การนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติในประเทศไทย อินโดนีเซียสิงคโปร์และเวียดนาม : ความท้าทายและโอกาส

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Implementing “the ASEAN Regional Guidelines on Competition Policy” in Thailand, Indonesia, Singapore and Vietnam: Challenges and Opportunities

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สาธิตา วิมลคุณารักษ์ : การนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติในประเทศไทย อินโดนีเซียสิงคโปร์และเวียดนาม: ความท้าทายและโอกาส (Implementing “the ASEAN Regional Guidelines on Competition Policy” in Thailand, Indonesia, Singapore and Vietnam: Challenges and Opportunities) อ.ที่ปรึกษาวิทยานิพนธ์หลัก: ศ. ดร. ศักดา ธนิตกุล, 573 หน้า.

ASEAN Regional Guidelines on Competition Policy ถูกสร้างขึ้นมาเพื่อเป็นกรอบสำหรับประเทศสมาชิกอาเซียนในเรื่องนโยบายแข่งขันทางการค้าซึ่งรวมไปถึงกรอบของกฎหมายแข่งขันทางการค้าและการบังคับใช้กฎหมายด้วย การนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติในประเทศสมาชิกอาเซียนเป็นเครื่องมือสำคัญที่ช่วยทำให้บรรลุเป้าหมายของประชาคมเศรษฐกิจอาเซียนได้ โดยการทำให้เกิดสภาพตลาดการแข่งขันที่เป็นธรรมสำหรับผู้ประกอบธุรกิจทุกราย ซึ่งจะช่วยทำให้อาเซียนเป็นภูมิภาคที่ศักยภาพในการแข่งขันสูงและช่วยให้การเปิดเสรีทางเศรษฐกิจของอาเซียนบรรลุผลได้ ประโยชน์ที่ประเทศสมาชิกอาเซียนจะได้รับจากการบรรลุเป้าหมายการรวมกลุ่มทางเศรษฐกิจของอาเซียนถือเป็นโอกาสที่จะได้รับจากการนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติตาม

ผลการศึกษาพบอุปสรรคในการนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติตามในประเทศไทย อินโดนีเซีย สิงคโปร์และเวียดนาม โดยการวิจัยนี้แบ่งอุปสรรคออกเป็น 5 กลุ่ม คือ อุปสรรคที่เกี่ยวข้องกับนโยบายแข่งขันทางการค้า กฎหมายแข่งขันทางการค้า การบังคับใช้กฎหมาย การส่งเสริมการแข่งขันทางการค้าและความตกลงระหว่างประเทศในเรื่องการแข่งขันทางการค้า อุปสรรคบางประเภทพบร่วมกันในทั้งใน 4 ประเทศ เช่น การขาดวัฒนธรรมการแข่งขันที่ดี ความขัดแย้งกันระหว่างนโยบายแข่งขันทางการค้าและนโยบายการค้าและอุตสาหกรรม อุปสรรคบางประเภทพบเฉพาะในบางประเทศ เช่น ความไม่เชี่ยวชาญของบุคคลากรและการขาดแคลนทรัพยากรที่สำคัญในองค์กรบังคับใช้กฎหมายเป็นอุปสรรคที่พบร่วมกันในประเทศไทย อินโดนีเซียและเวียดนาม การแทรกแซงการบังคับใช้กฎหมายเป็นอุปสรรคที่พบในประเทศไทยและเวียดนาม การวิจัยค้นพบว่าการนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติตามขัดกับผลประโยชน์ของประเทศสมาชิกอาเซียนและกลุ่มผลประโยชน์ภายในประเทศเหล่านี้ ส่งผลให้เป็นที่มาหลักของอุปสรรคในด้านต่างๆ

อุปสรรคเหล่านี้จะทำให้ ASEAN Regional Guidelines on Competition Policy ไม่สามารถปฏิบัติตามเป้าหมายที่ตั้งไว้ได้และลดทอนโอกาสและผลประโยชน์ที่ตั้งเป้าไว้ ผลการศึกษาพบว่ามีปัจจัยสำคัญ 3 ประการที่จะช่วยทำให้ ASEAN Regional Guidelines on Competition Policy สามารถดำเนินการตามเป้าหมายต่อไปได้ คือ เจตจำนงทางการเมือง ประเทศสมาชิกอาเซียนต้องให้ความสำคัญเป็นอันดับต้นและต้องปฏิบัติตามพันธกรณีของอาเซียนในเรื่องเกี่ยวกับการแข่งขันทางการค้า และทุกๆภาคส่วนในสังคม เช่น รัฐบาล องค์กรบังคับใช้กฎหมาย ภาคธุรกิจ ผู้บริโภคต้องตระหนักถึงความสำคัญของกฎหมายแข่งขันทางการค้า ปัจจัยสำคัญทั้งสามนี้จะช่วยทำให้การนำ ASEAN Regional Guidelines on Competition Policy ไปปฏิบัติสามารถบรรลุผลได้ แต่ต้องอาศัยการเปลี่ยนมุมมองจากการคำนึงถึงผลประโยชน์ของประเทศซึ่งเป็นที่มาของอุปสรรคต่างๆ มาเป็นการคำนึงถึงผลประโยชน์ร่วมกันของทุกๆประเทศสมาชิกอาเซียนแทน เพราะการเปลี่ยนมุมมองนี้จะช่วยเป็นแรงจูงใจให้ประเทศสมาชิกเต็มใจที่จะปฏิบัติตามกรอบของ ASEAN Regional Guidelines on Competition Policy ซึ่งผลประโยชน์ร่วมกันของทุกๆประเทศในกรณีนี้ คือ ผลประโยชน์ที่ประเทศสมาชิกอาเซียนจะได้รับจากการบรรลุเป้าหมายของการเป็นประชาคมเศรษฐกิจอาเซียน นอกจากนี้ประเทศสมาชิกอาเซียนจำเป็นต้องพัฒนากฎหมายแข่งขันทางการค้าและการบังคับใช้กฎหมายให้สอดคล้องกับกรอบของ ASEAN Regional Guidelines on Competition Policy เพื่อให้มั่นใจได้ว่ากฎหมายแข่งขันทางการค้าของทุกๆประเทศสมาชิกอาเซียนจะมีผลบังคับใช้ได้อย่างมีประสิทธิภาพเพื่อเป็นเครื่องมือสำคัญในการช่วยให้การรวมกลุ่มทางเศรษฐกิจของอาเซียนบรรลุเป้าหมายที่ตั้งไว้ได้ ซึ่งก็คืออาเซียนกลายเป็นภูมิภาคที่มีศักยภาพในการแข่งขันสูง การเปิดเสรีทางเศรษฐกิจของอาเซียน การเป็นตลาดและฐานการผลิตเดียวกัน

สาขาวิชา นิติศาสตร์ ลายมือชื่อนิสิต .....

ปีการศึกษา 2560 ลายมือชื่อ อ.ที่ปรึกษาหลัก .....

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KEYWORDS: COMPETITION LAW / COMPETITION POLICY / ASEAN

SATHITA WIMONKUNARAK: Implementing “the ASEAN Regional Guidelines on Competition Policy” in Thailand, Indonesia, Singapore and Vietnam: Challenges and Opportunities. ADVISOR: PROF. SAKDA THANITCUL, Ph.D., 573 pp.

The ASEAN Regional Guidelines on Competition Policy was created to be a common framework for competition policy, which includes competition law and its enforcement for all ASEAN Member States. Implementing the ASEAN Regional Guidelines on Competition Policy is an important tool for achieving the goals of the ASEAN economic integration by level playing field for all market participants to create fair competition environment, which help turning ASEAN into highly competitive economic region and facilitate trade liberalization in ASEAN.These are considered the ultimate opportunities in implementing the Guidelines among ASEAN Member States.

However, this study found that Guidelines cannot fully function because there are impediments in implementing the Guidelines in Thailand, Indonesia, Singapore and Vietnam. This dissertation divides these impediments into five main groups, namely competition policy, competition law, enforcement, competition advocacy and international cooperation. This study found that some impediments faced in Thailand, Indonesia, Singapore and Vietnam are quite common, particularly having weak competition culture and the conflict between competition policy and trade policy and industrial policy. While other impediments are found only in some countries such as inexperienced and inadequacy of resources in competition authorities to deal with complex competition cases being found in Thailand, Indonesia and Vietnam. Political intervention in the enforcement of competition law can be seen in Thailand and Vietnam. The main source of these impediments in implementing the Guidelines is some competition standards in the Guidelines are contradict with the national interest and vested interests of these AMSs.

These impediments in the implementation of the Guidelines in these four ASEAN countries obstruct the operational function of this Guidelines and reduce the expected opportunities. This study found that there are three necessary factors that can bring about the operational implementation of the Guidelines, which are political will, AMSs prioritizing and complying with the ASEAN regional competition commitment, and the existence of competition awareness among all stakeholders in the society, including governments, competition regulatory bodies, businesses and consumers. These factors can mutually make the implementation process of the Guidelines operational. To create these three crucial factors, changing the perception of AMSs from considering only national interest to common interest of all AMSs and ASEAN as a whole is required. Considering only national interest is the main source of impediments in implementing the Guidelines; thus, it is necessary to consider the common interest, which is what all AMSs and ASEAN will get from achieving the goals of ASEAN economic integration. Considering the common interest will be a good incentive for all AMSs to create the willing in implementing the Guidelines. ASEAN Member States also need to develop the domestic competition law and enforcement to be consistent with the framework of the Guidelines to ensure that competition laws in all AMSs are operational and effective to facilitate the achievement of ASEAN economic integration: competitive economic region and ASEAN liberalization, single market and production base

Field of Study: Laws Student's Signature ----------

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CHAPTER 1

INTRODUCTION

1.1 Background

ASEAN has four main goals indicated in the AEC Blueprint that ASEAN will be the single market, high competitive economic region, the integration into global economy and equitable economic development. ASEAN economic integration will bring about foreign direct investment into the ASEAN. Trade and investment will progressively rise. A single market of more than 600 million people makes ASEAN the world' s ninth largest economy. The more liberalized trade and investment regime in the ASEAN, the more enhancement in free economies and favorable trade and investment climate are required.

