【Special Features】

Competition Law in ASEAN: Transplanting Legal Frameworks to Prohibit Abuse of Dominance from Europe to South East Asia

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Abstract

National competition laws have been introduced in most of the ASEAN (Association of South East Asian Nations) Member States in the last two decades, many of which are based on the European competition law framework, even though many of these transplant jurisdictions have vastly different socio-economic and political landscapes. It should be noted that competition law in ASEAN only exists at the national level – in contrast with the legal model in Europe, where competition laws exist for at a regional as well as at a national level. This paper will provide an overview of the regional competition law framework in the ASEAN Economic Community and explain how the national competition law frameworks of each ASEAN Member State have implemented these non-binding regional guidelines in their national competition law frameworks, focusing on particular on the prohibition against conduct that amounts to an abuse of dominance. It will illustrate how a single European competition law concept has been enacted and adapted in different ways in individual ASEAN Member States despite the existence of regional guidelines which seek to achieve regional convergence in this field of economic law.

Contents

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I. Introduction: Competition Law in South East Asia

Competition law is a relative new field in the member states of ASEAN (Association of South East Asian Nations), with 9 out of 10 countries enacting competition law statutes between the last 5 and 20 years. The reasons for introducing competition law in each member state vary from jurisdiction to jurisdiction. For some countries, it was part of a broader effort to enhance economic development and liberalise their economies, which were previously dominated by state-owned enterprises, for others, it was to comply with their international commitments to free trade and to attract foreign investment. In many cases, it was a combination of some or all of the factors above. In this paper, I will explore the legal and economic context in which several ASEAN member states introduced their respective competition law and policy frameworks, focusing on legal prohibitions which were transplanted from the European competition law model.

At a regional level, competition policy has been given some prominence by the ASEAN member states (AMSs) because of its potential to contribute to the ASEAN Economic Community (AEC), a regional market initiative that aims to establish a common market for South East Asia.[1] Competition law is regarded as a means for facilitating regional market integration and spurring economic growth within the region. Competition law scholars support the view that regionalising Competition policy can advance economic development objectives, facilitating regional market integration between, in particular, developing countries.[2] AMSs have recognised the nexus between Competition policy and the establishment of a regional common market – the ASEAN Economic Community – and have chosen to adopt a regional Competition policy as an instrument to advance their collective economic interests.

Section 2 will introduce the ASEAN region, while Section 3 critically examines the original ASEAN Blueprint and the various implementing instruments that spawned from it, including the

[1] See Burton Ong (ed), *The Regionalisation of Competition Law and Policy within the ASEAN Economic Community*, Cambridge University Press (2018).

[2] See Drexl, J. "Economic integration and competition law in developing countries", chapter 11 in Drexl, Bakhoum, Fox, Gal and Gerber (eds), Competition Policy and Regional Integration in Developing Countries (Cheltenham: Edward Elgar, 2011).

regional competition policy guidelines developed to facilitate the introduction of national competition law frameworks in the ASEAN member states. Section 4 will look at examples from different AMSs to illustrate how competition law prohibitions have been imported from Europe into these jurisdictions, to establish national competition law frameworks, pursuant to the wider policy objectives of this regional economic grouping.

II. The Association of South East Asian Nations

Established in 1967, ASEAN has grown into an important regional economic grouping with ten countries in South East Asia – Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam – whose initial aims focused upon the acceleration of "economic growth… in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations".[3] The ASEAN Member States (AMSs) are organised around a series of cooperative principles which preserves each member state's freedom to independently pursue their own legislative and regulatory agendas. The "fundamental principles" that govern the relations between AMSs are set out in Article 2 of the *ASEAN Treaty of Amity and Cooperation*:[4]

(a) Mutual respect for the independence, sovereignty, equality and territorial integrity and national identity of all nations;
(b) The right of every State to lead its national existence free from external interference, subversion or coercion;
(c) Non-interference in the internal affairs of one another;
(d) Settlement of differences or disputes by peaceful means;
(e) Renunciation of the threat of use of force;
(f) Effective cooperation among themselves.

