘object’ standard.
- (4) Clarity around the standard that will be applied to anti-competitive horizontal agreements in the jurisdictions that are currently silent on this issue.

In addition, further areas for discussion include:

- (1) Clarity around whether an ‘appreciability’ threshold applies in those jurisdictions that are currently silent on this issue.
- (2) Considering whether it is desirable to set ‘safe harbours’ to provide business with certainty regarding when agreements are likely to be considered harmful to competition. Malaysia, Singapore and Vietnam have already identified safe harbours in their Guidelines.
- (3) Considering whether an efficiencies defence should be permitted and, if so, whether there is a requirement for consumer benefit.

As with cartels, many of these matters can be managed through policy approaches. In all cases, the key to achieving greater regional convergence in this area will be cooperation and coordination between the AMS competition authorities.

4. Vertical agreements

4.1 ASEAN Regional Guidelines

The Regional Guidelines recommend that the AMS:

“should consider prohibiting horizontal and **vertical** agreements between undertakings that prevent, distort or restrict competition in the AMS’ territory, unless otherwise exempted.” (paragraph 3.2.1) (emphasis added)

4.2 ASEAN Prohibitions against Anti-Competitive Vertical Agreements

Not all AMS laws include a prohibition/s against anti-competitive vertical agreements. Brunei Darussalam and Singapore expressly exclude vertical agreements from the prohibitions against anti-competitive agreements⁷⁰. In Lao PDR and Myanmar, the prohibitions identified in the table below could also be applied to vertical agreements but further clarification will be required as to what is intended. In the other AMS, vertical agreements are either covered by the general prohibition against anti-competitive agreements (Malaysia, the Philippines, Vietnam) or by separate prohibition/s (Cambodia, Indonesia, and Thailand).

⁷⁰ Brunei Darussalam and Singapore: Third Schedule, paragraph (8) exempts vertical agreements (agreements between 2 or more undertakings each of which operates at a different level of the production or distribution chain).

Table 8: Anti-competitive vertical agreements prohibitions

Prohibition against anti-competitive vertical agreements	
Brunei Darussalam	Exempt
Cambodia	Article 8
Indonesia	Articles 6, 8, 14, 15 & 16
Lao PDR	Articles 20-29
Malaysia	Section 4(1)
Myanmar	Section 13
Philippines	Section 14(c)
Singapore	Exempt
Thailand	Section 55
Vietnam	Article 11 and 12

Source: Author's analysis based on review of laws and input from AMS

4.2.1 'Object and effect', 'preventing, restricting or distorting competition' and 'appreciability'

A number of AMS jurisdictions apply the 'object or effect' standard to test whether a vertical agreement is anti-competitive (Cambodia, Malaysia, Philippines). Vietnam apply both "per se" and the "object or effect" standard for the prohibitions of vertical agreement. The remaining jurisdictions that prohibit anti-competitive agreements do not use this terminology at all.

In relation to the use of "preventing, restricting or distorting competition", once again this terminology is expressly adopted in some of the AMS in relation to vertical agreements: Cambodia (Article 8), Malaysia (section 4(1)). Similar terminology is used in Lao PDR (reduce, distort and/or prevent competition)⁷¹, Myanmar (reduce or hinder the competition)⁷², the Philippines (prevent, restrict or lessen competition), Thailand (monopolizes, reduces or restricts competition)⁷³ and Vietnam (excluding, reducing, misleading or preventing competition)⁷⁴. Again, Indonesia does not use this type of terminology at all, but instead uses the terminology "that may cause monopoly practices and unfair competition".

The comments regarding 'appreciability' thresholds made in relation to horizontal anti-competitive agreements are also applicable to vertical agreements.

4.2.2 Pricing and non-pricing

Vertical restraints commonly address pricing (resale price maintenance) and non-pricing (tying and exclusive dealing) issues and most of the AMS address both categories.

⁷¹ Article 18 Lao PDR law. Note that Article 20 uses the different terminology of 'reduce, distort and/or impede the business competition' which may be a translation issue.

⁷² Article 2(g) Myanmar law

⁷³ Sections 54, 55 Thai law

⁷⁴ Article 3(3) definition of 'effects of restraint of competition' Vietnam law

In the case of Malaysia and the Philippines, the general prohibition against anti-competitive agreements would cover vertical pricing and non-pricing restraints (in fact, the MyCC Guidelines on Chapter 1 Prohibition expressly refers to price and non-price restrictions⁷⁵).

In Article 8 of the Cambodia law, a distinction is made between pricing restraints (which are prohibited) and non-pricing restraints (which are prohibited only where the agreement has the object or effect of significantly preventing, restricting or distorting competition). Indonesia, Thailand and Vietnam prohibit both pricing⁷⁶ and non-pricing⁷⁷ vertical restraints. Assuming that the provisions in Lao PDR and Myanmar are intended to apply to vertical restraints, they too cover both pricing⁷⁸ and non-pricing⁷⁹ restraints.

4.2.3 Efficiencies arguments

The discussion regarding the availability of 'efficiencies' as a defence in relation to horizontal agreements has potentially more relevance and importance in the context of vertical agreements.

Vertical agreements are considered less potentially harmful to competition than horizontal agreements, on the basis that a vertical agreement is not between competitors in a market. They do not always cause economic harm and are therefore generally considered less potentially harmful to competition. The application of competition law to vertical restraints can give rise to Type 1 errors (where a restraint that benefits consumers is found to be anti-competitive) or Type 2 errors (where an anti-competitive restraint is not found to be anti-competitive). The inclusion of an available efficiency defence will be important for jurisdictions that prohibit anti-competitive vertical agreements to assist in avoiding Type 1 or Type 2 errors.

4.2.4 Sanctions for vertical agreements

The sanctions applicable for anti-competitive horizontal agreements also apply to vertical agreements in the relevant jurisdictions.

4.3 AMS Self-Assessment

The Self-Assessment did not ask any questions specific to vertical agreements.

4.4 Initial Conclusions on Commonalities and Differences: Vertical Agreements

The approach taken by the AMS to anti-competitive vertical agreements immediately gives rise to a divergence issue as two of the ten AMS have excluded the application of competition law to vertical agreements (instead applying the law only to vertical restraints imposed by a

⁷⁵ MyCC, *Guidelines on Chapter 1 Prohibition*, pp 12-14, available at https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition001_1.pdf

⁷⁶ Indonesia law, Article 6 and 8; Thai law, section 55; Vietnam law, Article 11(1) and 12(4)

⁷⁷ Indonesia law, Articles 14, 15, 16; Thai law, section 55; Vietnam law, Article 11(2)-(11) and 12 (2) & (4)

⁷⁸ Lao PDR law, Article 22; Myanmar law, Article 13(a)

⁷⁹ Lao PDR law, Articles 23-28; Myanmar law, Article 13(b)-(f)

dominant player). In some jurisdictions, the sanctions applicable to vertical agreements appear to include criminal liability, giving rise to the potential for a resale price maintenance agreement to be subject to criminal sanctions in some AMS but escape all liability in others (Singapore and Brunei Darussalam) unless imposed by a dominant player.

The availability (or otherwise) of an efficiencies defence will be particularly important in the context of vertical agreements as, without it, there is an increased risk of Type 1 or Type 2 errors.

In addition, most of the matters raised in paragraph 3.4 above in relation to anti-competitive horizontal agreements are also relevant to vertical agreements.

5. Abuse of dominance

5.1 ASEAN Regional Guidelines

The Regional Guidelines state that the “AMSs should consider prohibiting the abuse of a dominant position” (paragraph 3.3.1). The Guidelines then define ‘dominant position’ by reference to market power, importantly recognising the concept of “collective dominance” and the possibility of presumptions (rebuttable or a pre-requisite) of dominance:

“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 laws should contain a **market share threshold test**, whether prescriptive or indicative.” (paragraph 3.3.1.1) [emphasis added]

The Guidelines then define ‘abuse’ by reference to exploitative and exclusionary behaviour, recognises that the prohibition is about harm to the competitive process (not competitors) and recommends an ‘effects’ test:

“Abuse of a dominant position occurs where the dominant enterprise ... **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.” (paragraph 3.3.1.2) [emphasis added]

Paragraph 3.3.2 states that the AMSs “may provide an **illustrative** list of [abusive] conduct”⁸⁰ [emphasis added] and then categorises conduct as either exploitative, exclusionary, discriminatory or relating to limiting production.

⁸⁰ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 3.3.2

5.2 ASEAN Prohibitions against Abuse of Dominance

Across ASEAN, all AMS have included a prohibition against abuse of dominance that applies to entities that hold a dominant position in the relevant market⁸¹.

5.2.1 Dominance, collective dominance and market share thresholds

Reflecting the Regional Guidelines, many of the AMS define dominance by reference to market power⁸² (see Table 9). However, Myanmar and Singapore remain silent, choosing not to include a definition which will allow the meaning of dominance to develop through jurisprudence⁸³. Lao PDR defines dominance by reference to the market share threshold⁸⁴ while Thailand refers to both market share and sales revenue thresholds and the competitive situation in the market⁸⁵. In the case of Indonesia, the definition is based on both market power and other factors, while in Vietnam, the test is based both on market power and the market share threshold⁸⁶.

In most cases, collective dominance (where more than one entity together holds the dominant position) is also explicitly provided for in the law⁸⁷.

Maximiano, Burgess and Meester note that “[m]ore than half of the jurisdictions have (or will have) a presumption of dominance above a stated market share threshold, which is as low as 30% in Vietnam but as high as 60% in Malaysia and Singapore⁸⁸. In some cases, this presumption is rebuttable (Philippines⁸⁹, Singapore (indicative)⁹⁰ and Malaysia (indicative)⁹¹), in others it is a prerequisite for a finding of dominance (Indonesia⁹², Vietnam⁹³), whilst in the remaining jurisdictions, the position is not yet clear”.⁹⁴

⁸¹ Brunei Darussalam, s 21; Indonesia, Art 25(1); Lao PDR, Art 30; Malaysia, s 10; Myanmar, s 13(c); Philippines, s 15; Singapore, s 47; Thailand, s 50; Vietnam, Art 27. Note that Vietnam also contains a prohibition against abuse of a monopoly position (Art. 27)

⁸² Brunei Darussalam, s 2(1); Cambodia, Art 4(6); Malaysia, s 2; Philippines, s 4(g)

⁸³ Note, the CCCS *Guidelines on the Section 47 Prohibition* provides guidance on how dominance would be assessed

⁸⁴ Lao PDR law, Article 30

⁸⁵ Thai law, Section 5 definition of ‘business operator with a dominant position of market power’

⁸⁶ Indonesia law, Art 1(4); Vietnam law, Art 24

⁸⁷ Only Cambodia, Myanmar and Thailand do not appear to recognise collective dominance.

⁸⁸ Indonesia law, Art 25(2); Lao PDR, to be determined by BCC; Malaysia, *Guidelines on Chapter 2 Prohibition*; Art 30; Philippines, Section 27 PCA and Rule 8, section 3, *Implementing Rules and Regulations*; Singapore, *Guidelines on section 47 Prohibition*; Thailand, to be determined by TCCT; Vietnam law, Art 24.

⁸⁹ Section 27 Philippine law, section 27

⁹⁰ Para 3.8 CCCS *Guidelines on Section 47 Prohibition*

⁹¹ Para 2.14 MyCC *Guidelines on Chapter 2 Prohibition*

⁹² Indonesian law, Article 25(2)

⁹³ Vietnam law, Article 24

⁹⁴ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 245

Table 9: Dominance

	Dominance defined			Collective dominance	Presumption of dominance	
	Market power	Market share	Other		Rebuttable	Pre-requisite Effect
Brunei Darussalam	✓	-	-	✓	-	-
Cambodia	✓	-	-	-	-	-
Indonesia	✓	-	✓	✓	-	✓ (50%)
Lao PDR	-	✓	-	✓	-	-
Malaysia	✓	-	-	✓	✓ (60%)	-
Myanmar	Not defined			-	-	-
Philippines	✓	✓ ⁹⁵	-	✓	✓ (50%)	✓
Singapore	Not defined ⁹⁶			✓	✓ (60%)	✓
Thailand	✓	✓	✓	-	✓	-
Vietnam	✓	✓		✓	-	✓ (30%)

Source: Author's analysis based on review of laws and input from AMS

5.2.2 Exclusionary versus exploitative practices

Exclusionary practices are those which exclude competitors (actual or potential) from the market, to the detriment of consumers. Exploitative practices are those where consumers are exploited directly (usually through high prices).

Maximiano, Burgess and Meester note that “[a]most all jurisdictions prohibit both exclusionary and exploitative practices...Indonesia expressly refers to exploitative and exclusionary practices in its *Guidelines on Article 25*⁹⁷, as does Malaysia⁹⁸. Singapore only refers to exclusionary practices⁹⁹.

5.2.3 Types of abuse

Jurisprudence from the developed competition regimes has determined common categories of abuse of dominance. Exclusionary abuses commonly include predatory pricing, refusal to supply, exclusivity provisions (which includes fidelity or loyalty rebates), tying/bundling, margin

⁹⁵ As it is the market share of 50% that gives rise to a rebuttable presumption of dominance, the view of the PCC is that the Philippines defines dominance not solely in terms of “market power” but also “market share”.

⁹⁶ Note, the CCCS *Guidelines on the Section 47 Prohibition* provides guidance on how dominance would be assessed

⁹⁷ Accessed 12 February 2019 but no longer available on the KPPU website

⁹⁸ Paragraph 3.1 *Guidelines on Chapter 2 Prohibition*

⁹⁹ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 246

squeeze, and access to essential facilities. Exploitative abuses include excessive pricing, price discrimination and unfair prices¹⁰⁰.

In some of the AMS laws, the language used reflects commonly recognised categories of abuse. In other cases, the wording used appears intended to cover these internationally recognised abuses without using the same terminology. In a few jurisdictions, it can be difficult to reconcile the provisions with international norms without further guidance on what is intended by the terminology used¹⁰¹. Where the laws do not expressly cover certain abusive behaviours, the laws may be able to be interpreted widely enough to cover additional breaches.

The following table illustrates the substantial degree of consistency across the AMS in relation to the types of abuses contemplated by the respective laws (based on the author's interpretation and checked by the AMS).

¹⁰⁰ A discussion of exclusionary abuses with a short overview of exploitative abuses can be found in European Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN)

¹⁰¹ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 246

Table 10: Exclusionary and exploitative practices

	Exclusionary practices				Exploitative practices			Catch all	
	Pre-datory pricing ¹⁰²	Tying/Bundling ¹⁰³	Refusal to supply ¹⁰⁴	Exclusivity provisions	Limiting production, markets, technical development	Monopoly/excessive pricing	Price discrimination		Unfair pricing (high or low)
Brunei Darussalam	✓	✓			✓ Section 21(2)(b)		✓ ¹⁰⁵	-	-
Cambodia	✓ (Art 9)	✓ (Art 9)	✓ (Art 9)	✓ (Art 9)	✓ (Art 9) Refusing access to essential facility	-	-	-	✓
Indonesia	✓ ¹⁰⁶	✓ ¹⁰⁷	✓ ¹⁰⁸	✓ ¹⁰⁹	✓ ¹¹⁰	✓ ¹¹¹	✓ ¹¹²	✓ ¹¹³	-
Lao PDR	✓	✓	✓	-	✓ ¹¹⁴	-	✓	✓	Other practices stipulated in Regulations
Malaysia	✓	✓	✓		✓ ¹¹⁵		✓ ¹¹⁶	✓ ¹¹⁷	-
Myanmar	✓ ¹¹⁸	?119	?120	✓ ¹²¹	✓ ¹²²	-	-	-	-
Philippines	✓	✓	✓	✓ ¹²³	✓ ¹²⁴	✓ ¹²⁵	✓ ¹²⁶	✓ ¹²⁷	- ¹²⁸
Singapore	✓	✓	✓ ¹²⁹	✓ ¹³⁰		-	-	-	-
Thailand	✓	✓ ¹³¹	✓ ¹³²	✓ ¹³³	✓ ¹³⁴	-	-	✓	-
Vietnam¹³⁵	✓	✓	✓	✓ ¹³⁶	✓ ¹³⁷	✓ ¹³⁸	✓ ¹³⁹	✓ ¹⁴⁰	✓ ¹⁴¹

Source: Author's analysis based on review of laws and input from AMS

- ¹⁰² Brunei Darussalam, s 21(2)(a); Indonesia law, Article 20; Lao PDR law, Arts 31(2), (33); Malaysia law, s 10(2)(f); Philippines law, s 15(a); Singapore law, s 47(2)(a); Vietnam law, Art 27(1)(a)
- ¹⁰³ Brunei Darussalam law, section 21(2)(d); Lao PDR law, Arts 31(4), 35; Malaysian law, s 10(2)(e); Philippines law, s 15(c), (f); Singapore law, s 47(2)(d); Vietnam law, Art 27(1)(dd)
- ¹⁰⁴ Indonesian law, Art 25(1)(c), Lao PDR law, Arts 31(3), 34; Malaysia law, s 10(2)(c); Philippines law, s 15(c); Vietnam law, Art 27(1)(e)
- ¹⁰⁵ Brunei Darussalam law, section 21(2)(c)
- ¹⁰⁶ Article 7 and 20, Indonesia law
- ¹⁰⁷ Article 15(2) Indonesia law
- ¹⁰⁸ Articles 15(1) and 24 Indonesia law
- ¹⁰⁹ Article 25(1)(c) or (a) Indonesia law
- ¹¹⁰ Article 25(1)(b) Indonesia law
- ¹¹¹ Article 17 Indonesia law
- ¹¹² Article 19(d) Indonesia law
- ¹¹³ Article 6 Indonesia law
- ¹¹⁴ Art 14 Lao PDR law prohibits the imposition of obstacles that directly or indirectly create difficulties for other business operators in operating businesses such as access to finance, raw materials, information and technology.
- ¹¹⁵ Section 10(2)(b) and (2)(g) Malaysia law which relates to purchasing scarce supply of intermediate goods
- ¹¹⁶ Section 10(2)(d) Malaysia law
- ¹¹⁷ Section 10(2)(a) Malaysia law
- ¹¹⁸ 15(a) Myanmar law;
- ¹¹⁹ 15(b) Myanmar law may be applicable, subject to how it is interpreted
- ¹²⁰ 15(b) Myanmar law may be applicable, subject to how it is interpreted
- ¹²¹ 15(d) Myanmar law
- ¹²² 15(c) Myanmar law
- ¹²³ 15(3) Philippines law
- ¹²⁴ 15(i) Philippines law
- ¹²⁵ 15(h) Philippines law
- ¹²⁶ 15(d) Philippines law
- ¹²⁷ 15(g) and (h) Philippines Law
- ¹²⁸ The list of unilateral conduct found in section 15 is not meant to be an exhaustive list of acts of abuse of dominance
- ¹²⁹ Refusal to supply and exclusive purchasing are examples of conduct that may amount to an abuse under section of the Singapore law. See Annex C of the *Guidelines on the Section 47 Prohibition*
- ¹³⁰ Ibid
- ¹³¹ Could be covered by section 50(2) Thai law
- ¹³² Id.
- ¹³³ Id.
- ¹³⁴ Section 50(3) Thai law
- ¹³⁵ Note Vietnam also imposes different prohibitions against enterprises holding a monopoly position: these include all of the prohibitions against dominant players except predatory pricing. It also adds a prohibition against imposing conditions to the disadvantage of customers, unilaterally rescinding or changing signed contracts without justifiable reasons and other acts abusing a market monopoly position which are prescribed by other laws.
- ¹³⁶ Art 27(1)(d) or (e) Vietnam law
- ¹³⁷ Article 27(1)(c) Vietnam law
- ¹³⁸ Article 27(1)(c) and 27(2)(a) Vietnam Law
- ¹³⁹ Id.
- ¹⁴⁰ Id.
- ¹⁴¹ Article 27(2)(d) Vietnam

5.2.4 Defences or commercial justifications

In some jurisdictions around the world, the competition agencies and courts have recognised a defence of ‘reasonable commercial justification’ in relation to allegations of abuse of dominance. Efficiencies achieved by the dominant player may also be argued in defence of an allegation of abuse i.e. is it really abusive or is the dominant player simply operating efficiently?

The Regional Guidelines acknowledge the general ability for AMS to grant exemptions or exclusions for agreements or conduct:

“which have significant countervailing benefits, 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.” (paragraph 3.5.3)

This reflects the Article 101(3) exemption. There is no express reference to a ‘reasonable commercial justification’ defence in the Regional Guidelines.

In the AMS, there is a mixed approach taken in the laws to expressly recognising defences against allegations of abuse of dominance. Cambodia and Malaysia expressly recognise a ‘reasonable commercial justification’ defence¹⁴². Lao PDR includes a defence based on contribution to the country’s national socio-economic development or due to national strategy and security reasons¹⁴³.

In the Philippines, section 15 contains a proviso similar to that outlined in the Regional Guidelines (and reflective of Article 101(3) TFEU) which would allow economic efficiency arguments. Brunei Darussalam and Singapore both contain an exemption for agreements with net economic benefits which also reflects the Regional Guidelines and Article 101(3) but it is only applicable to anti-competitive agreements and not abuse of dominance¹⁴⁴.

There are no defences provided for in relation to abuse of dominance in the remaining jurisdictions (Indonesia, Myanmar, Thailand and Vietnam¹⁴⁵).

5.2.5 Sanctions for abuse of dominance

The sanctions for abuse of dominance are generally consistent with those applicable to anti-competitive horizontal (non-cartel) agreements. However, in Lao PDR¹⁴⁶, Myanmar¹⁴⁷,

¹⁴² Article 11 Cambodia law (but note the conditions). This is in addition to the individual exemption provision in Article 14; Malaysia law, section 10(3)

¹⁴³ Article 46 Lao PDR law but note there is a requirement to comply with the Government’s Administration and Regulations which deal with price, quantity and production plans.

¹⁴⁴ Note that under paragraph 4.5 of the CCCS *Guidelines on the Section 47 Prohibition*, CCCS may consider if the dominant undertaking is able to objectively justify its conduct

¹⁴⁵ According to Article 28 Vietnam Competition Law 2018, the Government may control enterprises operating in state-monopolized areas with the following measures: a) Deciding buying prices, selling prices of goods, services in state-monopolized domains; b) Deciding the quantity, volume and market scope of goods, services in state-monopolized domains; c) Directing, organizing the markets related to goods, services in state-monopolized domains prescribed by this Law and other relevant laws.

¹⁴⁶ Article 75 Lao PDR law

¹⁴⁷ Section 41 Myanmar law provides that anyone that violates section 15 shall be punished with imprisonment for a term not exceeding 2 years

Thailand¹⁴⁸, and Vietnam¹⁴⁹ there is also the possibility of criminal sanctions for abuse of dominance.

5.3 State Owned Enterprises

The Regional Guidelines provide:

“AMSs may decide that the intent of the competition law is to regulate the conduct of market players, and the prohibitions will not apply to the Government, statutory bodies or any person acting on their behalf... These exemptions apply insofar as the Government activities are connected with the exercise of sovereign power.” (paragraph 3.5.4)

This final sentence of paragraph 3.5.4 is important as it acknowledges that there may be some circumstances where Government activities are not connected with the exercise of sovereign power. For example, particularly in the context of SOEs, Government could be operating in commercial markets.

The approach to applying AMS laws to SOEs is not yet completely clear. In Brunei Darussalam and Singapore, all activity, agreements or conduct of the Government or any statutory body or any person acting on their behalf is exempt from competition law¹⁵⁰. Singapore has stated clearly that this exclusion only applies when it is the Government and/or a statutory body participating in the market in its governmental capacity, “and not when government-linked companies (“GLCs”) ... engage in commercial or economic activities in any market”¹⁵¹. For the purposes of this Study, it is assumed that a similar interpretation will be taken to the provision in Brunei Darussalam. There is a limited exclusion from competition law for SOEs in Thailand where the SOEs are engaged in conduct which is “necessary for the benefit of maintaining national security, public interest, the interests of society, or the provision of public utilities”¹⁵². In the Philippines, the law is clearly stated to apply to SOEs¹⁵³, while in Malaysia and Vietnam¹⁵⁴, the law also seems intended to apply to SOEs¹⁵⁵. In Indonesia, exemption may apply to the creation of designated monopolies (both SOEs and non-SOEs) that are stipulated in a law.¹⁵⁶ Section 8(b) of the Myanmar law states that the Commission may exempt businesses essential for the State, if necessary, suggesting that an application needs to be made to the Commission. The definition of ‘persons’ in the Cambodia law would include SOEs

¹⁴⁸ Section 72 Thai law

¹⁴⁹ Article 217, Criminal Code

¹⁵⁰ The laws also contains an exemption in Third Sch, para (1) which exempts undertakings entrusted with operation of services of general economic interest or having character of revenue producing monopoly: Section 33(4) and Third Schedule, paragraph 1, Singapore law; Section 10(4) and Third Schedule, paragraph 1, Brunei Darussalam law

¹⁵¹ CCCS, *Competition Law and State-Owned Enterprises – Contribution from Singapore*, Global Forum on Competition, DAF/COMP/GF/WD(2018)72, 30 November 2018, p 3

¹⁵² Section 4(2) Thai law

¹⁵³ In the Philippines, ‘entity’ is defined to expressly include ‘those owned or controlled by government’. The definition is linked to those engaged directly or indirectly in economic activity.

¹⁵⁴ The activities of SOEs in monopoly areas are controlled by the Government in accordance with Article 28.1 The other commercial activities of an SOE shall be subject to the law.

¹⁵⁵ Section 3(4) Malaysia law applies the law to any commercial activity but excludes ‘any activity directly or indirectly in the exercise of government authority’. This would not seem to exclude SOEs. In Vietnam, the ‘applicable entities’ listed in Article 2 cover SOEs.

¹⁵⁶ Article 51, Indonesia Law, based on input from ICC.

as non-profit organisations¹⁵⁷, however there will be an exemption if the agreement or activity fulfils the four requirements stated in Article 12 of the Law.

The position in Lao PDR is not yet clear¹⁵⁸.

5.4 AMS Self-Assessment

Question 3 asks 'Which of the following actors (including SOEs, SMEs, industry or trade associations) are exempted from the competition law? Thailand provides that SOEs are exempt in the circumstances set out in section 4. The Myanmar Commission may exempt businesses essential for the benefit of the State and SMEs¹⁵⁹. Indonesia notes that SMEs are exempt from their law.

5.5 Initial Conclusions on Commonalities and Differences: Abuse of Dominance

All AMS laws regulate abuse of dominance and, to date, many international norms have been adopted. If the AMS continue to follow international best practice, this will help to achieve regional convergence.

There are a few key points of difference that need to be considered. If addressed in the early years of operation, these differences can be managed so as not to result in a divergent approach. In some cases, convergence in the policy approach should be able to achieve the consistency required, while in other cases there may be a need for legislative changes:

- (1) Although many jurisdictions test dominance by reference to 'market power', some set market share thresholds. This could be problematic to convergence where the market share thresholds operate as pre-requisites (Indonesia) rather than presumptions.
- (2) Most, but not all, of the AMS contemplate collective dominance. It may be desirable to amend or clarify the remaining laws through guidelines to make clear that collective dominance is covered in all AMS.
- (3) In relation to the types of abuses that are prohibited, all jurisdictions except Cambodia cover both exclusionary and exploitative abuses. Against international norms, many of the classes of abuse seem also to be covered but it will be difficult to confirm this until the laws are applied in practice. This is an area where guidance from the competition regulators as to how they intend to apply their abuse provisions will be helpful to ensuring a consistent approach.

¹⁵⁷ 'Persons' is defined in Article 4(11) as those carrying on business activities regardless of profit or non-profit, registered or unregistered which the CCC confirmed will include SOEs.

¹⁵⁸ In Cambodia, the prohibitions apply to 'Persons' which is defined in Article 4(11) as those carrying on business activities regardless of profit or non-profit, registered or unregistered which would seem to be able to include SOEs. However, the definition of 'Business' in Article 4(15) includes reference to where a profit is intended to be made.

