NOTES & COMMENTS

The Harmonization of Competition Laws towards the ASEAN Economic Integration

Udin Silalahi*

On December 31, 2015, the ASEAN Economic Community had officially been launched. The direct impact of this policy will be on the field of Competition Law which differs from one country to another. The Competition Law plays an important role in ensuring fair and equitable business practices within the ASEAN. The ASEAN has its Regional Guidelines on Competition Policy to assist its member countries to increase their awareness about fair and equitable business practices. This policy only serves as a guideline and has not been adopted as an enforceable rule. Therefore, the business competition in the domestic market involving the ASEAN member's company is still being regulated by each ASEAN member country. This paper examines and analyzes the role of the competition law in addressing the intra-ASEAN members' unfair business practices and the needs for the harmonization of the competition law within the ASEAN Countries as a transition to promulgate the ASEAN Competition Law.

Keywords
ASEAN, AEC, Competition Law, Harmonization of Competition Law.

* Lecturer at Faculty of Law Universitas Pelita Harapan, Tangerang, Indonesia. SH (Atma Jaya Univ., Yogyakarta), LL.M./Dr. iur (Friedrick-Erlangen Univ., Germany). ORCID: http://orcid.org/0000-0002-5632-4069. The author may be contacted at: udin.silalahi@uph.edu /Address: Faculty of Law Univesitas Pelita Harapan Jl. M.H. Thamrin Boulevard 1100 Lippo Village, Tangerang 15811 Indonesia.
DOI: http://dx.doi.org/10.14330/jeail.2017.10.1.06

1. Introduction

In 2003, ten Leaders of the ASEAN (Association of South East Asian Nations) reached an 'ASEAN Concord' to establish the so-called "ASEAN Economic Community" ("AEC") to be effective by 2015.[1] The ASEAN Concord would not only transform the ASEAN into a region with free movement of goods, services, investment and skilled labors and a freer flow of capital, but also into a highly competitive region that is fully integrated into the global economy.[2]

There were at least three factors leading the leaders to the AEC, which are: (1) the deeper integration of the ASEAN's economies with the globalization and domestic upheavals; (2) the ASEAN Countries' membership in multilateral organizations particularly in the WTO and the APEC; and (3) the increasing numbers of MNEs engaged in production and providing goods and services within the ASEAN Countries.[3]

In addition, Article 1 of the ASEAN Charter provides for not only the ASEAN single market, but also the culture of competition.[4] This can also be inferred from the phrase of Article 1: "to create a single market and production base which is stable, prosperous, highly competitive an economically integrated with effective facilitation for trade and investment..." The 'highly competitive' means that the implementation of the ASEAN single market necessitates the creation of a culture of competition. The ASEAN single market must be created under the culture of competition in conducting their businesses in both the domestic and regional market of the ASEAN.[5] However, in order to become bigger business actors with a dominant position in the relevant market, they must adopt the competition law and policy. Currently, neither all ASEAN Member States ("AMSs") nor the ASEAN itself have a competition law. For this purpose, they only depend on the ASEAN Regional Guidelines on Competition Policy (hereinafter Regional Guidelines). Now, the harmonization of

1 Year 2015 has been stipulated as the target for creation of a single regional economic market known as the ASEAN Economic Community which was accelerated five years than initially planned in 2020. *See* Declaration of ASEAN Concord II (BALI Concord II), *available at* http://www.asean.org/news/asean-statement-communiques/item/declaration-of-asean-concord-ii-bali-concord-ii-3. *See also* The National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* 363-4 (2004), *available at* http://govinfo.library.unt.edu/911/report/911Report.pdf (all last visited on Apr. 15, 2017).

2 ASEAN Secretariat, ASEAN Economic Community Blueprint (2008), *available at* http://asean.org/wp-content/uploads/archive/5187-10.pdf (last visited on Apr. 15, 2017).

3 U. Silalahi, *Accelerating the Development of ASEAN Competition Culture,* XII:2 L. Rev. 243 (2012).

4 ASEAN Charter art. 1(5).

5 *Supra* note 3, at 242.

competition law in the ASEAN is under consideration.

The harmonized competition laws in the ASEAN will play two principal (intrinsic and extrinsic) roles in accordance with the envisaged objectives of AEC. Even though the competition cultures and competition laws exist and are deemed sufficient, the implementation of a harmonized competition law in the ASEAN will benefit the AEC in the following ways. Firstly, the law should overcome the concerns about the possibilities to prosecute competition fraudulence committed by undertakings in any Member country which adversely impact the intra-regional trade in the ASEAN. Secondly, it would be remedying the different levels of economic development largely supporting the less developed Member States of the ASEAN.[6]

Nevertheless, in the course of the harmonization of competition laws and the economic integration of the AEC, there has been substantial fragmentation and diversities as to the material substance and procedural provision on the enforcement of competition rules in the AMS. Equally, competition laws in the current ten AMSs are in different levels of development; some are already enforcing, others are in the drafting stage.[7] Accordingly, there would be increasing uncertainties in the law enforcement between the Competition Authorities ("CAs") and the courts in the ASEAN, thereby deterring investments in the ASEAN.

The primary purpose of this research is to comprehensively analyze the harmonization of competition laws in the ASEAN by taking into account the factual and latent obstacles in the light of the economic integration pursuant to the AEC. This paper is composed of seven parts including short Introduction and Conclusion. They are as follows: Background and Characteristics of the AEC (Part 2); The Role of the Competition Law in the AEC (Part 3); Empirical Circumstances and Obstacles for the Implementation of Competition Law (Part 4); Harmonization of Competition Law in the ASEAN (Part 5); Shifting from the Consensus Model to the Rules-Based Approach (Part 6). In the end, the author will provide feasible solutions for the harmonization of competition laws in the ASEAN.