[3] The ASEAN Declaration (Bangkok Declaration), 8 August 1967. Available at http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967.
[4] Treaty of Amity and Cooperation in Southeast Asia (Indonesia), 24 February 1976. Available at http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976.

The member states of ASEAN have incredibly diverse political, geographical and socio-economic landscapes. The spectrum of political systems within the ASEAN region include an Islamic monarchy, socialist states, a constitutional monarchy under military rule, transitional economies and several distinct parliamentary democracies with diverse political values. In 2015, the ASEAN Economic Community was formally established with the goal of drawing the economies of the AMSs closer together, though not going so far as integrating them into a single market as has been done in the European Union. The regional grouping merely aspires towards establishing a common market in which tariff and non-tariff barriers to trade are eliminated or at least substantially reduced. The table below captures the land and population size of these countries, as well as various indicators of their respective economic profiles.

Table 1: Comparison between key characteristics of ASEAN Member States

World Development Indicators (2021)	Surface Area (sq km)	Population Size (Million)	Gross Domestic Product ($US) – per capita	Agriculture (% GDP)	Income Level Categorisation
Brunei Darussalam	5770	0.441	31,722	1.3	High
Cambodia	181,040	16.9	1,591	22.8	Lower Middle
Indonesia	1,910,931	276.3	4,292	13.3	Lower Middle
Lao PDR	236,800	7.3	2,551	16.1	Lower Middle
Malaysia	330,800	32.7	11,371	9.6	Upper Middle
Myanmar	676,590	54.8	1,187	23.5	Lower Middle
Philippines	300,000	111.0	3,549	10.1	Lower Middle
Singapore	719	5.4	72,794	0.0	High
Thailand	513,120	69.9	7,233	8.5	Upper Middle
Vietnam	330,967	98.2	3,694	N.A.	Lower Middle

Source: The World Bank (World Development Indicators, data.worldbank.org)

Between 2007 and 2015, ASEAN has enjoyed an average of 5.3% GDP growth per annum, with the aggregation of the 10 AMSs' GDPs amounting to USD2.6 trillion by 2016. With a combined consumer base of 625 million people, with a majority under the age of 30, the ASEAN region attracted USD 120 billion of foreign direct investment (FDI) in 2015, or 7% of global FDI. [5] The regional market which ASEAN is working to establish would qualify as the world's seventh largest economy. [6] As a result of implementing the initiatives laid out in the ASEAN Free Trade Area and the ASEAN Economic Community Blueprint (2008-2015)(see below), extensive trade liberalisation measures[7]

[5] ASEAN Expert Group on Competition (AEGC) Inaugural Annual Report 2016, ASEAN Secretariat, May 2017, at p.2.

[6] Welcome Address by Mr Lim Hng Kiang, Minister for Trade and Industry (Singapore), at the International Competition Network Annual Conference 2016, 27 April 2016, at [7], available online at https://www.ccs.gov.sg/media-and-publications/speeches.

[7] Investment liberalization policies introduced by AMSs were introduced with the view of permitting market entry into previously state-controlled sectors and enhancing the contestability of such markets. Competition policy complements the removal of these internal barriers by preventing anti-competitive conduct from replacing these obstacles to market entry. See Lawan Thanadsillapakul, "The Harmonisation of ASEAN: Competition Laws and Policy from an Economic Integration Perspective" in Gugler and Chaisse (eds), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers* (Edward Elgar Publishing 2010) at p.130.

have been implemented by the AMSs to achieve duty-free internal tariffs for 96% of tariff lines, more liberal market access in more than 100 services sectors, improved customs clearance and other business-friendly regulatory frameworks. The overall economic strategy pursued by ASEAN towards economic integration has been described as an approach based on "open regionalism",[8] where both intra-regional and extra-regional liberalisation of trade and investment are simultaneously pursued by the AMSs, acting individually in some instances and acting collectively in others.