In Lao PDR, the law applies to business persons which is not defined. Art 2 refers to competition among the same type of business operators. Business operation refers to the business activities regarding production, trade and services. It is not clear whether this covers SOEs however Article 4 states that "The State facilitates a free competition under by-law and does not allow any authority to impede or create barriers to competition." Does this refer to SOEs? In Myanmar, most of the prohibitions apply to businesspersons however Section 15 applies to persons. Would 'person' be wide enough to include an SOE in Myanmar?

¹⁵⁹ Article 8(b) Myanmar law

- (4) The approach to defences for abuse of dominance cases is varied across the AMS. This could also be covered in guidance from the competition regulator.
- (5) Finally, a consistent approach should be encouraged in relation to applying the abuse of dominance provisions to SOEs. As noted by Maximiano, Burgess and Meester:

“SOEs commonly hold a dominant market position and can significantly affect competitiveness if not subject to the competition rules. Too diverse an approach to applying abuse provisions to SOEs across ASEAN would pose a significant risk to convergence.”¹⁶⁰

6. Merger control

6.1 ASEAN Regional Guidelines

The Regional Guidelines state:

“AMSs may consider prohibiting mergers that lead to a substantially lessening of competition or would significantly impede effective competition in the relevant market or in a substantial part of it, unless otherwise exempted.” (paragraph 3.4.1)

The Guidelines provide that notification may be mandatory (where the transaction cannot be implemented until the undertakings have received merger clearance from the competition regulator¹⁶¹) or voluntary (where businesses can undertake “their own merger self-assessment, to decide if they should notify the competition regulatory body to clear the merger”¹⁶²).

It is also recognised that not all mergers will give rise to competition concerns. As such, the Regional Guidelines suggest that AMS should consider filtering out mergers with no significant impact by setting merger thresholds. Thresholds may refer to turnover, market shares or a combination of turnover and market shares¹⁶³.

AMSs may also include:

- a standstill provision so that mergers cannot proceed until they are approved¹⁶⁴;
- a procedure by which the competition regulatory body is tasked to stop the merger or impose conditions on, or require commitments from, the parties¹⁶⁵;
- a simplified filing system for cases that appear not to raise competition concerns¹⁶⁶.

¹⁶⁰ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 249

¹⁶¹ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, Paragraph 3.4.2.1

¹⁶² Ibid. Paragraph 3.4.2.2

¹⁶³ Ibid. Paragraph 3.4.3

¹⁶⁴ Ibid. Paragraph 3.4.3

¹⁶⁵ Ibid. Paragraph 3.4.4

¹⁶⁶ Ibid. Paragraph 3.4.5

6.2 ASEAN Prohibitions on Merger Control

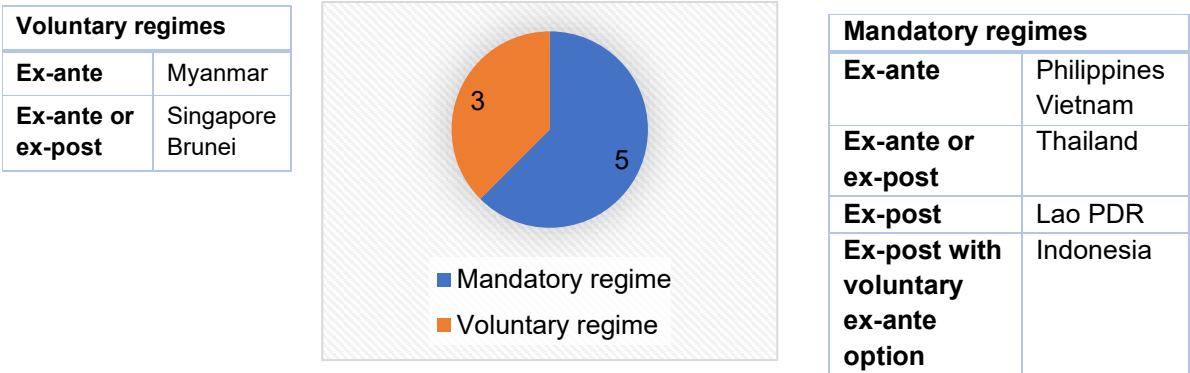
All AMS laws, with the exception of Malaysia, currently contain a merger control regime¹⁶⁷. Although Cambodia has included a merger regime in its law, the details are to be provided in a separate Sub-Decree which is not yet available. The analysis that follows therefore makes limited references to Cambodia.

6.2.1 Notification requirements - mandatory versus voluntary, ex-ante versus ex-post

The AMS contain a mix of mandatory and voluntary notification regimes, together with a mix of ex-ante (required to be notified before the merger proceeds) and ex-post (notified after the merger has completed) regimes.

Figure 4 shows the current position in relation to eight AMS. It can be seen that six of the eight AMS have mandatory notification regimes, with a mix of ex-ante and ex-post requirements. Indonesia’s regime contains a compulsory obligation to notify (within 30 days of the merger) where the relevant threshold is exceeded, while Thailand provides a compulsory ex-post regime for mergers that may substantially reduce competition and a compulsory ex-ante regime for mergers that may cause a monopoly or dominant position in a market.

Figure 4: Mandatory versus Voluntary Merger Regimes



Source: Maximiano, Burgess and Meester, *Promoting Convergence in ASEAN Competition Laws*, in Kovacic and de Silveira (eds) "Global Competition Enforcement", Kluwer Publishing, 2019, p 250. Updated by Rachel Burgess, October 2019

6.2.2 Notification thresholds¹⁶⁸

The requirement to notify mergers in any given jurisdiction depends on:

- (i) the definition of a merger transaction; and
- (ii) whether certain notification thresholds are met.¹⁶⁹

¹⁶⁷ The MyCC noted the need for merger control in a competition regime in its *Draft Final Report: Market Review on Transportation Sector under the Competition Act 2010* that "monitoring and review of M&A deals are imperative to safeguard against the risk of collusion (e.g. setting high prices) and exclusionary practices (e.g. tying or exclusive dealings) following the success of the deals".

¹⁶⁸ Section 6.2.2 is taken from Maximiano, Burgess and Meester, *Promoting Convergence in ASEAN Competition Laws*, in Kovacic and de Silveira (eds) "Global Competition Enforcement", Kluwer Publishing, 2019.

¹⁶⁹ See OECD Policy Roundtable on "Definition of Transaction for the Purpose of Merger Control Review" (2013), DAF/COMP(2013)25, p. 12.

6.2.2.1 Merger transaction

Different terminology is used across the AMS laws in relation to merger transactions. Brunei Darussalam, Singapore and Thailand classify merger transactions as “Mergers”, Indonesia as “Mergers, Consolidations and Acquisitions”, Lao PDR as “Combinations”, Myanmar as “Collaboration among Businesses”, The Philippines as “Mergers and Acquisitions” and Vietnam as “Economic concentrations”. In practice, this difference in terminology is unlikely to have any significant impact. The question of greater importance is the criteria used to determine whether a merger has taken (or will take) place.

As stated by Maximiano, Burgess and Meester:

“...two types of criteria are used: “objective” numerical criteria, and “economic” criteria, which are more aligned with the mechanism through which a merger transaction might harm competition.¹⁷⁰ These two criteria are not mutually exclusive; some jurisdictions combine objective and economic criteria. Six out of the eight AMSs with a merger control regime have chosen for economic criteria (Brunei, Indonesia, Singapore, the Philippines, Thailand and Viet Nam)¹⁷¹. Obtaining “control” is the key criterion, but the exact interpretation of what constitutes “control”, or the level of intensity of the influence, is different in some AMSs. Both Brunei¹⁷² and Singapore¹⁷³ use the acquisition of “decisive influence over the activities of the undertaking”. The Philippines refers to the ability to “substantially influence or direct the actions or decisions of an entity”¹⁷⁴. Indonesia, Thailand and Viet Nam seem to adopt slightly different wording, and assess the ability to determine or influence the “enterprise’s management and policies” (Indonesia¹⁷⁵), “enterprise’s policy, business administration, direction, or management” (Thailand¹⁷⁶), or “enterprise or a business line” (Viet Nam¹⁷⁷). Three of the aforementioned six AMSs with economic criteria (Indonesia, The Philippines and Singapore) have chosen to add also an objective criterion...”¹⁷⁸

¹⁷⁰ An example of the “objective” approach is the percentage thresholds for share acquisition (e.g. 25% or 50%). “Economic” criteria used in the definition of a merger transaction are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of control over a previously independent firm. An example is EU’s merger review regime that uses an acquisition of “control/decisive influence” standard (EC Merger Regulation, at. 3(1) and (2)).

¹⁷¹ Lao PDR and the Myanmar laws are less explicit in what they consider a merger transaction. Lao PDR only defines a merger as a transfer of assets, rights, obligations and interests (Art. 3 Lao PDR law), while the Myanmar law only lists the types of transactions (Section 30 Myanmar law): “In collaboration among businesses the following acts are included: (a) merger of businesses, (b) consolidation of businesses, (c) purchasing or acquisition of other business by a business, (d) joint-venture of businesses, (e) performing other means of collaboration among businesses specified by the Commission”.

¹⁷² Art. 23 Brunei Darussalam law

¹⁷³ CCCS, *Guidelines on the Substantive Assessment of Mergers 2016*. CCCS: Singapore, Para. 3.6.

¹⁷⁴ Rule 2(a) and (f) and Rule 6, Section 1 of Act no. 10667 (Rules And Regulations to implement the provisions of the Philippines Competition Act).

¹⁷⁵ Art. 1 and the explanation of Art. 5(4) in the Government Regulation No. 57 of 2010 (Concerning Merger Or Consolidation Of Business Entities And Acquisition Of Shares Of Companies Which May Cause Monopolistic Practices And Unfair Business Competition)

¹⁷⁶ Section 51 Thai law.

¹⁷⁷ Art. 29(4) of Vietnam law. In Article 2 of Decree 35, “control” refers to the ability to gain ownership of more than 50% of capital and voting shares or right to use more than 50% of total assets of acquired enterprise, and also to decide important issues related to business activities of the entity such as appointment of the board.

¹⁷⁸ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, pp 251-252.

6.2.2.2 Thresholds

Notification thresholds commonly refer to the size of the transaction in an attempt to eliminate mergers that are not likely to have a material impact on competition. As stated by Maximiano, Burgess and Meester:

“So far, only four of the AMSs (Indonesia, Philippines, Thailand and Viet Nam) have created specific notification thresholds for mergers in their legislation. The first two use solely objective criteria, as Indonesia has defined minimum asset values and/or sales values¹⁷⁹ and The Philippines minimum revenues and/or asset values as the value of the transaction¹⁸⁰. Thailand and Vietnam use both objective and subjective criteria. In Thailand¹⁸¹, it uses both market share (subjective) and sales turnover (objective), while Vietnam considers market share (subjective) combined with asset values, turnover and transaction value (all objective).¹⁸²None of the other countries have implemented notification thresholds.”¹⁸³

6.2.3 Substantive assessment

There is a substantial amount of consistency between the AMS in terms of the legal tests to be used in determining whether a merger will infringe their competition laws. All AMS use an effects-based test, five of which have incorporated the ‘substantial lessening of competition’ or ‘SLC’ test.

As stated by Maximiano, Burgess and Meester:

“Brunei and Singapore prohibit mergers that “result in a substantial lessening of competition”¹⁸⁴, while the Philippines prohibits mergers that “substantially prevent, restrict or lessen competition”¹⁸⁵ and Thailand prohibits mergers that result in a “substantial reduction of competition”¹⁸⁶. The other countries use terminology less close to the SLC, although the assessment focuses on the effects of the merger. In the case of Lao PDR a merger (“combination”) that restrains competition, i.e. aimed “to reduce, distort and/or prevent competition”, is prohibited.¹⁸⁷ Indonesia assesses whether a merger “causes monopolistic practices and/or unfair business competition”¹⁸⁸... Finally,

¹⁷⁹ In Indonesia, the combined value of the assets should exceed IDR 2.5 trillion (or IDR 20 trillion for banks); and/or the combined value of the sales turnover should exceed IDR 5 trillion. Ar. 5, Government Regulation No. 57 of 2010.

¹⁸⁰ In the Philippines, mergers need to be notified when (i) the aggregate annual gross revenues or value of the assets of at least one of the ultimate parent entities exceeds PHP 5.6 billion, or (ii) the value of the transaction exceeds PHP 2.2 billion. See Commission Resolution No. 03-2019: Adjusting the Merger Notification Thresholds Pursuant to Memorandum Circular No. 18-001. The most recent issuance on thresholds is Resolution 02-2020 (adjusting thresholds to 6Bn and 2.4Bn), effective 01 March 2020.

¹⁸¹ Section 5 of Thai law.

¹⁸² Art. 33(2) Vietnam law. Article 13, Decree 35/2020 regulates the threshold for merger notification.

¹⁸³ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, pp 252-253

¹⁸⁴ Art. 23(1) Brunei Darussalam law and art. 54(1) Singapore Competition Law.

¹⁸⁵ Section 20 Philippines law.

¹⁸⁶ Section 51 Thai law.

¹⁸⁷ Art. 18, 19 Lao PDR law. Art. 38 dictates that a merger is aimed to restrain competition if it leads to restrained market access and technology development, and creates a negative impact on consumers, other business operators and the national socio-economic development. Hence, this seems also an SLC test.

¹⁸⁸ Art. 28(1) Indonesia law. Moreover, art. 3(2) of the Government Regulation No. 57 of 2010 prescribes that the merger assessment will include an analysis of market concentration, barriers to market entry, potential of anti-competitive behaviour, efficiency and/or bankruptcy).

the terminology in the Myanmar Competition Law emphasises the dominance as a result of a merger (it prohibits “collaboration among businesses” that “raise extremely the dominance over the market”)¹⁸⁹, but it seems to focus on effects of the merger as well.^{190,191}

Article 30 of the Vietnam law prohibits an economic concentration that causes impact or is likely to cause impacts of significantly restricting competition in the market of Vietnam¹⁹².

Cambodia also uses language reflective of the SLC test, prohibiting mergers that have or may have the “effect of significantly preventing, restricting or distorting competition”¹⁹³.

6.2.4 Joint ventures and ancillary restraints

A key question for the AMS merger regimes will be whether they also capture full-function joint ventures as well as how restraints that are ancillary to the merger are treated.

Six of the AMS expressly refer to joint ventures in their AMS laws (Brunei Darussalam, Lao PDR, Myanmar, Singapore, Thailand¹⁹⁴, and Vietnam)¹⁹⁵. The Philippines has prepared separate *Guidelines on Notification of Joint Ventures*¹⁹⁶. Only Brunei Darussalam and Singapore deal expressly with ancillary restraints in their laws¹⁹⁷.

6.2.5 Defences/justifications

Defences that are commonly recognised in the context of merger assessment around the world are the ‘failing firm’ defence (the firm to be merged will leave the market even if the merger does not proceed (because it will fail)) and an ‘efficiencies’ defence (the merged firm will generate efficiencies that will not be available absent the merger).

Some AMS expressly recognise these defences in their laws. Three of the AMS recognize the failing firm defence (Lao PDR, Myanmar, Philippines¹⁹⁸) while Brunei Darussalam, the Philippines and Singapore expressly recognize the efficiencies defence in the context of mergers. Lao PDR and Myanmar include a broader defence that is focused on growth of exports and technological development¹⁹⁹. Thailand allows an exemption where there is a “valid business-related necessity, benefit in supporting a business operator, not causing

¹⁸⁹ See Myanmar law, Art. 30 and 31(a).

¹⁹⁰ It assesses whether a collaboration intends to “decrease competition”. Art. 31(b).

¹⁹¹ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 254

¹⁹² Article 30 Vietnam law

¹⁹³ Article 11 Cambodia law

¹⁹⁴ Section 23(5) Brunei Darussalam law, Article 37 Lao PDR law, Section 30 Myanmar law, Section 54(5) Singapore law, Article 29(1) Vietnam law

¹⁹⁵ Article 29(5) Vietnam law

¹⁹⁶ Available at <https://phcc.gov.ph/guidelines-on-notification-of-joint-ventures/>

¹⁹⁷ Paragraph 10 of the Third Schedule clearly states that the prohibitions against anti-competitive agreements and abuse of dominance do not apply to “any agreement or conduct that is directly related and necessary to the implementation of a merger”.

¹⁹⁸ It is unclear whether section 52 of the Thai law is applicable in these circumstances.

¹⁹⁹ Article 47 Lao PDR law, Section 33(c) Myanmar law

severe damage to the economy, and no impact on the essential benefits consumers are entitled to as a whole”.²⁰⁰ It is not yet clear how those defences will be applied in practice.

6.2.6 Remedies

Remedies imposed by competition authorities to address anti-competitive mergers are either structural remedies (where the structure of the market is altered to seek to address the competition concerns – this may include divestment of assets or sale of part of the business) or behavioural remedies (where the behaviour of the merged entity is regulated to seek to address the competition concerns).

Only the Philippines and Vietnam expressly refer to structural or behavioural remedies in their laws²⁰¹. This is an area that is more commonly addressed in guidelines²⁰².

6.2.7 Sanctions

All AMS include sanctions for substantive breaches of the merger provisions. In addition, Indonesia, the Philippines and Thailand can impose sanctions for a failure to notify. Some of the jurisdictions also potentially have the ability to impose criminal sanctions for breach of the merger provisions (Indonesia, Myanmar).

Further analysis is needed of the differences in sanctions applicable to mergers across the AMS.

6.3 AMS Self-Assessment

There are no points to add from the Self-Assessment.

6.4 Initial Conclusions on Commonalities and Differences: Merger Provisions

There are a number of significant differences in the merger control regimes across the AMS that will potentially cause issues for convergence:

- (1) The differences in terminology used across the AMS could result in different interpretations and merger assessments, potentially leading to legal uncertainty and increasing transaction costs for merging parties²⁰³.
- (2) The notification thresholds are diverse, with a mix of mandatory and voluntary, ex-ante and ex-post regimes, again leading to the risk of increased costs and uncertainty²⁰⁴.

²⁰⁰ Section 52 Thai law

²⁰¹ Section 12(h) Philippines Act; Article 42 Vietnam law

²⁰² See for example, CCCS, *Guidelines on Substantive Assessment of Mergers*, 2016. CCCS: Singapore, p 88

²⁰³ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 256

²⁰⁴ Id.

There is a substantial amount of consistency between the AMS in terms of the legal tests to be used in determining whether a merger will infringe their competition laws with all AMS using an effects-based test. This is a positive result, especially for cross-border mergers.

The AMS laws do not all address the treatment of joint ventures, ancillary restraints and defences to proposed mergers. This provides the AMS competition regulators with an opportunity to address these issues consistently in merger guidelines.

A key area for convergence will be the use of remedies for proposed mergers, in particular whether structural or behaviour remedies are favoured. This will be especially relevant for cross-border mergers.



PART IV: COMPARATIVE ANALYSIS OF ASEAN INSTITUTIONAL ARRANGEMENTS AND POWERS

1. Institutional Structure and Design

Maximiano, Burgess and Meester recognise three institutional factors that will influence the enforcement and convergence of competition laws across ASEAN: regulator independence; the role of sector regulators and the courts²⁰⁵. Regulator independence relies in part on the budget available and the number and quality of staff of each competition authority (see below). An independent regulator has more freedom to apply up to date economic thinking which, in turn, is more likely to lead to convergence across the region if all regulators are free to do the same. The role of sector regulators is relevant as a jurisdiction with multiple sector regulators with competition powers is at risk of not achieving convergence domestically, making regional convergence very challenging. Finally, if international interpretation and best practices are adopted by the courts, convergence across the region is more likely²⁰⁶.

1.1 ASEAN 2010 Regional Guidelines: Regulator Independence

The Regional Guidelines make a number of important recommendations regarding the independence of the competition regulatory body. Firstly, the AMS should determine whether to:

- “4.3.1.1 Establish a standalone independent statutory authority responsible for competition policy administration and enforcement;
- 4.3.1.2 Create different statutory authorities respectively responsible for competition policy administration and enforcement within specific sectors; or
- 4.3.1.3 Retain competition regulatory body functions within the relevant Government department or Ministry.”

The Guidelines then note:

- “4.3.2 AMSs should also determine whether they would establish an administrative appeal body which is independent of the competition regulatory body and executive Government or leave appeals to the judicial authority.

²⁰⁵ Regulator independence and sector regulators are covered in this Section; a discussion on the courts is included in relation to appeals in Part V, Section 6.

²⁰⁶ Maximiano, R., R. Burgess and W. Meester, “Promoting Similarities and Eliminating Contradictions in ASEAN Competition Laws and Practice” in *Global Competition Enforcement: New Players, New Challenges* edited by Paulo Burnier da Silveira, William Evan Kovacic, 2019, p 256-261

4.3.3 AMS may grant a competition regulatory body as much administrative independence as necessary and as possible, in order to avoid political influence. AMSs may appoint independent commission members to be in charge of the competition regulatory body...”

“4.3.4 AMS may determine that the competition regulatory body’s budget should be free from political considerations.” The paragraph then offers some suggestions as to how this can be achieved.

From this, the Regional Guidelines appear to be recognising the following factors as being required for regulatory independence:

- A separate administrative appeal body or appeal process to the relevant judicial authority;
- Appointment of independent commission members; and
- A budget free from political considerations.

1.2 Independence of ASEAN Institutional Structures

Recognising the different approaches that may be adopted to achieve regulatory independence, the OECD identified some safeguards that can be relied upon to provide competition authorities with protection against political pressures, including:

“provisions concerning the status of the agency; the appointment-dismissal procedures for its senior management; the relationship between the agency and the government; and the financial and human resources allocated to the agency to perform its mandate”²⁰⁷.

The extent to which these safeguards exist in ASEAN are considered below.

1.2.1 Legislative statements of independence

Some AMS laws contain express statements regarding the independence of the competition authority. The remainder are silent on this issue.

Indonesia’s competition law expressly states that the Commission is an independent institution, free from government or other parties influence or power²⁰⁸. Lao PDR’s law states that the LCC is ‘independent in terms of technical aspects’²⁰⁹, while Myanmar’s law states that the ‘Commission may independently administer and carry out its functions and duties in accordance with economic policies laid down by the State’²¹⁰. Section 5 of the Philippines law establishes the PCC as ‘an independent quasi-judicial body’.

²⁰⁷ OECD Secretariat, Background Paper – Independence of Competition Authorities – from Designs to Practices, Global Forum on Competition, 1-2 December 2016

²⁰⁸ Article 30(2) Indonesia law

²⁰⁹ Article 48 Lao PDR law

²¹⁰ Section 7, Myanmar law

1.2.2 Responsible Ministry and Relationship with Government

Some competition agencies in ASEAN sit under a Ministry to which they are accountable for decisions and initiatives. However, this does not mean that the government department has the ability or power to review decisions of the authority. Table 11 below identifies the relevant line ministry for each AMS competition authority.

Table 11: Responsible Ministry

Jurisdiction	Authority	Line Ministry
Brunei Darussalam	Competition Commission of Brunei Darussalam (CCBD)	Ministry of Finance and Economy
Cambodia	Cambodia Competition Commission (CCC)	Ministry of Commerce, Consumer Protection, Competition and Fraud Repression Directorate General (CCF) as Secretariat
Indonesia	Indonesia Competition Commission	The ICC has a financial reporting obligation only to the President and the Parliament
Lao PDR	Lao Competition Commission	Ministry of Industry and Commerce
Malaysia	Malaysia Competition Commission	Ministry of Domestic Trade and Consumer Affairs
Myanmar	Myanmar Competition Commission	Ministry of Commerce
Philippines	Philippine Competition Commission	Office of President
Singapore	Competition and Consumer Commission Singapore	Ministry of Trade and Industry
Thailand	Trade Competition Commission	A government agency which is not part of the civil service, nor a state-owned enterprise ²¹¹ and is under supervision of Chairperson
Vietnam	Vietnam Competition Commission	Ministry of Industry and Trade

Source: Author's analysis based on Competition Laws, responses to Self-Assessment and input from AMS

1.2.2.1 AMS Self-Assessment

The Self-Assessment questionnaire asked important questions relating to independence of the competition authorities across ASEAN:

“26. On which amongst the following matters does the government/a minister have overriding power over the competition agency as provided by law?

- The decision to open/close an investigation on an alleged infringement of the competition law

²¹¹ Section 27 Thailand law

- The decision to impose/not to impose specific sanctions and/or remedies when closing an investigation on an alleged infringement of the competition law
- The decision to clear/block a merger
- The decision to grant/not to grant exemption for anticompetitive conducts which would otherwise have contravened the competition law
- Neither the government nor any minister could override the decisions of the competition agency over competition matters”.

Indonesia, Myanmar, the Philippines and Thailand stated that there are no circumstances where the government or a minister has power to override a decision of the competition authority. Singapore noted the Minister’s power to “grant an exemption for anti-competitive conduct which would otherwise have contravened the competition”²¹². In Malaysia, the Minister has power to give directions to the MyCC, consistent with the competition law²¹³. Brunei Darussalam identified matters where the government/a minister *could* intervene in a decision of the competition authority as follows:

- (i) Decision to clear/block a merger
- (ii) The decision to grant/not grant an exemption for anti-competitive conduct
- (iii) Vary or revoke a block exemption.²¹⁴

Legislatively, (i) and (iii) are also provided for in Singapore’s legislation²¹⁵. Vietnam subsequently confirmed that there are no occasions in which the government could intervene in a decision of the competition authority.

Lao PDR did not answer this question and Cambodia did not complete the 2019 self-assessment.

1.2.3 Commissioners – Appointment and Dismissal

The appointed members of the Commission play a key role in the development and progress of the law.

In all AMS, Commission members are appointed by the relevant Head of State or Minister²¹⁶, with removal also generally by the Head of State²¹⁷. Cambodia, Lao PDR and Myanmar are

²¹² See exclusions found in the Third and Fourth Schedule of the Singapore law and the power to grant a block exemption under section 36 of the Singapore law

²¹³ Section 18(2) Malaysia law

²¹⁴ Legislatively, (i) and (iii) are also provided for in Singapore’s legislation: section 40(3) and section 57(3) Singapore law. In addition, the CCCS are required to give effect to any directions relating to policy, performance of functions and discharge of duties given by the Minister: section 8 Singapore law.

²¹⁵ Section 40(3) and Section 57(3) Singapore law

²¹⁶ Section 3, Brunei law; Article 5 Cambodia law; Article 31(2) Indonesia law; Article 49 Lao PDR law; Section 5 Competition Commission Act 2010 (Malaysia); Section 5 Myanmar law; Section 6 Philippines law; Section 1, First Schedule to Singapore law; Section 7 Thai law; Article 48(3) Vietnam law.

²¹⁷ Paragraph 3, First Schedule to Brunei law; Article 31(2) Indonesia law. See also Article 33 which recognizes a membership may end in the event of death, resignation, domicile outside the Republic of Indonesia, illness or end of term; Section 11 Competition Commission Act 2010 (Malaysia); Para 9, First Schedule to Singapore Competition Act; Section 7 Philippine law; Section 14 Thai law; Article 48(3) Vietnam law

²¹⁷ Section 11 Competition Commission Act 2010

²¹⁷ Section 5, Myanmar law

²¹⁷ Para 9, First Schedule to Singapore Competition Act

silent on removal. Some security of tenure is guaranteed, however, with removal normally only being permitted “if necessary in the interest of the effective and economical performance of the functions of the Commission”²¹⁸ or “in the public interest”²¹⁹ or “just cause as provided by law”²²⁰ or “due to a failure to fulfil his/her duty, atrocious behaviour or lack of capacity to perform duties”²²¹.

All jurisdictions apart from the Philippines allow Commissioners to serve a second term as Commissioner. Most jurisdictions have terms of 3-5 years, the Philippines is the only exception with a term of 7 years, possibly explaining the limit to one term. All appointments are made at the highest political level.