6 M. Botta, *The Role of Competition Policy in the Latin Regional Integration: A Comparative Analysis of CARICOM, Andean Community and MERCOSUR*, Paper on the IX Annual Conference of the Euro-Latin Studiy Network on Integration and Trade (2011), at 3, *available at* http://www19.iadb.org/intal/intalcdi/PE/2012/09801a05.pdf. *See also* F. Andreea-Florina, *Regional Trade Agreements and Competition Policy. Case Study: EU, ASEAN and NAFTA,* 23:1 Annals U. Oradea, Econ. Sci. Series 89 (2014), *available at* http://steconomiceuoradea.ro/anale/volume/2014/n1/009.pdf (all last visited on Apr. 15, 2017).

7 H. Qaqaya, *The Challenges in Introducing Competition Law and Policy in ASEAN Member States*, Paper presented in the ASEAN Competition Conference, Bali (Nov. 2011), at 3.

2. Background and Characteristics of the AEC

In 2003, all ASEAN Leaders resolved that ASEAN Community should be established by 2020. In 2007, the Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015. The ASEAN Community is expected to be realized on the following three pillars: (a) the ASEAN political - security community; (b) AEC; and (c) the ASEAN socio-cultural community.[8]

AEC will not only transform the ASEAN into a region with free movement of goods, services, investment and skilled labor, and a freer flow of capital, but also to a 'highly competitive' region that is fully integrated with the global economy.[9] Furthermore, the ASEAN Leaders through the Declaration on the ASEAN Economic Community Blueprint (hereinafter AEC Blueprint) in Singapore in November 2007, agreed on joint statement as follows:

> … the AEC Blueprint which each ASEAN Member Country shall abide by and implement the AEC by 2015. The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy…[10]

If developing into a single market and production base, the ASEAN will be more dynamic and competitive. The creation of a stable, prosperous, and highly competitive economic region is the goal of the ASEAN economic integration. This will encourage an efficient scale of production in more accessible locations and improve responsiveness to consumer requirement.

Hill and Menon are of the opinion that for achieving the AEC objectives, four intrinsic characteristics of the ASEAN are to be taken into account. Firstly, its economic, political, cultural and linguistic diversities are greater than any other grouping worldwide, such as the European Union.[11] Secondly, most ASEAN

8 ASEAN Secretariat, ASEAN Economic Community FactBook, xii (2011), *available at* http://www.asean.org/wp-content/uploads/images/2012/publications/ASEAN%20Economic%20Community%20Factbook.pdf (last visited on April 20, 2017).

9 Ministry of Foreign Affairs Republic of Indonesia, ASEAN Selayang Pandang 32 (2008).

10 *See* One ASEAN at the Heart of Dynamic ASIA, Singapore (Nov. 20, 2009), Chairman's Statement of the 13th ASEAN Summit, *available at* http://asean.org/?static_post=chairman-s-statement-of-the-13th-asean-summit-one-asean-at-the-heart-of-dynamic-asia-singapore-20-november-2007 (last visited on Apr. 21, 2017).

11 H. Hill & J. Menon, *ASEAN Economic Integration: Features, Fullfillments, Failures and the Future*, ADB Working Papers on Regional Economic Integration Asian Development Bank No. 69, 1 (2010), *available at* https://www.adb.

members have achieved enormous economic growth within the last decade partly due to transitions to market economy. Such regional economic developments have brought a virtuous circle to an increased regional harmony and more conducive business environment. Thirdly, the ASEAN diplomacy and cooperation have been characterized by caution, pragmatism, and consensus-based on decision-making. Accordingly, the so-called 'ASEAN Way' has demanded the non-interference in the internal affairs of member States and lowest-common-denominator decision-making. Finally, the ASEAN would hardly adopt a common external trade policy and to institute formal mechanisms for macroeconomic policy like a common currency.[12]

3. The Role of the Competition Law in the AEC

Whereas the implementation of the AEC could finally generate obvious benefits, as Stephan pointed out, institutional cooperation between the ASEAN members would become more important than before. The following factors should be taken into account for adopting the competition law in the ASEAN. The first is an increasing exposure to cross-border cartels, which controls raw materials and key commodities of great importance to emerging economies. The second is the weak enforcement of competition laws. It means that enforcement against competition law infringements are only currently undertaken by a small number of jurisdictions, with fines falling short of deterrence. The third is the institution which constraints enforcing competition laws against practices such as the comprise of inadequate assets in jurisdictions to enforce decisions, fears of losing investment and jobs, and lobbying from foreign firms not to enforce laws. In addition, CAs in the ASEAN member States have been also suffered from an institutional limitation, such as their ability to deal with regional infringements, whereas the boundaries of markets rarely coincide with the borders of legal jurisdictions.[13]

Meanwhile, there are two main (intrinsic and extrinsic) roles of competition law. Intrinsic role means that the competition law will foremost counter and thus systematically eradicate anticompetitive practices of various undertakings in the

org/publications/asean-economic-integration-features-fulfillments-failures-and-future (last visited on Apr. 21, 2017).