ASEAN needs to create the suitable market environment for facilitating the AEC Blueprint's goals. One of the most important tools to facilitate these ASEAN's goals is operational and effective competition policy, includes competition law. In principle, objectives of competition policy and law are protecting the competition process, promoting consumer welfare, supporting well-functioning market economy, improving allocative and productive efficiency, ensuring that benefits from trade liberalization being passed on to population, contribution to economic growth.[1] The objectives of

[1] Ulla Schwager and Elizabeth Gachuiri, "Objectives and Scope of Competition Law and Policy & Institutional Arrangement for Competition Law Enforcement," [Online]. Available from: http://www.diplomacydialogue.org/images/files/Schwager&Gachuiri_Combined%20PPT%20on%20comp%20lawandpolicy%20institu%20framework.pdf

competition policy and law are consistent with the goals of ASEAN Economic Integration. Thus, competition policy and competition law are considered a vital tool to the process of the ASEAN liberalization and the formation of single market.[2] ASEAN does not require only free trade, but also the fair competition to support well-functioning market across the ASEAN Member States (AMSs). To be competitive economic region as well as achieving ASEAN liberalization require the process of free trade and fair competition. ASEAN setting the goal in order to be the region fully integrated into the global economy means the business sectors in ASEAN are able to compete globally.[3] Firms are not likely to be competitive in the international market, if they are not competitive in the domestic market. Competition policy and competition law exposes firms to the real competition and set the rule of the game by level playing field to all market players. Thus, they contribute to enhance competitiveness and create competitive landscape in the ASEAN community.

The promotion of competition policy and law in ASEAN has two functions. The first function is fostering ASEAN into highly competitive economic region as identified in the AEC Blueprint 2015. This function is then developing to turn ASEAN into competitive, innovative and dynamic ASEAN as indicated in the AEC Blueprint 2025. By having competition policy and competition law help incentivizing firms to compete more effectively in the domestic level and then in the regional level. These firms will be ready for compete in the bigger ASEAN single market. Businesses in ASEAN will be transformed to be more competitive and might have more opportunities to compete in the international level. According to the UNCTAD report,

> ***"There is evidence that competition policy improves productivity, and it is a fundamental tool for increasing economic growth. The removal of entry barriers can promote efficiency and the development of new enterprises.***

[2] ASEAN Competition Action Plan (2016-2025)

[3] Cassey Lee and Yoshifumi Fukumaga, "Asean Region Cooperation on Competition Policy," [Online] Accessed: 4 November 2016. Available from: http://www.eria.org/ERIA-DP-2013-03.pdf 2

Competition policy can encourage the efficient allocation of resources within an economy, lowering the prices of important products and inputs and improving quality and hence choice."[4]

The competition policy benefits not only industrialized and high competitive economic countries but also developing countries or countries in transition. As stated by the economic Noble laureate Joseph Stiglitz* ***" strong competition policy is not just a luxury to be enjoined by rich countries, but a real necessity for those striving to create democratic market economies***[5]***".*** Competition policy not only benefits economic purpose, but also benefits consumers. By creating business competition through the promotion of competition and prohibition of anti-competitive conducts enables firms to compete. Higher competition in the market forces firms to offer greater variety of products, better quality of products and services at lower or affordable price to attract consumers. Thus, competition bring about more variety of products and services for consumers, encouraging companies to effectively use resources to reach the economy of scale and encourage firms to innovate.[6] These benefits of competition create the well-being of consumers and social wealth.[7] Therefore, the competition policy plays an important role in creating fair competition environment in the achievement of the AEC's goal: turning ASEAN into the highly competitive economic region.

[4] UNCTAD secretariat, "Criteria for Evaluating the Effectiveness of Competition Authorities " [Online] Accessed: 9 January 2016. Available from: http://unctad.org/en/Docs/c2clpd59_en.pdf, p. 3

* Joseph E. Stiglitz, a Nobel laureate in economics and University Professor at Columbia University, was Chairman of President Bill Clinton's Council of Economic Advisers and served as Senior Vice President and Chief Economist of the World Bank.

[5] Joseph E. Stiglits, "Competing over Competition Policy," [Online] Accessed: 31 January 2015. Available from: https://www.project-syndicate.org/commentary/competing-over-competition-policy

[6] ASEAN Experts Group on Competition, "10 Years Asean Experts Group on Competition," [Online] Accessed: 2 July 2017 Available from: http://asean-competition.org/pages-10-years-asean-experts-group-on-competition

[7] Lawan Thanadsillapakul, "The Harmonisation of Asean Competition Laws and Policy from an Economic Integration Perspective," [Online] Accessed: 12 September 2016. Available from: http://www.thailawforum.com/articles/theharmonisation.html, 2

The second function is competition policy and law is one of the necessary legal infrastructure for ASEAN economic integration.[8] They are used as one of the main building blocks for facilitating the achievement of the ASEAN liberalization and economic integration. The function of competition policy and competition law help ensuring that ASEAN markets are not monopolized and kept open to new entrants regardless of its nationality, origin and size. Thus, businesses from other ASEAN member states whether they are small or medium enterprises or large transnational companies are enabled for free entry into markets of any member states and able to compete more equally under the same competition rule because competition policy and law prohibiting anti-competitive behaviors from distorting fair competition. These illustrate the interplay between all the goals of the AEC Blueprint and the competition policy. Moreover, competition policy helps ensuring that benefits of ASEAN liberalization and economic integration will contribute to general public wealth, not just a few firms acquiring market shares through cartels and abuse of its dominance.[9]

In order to guarantee that competitive process will be protected in all ASEAN Member States, the AEC Blueprint imposed the action to fulfill the competition policy task by obliging ASEAN member states introduce a nation-wide competition policy and law by 2015.[10] However, competition regime in the South East Asia is state-based. Some countries have long been applied the competition laws whereas some countries have just introduced competition laws. To what extent the competition law is supposed to be is under the power of each country. There is no unification or harmonization of competition law in ASEAN. However, ASEAN requires a common framework to make sure that competition policy and competition law of each member are all truly leading to the protection of competition process, the creation of fair competition environment to facilitate the goals of AEC Blueprint, particularly highly

[8] Ibid. 2

[9] Ibid. p. 2

[10] DECLARATION ON THE ASEAN ECONOMIC COMMUNITY BLUEPRINT B. Competitive Economic Region, B1. Competition Policy, Actions: i

competitive economic region and facilitating the 'open regionalism' without market barriers. In this regards, the ASEAN Regional Guidelines on Competition Policy; after this will be called 'the Guidelines', is provided for ASEAN Member States to be the common framework to introduce, implement and develop their competition policies by basing on country experiences and international best practices with the view of creating fair competition environment while taking into account the different levels of competition policy development in ASEAN.

The ASEAN Regional Guidelines on Competition Policy and its Objectives

The Guidelines is the ASEAN public document aiming to be a general framework guide for all AMSs to develop their competition policy, including competition law, with a view to create fair competition environment in ASEAN.[11] The ASEAN Regional Guidelines on Competition Policy is unveiled by the ASEAN Economic Ministers on 24 August 2010.[12]The main objective of the Guidelines is to be the common reference guidance for all AMSs to develop their competition systems. The introduction of the Guidelines conforms to the commitment of ASEAN Member States to introduce competition policy and competition law within 2015.[13] Thus, for ASEAN Member States that have never introduced competition laws before, the Guidelines aims to facilitate the introduction and incorporation of competition policies and laws into their systems. While ASEAN members that have already had competition law in force, the Guidelines will be used as a framework guidance to develop their competition laws basing on international best practices and countries experiences.[14] The Guidelines also attempt to narrower the distinctions between national competition laws among AMSs to bring more convergence and laying a foundation for greater convergence of competition policy and law in ASEAN in the future if AMSs implement and refer to the Guidelines

[11] ASEAN Regional Guidelines on Competition Policy, preface, Chapter 1.2 Purpose and Benefits of Regional Guidelines

[12] Luu Huong Ly, "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law 2(2012). p. 291-321

[13] AEC Blueprint 2015

[14] ASEAN Regional Guidelines on Competition Policy, Chapter 1.1-1.3

when drafting and revising their competition laws.[15] The Guidelines facilitate the continuous competition law development in AMSs according to the timeframe specified in the Strategic Schedule of the AEC Blueprints in order to create a fair competition environment. By having fair competition environment, it will facilitate the achievement in turning ASEAN to be competitive region with well-functioning market and stimulate the economic integration in ASEAN.

Legal Basis of the ASEAN Regional Guidelines on Competition Policy

As a result of functioning as a common framework guide similar to the 'Model Law'[16], AMSs are not binding to ratify and implement every exact word indicated in the Guidelines.[17]The legal basis of the Guidelines is a soft law. Being the soft law is a quasi-legal instrument, which do not have legal binding force. The soft law appears in the form of code of conduct or guidelines.[18] As a result, the implementation of the Guidelines is based on the soft law approach. Unlike the hard law, the soft law can be just the guiding principles, which allow flexibility in the implementation.