As can be seen from Table 12, most of the institutions in ASEAN are represented by Commissioners who come from the civil service and/or undertake the role in a part time capacity. The part time nature of many of the ASEAN Commissioners could have a significant impact on the development of competition law across ASEAN. The introduction and implementation of competition law is an enormous task and one that is difficult for both the Commissioners and the agency staff to achieve with part-time Commissioners.

²¹⁷ Section 7 Philippine law

²¹⁷ Section 14 Thai law

²¹⁷ Article 48(3) Vietnam law

²¹⁸ Brunei Darussalam, Malaysia, Singapore

²¹⁹ Brunei Darussalam, Singapore

²²⁰ Section 7 Philippine law

²²¹ Section 14 Thai law

Table 12: Commissioners appointed to Competition Regulators

Jurisdiction	Authority	Commissioners (Part Time/Full Time)	Number of Commissioners	Representation of Commissioners	Appointed by	Term	Re-appointment
Brunei Darussalam	Competition Commission of Brunei Darussalam (CCBD)	Part Time	Chairman plus 6-12 Commissioners	Mainly civil servants, private and academia	His Majesty the Sultan of Brunei Darussalam	3-5 years	Yes
Cambodia	Cambodia Competition Commission (CCC)	Full/Part time	11 Commissioners comprising Chairman, Vice-Chairmen and others from relevant ministries/institutions	Civil Servants, Experts	Prime Minister with the recommendation from the Minister of Commerce as the Chair of CCC	5 years	Yes (it will be determined on the Sub decree on Organizational and Functions of CCC)
Indonesia	Indonesia Competition Commission (ICC)	Full time	Chairman, Vice Chairman, and not less than 7 members	Private sector/academia/ Legal practitioner	President of the Republic of Indonesia upon recommendation of the Parliament	5 years	1 (one) subsequent term of office
Lao PDR	Lao Competition Commission	Part time	11	Civil servants	Prime Minister upon recommendation of Minister of Industry and Commerce	NA	NA
Malaysia	Malaysia Competition Commission (MyCC)	Part time	Chairman and 9 Commissioners	Civil servants, private and academia	Prime Minister	3 years	Yes, for one additional term only
Myanmar	Myanmar Competition Commission (MmCC)	Full/Part time	13	Civil servants, private and academia	Union Government (Cabinet)	3 years	The members shall not serve for more than two consecutive tenures. However, the tenure may be extended in case of skills and other requirements. (Rule 10).
Philippines	Philippine Competition Commission (PCC)	Full time	Chairman plus 4 Commissioners	Private and academia	President	7 years ²²²	No
Singapore	Competition and Consumer Commission Singapore (CCCS)	Part time	Chairman plus 6-12 Commissioners	Civil servants, private and academia	Minister of Trade and Industry ²²³	3-5 years	Yes
Thailand	Trade Competition Commission	Full time	Chairperson, Vice Chairperson and 5 Commissioners	Private and academia	Prime Minister after a detailed selection process	4 years	Yes, for one additional term only
Vietnam	Vietnam Competition Commission (VCC)	Both Full time and Part time	Chairman, 2 Vice Chairman and 11-15 Commissioners	Civil servants and experts	Prime Minister on the recommendation of Minister of Industry and Trade	5 years	Yes

Source: Author's analysis based on Competition Laws, responses to Self-Assessment and input from AMS; NA means not available

²²² For first set of appointees, two of the Commissioners will hold office only for 5 years: section 7 Philippines law

²²³ See First Schedule of the Singapore law

1.2.4 Financial and Human Resources

The budget available to the competition authority has a direct impact on the number and experience of the staff that it can employ.

Table 13: Budget and Staff of Selected Competition Authorities for 2020 and GDP and Population Context

AMS	Budget of Competition Authority (EUR Million)	GDP in USD Million	No. of Staff Members Working on Competition	Population (Million)
Brunei Darussalam	0.00425 ²²⁴	13,469	5	0.4
Cambodia	Commission not yet established	27089	33 (Competition department staff)	16
Indonesia	6.04	1,119,190	158	270 (2019)
Lao PDR	NA	18,173	6	7.2
Malaysia	3.4 (2019)	364,680	74	31.9
Myanmar	NA	76,085	23	54
The Philippines	7.8	376,795	192	108
Singapore	11	353,741	44	5.7
Thailand	6.2	543,548	139 (including Commissioners)	69.6
Viet Nam	0.8	261,921	60	96.4

Source: Maximiano R., R. Burgess and W. Meester, *Promoting Convergence in ASEAN Competition Laws*, in Kovacic and de Silveira (eds) "Global Competition Enforcement", Kluwer Publishing, 2019, p 258. Updated May 2021

Note: NA means that information is either not available or not applicable.

Maximiano, Burgess and Meester say:

“As can be observed from Table[14], budget and staff count differ significantly not only in absolute but also in relative terms. Singapore and the Philippines seem to have a relatively high budget compared with others (taking into account its GDP), while Singapore has by far the largest relative staff count (taking into account the population). A lower budget indicates a relatively marginal importance of competition matters on the national public policy agenda. Without the necessary investment from the public purse, there is a decreased likelihood that a competition authority can fulfil its duties under the competition law. A shortage of staff can lead to challenges in terms of the number and quality of investigations of competition law violations the authority can execute. Moreover, given the (growing) importance of economics in competition law, a competition authority requires a sufficient number of sufficiently qualified (economic and legal) staff.”²²⁵

²²⁴ Operational only i.e. training, advocacy materials. Salaries and other expenditures fall under the line Ministry.

²²⁵ Given that competition law lies at the interface of law and economics, a sound competition enforcement of competition law requires a sufficient number of well-qualified staff with sophisticated skills.

Table 14: Budget and staff as at 30 June 2021

Jurisdiction	Authority	Budgetary source	Staff numbers	Qualifications of staff
Brunei Darussalam	Competition Commission of Brunei Darussalam (CCBD)	Ministry of Finance and Economy via Department of Competition and Consumer Affairs, Department of Economic Planning and Statistics	5	3 economists 2 finance and accounting
Cambodia	Cambodia Competition Commission (CCC)	NA	NA	NA
Indonesia	Indonesia Competition Commission (ICC)	State Treasury and percentage of Collected Fines determined by the Minister ²²⁶	466	72 lawyers 101 economists 46 finance and accounting 16 communications 42 strategic planning 42 others (engineers, social scientists)
Lao PDR	Lao Competition Commission	Ministry of Industry and Commerce	6	2 law 2 business administration 1 internal trade 1 business English language
Malaysia	Malaysia Competition Commission	Ministry of Finance through MDTCA	75	23 lawyers 10 economists 4 finance and accounting 5 IT forensics 1 statistics 2 communications 9 others
Myanmar	Myanmar Competition Commission	Ministry of Commerce	21	1 economist 3 legal practitioners
Philippines	Philippine Competition Commission	Congress	261	56 lawyers 37 economists 10 accountants 3 engineers
Singapore	Competition and Consumer Commission Singapore	Ministry of Trade and Industry	44 (only includes staff working on competition enforcement)	16 lawyers 24 economists 2 non-administrative staff with other roles 2 administrative staff
Thailand	Trade Competition Commission	Legislature through Ministry of Commerce	140	17 lawyers 13 economists 15 business 3 accounting 7 political science 3 science 4 art 2 communications 1 logistics 2 engineers
Vietnam	Vietnam Competition Commission	Ministry of Industry and Trade	58	10 lawyers 27 economists 5 finance and accounting 3 IT forensics 5 strategic planning

Source: Author's analysis based on Competition Laws, responses to Self-Assessment and input from AMS; NA means not available

²²⁶ Indonesia's response to the Self-Assessment, 2019

Maximiano, Burgess and Meester say:

“As can be observed from Table[14], budget and staff count differ significantly not only in absolute but also in relative terms. Singapore and the Philippines seem to have a relatively high budget compared with others (taking into account its GDP), while Singapore has by far the largest relative staff count (taking into account the population). A lower budget indicates a relatively marginal importance of competition matters on the national public policy agenda. Without the necessary investment from the public purse, there is a decreased likelihood that a competition authority can fulfil its duties under the competition law. A shortage of staff can lead to challenges in terms of the number and quality of investigations of competition law violations the authority can execute. Moreover, given the (growing) importance of economics in competition law, a competition authority requires a sufficient number of sufficiently qualified (economic and legal) staff.²²⁷...

In summary, low budgets and staffing can pose a challenge for the independence of – and the sound technical decisions made by – competition agencies of the AMSs. This in turn can eventually deter further convergence of decision making across ASEAN based on well-accepted and well-tested competition law and economics.”²²⁸

1.3 Initial Conclusions on Commonalities and Differences: Institutional arrangements

An independent competition authority is able to make decisions without influence or fear of consequences. Although all AMS have established stand-alone competition authorities, the levels of independence granted differ. Some AMS include express legislative statements of independence, however the relationship with the government remains strong in all cases. This can be seen particularly vis-à-vis the Commissioners appointed to the authority with seven out of ten competition authorities with Commissioners appointed from the civil service. This may affect the perceived autonomy of the institution. The same seven jurisdictions have only part-time Commissioners which suggests that these appointments also hold concurrent government positions. This may limit their ability to give the implementation and enforcement of competition law the time and attention it requires.

All jurisdictions allow Commissioners to serve a second term (except the Philippines that has a seven-year initial term). This gives Commissioners a reasonable opportunity to obtain a thorough understanding of this complex law and make meaningful contributions. Although dismissal during a term is possible, there are restrictions on the exercise of this power. This stability is particularly important in the early years of implementation.

The budget provided to the authorities will have an impact on the ability to employ qualified staff, including lawyers, economists and investigators which will ultimately impact the decision-making process. As Maximiano, Burgess and Meester notes, convergence of decision-making

²²⁷ Given that competition law lies at the interface of law and economics, a sound competition enforcement of competition law requires a sufficient number of well-qualified staff with sophisticated skills.

²²⁸ Maximiano, R., R. Burgess and W. Meester, “Promoting Similarities and Eliminating Contradictions in ASEAN Competition Laws and Practice” in *Global Competition Enforcement: New Players, New Challenges* edited by Paulo Burnier da Silveira, William Evan Kovacic, 2019, p 258-259

will depend on the application of well-accepted and well-tested competition law and economics, which in turn depends upon the staff of the authority.

In ASEAN, the institutional design of competition authorities (and other agencies) is impacted by divergent strategic interests, the involvement of the State, differing policy priorities, as well as poverty and underdevelopment. Against this background, it is difficult to achieve a totally independent institution in ASEAN.

Nonetheless, a desire to do so should be maintained for due process reasons, as well as increasing the possibility for a convergent approach to competition law and economics in the region based on international best practices.

2. Sector Regulators

2.1 ASEAN 2010 Regional Guidelines: Sector regulators

The Regional Guidelines offer suggestions as to how the AMS should manage sector-specific regulators, both in terms of the scope, and implementation, of competition law²²⁹. The Guidelines also suggest the establishment of:

“a regular inter-agency forum or a platform with the relevant stakeholders to enable the competition regulatory body and sector-specific regulators to work together to help reduce the incidence of conflict between regulators...” (paragraph 4.4.4)

2.2 Sector Regulators with Competition Law Jurisdiction

Across the ASEAN region, there are some jurisdictions that share responsibility for competition law and policy enforcement with sector-specific regulators, while in other jurisdictions, the responsibility for competition law and policy rests entirely with the competition agency.

²²⁹ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*, 2010. ASEAN Secretariat: Jakarta, section 4.4

Table 15: Regulatory authorities with competition enforcement powers

Jurisdiction	Sector specific Regulatory Authorities with competition enforcement powers
Brunei Darussalam	Yes ²³⁰
Cambodia	None
Indonesia	None
Lao PDR	Sector specific authorities have powers to regulate disruptive behaviours. This may include anti-competitive behaviours but so far there is no precedent ²³¹
Malaysia	Yes ²³²
Myanmar	Yes ²³³
Philippines	Yes ²³⁴
Singapore	Yes ²³⁵
Thailand	Yes ²³⁶
Vietnam	Yes ²³⁷ – Telecommunication Authority, among others

Source: Handbook on Competition Policy and Law in ASEAN for Business 2019, updated by AMS

NB: The question asked in the Handbook was “Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?” which differs to the question in the Self-Assessment

AMS Self-Assessment

The self-assessment contained three questions relevant to sectoral regulators:

“27. In which amongst the following sectors does the competition agency have concurrent jurisdiction with the sector regulators – telecommunications, power and gas, water, banking and other financial services, petrol and oil, education, healthcare?”

Myanmar identified concurrent jurisdiction with the telecommunications regulator; Malaysia identified concurrent jurisdiction with telecommunications and multimedia, energy, petroleum and aviation. Singapore and Brunei Darussalam said there was no overlap in the stated

²³⁰ Telecommunication sector has a code of practice for competition.

²³¹ As advised by LCC

²³² Malaysian Communications and Multimedia Commission (MCMC), Energy Commission (EC), Malaysian Aviation Commission (MAVCOM)

²³³ Post and Telecommunications Department under the Ministry of Transport and Communications

²³⁴ Downstream Oil Industry Deregulation Act - Department of Energy (DOE); Electric Power Industry Reform Act – Energy Regulatory Commission (ERC); Public Telecommunications Policy Act – National Telecommunications Commission (NTC); Revised Charter of the Philippine Ports Authority - Philippine Ports Authority (PPA); Domestic Shipping Development Act - Maritime Industry Authority (MARINA); Consumer Act and Price Act - Department of Trade and Industry (DTI); Tariff and Customs Code of the Philippines – Tariff Commission (TC); Securities Regulation Code, Corporation Code and Revised Securities Act - Securities and Exchange Commission (SEC); Civil Aeronautics Act - Civil Aeronautics Board (CAB); New Central Bank Act - Bangko Sentral ng Pilipinas (BSP); Insurance Code - Insurance Commission (IC); and National Food Authority Act - National Food Authority (NFA)

²³⁵ Civil Aviation Authority of Singapore; Energy Market Authority of Singapore; Infocomm Media Development Authority of Singapore; Singapore Police Force.

²³⁶ National Broadcasting and Telecommunications Commission; Energy Regulatory Commission; Civil Aviation Authority Commission; Securities and Exchange Commission; Insurance Commission; Bank of Thailand (Banking Sector).

²³⁷ Telecommunications Authority; Electricity Regulatory Authority of Viet Nam (Ministry of Industry and Trade); the Viet Nam National Maritime Bureau (Ministry of Transport); the Civil Aviation Administration of Viet Nam (Ministry of Transport); the Foreign Investment Agency (Ministry of Planning and Investment); the Ministry of Finance and The State Bank of Viet Nam; the Drug Administration of Viet Nam (Ministry of Health); the National Office of Intellectual Property of Viet Nam (Ministry of Science and Technology); the Insurance Administration and Supervision Department (Ministry of Finance).

sectors. The Philippines noted it has primary jurisdiction. Lao PDR did not answer this question.

“34. Does the competition agency have MOUs/cooperative relations with sector regulators in your jurisdiction?”

Thailand, Indonesia, Philippines and Malaysia confirmed it had MOUs with sectoral regulators, while Singapore and Vietnam noted that it consulted with relevant bodies. The remaining jurisdictions (Brunei Darussalam, Lao PDR and Myanmar²³⁸) have not yet reached arrangements.

“35. If possible, please inform on any actual consultations on competition matters between the competition agency and sector regulator(s) in your jurisdiction in the past two years.”

Consultations had taken place between the competition agency and the sector regulators in Brunei Darussalam²³⁹ (communications, development, banking), Indonesia (food, health, banking and finance, transport, telecommunication), Lao PDR (telecommunications), Myanmar (telecoms, investment, transport and information), Singapore, Philippines (telecommunications, land transport), Thailand²⁴⁰ (banking, insurance, securities, energy and aviation), Vietnam²⁴¹ (electricity, telecommunications). Malaysia holds regular meetings with 7 other sector regulators at least twice per year to discuss competition issues.

2.3 Initial Conclusions on Commonalities and Differences: Sector Regulators

The overlap of responsibilities for competition law between the competition authority and the sector regulators gives rise to a risk of divergent interpretations within the jurisdiction and increases the likelihood of divergence across the region.

Finally, the overlap of responsibilities for competition law between the competition regulator and the sector regulators gives rise to a risk of divergent interpretations within the jurisdiction and increases the likelihood of divergence across the region.

As Maximiano, Burgess and Meester states:

“[t]he presence of sector regulators with competition powers may also be a further challenge for the convergence process. There may be different legal provisions in the sectoral laws, or the regulators may be implementing the same legal tests differently. They may even not be applying them at all, as they do not see it as their main responsibility and priority, among their competing tasks.”²⁴²

Despite the challenges, concurrent jurisdiction between the competition regulator and the sector regulator is to be preferred to exclusion of the relevant sector from competition law in its entirety. To reduce the risk of divergent interpretation, cooperation between the regulators

²³⁸ Note: Cambodia did not complete the self-assessment in 2019

²³⁹ Updated 2021

²⁴⁰ Updated 2021

²⁴¹ Updated 2021

²⁴² Maximiano, R., R. Burgess and W. Meester, “Promoting Similarities and Eliminating Contradictions in ASEAN Competition Laws and Practice” in *Global Competition Enforcement: New Players, New Challenges* edited by Paulo Burnier da Silveira, William Evan Kovacic, 2019, p 259

will be vital. Agencies could work together to develop a common interpretation or one agency could be awarded primacy (as in the Philippines). In recent years, a number of the competition authorities have entered into MOUs with sector regulators, which is a positive step towards achieving a consistent approach to enforcement in each jurisdiction.

This may be more difficult to achieve on a regional basis and warrants further research and discussion.

3. Investigation and Enforcement Powers

3.1 ASEAN 2010 Regional Guidelines

The Regional Guidelines recognise that effective enforcement of competition law is an important factor in the establishment of competition policy in the AMS. The choice of enforcement regime (civil, administrative, criminal or a combination) affects the type of investigative and enforcement powers and the agencies required to be involved²⁴³.

The sanctions applicable to competition law infringements in the ASEAN region are discussed in Part V, Section 1 below. This section focusses on investigation and enforcement powers.

The Regional Guidelines contemplate three types of investigation powers:

- (1) Power to require the production of documents and information:
 - a. Right to take original copies
 - b. Require someone to explain
 - c. Require someone to state where document can be found
 - d. Require someone to provide information that is not in recorded form;
- (2) Power to enter and search business premises without warrant;
- (3) Power to enter and search business premises and private premises, land and means of transport, under warrant²⁴⁴.

The Regional Guidelines also recommend that the AMS include safeguards to protect the confidentiality of information obtained during the course of a search²⁴⁵. Other important rights, such as the right to the protections of self-incrimination and legal professional privilege during a search and seizure, the consequences for obstruction and failure to comply with search and seizure powers are not specifically addressed in the Regional Guidelines. Nonetheless, these are addressed in this Study. (Note: self-incrimination and legal professional privilege protections are addressed in Part V, Section 4 below.)

The power to require the production of documents and information is considered below both in the context of a search of business premises and during an investigation.

²⁴³ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 6.1

²⁴⁴ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 6.2

²⁴⁵ *Ibid.* para 6.3.2

3.2 ASEAN Competition Laws: Searching Business Premises

All ASEAN competition laws, except Indonesia, include express search and seizure powers. Current amendments proposed to the competition law in Indonesia include the introduction of search and seizure powers.

3.2.1 Requirement for a warrant

Although search and seizure powers exist, there are differences between the legislative regimes across the region²⁴⁶. It is also highly likely that there will be differences in practice regarding how the search and seizure powers will be exercised.

Some regimes require a search warrant, others do not expressly do so. The provisions in Brunei Darussalam, Lao PDR, Malaysia, Philippines, Singapore and Thailand set out relatively clearly where a warrant is required. According to the law, a warrant is not required in Myanmar. However, the permission of the MmCC (in the form of an order) is needed before an investigation can be started and the MmCC order must be shown to the parties under investigation. Vietnam has advised that, under Article 82, the VCC has the power to require the competent authorities to utilise its search powers (i.e. no warrant is required by VCC).

The law in Cambodia does not expressly provide for a warrant. The CCC has advised that the rules and procedures on investigation will be set out after enactment of the law.

²⁴⁶ Currently, very few of the ASEAN regimes have utilised their search and seizure powers. It may be that differences will arise in practice regarding how the search and seizure powers are exercised. This could be considered as part of a later study once the regimes are operational.

Table 16: Search and seizure powers

	Search with warrant	Search without a warrant
Brunei Darussalam	✓ Section 38	✓ Section 37 (upon notice)
Cambodia	✓ Article 19 Entry and search is permitted under Articles 18 and 19 but it is not clear whether a warrant is required	
Indonesia	Amendments being considered by government	
Lao PDR	✓ Article 68 ²⁴⁷	✓ Article 68
Malaysia	✓ Section 25	✓ Section 26
Myanmar	✓ Entry, inspection and search is permitted under Section 12(c) ²⁴⁸ . Order of the MmCC must be made and shown to the parties	
Philippines	✓ Section 12(g) gives the PCC power to undertake inspections upon order of the court. ²⁴⁹	✗
Singapore	✓ Section 65	✓ Section 64 (upon notice)
Thailand	✓ Section 63 (warrant required if search and seize is under the Criminal Procedure Code)	✓ Section 63 (if the process of getting a search warrant is too slow or if documents may be removed or destroyed)
Vietnam	✓ Article 82 permits the VCC to ask competent authorities to conduct a search and seizure. This would include obtaining a warrant, where necessary ²⁵⁰ .	

Source: Author's analysis based on review of laws, rules and input from AMS

3.2.2 Premises that can be searched

Most of the ASEAN jurisdictions allow for all premises associated with a business to be searched (Lao PDR, Malaysia, Myanmar) with some specifically including vehicles and domestic premises where used in conjunction with the business (Brunei Darussalam, Philippines, Singapore, Thailand and Vietnam²⁵¹). The limitation to searching premises associated with a business is that it could encourage the hiding of evidence on private premises. This can be avoided where the warrant permits searching of other premises used by the party, for example, the Philippines allows searching of 'other offices, land and vehicles as used by the entity'²⁵².

²⁴⁷ See also Article 85 Lao PDR law

²⁴⁸ See also Myanmar Competition Rules

²⁴⁹ Note the Rules for Inspection were approved by the Philippines Supreme Court and take effect from 16 November 2019. Available at <http://sc.judiciary.gov.ph/7739/>

²⁵⁰ As advised by the VCCA

²⁵¹ Article 82(1)(c) Vietnam Competition Law

²⁵² Section 2, Supreme Court Rule on Administrative Search and Inspection under the Philippine Competition Act (A.M. No. 19-08-06-SC)

3.2.3 Protection of evidence

Some jurisdictions have power to take steps necessary to preserve or prevent interference with any document (Brunei Darussalam²⁵³, Singapore²⁵⁴). In some cases, this includes an express right to seal premises (Malaysia²⁵⁵, Philippines²⁵⁶). The remaining jurisdictions do not expressly address this issue in their laws but Singapore allows premises (or any part of premises e.g. cupboard) to be sealed to enable the inspection to be completed²⁵⁷. The inability to seal premises will have a negative impact on due process if evidence cannot be preserved.

3.2.4 Production of documents and information

All of the search and seizure regimes include production and inspection powers that include some or all of the powers suggestion in the Regional Guidelines.

- (1) Most jurisdictions include the express right to take either original (Brunei Darussalam²⁵⁸, Lao PDR²⁵⁹, Malaysia²⁶⁰, Myanmar²⁶¹, Singapore²⁶²) or copies of (Brunei Darussalam²⁶³, Philippines²⁶⁴, Singapore²⁶⁵) or both original and copies (Vietnam)²⁶⁶ of documents. The power to take original documents may only arise where a search warrant has been issued (Brunei Darussalam, Singapore). Malaysia expressly allows original documents to be taken, irrespective of whether a warrant exists²⁶⁷. The Philippines expressly provides that only copies may be taken²⁶⁸. In Thailand, the TCCT can “search and seize, or gather documents ... for the benefit of examination” which seems to suggest that original documents can be taken²⁶⁹. In Vietnam, both VCC and other competent authorities (that is undertaking the search and seizure on behalf of the VCC) have the right to take documents²⁷⁰. In Cambodia, the CCC has advised that the rules and procedures on investigation will be set out after enactment of the law²⁷¹.
- (2) Most jurisdictions include an express provision that permits the competition authority to require someone to explain a document (Brunei Darussalam²⁷², Malaysia²⁷³,

²⁵³ Section 37(5)(f) and 38(2)(d) Brunei law

²⁵⁴ Section 64(5)(f) and 65(2)(v) Singapore law

²⁵⁵ Section 25(6) Malaysia law

²⁵⁶ Rule 10 Supreme Court Rules on Administrative Search and Inspection under the Philippine Competition Act

²⁵⁷ CCCS, Guidelines on the Powers of Investigation in Competition Cases 2016, paragraph 5.5

²⁵⁸ Only where searching under warrant and it appears necessary to do so to preserve the document (see section 38(2)(d) Brunei law

²⁵⁹ Articles 53, 64 and 68 Lao PDR law

²⁶⁰ Sections 19 and 25 Malaysia law, whether with or without a warrant. A list of records, books, accounts seized must be provided in accordance with section 29

²⁶¹ The Myanmar Competition Rules (Rule 34) provide for materials to be seized. See also section 8(n) Myanmar law.

²⁶² Sections 64(5)(d) and 65(2)(iv) Singapore law

²⁶³ Including extracts, see sections 36(4)(a)(i), 37(5)(d), 38(2)(c) Brunei law

²⁶⁴ Rule 10 Supreme Court Rules on Administrative Search and Inspection under the Philippine Competition Act

²⁶⁵ Sections 61A(4)(a)(i), 63(4)(a)(i) and 64(5)(d) Singapore law

²⁶⁶ Article 56 Vietnam law

²⁶⁷ See Section 26 Malaysia law

²⁶⁸ Rule 10 Supreme Court Rules on Administrative Search and Inspection under the Philippine Competition Act

²⁶⁹ Section 63(2) Thai law

²⁷⁰ Article 56 identifies the list of evidence that can be ‘collected’. Article 82 refers to the temporary seizure of exhibits which envisages that originals can be taken.

²⁷¹ Article 19 Cambodia law uses the phrase ‘collect objects’ which suggests that items may be taken

²⁷² Sections 36(4)(a)(ii), 37(5)(b)(ii) and 38(2)(f) Brunei law

²⁷³ Section 18(1)(b) Malaysia law

Philippines²⁷⁴, Singapore²⁷⁵, Thailand²⁷⁶ and Vietnam). In Vietnam, the right to require someone to explain will also depend on the competent authority that is undertaking the search and seizure on behalf of the VCC²⁷⁷. Some jurisdictions appear silent on the issue (Lao PDR). In Cambodia, the CCC has advised that the rules and procedures on investigation will be set out after enactment of the law²⁷⁸. In Myanmar²⁷⁹ the MmCC has confirmed that someone can be required to explain a document²⁸⁰.

- (3) Fewer jurisdictions include an express provision allowing the competition authority to require a person to state where a document can be found. This power exists in Brunei Darussalam²⁸¹, Malaysia²⁸², Philippines²⁸³, Singapore²⁸⁴ and Vietnam²⁸⁵. In Thailand, the TCCT has confirmed that a person can be required to state where a document can be found²⁸⁶, while Lao PDR is silent on this issue. In Myanmar, the MmCC has confirmed that it can require a person to state where a document can be found²⁸⁷. In Vietnam, the right to require a person to state where a document can be found will also depend on the competent authority that is undertaking the search and seizure on behalf of the VCC. In Cambodia, the CCC has advised that the rules and procedures on investigation will be set out after enactment of the law.
- (4) Similarly, fewer jurisdictions include an express provision allowing the competition authority to require the production of information in recorded form. This power exists in Brunei Darussalam²⁸⁸, Malaysia²⁸⁹, Philippines²⁹⁰, Singapore²⁹¹ and Vietnam²⁹². In Myanmar, electronic evidence is acceptable before the court or any legal authority to take evidence according to the Evidence Act of Myanmar (as amended by 2015). In Thailand, the TCCT has confirmed that a person can be required to provide information in recorded form²⁹³. In Vietnam, the right to require the production of information in recorded form will also depend on the competent authority that is undertaking the search and seizure on behalf of the VCC. The law in Lao PDR is silent on this issue. In Cambodia, the CCC has advised that the rules and procedures on investigation will be set out after enactment of the law.

