
Competition Law and Policy in the ASEAN Region

Origins, Objectives and Opportunities

BURTON ONG

1.1 Introduction

Competition policy plays a central role in making markets operate more efficiently – prohibiting or eliminating conduct that might impede effective competition, thereby making markets more dynamic and improving consumer welfare. If the competition framework is implemented on a larger scale, expanding from a single jurisdiction to a regional level, the economic benefits generated are correspondingly more significant if the regional competition policy is used to complement regional trade policies that seek to establish common markets or free trade areas across multiple states. Competition law scholars support the view that regionalising competition policy can advance economic development objectives, facilitating regional market integration between developing countries.¹ The member states of the Association of South East Asian Nations (ASEAN) 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. This chapter will provide a structured overview of the main actors and instruments connected to the regionalisation of competition policy within these countries, analysing the objectives underlying these efforts while proposing the direction future developments in this area might take.

Section 1.2 will introduce the ASEAN region, while Section 1.3 critically examines the original ASEAN Blueprint and the various implementing instruments that spawned from it, including the regional competition

¹ See Drexl, J. “Economic integration and competition law in developing countries”, Chapter 11 in Drexl, Bakhoun, Fox, Gal and Gerber (eds.), *Competition Policy and Regional Integration in Developing Countries* (Cheltenham: Edward Elgar, 2011).

policy guidelines developed to facilitate the introduction of national competition law frameworks in the ASEAN member states. Section 1.4 looks at the ASEAN Blueprint 2025, which was published after the ASEAN Economic Community was established in 2015, along with the regional action plan for developing competition policy in ASEAN over the course of the next decade. Section 1.5 provides a summary of how the different issues arising from the regionalisation of competition policy in the ASEAN region will be specifically addressed in each of the other chapters of this book.

1.2 The Association of South East Asian Nations

Established in 1967, ASEAN has grown into an important regional economic grouping of 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”.² 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*:³

- (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; and
- (f) Effective cooperation among themselves.

The member states of ASEAN have incredibly diverse political, geographical and socio-economic landscapes. The spectrum of political systems

² The ASEAN Declaration (Bangkok Declaration), 8 August 1967. Retrieved from: <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967>.

³ Treaty of Amity and Cooperation in Southeast Asia (Indonesia), 24 February 1976. Retrieved from: <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976>.

Table 1.1 *Key geographical and socio-economic indicators of the ten ASEAN member states*

World development indicators (2015)	Surface area (sq km)	Population size (million)	Gross national income (\$US) – per capita	Agriculture (% GDP)	Exports (% GDP)
Brunei Darussalam	5,770	0.423	38,010	1.1	52.2
Cambodia	181,040	15.6	1,070	28.2	61.7
Indonesia	1,910,931	257.6	10,690	13.5	21.1
Lao PDR	236,800	6.8	1,740	27.4	36.0
Malaysia	330,800	30.3	10,570	8.5	70.9
Myanmar	676,590	53.9	1,160	26.7	20.8
Philippines	300,000	100.7	3,550	10.3	28.2
Singapore	719	5.5	52,090	0.0	176.5
Thailand	513,120	67.9	5,720	9.1	69.1
Vietnam	330,967	91.7	1,990	18.9	89.8

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

within the ASEAN region includes an Islamic monarchy, socialist states, a constitutional monarchy under military rule, transitional economies and several distinct parliamentary democracies with diverse political values. Table 1.1 captures the land and population size of these countries, as well as various indicators of their respective economic profiles.

Between 2007 and 2015, ASEAN has enjoyed an average of 5.3 percent GDP growth per annum, with the aggregation of the ten AMSs' GDPs amounting to USD 2.6 trillion by 2016. With a combined consumer base of 625 million people, a majority of whom are under the age of 30, the ASEAN region attracted USD 120 billion of foreign direct investment (FDI) in 2015, or 7 percent of global FDI.⁴ The regional market that ASEAN is working to establish would qualify as the world's seventh largest economy.⁵ As a result of implementing the initiatives laid out in the ASEAN Free Trade Area and the ASEAN Economic Community Blueprint (2008–15) (see

⁴ ASEAN Expert Group on Competition (AEGC) Inaugural Annual Report 2016, ASEAN Secretariat, May 2017, at p. 2.

⁵ 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]. Retrieved from: www.ccs.gov.sg/media-and-publications/speeches.

below), extensive trade liberalisation measures⁶ have been implemented by the AMSs to achieve duty-free internal tariffs for 96 percent of tariff lines, more liberal market access in more than 100 services sectors, improved customs clearance and other business-friendly regulatory frameworks.⁷ These cooperative arrangements between the AMSs have resulted in a more integrated and liberalised regional market, leading to the formal establishment of the ASEAN Economic Community in 2015, the sixth largest economy in the world. 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.