The rationale behind adopting the soft-law approach in the Guidelines inheres in the characteristics of ASEAN, which its members have great diversities in economic structures, legal systems, political systems, society goals, natural socio-economic infrastructure and level of competition culture. These great diversities in many aspects mean that one-size-fits-all solution is hardly possible in ASEAN. Flexibility and the allowance of national differences continuing to exist are necessary conditions for ASEAN economic integration. Any directions or measures issued by ASEAN should realize this unique characteristic of ASEAN and should not prevent AMSs from pursing their national policies' goals they consider appropriate. Otherwise, they will not fit in the context and nature of ASEAN. This view is supported by LUU Huong Ly that the

[15] AEC Blueprint 2025, ASEAN Competition Action Plan (ACAP) 2016-2025.

[16] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy." , p. 30

[17] ASEAN Regional Guidelines on Competition Policy, Chapter 1.2 Purpose and Benefits of Regional Guidelines

[18] Soft law, [Online] Accessed: 8 June 2016. Available from: https://www.malcolm.id.au/thesis/sec-soft-law.html

ASEAN has opted for the soft law approach instead of the hard law approach like the EU. The rationales behind adopting the soft law approach is partly inherits from the ASEAN Way, limited level of current ASEAN regional economic integration, diversity in AMSs' economic conditions and competition regimes. [19]

Furthermore, the single unified regional of competition law is too ambitious for the current ASEAN's situation with the fact of a great diversities among AMSs and the early level of the economic integration in ASEAN these days. Even the harmonization of competition law in ASEAN is not going to be successful in the near future because of too many great diversities in many aspects, for example different legal systems and legal infrastructure. The willing of all AMSs are still not clear to support this idea since the ASEAN Member States are so protective of their sovereignty. Many scholars believe in the same way, for example **"any solution to the general problem of promoting the complementarity of trade liberalization, regulatory reform (regional economic integration) and competition policy must be flexible enough to allow such national differences to continue to exist"**[20]

Consequently, the measures to promote competition in ASEAN should not take the hard law approach. Otherwise, it will not fit and might be undesirable for AMSs to comply and implement. Rather the soft law approach that provide the broad framework of how AMSs can achieve the AEC Blueprint's goal and its actions with variety of approaches for AMSs to choose what it deems appropriate is more appropriate in the ASEAN's context. This is the reason why flexibility is intentionally allowed for AMSs in implementing the Guidelines into their competition policy to be compatible with the characteristics of ASEAN.

[19] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321

[20] Jenny F., "Globalization, Competition and Trade Policy: Convergence, Divergence and Co-Operation," in Competition Policy in the Global Trading System: Perspectives from the Eu, Japan and the USA (Kluwer Law international, 2002).

Flexibility in implementing the Guidelines appears in the purpose of the Guidelines that enable the implementation of the Guidelines in the way that conforming to each specific legal and economic context of each ASEAN Member State.

"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."[21]

Another flexibility is found in the chapter 1.3 that the Guidelines allows AMSs to selectively adopt different measures recommended in the Guidelines that seem to be appropriate to the level of competition policy development in that ASEAN member. The Guidelines realizes that there are a varied stages of competition policy development among AMSs. This appears in chapter 1.3 Different Stages of Competition Policy Development in ASEAN of the Guidelines.

> ***" 1. 3. 1 The Regional Guidelines take into account the varying development stages of competition policy in the AMSs. For example, the Regional Guidelines 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."***

As a result of the different stages of competition policy development among AMSs, one-size-fits-all approach is inappropriate to be applied in ASEAN. That is the reason why the Guidelines intentionally provides various measures and guidance for ASEAN members to adopt in accordance with specific legal and economic context of each ASEAN member state. Therefore, Guidelines allows flexibility in its implementation.

[21] ASEAN Regional Guidelines on Competition Policy, Chapter 1.2 Purpose and Benefits of Regional Guidelines

Each ASEAN Member State has different level of competition policy and law development. Thailand has the longest period of the application of competition laws but face significant enforcement problems. Indonesia introduced the competition law (Law No.5) after Thailand with the majority of cases relating to bid-riggings. Singapore has not applied competition law as long as Thailand and Indonesia. However, the enforcement of competition law in Singapore goes beyond domestic level. Singapore was able to catch international cartel by the application of leniency program, which reflect its effective enforcement mechanism.[22] On the other hand, Laos and Cambodia are ranked in the least developed countries in ASEAN. Formal competition laws were not established in these countries when the Guidelines being issued. However, as being the ASEAN Member States, they are obliged by the AEC Blueprint as ASEAN Member States to introduce competition policy by 2015[*]. Some ASEAN Member States might not have plans to set competition policy and introduce competition law this soon, if they are not obliged to do so as the important commitment of being the ASEAN Member States. It can be seen that there are a totally different stages of competition policy development in the South-East Asia. Consequently, it is impossible to force all ASEAN members to introduce the unified competition law without considering the different levels of competition policy development in ASEAN as well as the ASEAN Way.

[22] Competition Commission Singapore, "Ccs Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel," [Online] Accessed: 15 August 2015. Available from: https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-imposes-penalties-on-ball-bearings-manufacturers-involved-in-international-cartel

[*] AEC Blueprint, *B. Competitive Economic Region B1. Competition Policy*

"The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs).5 There is currently no official ASEAN body for cooperative work on CPL to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on CPL.

Actions: I. Endeavour to introduce competition policy in all ASEAN Member Countries by 2015;

All of these statements can explain the reason why the Guidelines is not intended to have legal binding on the AMSs as a hard law. The hard law cannot provide flexibility in the implementation like the soft law. The hard law is, thus, inappropriate in the context of ASEAN today because there are too many diversities in competition policy of each member to make uniform law.[23] By being a general framework guide, the Guidelines can take into account the different stages of competition policy development among AMSs. Consequently, they are able to set out a variety of measures for AMSs to adopt.[24] All the measures and approaches provided by the Guidelines are based on the international best practices so at least ASEAN can ensure that if the AMSs implement the Guidelines, the development of competition policy in AMSs are basing on the good competition standards and able to achieve the competition related goals of ASEAN.

By implementing the measures within the framework of the Guidelines, it will help formulating the common framework of competition polices and competition laws between AMSs. These measures provided in Guidelines for AMSs to implement is the beginning step to guarantee that common goal, which is the creation of fair competition environment. Creating the fair competition environment is the main objective of the competition policy as set out in the AEC Blueprint[*]. The creation of fair competition environment is also the ultimate purpose of the Guidelines.

[23] Barbora Valockova, "Eu Competition Law: A Roadmap for Asean? Euc Working " [Online] Accessed: 8 June 2016. Available from: http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf

[24] ASEAN Regional Guidelines on Competition Policy, Chapter 1.3.1

[*] AEC Blueprint Competitive Economic Region, B1. Competition Policy

" 41. The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs).5 There is currently no official ASEAN body for cooperative work on CPL to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on CPL."

> ***" To fulfill the goal of a highly competitive economic region, one of the action tasks identified under the AEC Blueprint is to develop by 2010 regional guidelines on competition policy, which would be based on country experiences and international best practices with the view to creating a fair competition environment. As outlined in the AEC Blueprint, all AMSs will endeavour to introduce competition policy by 2015."*** [25]

The sharing objectives of creating fair competition environment between the AEC Blueprint and the Guidelines, which is one of the deliverables of AEC Blueprint shows the important function of the Guidelines in fulfilling the goal of the AEC Blueprint: highly competitive economic region.

Root and Rationales behind ASEAN Member States Implementing the ASEAN Regional Guidelines on Competition Policy?

In spite of being the soft law, all AMSs should implement the Guidelines into their competition policies and laws. The rationales behind AMSs are required to implement the Guidelines will be elaborated in this part. In order to understand the rationales behind the requirement of AMSs implement the Guidelines, the root and importance of the Guidelines and its interconnection with the whole system of ASEAN needs to be elaborated first.

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[25] ASEAN Regional Guidelines on Competition Policy, Chapter 1.1.3

* ASEAN Charter "COMMITTED to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, as provided for in the Bali Declaration of ASEAN Concord II;"

** CHARTER OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS, CHAPTER I PURPOSES AND PRINCIPLES ARTICLE 1 PURPOSES "To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital; "

*** AEC Blueprint, DECLARATION ON THE ASEAN ECONOMIC COMMUNITY BLUEPRINT

"1. ADOPT 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. The AEC Blueprint including its strategic schedule is annexed to this Declaration.

2. TASK concerned Ministers, assisted by the ASEAN Secretariat, to implement the AEC Blueprint and to report to us regularly, through the Council of the ASEAN Economic Community, on the progress of its implementation."

ASEAN is an inter-governmental organization in the South-East Asia. The ASEAN Charter is considered as the constitution among ASEAN Member States. It gives the clear legal personality of ASEAN as an inter-governmental organisation. It also indicates the clear objectives and guiding principles of ASEAN, which are legally binding on the ASEAN Member States. Therefore, institutional framework, rights and obligations of members are imposed by the ASEAN Charter. Through this ASEAN Charter, the ASEAN Economic Community; AEC, was established as one of the three main pillars of ASEAN[*]. ASEAN is inspired by and united under 'One Vision, One Identity and One Caring and Sharing Community'; therefore, all ASEAN members have common purposes in relation to the ASEAN Economic Community as described in Article 1(5) of ASEAN Charter[**]

Then the AEC Blueprint aiming to set up the clear goals, plans and timeframe for AMSs to complete ASEAN Economic integration by 2015 was adopted by all the ASEAN Members[***]. One of the main goals of the AEC Blueprint is turning ASEAN into highly competitive economic region. Under the goal of competitive economic region, competition policy is considered one of the elements in helping ASEAN to achieve this goal.

"B. Competitive Economic Region

B1. Competition Policy

41. The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs).

Actions:

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 competition environment."[26]

Competition policy is the main element in facilitating highly competitive economic region. These four actions further elaborate the ASEAN commitments concerning the competition element. The reason why competition policy must be incorporated in the all AMSs as identified in the first action is the main objective of competition policy fostering fair competition. According to the AEC Blueprint, all members are urged to ensure the development of competition policy and law to foster a culture of fair business competition.