²⁷⁴ Rule 10 Supreme Court Rules on Administrative Search and Inspection under the Philippine Competition Act

²⁷⁵ Sections 61A(4)(a)(ii) and 63(4)(a)(ii) Singapore law. Note the right to orally examine individuals during a search and seizure under section 63(4A) but this must be reduced to a written statement under section 63(4B). These latter provisions were added in 2018.

²⁷⁶ Section 63(1) Thai law

²⁷⁷ Articles 69(1) and 83(2) Vietnam law allow the competition authority to require someone to explain a document

²⁷⁸ Article 17 Cambodia law allows an investigator to request individuals provide information

²⁷⁹ Sections 8(l) and 12(a) Myanmar law allow inquiries of witnesses

²⁸⁰ Section 8(1) (Commission power) and Section 12(a) Investigative Committee power; see also Rule 60 Myanmar Competition Rules

²⁸¹ Sections 36(4)(b), 37(5)(c) and 38(2)(f) Brunei law

²⁸² Section 18(2) Malaysia law

²⁸³ Rule 10 Supreme Court Rules on Administrative Search and Inspection under the Philippine Competition Act

²⁸⁴ Sections 61A(4)(b), 63(4)(b), 64(5)(c) and 65(2)(vi)

²⁸⁵ Article 83 Vietnam law

²⁸⁶ Section 63 Thai law

²⁸⁷ Rules 46 and 50, Myanmar Competition Rules

²⁸⁸ Sections 37(5)(e) and 38(2)(g)

²⁸⁹ Section 27 allows access to computerized data whether stored in computer or otherwise

²⁹⁰ Rule 10 Supreme Court Rules on Administrative Search and Inspection under the Philippine Competition Act

²⁹¹ Sections 64(5)(e) and 65(2)(vii) Singapore law

²⁹² Article 83 Vietnam law

²⁹³ Section 63 Thai law

3.2.5 Tipping off and reprisals

A few jurisdictions include offences for tipping off in relation to an investigation or the threat of reprisals in relation to making a complaint to a competition authority or cooperating in an investigation (Brunei Darussalam²⁹⁴, Malaysia²⁹⁵, Philippines²⁹⁶, Singapore²⁹⁷ and Vietnam²⁹⁸). In some jurisdictions, broad provisions may be interpreted to give these protections (e.g. Lao PDR²⁹⁹). Cambodia, Myanmar and Thailand confirmed that they currently do not have a specific offence for tipping off or the threat of reprisals in their competition laws.

3.3 ASEAN Competition Laws: Requiring Production of Documents and Information during an Investigation

Most AMS jurisdictions have express powers to require the production of documents or information as part of their investigation process (Brunei Darussalam³⁰⁰, Cambodia³⁰¹, Indonesia³⁰², Malaysia³⁰³, Myanmar³⁰⁴, Philippines³⁰⁵, Singapore³⁰⁶, Thailand³⁰⁷). In some cases, the power is not as express but would appear to allow the gathering of documents and information: in Lao PDR, Article 65 gives the competition inspectors a right to gather preliminary information; in Vietnam, Article 56 refers to evidence being collected from a range of sources include readable, audible or visible documents or electronic data, material objects, testimony or statements or explanation.

Some jurisdictions also have power to require a person to give evidence in person or to explain a document (Cambodia, Malaysia, Myanmar, Philippines, Thailand, Vietnam).

3.4 Digital information

Although not specifically addressed in the Regional Guidelines, it seems appropriate to consider the extent to which competition authorities in the region can collect digital information. A number of laws specifically contemplate a need to be able to collect digital information in a form in which it can be removed from the relevant premises (Brunei Darussalam, Malaysia, Philippines, Singapore³⁰⁸). In Vietnam, Article 56 expressly refers to the collection of electronic data. In Thailand, there is no specific provisions for the competition authority to collect digital information but other relevant laws and regulations will be followed³⁰⁹. In Cambodia, the CCC

²⁹⁴ Sections 57 and 58 Brunei law

²⁹⁵ Sections 33 and 34 Malaysia law

²⁹⁶ Rider to section 35 Philippines law. See also Rule 6.12 Rules of Procedure

²⁹⁷ Section 78 Singapore law

²⁹⁸ Article 75 (3) Vietnam law

²⁹⁹ Article 55 Lao PDR law

³⁰⁰ Section 36 Brunei Darussalam law

³⁰¹ Article 17 Cambodia law

³⁰² Article 41 Indonesia law

³⁰³ Section 18(1) Malaysia law

³⁰⁴ Sections 8(k) and (l) Myanmar law; the Investigative Committee has similar powers under section 12(a)

³⁰⁵ Section 12(f) Philippine law

³⁰⁶ Section 63 Singapore law

³⁰⁷ Section 63(1) Thai law

³⁰⁸ See also Guidelines on Powers of Investigation, paragraph 5.5

³⁰⁹ Section 11 of the Electronic Transactions Act B.E. 2544 (2011) prescribing that the admissibility of a data message as an evidence in the legal proceedings shall not be denied solely on the grounds that it is a data message. In assessing the evidential weight of a data message whether it is reliable or not, regard shall be had to the reliability of the manner in which or the method by which the data message was generated, stored or communicated, the manner in which or the method by

has advised that the rules and procedures on investigation will be set out after enactment of the law. The MmCC recognise there is a need for them to find ways to collect digital information. In Indonesia, digital information is included as one of the types of evidence³¹⁰. The law in Lao PDR does not refer specifically to the types of information that can be collected.

3.5 ASEAN Self-Assessment Responses

The self-assessment contained two questions relevant to investigation powers. The first question asked whether it was mandatory for firms being investigated for a possible infringement of competition law to respond to information requests or inquiries from the competition agency (question 13). All jurisdictions (including Indonesia) confirmed that responses are mandatory.

Regarding whether the competition regime allowed the competition authority to perform unannounced inspections or searches (commonly referred to as 'dawn raids') (question 15), all jurisdictions confirmed that this power is available, except Indonesia.

These responses are consistent with the conclusions above.

3.6 Additional clarifications from AMS

Subsequent clarifications were provided by the AMS as part of the review of the 2010 Regional Guidelines in 2020. Responses offered the following additional information:

- Brunei Darussalam³¹¹, Lao PDR, Malaysia³¹², the Philippines and Thailand³¹³ indicated that they may invoke assistance from other law enforcement agencies (if necessary) when conducting a dawn raid.
- Cambodia confirmed that when conducting a search and seizure the local authority (ex: Commune chief or Police) must be involved.
- Myanmar indicated that the MmCC holds itself the power for seizure of necessary evidence as exhibits, and may also delegate it to an investigation committee by empowering it with the functions and duties regarding the investigation, raid search and seizure of necessary evidence for the specific case.

which the completeness and integrity of the information was maintained, the manner in which or the method by which the originator was identified or indicated, including all relevant circumstances; The Guidelines for the Standard of Managing of Digital Tools for the Digital Forensics issued by the Electronic Transactions Development Agency (ETDA); Rule 33-Rule 36 of the Rules for Intellectual and Property and International Trade Cases, B.E. 2540 (1997) (<https://ipitc.coj.go.th/th/content/page/index/id/191388>); Article 33 of the Regulation of the President of the Supreme Court on Procedure for Cases Relating to Electronics B.E. 2563 (2020); Clause 67 of the Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure B.E. 2543 (2000) prescribing that the Court may admit as evidence in the case computer-recorded or computer-processed data, provided that the recording and processing have been properly carried out and accompanied by a certification by the person concerned or the person who carried it out. This will apply mutatis mutandis to the admissibility into evidence of data recorded or obtained by any other type of electronic means or information technology.

³¹⁰ Article 55 & 57, ICC's Regulation Number 1 Year 2019 on Case Handling Procedure

³¹¹ Brunei – Police

³¹² Malaysia – Police, Enforcement officers of Ministry of Domestic Trade and Consumer Affairs

³¹³ Thailand - Police, Attorney, Economic Crime Suppression Division, Administrative Court, Intellectual Property and international Trade Court

3.7 Guidelines on Investigation Powers

To date, only Singapore has published guidelines on their investigation powers, that includes further information on their powers to require documents or information, enter premises and any limits on those powers.

In all other jurisdictions, as there is limited detail in the law itself, further guidance like that provided in Singapore will be beneficial.

3.8 Initial conclusions on commonalities and differences

Broadly, the investigation and enforcement powers held by each of the competition authorities in the ASEAN region are similar with the ability to use their investigation powers to undertake searches of business premises, to seize (or copy) documents and information and to issue notices requiring documents and information to be produced. There are differences in the legal regimes, for example, some jurisdictions do not require a court-issued warrant which could result in that evidence not being able to be used in another ASEAN jurisdiction (for example, where a warrant is required for unannounced inspections). There is some inconsistency amongst the AMS in relation to their express ability to seal premises to preserve evidence.

The circumstance in which these procedural differences are most likely to cause issues for regional convergence is when competition authorities cooperate in relation to cross-border investigations. Cooperation between the competition agencies risks being prejudiced unless there is an awareness of the differences and a protocol/mechanism for addressing these differences in practice. It is understood that the *Study on Recommended Procedures for Cooperation on Cross-Border Competition Cases* provides the recommendations of such protocol/mechanism.

The legal basis to access digital information is likely to be implied, even where it is not express. The greater challenge may be educating competition agencies on how to access digital information as this will play a critical role in investigations going forward. There may be significant gaps in the ability to access sophisticated digital tools as between the more and less developed competition authorities which may require donor support. Convergence and cooperation will be jeopardised if all competition authorities are unable to access and interpret digital information.

4. Due process

4.1 ASEAN 2010 Regional Guidelines

Chapter 7 of the Regional Guidelines discusses due process. It identifies a number of considerations for the AMS to take into account when designing competition laws, which can be summarised as:

- (a) Identifying whether the competition regulator or a judicial authority should be the *arbiter* of competition law infringements;
- (b) Whether any *special rules of evidence and procedures* are to be applied;

- (c) Whether any procedures for *interim redress* are required;
- (d) The need for greater *transparency* where the competition authority is the investigating, adjudicating and enforcing authority. This can be achieved by allowing access to investigation evidence, excluding confidential or internal documents;
- (e) Recognition of the *role of the judiciary* in enforcement of competition law, either as an appellate body, for judicial review or through specialised competition courts.
- (f) AMS may allow the competition authority to submit documents or appear as '*amicus curiae*'³¹⁴.

The extent to which these considerations have been addressed in the competition laws is addressed below.

The Regional Guidelines then set out guiding principles for the institutional framework and processes:

- (a) Accountability³¹⁵;
- (b) Administrative review³¹⁶;
- (c) Confidentiality³¹⁷;
- (d) Independence³¹⁸;
- (e) Natural justice;
- (f) Transparency and consistency³¹⁹;
- (g) Timeliness³²⁰; and
- (h) Checks and balances^{321, 322}

As natural justice is not considered elsewhere, it is discussed below.

4.2 ASEAN Competition Laws

All AMS have provisions in their competition laws, regulations and guidelines that address due process.

4.2.1 Arbiter of competition law infringements

All AMS have created systems whereby the competition authority is the arbiter of competition law infringements, with the exception of Myanmar. The MmCC can make a decision to take administrative action in relation to an infringement (issue a warning, impose a fine or

³¹⁴ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 7.1

³¹⁵ See Part IV, Section 6

³¹⁶ See Paragraph 4.2.5.2

³¹⁷ See Part IV, Section 7 (Provisions to Support Regional Convergence); Part V, Section 3

³¹⁸ See Part IV, Section 1

³¹⁹ See Paragraph 4.2.4

³²⁰ See Part IV, Section 5

³²¹ See Part IV, Section 6 on Decision-making processes

³²² ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 7.2

temporarily or permanently close a business) in coordination with relevant ministries.³²³ If the MmCC determines to bring the case for a civil or criminal action, the case will be brought before the court.

4.2.2 Rules of evidence and procedure

The competition laws usually do not contain rules of evidence and procedure, but rather many of the jurisdictions have separate regulations, rules or guidelines that deal in part with these matters³²⁴.

In Malaysia, the rules on evidence applicable to all judicial proceedings also apply to MyCC investigations³²⁵. The MyCC has some discretion in determining the procedures to be adopted for the oral representations under section 37 and hearings under section 38. To date, no additional procedures have been prescribed³²⁶.

The position in Lao PDR has not yet been considered.

4.2.3 Interim redress

Many of the AMS laws contain express interim measure provisions (Brunei Darussalam³²⁷, Cambodia³²⁸, Lao PDR³²⁹, Malaysia³³⁰, Philippines³³¹, Singapore³³², Thailand³³³ and Vietnam³³⁴). All of these jurisdictions (apart from Lao PDR and Thailand) allow interim measures where it is considered necessary to prevent serious, irreparable damage or to protect the public interest. Brunei Darussalam and Singapore also allow interim measures for the purpose of preventing any action that could prejudice a merger investigation³³⁵. The test in the Philippines is whether the continued performance of the agreement or conduct would

³²³ Section 34 Myanmar law

³²⁴ Brunei Darussalam – Competition Regulations 2020, Competition (Appeals) Regulations 2020, Competition (Composition of Offences) Regulations 2020, Competition (Transitional Provisions for Section 11) Regulations; Indonesia – Regulation on Case Handling Procedure 2010, replaced by Regulation on Case Handling Procedure 2019; Myanmar – Competition Rules 2017; Philippines – Implementing Rules and Regulations 2016, Rules of Procedure 2017, Rules of Merger Review Procedure 2017, Supreme Court Rules on Administrative Search and Inspection Under the Philippine Competition Act; Singapore - Competition Regulations; Competition (Notification) Regulations; Competition (Transitional Provisions for Section 34 Prohibition) Regulations; Competition (Fees) Regulations; Competition (Composition of Offences) Regulations; Competition (Appeals) Regulations; Competition (Financial Penalties) Order [Competition (Financial Penalties) (Amendment) Order] 2010; Competition (Block Exemption for Liner Shipping Agreements) Order; *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016*; *CCCS Guidelines on Enforcement of Competition Cases 2016*; Thailand - Regulation of the Trade Competition Commission on Complaints, Investigation, and Procedures for Criminal or Administrative Prosecution B.E. 2562 (2019). The TCCT also applies The Criminal Procedure Code B.E. 2477 (1934) for criminal cases; and The Administrative Procedure Act B.E. 2539 (1996) and the Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure B.E. 2543 (2000) for administrative cases. Vietnam – Decree No. 35/2020/ND-CP, Decree No. 75/2019/ND-CP

³²⁵ Evidence Act 1950

³²⁶ As advised by the MyCC

³²⁷ Section 40 Brunei law

³²⁸ Articles 24 and 27 Cambodia law

³²⁹ Article 69 Lao PDR law refers to interim measures. Note Article 64 refers to preventative measures. It is not clear how these differ.

³³⁰ Section 35 Malaysia law

³³¹ Section 31 Philippines law allows the PCC to issue an order for temporary cessation or desistance, the continued performance of which would result in a material and adverse effect on consumers or competition in the relevant market.

³³² Section 67 Singapore law

³³³ Section 60 Thai law

³³⁴ Article 82 Vietnam law (See also Articles 50, 59, 62, 63, 67). Article 26, 27, 28 Decree 35.)

³³⁵ Section 40(2) Brunei law and Section 67(1A) Singapore law

“result in a material and adverse effect on consumers or competition in the relevant market”³³⁶. In Thailand, where there is sufficient evidence to believe that a business operator has violated or will violate the law, the TCCT may make an order in writing to instruct that business operator to suspend, stop or correct or change conduct³³⁷ or impose any necessary conditions required in order to achieve the purposes of the law³³⁸.

In terms of due process, the competition authorities in Brunei Darussalam, Malaysia, the Philippines and Singapore are required to give written notice to the person to whom it proposes to give the interim direction and give that person an opportunity to make representations³³⁹. Indonesia issues its Interim Measure (or Consent Decree) at the stage of Preliminary Examination, which provides an opportunity for behaviour change.³⁴⁰ In Cambodia, a person dissatisfied with the interim measures can file a petition for review with the CCC and, ultimately, the competent court³⁴¹. In all jurisdictions other than Lao PDR, the interim measures are enforceable in the courts³⁴².

Myanmar does not have any ability to impose interim measures.

4.2.4 Transparency

There are a number of important aspects to consider in relation to the transparency of competition authorities in the ASEAN region: (i) access to files; (ii) processes and procedures; and (iii) publication of decisions.

4.2.4.1 Access to files

The Regional Guidelines include specific provisions about access to file:

7.2.1.6.3 Access to file constitutes a fundamental procedural guarantee intended to apply the principle of equality of arms and to protect the rights of the defence. The competition regulatory body should grant, as far as possible, to the natural and legal persons against whom it has started infringement proceedings, access to all documents, which have been obtained, produced and/or assembled by the competition regulatory body during the investigation, on which the accusation is based, with the exception of purely internal documents or drafts, confidential correspondence between the competition regulatory body and other public authorities and documents protected by secret or confidentiality (e.g., complaints and confidential documents attached to them, where the complainants have applied for confidentiality, or documents containing business or national security secrets). AMSs may provide that the decisions, by which the competition regulatory body denies access to file, should state the reasons for denial and may be subject to judicial review.

³³⁶ Section 31 Philippines law allows the PCC to issue an order for temporary cessation or desistance, the continued performance of which would result in a material and adverse effect on consumers or competition in the relevant market.

³³⁷ Section 60(1) Thai law

³³⁸ Section 60(2) Thai law

³³⁹ Section 40(1)(b) Brunei law; Section 35(2) Malaysia law; Section 67(1)(b) Singapore law

³⁴⁰ Article 33 – Article 39, ICC’s Regulation Number 1 Year 2019 on Case Handling Procedure

³⁴¹ Article 30 Cambodia law

³⁴² Section 46 Brunei law; Art 33 Cambodia law; Section 42 Malaysia law; Section 85 Singapore law (provided registered with court); confirmed by the PCC

7.2.1.6.4 Where feasible, the competition regulatory body may also grant third parties interested in the proceedings (i.e., complainants or other participants to the proceedings) access to specific documents of the files, further to a specific request, provided that these documents are not protected by secrecy or confidentiality.

In most AMS jurisdictions, there is a right to access evidence held by the competition authority, although the mechanisms vary. Vietnam's law contains an express provision that allows access to the evidence contained in the competition case dossiers (and to record or copy it, as required) to protect legitimate rights and interests, excluding documents and evidences not permitted for disclosure in accordance with law³⁴³.

None of the other jurisdictions contain an express provision dealing with access to competition authority evidence in their laws, however provisions are made in regulations or rules.

In Brunei Darussalam and Singapore, the *Competition Regulations* permit access to the Commission's files, excluding confidential and internal documents³⁴⁴. In Singapore, as part of the newly introduced fast-track procedure, a party can request access to non-confidential versions of documents on the case file. Likewise, CCCS guidelines on *Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016* provides that access to the CCCS file may be given to the recipient of a Provisional Infringement Decision.

In Indonesia, access to file is provided in the Follow-Up Examination, where the Commission Panel, assisted by the Clerk of Hearing, conducts a verification of all documents in the hearing process which is witnessed by the Prosecution Investigators, Reported Parties and/or their Attorneys.³⁴⁵ Malaysia has advised that a party facing prosecution can have access to the documents and evidence held by the competition authority³⁴⁶. In Myanmar, the investigated party can request to inspect documents held by the MmCC³⁴⁷. In the Philippines, an accused entity is entitled to receive a copy of the Statement of Objections (in anti-competitive agreement or abuse cases) or the Statement of Concerns (in merger cases) and the supporting documents relied upon as evidence by the PCC, subject to confidentiality³⁴⁸. In Thailand, the TCCT has advised that a party is not allowed access to the documents and evidence held by the TCCT during the investigation process, but will be permitted access during the prosecution process, subject to a court order.

In Cambodia, the CCC has advised that the rules and procedures on investigation will be set out after enactment of the law.

The position in Lao PDR has not yet been considered.

³⁴³ Article 67(3)(d) Vietnam law

³⁴⁴ Regulation 4(2) Brunei Darussalam Competition Regulations 2020 and Regulation 8(2) Singapore Competition Regulations 2007

³⁴⁵ Article 41 & 56, ICC's Regulation Number 1 Year 2019 on Case Handling Procedure

³⁴⁶ Although there is no legislative provision requiring this procedure to be followed, the MyCC have developed internal procedures to facilitate access to documents relating to the investigation. A *Request for Access to Documents Form* is enclosed with the Notice of Proposed Decision under Section 36 Competition Act 2010.

³⁴⁷ Article 46(f) Competition Rules

³⁴⁸ See section 8.8-8.11 Rules of Merger Procedure, subject to confidentiality as provided for in section 4.25 Rules of Procedure

4.2.4.2 Processes and Procedures

The development of processes and procedures is important for the new competition authorities in the region. To date, only a few jurisdictions have published information outlining procedural matters. For example, the ICC has published its Guidelines on Procedure for Case Handling, the PCC has published its Rules of Procedure and Rules of Merger Procedure and the CCCS has published Guidelines on Merger Procedures and Guidelines on Filing Notifications for Guidance.

Publication (transparency) of processes and procedures will be important to due process in relation to competition law in the region. In relation to convergence, once again the key will be that other AMS competition authorities understand each other's processes and procedures to facilitate cooperation.

4.2.4.3 Publication of Regulations, Guidelines and Decisions

Many of the competition authorities in ASEAN have established dedicated websites on which information and materials can be shared³⁴⁹. Many of the regimes already publish regulations and guidelines³⁵⁰; and decisions, including proposed decisions³⁵¹.

For the benefit of increasing knowledge, awareness and understanding of competition law across the ASEAN jurisdictions, decisions should be published. As far as possible (recognising the resource constraints), these decisions should be published in English to allow maximum accessibility. The publication of decisions can perform a great advocacy role. Some jurisdictions publish summaries of their cases in Annual Reports, even where the full decisions are not available (or not available in English)³⁵².

Transparency of decisions, regulations and guidelines will assist in a greater understanding in the region of the approach taken by each of the competition authorities. In turn, this may lead to a greater potential for convergence to the extent that competition authorities in one jurisdiction are able to adopt practices already employed in other jurisdictions.

4.2.5 Role of the judiciary in enforcement of competition law

The judiciary play an important role in the enforcement of competition law throughout the ASEAN region.

³⁴⁹ Brunei Darussalam, Indonesia, Malaysia, The Philippines, Singapore, Thailand and Vietnam (although not yet in English)

³⁵⁰ Brunei Darussalam, Indonesia, Malaysia., The Philippines, Singapore, Thailand and Vietnam (not yet in English)

³⁵¹ Indonesia – final decisions available at <http://putusan.kppu.go.id/simper/menu/> (in Bahasa Indonesia only), Malaysia, Philippines, Singapore, Thailand – shortened decisions only. In Vietnam, the legislative provision requires that the decision be made publicly available for a period of 90 consecutive days after such decisions take effect.

³⁵² Vietnam (typical cases), Thailand is intending to publish decisions in English following translation.

4.2.5.1 Appellate bodies

Most laws contain an appeal to the courts from a decision of the competition authority, either directly or via a competition appeal tribunal or board³⁵³. The exception to this is Myanmar which provides for substantive cases to be brought before the courts in the first instance. The position in Lao PDR is unclear in the law³⁵⁴.

In Brunei Darussalam, Malaysia, the Philippines and Singapore, the order, ruling or decision is generally not stayed pending the appeal unless the court orders otherwise³⁵⁵. The position in the other jurisdictions is not expressly stated.

4.2.5.2 Administrative review

The judiciary also have a role to play in relation to administrative review of the exercise of powers by the competition authorities.

Indonesia provides power for both parties to seek judicial review of the decision issued by ICC by the Commercial Court³⁵⁶. In Malaysia, there is a power for both parties to seek judicial review of the decision made by the Competition Appeal Tribunal, High Court and Court of Appeal³⁵⁷. Where the MmCC has exercised its administrative powers (through the investigative committee), the decision can be reviewed by the MmCC³⁵⁸. In the Philippines, a petition for *certiorari* can be filed with the courts where there is an alleged grave abuse of discretion in the exercise of administrative powers. In Singapore, persons who wish to challenge the CCCS' use of its investigation powers may do so via judicial review, provided leave is granted by the court³⁵⁹. A decision of the TCCT can be judicially reviewed by the Administrative Court insofar as it relates to due process³⁶⁰ and in Viet Nam, where a party disagrees with the VCC's case-handling decision, the party can lodge a complaint with the VCC's Chairman within 30 days after receiving the settlement decision³⁶¹ which will allow the Chairman to issue a complaint handling decision. If the parties disagree with this decision, the party may initiate a lawsuit against a part or the whole of the contents of such decision to the competent court as prescribed in the Law on Administrative Proceedings within 30 days from the date of receiving the decision³⁶².

³⁵³ Brunei Darussalam and Malaysia laws contain an appeal to a Competition Appeal Tribunal (Section 59 Brunei law – within prescribed period; and Section 51 Malaysia law – within 30 days); Singapore's law establishes a Competition Appeal Board; the remaining jurisdictions allow appeals to the relevant court: Article 31 Cambodia law (within 30 days); Article 44(2) Indonesia law (within 14 days); Section 39 Philippine law (in accordance with Rules of the Court); Sections 71 and 74 Singapore law (within prescribed period); Thailand – Criminal cases (Sections 50, 54) can be appealed under the Criminal Procedure Code and Administrative cases (Sections 51, 55, 57, 58) can be appealed to the administrative court directly; Vietnam – Article 103 Vietnam law

³⁵⁴ Section 26 of Thai law provides that criminal law suits and civil lawsuits for damages are brought before the intellectual property and international courts.

³⁵⁵ Section 59 Brunei law; Section 53 Malaysia law; Section 39 Philippine law; Section 71 Singapore law

³⁵⁶ Article 44 Indonesia's Law Number 5 Year 1999 and Article 118 Indonesia's Law Number 11 Year 2020 (Omnibus Law on Job Creation)

³⁵⁷ Order 53 Rules of Court, Malaysia

³⁵⁸ Section 36 Myanmar law; Chapter 11 Myanmar Competition Rules

³⁵⁹ Order 53 Rules of Court, Singapore

³⁶⁰ As advised by TCCT, this power is to be found in Administrative Procedure Act, B.E.2539

³⁶¹ The VCC's Chairman shall decide to set up a Complaint Resolution Board composed of the VCC's Chairman and other members of VCC except for members who have participated in the Case handling Council for handling the complaint within the time limit of 30 days (may be extended but for no more than 45 days).

³⁶² Article 96, 100, 103 Vietnam law

In Cambodia, any person dissatisfied with the interim measures and/or decision issued by the CCC may file a petition to the CCC for a review no later than 15 (fifteen) days from the date of receiving the notification on interim measures and/or decision. The CCC may decide not to consider the petition on reasonable grounds. If the CCC refuse to grant the petition to review the interim measures and/or decision issued by the CCC, a person may appeal to a competent court no later than 30 (thirty) days from the date of receiving a refusal notification³⁶³.

The position in Lao PDR is not yet clear.

4.2.6 Competition authority as ‘amicus curiae’

The AMS take a varied approach to the issue of ‘amicus curiae’, with only the Philippines submitting amicus briefs to date. As it is part of the PCC’s mandate to give opinions on competition matters (section 12(k) PCA)), the PCC may submit amicus briefs to the courts and has done so recently³⁶⁴. In addition, the competition authority is included as a party respondent to an appeal case³⁶⁵. If a case is already in the courts (for example, a private action for damages), it is not automatic that the PCC will be joined as a party. The court may invite the PCC or the PCC may file a motion to be joined as a party.