12 M. Krenin & M. Plummers (eds.), ASEAN Economic Integration; Driven by Markets, Bureacratics, or Both? 1-2 (2012)

13 A. Stephan, *The Role of Competition Policy in Promoting the ASEAN Economic Community*, Paper presented in the ASEAN Competition Conference, Bali (Nov. 2011), at 6.

market. According to Schmidt, there are three types of anticompetitive practices. (Table 1)[14]

Table 1: Anticompetitive Strategies

Negotiating strategy	Horizontal	Concerted practices
		Cartels
	Vertical	Vertical pricing
		Vertical price recommendation
		License contract
Obstruction or impediment strategy	*De jure*	Boycott, Refusals to supply
		Price differentiation and discrimination
	De facto	Exclusive agreement and tying contract
Concentration or conglomeration strategy	External	Horizontal
	Internal	Vertical
		Conglomerate (diagonal)

Source: SCHMIDT, *supra* note 14, at 121.

First, the negotiating strategy (*Verhandlungsstrategie*) refers to legal restrictions over competition-relevant conduct and/or decision relating to one or several action parameters due to collusive agreements, decisions of association of undertakings and concerted practices.[15] Second, the obstruction or impediment strategy (*Behinderungsstrategie*) means *de jure* or *de facto* restraints over competition-relevant conduct and/or related decision to the one or several action parameters due to the obstruction against rival undertakings (competitors) through agreements (tying/coupling contract) or *de facto* market conducts (discrimination, boycott, refusals to supply).[16] Third, the concentration or conglomeration strategy (*Konzentrationsstrategie)* is defined as factual restrictions over competition-relevant conduct and/or decision relating to the one or several action parameters due to the cutting of quantity (numbers) of competition policy's decision-makers through external or over-

[14] I. SCHMIDT, WETTBEWERBSPOLITIK UND KARTELLRECHT: EINE INTERDISZIPLINAERE EINFUEHRUNG [Competition Policy and Care Law: An Interdiscipline Introduction] 122-5 (8th ed. 2005).

[15] *Id.* at 121.

[16] *Id.*

proportionally, internal corporate growth.[17]

Conversely, the extrinsic role means the **c**ompetition law will promote the achievement of a well-functioning internal market in the ASEAN. That is to say, the competition law in the Association will serve as the juridical platform for the free movement of goods, services, investments, skilled-labors and freer flow of capital within the ASEAN. According to Schweitzer and Mestmäcker, these five free movements and competition law are to be seen as the constituting factors of a market economy in the regional economic integration, such as in the ASEAN.[18]

As regards the free services, *e.g.*, the competition law in the ASEAN will penalize the three anticompetitive strategies abovementioned, thereby curbing those collusive practices within the four modes of services (from the perspective of an 'importing' country).[19] In fact, these four modes of services are as follows. Firstly, "cross border supply" is a supply of services from the territory of one member country to that of any other member countries.[20] Cross border supply covers services flow from the territory of one country into the territory of another country. Secondly, the 'consumption abroad' is the services provided in the territory of one member country for the consumer of any other member countries,[21] meanings that consumption abroad refers to situation where a service consumer moves into another country's territory to obtain a service. Thirdly, the 'commercial presence' is the services provided by a service supplier of one Member country for those who are in the territory of any other member countries,[22] meanings that commercial presence implies that a service supplier of one country establishes a territorial presence, including through ownership or lease of promise, in another country's territory to provide a serive. Fourthly, the "presence of natural person" consist of person of one country entering of another country to supply a service (*e.g.*, accountants, doctors or teachers).[23]

17 *Id.*

18 H. Schweitzer & E.-J. Mestmäcker, Europäische Wettbewerbsrecht [European Competition Law] 30 (2014)

19 WTO, A Handbook on the GATS Agreement 4 (2011).

20 A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings. *See id.* at. 4

21 Nationals of country A have moved abroad as tourists, students, or patients to consume the respective services.

22 The service is provided within country A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and - controlled company (bank, hotel group, construction company, etc.). *See supra* note 19, at 4.

23 A foreign national provides a service within country A as an independent supplier (*e.g.*, consultant, health worker) or employee of a service supplier (*e.g.*, consultancy firm, hospital, and construction company). *See supra* note 19, at 4.

4. Empirical Circumstances and Obstacles for the Implementation of Competition Law

In general, the implementation and enforcement of competition law in the national laws of the ASEAN members have been a relatively new phenomenon. After the Asia Financial Crisis between 1997 and 1998, Indonesia and Thailand initiated to implement and enforce their competition laws, partly advocated by the International Monetary Fund ("IMF") as part of structural economic reforms program.[24]

Up to now, merely five ASEAN countries have implemented comprehensive national (general) competition laws such as Indonesia, Singapore, Malaysia, Thailand and Viet Nam.[25] The Philippine just enacted its Competition Act on July 21, 2015, and Myanmar enacted the Pyidaungsu Hluttaw Law No. 5 (the Act) on February 24, 2015.