However, ASEAN cannot fully become into highly competitive region, if the competition system in each member is totally different and lacking direction towards the achievement of the goal of the ASEAN economic community. This is the reason why it is necessary to develop the ASEAN Regional Guidelines on Competition Policy to provide the common framework for all AMSs in developing their competition policies and laws towards the same direction, which is the creation of fair competition environment.

[26] ASEAN ECONOMIC COMMUNITY BLUEPRINT, B. Competitive Economic Region

Rationale behind the Implementation of the ASEAN Regional Guidelines on Competition Policy of the ASEAN Member States

The first rationale behind AMSs should implement the ASEAN Regional Guidelines on Competition Policy is this Guideline was issued as one of the key actions of the AEC Blueprint under the goal of 'competitive economic region'. As a result of the Guidelines being one of the action tasks in the AEC Blueprint, AMSs are required to implement the AEC Blueprint.[27] If the Guidelines is not implemented into competition laws of AMSs, the purpose of the Guidelines in creating fair competition environment will not have anything to guarantee the achievement. Thus, the objective of developing the Guidelines with the view to creating fair competition environment in ASEAN could not be fully fulfilled. Relying on existing competition policy and law of each member might not be able to ensure that fair competition will be created within the specified timeframe of the AEC Blueprint 2015 and the AEC Blueprint 2025, which are in the Strategic Schedule for the ASEAN Economic Community. The strategic schedule identifies the expected continuous chart of competition policy development in ASEAN and guides the ASEAN' s continued effort in fostering fair competition environment in ASEAN. This strategic schedule is a part of the AEC Blueprint that AMSs are bound to implement[*].

"Towards a Highly Competitive Economic Region

B1. Competition Policy

Building capacity and introduction and/or adoption of best practices for introducing competition policy

2008-2009: Carrying out a foundation-laying study, review of study findings and recommendations, and convening a regional meeting on

[27] ASEAN ECONOMIC COMMUNITY BLUEPRINT, Strategic Schedule

[*] In the DECLARATION ON THE ASEAN ECONOMIC COMMUNITY BLUEPRINT the strategic schedule is explicitly mentioned that it is a part of the AEC Blueprint. "The AEC Blueprint including its strategic schedule is annexed to this Declaration."

study findings and recommendations.

2010-2015: Drawing up a regional work plan on Competition Policy and Law with special focus: capacity building and the introduction of best practices for introducing competition policy.

Exploring funding opportunities for the implementation of selected elements of the work plan in line with the strategic schedules of AEC building."[28]

According to this Strategic Schedule, one of the main strategies, which should be fulfilled before the end of 2015, is the introduction and/or adoption of best practices for introducing competition policy. This strategy is in accordance with the two action tasks under competition policy in the AEC Blueprint, which are an introduction of competition policy in all ASEAN Member Countries by 2015 and developing a regional guideline on competition policy by 2010, based on country experiences and international best practices.[29] The AEC Blueprint realizes the importance of competition policy because it is the main tool to create fair competition. However, competition policy has not been established in only some ASEAN Members. In order to succeed in creating fair competition in ASEAN as a whole, every ASEAN member needs to have competition policy. This is the reason why the first action task of competition policy is required all ASEAN member states to introduce competition policy by 2015.[30] Competition policy is divided into two parts. The first part is the set of policies and government measures to promote and maintain competition. The second part of competition policy is competition law. Therefore, by 2015 all ASEAN members are required to introduce both competition policy and national competition law.

Only the introduction of competition policy and competition law are not adequate. Under the AEC Blueprint, the AMSs are endeavored to introduce and/or

[28] ASEAN ECONOMIC COMMUNITY BLUEPRINT, Strategic Schedule

[29] ASEAN ECONOMIC COMMUNITY BLUEPRINT, B. Competitive Economic Region

[30] ASEAN ECONOMIC COMMUNITY BLUEPRINT, B. Competitive Economic Region, Actions

adopt of best practices for the introduction of their competition policy, which include competition law. The ASEAN Regional Guidelines on Competition Policy play the role in facilitating this commitment of AMSs by being used as the good reference guidelines. The Guidelines pools the international best practices concerning competition policy and law for AMSs to adopt. This is another reason why the AMSs should use the Guidelines as the reference guide in making sure that competition policies and laws that they are introducing or developing basing on international best practices. Moreover, implementing the Guidelines ensures that the development of competition systems of all AMSs moving forward to the same direction, which is conforming to the Competition Strategic Schedules of the AEC Blueprints with the ultimate goal to create fair competition environment in ASEAN and facilitate ASEAN Economic Integration.

Another rationale behind implementing the Guidelines is the fact that the representatives of all ASEAN members all agreed to adopt the Guidelines through ASEAN Experts Group on Competition Policy (AEGC).[31] Despite of having the legal status of soft law, all AMSs should implement the Guidelines because the Guidelines is one of the action tasks of the AEC Blueprint. The action task like the Guidelines is the vital tool helps leading the way to the achievement of the set goal of the AEC Blueprint. Without the action tasks, the goal of turning ASEAN into highly competitive economic region might be just the goal written in the AEC Blueprint papers. All action tasks are established to provide measures to ensure that the goals of the AEC Blueprint can really be achievable in practice. The action task like the Guidelines is a necessary measure to guarantee the adoption of the AEC Blueprint by all AMSs.[32] Consequently, the Guidelines, as one of the action tasks of the AEC Blueprint, shall be implemented into competition policy of all AMSs. Otherwise, the goal of the AEC Blueprint in creating fair competition environment and turning ASEAN into highly competitive economic

[31] Pornchai Wisuttisak and Nguyen Ba Binh, "Asean Competition Law and Policy: Toward Trade Liberalization and Regulation Market Integration " ICIRD 2012 International Conference, Chiangmai, Thailand

[32] AEC Blueprint Competitive Economic Region, DECLARATION ON THE ASEAN ECONOMIC COMMUNITY BLUEPRINT

region will have no practical measures and tools leading to its achievement. In conclusion, in order to fulfil the goals of the AEC Blueprint, AMSs should implement the Guidelines.

It must be noted that the Guidelines is not only sole tool to create fair competition environment. According to the AEC Blueprint, there are four action tasks under the competition policy. These four action tasks complement each other and all of them lead to the same goal, which is fostering the culture of fair competition in ASEAN. One of the purposes of establishing the Guidelines is to complement the first action task. The Guidelines can be a framework guide for members that have never established competition policy and law by functioning as a reference guide for these members to adopt the most appropriate measures within the framework of the Guidelines and then implement it into their competition laws. This statement can be proved by the foreword message in the Guidelines by Dr. Surin Pitsuwan, who was the Secretary-General of ASEAN when the Guidelines was developed.

"The Guidelines on Competition Policy is a pioneering attempt to achieve the stated goal of ensuring ASEAN as a highly competitive economic region as envisaged in the ASEAN Economic Community (AEC) Blueprint, in particular the introduction of nation-wide Competition Policy and Law by 2015."[33]

The More Distinctive Role of the ASEAN Regional Guidelines on Competition Policy under the AEC Blueprint 2025

Competition policy and law should be continuously developed according to the level of ASEAN economic integration**.** This continuous development of the competition policy in ASEAN is clearly reflected in the AEC Blueprint 2015 and AEC Blueprint 2025 and their action plans**.** The competition part under the AEC Blueprint 2015 seems to be quite general and not demanding because ASEAN aims to establish the competition policy and competition law in all ASEAN Member States first and

[33] ASEAN Regional Guidelines on Competition Policy, Foreword

creating some important facilitating forum and tools like the ASEAN Experts Group on Competition (AEGC) and the ASEAN Regional Guidelines on Competition Policy. However, the next ten-year plan of ASEAN competition policy in the AEC Blueprint 2016-2025 shows a clear development and more requirements for AMSs to implement. It must be noted that the AEC Blueprint 2015 is still relevant but the new AEC Blueprint 2025 will build on the goals and obligations of the AEC Blueprint 2015.

While the AEC Blueprint 2025 lays down the further development with the long-term plan of competition policy development step by step. The first step that is the continuing task from the AEC Blueprint 2015 is forcing all the remaining ASEAN Member States to introduce the competition policy and law. The second step requires AMSs to have effective enforcement of competition law by focusing on capacity building and technical assistance to the competition agency to be able to be able to enforce competition law effectively. The effective enforcement must be complemented by the raise of competition awareness in the region in order to create fair competition and competition culture in ASEAN. When the single market and production base advance, ASEAN realizes that anti-competitive conducts can produce cross-border effects. It is anticipated that there will be a growing number of competition cases with international dimension. The only one jurisdiction might not be able to effectively deal with these international competition cases without cooperation from other related countries. Consequently, ASEAN demands its member to enter into competition enforcement cooperation agreements to effectively deal with cross-border commercial transactions. Another step further, which is the most advanced goal that cannot be fulfilled unless all AMSs have competition policies and laws in place and able to effectively enforce these rules. Thus, the achievement of the strategic goal 1 and 2 are the preconditions of the start of this strategic goal, which is achieve the greater harmonization of competition policy and law in ASEAN. It can be seen that the AEC Blueprint 2025 is another advanced and more demanding step further from the beginning step of the AEC Blueprint 2015 that laying down competition policy and law in AMSs.

AEC Blueprint 2016-2025

A Competitive, Innovative and Dynamic ASEAN

" 25. The objective of this characteristic is to focus on elements that contribute to increasing the region's competitiveness and productivity by

(*i*) *engendering a level playing for all firms through effective competition policy;*

(*ii*) *fostering the creation and protection of knowledge;*

(*iii*) *deepening ASEAN participation in GVCs; and*

(*iv*) *strengthening related regulatory frameworks and overall regulatory practice and coherence at the regional level.*

The key elements of a competitive, innovative and dynamic ASEAN include:

B.1. Effective Competition Policy

26. For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective. The fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base, as well as to support the formation of a more competitive and innovative region.