In Singapore, there is legislative power for a follow-on private action but not a stand-alone private action, so the CCCS is more likely to be involved in an appeal case than a private action at this point in time³⁶⁶. Where the CCCS is not a party to a case, it would have the power to seek leave of the court to intervene on an ‘amicus curiae’ basis³⁶⁷. There is no specific power for the MyCC to act as amicus curiae and neither the MyCC nor ICC has acted in this capacity yet³⁶⁸. The courts in Vietnam may seek the assistance of the VCC.

In other jurisdictions it is likely the competition authority will want to be able to join the case, even where there is no express power to do so. For example, the MmCC advised that although there is no discretion for MmCC to appear in a case, this is something the MmCC may seek to do in the future. In many cases, processes and procedures for the appeal body are not yet established so this may develop over the coming years.

The position in Lao PDR is not known.

The question of whether a competition authority can intervene may become important to convergence, as the competition authority, if following international best practice, may be able to guide the court on the relevant legal or economics issue.

³⁶³ Article 30 Cambodia law

³⁶⁴ Philippine Contractors Accreditation Board v Manila Water Co Inc G.R. No. 217590. March 10, 2020

³⁶⁵ Section 39 Philippines law

³⁶⁶ As advised by CCCS

³⁶⁷ Section 6 Singapore law which gives the CCCS power to advise any public authority

³⁶⁸ As advised by the MyCC

4.2.7 Natural justice (the ‘hearing’ rule, rule against ‘bias’ and ‘no evidence’ rule)

4.2.7.1 The ‘hearing’ rule

Some of the ASEAN competition laws expressly provide that parties must be given notice of the proposed decision against them and an opportunity to be heard (written submissions or oral hearing or both)³⁶⁹ prior to a final decision being made. Importantly, the proposed decision must set out the reasons for the decision in sufficient detail to enable the party to defend itself. This is provided for legislatively in some jurisdictions³⁷⁰. In the newer competition regimes, the position regarding the right to be heard is less clear.

In Indonesia, the Preliminary Examination process involves a hearing³⁷¹. Following this hearing, there is another opportunity for a hearing as part of the Follow Up Examination. Should the Reported Parties take the behaviour change opportunity, a written decision will be provided in the Preliminary Examination (in the form of Consent Decree). Should the Reported Parties choose to continue the examination process, the written decision will be provided in the Follow-Up Examination. The Reported Party has an opportunity to submit evidence during this process³⁷² but does not have an opportunity to see the written decision in draft form³⁷³.

In Myanmar, a draft decision is not provided to the investigated party. The investigated party is able to appeal the final decision once received.

The PCC is granted powers to apply remedies ‘after due notice and hearing’³⁷⁴. Respondents are provided with a copy of the Statement of Concerns or the Statement of Objections and a notice permitting the respondents to file comments within 10 days. If those submissions are considered inadequate, the PCC can ask for replies or rejoinders. If the responses are still not clear, the PCC may ask for a clarificatory hearing. The hearing is not automatic and the intention of the PCC is that it will not be regularly given. Instead, the PCC will rely on the written submissions made by the parties³⁷⁵.

Cambodia does not currently have any provision under which a copy of the draft decision is provided to the parties in advance, nor a right to be heard. The Final Decision appears to be given to the parties without any prior notice, from which there is a right to appeal³⁷⁶.

In Thailand, the TCCT does not provide the party under investigation with a draft decision. However, the *Regulation of the Trade Competition Commission on Complaints, Investigation, and Procedures for Criminal or Administrative Prosecution B.E. 2562 (2019)* provides the party with an opportunity to be heard throughout the investigation process until such time as the TCCT makes a decision.

The position in Lao PDR is not yet known.

³⁶⁹ Section 41 Brunei law - representations; Section 36 Malaysia law – written submission or oral hearing; Section 68 Singapore law; Article 58 Indonesia Case Handling Procedure 2019; Section 46(g) Myanmar law; Article 91 and 93 Vietnam law

³⁷⁰ Section 36 Malaysia

³⁷¹ Article 29 Case Handling Procedure 2019

³⁷² Article 42 Case Handling Procedure 2019

³⁷³ As advised by the ICC

³⁷⁴ Section 12(d) Philippines law

³⁷⁵ See Rules of Procedures (Rules 2.12 and 4.24) and Rules of Merger Procedures

³⁷⁶ Article 28 Cambodia law

Where a competition authority is to conduct a hearing, reasonable notice should be provided to ensure natural justice. This is provided for legislatively in Malaysia, where 14 days notice is required, and Vietnam (see below). The Malaysian law also provides that a record of the hearing be kept³⁷⁷. In Brunei Darussalam and Singapore, the Competition Regulations requires the competition authority to give details of the case (facts on which the competition authority relies and reasons for the proposed decision) and allow a person under investigation to make a written statement and to request an oral hearing. A time period must be specified but the period itself is not stated³⁷⁸.

Finally, Vietnam law provides quite extensive due process provisions including a right for the accused party to provide information, documents or objects to protect its legitimate rights and interests, to know about the information held by the competition authority, to have access to the competition authority file, to participate in hearings, to have witnesses subpoenaed and request expert opinions and to recommend replacements persons conducting the legal proceedings³⁷⁹. Notice of the investigative hearing is to be given to all relevant parties at least 5 business days prior to the hearing³⁸⁰.

As noted above, access to the evidence against a party is less consistent across the region (see 4.2.4).

4.2.7.2 Rule against ‘bias’

The rule against bias is a well-established principle that seeks to ensure that the decision maker is impartial and not influenced by prejudices and prejudgment³⁸¹. The risk of bias may be potentially greater in jurisdictions where the investigating authority is also the decision maker. This is the case in all ASEAN jurisdictions, apart from Myanmar (where MmCC can make administrative decisions only). This risk has been mitigated by the competition authorities by ensuring that the decision-making body (usually the Commission) is separated from the personnel investigating the infringement. This has been confirmed by Brunei Darussalam³⁸², Indonesia³⁸³, Malaysia³⁸⁴, Myanmar³⁸⁵, the Philippines³⁸⁶, Singapore³⁸⁷ and Vietnam³⁸⁸. In Thailand, special rules exist as to characteristics of the officials that can engage

³⁷⁷ This is provided for in section 38 Malaysia law. Section 38 also refers to procedural rules from time to time in effect. The MyCC has advised that the Commission has not yet enacted procedural rules pursuant to this provision.

³⁷⁸ Regulation 4 Brunei Competition Regulations and Regulation 8 Singapore Competition Regulations

³⁷⁹ Article 67 Vietnam law

³⁸⁰ Article 93 Vietnam law

³⁸¹ Groves, M. “The Rule Against Bias” [2009] UMonashLRS 10

³⁸² Board of Commissioners is independent from the Executive Secretariat that carries out the investigation.

³⁸³ Board of Commissioners is independent from the investigation process and prosecution process which are conducted by different units; the Executive Secretariat that carries out the Commission Panel is not involved in the investigation process.

³⁸⁴ Active cases are reviewed by the Legal Division and the Business Economics Division before going through the Investigation and Enforcement Committee for evaluation. The case is then presented to the Members of the Commission for their deliberation

³⁸⁵ The Investigative Committee is separate from the MmCC which is the decision-making body.

³⁸⁶ There is a firewall between the PCC and the MAO/CEO. It is only after the Statement of Objections or the Statement of Concerns is issued that the PCC has access to the evidence.

³⁸⁷ The CCCS advised that decisions are taken by the Commission members, 8 out of 9 of whom are non-executive members and not involved in the day to day work of the CCCS. The rights of appeal to the CAB also ensure no bias. The CAB members are public and private sector representatives independently appointed by the Ministry of Trade and Industry. CCCS staff are also required to declare any potential conflicts of interest before being involved in a case. This applies across all levels of the CCCS.

³⁸⁸ In the newly restructured Commission, the investigation body sits under the Commission but the decision is made by the Commission based on report of investigation division. The Commission can also hear from other parties.

in investigation and decision-making processes³⁸⁹. In the case of Cambodia, issues of this nature have not yet been resolved³⁹⁰. The position in Lao PDR is not yet known.

4.2.7.3 The ‘no evidence’ rule

The Regional Guidelines recommend that competition authorities act only on the basis of ‘logically probative evidence’ or a similar legal concept. According to the Australian Administrative Review Council³⁹¹ guide for administrative law decision-makers, logically probative evidence is:

“material that tends logically to prove the existence or non-existence of a fact. For example, rumour or speculation is not logically probative evidence because it does not tend rationally to prove what it asserts.”

Similarly, the Dictionary that supports the NSW *Evidence Act* defines the ‘probative value of evidence’ to mean:

“the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue”³⁹².

It does not appear that the concept of logically probative evidence is expressly covered in any of the competition laws but that (or a similar concept) may apply in practice or through regulation³⁹³. The PCC advised that they apply the ‘substantial evidence’ rule in administrative cases. The ICC explained that Commission Regulation No. 1 of 2019 requires at least two (2) valid instruments of proof to meet the adequate evidence standard³⁹⁴. In Malaysia, the concept of logically probative evidence is not expressly encapsulated, however, the MyCC have taken the view that:

“it is sufficient if the body of evidence, viewed as a whole, proves that an infringement of the section 4 prohibition has occurred on a balance of probabilities. Such evidence would consist of direct, circumstantial evidence, and inferences from the established facts”³⁹⁵.

Currently, Myanmar relies on the scrutiny of the MmCC to determine the sufficiency and accuracy of the evidence and relies on the Evidence Act to support the collection of the

³⁸⁹ Section 13 of the Administrative Procedure Act B.E. 2539 (1996) and the Regulation of the Trade Competition Commission on Complaints, Investigation, and Procedures for Criminal or Administrative Prosecution B.E. 2562 (2019) prescribes the prohibited characteristics of officials who will engage in the investigation process, as well as decision making process in order to ensure that there will be no bias for adjudicating competition cases.

³⁹⁰ As advised by the CCF

³⁹¹ Commonwealth of Australia, *Administrative Review Council Best Practice Guide – Decision Making: Evidence, Facts and Findings*, 2007, available at <https://www.ag.gov.au/sites/default/files/2020-03/best-practice-guide-3-evidence-facts-and-findings.pdf> (accessed 12 November 2020)

³⁹² Available at <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1995-025#dict>

³⁹³ The CCCS has confirmed that the evidence needed to prove a case must be of sufficiently probative value that the infringement can be proved on the balance of probabilities.

³⁹⁴ Article 1(13), Regulation of the Commission for the Supervision of Business Competition, Number 1 of 2019 regarding Procedures for Case Handling Monopolistic Practice and Unfair Business Competition Cases

³⁹⁵ MyCC Decision, MyCC v General Insurance Association of Malaysia (PIAM) & Others, Case No. 700–2.1.3.2015, decision dated 14 September 2020, page 136, available at https://www.mycc.gov.my/sites/default/files/pdf/decision/Public%20Version%20Decision%20PIAM%20%26%2022%20Members_28.2.2021_2.pdf (accessed 1 November 2021)

evidence³⁹⁶. Decree No. 35/2020/ND-CP (Vietnam) requires that evidence be evaluated as ‘sufficient, objective, comprehensive and accurate’³⁹⁷.

The sources that can be used as evidence are set out in some jurisdictions e.g. Vietnam³⁹⁸ and Indonesia³⁹⁹. In Thailand, the TCCT adopts and applies the principle of the admissibility of unlawfully obtained evidence in accordance with the Criminal Procedure Code B.E. 2477 (1934).

Many of the competition laws impose thresholds that must be met before investigation powers can be used. For example, Brunei Darussalam and Singapore impose a ‘reasonable grounds for suspecting’ threshold⁴⁰⁰, Malaysia imposes a ‘reason to suspect’ threshold⁴⁰¹ while the Philippines imposes a ‘reasonable suspicion’ threshold before an inspection can be undertaken⁴⁰².

4.3 ASEAN Self-Assessment Responses

The self-assessment contained questions relevant to due process⁴⁰³.

Question 19 asked if decisions taken by the competition agency can be appealed to the court or designate appellate bodies. All jurisdictions (including Lao PDR and Thailand) confirmed that decisions can be appealed to the courts. Thailand states that appeals on the administrative penalty are to be heard by the administrative courts.

Question 29 asked if the competition agency undertakes regular reporting of its activities, including publication of annual reports, audited accounts etc. All jurisdictions (except Cambodia) confirmed that annual reports are published.

Question 30 asked on which matters the competition agency would publish its final decision. Most jurisdictions (Brunei Darussalam, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) will publish all decisions.

Question 31 asked whether competition agencies publicly announced their decisions to proceed or not to proceed with an investigation. Only four jurisdictions (Indonesia, Vietnam⁴⁰⁴, Myanmar and Philippines) answered yes to this question. Myanmar noted it is not legally obliged to publicly announce their decisions.

Question 32 asked whether parties have the right to be heard and present evidence/arguments in their defence before the competition agency (or applicable court) decides to impose sanctions or remedies. All jurisdictions confirmed that this right is available to parties in their jurisdictions.

³⁹⁶ Based on advice from MmCC

³⁹⁷ Article 24 Decree No. 35/2020/ND-CP

³⁹⁸ Article 56 Vietnam law

³⁹⁹ Article 45 Indonesia Case Handling Procedures

⁴⁰⁰ Section 35(1) Brunei law; section 62 Singapore law

⁴⁰¹ Section 14 Malaysia law

⁴⁰² Section 12(g) Philippine law

⁴⁰³ Note Cambodia did not complete the questionnaire

⁴⁰⁴ Article 104.1.c Vietnam law

Question 33 asked whether parties under investigation for an infringement of competition law have the opportunity to consult with the competition agency regarding significant legal, factual or procedural issues during the course of the investigation. All AMS responded in the affirmative. Malaysia’s response confirmed that access to file is made available to the parties upon request, subject to confidentiality obligations.

Questions 52 to 55 asked questions regarding the authorities’ approach to public relations, in particular whether the agency issues press releases, whether the media reports on activities of the competition agency, whether the agency makes public speeches about competition policy and law issues and publishes advocacy/awareness-raising materials. The responses to these questions from all jurisdictions was generally positive.

4.4 Initial conclusions on commonalities and differences

As the table below demonstrates, although there is a mixed picture when considering the consistency of due process provisions in the AMS, there is a reasonable degree of consistency at least at the macro level.

Table 17: Due process

Jurisdiction	Interim measures	Access to file	Appeal from decision of CA	Administrative review of CA power	CA as ‘amicus curiae’	Right to be heard	Published guidelines and decisions
Brunei Darussalam	✓	✓	✓	✓	✓	✓	✓
Cambodia	✓	✓	✓	✓	To be determined	✗	✓
Indonesia	✓	✓	✓	✓	✗	✓	✓
Lao PDR	✓	N/A	N/A	N/A	N/A	N/A	N/A
Malaysia	✓	✓	✓	✓	✗	✓	✓
Myanmar	✗	✓	✓	✓	✗	✓	✓
Philippines	✓	✓	✓	✓	✓	✓	✓
Singapore	✓	✓	✓	✓	✓	✓	✓
Thailand	✓	✓ subject to court order	✓	✓	✗	✓	✓
Vietnam	✓	✓	✓	✗	✓	✓	✓

The AMS have taken positive steps in relation to cross-border cooperation. As this practical experience is obtained, the AMS will gain a greater understanding of how (and if) these differences lead to divergencies in practice. At that point, the AMS will need to consider how these differences can be handled in practice. An awareness and understanding of the differences will be the necessary first step.

5. Timeframes for investigation

5.1 ASEAN 2010 Regional Guidelines

Paragraph 5.1.3 sets out guidance on the provisions that the AMS may wish to include in legislation and guidelines including:

“5.1.3.21 Statutory time periods (e.g. for the competition regulatory body to issue a decision or for affected parties to file an appeal)”.

Paragraph 7.2 provides guiding principles on institutional framework and process. It includes, at 7.2.1.7 guiding principles on timeliness:

“*Timeliness*: The competition regulatory body could be required to comply with legislative pre-determined time periods for the handling of cases. The competition regulatory body 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. This would allow sieving out cases which are unlikely to raise competition concerns and allocate resources to more important cases.”

5.2 ASEAN Competition Laws

Some of the AMS (discussed below) include provisions on the time in which various stages of the procedures should be completed, either in the law, regulations or guidelines. Although the timeframes themselves are not essential for due process, the differences will be important in the case of concurrent cross-border cases. A summary of the position in relation to anticompetitive agreements and abuse of dominance cases is set out in Table 18:

Table 18: Time periods for investigation

	Jurisdiction	Preliminary phase	Investigation phase	Decision
Anti-competitive Agreements and Abuse of Dominance	Indonesia	60 days	90-120 days	30 days
	Lao PDR – restraint of competition	n/a	150-240 days ⁴⁰⁵	n/a
	Lao PDR – unfair competition	n/a	90-150 days ⁴⁰⁶	n/a
	Myanmar	n/a	90 days	n/a
	Philippines	90 days	n/a	n/a
	Thailand – civil	n/a	90-120 days	n/a
	Thailand – criminal	n/a	12-18 months	n/a
	Vietnam – restriction of competition	n/a	9-12 months	
	Vietnam – unfair competition	n/a	60-105 days	
Mergers	Indonesia	60 days ⁴⁰⁷	90 days	
	Lao PDR	n/a	30-60 days	n/a
	Myanmar	n/a	90 days	n/a
	Philippines	n/a	30-60 days	n/a
	Singapore	30 working days	120 working days	n/a
	Thailand	n/a	90-105 days	n/a
	Vietnam	30 days	90-150 days	30 days ⁴⁰⁸

There are jurisdictions with no statutory timeframes imposed. In Brunei Darussalam⁴⁰⁹, there is no time limit specified for completion of investigations (anti-competitive agreements, abuse of dominance and mergers). In Malaysia and Singapore, there is no time limit specified for completion of investigations into anti-competitive agreements and abuse of dominance⁴¹⁰.

Currently, Cambodia does not have rules and procedures for investigations – these will be established following enactment of the law.

5.2.1 Anti-competitive agreements and Abuse of dominance

In Indonesia, a preliminary investigation must be completed within 60 days of receiving the report and a decision must be made as to whether it is necessary to conduct a further

⁴⁰⁵ If further inspection orders are required, a further 60 days is permitted

⁴⁰⁶ If further inspection orders are required, a further 30 days is permitted

⁴⁰⁷ If the merger qualifies for a simple assessment, the ICC has 14 business days only to assess the merger

⁴⁰⁸ The VCC can order further investigation due to insufficient evidence in which case there is a 30 day time limit: Article 89 Vietnam law

⁴⁰⁹ As advised by CCBD

⁴¹⁰ As advised by MyCC and CCCS

investigation⁴¹¹. Further investigations must be completed within 90 days, with the possibility of extension for up to 30 days⁴¹². A decision on violation must then be taken within a maximum of 30 days⁴¹³ and the decision must be read in a session open to the public⁴¹⁴.

In Lao PDR, an investigation of allegation of unfair competition must be completed within 90 days of the inspection order being issued, with an extension for up to 60 days permitted. An investigation of allegation of restraint of competition must be completed within 150 days of the inspection order being issued, with extension for up to 90 days permitted⁴¹⁵. Where additional inspection orders are ordered by LCC (as a result of insufficient information and evidence), the additional inspection must be completed within 30 days for unfair competition or 60 days for restraint of competition⁴¹⁶.

Details on timeframes are provided in the Myanmar *Competition Rules*. Rule 32 specifies that the final report on the investigation must be submitted by the Investigation Committee to the MmCC within 90 days after commencing the investigation, subject to extensions.

A preliminary inquiry must be completed by the PCC within 90 days of the submission of the verified complaint, referral or date of initiation⁴¹⁷.

In Thailand, an opinion and a report must be provided to the TCCT within 90 days of the commencement of the investigation, with the possibility for an extension of up to 30 days⁴¹⁸. If the offence is not able to be considered in this period, a further extension is possible. Where the inquiry relates to a criminal offence, the committee has a period of 12 months with the possibility of a six-month extension⁴¹⁹.

In Vietnam, the time limit for investigation of a competition restriction case is 9 months (or up to 12 months for complicated cases)⁴²⁰ while the time limit for an unfair competition case is 60 days (or up to 105 days for complicated cases)⁴²¹. There are separate time frames imposed on the Commission for it to make its decision, following completion of the investigation.⁴²²

5.2.2 Investigations: Mergers

In Indonesia, following notification of a merger, the ICC has 60 days to assess whether the merger meets the criteria for assessment, following which the ICC has a further 90 days to assess the merger. The same periods apply where a party has sought to consult with the ICC.

⁴¹¹ Article 39(1) Indonesia law

⁴¹² Article 43(1) and (2) Indonesia law

⁴¹³ Article 43(3) Indonesia law

⁴¹⁴ Article 43(4) Indonesia law

⁴¹⁵ Article 71 Lao PDR law

⁴¹⁶ Unfair competition – misleading conduct, business secrets, coercion, defamation, imposing obstacles to business operation, false advertising, unfair sales, discrimination by business association; Restraint of competition – anti-competitive agreements, abuse of dominance and mergers

⁴¹⁷ Section 31 Philippine law

⁴¹⁸ Section 43 Regulation of the Trade Competition Commission on Complaints, Investigation, and Procedures for Criminal or Administrative Prosecution B.E. 2562 (2019)

⁴¹⁹ Section 21 Thai law

⁴²⁰ Article 81 Vietnam law

⁴²¹ Article 81 Vietnam law

⁴²² Articles 90-91 Vietnam law

Where the merger qualifies for a simple assessment, the ICC has 14 business days to assess the merger⁴²³.

In Lao PDR, the Competition Commission has 30 days to approve or disapprove a combination from the date of receipt of correct and sufficient documents. This can be extended in case of necessity by up to 30 days⁴²⁴.

The timeframes provided in Rule 32 of the Myanmar *Competition Rules* also apply to mergers i.e. 90 days.

For compulsory merger notifications, the PCC must make a decision within 30 days (or within 30 days plus a 60 day extension where additional information is sought)⁴²⁵.

The CCCS carries out a Phase 1 review which it endeavours to complete within 30 working days. Where the CCCS is unable to conclude that the merger does not raise competition concerns in that 30 day period, it will proceed to a Phase 2 merger investigation. The CCCS endeavours to complete this Phase 2 investigation in 120 working days⁴²⁶.

In Thailand, the authority must complete its merger review within 90 days of receipt of the request, with a 15 day extension permitted⁴²⁷.

In Vietnam, the results of the preliminary appraisal must be notified within 30 days from the date of receipt of a complete and valid file notifying the economic concentration⁴²⁸. If the merger notification is under official review, the timeframe shall be 90 days after issuing a notice of result of preliminary review (the time period may be extended but not exceeding 60 days)⁴²⁹. For violation of merger regulations, the time limit for investigation is 90 days from the date of the investigation decision; in complicated cases, the time period may be extended once by a period not exceeding 60 days⁴³⁰. There is a separate time frame imposed on the Commission for it to make its decision, following completion of the investigation.⁴³¹

From a practical perspective, the differences in timeframes for completion of investigations across the AMS has the potential to significantly impact cross-border cooperation. A practical solution will be required.

5.2.3 Appeals

Timeframes within which appeals must be brought against decisions of the competition authority are generally specified.

⁴²³ ICC, Guidelines for the Assessment of Mergers, Consolidations or Acquisitions, Attachment I, III and IV

⁴²⁴ Article 42 Lao PDR law

⁴²⁵ Section 17 Philippine law

⁴²⁶ As advised by the CCCS

⁴²⁷ Section 52 Thai law

⁴²⁸ Article 36 Vietnam law and *Process for assessment of an economic concentration in accordance with the provisions on appraisal of economic concentrations in accordance with the Law on Competition* [Allens' English translation provided by VCCA]

⁴²⁹ Article 37 Vietnam law

⁴³⁰ Articles 37, 81 (2) Vietnam law and *Process for assessment of an economic concentration in accordance with the provisions on appraisal of economic concentrations in accordance with the Law on Competition* [Allens' English translation provided by VCCA]

⁴³¹ Article 89 Vietnam law

Table 19: Timeframe for appeals

Jurisdiction	Internal review	Appeal
Brunei Darussalam	-	2 months from date of notification or publication of decision, whichever is earlier
Cambodia	15 days for appeal to CCC for review	If refused, 30 day period to appeal to competent court
Indonesia	-	14 days of receiving notification of decision
Malaysia	-	30 days of date of decision
Myanmar	60 days for review by Commission	-
Philippines	-	15 days
Singapore	-	4 weeks of date of notification or publication of decision, whichever is earlier
Thailand	-	60 days
Vietnam	30 days	30 days

Appeals against the decision of the CCBD can be brought within 2 months of the date of notification or publication of the decision, whichever is earlier⁴³². In Cambodia, a petition can be filed with the CCC asking for review within 15 days from date of receiving notification of the interim measures or decision. If refused, the respondent can appeal to competent court within 30 days of receiving the refusal⁴³³.

A party that is dissatisfied with a decision of the ICC can submit a position of objection to the Commercial Court within 14 days of receiving notification of the Commission decision⁴³⁴. The Commercial Court must make a decision not earlier than 3 months and not later than 12 months of the date the objection begins to be examined⁴³⁵. Parties can object to the Commercial Court’s decision by submitting a petition of cassation to Supreme Court. The Supreme Court must make a decision within 30 days from date the cassation petition is received⁴³⁶.

The appeal process for competition cases in Lao PDR has not yet been considered.

In Malaysia, a notice of appeal must be filed within 30 days from the date of the MyCC decision⁴³⁷ and in Myanmar a decision of the Committee can be appealed to the Commission within 60 days⁴³⁸. The decision of the Commission shall be final and conclusive⁴³⁹. The time limit for appeals in the Philippines is 15 days⁴⁴⁰. Appeals against the decision of the CCCS can

⁴³² Article 7, *Competition (Appeals) Regulations 2020*

⁴³³ Articles 30 and 31 Cambodia law

⁴³⁴ Article 3, Supreme Court Regulation Number 3 Year 2021

⁴³⁵ Article 14, Supreme Court Regulation Number 3 Year 2021

⁴³⁶ Article 16, Supreme Court Regulation Number 3 Year 2021

⁴³⁷ Section 51 Malaysia law

⁴³⁸ Section 35 Myanmar law

⁴³⁹ Section 36(b) Myanmar law

⁴⁴⁰ Rule 43, Supreme Court Rules

be brought within 4 weeks of the date of notification or publication of the decision, whichever is earlier⁴⁴¹. In Thailand, appeals from merger decisions and decisions on anti-competitive practices may be filed in the administrative court within 60 days⁴⁴².

A respondent has 30 days to lodge a complaint with the Chairman of Vietnam Competition Committee⁴⁴³ who must accept the complaint within 10 days⁴⁴⁴. Within 5 days of acceptance of the complaint, the Chairman must establish a Complaint Resolution Board. That Board must make its decision within 30 days of establishment (or 45 days if complicated case)⁴⁴⁵. In case of disagreement with complaint handling decisions of the Chairman of National Competition Commission, the related party may initiate an appeal against a part or the whole of the contents of such decision to the competent court as prescribed in the Law on Administrative Proceedings, such appeal to be lodged within 30 days⁴⁴⁶.

5.2.4 Time period for bringing actions

Some of the competition authorities in ASEAN (Brunei Darussalam, Cambodia, Malaysia, Myanmar and Singapore) are not subject to a time limit within which they must commence proceedings for infringement of their competition law⁴⁴⁷.