III. The ASEAN Economic Community Blueprint (2008-2015)

The proposal for establishing an ASEAN Economic Community (AEC) in dates back to 2007 when the AMSs conceptualised the AEC Blueprint, setting out the many reforms that the AMSs had to carry out to establish the AEC by 2015 in order to "transform ASEAN into a region with free movement of goods, services, investment, skilled labour and freer flow of capital".[9] Four key inter-related and mutually reinforcing characteristics for the AEC were articulated: (a) an ASEAN single market and production base; (b) a highly competitive economic region; (c) a region of equitable economic development; and (d) a region fully integrated into the global economy. Individual chapters in the Blueprint are dedicated to each of these goals, with each chapter setting out specific areas of policy-making and more detailed action plans for the AMSs to pursue.

In relation to (a), the Blueprint focuses on measures required to ensure the free flow of goods, services and investment between the AMSs. The goal was to "facilitate the development of production networks in the region and enhance ASEAN's capacity to serve as a global production centre or as part of the global supply chain", building upon the creation of the ASEAN Free Trade Area in order to eliminate non-tariff barriers to trade and attract sustained inflows of foreign direct investment.[10]

In relation to (b), a "competitive" ASEAN region was envisioned as one where every AMS had its own competition law and policy framework, consumer protection measures and intellectual property frameworks to "develop a culture of learning and innovation supported by a friendlier IP profile to businesses, investors and creators in ASEAN".[11] The Blueprint also exhorts cooperation between the AMSs in the areas of infrastructure development (multi-modal transportation, information

[8] See Lawan Thanadsillapakul, "The harmonization of ASEAN: Competition laws and policy from an economic integration perspective" in Drexl et al (eds) (n 1) above at p13-14.

[9] ASEAN Economic Community Blueprint, ASEAN Secretariat, Jakarta, January 2008, at [4]. http://asean.org/wp-content/uploads/archive/5187-10.pdf ("AEC Blueprint")

[10] AEC Blueprint, [10]-[23].

[11] AEC Blueprint, [41]-[45]

and communications technology, energy generation, mining and project finance), taxation reform and e-commerce.

In relation to (c), the Blueprint makes reference to The ASEAN Policy Blueprint for SME Development (APBSD) 2004-2014, calling upon AMSs to implement the APBSD's objectives of accelerating the development of small and medium enterprises, enhancing their competitiveness and dynamism, strengthening their resilience to better withstand the challenges of a more liberalised trading environment, as well as increasing the contribution of SMEs to the growth and development of the ASEAN region.[12]

In relation to (d), the Blueprint reaffirms the outward-looking nature of the AEC and the importance placed by the AMSs on making the region a more dynamic and stronger segment of the global supply chain, such that "it is crucial for ASEAN to look beyond the borders of AEC [and that] (e)xternal rules and regulations must increasingly be taken into account when developing policies related to AEC".[13] Furthermore, AMSs committed themselves towards maintaining "ASEAN Centrality" in ASEAN's external economic relations, particularly in relation to its free trade agreements and comprehensive economic partnership agreements.[14]

Competition laws were expected to be implemented by each individual AMS in accordance with their respect socio-economic needs and legal systems. As far as developing a regional Competition policy for the AEC is concerned, the AEC Blueprint advanced a "soft law" approach to give AMSs maximum flexibility to take into account their respective socio-economic and political landscapes in the process of introducing competition law frameworks to their respective jurisdictions, an approach entirely consistent with the "ASEAN Way".[15]

1. Competition policy within the AEC Blueprint (2008-2015)

It is noteworthy that the Competition policy section is located in the "Competitive Economic Region" chapter of the AEC Blueprint, bundled together with sections dealing with foreign-investment-linked issues such as Intellectual Property Rights and Infrastructure Development. Placing

[12] AEC Blueprint, [60].

[13] AEC Blueprint, [64].

[14] AEC Blueprint, [65]. Examples of these ASEAN-led trade agreements are the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) and the Regional Comprehensive Economic Partnership (RCEP) between ASEAN, China and various other FTA partners. See http://www.asean-competition.org/about-aegc-free-trade-agreements.

[15] Luu Huong Ly, "Regional Harmonisation of Competition Law and Policy: An ASEAN Approach" (2012) Asian Journal of International Law 291. The "ASEAN Way", an approach that is centred on the principle of non-interference in the domestic affairs of each AMS, is analysed in depth in Rodolfo C. Severino, South East Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, 2008).

the Competition policy section alongside these other economic development priorities, rather than within the "Single Market and Production Base" chapter, is telling. Competition policy is probably regarded by the AMSs as something that will attract foreign direct investment to the ASEAN region,[16] as would have an effective system for protecting intellectual property or a mature intra-ASEAN transportation network.