Strategic Measures

i. Establish effective competition regimes by putting in place competition laws for all remaining ASEAN Member States that do not have them, and effectively implement national competition laws in all ASEAN Member States based on international best practices and agreed-upon ASEAN guidelines;

ii. Strengthen capacities of competition-related agencies in ASEAN Member States by establishing and implementing institutional mechanisms necessary for effective enforcement of national competition laws, including comprehensive technical assistance and capacity building;

iii. Foster a "competition-aware" region that supports fair competition, by establishing platforms for regular exchange and engagement, encouraging competition compliance and enhanced access to information for businesses, reaching out to relevant stakeholders through an enhanced regional web portal for competition policy and law, outreach and advocacy to businesses and government bodies, and sector-studies on industry structures and practices that affect competition;

iv. Establish Regional Cooperation Arrangements on competition policy and law by establishing competition enforcement cooperation agreements to effectively deal with cross-border commercial transactions;

v. Achieve greater harmonisation of competition policy and law in ASEAN by developing a regional strategy on convergence;

vi. Ensure alignment of competition policy chapters that are negotiated by ASEAN under the various FTAs with Dialogue Partners and other trading nations with competition policy and law in ASEAN to maintain consistency on the approach to competition policy and law in the region; and

vii. Continue to enhance competition policy and law in ASEAN taking into consideration international best practices."[34]

[34] AEC Blueprint 2016-2025

The table below shows

Table 1 the comparison of ASEAN competition policy goals and commitments between the beginning of competition policy in AEC Blueprint 2015 and the further development of ASEAN competition policy in the AEC Blueprint 2025.

Comparing Elements	**AEC Blueprint 2015**	**AEC Blueprint 2025**
ASEAN's Goal	Competitive Economic Region	Competitive, Innovative and Dynamic ASEAN
Main Objective	To foster a culture of fair competition.	For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective. The fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalization and a unified market and production base, as well as to support the formation of a more competitive and innovative region.

Competition Strategic Measures and Action Plan	Actions: i. Endeavour to introduce competition policy in all ASEAN Member Countries by 2015;	Strategic measures i. Establish effective competition regimes by putting in place competition laws for all remaining ASEAN Member States that do not have them, and effectively implement national competition laws in all ASEAN Member States based on international best practices and agreed-upon ASEAN guidelines;
	iii. Encourage capacity building programmes/activities for ASEAN Member Countries in developing national competition policy; and	ii. Strengthen capacities of competition-related agencies in ASEAN Member States by establishing and implementing institutional mechanisms necessary for effective enforcement of national competition laws, including comprehensive technical assistance and capacity building;

	ii. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;	iv. Establish Regional Cooperation Arrangements on competition policy and law by establishing competition enforcement cooperation agreements to effectively deal with cross-border commercial transactions; vi. Ensure alignment of competition policy chapters that are negotiated by ASEAN under the various FTAs with Dialogue Partners and other trading nations with competition policy and law in ASEAN to maintain consistency on the approach to competition policy and law in the region; 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 competition environment	v. Achieve greater harmonisation of competition policy and law in ASEAN by developing a regional strategy on convergence;

		vii. Continue to enhance competition policy and law in ASEAN taking into consideration international best practices.
		iii. Foster a "competition-aware" region that supports fair competition, by establishing platforms for regular exchange and engagement, encouraging competition compliance and enhanced access to information for businesses, reaching out to relevant stakeholders through an enhanced regional web portal for competition policy and law, outreach and advocacy to businesses and government bodies, and sector-studies on industry structures and practices that affect competition;

One of the strategic goals of the AEC Blueprint 2025 represents the more

distinctive and visible role of the ASEAN Regional Guidelines on Competition Policy that AMSs should implement their competition policies and competition laws effectively basing on the Guidelines. This reflects that the AEC Blueprint 2025 emphasizes the deeper role of competition policy and law and further obliges the AMSs to establish effective competition regime and effectively implement national competition laws based on agreed-upon Guidelines. Under the strategic measures in AEC Blueprint 2025, the ASEAN Regional Guidelines on Competition Policy is regarded as a part of the tools to turn ASEAN into competitive region with well-functioning market.

To sum up, all ASEAN Members States agreed to adopt and being bound to implement the AEC Blueprint.[35] Accordingly, all AMSs are required to implement the Guidelines because the Guidelines is the action task, which is the deliverable of the AEC Blueprint. The Guidelines also used as a framework basing on international best practice for AMSs to adopt in order to fulfill the Strategic Schedule, which is the integral part of the AEC Blueprint. In conclusion, all ASEAN Member States should develop their competition policies and competition laws in accordance with the frameworks and standards of the Guidelines. The Guidelines enables the flexibility in the implementation. As long as the ASEAN members choose to implement one of the measures and institutional options indicated in the Guidelines. If all AMSs implement the Guidelines into their competition regimes, it can be ensured that competition policies and laws of all AMSs will be developed and brought about fair competition environment, which is the goal of the AEC Blueprint.

[35] AEC Blueprint, DECLARATION ON THE ASEAN ECONOMIC COMMUNITY BLUEPRINT

1.2 Research Questions

Why ASEAN Member States have to implement the ASEAN Regional Guidelines on Competition Policy?

Do the current competition policies and laws in Thailand, Indonesia, Singapore and Vietnam conform to what state in the ASEAN Regional Guidelines on Competition Policy?

What are the challenges and opportunities Thailand, Indonesia, Singapore and Vietnam face in the implementation of the ASEAN Regional Guidelines on Competition Policy?

How to overcome the challenges in implementing the ASEAN Regional Guidelines on Competition Policy?

How to strengthen the opportunities from implementing the ASEAN Regional Guidelines on Competition Policy?

1.3 Objective of the Dissertation

1. To assess the reason why ASEAN Member States should implement the common frameworks and standards indicated in the ASEAN Regional Guidelines on Competition Policy into their competition systems. (Chapter 1 and 2)

2. To assess the implementation of the ASEAN Regional Guidelines on Competition Policy in Thailand, Indonesia, Singapore and Vietnam whether they have impediments in the implementation or not. (Chapter 3)

3. To address the main impediments and opportunities in implementing the ASEAN Regional Guidelines on Competition Policy into Thailand, Indonesia, Singapore and Vietnam. (Chapter 3)

4. To suggest some common recommendations on how to overcome impediments in implementing the Guidelines in order to make the implementing process of the Guidelines operational. (Chapter 5)

5. To suggest some common recommendations on how to strengthen the opportunities in implementing the Guidelines (Chapter 5)

1.4 Hypothesis

Implementing the ASEAN Regional Guidelines on Competition Policy helps creating fair competition environment. However, there are impediments in implementing the Guidelines. Political will, prioritizing and complying with ASEAN regional commitments and competition awareness are crucial factors for operational implementation of the Guidelines.

1.5 Scope of Dissertation

The scope of this dissertation is on the exploration and assessment of challenges and opportunities in implementing the ASEAN Regional Guidelines on Competition Policy in Thailand, Indonesia Singapore, and Vietnam. This study will focus on the main role of the ASEAN Regional Guidelines on Competition Policy in creating the fair competition. The free trade and free competition are not in the scope of this dissertation.

The rationales behind selecting these countries are various. They are the first groups of ASEAN Member States, which have applied competition laws. Some ASEAN members did not have applicable competition laws during the beginning of this study. Thailand is an interesting choice because it is the first country that introduced competition law; however, they face many problems in its application and enforcement. This findings and recommendation in dissertation limits the scope only to the Thai Trade Competition Act 1999 only. Indonesia presents the situation of a developing country with the civil law legal system, which introduced competition law

after Thailand but have higher experiences in the competition law enforcement. Singapore is selected to present different situation from the rest of AMSs because it is only developed country in ASEAN with more developed economy and legal infrastructure. Singapore is ranked as the top 2 most competitive country in this world and country with the business-friendly environment with low corruption rate in ASIA PACIFIC.36 Vietnam presents the situation of communist country with the Communist Party of Vietnam playing the lead role in its economy. Different countries present different situations so make it worth to conduct comparative study.

This dissertation will study challenges and opportunities in five main aspects, which are competition policy, competition law, enforcement, competition advocacy, and international cooperation. After identifying and analyzing these challenges and opportunities, the recommendations on how to overcome these main important challenges and strengthen opportunities will be proposed.

The ASEAN Regional Guidelines on Competition Policy does not specifically mention about sector regulators, such as telecommunication, transport and energy since in some countries these areas are exempted from the application of national competition law. They are subjected to sectoral regulations instead. Hence, the issues relating to specific sector regulators are outside the scope of this dissertation

[36] Singapore Government ‘ Facts and Rankings’ Retrieved 14 August 2017 from https: / / www. edb. gov. sg/ content/ edb/ en/ why-singapore/about-singapore/facts-and-rankings/rankings.html

1.6 Research Methodologies

This dissertation is a qualitative research.

1.6.1 Data Collection

Literature Base

The review of literatures, books, academic articles, reports, research, study, guidelines and recommendations from international institutions, for example OECD, ICN and UNCTAD, that related to competition issues including competition policy, the application of competition laws and the enforcement mechanisms in international level and in ASEAN level. The main literatures are related to legal, political-economy and economics fields.