The United Nations Conference on Trade and Development ("UNCTAD") analyzed that the implementation of competition law within the ASEAN could be mapped according to the following categorization:

1. countries with a competition law with actual cases of enforcement;
2. countries with a Competition Law and beginning enforcement;
3. countries with a Competition Law but without enforcement;
4. countries without a competition law but with drafts already made and close to adoption; and
5. countries without a competition law but draft laws at various stages.[26]

Table 2 illustrates the current implementation of competition laws in the ASEAN Countries.[27]

[24] Indonesia's decision to implement competition law was influenced by an IMF assistance program. *See* M. Pangestu et al., *The Evolution of Competition Policy in Indonesia,* 21 Rev. Industrial Org. 205-24 (2002). *See also* C. Lee & Y. Fukunaga, *ASEAN Regional Cooperation on Competition Policy*, ERIA Discussions Series, ERIA-DP-2013-3*, available at* http://www.eria.org/ERIA-DP-2013-03.pdf. Thailand's decision was purely internally driven and was facilitated by the passage of the country's new Constitution in 1997. *See* D. Nikomborirak, *Political Economy of Competition Law: the Case of Thailand, the Symposium on Competition Law and Policy in Developing Countries,* 26 Nortwestern J. Int'l L. & Bus. 597 (2006). In Singapore's case, the Competition Act was enacted due to legal obligations set out in the U.S.–Singapore Free Trade Agreement (2003). *See* B. Ong, *The Origin, Objectives and Structure of Competition Law in Singapore*, 29 World Competition 271 (2006), *available at* http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan025141.pdf (all last visited on Apr. 24, 2017). The WTO Accession was the main driver to Viet Nam's implementation of its competition law. In the case of the Philippines, Executive Order No. 45 (June 9, 2011) designated the Office for Competition, Department of Justice (OFC) as the competition authority. *See* Lee & Fukunaga, *id.* at 77-91.

[25] D. Shiau & E. Chen, *ASEAN Developments in Merger Control*, 5 J. European Competition L. & Prac. 150 (2014).

[26] Qaqaya, *supra* note 7, at 3.

[27] U. Silalahi & D. Parluhutan, *The Necessity of ASEAN Competition Law: Rethinking*, Paper presented at Seminar:

Table 2: Competition Law Implementation in the ASEAN

Country	Implementation	Year	Details
Indonesia	Yes	1999	Law No. 5 of 1999 Agency: Komisi Pengawas Persaingan Usaha (KPPU, Commission for Supervision of Business Competition)
Singapore	Yes	2005	Competition Act Agency: Competition Commission of Singapore (CCS)
Malaysia	Yes	2010	Competition Act 2010 Agency: Malaysia Competition Commission (MyCC) Operational in March 2011
Thailand	Yes	1999	Trade Competition Act B.E.2542 (1999) Agency: Trade Competition Commission
Vietnam	Yes	2005	Competition Law No. 27/2004/QH11 Agencies: Vietnam Competition Authority (investigation) and Vietnam Competition Council (adjudication)
Philippines	Yes	2015	Competition Act 2015. Agency: The Philippine Competition Commission
Myanmar	Yes	2015	2015 Pyidaungsu Hluttaw Law No) (the "Act") entering into force on 24 February 2015
Brunei	Yes	2015	Sector provisions–Telecommunications Order 2001. For example, Authority for Info-communications Technology Industry of Brunei Darussalam (AITI) issued regulation: "to promote and maintain fair and efficient market conduct and effective competition between persons engaged in commercial activities connected to telecommunication technology in Brunei Darussalam [Section 6(1)(c)]." The Competition Order of Brunei Darussalam was enacted in mid-2015, but it is not enforced yet.
Cambodia	No	-	Draft law under consideration– Council of Ministers in 2012
Lao PDR	No	-	Decree 15/PMO on Trade Competition to prohibit restrictive business practices–enacted in 2004 but not enforced Agency– Trade Competition Commission (Ministry of Industry and Commerce)

Source: ASEAN (2010b), PCC website (The Philippines)[28]

ASEAN Community and Beyond: Member-Countries Legal and Regulatory Readines and ASEAN Ecternal Relations (Apr. 6-7, 2016), at 10.

[28] Philippine Competition Law (R.A. 10667), *available at* http://phcc.gov.ph/philippine-competition-law-r-10667

The competition laws in the five implementing ASEAN members have gone into effect. There are, however, differences in terms of substance of competition rules. To a large extent, these differences encompass the following regulatory provisions: (1) the horizontal collusive agreement,[29] (2) the dominant position abuses,[30](3) the merger control,[31]and (4) the competition enforcement authorities and enforcement mechanisms.[32] Table 3 outlines the substantial differences abovementioned.

Table 3: Analysis of the Prohibition of Horizontal Collusive Agreement

Countries	Provision	Market share threshold	Sanction
Indonesia	Art. 5–12	Group – 75%	Administrative: Min. Rp.1 bil, Max. Rp.25 bil Criminal: Min. Rp.1 bil, Max. Rp.25 bil or Max 5 months imprisonment
Singapore	Sec. 34	Group -20% Individual-25% SMEs	Financial penalty: Max. 10% of the turnover for each year of infringement for maximum period of 3 years
Malaysia	Sec. 4	N/A	For offenses involving corporate body: First time–Max. RM 5 million Repeated Offense Max. RM10 million For infringements, the financial penalty is a maximum of 10% of worldwide turnover for the period during which the infringement occurred
Thailand	Sec. 27	Business operator: 50% Market share and 1 trillion Baht Top three business operator: 75% Market share and 1 trillion Baht Exception: a business operator with market share less than 10% or turnover less than 1 trillion Baht	Max. Baht 6 million or/and Max. 3 years imprisonment. Repeat offense – double penalty
Vietnam	Art. 8 Group	30%	Max. 10% of turnover

Source: compiled by author

(last visited on Apr. 20, 2017).

29 Lee & Fukunaga, *supra* note 24, at 82.

30 *Id.* at 83.

31 Shiau & Chen, *supra* note 25, at 150.

32 A. Junaidi, *Competition Authority in the ASEAN Member States,* Paper presented in the ASEAN Competition Conference, Bali (Nov. 2011), at 1-12.