There is a transitional period provided for in the *Competition (Transitional Provisions for Section 11 Prohibition) Regulations 2020* in Brunei Darussalam until 30 June 2020 for agreements entered into on or before 31 May 2019. Agreements entered into after this date, will not benefit from this transitional period. With this exception, there is no time limitation within which the CCBD must bring actions for infringement of the law. The Malaysian Competition Act does not specify a limitation period within which the MyCC must commence an enforcement action. The MyCC has power to commence an action at any time provided the agreement was entered into, or conduct commenced, or continues after the coming into force of the Competition Act (1 January 2012)⁴⁴⁸. The ICC also has power to commence an action provided the agreement was entered into, or conduct commenced, or continues after the coming into force of the Law Number 5 Year 1999 (5 March 1999). The MmCC has advised that there is no time limit for bringing enforcement actions under Myanmar law. However, the MmCC can only bring actions for conduct or agreements entered into, or continuing, after February 2017⁴⁴⁹. Like Brunei Darussalam, there was a transitional period in Singapore that applied to agreements made on or before 31 July 2005⁴⁵⁰. With this exception there is no limit on CCCS' powers to commence proceedings⁴⁵¹.

The position in Lao PDR has not yet been considered.

⁴⁴¹ Article 7, *Competition (Appeals) Regulations 2006*

⁴⁴² Section 52 Thai law and Section 60 Thai law

⁴⁴³ Article 96 Vietnam law

⁴⁴⁴ Article 98 Vietnam law

⁴⁴⁵ Article 100 Vietnam law

⁴⁴⁶ Article 103 Vietnam law

⁴⁴⁷ Confirmed by CCBD, MyCC, MmCC and CCCS

⁴⁴⁸ There is no limitation period prescribed in the competition law for the MyCC to exercise its powers of enforcement against infringement, as advised by MyCC

⁴⁴⁹ As advised by MmCC

⁴⁵⁰ *Competition (Transitional Provisions for Section 34 Prohibition) Regulations*.

⁴⁵¹ Confirmed by CCCS

In other jurisdictions, there are time limits imposed. In the Philippines, the PCC must bring an action within 5 years from the date the cause of action accrues (for administrative and civil actions) and 5 years from the time the violation is discovered by the offended party, the authorities or their agents (for criminal actions). The VCC has three years from the date of the violation to commence an action for infringement of Vietnam's competition law⁴⁵².

In Thailand, criminal cases (section 50 and section 54) must be prosecuted within 10 years as it is punishable by a term of imprisonment of not more than 2 years⁴⁵³. Administrative cases must be filed within 90 days from the date the cause of action is known or should have been known⁴⁵⁴. A complainant that is filing an action for damages under section 69 has a one year time limit from the date the person suffering damage knows or should have known the cause of such damage⁴⁵⁵.

Cambodia has advised that the issue will likely be addressed in the investigation procedures sub-decree.

5.2.5 Decisions on exemptions

The position across the region is mixed in relation to time limits for consideration of exemptions.

There is no time period prescribed for the consideration of block or individual exemptions by the CCCS or the TCCT. There is a requirement for the MyCC to conduct a 30 day public consultation in relation to a proposed block exemption⁴⁵⁶ but no time period within which the MyCC must make its decision.

The PCC has established time limits for the issuing of a binding ruling – 30 days from the date of receipt of the CEO's comment⁴⁵⁷. The PCC has issued *Revised Guidelines on Letters of Non-Coverage from Compulsory Notification* and the PCC has advised that it is required to act within a 7 working day time limit on these requests⁴⁵⁸. The VCC has 60 days from date of accepting a file⁴⁵⁹ or 90 days where extension is required (complicated cases) to reach a decision on exemptions.

Indonesia has stipulated its exemption and exclusion provisions in its competition law⁴⁶⁰, although ICC does not have authority to grant exemptions. The MmCC has not yet considered whether a time limit will apply to its power to grant exemptions. There is no provision in the law but the MmCC may consider setting this out in Guidelines⁴⁶¹.

In all other cases, the position is not yet clear.

⁴⁵² Article 80 Vietnam law

⁴⁵³ Section 95 (3) of the Penal Code B.E 2499 (1956)

⁴⁵⁴ Section 9 paragraph 1 (1) and (2) of the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999)

⁴⁵⁵ Section 70 Thai law

⁴⁵⁶ Section 9(b) Malaysia law

⁴⁵⁷ Section 3.7 Rules of Procedure

⁴⁵⁸ Revised Guidelines on Letters of Non-Coverage from Compulsory Notification on November 29, 2019.

⁴⁵⁹ Article 20 Vietnam law

⁴⁶⁰ Article 50 & 51, Indonesia Law Number 5 Year 1999.

⁴⁶¹ As advised by the MmCC

5.2.6 Case screening

Most of the AMS employ case screening criteria to ensure appropriate allocation of resources.

The CCBD has developed case screening criteria that it will consider in determining whether to pursue an investigation. This will include:

“having regard [sic] the impact to the competitive marketplace and public interest, the risk involved in taking on the complaint and the resource required to proceed the investigation”⁴⁶².

Indonesia’s case screening criteria include matters such as whether the ICC has jurisdiction to handle the case and whether the identity of the complainant and the Reported Parties are legitimate⁴⁶³.

Malaysia also employs case screening criteria, including whether the case gives rise to significant public interest or concern, whether there is substantial consumer detriment and the impact of the agreement/conduct on the functioning of the market⁴⁶⁴.

The Myanmar *Competition Rules* set out criteria that will form the basis of scrutinizing complaints received by the MmCC. This criteria includes:

- (a) a negative impact on the interests of public as a whole or could result in a negative impact on public interests;
- (b) status of violating the law
- (c) circumstances involving domestic or international issues with regard to competition
- (d) market condition that has impact on small enterprises
- (e) whether enterprise has a record of past violations of the law.

The Philippines has case screening criteria that is applied by the Intake Committee that reviews verified complaints and referrals received from other government authorities. The PCC, in reviewing verified complaints and referrals, take into consideration the following: (a) jurisdiction of the PCC; (b) public interest; (c) resource allocation; (d) likelihood of a successful outcome; (e) non-compliance of the verified complaint with the prescribed form; or (f) absence of reasonable grounds to commence a preliminary inquiry.⁴⁶⁵ The notification thresholds apply to screen cases in the case of mergers.

Singapore has case screening criteria but it is not publicly available⁴⁶⁶.

In Thailand, the TCCT has an obligation to review all complaints to determine whether a complaint relates to anticompetitive conduct. There are no particular case screening criteria⁴⁶⁷.

The Lao Competition Commission has not yet developed case screening criteria.

⁴⁶² Paragraph 6.1 *Guidelines on Complaints Procedure*

⁴⁶³ Article 6, ICC’s Regulation Number 1 Year 2019 on Case Handling Procedure

⁴⁶⁴ As advised by MyCC

⁴⁶⁵ Rule II Section 2.3 2017 PCC Rules of Procedure

⁴⁶⁶ Based on CCCS input

⁴⁶⁷ As advised by TCCT

The Vietnam competition law provides some criteria that will form the basis of case screening for complaints received by the VCC (Article 77, 78 and 79). This criteria includes:

- (a) the complaint falls under the investigation authority of the VCC;
- (b) the time limit for making such a complaint is 3 years since the performance of the acts with signs of violation of competition;
- (c) there are signs of violation (there are grounds, evidence to prove that contents of the complaint have grounds and legality).

5.3 Initial conclusions on commonalities and differences

The significantly differing timeframes in relation to investigations has the potential to give rise to considerable practical issues for cross-border investigations. Inconsistent time frames for investigations will impact on the AMS' ability to coordinate investigations, share information and discuss proposed remedies. For example, if all AMS commenced an investigation into an allegation of anticompetitive agreements or abuse of dominance at the same time (civil case only, ignoring any preliminary phases), Indonesia would be required to complete its investigation first (60-90 days), followed by Myanmar and Philippines (90 days), and Thailand (90-120 days) while Lao PDR and Vietnam have much longer periods of 150-240 days and 9-12 months respectively. The decision of Indonesia/Myanmar/Philippines/Thailand could impact on the investigation in Lao PDR/Vietnam. Or will pressure be applied to Lao PDR/Vietnam to meet the timeframes of Indonesia/Myanmar/Philippines/Thailand?

In relation to mergers, similar timing challenges will occur. Further issues arise where there are differences in the notification requirements (pre- and post-merger notifications, voluntary versus mandatory) as discussed in Part III, Section 6.

6. Decision-making processes

6.1 ASEAN 2010 Regional Guidelines

Paragraph 5.1.3 lists the topics on which the competition authority may wish to publish legislation and guidelines. The list includes:

5.1.3.11 Decision process for the prosecution of anti-competitive practices (anti-competitive agreements and abuse of dominant position and anti-competitive mergers) and exemption/authorisation of agreement or conduct or merger.

Paragraph 7.2 sets out the guiding principles on institutional framework and process. It includes:

7.2.1.2 Administrative review: AMSs may allow the competition regulatory body to review its own decisions, when circumstances prompting the decision have changed or have ceased to exist.

7.2.1.6 Transparency and Consistency: The transparency of the competition regulatory body's policies, practices and procedures may be strengthened by such a means as the

publication of procedural and enforcement guidelines, guidelines on the competition regulatory body's policies and priorities in the application of the substantive rules, and competition regulatory body/judicial authority decisions. These means would help to promote consistency in the competition regulatory body's decision making and to encourage compliance with competition law.

- (a) The competition regulatory body can set up a website for the publication of the competition regulatory body's / judicial authority's decisions, guidelines, documents and other public statements on competition policy.
- (b) The competition regulatory body should provide, as far possible, transparency and certainty with respect to the requirements for notifications (e.g., exemptions, mergers, leniency); and the application of policies, procedures and practices governing applications, the conditions for granting it and the roles, responsibilities and contact information for officials involved in the notification or decision making process.

6.2 ASEAN Competition Laws

6.2.1 Publication of Decisions

As noted above, many of the ASEAN competition authorities have already established dedicated websites on which decisions, guidelines and other relevant materials are being published (Brunei Darussalam⁴⁶⁸, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand⁴⁶⁹)

Cambodia also intends to establish a dedicated website for the competition authority. The VCC plans to upgrade their website after the Commission is established. All sites will be in both the local language and English.

The Lao Competition Commission has not yet determined a position in relation to publication of decisions.

6.2.2 Transparency of processes

In terms of transparency of the decision-making process, only a few AMS have addressed this in documents that are publicly available. The ICC sets out its decision-making process in Regulation Number 1 Year 2019 on Case Handling Procedure. The CCCS has published external guidelines which include *Guidelines on the Powers of Investigation in Competition Cases 2016* and *Guidelines on Enforcement of Competition Cases 2016*.

A number of jurisdictions confirmed that there are clear internal guidelines that set out the processes to be followed in relation to decision-making (Malaysia, Myanmar, Philippines⁴⁷⁰,

⁴⁶⁸ Although no decisions have yet been made

⁴⁶⁹ Decisions translated into English will be available on the TCCT website when they become available.

⁴⁷⁰ Processes for decision making are set out in sections 15-17 Rules on Merger Procedure and Rules IV and VI-X of the PCC Rules of Procedure

Singapore) or are in the process of establishing those internal processes (Brunei Darussalam). In the case of Cambodia, these processes have not yet been established⁴⁷¹.

The Thai law itself provides some detail on the decision-making process, stating that decisions of the Commission will be made by majority. Where there is an equal number of votes, the chair will have the deciding vote⁴⁷².

Likewise, the Vietnam law provides that the Chairman of the VCC shall issue a decision in relation to violations of the merger regulations or the unfair competition cases⁴⁷³. In the case of potentially anti-competitive practices, the Chairman of the VCC shall establish an anti-competitive settlement council that shall issue a decision according to discussion, ballot and decision on the majority rule⁴⁷⁴.

The Lao Competition Commission has not yet determined its internal processes.

6.3 Initial conclusions on commonalities and differences

Transparency of decisions made by the AMS may assist in convergence where the competition authorities in the region are willing to have regard to the development of competition law jurisprudence in other AMS when interpreting their own law. Such jurisprudence will, of course, not be binding but may be regarded as persuasive, particularly as between those jurisdictions with similar substantive rules and similar legal systems.

The development of best practices in relation to decision-making processes is an area that will benefit from convergence in the ASEAN region. Robust decision-making processes leads to robust and sound legal and economic decisions, which make them less vulnerable to legal challenge. Younger competition authorities may benefit from the hard lessons learned by other jurisdictions in relation to these procedural matters. Sharing of learning as between the AMS on this topic will be of great benefit.

7. Provisions to support Regional Convergence

One of the best strategies to achieve regional convergence will be through soft law, coordination and cooperation between the competition authorities in the AMS. This section considers the legislative provisions in the AMS laws that support (or obstruct) this required soft law and cooperation.

7.1 Guidelines

The power to publish Guidelines will be critical to achieving regional convergence as many of the potential areas of divergence can be addressed through consistent guidelines. All AMS

⁴⁷¹ As advised by CCC

⁴⁷² Section 19 Thai law

⁴⁷³ Article 89-90 Vietnam law

⁴⁷⁴ Article 91 Vietnam law

(except Cambodia⁴⁷⁵ and Vietnam) have this power expressly stated in their laws⁴⁷⁶, although the terminology sometimes differs. For example, Myanmar gives powers “to issue necessary notifications, orders, directives and procedures” which would seem to include guidelines.

7.2 Cooperation with foreign competition agencies

7.2.1 Confidential information

One of the key considerations for cooperation between competition authorities will be their treatment of confidential information. All AMS laws (except Myanmar) contain a provision that requires the competition authority to protect confidential information⁴⁷⁷. Myanmar has addressed this in its Rules which provide for confidentiality to be retained⁴⁷⁸.

Although competition authorities regularly cooperate without sharing confidential information, in cases where it is necessary to share confidential information (such as mergers), differences in the treatment of confidential information between the AMS a form of waiver is generally required.

7.2.2 Express ability to cooperate

Six of the AMS laws contain an express provision that permits the competition authority to cooperate with foreign competition bodies (Brunei Darussalam, Lao PDR, Myanmar, Singapore, Thailand, Vietnam)⁴⁷⁹.

Malaysia and the Philippines do not have an express provision but the power may be implied:

- (a) In the case of the Philippines, by virtue of its power to act as the representative of the government in international competition matters⁴⁸⁰; and
- (b) In the case of Malaysia, by virtue of its power to disclose confidential information to a foreign competition agency in connection with a request from that country’s competition authority⁴⁸¹.

7.2.3 Exchanging confidential information

Currently, only four AMS expressly provide for a competition authority to exchange confidential information with a foreign competition agency provided:

⁴⁷⁵ Article 6 Cambodia law allows the CCC to prepare Requirements and Procedures on stated specific areas (individual exemptions, block exemptions, leniency) but it does not appear to allow a general guideline power.

⁴⁷⁶ Section 69 Brunei Darussalam law; Article 35(f) Indonesia law; Art 79(3) Lao PDR law; Section 66 Malaysia law; Section 56(b) Myanmar law; Section 12(k) Philippines law; Section 61 Singapore law; Section 17(3) Thai law.

⁴⁷⁷ Section 70 Brunei Darussalam law; Art 22 Cambodia law; Article 39(3) Indonesia law; Art 57(1) Lao PDR law; Section 21 Malaysia law; Section 34 Philippines law; Section 89 Singapore law; Section 76 Thai law; Art 54(2) Vietnam law.

⁴⁷⁸ Rules 64, 67 and 73, Myanmar Competition Rules 2017

⁴⁷⁹ Section 69 Brunei Darussalam law; Art 79(6) Lao PDR law; Section 8 Myanmar law; Section 88 Singapore law; Section 29(8) Thai law; Art 108 Vietnam law.

⁴⁸⁰ Section 12(p) Philippines law

⁴⁸¹ Section 21(2) Malaysia law

- (a) In the case of Brunei Darussalam and Singapore, the exchange can only take place if an undertaking is obtained that ensures the foreign agency will comply with the confidentiality requirements⁴⁸²;
- (b) In the case of Cambodia and Malaysia⁴⁸³, the disclosure needs to be authorised by the Commission or the Chairman.

The remaining jurisdictions do not include an express provision to allow exchange with foreign government agencies.

7.2.4 Ability to receive and give undertakings

The OECD/ICN Report finds that “sharing confidential information pursuant to a waiver is the most frequent method ... The waiver itself sets out the terms on which the information is shared and confirms the provider of the information gave permission for the information to be shared on those terms”⁴⁸⁴. Only Brunei Darussalam and Singapore contain provisions that contemplate the giving and receiving of undertakings to deal with confidential information⁴⁸⁵.

7.3 AMS Self-Assessment

The Self-Assessment asks two questions relevant to cooperation with foreign competition authorities:

“38. Which amongst the following types of cooperation regarding competition law enforcement does the competition agency enter into with other jurisdictions?”

39. Which amongst the following types of informal cooperation arrangements does the competition agency have with its counterparts from other jurisdictions?”

Each of the competition authorities in Indonesia, Malaysia, Philippines, Singapore and Vietnam responded to question 38 that they engaged in ‘consultation and information exchange’. It is not clear whether this included confidential information. In addition, Indonesia responded that it may engage in positive and/or negative comity principles and joint investigations.

In response to question 39, the competition authorities in Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam responded that they cooperated in relation to capacity building. Indonesia, Malaysia, Philippines, Singapore and Vietnam responded that they cooperated in relation to exchanges of non-confidential case information, with Indonesia, Malaysia, Philippines and Singapore adding staff exchanges. In addition, Malaysia noted joint trainings.

⁴⁸² Section 69(2) Brunei Darussalam law; section 88(2) Singapore law

⁴⁸³ Article 23 Cambodia law; Section 21(2) Malaysia law

⁴⁸⁴ OECD/ICN, 2021. *IOECD/ICN Report on International Co-operation in Competition Enforcement*, <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf>, at paragraph 417

⁴⁸⁵ Section 69(2) and 69(3) Brunei Darussalam law; section 88(2) Singapore law

7.4 Initial Conclusions on Commonalities and Differences: Supporting Regional Cooperation

All AMS have power to publish guidelines (although the terminology sometimes differs) which will be an important tool for achieving convergence. Although many of the AMS have the power to cooperate with foreign competition agencies, there are potential barriers to sharing confidential information. All AMS laws impose an obligation to retain confidentiality of information on the competition authority. Myanmar has addressed this in its Rules which provide for confidentiality to be retained (Rules 64, 67, 73 and 74 Myanmar Competition Rules 2017). A limited number of AMS expressly contemplate a waiver of that confidentiality where it is required to assist a foreign competition authority.

In practice, this challenge can be overcome by agreeing an ASEAN-wide pro-forma confidentiality waiver that could be used in cross-border cases. Although less likely to be accepted by parties to an investigation for anticompetitive agreements or abuse of dominance, it will be in the interests of the parties to a merger to do so. This may be the most appropriate next step to take to assist cooperation (and indirectly convergence) in the region.

PART V: COMPARATIVE ANALYSIS OF PROCEDURAL PROVISIONS IN ASEAN COMPETITION LAWS

1. Sanctions

1.1 ASEAN 2010 Regional Guidelines

1.1.1 Sanctions

The Regional Guidelines allow the AMS to provide a range of sanctions in their competition laws, both punitive and non-punitive, and either criminal, civil or administrative. The AMS may also make the sanctions subject to judicial review⁴⁸⁶.

The sanctions may be imposed for substantive infringements of the law or for procedural infringements of the law. Examples provided in the Regional Guidelines are administrative financial penalties, civil financial penalties, periodic penalty payments, criminal sanctions, corrective orders and contempt orders⁴⁸⁷.

The difference between administrative and civil financial penalties is explained. Administrative financial penalties are imposed by an administrative body (normally the competition authority) or the judicial authority⁴⁸⁸. This occurs where the competition law is administered by an administrative agency. By contrast, a civil financial penalty is imposed by a judicial authority where civil proceedings have been initiated in the court by the administrative agency⁴⁸⁹. It is not clear whether civil financial penalties is also intended to cover the scenario where civil damages are awarded to a party following a private action. This is discussed in section 7 below.

Periodic penalty payments are daily fines imposed to punish for a failure to put an end to an infringement, or comply with an order or to submit to investigative procedures. Criminal sanctions include both fines and imprisonment and are imposed by a judicial authority that is applying criminal law⁴⁹⁰. Corrective orders include cease and desist orders, injunctions or divestiture, public disclosure or apologies⁴⁹¹.

⁴⁸⁶ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 6.7.1

⁴⁸⁷ *Ibid.*, para 6.7.2-6.7.4

⁴⁸⁸ *Ibid.*, para 6.7.4.1

⁴⁸⁹ *Ibid.*, para 6.7.4.2

⁴⁹⁰ *Ibid.*, para 6.7.4.4

⁴⁹¹ *Ibid.*, para 6.7.4.5

1.1.2 Financial penalties

The Regional Guidelines provide that the AMS may establish a method of calculation and the amount of penalties to be imposed. The basic principles for setting the amount of fines is then set out for consideration:

- (a) Seriousness (gravity) and duration of infringement and its impact on the relevant market
- (b) Turnover of the undertaking involved
- (c) Any aggravating circumstances (such as repeat infringements, refusal to cooperate, role as leader or instigator)
- (d) Any mitigating factors (such as acting under duress, passive role, cooperation).
- (e) Restitution or disgorgement principles
- (f) Possibility of infringement for individuals
- (g) Other relevant factors (such as deterrence)⁴⁹².

The AMS may consider setting a specified maximum amount or up to a certain percentage of the undertaking's turnover in previous years⁴⁹³. Fines may also vary depending on the type of infringement and whether it was committed wilfully/intentionally or negligently. The AMS may provide that the fines imposed are subject to judicial review.

1.2 ASEAN Competition Laws

1.2.1 Types of sanctions

All jurisdictions provide for sanctions to be imposed for breaches of the substantive provisions of the law (anti-competitive agreements, abuse of dominance and merger control) with all jurisdictions, apart from Myanmar, imposing administrative financial penalties. Myanmar is required to commence civil proceedings in the courts and the court imposes the appropriate sanction (civil financial penalty).

Some jurisdictions allow for the possibility of criminal penalties to be imposed in relation to substantive infringements (Lao PDR, Myanmar, Philippines, Thailand and Vietnam⁴⁹⁴).

Some of the ASEAN jurisdictions allow for criminal sanctions for breach of the procedural provisions including tipping off, obstruction, providing false or misleading information or failure to comply with a request from the competition authority to provide documents or give evidence (Brunei Darussalam, Indonesia, Malaysia, Myanmar, Singapore and Thailand). An express provision for periodic penalty payments can be found in only three jurisdictions (Philippines, Singapore, Thailand).

A range of corrective orders are available across the ASEAN competition laws. These have been broadly categorised below:

⁴⁹² Ibid., para 6.8.1

⁴⁹³ Ibid., para 6.8.2

⁴⁹⁴ The sanction in Vietnam is contained in the criminal laws, not the competition law: see Art 217 Criminal Code

Table 20: Corrective orders

REMEDY	JURISDICTION	ADDITIONAL INFORMATION
Cease and desist order	Brunei Darussalam ⁴⁹⁵ , Cambodia ⁴⁹⁶ , Indonesia, Lao PDR ⁴⁹⁷ , Malaysia, Singapore ⁴⁹⁸ , Thailand ⁴⁹⁹	
Injunctions	Philippines ⁵⁰⁰	
Modify agreement or behaviour	Brunei Darussalam, Indonesia (revoke contracts), Singapore, Vietnam	
Divestiture/restructure of business	Brunei Darussalam, Cambodia, Singapore, Vietnam	
Revoke merger	Indonesia, Vietnam, Singapore	
Undertakings	Brunei Darussalam, Malaysia, Singapore	
Compensation to victims/return of profits	Cambodia, Indonesia, Philippines, Vietnam	
Informing public	Singapore ⁵⁰¹	
Compliance/education programmes	Cambodia, Lao PDR	
Contempt orders	Philippines ⁵⁰²	
Warning	Cambodia, Indonesia ⁵⁰³ , Lao PDR, Myanmar, Vietnam	
Other orders	Brunei Darussalam ⁵⁰⁴ , Singapore ⁵⁰⁵	Performance bond, guarantee or other form of security
	Cambodia	Suspend, revoke or withdraw business registration certificates, licences, or permits Licence IPR
	Lao PDR	Disciplinary measures Suspension or withdrawal of enterprise registration certificate
	Malaysia	Any other direction as it deems appropriate
	Myanmar	Close the business temporarily or permanently
	Vietnam	Restructure the firm having abused its dominant/monopoly position, remove illegal provisions from contract, agreement, divide, split or resell part or the whole of the contributed capital amount and assets of the enterprises of merger cases

⁴⁹⁵ Section 42 Brunei law

⁴⁹⁶ Article 37 Cambodia law

⁴⁹⁷ Self-Assessment response

⁴⁹⁸ Section 69 Singapore law

⁴⁹⁹ Self-assessment response

⁵⁰⁰ Self-assessment response

⁵⁰¹ Self-assessment response

⁵⁰² Section 38 Philippines law

⁵⁰³ In relation to the rules on violation on partnership between large companies and MSME only

Some jurisdictions provide that a financial penalty may only be imposed where the infringement has been committed intentionally or negligently (Brunei Darussalam, Singapore, Thailand)⁵⁰⁶.

1.2.2 Financial penalties

There is a mixed approach in the ASEAN competition laws to stipulating the means for calculating the pecuniary fine for infringement of the substantive competition law provisions.

The laws in most jurisdictions stipulate a maximum fine amount, either by reference to a percentage of turnover, a fixed amount or between a minimum and maximum range (Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam). Details on how the penalties are to be calculated are not generally included in the laws themselves, with the exception of Thailand which provides that the seriousness of the offence should be taken into account when imposing an administrative fine⁵⁰⁷. Some jurisdictions have already published guidelines on the calculation of penalties (Indonesia, Malaysia, Singapore). In these cases, the guidelines indicate commonality across all three jurisdictions which stipulate the following factors:

- (a) Gravity and duration of infringement;
- (b) Turnover of undertaking; and
- (c) Aggravating or mitigating circumstances.

1.2.3 Setting and review of the fines

In all jurisdictions, other than Myanmar, the competition authority has the power to impose financial penalties following a finding of infringement of the substantive competition law. There is less clarity in the competition laws around the ability for the fines imposed by the competition authority to be the subject of judicial review. Some jurisdictions (Brunei Darussalam, Malaysia, Singapore) expressly provide in their laws for financial penalties to be reviewed by the courts or relevant appeal body. Other jurisdictions have confirmed that the appeal provisions apply both to the substantive decision and the penalty amount: Cambodia, Indonesia, Lao PDR, Philippines, Thailand⁵⁰⁸, Vietnam.

1.3 ASEAN Self-Assessment Responses

Additional information provided in the self-assessment responses has been incorporated in Table 19 above.

⁵⁰⁴ Section 42(2)(f)(iii) Brunei law

⁵⁰⁵ Section 69(2)(e)(iii) Singapore law;

⁵⁰⁶ Thailand has confirmed that the requirement for intention or negligence relates only to criminal sanctions. Although there is no requirement in the law for the infringement to have been committed intentionally or negligently in order to impose a penalty, the MmCC has advised that this is a factor that the Commission will take into account in deciding whether to impose administrative penalties or take the matter to court.

⁵⁰⁷ Section 85 Thai law

⁵⁰⁸ Where the fine relates to a criminal case, if the offending party disagrees with the fine imposed, the case must be sent to the prosecuting attorney for prosecution in the Intellectual Property and International Trade Court. In this case, the court shall be able to review the criminal penalty imposed by the TCCT, as well as to adjudicate such case. In civil cases, the appeal will be heard by the Administrative Court.