Field Research

Interview (In-depth Interview)

The in-depth interview of scholars, officials of competition agencies, competition experts and practitioners in the field of competition laws in ASEAN members, which are Thailand, Indonesia, Singapore and Vietnam regarding the impediments found in the implementation of Guidelines in their countries, is the field research employed in this dissertation. The interviewing questions will be prepared before the face-to-face interviews mostly concerning the practical problems that cannot find in the literatures. The in-depth interviews of competition agencies' officials: both economists and legal officials, from Thailand, Indonesia, Singapore and Vietnam are conducted mainly concerning the practical problems, which hardly find from the literature review. Five main questions are prepared to interview, which are as follows:

1. Do you think the ASEAN Regional Guidelines on Competition Policy plays any role in your competition regime?

2. Do you have any action plan in implementing the ASEAN Regional Guidelines on Competition Policy in your country?

If the question is yes, please elaborate.

3. Do you have any problem or limitation in implementing the ASEAN Regional Guidelines on Competition Policy?

4. Do you have any plan to amend or develop the competition law or competition policy to be in accordance with the AEC's goal and the ASEAN Regional Guidelines on Competition Policy?

5. Do you have any cooperation agreement between countries regarding the enforcement of competition Laws? The outcome of the interviews will be summarized and put as a part of the findings of chapter 3. The names of interviewees are as follows:

Thailand

1. Mr. Santichai Santawanpas

Deputy Director-General, DIT, Ministry of Commerce

2. Mr. Wattanasak Suriam

Director of Trade Competition Bureau

3. Ms. Aramsri Rupan

Director of Expert Group, Business Competition Bureau

4. Ms. Yanisa Srisatvaja

Trade Officer, Business Competition Bureau

5. Mr. Pongkun Supavita

Trade Officer, Foreign Affair Unit, Business Competition Bureau

Singapore

1. Mr. Kong Weng Loong

Senior Assistant Director (Business & Economics); Head of Commitments and Remedies Unit, Competition Commission of Singapore (CCS)

Indonesia

1. Mr. Arnold Sihombing

Senior Investigation officer, Investigation Division of Enforcement Law Bureau, Komisi Pengawas Persaingan Usaha (KPPU)

2. Mr. Mohammad Reza

Head, International Cooperation Division, Komisi Pengawas Persaingan Usaha (KPPU)

Vietnam

1. Ms. Tran Thi Mins Phuong

Deputy Director, International Cooperation Division, Vietnam Competition Authority

2. Mr. Cao Xuan Hien

Head of Antitrust Division Vietnam Competition Authority (VCA)

3. Dr. Luu Huong Ly

Legal Officer at the Civil and Economic Law Department, Ministry of justice of Vietnam

1.6.2 Data Analysis

The data analysis on how to prove hypothesis will be divided into three main parts. The first part is proving that implementing the ASEAN Regional Guidelines on Competition Policy helps creating fair competition environment. The data collected from the literatures, economic theories related to competition concepts, roles and benefits of competition policy and law in level playing field as well as the role of ASEAN Regional Guidelines on Competition Policy towards the creation of fair

competition will be analyzed and prove the hypothesis. The objectives and goals of the AEC Blueprints and the ASEAN Regional Guidelines on Competition Policy will also be raised to support the analysis in this part. The analysis appears in the Chapter 1, 2 and 3.

The second part is proving that there are impediments in implementing the Guidelines. The prerequisite before analyzing this part is extracting the obligations under the ASEAN Regional Guidelines on Competition Policy to see the standards and frameworks of the Guidelines imposed on the AMSs to implement. After that these standards and frameworks will be set as benchmarks and compare with the competition situations in Thailand, Indonesia, Singapore and Vietnam to assess whether they can implement the Guidelines or not. The data collected for proving this part of hypothesis is from literature base and interview of staffs of competition agencies and competition experts, who are working or having experiences in the field of competition in Thailand, Indonesia, Singapore and Vietnam. The reports of competition agencies, researches and academic articles related to competition issues in these four selected countries are also examined and analyzed to get the findings. The findings concerning the impediments in implementing the Guidelines will be divided into five groups, which are competition policy, competition law, enforcement, competition advocacy and competition culture and finally international cooperation between ASEAN Member States. The analysis of each group of impediment appears in the Chapter 3.

At the end of the Chapter 3 the data analysis will be concluded in the table comparing which type of impediments are common problems among Thailand, Indonesia, Singapore and Vietnam and which impediments found only in some countries. This analysis will help drawing the appropriate solutions on how to overcome impediments in implementing the Guidelines in the final Chapter of this dissertation. Only identifying challenges in the implementing the Guidelines into Thailand, Indonesia, Singapore and Vietnam is not adequate to see the whole picture of implementing the Guidelines. This study also explores opportunities resulting from

implementing the Guidelines. The opportunities resulting from implementing the Guidelines will be addressed into two levels, which are opportunities in the ASEAN regional level and the opportunities in ASEAN Member States level.

The third part is proving that political will, prioritizing and complying with the ASEAN regional commitments and competition awareness are crucial factors for operational implementation of the Guidelines in these four countries. The data analysis of this part uses the findings of the Chapter 1,2,3 and 4 to analyze, synthesize and then extract the main reasons behind impediments in implementing the Guidelines in Thailand, Indonesia, Singapore and Vietnam. Another main objective of this dissertation is to suggest the solutions to overcome the impediments in implementing the Guidelines by taking the international best practices as benchmarks and assess experiences from matured and successful competition agencies, which are the United States, the European Union and Japan to study the ways they tackle the similar problems. The similarities and disparities between the approaches of these experienced jurisdictions will be identified and analyzed because this dissertation realizes that adopting the solutions taken by other matured competition regimes might not always be suitable for the context of ASEAN countries because most of them are developing countries. Therefore, the recommendations to overcome these challenges will be proposed by considering the possibility to be applied in the context of ASEAN Member States as a whole. This appears in the recommendations part of the final Chapter. While the recommendations to strengthen the opportunities in implementing the Guidelines is also in the final chapter and employ the similar data analysis.

1.7 Conceptual Framework

A main drive of ten countries in the South- East Asia to join the ASEAN Economic Community is opportunities and interests from the ASEAN economic integration including becoming the bigger single market to attract the foreign direct investment, increase better investment climate, progress in trade, economic growth and improving the living standards of the ASEAN people through more employment opportunities and reducing poverty through economic development. [37] The economic integration will make integrated countries better off where there are some barriers to free trade and free competition in this world. The theories of economic integration reflect the rationales of ASEAN economic integration. ' SHARED MARKET, SHARED BENEFITS' motivates ASEAN Members to agree on the AEC Blueprints to manage the whole system of ASEAN economic integration.

This study is related to one of the goals of the AEC Blueprint in turning ASEAN into a competitive economic region with fair competition environment and well-functioning market. ASEAN needs some tools to achieve this goal. "For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective. The fundamental goal of competition policy is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base, as well as to support the formation of a more competitive and innovative region."[38] Competition policy and law are used as the main tools to help achieving the AEC's goal and the common interests among ASEAN Member States from participating the ASEAN economic integration. Competition policy and law are also widely used to promote productivity and growth

[37] Benefits of the ASEAN Economic Community – AEC Retrieved 14 August 2017 from https://aseanup.com/benefits-asean-economic-community-aec/

[38] ASEAN Expert Group on Competition, ' ASEAN Competition Action Plan (ACAP) 2016-2025' Retrieved 14 August 2017 from http://www.asean-competition.org/about-aegc-asean-competition-action-plan-acap-2016-2025

of the economy[39], which are a part of expected benefits in the view of ASEAN members.

However, simply introducing competition policy and law in ASEAN Member States cannot automatically generates fair competition. Rather the competition policy and law should be sound enough to create level playing field and promote competition process.

Sound competition law needs to prohibit all anti-competitive conducts that harm competition. These prohibitions are based on the economic analysis that what kinds of conducts cause detrimental effects to competition, create monopoly or create barriers to trade will be prohibited. Competition law bases on the economic principle that competition is good and monopoly is bad because it bars allocative efficiency, dynamic efficiency and consumers may be exploited from output restriction, the set of unfair prices for low quality of products or services. This leads to a decline in consumer surplus and a deadweight welfare loss. This is why abuse of dominant position that consider causing exploitative behaviors towards consumers; tying, limitation of production and exclusionary behaviors towards competitors; predatory pricing, discriminatory behaviors should be prohibited under the competition law. Collusion between competitors distorts competition, especially collusion in the form of hardcore cartels; price-fixing cartels, output restriction, bid-rigging and market sharing, injure consumers and their social costs exceed the gain of the cartelists[40]; therefore, they should be subject to the strict liability rule; *per se* illegal. While some conducts that cannot exactly determine to produce more pros or cons to competition, for example vertical agreements and the merger control should be subject to the rule of reason analysis. Mergers and acquisitions can lead to pros and cons to economy so it should not be strictly prohibited. However, they should be controlled because they can lead to monopoly or significantly lessen competition in the market. It can be seen

[39] Nick Godfrey, 'Why is Competition Important for Growth and Poverty Reduction?' OECD Global Forum on International Business (27-28 March 2008) Retrieved 14 August 2017 from http://www.oecd.org/investment/globalforum/40315399.pdf

[40] Posner, Richard A., Economic Analysis of Law, 369

that economic theories and analysis play an important role in the application and enforcement of competition law

Merely introducing sound competition law is not enough but enforcement mechanism should be able to detect and sanction violated conducts under competition law. The competition agency should be equipped with adequate powers to effectively enforce the law. Staffs in competition agencies, commission and courts, which have jurisdictions in competition matters should have enough knowledge and expertise to deal with complicated nature of competition cases. Sanctions should be high enough to create deterrent. In other world, the whole national competition system should be work and able to create fair competition environment in the national level. Otherwise, the AEC Blueprint's goal in creating fair competition in ASEAN region will not be achieved if there is no fair competition in the national level of AMSs.