In term of merger control, the ASEAN Member States have different ways. In Indonesia, *e.g.*, Law No. 5 of 1999 regulates merger control with pre- and post-merger notification on a voluntary basis based on a certain threshold. The Singapore Competition Act regulates merger control based on voluntary self-assessment for pre- and post-merger. Vietnam regulates merger control based on market share of 30-50 percent with compulsory notification. Thailand regulates merger control without any threshold consideration, but with compulsory notification. (Table 4)

Table 4: Analysis of the Merger Control Provision

Countries	Provision	Notification	Threshold	Sanctions/Remedies
Indonesia	Arts. 28–29	Post-merger Notification and pre-merger notification voluntary Within 30 days of merger	Consolidated assets >Rp.2.5 trillion Consolidated turnover >Rp.5 trillion Banks: Consolidated assets >Rp.20 trillion	Administrative: Revoke merger Criminal: Min. Rp.25 bil, Max. Rp.100 bil or Max. 6 months imprisonment
Singapore	Sec. 34	Voluntary self -assessment– for pre & post-merger	Market share of 40% or more or Market share of 20–40% and post-merger CR3 at 70% or more	Structural: Sale or divestiture Behavioral: Commitment to specified conduct
Malaysia	Sec. 4	N/A	N/A	N/A
Thailand	Sec. 26	Compulsory	Not issued.	No sanctions due to absence of notification thresholds
Viet Nam	Art. 8	Compulsory	Market share of 30–50%	Financial penalty: 1–3% of turnover

Source: compiled by author

Five competition authorities of AMSs have fully implemented their own competition laws. Competition Authority is an independent body that is mandated to implement the national competition law which serves to promote and protect competitive market. The Indonesian Commission for the Supervision of Business Competition ("KPPU") is one active CA in the ASEAN region for supervising and implementing the Law No. 5/1999 and followed by the Trade Competition Commission of Thailand, the Vietnam Competition Council, the Competition Commission of Singapore and the Malaysia Competition Commission. The procedure and the enforcement mechanisms are regulated in details of each AMS's competition laws.

Table 5 shows how the CAs analyze and enforce the competition law generally.

Table 5: The Competition Law Authorities & Enforcement Mechanisms

Countries	CAs	Line of reporting	MakingDecision	In Defining Jurisdiction
Indonesia	Commission for the Supervision of Business Competition (KPPU)	President	Investigation and Adjudication in one institution: KPPU	Individual or business entities, established and domicile or conducting business activities within the jurisdiction of the Republic of Indonesia...
Singapore	Competition Commission of Singapore (CCS) within Ministry of Trade and Industry	Ministry of Trade and Industry	Investigation and Adjudication in one institution: CSS	"Effect Doctrine (ED)"
Malaysia	Competition Commission of Malaysia (MyCC)	Prime Minister	Investigation and Adjudication in one institution: MyCC	"ED" Over any entities carrying on commercial activities both within and outside Malaysia, provided that commercial activity has an effect on competition in any market of Malaysia
Thailand	Trade Competition Commission (TCC) in Department of Internal Trade under Ministry of Commerce	Ministry of Commerce	Investigation and Adjudication in one institution: TCC	Individual or business entities, established and domicile or conducting business activities within its jurisdiction
Vietnam	Vietnam Competition Authority (VCA) within Ministry of Trade and Industry (MoTI) and Vietnam \Competition Council (VCC)	Ministry of Industry and Trade	Restrictive agreement, abuse of dominant position, and anti- monopoly cases: VCC Exemption from Restrictive Agreement: MoTI Exemption from prohibited merger: Office of Economic Planning (PM)	Enterprises on public-utility services, sectors as well as foreign enterprises and professional association operating in Vietnam

Source: compiled by author

The substantive analysis of competition laws as described above shows that there have been considerable differences among AMS, *e.g.*, the conflict of jurisdiction over competition violations in the ASEAN Countries. At present, there are two main approaches in regard to the jurisdiction to investigate and prosecute competition law infringements. One is the form-based approach,[33] while the other is the effects-based approach (hereinafter Effect Doctrine).[34] The first approach is applied largely in the civil law countries, such as Indonesia whereas the second approach or 'Effect Doctrine' is applied in the common law member countries, like Singapore and Malaysia.[35] These different approaches can be seen as latent obstacles to the implementation of competition rules for concretizing the AEC's purposes.

Furthermore, the UNCTAD has noticed that a proliferation of cross-border mergers as well as increasing numbers of total mergers in many jurisdictions is taking place.[36] Consequently, mergers and acquisitions are to be subject to the review of CAs in multiple jurisdictions. Take a look at the case of mergers in the telecommunication sector involving the Singapore and Indonesia corporations. From the business stakeholders' perspective, this circumstance will ultimately raise unnecessary transaction costs and thus lead to friction between mergers and CAs.[37] Likewise, Tarullo says: "It is certainly conceivable that successive reviews of the same merger by eight or ten different national authorities could delay or even defeat

33 According to British Airways v. Commission (Case T-219/99) and Hoffmann-La Roche v. Commission (Case 102/77) in conjunction to Article 102 Treaty on Functioning European Union (TFEU), the Court Justice of the European Union explained the form-based approach in the following terms:

> For the purposes of establishing an infringement of Article [102 TFEU], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.

See D. Geradin & I. Girgenson, *The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach*, Paper presented at 7th Annual Conference of the Global Competition Law Centre in Brussels (Oct. 27-28, 2011), at 17-8, *available at* https://www.coleurope.eu/content/gclc/documents/7th_conference/6.%20D.%20Geradin%20-%20The%20Counterfactual%20Method%20in%20EU%20Competition%20Law.pdf (last visited on Apr. 24, 2017).