Developing competition law frameworks within ASEAN would make the region more attractive to foreign investors concerned about the economic risk of entering markets occupied by state-owned enterprises, particularly if the AMSs adopt laws that are based upon competition policy foundations that are similar to the laws that these foreign investors are familiar with.

The Blueprint itself is silent on the extent of the role that competition law should play in facilitating the market integration goals set out in the "Single Market and Production Base" chapter. The common market which the AMSs envisage within the ASEAN region is fundamentally different from that found in the European Union, where a supranational competition law framework plays a central role to ensure that markets are not divided along national lines and that private conduct does not impede trade between Member States. The AEC Blueprint does not expect Competition Policy to perform such an onerous task because the AMSs have only committed themselves, to date, towards a much lower level of integration between their respective economies. In the absence of a supranational institutional and legal framework within the ASEAN region, the Competition Policy agenda articulated in the Blueprint must have been intended by the AMSs to focus primarily on their respective national jurisdictions.

The Competition Policy section of the AEC Blueprint states that the "main objective of competition policy is to foster a culture of fair competition"[17] and identifies the following actions to be pursued by the AMSs in this regard:

i. Endeavour to introduce competition policy in all ASEAN Member Countries by 2015;
ii. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;
iii. Encourage capacity building programmes/activities for ASEAN Member Countries in developing national competition policy; and

[16] On the supportive role that a regional Competition policy can have on the foreign direct investment regimes and regulations of the AMSs, ensuring that the liberalization of the ASEAN market is not "frustrated" by anti-competitive practices that produce market entry barriers, see Thanadsillapakul (n. 8) above at p.17-19. Intriguingly, Thanasillapakul goes further to argue that "[c]ompetition laws may replace the current restrictive investment laws and regulations, incorporating principles based on non-discrimination in the control of restrictive business practices among firms regardless of their origin or nationality."
[17] AEC Blueprint, [41].

iv. Develop a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition[18] environment.

Action (i) has been achieved, with Cambodia being the last country to implement its national competition law framework in October 2021, with Cambodian Competition Commission established in February 2022. Action (ii) was achieved with the establishment of the ASEAN Experts Group on Competition (AEGC), a regional forum for discussing and coordinating competition policies within ASEAN that comprises representatives from the respective national competition authorities of the AMSs. Action (iii) is pursued through the capacity-building efforts of the AEGC, together with its economic development partners, while Action (iv) was achieved with the publication of the ASEAN Regional Guidelines on Competition Policy in 2010 ("Regional Guidelines"),[19] followed thereafter by the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN in 2013 ("Regional Core Competencies – RCC – Guidelines").[20] Both these Guidelines articulate broad non-binding principles to assist the AMSs, particularly those with less experience with competition law, in developing their respective national legal frameworks. The Regional Guidelines provide AMSs with a framework guide to the core legal and economic principles underlying competition law regimes, while the RCC Guidelines introduce national competition authorities to useful international best-practices that are relevant to the development of their respective competition law agencies, enforcement systems and advocacy programmes. The production of both Guidelines was funded with technical and economic assistance from the German Federal Foreign Office, implemented through the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

2. The ASEAN Experts Group on Competition (AEGC)

Economic Ministers from the AMSs endorsed the establishment of the AEGC in 2007 as an official ASEAN body, comprising country representatives from national competition authorities and government departments responsible for their respective national competition policies. The AEGC is the central network through which the action plans relating to ASEAN Competition Policy are carried out, providing a focal point for undertaking the cooperative activities necessary to implement capacity building and institutional development goals set out in the Blueprint.

[18] The implications of the term "fair competition" will be explored below in the section dealing with the Regional Guidelines.

[19] http://www.asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy

[20] http://www.asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean

3. The ASEAN Regional Guidelines on Competition Policy

The 2010 Regional Guidelines serve as a non-binding reference guide for AMSs on the various policy and institutional options that may be used to shape their respective national competition law and policy frameworks. These Guidelines are based on country experiences and international best practices, with 10 chapters and 44 pages of proposals for how competition policy might be implemented by the AMSs in their respective jurisdictions.