To ensure that all ASEAN Member States will have the sound competition policy and law as well as credible enforcement mechanism, which effectively enforce competition law and conduct competition advocacy. The ASEAN Regional Guidelines on Competition Policy was established as one of the tools in the AEC Blueprint to help achieving this goal. The Guidelines help enhancing the development of competition policies of all AMSs to foster the fair competition environment[41] and try to even the different level of competition policy and law in AMSs by basing them within the common framework of the ASEAN Regional Guidelines on competition policy. AMSs are required to implement the Guidelines into their national competition systems, which is designed to be a tool helping ASEAN to be competitive economic region.

This study categorizes the obligations under the Guidelines into four main obligations namely; 1. obligation to create fair and equal competitive conditions to all market participants, 2. obligation to create the highly competitive economic region 3. obligation to eliminate barrier to entry of trade and investment for ensuring free and open markets 4. obligation to establish transparency and fairness in competition regulatory process. The function of these four obligations aims to foster fair

[41] ASEAN Regional Guidelines on Competition Policy, Preface

competition environment. If AMSs implement these obligations into their national competition systems, this will help creating fair competition environment in each ASEAN member. If all ASEAN Members have fair competition environment, the fair competition environment in ASEAN regional level will be more achievable.

The obligations under the Guidelines will be examined and analyzed to extract the core principles and then use to be the benchmarks to assess whether there are any impediments in implementing the ASEAN Guidelines in Thailand, Indonesia, Singapore and Vietnam or not. These impediments are the challenges in implementing the Guidelines into the national competition systems, which bar the operational function of the Guidelines. Therefore, it is necessary to find the solutions to overcome these impediments to make the function of the Guidelines operational.

The solutions to overcome these impediments in implementing the Guidelines will be proposed according to the selection of main impediments basing on the frequency and detrimental effects of the impediments. The recommendations proposed under this dissertation aim to develop the national legal infrastructures, encourage necessary foundations and factors for the implementation of national competition policy and law basing on the common standards of the ASEAN Guidelines.

There are two sides of the same coin. Only identifying challenges in implementing the Guidelines cannot show the whole picture of implementing the Guidelines. This study also explores opportunities resulting from implementing the Guidelines. The opportunities resulting from implementing the Guidelines will be addressed into two levels, which are opportunities in the ASEAN regional level and the opportunities in ASEAN Member States level. The measures to strengthen these opportunities will be proposed in the final chapter of this dissertation.

The recommendations to overcome impediments and strengthen the opportunities will be proposed by considering the unique characteristics of ASEAN economic integration. ASEAN is an intergovernmental organization without any

establishment of supranational authorities to legislate laws and enforce them. Unlike the European Union, that have the supranational laws and authorities to monitor the function and compliance of economic integration. ASEAN economic integration is driven by the willingness to entering into a web of economic agreements between AMSs basing on the consensus base. Thus, ASEAN members engages in the horizontal relationship without the supranational force. The monitoring mechanism for non-complying with the ASEAN commitments is unique. It bases on the consultation and consensus with the influence of ASEAN Way. Therefore, any recommendations to solve impediments in implementing the Guidelines and strengthen opportunities must consider these ASEAN characteristics. This dissertation will find and propose some recommendations that are appropriate and consistent with the characteristics of the ASEAN economic integration.

1.8 Significance of the Study

This study is a significant endeavor in identifying challenges and opportunities in the implementation of the ASEAN Regional Guidelines on Competition Policy in Thailand, Indonesia, Singapore and Vietnam. By indicating the impediments found in the implementation of the Guidelines into Thailand, Indonesia, Singapore and Vietnam, ASEAN and AMSs can be acknowledged that the Guidelines are not well-implemented; therefore, it is unable to play its role in being a common framework and reference guidelines for these countries to develop their competition systems.

Furthermore, this study helps Thailand, Indonesia, Singapore and Vietnam realize these impediments and thus able to find solutions in order to overcome them. If there is no impediment in the implementation of the Guidelines, the Guidelines can completely play its role in developing competition policy and laws in these ASEAN Member States. Thus, the objectives of the Guidelines can be fulfilled.

Some ASEAN Member States, which just introduced competition laws from the obligation of the AEC Blueprints also able to learn some lessons from Thailand, Indonesia, Singapore and Vietnam concerning the problems in implementing the Guidelines. Therefore, the same mistakes or impediments could be avoided.

This dissertation does not only address the impediments in the implementation of the Guidelines, it also provides some recommendations on how to overcome the impediments found in the implementation of the Guidelines. This study will find out whether experience and approaches of other jurisdictions, which have more mature competition regimes and used to face these kinds of problems could be appropriately applied to the ASEAN or not.

By being able to address the impediments and find solutions to overcome the implementation's problems of the Guidelines will bring about the benefits to the ASEAN as a whole because the ASEAN can ensure that the process of the implementation of the Guidelines into the competition policies and competition laws of those aforementioned countries is operational and continue according to the latest ASEAN competition action plan (ACAP 2016-2025). The ASEAN can also ensure that the goals of the Guidelines and the AEC Blueprints are capable of being fulfilled in order to achieve the ultimate goals of the ASEAN economic integration.

Another benefit of this study is making the ASEAN Member States realize the opportunities of incorporating and implementing the competition policy into their countries. By being able to realize the opportunities and benefits received from implementing the Guidelines, ASEAN members will be more encouraged to develop their competition policy and laws consistently with the framework and standards of the Guidelines

The last chapter of this study will recommend on how to modify and develop the new updated version of the Guidelines to reflect any changes and development in ASEAN and in international best practices as well as conforming to the degree of ASEAN economic integration in the future. This will be helpful to drafters of the new version of the Guidelines.

This dissertation will also serve as a future reference for researchers to study further on the ASEAN Regional Guidelines on Competition Policy including its connection to the development of competition policies, competition laws and ASEAN economic integration.

1.9 Relevant Legal Theories and Economic Theories

Relevant Legal Theories

- The Effect Doctrine
- The Implementation Approach
- The Rule of Reason Doctrine
- The Merger Doctrine
- The International Comity Principle
- Jurisdiction (Extraterritorial application issue)
    1. Territorial Principle
    2. Objective Territoriality
    3. Nationality Principle[42]
- Sovereign Equality Principle in International Law
- Public International Ban on Intervention (Public International Law)

[42] Jörg Philipp Terhechte, International Competition Enforcement Law Between Cooperation and Convergence, (Springer 2011) 41. In practice, the nationality principle is no longer play a significant role in the competition enforcement law.

- Foreign Sovereign Compulsion

- The Principle of State Immunity

- Sovereign Immunity

- Act of State

- The Doctrine of *forum non conveniens*[43]

Relevant Economic Theories

- Theories of Economic Integration

- Theories of Competition

- Theories of Monopoly

1.10 Relevant Legislations

- Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No.54 of April 14, 194

- Clayton Act

- European Competition Law

- Indonesia's Anti-Monopoly and Unfair Competition Law

- Sherman Act

- Singapore Competition Act

- Thai Trade Competition Act (1999)

- Vietnam Competition Law No.27/2004/QH11

[43] The doctrine used in the United States' courts for dismissing the case where the alternative foreign forum is found to be more convenient. However, this doctrine is available only if there is adequate alternative remedy in foreign jurisdiction. This doctrine will be impossible to be raised, if no private right of action is permitted in the alternative jurisdiction. Therefore, this doctrine is not the ultimate solution for the implementation conflict See: Hannah L. Buxbaum, 'Jurisdictional conflict in global antitrust enforcement', (2004). Faculty publications. Paper 325. <http://www.repository.law.indiana.edu/facpub/325> 375 See also the Capital Currency Exchange, N.V. v. National Westminster Bank PLC

1.11 Relevant Cases

Relevant Cases on Extraterritorial Application

(These cases show the development of case law regarding extraterritorial application and to what extent it can be applied.)

American Banana Company V. United Fruit Company 213 U.S. 347 (1909)

Empagran, S.A. v. F. Hoffmann-LaRoche, Ltd. 542 US 155 (2004)

Timeberland Lumber Co V. Bank of America 549 F.2d 597, 613 (9th Cir. 1976)

Hardford Fire Insurance Co., et al. v. California et. Al 113 S. Ct. 2891 (1993)

United States V**.** Aluminum Company of America 148 F.2d 416 (2nd Cir. 1945)

Westinghouse Electric Corporation v. Rio Algom Ltd., 617 F.2d 1248 (7th Cir.) 1980

Matsushita Electric Industrail Co. Ltd, et al v. Zenith Radio Corp. et al. 475 U.S. 574 (1986)

US V. Nippon Paper Indus. Co., Ltd 109 F.3d I cert Denied, 118 S. Ct. 685 (1988)

Case 48/69 etc *ICI* v Commission [1972] ECR 619, [1972] CMLR 557. (Dyestuff case)

Case 114/85 etc A Ahlström Oy v Commission [1988] ECR 5193, [1988] 4 CMLR 901. (Wood Pulp case)

Cartel Cases

(For studying the process of cartel enforcement mechanism in the foreign competition jurisdictions)

Lysine and Citric Acid Cartel

Sodium Gluconate Cartel

US V. Nippon Paper Indus. Co., Ltd 109 F.3d I cert Denied, 118 S. Ct. 685 (1988). (Nippon Paper Cartel**)**

Vitamin Cartel

United States v. Socony-Vacuum Oil Co.