34 The effects doctrine in competition law or anti-trust law initially was developed by the US courts. It means that agreements, concerted practices or decisions of association of undertakings conceived by foreign undertakings, that have effects in the US, are brought into its jurisdiction. *See* EU Commission, Roundtable on Cartel Jurisdiction Issues, including the Effects Doctrine OECD Roundtable, Paris (2008), at 3-4, *available at* http://ec.europa.eu/competition/international/multilateral/2008_oct_effects_doctrine.pdf (last visited on Apr. 24, 2017).

35 Junaidi, *supra* note 32, at 11.

36 UNCTAD, World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy, *available at* http://unctad.org/en/docs/wir1997_en.pdf (last visited on Apr. 25, 2017).

37 L. Huong Ly, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach,* 2 Asian J. Int'l L. 295 (2012).

a merger that is substantively unobjectionable."[38]

Moreover, with respect to factual and latent obstacles for the various competition laws' implementation, the ASEAN has indeed suffered from following drawbacks. Firstly, the ASEAN does not operate a CA supported by highly skilled competition law directorates and a well-developed judicial framework. Secondly, the ASEAN has deficits with regard to a strong institutional framework, backed by appropriate legislative provisions for implementing competition rules. Thirdly, both the ASEAN Experts Group on Competition ("AEGC") and the ASEAN Consultative Forum for Competition ("ACFC") have been insufficient for an effective implementation of the competition law due to the lack of their general acceptance by the members and the absence of their enforcement power.[39] Thus, without an ASEAN competition law and an ASEAN CA, the supervision of competition among AMSs will be minimized. Each CA of AMSs cannot apply the provisions of its national competition law into the cases of anti-competition among AMSs (*e.g.*, Cross Cartel among AMSs).

5. Harmonization of Competition Law in the ASEAN

The harmonization (approximation) of competition laws in the ASEAN is a *condition sine qua non* for its economic integration. As regards the high importance of the harmonization of competition law, Thanadsillapakul underlined:

> While investment liberalization within ASEAN can help encourage the free entry of the firms and to enhance the contestability of the ASEAN market, it is not enough: competition laws are needed to ensure that the former statutory obstacles to contestability are not replaced by anti-competitive business practices, thus negating the benefits that might arise from liberalization.[40]

The harmonization of competition law refers to the reciprocal approximation of

38 D. Tarullo, *Competition Policy for Global Markets,* 2 J. Int'l Econ. L. 445 (1999).

39 L. Briguglio, *Competition Law and Policy in the European Union - Some Lessons for South East Asia,* Paper presented in the 37th FAEA Annual Conference, Manila, The Phillippines (2012), at 6, *available at* https://www.um.edu.mt/__data/assets/pdf_file/0007/177163/ASEAN_competition_law_and_policy_of_the_EU_031102.pdf (last visited on Apr. 24, 2017).

40 L. Thanadsillapakul, *The Harmonixation of ASEAN Competition Laws and Policy from an Economic Integration Perspective,* 1(2) MFU Connexion: J. Humanities & Social Sci. 11 (2012), *available at* http://connexion.mfu.ac.th/2015/ejournal/Vol.1%20No.2%202012/1-42%20The%20Harmonization%20of%20ASEAN.pdf (last visited on May 1, 2017).

domestic material and procedural laws for collectively agreed legislation on a higher regulatory level. In contrast to a unification law, the harmonization of competition laws aims not to remove the prevailing national laws and regulations, but to adjust national laws to collective guidelines. Evidently, in the EU, *e.g.*, the harmonization of competition laws has been a determining factor for the establishment of an internal market, whereas the Directive (*Rechtlinie)* is one of the main regulatory instruments.[41] According to the International Institute for the Unification of Private Law ("UNIDROIT"), legal harmonization can be performed through the following ways: (1) legislative means (conventions, model laws and model legislatives); (2) explanatory means (legislative guides and legal guidelines for use in legal practices); and (3) contractual means (standard contract clauses, rules).[42] In particular, the harmonization of competition laws is a concrete manifestation of positive integration.[43]

Nevertheless, the harmonization of competition laws in the current ASEAN is confronted by roadblocks. Kokkoris argued that the harmonization of competition laws in the ASEAN suffers from the following drawbacks: First, the ASEAN lacks a supranational law-making body for legislating and enforcing community laws. Second, despite three decades of close cooperation, the ASEAN leaders have repeatedly refused the proposal of any supra-nationality in the Association. Third, a Community Law regulating competition has been absent in a supranational way. Fourth, there are no community rules which are 'neutral' from the cultural sensitivities of the ASEAN members. Fifth, the legal systems in the ASEAN members differ greatly, varying from the common law, civil law and hybrids of the both.[44] In contrast, Thanadsillapakul argued for another alternative to the harmonization of competition laws. According to his argument, three options are available. The first is the coordinated or sovereignty model, in which the ASEAN governments

41 In the EU basic legislations, 'directive' is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to decide how. *See* Regulations, Directives and others acts, *available at* http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm (last visited on Apr. 24, 2017).

42 A Guide to UNCITRAL Basic Facts about United Nations Commission on International Trade 13-20 (2003), *available at* http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf (last visited on Apr. 24, 2017).

43 J. Weiler, Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO in the Principle of Mutual Recognition in the European Integration Process (2005). *See also* P. de Sousa, *Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?*, 13:8 German L. J. 7 (2012).