Updates to these Regional Guidelines were subsequently made and published in 2020. The key features of these Regional Guidelines relating to the key competition law prohibitions will be summarised in the table below, along with the recommendations made to the national competition authorities of each AMS on how they can implement these guidelines in their respective national competition laws.

Table 2: Contents and Recommendations

Competition Law Prohibitions	Regional Guidelines (2020 edition)	Recommendations to AMSs
3.2 Prohibition of Anti-competitive agreements	Agreements to be evaluated by reference to their objects or effects. EU test for "by object" restrictions cited – "restrictions of competition by object are those that, by their very nature, are injurious to the proper functioning of normal competition"[21] and object should be "determined by reference to the provisions of the agreement between the parties, the objectives it seeks to achieve and its economic and legal context"[22] EU competition law concepts introduced: i) "hardcore restrictions" on competition (price-fixing, bid-rigging, market sharing, limits on production and investment); ii) Use of Counter-Factual in assessing the "effects" of an agreement; iii) "appreciability" threshold; iv) Safe harbour thresholds; v) Decisions of associations of undertakings; vi) Concerted Practices; vii) Vertical agreements as less restrictive of competition than horizontal agreements, especially where pro-competitive benefit outweighs the anti-competitive harm	AMS should clarify their position on the interpretation of the "object threshold" in their national guidelines to help business community determine when their agreements are anti-competitive. AMSs should introduced national competition law guidelines to clarify the application of competition to the activities of businesses and trade associations, as well as to "provide reassurance to businesses in the region" as to when their agreements "are unlikely to raise competition concerns"

[21] *Expedia Inc v Autorite de la Concurrence*, Case C-226/11 EU:C:2012:795, para 36

[22] 519/06 P GlaxoSmithKline [2009] ECR I-9291 [58].

3.3 Prohibition of Abuse of Dominant Position	Policy objective of abuse of dominance provisions "should be to protect competition in the market, not to protect individual competitors" EU competition law concepts introduced: i) exploitative vs exclusionary abuses of dominance[23]; ii) Price-based and non-price based abusive conduct; iii) Predatory pricing, Price discrimination, Margin squeeze, excessive pricing; iv) Bundling, Exclusive purchasing, Refusal to Supply; v) Effects-based test for market foreclosure (whether or not the conduct would result in "a competitor as-efficient as the dominant firm" being excluded from the market?)	(3.3.12) AMS may wish to consider whether certain types of abuses should be treated as abusive 'by object', with no obligation on the competition authority to establish an anti-competitive effect (as is the case with anti-competitive agreements). This could be the case, for example, with discrimination against suppliers from another AMS as such discrimination would oppose integration of the ASEAN Economic Community.
3.4 Prohibition of Anti-competitive Mergers	Mergers raise competition concerns when they lead to a substantial lessening of competition (SLC) or "significantly impede effective competitive in the relevant market". EU competition law concepts introduced: i) joint ventures that create independently functioning new entities; ii) substantive merger notification thresholds (e.g. merger = change in "control" or acquisition of decisive influence over activities of enterprise); iii) theories of harm – coordinated vs unilateral effects; iv) SLC test – use of counterfactual and relevant merger assessment factors	Recognises that there is great divergence between the merger notification systems of the AMSs – only a small number of AMSs have adopted simplified filing systems for cases that do not raise serious competition concerns. (3.4.11) "Given the likelihood of increased cross-border mergers in the ASEAN region, AMS may wish to consider taking steps to better understand each other's merger regimes and identify practical ways in which differences can be managed in practice. For example, AMS with mandatory regimes could inform AMS with voluntary regimes of a notified merger (of which the latter may be unaware) and a proforma merger waiver could be developed to allow confidential information to be shared among the competition authorities."