1.4 Initial conclusions on commonalities and differences

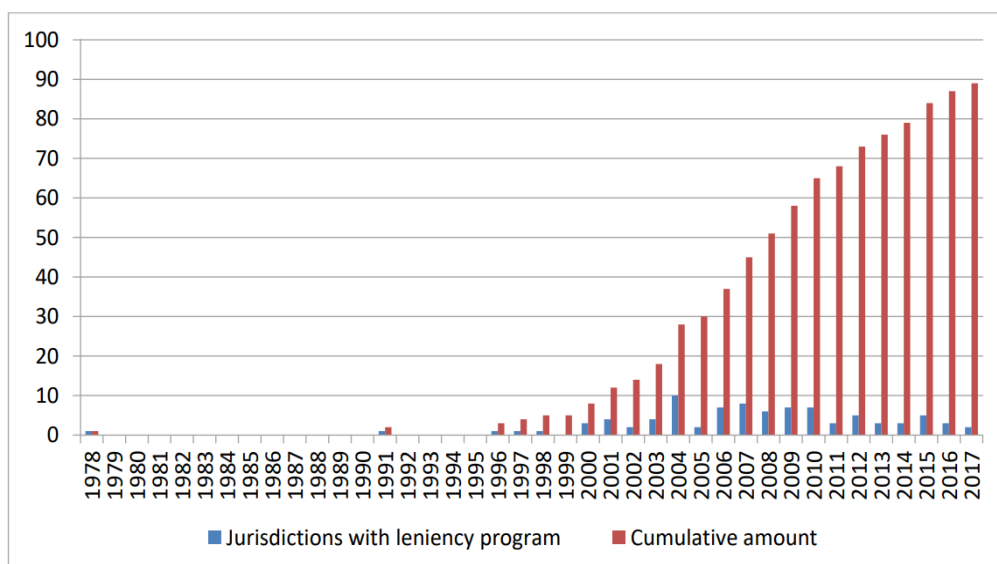
Achieving some convergence in relation to sanctions will be important for cross-border cases. The need to establish an intentional or negligent breach in some jurisdictions and not others constitutes a significant divergence. However, the AMS that have already begun to develop guidelines on penalty calculation are already converging in relation to the matters that can be taken into account. AMS that have not yet considered this area, may wish to follow the approach being taken in the region, which also accords with international best practice. Even with a common approach to penalty calculation, there is still a risk of the final fines being different.

It will be essential for AMS involved in cross-border cases to discuss potential non-financial sanctions to ensure that proposed sanctions in one jurisdiction do not conflict or detract from intended sanctions in another.

2. Leniency regimes

It is well recognised that a leniency program is an important tool used by competition agencies to detect hardcore cartels. The growth in leniency programmes around the world has been significant – a 2019 OECD report notes that in 2000 only 6 programmes were in operation, compared with 89 programmes in existence around the world in 2017. All OECD member countries have a leniency programme in place and consider it to be “the most effective tool for detecting and punishing cartels”⁵⁰⁹.

Figure 5: Leniency programmes by year of introduction⁵¹⁰



⁵⁰⁹ OECD (2019), *Review of the 1998 OECD Recommendation concerning effective action against hard core cartels*, available at <http://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf>, accessed 2 October 2019, page 11

⁵¹⁰ *Ibid.*, page 16

The Regional Guidelines provide:

“AMSs may introduce a leniency programme targeted at undertakings 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 regulatory body or other law enforcement body with evidence of the cartel.” (paragraph 6.9.1)

The existence (or not) of a well-utilised leniency regime will have a significant impact on the ability of the AMS competition agencies to enforce their competition laws, particularly in relation to cross-border cartels:

“A consistent approach to leniency across ASEAN will be important if cross-border cartels are to be prosecuted and if competition authorities are to be able to cooperate effectively and efficiently. For this they need to avoid conflicting requirements. An inconsistent approach will risk convergence as cartelists may forum shop for the most favourable leniency regimes.”⁵¹¹

Currently, Brunei Darussalam, Malaysia, the Philippines and Singapore have an operational leniency regime that applies in relation to hard core cartels. The laws of Cambodia, Lao PDR Myanmar and Vietnam allow for a leniency regime but the programmes are not yet in force. Indonesia is currently seeking amendments to the law to allow for a leniency regime. Thailand does not have legislative provision for a leniency regime, nor does it have a leniency regime in place⁵¹².

In Myanmar and Vietnam, the ability to grant leniency appears to apply more widely than hardcore cartel offences. (In Myanmar, leniency applies to section 13 and in Vietnam, leniency applies to anti-competitive agreements stiputed in Article 12 of Vietnam competition law, both of which are wider than hardcore cartels). In Lao PDR, the potential scope of the leniency regime is unclear; while in Cambodia the leniency provisions apply only to horizontal agreements as defined, which is limited to hardcore cartels.

⁵¹¹ Maximiano, R., R. Burgess and W. Meester, “Promoting Similarities and Eliminating Contradictions in ASEAN Competition Laws and Practice” in *Global Competition Enforcement: New Players, New Challenges* edited by Paulo Burnier da Silveira, William Evan Kovacic, 2019, p 240-241

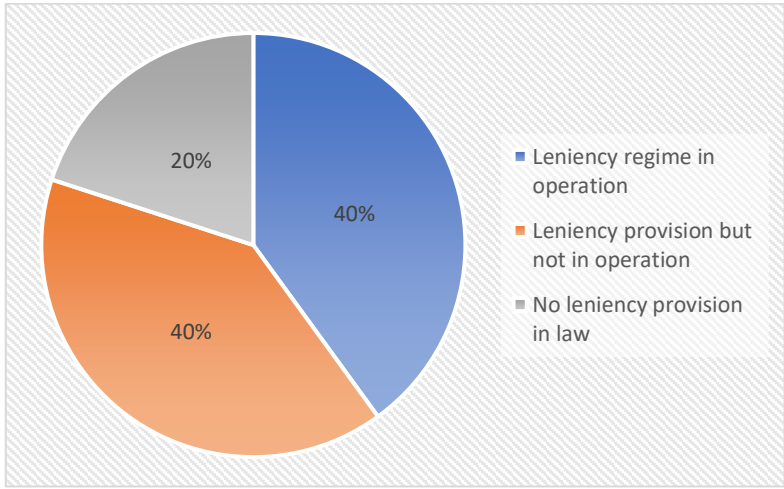
⁵¹² It may be possible for the TCCT to introduce a leniency programme through its power under section 17(3) to impose guidelines to maintain free and fair competition. Singapore does not have a specific legislative power to establish a leniency programme but the CCCS sets out its policy on lenient treatment in its *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016*.

Table 21: Leniency programmes

	Legislative provision	Operational leniency programme
Brunei Darussalam	✓ Section 44	✓ ⁵¹³
Cambodia	✓ Art 15	✗
Indonesia	✗ (Legislative amendment pending)	✗
Lao PDR	✓ Art 62	✗
Malaysia	✓ Section 41	✓ ⁵¹⁴
Myanmar	✓ Section 8(p) and 52 ⁵¹⁵	✗
Philippines	✓ Section 35	✓ ⁵¹⁶
Singapore	✗ No legislative provision for leniency	✓ ⁵¹⁷
Thailand	✗	✗
Vietnam	✓ Article 112 (leniency policy)	✗

Source: Author’s analysis based on review of laws and input from AMS

Figure 6: AMS with leniency provisions



Consistent leniency regimes will be particularly important for convergence of competition law and policy in the region. This is an area that requires particular attention by the AMS.

⁵¹³ Leniency regime in operation from 1 January 2020, as advised by Competition Commission of Brunei Darussalam. Available at www.ccbd.gov.bn

⁵¹⁴ Available at <https://www.mycc.gov.my/guidelines/guidelines-lenency-regime>, accessed 2 October 2019

⁵¹⁵ See also Chapter X, Myanmar Competition Rules, 2017

⁵¹⁶ Available at <https://phcc.gov.ph/leniency-application/>, accessed 2 October 2019

⁵¹⁷ Available at <https://www.ccs.gov.sg/legislation/competition-act> accessed 2 October 2019

3. Confidential information

This section deals with the treatment of confidential information generally. Confidential information in the context of regional cooperation is considered in Part IV, Section 7.

3.1 ASEAN 2010 Regional Guidelines

The Regional Guidelines allow the AMS to recognise the importance of maintaining confidentiality of commercially sensitive information and individual details in their competition legislation. Three types of confidential information are identified:

- (a) Relating to the business, commercial or official affairs of any person;
- (b) Which have been identified as confidential; or
- (c) Relating to the identity of persons furnishing information.

Where this information has come to the knowledge of the competition authority during the course of performing its functions and duties it must not be disclosed unless it is necessary to do so to perform its function or disclosure is required by law⁵¹⁸.

The policy reason for protecting information is to avoid the risk of harming legitimate business or personal interests of those providing information to the competition authority. Those persons claiming confidentiality should identify the confidential information and explain why it is confidential⁵¹⁹.

The Regional Guidelines also acknowledge that the same information may be protected by legal professional or litigation privilege or privacy laws⁵²⁰.

The identity of a company or individual that informs the competition authority of the existence of an anti-competitive practice should be protected⁵²¹.

3.2 ASEAN Competition Laws

All AMS jurisdictions, other than Myanmar, contains provisions in their competition laws that address confidentiality. Myanmar contains provisions on confidentiality in its *Competition Rules*. Brunei Darussalam and Singapore expressly cover the three types of information identified in the Regional Guidelines. Most of the other jurisdictions expressly identify the confidentiality of business or commercial information or the official affairs of any person, as well as the identity of persons furnishing information (Cambodia, Indonesia, Myanmar, Philippines and Vietnam). In Vietnam, the confidentiality of the person furnishing information is available upon request and a witness may be entitled to refuse to testify if evidence involves State, professional, business or private secrets.

⁵¹⁸ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 6.4.1

⁵¹⁹ *Ibid.*, para 6.4.2

⁵²⁰ *Ibid.*, para 6.4.3

⁵²¹ *Ibid.*, para 6.3.2

Brunei Darussalam and Singapore include a provision in their competition law that obliges the party claiming confidentiality to explain why the information is confidential.

Some of the jurisdictions allow disclosure of confidential information where it is required by law (Brunei Darussalam, Cambodia, Philippines, Singapore, Thailand), or required to carry out the duties of the competition authority (Brunei Darussalam, Cambodia, Malaysia, Singapore, Thailand) or consent is obtained (Brunei Darussalam, Lao PDR, Malaysia, Philippines, Singapore).

3.2.1 Processes for protecting confidentiality

Some of the AMS have established procedures to protect confidential information, although in some cases the procedures are internal.

CCBD has an internal operational document that sets out how confidential information is to be treated. It requires the confidential information to be identified and information will be redacted. The CCBD will accept anonymous complaints but there are drawbacks as there is no means to obtain follow up information.

Indonesia does not expressly stipulate the treatment of confidential information in its competition law. However, ICC is authorized to set out its own Guideline on this matter. The updated *Case Handling Procedures 2019* notes that the identity of the Reporting Party must be kept confidential by the ICC (Article 4) and data of the Reported Party can be declared to be confidential so as to avoid its disclosure during the hearings (Article 55(3)).

Lao PDR is establishing an internal process for the treatment of confidential information that ensures that only the relevant team can see the information (it is not shared with other divisions of the LCC). Anonymous complaints will be accepted but are difficult to pursue.

The MyCC confirmed that an enterprise may request that the MyCC keep information confidential, subject to disclosure that is permitted under section 21 Competition Act. The MyCC handles requests for confidentiality on a case-by-case basis⁵²². as an internal process that it follows to protect confidential information. Anonymous complaints will be accepted and the identity of the complainant will be kept confidential for as long as possible⁵²³.

Myanmar has set out its rules on confidentiality and its complaint form in its *Competition Rules*⁵²⁴. The MmCC will accept an anonymous complaint but it has advised that anonymous complaints are very difficult to follow up. The MmCC will protect the identify of a complainant.

The Philippines sets out its rules on confidentiality in its Rules of Procedure (Rule XI, Section 11.1-11.10) and its Merger Rules of Procedure (Rule 9, Sections 9.1-9.15)⁵²⁵. Currently, the Philippines distinguishes between confidential business information and other confidential information. The PCC provides a process for claiming confidentiality and the rules for disclosure. If the parties challenge a confidentiality decision made by the CEO/MAO, the matter can be raised directly with the Commission. The PCC can also protect the confidentiality of a

⁵²² As advised by the MyCC

⁵²³ Id.

⁵²⁴ Rule 64 Myanmar law

⁵²⁵ Section 34 PCA deals with confidentiality

complainant. Although it can, in theory, accept anonymous complaints, a verified complaint (required to commence an investigation) cannot be anonymous so a complainant would need to identify themselves to the PCC.

The CCCS has a process for claiming confidentiality and the rules for disclosure⁵²⁶.

In Thailand, the law protects confidential information, subject to exceptions when disclosure is in accordance with a government duty or for the benefit of the duties of the TCCT⁵²⁷. The identity of the complainant is a significant factor in accepting a complaint by the TCCT,⁵²⁸ however, the TCCT will protect the identity of a complainant until it is disclosed by the court⁵²⁹

Vietnam Competition law 2018 states the provisions of confidentiality. For merger notification, the VCC shall ensure confidentiality of documentation provided as per the law⁵³⁰. For information relating to violations, the VCC must take necessary measures to keep secret the information and identity of the organizations or individuals providing the information or evidence when requested⁵³¹. Public hearings that affect national secrets or trade secrets will be held confidentially⁵³².

3.3 ASEAN Self-Assessment Responses

The self-assessment did not ask any questions specific to confidentiality.

3.4 Initial conclusions on commonalities and differences

The rules for protecting confidentiality across the AMS already offer a significant amount of convergence insofar as the rules apply to information held within each jurisdiction. However, there are differences in the ability of the AMS to share information across borders. These differences can be overcome using mechanisms such as an ASEAN-wide confidentiality waiver or by sharing non-confidential information. Practical solutions such as agreeing to meet another jurisdiction's higher standard for confidential information may also offer solutions on a case-by-case basis.

4. Legal professional privilege and Self Incrimination

4.1 ASEAN 2010 Regional Guidelines

The Regional Guidelines acknowledge that confidential information may also be protected as privileged communications based on legal professional or litigation privilege⁵³³.

⁵²⁶ Section 28 of the *Competition Regulations 2007*

⁵²⁷ Section 76 Thai law

⁵²⁸ Regulation of the Trade Competition Commission on Complaints, Investigation, and Procedures for Criminal or Administrative Prosecution B.E. 2562 (2019)

⁵²⁹ As advised by TCCT

⁵³⁰ Article 40 (2) Vietnam law

⁵³¹ Article 75(3) Vietnam law

⁵³² Article 93(2) Vietnam law

⁵³³ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 6.4.3

There is no reference to self-incrimination in the Regional Guidelines.

4.2 ASEAN Competition Laws: Legal Professional Privilege

Few of the AMS jurisdictions contain an express provision in their laws dealing with legal professional privilege. Brunei Darussalam, Malaysia and Singapore expressly acknowledge that a professional legal adviser is not obliged to disclose or produce a privileged communication. However, all three jurisdictions do require the professional legal adviser to give the name and address of the client to whom the privileged communication was made. CCCS advised that the purpose of this provision is to allow the CCCS to verify with the client that the documents are in fact privileged. It would also allow the CCCS to ask the client whether they would be prepared to waive privilege. The MyCC advised that the name of the client is required so that MyCC can request the information from the client directly and seek a waiver of privilege.

Cambodia confirmed that legal professional privilege is observed. ICC confirmed that even though the law does not expressly stipulate legal professional privilege, it is recognised and implemented in ICC's enforcement process.

The MmCC confirmed that legal privilege is generally recognised under Myanmar law and it is likely that the MmCC will also recognise legal privilege.

The concept of legal professional privilege is recognised in the Philippines and the PCC confirmed it has been recognised in the context of enforcement and merger investigations. It is also recognised in the standard rules of evidence in the Philippines.

The Vietnam competition law requires that the lawful rights and interests of enterprises, organizations and individuals must be respected during competition legal proceedings⁵³⁴, however, the Vietnam's competition law does not expressly refer to legal privilege.

Thailand does not apply legal privilege to competition cases. At this time, Lao PDR is not able to confirm whether legal privilege will apply to competition cases.

4.3 ASEAN Competition Laws: Self-Incrimination

Very few of the AMS expressly recognise the privilege against self-incrimination, either in their competition laws or in other legal provisions.

Brunei Darussalam and Singapore recognise the privilege against self-incrimination. However, it does not allow a party to refuse to disclose information or documents. Instead, the evidence must be disclosed but is not admissible in criminal proceedings (although it is admissible in civil proceedings)⁵³⁵.

⁵³⁴ Article 54(3) Vietnam Law

⁵³⁵ Section 39 Brunei law; section 66 Singapore law

Cambodia confirmed it will recognise the privilege against self-incrimination in competition law cases. Indonesia confirmed that even though the law does not expressly stipulate the privilege against self-incrimination, it is recognised and implemented in ICC's enforcement process.

Malaysia does not recognise the privilege against self-incrimination in the context of competition law investigations (although it is available under Malaysian law)⁵³⁶. The concept of self-incrimination is not a familiar concept in Myanmar. The privilege against self-incrimination is recognised in the standard rules of evidence in the Philippines (based on the Philippines constitution) and will be recognised in the context of competition law. Likewise, the privilege against self-incrimination exists in the Thai constitution for criminal cases. Vietnam's competition law does not refer to the concept of self-incrimination. Thailand and Vietnam indicated that the privilege is not available in their jurisdictions in relation to the exercise of the search and seizure powers.

At this time, Lao PDR is not able to confirm whether the privilege against self-incrimination will apply to competition cases.

4.4 ASEAN Self-Assessment Responses

The self-assessment did not ask any questions specific to legal professional or self-incrimination privileges.

4.5 Initial conclusions on commonalities and differences

Evidence that may be protected as privileged communications or the right to protect oneself from self-incrimination are often not central to competition cases. As such, these differences between the legal regimes may have a limited impact on convergence. It is recommended that AMS develop their own processes for managing this on a regional basis, for example, consideration may need to be given to all operating to the highest standard (observing legal privilege and self-incrimination) in cross border cases.

5. Standard and Burden of Proof

5.1 ASEAN 2010 Regional Guidelines

The Regional Guidelines is silent on the standards of proof and the burden of proof applicable for competition law infringements in the AMS. This is not unexpected given that issues of standards and burdens of proof depend on the relevant legal regime. As there are ten different legal regimes across the region, there is potentially ten different standards and burdens of proof.

⁵³⁶ As advised by MyCC

5.2 ASEAN Competition Laws

Generally, the ASEAN competition laws do not specify the standards and burdens of proof. The position as advised by the AMS is set out below in Table 22.

Table 22: Standards and Burdens of proof

Jurisdiction	Standard of proof	Burden of proof
Brunei Darussalam	Balance of probabilities ⁵³⁷	Competition agency
Cambodia	To be addressed after enactment of the law	To be addressed after enactment of the law
Indonesia	Balance of probabilities	Competition agency
Lao PDR	Not available	Competition agency
Malaysia	Balance of probabilities	Competition agency
Myanmar	Unsure at this time	Competition agency
The Philippines	Substantial evidence	Competition agency, particularly the CEO
Singapore	Balance of probabilities ⁵³⁸	Competition agency
Thailand	Beyond reasonable doubt (criminal) Balance of probabilities (administrative) ⁵³⁹	Criminal – competition agency Administrative - complainant shall hold the burden of proof in accordance with the principle of "Ei incumbit probatio qui dicit, non qui negat".
Vietnam	Evidence must be complete/sufficient, objective, comprehensive and accurate ⁵⁴⁰	Competition agency ⁵⁴¹

5.3 ASEAN Self-Assessment Responses

The self-assessment did not ask any questions specific to standards or burdens of proof.

5.4 Initial conclusions on commonalities and differences

Differences in standards and burdens of proof will exist because of the differing legal regimes in the region. Where cross-border cases are being investigated, AMS will need to discuss the practical issues associated with these differences and work towards a solution that mitigates

⁵³⁷ The CCBD will be able to use direct and indirect evidence to prove cartels. For abuse of dominance and merger cases, the CCBD will need to introduce an economic effects analysis.

⁵³⁸ This involves satisfying the tribunal/court that the occurrence of the event/conduct was more likely than not.

⁵³⁹ Based on decision of the Supreme Administrative Court that the standard of proof in the administrative case shall be the Proof on the Balance of Probability (as advised by the CCBD)

⁵⁴⁰ Decree 35, Article 24; Article 56, Vietnam law provides a list of the types of evidence that may be used

⁵⁴¹ Decree 35, Article 17

any potential divergence. For example, the AMS may be able to meet the highest standards so that due process is protected in all relevant regimes.

6. Appeals process

6.1 ASEAN 2010 Regional Guidelines

The Regional Guidelines recognise a need for appeals both in relation to any procedural safeguards contained in the law and against decisions on substantive infringement made by the competition authority or relevant body.

Paragraph 6.3.1 of the Regional Guidelines states:

“...The competition law may allow aggrieved parties to seek redress where there is a failure to comply with the procedural safeguards.”

Further, in paragraph 7.1.4, the Regional Guidelines advise the AMS to “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.” Further recommendations are made for:

- (a) Infringing parties to have recourse to an appellate body that should ideally be a legal and competition expert body. Where this cannot be achieved, the appellate body should have access to recognised competition law and economics experts;
- (b) Judicial review of decisions made by the competition authority on any substantive or procedural point of law within a specified timeframe;
- (c) Specialised courts which are granted exclusive jurisdiction to hear competition cases;
- (d) Allowing the competition authority to submit written comments or appear in court as ‘amicus curiae’.⁵⁴²

6.2 ASEAN Competition Laws

Brunei Darussalam, Malaysia and Singapore contain provisions that allow an appeal from the decision of the competition authority to the specialist tribunal established in those jurisdictions (called the Competition Appeal Tribunal in Brunei Darussalam and Malaysia, and the Competition Appeal Board in Singapore)⁵⁴³.

Three of the remaining AMS (Cambodia, Indonesia and Philippines) expressly provide for appeals to the competent court⁵⁴⁴. Lao PDR also confirmed that appeals are available from decisions of the LCC to the courts.

The law in Myanmar expressly allows for a decision of the Committee to be appealed to the Commission but there are no express provisions dealing with appeals to the courts⁵⁴⁵. In Vietnam, the first avenue of appeal is to the Chairman of the National Competition Committee

⁵⁴² ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 7.1.4.1-7.1.4.4

⁵⁴³ Section 59 Brunei law; Section 51 Malaysia law; Section 71 Singapore law

⁵⁴⁴ Articles 30-31 Cambodia law; Article 44(2) Indonesia law; Section 39 Philippines law

⁵⁴⁵ Section 35 Myanmar law

who, if the complaint is accepted, will establish a Complaint Resolution Board for handling the complaint. Decisions of the resolution of a complaint then can be appealed to the competent court⁵⁴⁶.

In Thailand, appeals on contested criminal cases (liability and penalty) will be heard by the Intellectual Property and International Trade Court. Appeals in administrative cases can be heard directly by the Administrative Court⁵⁴⁷.

6.3 ASEAN Self-Assessment Responses

In their responses to the Self-assessment questionnaire, Lao PDR stated that decisions taken by the competition authority in relation to an infringement or a merger can be appealed to the courts. Likewise, Thailand also confirmed that decisions taken by the Office of Trade Competition Commission can be appealed to the Administrative Court.

Myanmar's response to the self-assessment questionnaire confirmed that decisions taken by the district courts on infringements of competition law can be appealed to the higher courts.

6.4 Initial conclusions on commonalities and differences

The availability of appeals on substantive infringements is unlikely to have a significant impact on convergence or on cross-border issues as the ability to enforce a decision in one jurisdiction is unlikely to bear any great significance on other jurisdictions. In any case, it is unlikely that changes will be able to be achieved.

The key will be understanding the systems in the other jurisdictions so that any issues arising on a day-to-day basis can be addressed. Appeals will inevitably be impacted by the differing court systems (timing or otherwise) across the AMS.

7. Private actions

7.1 ASEAN 2010 Regional Guidelines 2010

The Regional Guidelines contain quite detailed provisions on private enforcement of competition law.

Initially, the Regional Guidelines recognise that the AMS may give an applicant a right to bring a lawsuit for breach of competition law in order to recover the damages suffered⁵⁴⁸. The Guidelines recognise that this strengthens the enforcement of competition law and makes it easier for applicants who have suffered damage to seek redress and recover their losses⁵⁴⁹.

⁵⁴⁶ Section 103 Vietnam law – see Law on Administrative Procedures, No. 93/2015/QH13

⁵⁴⁷ Section 48 Administrative Procedures Act B.E. 2539 (1996)

⁵⁴⁸ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 6.11.1

⁵⁴⁹ *Ibid.*, para 6.11.2

The Guidelines then include further options that the AMS may wish to consider in facilitating private actions:

- (a) The manner in which damages could be calculated;
- (b) Evidence that may be required to be disclosed by parties other than the applicant; and
- (c) The potential for group actions⁵⁵⁰.

7.2 ASEAN Competition Laws

Many of the ASEAN competition laws make specific provision for private damages actions where there has been an infringement of competition law (Brunei Darussalam⁵⁵¹; Lao PDR⁵⁵², Malaysia⁵⁵³, Myanmar⁵⁵⁴, Philippines⁵⁵⁵, Singapore⁵⁵⁶, Thailand⁵⁵⁷, Vietnam⁵⁵⁸). The position on private actions is not stated in the laws in Cambodia and Indonesia.

The time limit for commencing the private damages action is limited in some jurisdictions (Brunei Darussalam⁵⁵⁹, Malaysia⁵⁶⁰, Philippines⁵⁶¹, Singapore⁵⁶², Thailand⁵⁶³, Vietnam⁵⁶⁴).

In some of the jurisdictions that do provide for a private damages action, it is not yet clear whether the private actions can be commenced as stand-alone actions (without a prior finding of infringement by the competition authority or courts) or follow-on actions (following on from a finding of infringement by the competition authority). In Brunei Darussalam and Singapore, the competition legislation only provides for follow on actions, i.e. after a finding of infringement by the competition authority⁵⁶⁵. In Myanmar, an action can be commenced before the MmCC has made a decision⁵⁶⁶. In Malaysia, section 64 provides that any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of action. This suggests that there must be a finding of infringement before a private action can be commenced⁵⁶⁷. The position in Lao PDR and Myanmar is not clear. In the Philippines, the action can be brought after the Commission has completed the preliminary inquiry, not the full administrative inquiry. In practice, this means that a finding of an infringement will not yet have been made. In Thailand, the right to commence an action under section 69 seems only available to a person that has received damages due to a violation. This would suggest that there has already been a finding of infringement by the competition authority, however the

⁵⁵⁰ Ibid., para 6.11.3

⁵⁵¹ Section 67 Brunei law;

⁵⁵² Article 77 Lao law;

⁵⁵³ Section 64 Malaysia law;

⁵⁵⁴ Section 51 Myanmar law;

⁵⁵⁵ Section 45 Philippines law

⁵⁵⁶ Section 86 Singapore law

⁵⁵⁷ Section 69 Thai law. There is also the possibility for a person to file a complaint with the Commission under section 78 Thai law in relation to abuse and cartel infringements

⁵⁵⁸ Article 77 (1) Vietnam law

⁵⁵⁹ 2 years from expiration of all appeal periods;

⁵⁶⁰ 6 years from the date of damage or date of discovery of the damage with a long stop limitation period of 15 years, as per section 6 of the Limitation Act 1953

⁵⁶¹ 5 years from the date the cause of action accrues: section 46 Philippines law

⁵⁶² 2 years from the date of the decision or after expiration of all appeal periods, whichever is later

⁵⁶³ Within 1 year from the date the person suffering the damage knows or should have known the cause of the damage: section 70 Thai law

⁵⁶⁴ 3 year time limit is provided under Vietnam law for civil actions

⁵⁶⁵ Section 67(2) Brunei law and section 86(2) Singapore law

⁵⁶⁶ As advised by the MmCC

⁵⁶⁷ The MyCC support this view.

TCCT indicated that the lawsuit could be filed while the Trade Competition Commission is considering the case.

The CCC has advised that private actions are not provided for under its law.