44 I. Kokkoris, *Regional Economic Integration: The Role of Competition Law*, Paper presented in the 9th Annual Conference in Hongkong (Dec. 7-10, 2013), *available at* http://www.asiancompetitionforum.org/docman/the-9th-annual-asian-competition-law-conference/power-point-slides-3/176-14-y302-sandra-marco-colino/file (last visited on Apr. 24, 2017).

can rely upon the coordinated application of national competition laws based on positive agreements. The second is the harmonized model, in which the ASEAN countries can harmonize their national competition laws following international guidelines. The third is the supra-nationality model, which involves the highest degree of collaboration, in a form of an agreement on international competition laws. Thanadsillapakul arguably insisted that the harmonized model is the most suitable for the ASEAN countries.[45]

With respect to the harmonization of competition laws, meanwhile, there has been a Regional Guideline serving as a pioneering attempt and a non-binding document to establish a common competition policy for the AEC.[46] According to Luu, the Regional Guideline is not intended to be a full or binding legal instrument on competition policy for the ASEAN, but merely serves as a general framework and a guide for its member States by providing different policy and institutional options for them to create a fair competition policy. In essence, the Regional Guideline is merely drafted to serve as 'soft law,' instead of 'hard law' on competition policy.[47] Moreover, the Regional Guideline contains substantial shortcoming in the efforts of the harmonization of competition law in the ASEAN, notably in regard to regional cooperation. The Regional Guideline mandates for the establishment of a regional platform of cooperation between CAs in the ASEAN, whose functions include exchanging experiences, identifying best practices, endeavoring to implement cooperative competition policy and legislative harmonization. Yet, this regional platform is not able to exert any rule-making function on the basis of consensus-building. Accordingly, whenever the regional platform would have reached consensus on recommendations or 'best practices,' each CA of the ASEAN members may decide whether and how to implement the recommendations by means of unilateral, bilateral or multilateral arrangements.[48] Admittedly, the rationales behind this consensus-building approach would lead to the complex interrelationships and conflicting interest between the competition law and other national (economic) goals within the ASEAN member States.[49]

45 Thanadsillapakul, *supra* note 40, at 749.

46 Huong, *supra* note 37, at 1.

47 'Hard law' is an international institutional response based on binding commitments to create domestic compliance, whereas 'soft law' refers to commitments that are not formally binding. *See* K. Abbot & D. Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421 (2000).

48 Huong, *supra* note 37, at 310.

49 D. Wood, *The Impossible Dream: Real International Antitrust*, U. Chi. Legal F. 307 (1992), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1654&context=journal_articles (last visited on Apr. 20, 2017).

6. Shifting from the Consensus Model to the Rules-Based Approach

Following the previous Asian financial crisis, Rodolfo C. Severino, Jr., the former ASEAN Secretary-General, stressed that the ASEAN Countries must shift from a 'relationship-based' to a 'rules-based' way of doing business and creating wealth based upon rules-based and market economy principles. Consequently, the harmonization of competition laws in the ASEAN shall shift from the so-called 'ASEAN approach' relying upon consensus decision-making, non-interference, and informal, non-binding agreements, to the formalistic 'rules-based' approach based upon clear and comprehensive rules and a dispute settlement mechanism or judicial procedure to enforce the competition rules.[50]

There are several reasons for this shift from the 'ASEAN approach' to 'rule-based approach. Firstly, the ASEAN Charter and the AEC Blueprint stipulates: "In establishing the AEC, ASEAN shall act in accordance to the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence *to rules-based systems for effective compliance and implementation of economic commitments.*"[51] Therefore, the realization of economic integration prerequisites the harmonized rules-based framework regulating competition in the ASEAN.[52]

Secondly, the implementation of competition law and policy requires rigorous economic analysis, whereas the same set of facts could result in different or conflicting decisions of the CAs because of differences in market conditions, analytical tools, and methods used by the CAs in the ASEAN Countries.[53] As a result, there may be differing views as to the impact of business transaction or conduct on the market. *E.g.*, a merger may be considered harmless to one market, but harmful to another. Further, there would be divergent interpretations of the commonly agreed competition rules whenever the harmonization of case-law by a centralized

50 Huong, *supra* note 37, at 321.

51 Chun Hung Lin, *ASEAN Charter: Deeper Regional Integration under International Law*, 9 Chinese J. Int'l L. 824 (2010). The signing at thirteen ASEAN Summit in Singapore 2007 of both the ASEAN Charter and the declaration of the ASEAN Economic Community Blueprint was the commitment to move away from the 'soft law' approach of political commitments dealing with trade and investment liberalation toward an adherence to rule based system. *See* ASEAN Charter art. 2, ¶ 2(n). [Emphasis added]

52 AEC Blueprint 5 (2008).

53 Huong, *supra* note 37, at 295.

antitrust court is absent.[54] These divergences and uncertainties lead to the increasing transaction costs for undertakings and investors.