IV. Transplanting Competition Laws from the European framework into the ASEAN Member States

Of all the AMSs with national competition law frameworks, Singapore has implemented the three major prohibitions against anti-competitive market conduct in a way that comes closest to the European model. Sections 34, 47 and 54 of the Singapore Competition Act are very closely based on Articles 101 and 102 TFEU, and the EU Merger Regulation. Case law from the European Courts is

[23] European Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

also frequently cited in the infringement decisions of the Competition and Consumer Commission of Singapore, as well as the appeal decisions of the Competition Appeal Board. Many of Singapore's commercial laws are based on corresponding English laws and the competition law framework is similarly based on the prohibitions found in the UK Competition Act which is, in turn, based on European competition law.

Malaysia has a similar colonial relationship with the UK as Singapore, and has also introduced a national competition law framework that is broadly similar to the Anglo-European model. However, it only currently has prohibitions against anti-competitive agreements (the Chapter 1 prohibition) and abuse of dominance (the Chapter 2 prohibition), though it is in the process of introducing its own legislative framework for merger control.

Vietnam first introduced its competition law in 2004, but has subsequently updated it with the Law on Competition in 2018, which came into effect on July 1 2019. New accompanying regulations were also passed to focus on agreements which restrain competition, abuses of market dominance, economic concentrations and unfair practices. The new law merged the pre-existing Vietnam Competition Authority and the Vietnam Competition Council into a National Competition Committee, a unit under the Ministry of Industry and Trade, which also has an investigation agency established within it. One of the main objectives of the new law is provide foreign investors with clearer guidelines on the regulations, using international standards as benchmarks for the national competition law.

Indonesia introduced its competition law, Law No.5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition Law, shortly after the Asian Financial Crisis as part of its economic restructuring efforts. Unlike other jurisdictions which use general language to describe the competition law prohibitions, the approach taken by this AMS is set out specific lists of prohibited practices. It covers prohibitions against cartels and anti-competitive horizontal agreements, anti-competitive vertical restraints, abuse of dominance, mergers that may result in monopolistic practices or unfair competition, as well as restrictions on "conglomerate power" (which prohibits interlocking directorates where the companies involved are in the same relevant market) and a prohibition against the formation of conglomerates with a single parent company holding the majority of shares in companies which collectively have high market shares. The stated goal of this legal framework is to promote "a fair, effective and efficient business environment" and "an atmosphere of fair and natural competition".

The Philippines introduced its competition statute in 2015, the Philippine Competition Act, after "languishing in Congress for 24 years" with its main goal of "creating more inclusive economic growth", improving consumer protection and accelerating investment and job creation. The Act

reflects the belief that competition "promotes entrepreneurial spirit", "encourages private investments", "facilitates technology development and transfer" and "enhances resource productivity". The law is a hybrid of US antitrust law and EU competition law, reflecting its historical links with the American legal tradition. For example, the prohibition against anti-competitive agreements includes both a list of "per se" US-style prohibitions as well as an EU-style "object or effect" based prohibition. The abuse of dominance and merger control provisions incorporate some of the legal language of the corresponding prohibitions from the EU competition law model, though the statutory provisions in the Act are drafted with much greater detail.

Cambodia was the tenth and final member of the ASEAN regional grouping to enact a comprehensive national competition law in September 2021, finally completing a long-drawn out process which began in 2006.[24] The Cambodian Law on Competition "governs any activities that prevent, restrict or distort Competition", while seeking to "encourage fair and honest business relations, increase economic efficiency, encourage new businesses and help consumers to access high-quality, low-cost, diverse and versatile products and services". It has specific prohibitions against anti-competitive horizontal agreements, vertical agreements, abuses of dominant market position and business combinations that have the effect of significantly restricting competition in the market.

1. Abuse of dominance – the "dominance" threshold

To illustrate the diversity of the ways in which the "abuse of dominance" prohibition has been implemented in the AMSs, consider the legal definitions given to the concept of "dominance" in these national competition law frameworks. In some jurisdictions like Singapore and Malaysia, the concept of dominance is not defined in the statute but is instead explained in non-binding guidelines issued by the national competition authority. Indicative thresholds, or starting points, for what sort of market share a firm should have before it is regarded as dominant are set out in the guidelines (see below).

Other jurisdictions are more prescriptive. Vietnam's law states that an enterprise with 30% or more market share is considered to have substantial market power. Indonesia's law states that states that a business with 50% of more market share shall be regarded as having a dominant position.