1.3 The ASEAN Economic Community Blueprint (2008–2015)

The ASEAN member states (AMSs) proposed the idea of an ASEAN Economic Community (AEC) in 2007 when they 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 In the Blueprint, the heads of the AMSs articulated four key inter-related and mutually reinforcing characteristics for the AEC: (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.

⁶ Investment liberalisation 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* (Cheltenham, UK: Edward Elgar Publishing 2010), at p. 130.

⁷ See n. 4 above, p. 3.

⁸ See Lawan Thanadsillapakul, “The harmonization of ASEAN: competition laws and policy from an economic integration perspective” in Drexler et al. (eds.) (n. 1) above at pp. 13–14.

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

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 AMSs 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 (multimodal transportation, information 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

¹⁰ AEC Blueprint, [10]–[23].

¹¹ *Ibid.*, [41]–[45].

¹² *Ibid.*, [60].

¹³ *Ibid.*, [64].

¹⁴ *Ibid.*, [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 www.asean-competition.org/about-aegc-free-trade-agreements.

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

1.3.1 *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 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

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* (Singapore: Institute of Southeast Asian Studies, 2008).

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 liberalisation of the ASEAN market is not “frustrated” by anti-competitive practices that produce market entry barriers, see Thanadsillapakul (n. 8) above at pp. 17–19. Intriguingly, Thanadsillapakul 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”.

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
- 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 competition¹⁸ environment.

Action (i) has been substantially achieved, with all the AMSs, except for Cambodia, having enacted national competition law frameworks by 2016. 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

¹⁷ AEC Blueprint, [41].

¹⁸ The implications of the term “fair competition” will be explored below in the section dealing with the 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).

1.3.2 *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. At the time the AEGC was set up, only four of the ten AMSs had national competition law regimes – Indonesia and Thailand introduced their own comprehensive competition laws in 1999, while Singapore and Vietnam enacted their laws in 2004. The work done by the AEGC facilitated the introduction of competition laws to Malaysia (in 2010), as well as to Brunei Darussalam, Lao PDR, Myanmar and the Philippines (all in 2015). The AEGC also played a central role in the development of the 2010 Regional Guidelines and the 2012 RCC Guidelines (see

¹⁹ Retrieved from: www.asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy.

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

below), organising an annual ASEAN Competition Conference Series to promote the importance of competition law and policy to the AMSs. The AEGC launched its website (www.asean-competition.org) in 2013 to serve as a virtual platform for building public awareness of competition law and policy issues within the region, as well as to provide updates on the latest developments in the field from the AMSs. Ahead of its 10-year anniversary, the AEGC published its inaugural 2016 Annual AEGC Report, the first in a series of annual reports, to provide summaries of the achievements made by national competition authorities in the AMSs each year. In its 2016 Annual Report, the AEGC declared that it is “committed to focus its work on establishing enforceable competition rules, putting in place effective institutional mechanisms to support the implementation of competition law, creating a competition-aware region that supports fair competition, strengthening regional cooperation on CPL, and ensuring the gradual alignment of competition rules under the new AEC Blueprint 2025”.²¹ The AEC Blueprint 2025 (see below) provides the broad directions for further economic integration between the AMSs and sets out a list of strategic measures to guide the future work of the AEGC, which has since produced The ASEAN Competition Action Plan 2025 (see below).

1.3.3 *The ASEAN Regional Guidelines on Competition Policy (2010)*

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 ten chapters and forty-four pages of proposals for how competition policy might be implemented by the AMSs in their respective jurisdictions. The key features of the Regional Guidelines will be summarised in Table 1.2, along with brief comments on their significance towards understanding the AEGC’s perspective on various competition policy issues.

²¹ See n. 4 above at p. 6.

Table 1.2 *The 2010 ASEAN Regional Guidelines on competition policy – a summary*

Chapter	Highlights	Commentary
10 1: Objectives of regional guidelines	<p>The Regional Guidelines “serve as a general framework guide for the AMSs as they endeavour to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each AMS” [1.2.1].</p> <p>The Regional Guidelines “endeavour to help in the process of building stronger economic integration in the region ... [and] only serve as a reference and are not binding on the AMSs” [1.2.2].</p> <p>The Regional Guidelines “take into account the varying development stages of competition policy in the AMS ... [and] set out different measures that an AMS can adopt or maintain to proscribe anti-competitive business conduct, depending on its own stage of competition policy development” [1.3.1].</p>	<p>The objective underlying p</p> <ol style="list-style-type: none"> 1. They con 2. They ma tailored 3. They are process <p>It is worth no do <i>not</i>:</p> <p>Propose the a establish a sin Contemplate or enforce Require any l law regimes.</p>