Thirdly, according to Botta, even if the existence of competition law in the ASEAN countries is deemed sufficient, the implementation of common competition policies in the ASEAN countries is inevitably essential because of the two importan reasons. One is the concern about prosecuting competition violations committed by undertakings in one member country which adversely impact the intra-regional trade in the ASEAN. The other is the implementation of a common competition policy in the ASEAN countries with different degrees of development, which would mostly support the less developed member countries.[55]

Fourthly, the harmonization of competition laws in the ASEAN which will profoundly facilitate coordination between the CAs of the ASEAN countries. According to Stephan, this will be seen with regard to the Leniency application in cartels violations. Undertakings will only apply for Leniency in jurisdictions of member States where there is a credible threat of antitrust law enforcement. All in all, the one-stop-shoping for Leniency in the ASEAN is necessary.[56]

In the end, the process of the harmonization of competition laws in the ASEAN would address four available options (examples) for the approximation of competition policy, which can be seen in Table 6. Nonetheless, the harmonization of competition laws in the ASEAN mentioned above not only considers a level of integration, but also includes determining the following factors: (1) the economic circumstances of each member country; (2) the political and social choices of each member country; (3) the legal environment of each member State; (4) the relative roles of public and private sector in the economy of each member State; and (5) the policymaker vision of competition policy of each member State.[57]

54 D. Geradin, *The Perils of Antitrust of Proliferation: The globaliation of Antitrust and the Risks of Overregulation of Competitive Behavior,*10 Chi. J. Int'l L. 199 (2009).

55 Andreea-Florina, *supra* note 6, at 89. *See also* Botta, *supra* note 6, at 3.

56 Stephan, *supra* note 13, at 6.

57 Qaqaya, *supra* note 7, at 3.

Table 6: The Approximation of Competition Policy[58]

Model	Key Characteristics	Examples
Centralized	Regional authority	EU=European Union
	Regional law	
	Regional enforcement	
Partially centralized	Regional authority	CARICOM=Caribbean Community
	Regional law	
	Domestic enforcement	
Partially decentralized	No regional authority	MERCOSUR= Southern Cone Common Market ASEAN
	Regional law	
	Domestic enforcement	
Decentralized	No regional authority	NAFTA= North American Free Trade Agreement SACU= Southern African Customs Union
	No regional law	
	Domestic law subject to harmonization criteria	

7. Conclusion

The competition laws in the ASEAN have been fragmented and divergent in terms of their material substance and procedural enforcement provisions. Further, the competition laws in the current ten ASEAN member States are in different levels of development. Accordingly, these variations will cause unnecessary compliance costs for undertakings and investors, as well as significant possibility of enforcement conflicts between the CAs of the ASEAN countries.

Today, the Regional Guidelines serve as a pioneering attempt, as well as a non-binding document to establish a common competition policy for the AEC. Nevertheless, the Regional Guideline is not intended to be a fully or binding legal instrument on competition policy for the ASEAN. It merely serves as a general

[58] K. Dawar & P. Holmes, Competition Policy, *in* Preferential Trade Agreement Policies for Development: A Handbook (J.-P. Chauffor & J.-C. Maur eds., 2011), at 347-66, *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/2329/634040PUB0Pref00Box0361517B0PUBLIC0.pdf?sequence=4&isAllowed=y (last visited on Apr. 20, 2017).

framework and guide for the ASEAN by providing different policy and institutional options for member countries to create a fair competition policy. Moreover, the Regional Guideline contains a substantial shortcoming notably in regard to regional enforcement cooperation.

Certainly, the harmonization of competition laws in the ASEAN is profoundly important and necessary for the positive integration. Nevertheless, the harmonization should be implemented based upon the principles of a 'rules-based' approach, which would enforce competition rules with a supranational character. This approach is in accordance with the envisaged mandates of the AEC.

In regard to the roles of competition law in the economic integration in ASEAN, two principal roles have been identified. One is intrinsic role, which means that competition law should systematically eradicate anticompetitive practices of undertakings in the ASEAN internal market. These anticompetitive practices consist of several strategies.The first is the negotiating strategy, which refers to restrictions against competition-relevant conduct and/or decisions relating to one or several action parameter(s) due to the collusive agreements, decisions of association of undertakings and concerted practices. The second is the obstruction or impediment strategy, which involves *de jure* or *de facto* restraints over competition-relevant conduct and/or decisions related to one or several action parameter(s) due to the obstruction against rival undertakings (competitors) through agreements (tying/coupling contracts) or *de facto* market conduct (discrimination, boycott, refusals to supply). The third is the concentration or conglomeration strategy which may be defined as factual restrictions over competition-relevant conduct and/or decision relating to the one or several action parameter(s) due to the cutting of quantity (numbers) of competition policymakers through external or over proportionally internal corporate growth.

The other is extrinsic role, in which the competition laws will be introduced and harmonized in a staggered manner by interlinking national sub-markets to the regional market of the ASEAN and further the whole global market in order to promote the regional economic integration pursuant to the AEC. In essence, the harmonized competition law in the ASEAN endeavors to achieve following objectives. First, "[i]n establishing the AEC, the ASEAN shall act in accordance to the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence *to rules-based systems for effective compliance and implementation of economic commitments.*"[59] Second, to

[59] Lin, *supra* note 51, at 824. [Emphasis added]

gradually increase divergences of the competition laws in the ASEAN, conducive circumstances should be created for business actors and investors both the domestic and foreign ones. Third, in spite of the existence of competition laws in the ASEAN countries, the harmonized competition law will overcome an ever increasing cross-border competition violations in the ASEAN. Again, the harmonized competition law would remedy different degrees of economic development among the ASEAN members. Fourth, the harmonized competition laws in the ASEAN will profoundly facilitate sound coordination between the CAs of the ASEAN countries in eradicating collusive practices by undertaking, such as in the Leniency application.

Although four viable approaches are working for the approximation of competition policies, the harmonization of competition laws in the ASEAN must take into consideration the following factors regarding to each member State: (1) economic circumstances; (2) political and social choices; (3) legal environment; (4) the relative roles of public and private sector in the economy; and (5) the policymaker's vision of competition policy.