[24] The Competition Commission of Cambodia, which was established in 2022, explains on its website that "the law on competition is an economic and complex regulation that covers the national economy and are far different from other regulations. Due to the complexity and different methods of international experts from different countries with various jurisdictions, Cambodia has revised almost all of its draft law on competition whenever there was a change of global expertise who came to support the law drafting process."

The Philippines' law includes a rebuttable presumption of dominance if an entity has a market share of 50% or more. This places the burden of proof on a firm with a high market share to disprove that it lacks the market power to be considered a dominant undertaking.

Table 3: Abuse of Dominance in selected ASEAN Member states' competition law frameworks

AMS	Numerical thresholds (market share) for dominance	Nature of guidelines
Singapore	60%	[3.9] CCCS Guidelines on the Section 47 Prohibition "…as a starting point, CCCS will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. However the starting point does not preclude dominance from being established at a lower market share."
Malaysia	60%	[2.14] Guidelines on Chapter 2 Prohibition "In general, the MyCC will consider a market share above 60% would be indicative that an enterprise is dominant. However, other factors will be taken into account in assessing dominance, such as whether there is easy entry into the market, etc"
Vietnam	30%	Article 24, Law No. 23/2018/QH14 Competition Law "An enterprise shall be considered to hold a dominant position on the market if it has substantial market power as specified in Article 26 of this Law or has market shares of 30% or more on the relevant market."
Indonesia	50%	Article 25(2) Law No.5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition Law "Business actors shall have a dominant position… [where] one business actor or a group of business actors controls more than 50% (fifty per cent) of the market share of a certain type of goods or services…"
Philippines	50%	Section 27 Philippine Competition Act (Republic Act 10667) (2015) "There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least fifty percent (50%), unless a new market share threshold is determined by the Commission for that particular sector.□"
Cambodia	N/A	Article 3(6) Cambodia Law on Competition: "Dominant Market Position means a situation in which a Person has the power to act in a Market significantly without any effective constraint from other competitors."

2. Implications of divergent thresholds for establishing market "dominance"

The quick survey above of the abuse of dominance prohibitions from 6 of the 10 ASEAN member states reveals a significance divergence between them on the thresholds used to determine when a market player is regarded as "dominant" for the purposes of this pillar of the competition law framework. From non-binding guidelines, to rebuttable presumptions and "deeming" provisions, these jurisdictions appear to pursue very different approaches towards identifying the category of

undertakings who are subject to these additional restrictions on their market conduct. These differences between the way the European competition law concept of "abuse of dominance" has been implemented in these ASEAN member states has at least three important ramifications.

Firstly, this potentially creates uncertainty for the business community when a successful undertaking in one ASEAN member state expands its operations into neighbouring states – lawful competitive conduct in one jurisdiction might be regarded as unlawful abusive market conduct an adjacent jurisdiction if the status of that undertaking is reclassified from non-dominant to dominant under the national competition law framework of the latter state.

Secondly, it is unclear how these different national approaches towards the issue of "dominance" might be applied to undertakings that operate in regional markets across the ASEAN region – that is, in markets for goods or services that transcend national boundaries to include two or more countries. The possibility for conflicting assessments of the status of such transnational business undertakings is very real especially because many ASEAN member states have national competition law frameworks with extra-territorial reach.

Thirdly, these divergent approaches towards the definition of a "dominant" undertaking do not augur well for the convergence or harmonization objectives of the ASEAN Competition Action Plan 2025. If these jurisdictions are unable to reach a consensus on how to differentiate between "dominant" and non-dominant market players, then it seems even less likely for them to come up with a collective understanding of exactly what forms of market conduct should be regarded as "abusive" and therefore prohibited by competition law.

V. Conclusion

Competition law has only been in the ASEAN region for a relatively short period of time, with individual member states having between 2 and 20 years of experience in this field of economic law. The brief survey above has focused on the divergences that exist in just one aspect of the national competition law frameworks of these countries, illustrating just one of the many areas of competition law that these members of the AEC will encounter substantial challenges if they seek to advance the convergence and harmonization agenda of the AEC Blueprint.