7.3 ASEAN Self-Assessment Responses

The self-assessment (Qu 21) asked the AMS whether it is possible for individuals, firms or consumer groups to claim private damages from firms that have committed an infringement of the competition law. The position set out above in relation to Brunei Darussalam, Lao PDR, Malaysia, Myanmar, Philippines, Singapore and Thailand was confirmed. Indonesia confirmed that this right is available to consumers who can bring a class action using the decision of the ICC, suggesting only a 'follow on' action is available. In Viet Nam, a claim for private damages arising from a breach of competition law could be pursued in a civil lawsuit, separate to the competition legislation.

7.4 Initial conclusions on commonalities and differences

Differences in the private action systems across the AMS may give rise to the potential for forum shopping by parties seeking to claim damages for competition law infringements. Where AMS laws allow for 'follow-on' actions, those jurisdictions that make decisions early may be an attractive option for private damages actions in cross-border cases.





PART VI: INSIGHTS AND OUTLOOK

1. Summary of the main findings of the Study

In summarising the main findings of the Study, it is most useful to begin with the findings on the provisions to support Regional Convergence. Regional Convergence of ASEAN Competition Laws will be supported primarily by the development of soft law, and cooperation and coordination between the AMS competition regulators. It is therefore important to understand the ability for each of the AMS competition regulators to participate in these activities.

The Study found that most AMS have power to publish guidelines (although the terminology sometimes differs). The important role for guidelines cannot be overstated. The Strategic Recommendations below identify a number of areas where **guidelines issued by the AMS could help achieve convergence**.

Although many of the AMS have the power to cooperate with foreign competition agencies, there are significant barriers to sharing confidential information. All of the AMS laws (except Myanmar⁵⁶⁸) impose an obligation to retain confidentiality of information on the competition regulator. A limited number of AMS expressly contemplate a waiver of that confidentiality where it is required to assist a foreign competition regulator. Only Brunei Darussalam and Singapore expressly set out what is required in these circumstances. **This is an area that should be addressed in the near term to ensure that regional cooperation, which will help significantly with regional convergence, can be achieved. Both the benefits and the risks of cross-border sharing of information will need to be considered. As has already been seen in the Grab/Uber case, there is an immediate need for cooperation in relation to cross-border mergers and the same point is relevant to cross-border cartels.**

In relation to the three pillars of competition law, the Study found a large degree of convergence existing at a macro level as all AMS prohibit anti-competitive agreements (including cartels) and abuse of dominance, and all AMS, except Malaysia, prohibit anti-competitive mergers. (Malaysia is in the process of seeking to amend its Competition Act and Competition Commission Act, including a proposed prohibition against anti-competitive mergers and acquisitions⁵⁶⁹. However, it is not yet certain that this amendment will be adopted or its timing.)

⁵⁶⁸ Myanmar has addressed this in its Rules which provide for confidentiality to be retained (Rules 64, 67 and 73 Myanmar Competition Rules 2017).

⁵⁶⁹ Shanthi Kandiah, *Malaysia: Overview* in Asia-Pacific Antitrust Review, 19 March 2019, available at <http://globalcompetitionreview.com/insight/the-asia-pacific-antitrust-review-2019/1189002/malaysia-overview> (accessed 13 January 2020)

There is a significant exception to this as both Brunei Darussalam⁵⁷⁰ and Singapore **exempt vertical agreements** from the prohibition against anti-competitive agreements in their competition laws. Particularly given the significant growth in online markets, this could **present a significant divergence in competition laws** across ASEAN.

When looking in more detail at the prohibitions on cartels, potential for divergence exists between the AMS in relation to key areas: the scope of application of the laws (the wider 'economic' or narrower 'commercial' activities); the meaning of 'object' and whether it is equivalent to 'per se'; the application of the laws to 'concerted practices'; the sanctions to be applied; the leniency regimes; and investigation powers. **Further research is required in these areas.**

In relation to anti-competitive horizontal and vertical agreements (non-cartel), regional convergence will benefit from clarity and consistency around the application of 'appreciability' thresholds and 'safe harbours'; the application of 'efficiency' defences; and the approach to calculating civil or administrative penalties. **Further research is required in these areas.**

Abuse of dominance is a difficult area for competition regulators in practice. Establishing dominance is a significant hurdle. Across ASEAN, there is a risk to regional convergence arising from the application of market share thresholds to determine dominance if they operate as pre-requisites. Divergence may also arise depending upon the willingness of the competition regulators to apply the abuse of dominance provisions to SOEs.⁵⁷¹ Regional convergence will benefit from consistency on what types of abuse are intended to be covered by the relevant laws and which, if any, defences may be argued. Both these points could be addressed in Guidelines issued by the AMS. A less pressing issue is the application of the laws to 'collective dominance' as some of the AMS do not currently provide for this.

In relation to **mergers**, there is **potential for considerable divergence leading to business uncertainty** in this area. This is due to the different terminology used as between the laws (which could give rise to confusion) and the notification requirements (a mix of mandatory and voluntary, pre- and post-merger requirements) which will make cross-border mergers difficult for businesses to navigate. In addition, the potential for diverse remedies to be imposed in different jurisdictions (as evidenced in the Grab/Uber merger), gives rise to substantial risks to convergence.

Overarching the application of the law in all areas are the **policy objectives** sought to be achieved by the AMS. This will impact the enforcement priorities set by the AMS competition regulators, the manner in which the laws are applied and the decisions regarding remedies and sanctions. It is therefore **key to regional convergence**. Although there is currently a large degree of overlap between the AMS in relation to their stated policy objectives, the concern is that multiple policy objectives will lead to divergence as each AMS determines which of the multiple policy objectives should take priority.

The institutional structures in the AMS will play a key role in achieving regional convergence. The appointment of Commissioners from the civil service, especially on a part time basis, put

⁵⁷⁰ See Third Schedule Paragraph 8(1), Sections 11 (Agreements etc preventing, restricting or distorting competition) and 12 (Excluded Agreements) of the Competition Order 2015 (Order made under 83(3) of the Constitution of Brunei Darussalam.

⁵⁷¹ Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 249

the **independence** of the competition regulator at risk. Sufficient **budgetary** allocations are needed to ensure that the appropriately skilled staff can be employed to ensure a “sound technical legal and economic analysis which will help [the regulator] deliver the desired efficiency benefits and productivity gains to the economy”⁵⁷². Overlaps between the competition regulator and **sector regulators** with competition law jurisdiction pose an additional threat to regional convergence.

In relation to **procedural** matters, there is more potential for **divergence** across the AMS, particularly due to differences in timeframes for investigation, leniency regimes, due process and potential sanctions and remedies. **Transparency** of procedural issues (through the publication of guidelines) such as investigation and enforcement powers, decision-making processes, remedies and sanctions would be of great benefit to convergence if international best practice is followed by the AMS.

Procedural matters are often linked to matters outside the control of the competition authorities (such as other national legal requirements covering legal privilege, appeals processes, and natural justice principles) or that would require legislative amendment (such as timelines for merger review) which may make convergence more difficult. To circumvent the need for legislative change, the Study recommends that the AMS gain a good understanding of the areas of potential divergence in procedural matters **through training and convene workshops to discuss potential practical solutions**. Increased understanding of the differences will be key to overcoming divergence.

2. Suggestions for further research and/or regional discourse

2.1 Further research

There is considerable further research that can be undertaken in this area

The Study itself will benefit from the following additional activities:

- (a) Testing the findings of the Study against the working practices and understanding of the competition regulators in each of the AMS through face to face (or phone) interviews, particularly for the newer regimes that have yet to determine policy approaches;
- (b) Compare the approaches taken in ASEAN with international best practices;
- (c) Review available ASEAN caselaw to obtain a clear picture of the manner in which the AMS regulators, relevant courts and appellate bodies are interpreting and applying the existing laws and regulations, and, in doing so, consider the extent to which international best practice is being followed.

In relation to cartels, the following additional research activities are recommended:

- (a) An in-depth review of the AMS leniency regimes (as there will be a need to avoid conflicting requirements);

⁵⁷² Ibid., p 257

- (b) A study on remedies and sanctions for cross-border cartels;
- (c) An in-depth analysis of the procedural matters relating to proving the cartels, including the investigation powers of the AMS regulators, burden and standard of proof, timeframes for investigation, appeals processes.

In relation to mergers, the following additional research activities are recommended:

- (a) A more in-depth review of merger procedural provisions for consistency in timings of reviews and processes;
- (b) An in-depth review of cross-border merger remedies;
- (c) An in-depth review of merger assessment criteria.

The following other additional research activities are recommended:

- (a) Exemptions and exclusions from competition law e.g. SOEs, SMEs. A Regional Study on Exemptions and Exclusions from Competition Laws in ASEAN was completed in 2020
- (b) Treatment of intellectual property rights by the AMS.

2.2 Further discourse

A separate conference dedicated to discussing the potential divergences raised, particularly where representatives from each jurisdiction (regulators, academics, lawyers) can input, would be highly beneficial to any further research.

2.3 Advocacy

The AMS may wish to consider preparing a simple publication that highlights the similarities and differences between the AMS competition laws. This would be a positive initial step to provide some reassurance to businesses operating in the region both that there are many similarities and that the competition regulators are aware of any potential differences.

PART VII: STRATEGIC RECOMMENDATIONS ON AREAS FEASIBLE FOR CONVERGENCE

Regional convergence will be supported primarily by converging policy objectives, the development of soft law (such as guidelines), and cooperation and coordination between the AMS competition authorities. The strategic recommendations on areas feasible for convergence therefore focus on these three areas.

The need for regional convergence will arise most acutely in relation to cross-border cartels and mergers, which continue to increase around the world. Despite the challenges that have arisen during the Covid-19 pandemic, competition law and policy in the ASEAN region continues to develop rapidly and, with it, an ever-increasing need for cooperation between competition authorities at both regional and international levels.

The recommendations reflect the fact that there is a rare (and potentially limited) opportunity to influence thinking of the government, the judiciary, lawyers, academics, business and consumers in the early days of implementation and enforcement of competition laws.

The recommendations follow the structure of the Report, addressing substantive and procedural issues arising from the commonalities and differences across competition legislation in ASEAN. Key recommendations, which potentially will have the greatest impact on convergence, are outlined first.

1. Key Recommendations

KEY RECOMMENDATION 1

The creation of Regional Guidelines on Cooperation would be an important step to facilitate cooperation in relation to cross-border mergers and cartels. The Guidelines could address the internal policies and procedures needed by each of the AMS to enable regional cooperation. They could also address important questions such as confidentiality and include a regional pro-forma confidentiality waiver and common conditions to be imposed on any sharing of information, for example, how information should be treated by the receiving party. See Recommendation 22.

KEY RECOMMENDATION 2

In addition, the AMS could consider establishing regular meetings between representatives of the AMS competition authorities designated with achieving regional cooperation. ACEN may provide the most appropriate forum for these meetings. A new ACAP deliverable was included following the Mid-Term Review of conducting meetings of Head of Competition Agencies in ASEAN from 2021.

KEY RECOMMENDATION 3

Training on the commonalities and differences in the ASEAN competition laws will be vital to achieving greater cooperation between the AMS as this will increase the knowledge and understanding of the competition laws in the region. A training activity has been suggested in the ASEAN Regional Capacity Building Roadmap 2021-2025.

KEY RECOMMENDATION 4

Where differences arise in the regimes, it will be necessary to consider how best to deal with those differences in practice (recognising that legislative change may be unlikely and, in any case, will not be timely). **ACEN** may provide the most appropriate forum within which to conduct workshops to discuss **potential practical solutions**.

2. Recommendations on Substantive Matters

2.1 Policy objectives

The updated Regional Guidelines 2020 provides guidance to the AMS on the challenges in prioritising actions when there are multiple, potentially conflicting, policy objectives for each AMS. Potential risks to convergence may arise as varying policy objectives at national levels will make it more difficult to work towards a consistent policy objective/s at a regional level.

Recommendation 1

The AMS should continue to give consideration to whether ASEAN-wide policy objectives could be agreed so that, at least in relation to regional matters, a common objective/s is/are being pursued.

In turn, this may provide guidance for the AMS competition authorities as to which of their multiple policy objectives should be prioritised when enforcing their laws on a domestic level.

2.2 Cartel enforcement

There is some potential for divergence in relation to enforcement of hardcore cartels across the AMS. Divergence will make prosecution of cross-border cartels difficult.

The updated Regional Guidelines 2020 provided additional guidance to the AMS on considerations relevant to diverging areas including the scope of application of the laws (the wider 'economic' or narrower 'commercial' activities); the meaning of 'object' and whether it is equivalent to 'per se'; and the application of the laws to 'concerted practices'.

Recommendation 2

AMS competition authorities could amend and/or develop guidelines on cartels that could address the potential areas of inconsistency between the AMS and thus support regional convergence.

See also Recommendations 13, 17-20 in relation to procedural matters relevant to cartels (sanctions, leniency and investigation powers).

Recommendation 3

Practically, regional cooperation facilitated pursuant to Regional Guidelines on Cooperation (Key Recommendation 1) would also help to align the application of the AMS cartel laws. In particular, if the AMS were able to share thoughts in relation to proposed remedies, a great deal of regional convergence could be achieved. See also Recommendations 18-19.

2.3 Other anticompetitive horizontal agreements

The updated Regional Guidelines 2020 provided additional guidance to the AMS on the benefits of appreciability and safe harbour thresholds (to provide more certainty for businesses) and considering efficiencies as part of the anticompetitive assessment.

Recommendation 4

AMS competition authorities could amend and/or develop guidelines on anticompetitive agreements that could address these potential areas of inconsistency between the AMS and thus support regional convergence.

2.4 Vertical agreements

Much of the additional information provided in the updated Regional Guidelines 2020 on anticompetitive horizontal agreements is also relevant to vertical agreements. The updated Regional Guidelines 2020 suggests that competition authorities in the region may wish to publish guidance on the types of vertical agreements that are unlikely to cause anticompetitive concerns because the pro-competitive benefit outweighs the anticompetitive harm. An

approach that reflects international best practice will contribute to regional convergence in this area.

Recommendation 5

AMS competition authorities could amend and/or develop guidelines on vertical agreements to reflect international best practice.

2.5 Abuse of dominance

The updated Regional Guidelines 2020 provided additional guidance to the AMS on the types of conduct that is commonly considered abuse, discussion of whether any types of abuse should be considered anticompetitive 'by object', the competition tests that may be applicable to abuse, the consequence of having different pre-requisites and thresholds for dominance in the region and the existence of defences.

Recommendation 6

AMS competition authorities could amend and/or develop guidelines on abuse of dominance that could explain the types of abuse that are recognised, the defences that may be considered and the applicability of collective dominance in their jurisdictions. If measured reflective of international best practice benchmarks, the potential for regional convergence will increase.

Training on understanding commonalities and differences in the abuse of dominance prohibitions in each other's substantive laws (Key Recommendation 3) is also recommended.

2.6 Merger control

There is significant potential for divergence in relation to the merger regimes across the AMS and this uncertainty is not good for investment in the region. This is likely to be one of the most difficult areas to address due to the potential need for legislative changes. However, much can be achieved at a policy level.

The revised ACAP (post Mid Term Review) recommended an additional deliverable in the form of Developing Guidelines for Sharing Merger Cases in the AEGC Portal and establishing an Information Portal on Merger Cases by 2023.

Recommendation 7

Clarification of the terminology used in the legislation can be provided in guidelines. Ideally, the terminology should be clarified in as consistent a manner as possible across the AMS. If reflective of international best practice, the potential for regional convergence will increase.

Recommendation 8

A pro-forma merger notification form could be considered on a regional level which would ease the burden on businesses required to file in multiple jurisdictions.

Recommendation 9

Consideration could be given to one jurisdiction 'leading' the investigation, where a merger is cross-border. The ability to share information will be critical if this is to be achieved. A pro-forma confidentiality waiver will be extremely beneficial.

Recommendation 10

A procedure for discussing remedies in cross-border merger cases is to be encouraged. See also Recommendation 19 below in relation to sanctions.

Recommendation 11

Practically, cooperation facilitated under Regional Guidelines on Cooperation (Key Recommendation 1) would also help to align the application of the AMS merger laws. In particular, if the AMS are able to share thoughts in relation to proposed remedies and work together to overcome timeline challenges, a great deal of regional convergence could be achieved.

There may be a need for separate Regional Guidelines on Merger Cooperation to facilitate the level of cooperation likely to be required. This activity may develop alongside the new ACAP deliverable of Developing Guidelines for Sharing Merger Cases in the AEGC Portal and establishing an Information Portal on Merger Cases by 2023.

See also Recommendation 19 below in relation to sanctions.

3. Recommendations on Institutional Structure and Design

Although all AMS have established stand-alone competition authorities, the levels of independence granted, and budgets provided, differ. It is recognised that these structural differences may be particularly hard to converge. The recommendations below are made as suggestions for AMS that have an opportunity to consider changes to the institutional structure and design. This opportunity may not arise at all or only for some jurisdictions.

An additional recommendation is included for those jurisdictions that share concurrent competition powers with sector regulators.

Recommendation 12

If opportunity arises for review of competition laws, AMS may consider amendments to allow Commissioners to be appointed on full time basis (where this is not currently the case).

Budgetary constraints could be addressed by ensuring stakeholder engagement highlights the benefits of competition law and policy and the need for a well-resourced competition authority. The ASEAN Regional Capacity Building Roadmap 2021-2025 includes activities to support competition authorities in stakeholder engagement.

Competition authorities should work with sector regulators with concurrent powers to develop common interpretations/application of laws and/or agree which body will have priority in enforcement activities. The Report on the ASEAN Regional Capacity Building Roadmap 2021-2025 includes engagement with sector regulators as a National Need which could be included in a national Roadmap, if desired.

4. Recommendations on Procedural Matters

4.1 Investigation and Enforcement Powers

There are a number of practical differences in investigation powers, for example, some jurisdictions require court issued warrants to search and seize documents, while others do not. There will be a need for AMS to be aware of these differences in investigation and enforcement powers in order to determine how to best handle cross border cases.

Recommendation 13

AMS competition authorities that have not done so already could develop guidelines on investigation and enforcement powers to provide transparency. Guidelines already developed in the region could aid in policy formulation, leading to a greater possibility of regional convergence.

Recommendation 14

Training on understanding the commonalities and differences in each other's investigation and enforcement powers (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.2 Due Process

This part of the Report covered a wide range of due process issues including interim measures, access to files, appeals, administrative review of exercise of powers of the competition

authorities, natural justice and transparency. Although many of the AMS competition laws address these issues, there are differences in the detail.

Recommendation 15

Training on understanding the commonalities and differences in each other's due process obligations (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.3 Timeframes

One of the most challenging issues for cooperation in relation to cross border cases relates to timeframes. Variations in timeframes makes coordinating investigations, sharing information and discussing remedies more challenging. Cooperation and coordination between the AMS is recommended.

Recommendation 16

Training on understanding the commonalities and differences in timelines for each other's investigation processes (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.4 Decision-making processes

Transparency of decisions and decision-making processes is to be encouraged in the region. Not only is transparency important for due process, it will also enable the AMS to learn from each other as implementation and enforcement of competition laws in the region continues to mature. Transparent, well-reasoned decisions will also help to raise awareness of competition law and policy in the region and support the reputation of the competition authorities themselves.

The OECD has recently published a new Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement⁵⁷³ which can guide the AMS on best practice in this area.

⁵⁷³ Available at [OECD Legal Instruments](#) (accessed 18 October 2021)

Recommendation 17

Transparency and decision-making processes could be discussed between the AMS as an 'ASEAN helps ASEAN' activity. The ACEN may provide the best forum (Key Recommendation 4).

4.5 Sanctions

Guidelines on the calculation of penalties, if following international best practice (gravity and duration of infringement, link to turnover and aggravating/mitigating circumstances), could lead to substantial convergence in this area. Differences currently exist in relation to the need to commit an infringement 'intentionally or negligently' in order for a fine to be imposed and the manner in which the maximum fine is calculated e.g. based on a fixed amount, turnover or range. These aspects could ultimately lead to significant divergence in the financial penalties imposed across the region for the same infringement.

The updated Regional Guidelines 2020 provided additional guidance to the AMS on the manner in which financial penalties can be calculated and gave an overview of the types of sanctions provided for across the AMS. This information can provide support to AMS developing or amending their policies in this area.

Recommendation 18

AMS competition authorities could amend and/or develop guidelines on financial penalties and/or other sanctions to provide transparency and, if international best practice is followed, to support regional convergence.

Recommendation 19

Training on understanding the commonalities and differences in relation to remedies and sanctions in each of the AMS laws (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to be able to discuss appropriate remedies as part of finalising cross-border cases. A workshop to develop processes to follow in a cross-border case may be best facilitated through ACEN (Key Recommendation 4).

4.6 Leniency

Leniency regimes are still developing in the region and it is important that AMS recognise that divergency in regimes could have serious consequences for cross-border cartel enforcement. For those jurisdictions developing leniency regimes, regard may be had to existing regimes (e.g. Singapore, Malaysia, Philippines) and international best practice to seek to achieve convergence.

Recommendation 20

AMS competition authorities that have not done so already could develop guidelines on leniency to provide transparency and, if international best practice is followed, to support regional convergence.

Recommendation 21

Training to increase awareness of the regimes in operation in the region could be achieved through training on commonalities and differences in ASEAN competition laws (see Key Recommendation 3).

It will also be necessary for the AMS to agree methods for dealing with the differences in leniency regimes that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.7 Confidential information

All AMS jurisdictions protect confidential information in some way, although differences exist in relation to the ability to share confidential information between competition authorities.

Recommendation 22

AMS competition authorities could consider developing a regional pro-forma confidentiality waiver and common conditions to be imposed on sharing information. This will provide much needed certainty and clarity in this area.

Recommendation 23

Training on understanding the commonalities and differences in relation to the treatment of confidentiality in each of the AMS laws (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.8 Privilege and Incrimination

There is a mixed approach to legal professional privilege and self-incrimination, with some jurisdictions recognizing it, while others do not.

Recommendation 24

Training on understanding the commonalities and differences in legal privilege and self incrimination in each other's laws (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.9 Standard and Burden of Proof

In most AMS, the burden of proof rests on the competition authority, while standards of proof differ based on the different legal regimes.

Recommendation 25

Training on understanding the commonalities and differences in standards and burdens of proof in each other's competition laws (Key Recommendation 3) is recommended.

It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

4.10 Appeals and Private Actions

Understanding how appeals and private actions work in each of the AMS will be important as cross-border parties may seek to 'forum shop' between jurisdictions.

Recommendation 26

Training on understanding the commonalities and differences in appeal processes and private actions in each other's competition laws (Key Recommendation 3) is recommended.

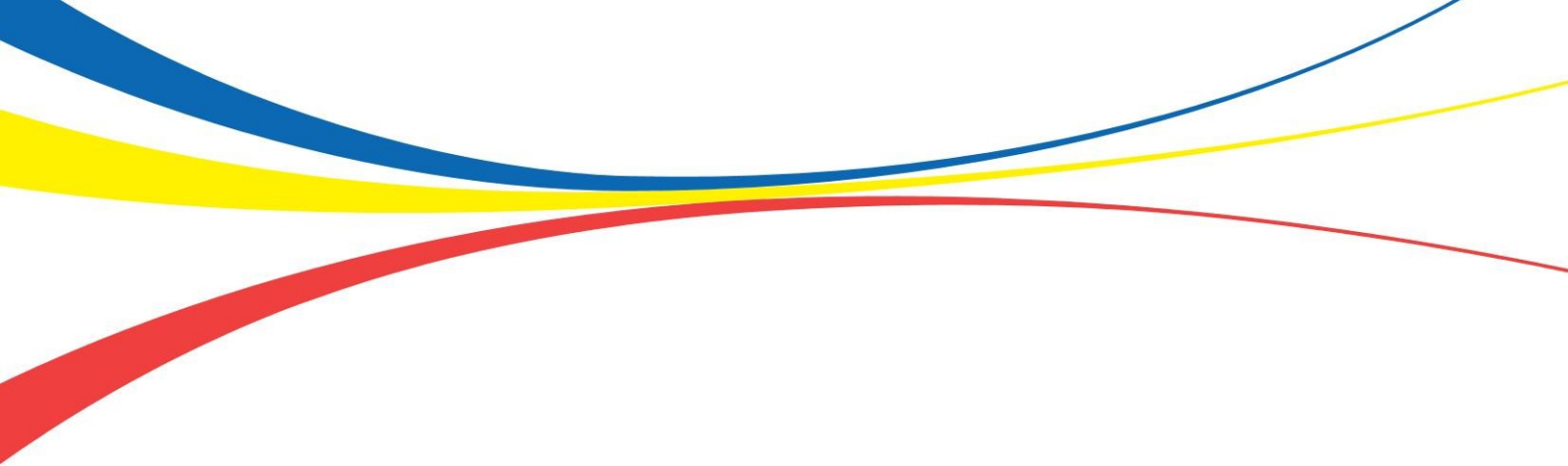
It will also be necessary for the AMS to agree methods for dealing with the differences that arise in practice. A workshop to find solutions may be best facilitated through ACEN (Key Recommendation 4).

Annex A: Objectives of Competition Laws in AMS

Policy Objectives	
Brunei Darussalam	Section 1(3): to promote and protect competition in markets in Brunei Darussalam, to promote economic efficiency, economic development and consumer welfare ; and to provide for the functions and powers of the Competition Commission of Brunei Darussalam and to provide for matters connected therewith.
Cambodia	Article 1: Purposes of the law are to: <ul style="list-style-type: none"> - Encourage fair and honest business relations, - Promote economic efficiency and the establishment of new businesses; - Protect the national economy from harmful anti-competitive behaviour; and - Assist consumers to obtain goods and services of higher quality at lower prices and with greater variety and greater choice.
Indonesia	Article 3: The purposes of enacting this law shall be as follows: <ol style="list-style-type: none"> 1. safeguard the public interest and enhance the efficiency of the national economy as one of the endeavours aimed at improving the people's welfare; 2. create a conducive business climate by regulating fair business competition in order to ensure certainty in equal business opportunities for large-, middle- as well as small-scale business actors; 3. prevent monopolistic practices and/or unfair business competition caused by business actors; and 4. creating effectiveness and efficiency in business activities.
Lao PDR	Article 1 Objectives: This Law determines principles, regulations and measures for managing and monitoring the competition in business activities in order to make such competition lawful, fair, transparent, flexible and equal , and aims to prevent and counter the unfair competition and the restriction of the business competition as well as to protect rights and interests of the State, business operators and consumers , which contributes to regional and international integration, and the expansion and sustainability of the national socio-economic development . Note also Article 4 State Policy on Competition (which includes the State creating conditions for and enhancing the capacity of SMEs to participate in fair competition) and Article 5 Principles of Competition

Malaysia	Preamble: An Act to promote economic development by promoting and protecting the process of competition , thereby protecting the interests of consumers and to provide for matters connected therewith.
Myanmar	Section 2(f) defines competition policy as “policies laid down by the State to cause direct effect on production, services, trade, investment and businesses in order to emerge fair competition in the market and protect the interests of the consumers from monopolization”. Section 3: The objectives of the Competition Law are: <ul style="list-style-type: none"> (a) to prevent acts that injure public interests through monopolisation or manipulation of prices by any individual or group with intent to endanger fair competition in economic activities, for the purpose of development of the national economy; (b) to control unfair market competition on the internal or external trade and economic development; (c) to prevent the abuse of dominant market power; and (d) to control the restrictive agreements and arrangements among businesses.
Philippines	Section 2 Declaration of Policy: <ul style="list-style-type: none"> (a) Enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole. (b) Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and (c) Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.
Singapore	None stated in the law
Thailand	None stated in the law
Vietnam	Article 6 State policies on competition: <ol style="list-style-type: none"> 1. To create and maintain competitive environment in a healthy, fair, equal and transparent manner. 2. To promote competition, ensure the enterprises’ right to freely compete in business as stipulated by law. 3. To strengthen the ability to access to market, increase the economic efficiency, social welfare and protect consumers interests. 4. To create conditions for the society and users to participate in the process of supervising the implementation of the competition law.

Source: Author's analysis



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