Ball Bearings International Cartel in Singapore

Merger Cases

General Electric/Honeywell v. Commission (2001) COMP/M.2220,

Case COMP/M.6796 *Aegean/Olympic II* EU commission

FTC v. Procter & Gamble Co., 386 U.S. 568 (1967)

Singapore Ball Bearing Case

Abuse of Dominant Position Cases

(The examples of abuse of dominance cases)

SISTIC.com Pte Ltd v. Competition Commission of Singapore

Case 27/76 United Brands v. Commission [1978] ECR 207, 1 CMLR 429

Hilti v. Commission [1991] ECR II-1439, [1992] 4 CMLR 16

Rule of Reason

(The example of the rule of reason's analysis in competition cases)

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)

Addyston Pipe and Steel Co. v. United States 175 U.S. 211 20 S Ct.96; 44 L. Ed. 136 (1899)

1.12 Relevant International Recommendations and International Best Practices

International best practices are used to be the benchmark and direction to provide the suitable recommendations to overcome the specific impediments as well as strengthening opportunities in the implementation of the ASEAN Regional Guidelines on Competition Policy. However, this dissertation concerns that one size does not fit all. Therefore, international best practices are simply used as a benchmark but recommendations will be suggested to conform to the context of ASEAN and the circumstances of ASEAN members that have various level of competition regime development.

International Best Practices concerning the Substantive Competition Law

- OECD Report on Hard Core Cartels 2000
- OECD Recommendations & Best Practices (Revised recommendation of the Council concerning cooperation between Member countries on Anti-competitive Practices affecting International Trade
- UNCTAD "Model Law on Competition 2010"
- UNCTAD "Model Law on Competition (Revised Chapters) 2015"
- ICN Merger Working Group Project on Remedies in Merger Review: Interim Report, March 2015
- ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, Interagency Coordination (2004)
- ICN: The Analytical Framework for Merger Control
- ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 2007

International Best Practices concerning the Improvement Competition Agency's Effectiveness and Capacity Building

- OECD Roundtable on Changes in Institutional Design of Competition Authorities (2014) " COMPETITION AGENCIES, INDEPENDENCE, AND THE POLITICAL PROCESS" -- Chapter by William Kovacic (George Washington University, United States)

- OECD Roundtable on Changes in Institutional Design of Competition Authorities (2014) " INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES" -- Note by Allan Fels and Henry Ergas –

- OECD GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE 2005

- OECD WORKING PARTY ON REGULATORY MANAGEMENT AND REFORM DESIGNING INDEPENDENT AND ACCOUNTABLE REGULATORY AUTHORITIES FOR HIGH QUALITY REGULATION (Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005)

- ASEAN Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN

- ICN Agency Effectiveness Chapter 1 "Strategic Planning and Prioritisation " (2010)

- ICN Agency Effectiveness Chapter 4 "Human Resources Management in Competition Agencies" (2014)

- ICN Competition Policy Implementation Working Group " Lesson to be learnt from the experiences of young competition agencies" (2006)

- ICN Agency Effectiveness Project on Investigative Process "Competition Agency Transparency Practices" (2013)

- ICN Report Lessons to be Learnt From The Experiences Of Young Competition Agencies (2009)

- ICN Report on Competition and the Judiciary

- UNCTAD “Foundations of an Effective Competition Agency” (2011)

- UNCTAD “Independence and Accountability of Competition Authorities” (2008)

- UNCTAD “Prioritization and resource allocation as a tool for agency effectiveness” (2013)

- UNCTAD Report by the secretariat “Criteria for Evaluating the Effectiveness of Competition Authorities” (2007)

International Best Practices concerning the Improvement of Investigation and Enforcement Mechanism

- OECD Council Recommendation concerning Effective Action Against ‘Hard Core’ Cartels (1998)

- OECD Policy Roundtables “The Role and Measurement of Quality in Competition Analysis” (2013)

- OECD BEST PRACTICE PRINCIPLES FOR IMPROVING REGULATORY ENFORCEMENT AND INSPECTIONS (2013)

- OECD Roundtable, Promoting Compliance with Competition Law (2011)

- ICN Agency Effectiveness Project on Investigative Process “Investigative Tools Report” (2013)

- ICN Agency Effectiveness Project on Investigative Process “Competition Agency Confidentiality Practices” (2014)

- ICN Roundtable Report on Competition Agency Investigative Process (2014)

- ICN Anti-Cartel Enforcement Manual: Chapter 5 Investigative strategy and interviewing Section I: Investigative strategy

- ICN ANTI-CARTEL ENFORCEMENT MANUAL: Cartel Case Initiation 2010

- ICN ANTI-CARTEL ENFORCEMENT MANUAL: Digital Evidence Gathering 2010

International Best Practices concerning the International Cooperation

- OECD Reports on Positive Comity (1999)

- OECD Challenges of International Co-operation in Competition Law Enforcement (2014)

- Secretariat Report on the OECD/ ICN Survey on International Enforcement Co-operation (2013)

- ICN Cartel Working Group paper, Cooperation Between Competition Agencies in Cartel Investigations (2007)

- ICN Report Cooperation Between Competition Agencies in Cartel Investigations Report

International Best Practices concerning the Competition Advocacy and Competition Culture

- ICN Advocacy Working Group Competition Culture Project Report (2015)

- ICN Report on Competition Advocacy Assessment

- ICN Report on Advocacy and Competition Policy (2002)

1.13 Relevant Bilateral Agreements

- Agreement Between the European Communities and the Government of the United States of the America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws

- Agreement Between the Government of the United States of the America and the Commission of the European Communities regarding the Application of their Competition Laws

- AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF JAPAN CONCERNING COOPERATION ON ANTI-COMPETITIVE ACTIVITIES

- Japan-Singapore Agreement for a new age economic partnership 2002

- Japan- Malaysia Economic Partnership Agreement 2006

- Japan- Thailand Economic Partnership Agreement 2007

1.14 Dissertation Outline

Chapter 1 shows an introduction, background and overall conceptual framework of this study. It also shows the scope, objective and significance of this dissertation. The research methodologies and the main principles and theories, which are employed in this study, are discussed here in this chapter.

Chapter 2 outlines the background, objectives, significance and structure of the ASEAN Regional Guidelines on Competition Policy. It also identifies the main prohibitions of anti-competitive conducts under the ASEAN Regional Guidelines on Competition Policy and their rationales of the prohibitions in the economic aspect by categorizing these prohibitions into four main ASEAN obligations.

Chapter 3 presents challenges and opportunities in the implementation of the ASEAN Regional Guidelines on Competition Policy in Thailand, Indonesia, Singapore and Vietnam. The challenges in implementing the Guidelines into these countries will be divide into five mains impediments; namely competition policy, competition law, enforcement, competition advocacy and competition culture and finally international cooperation. Each impediment will be raised and elaborated into its character. At the end of the chapter there will be a chart presenting all impediments whether they are commonly faced by the four selected countries or they are unique obstacle found only in single jurisdiction. While the opportunities received from ASEAN Member States implementing the ASEAN Regional Guidelines on Competition Policy will be the presented in two levels, which are the opportunities in ASEAN regional level and opportunities in ASEAN Member States level.

Chapter 4 presents the approaches and solutions of the international best practices suggested by the international organizations on how to solve the relevant challenges. Another part concerns the comparative analysis of approaches and solutions taken by the important jurisdictions, which are matured and have the successful competition regimes; namely the United States, the European Union and Japan on how to overcome the similar impediments as faced by the four ASEAN Member States. These international best practices and solutions of these foreign competition jurisdictions will be used as the benchmarks and direction for the proposed recommendations under the Chapter 5.

Chapter 5 analyzes the approaches identifies in the Chapter 4 and concludes whether they can be appropriately and possibly applied in the context of ASEAN. Some best practices, cases studies, experiences and approaches will be discussed before drawing to the common recommendations for ASEAN in making the implementation of the Guidelines operational and able to achieve its goals. This chapter then presents the conclusion and suggestion of this dissertation.

Note

It must be noted the words competition agency, competition authority and competition regulatory body are used interchangeably under this dissertation. While 'the Guidelines' refers to the ASEAN Regional Guidelines on Competition Policy.

1.15 Literature Reviews

There is no direct literature related to this dissertation topic. However, there are some literatures that are related and can be used as sources of information for the analysis under this dissertation.

1. Pornchai Wisuttisak, ' The ASEAN competition policy guidelines and its compatibility with ASEAN member countries competition law', (paper submission to 3rd Biennial Conference of Asian Society of International Law Beijing, 27-28 August 2011)

This paper shows the background and the role of the ASEAN Regional Guidelines on Competition Policy and the overview of competition main problems in Thailand, Indonesia, Singapore and Malaysia. Then these problems are drawn to the content of the ASEAN Regional Guidelines on Competition Policy to assess the compatibility. However, this paper raises only limited competition issues, particularly on the exclusions and exemption under the national competition laws related to state-owned enterprises in the national competition system of these four countries to examined and analyzed. Therefore, it does not cover the whole competition systems to be able to assess the whole compatibility or incompatibility between the national competition systems and the framework of the ASEAN Regional Guidelines on Competition Policy. Rather this paper selects to show only limited incompatibility issues between the national laws of these countries and the content of the Guidelines. Moreover, the data provided under this paper is not quite updated relying on information before 2011. Then the analysis is made consistent with the situations before ASEAN becoming the ASEAN Community in 2015. However, this paper is beneficial to be used as a ground for further analysis of the direction of the ASEAN competition policy.

2. Sakda Thanitkul, ‘ Competition Laws of ASEAN Member States’ Winyuchon Publication House (2560)

This is a great book compiling competition laws and enforcement mechanisms of ten ASEAN Member States with a review of legal, political and economic systems of each ASEAN Member. This book is used to review the findings of the Chapter 3 related to competition laws and enforcements in Thailand, Indonesia, Singapore and Vietnam. The information about the US antitrust system and Japanese competition law systems of this book is beneficial for the analysis under the Chapter 4 and recommendations under the Chapter 5.

3. Mark Williams, ‘The Political Economy of Competition Law in Asia’ , Edward Elgar Publishing Limited, (Edward Elgar Publishing Limited 2013)

This book is a great source for conducting the deep analysis under this dissertation concerning the specific environmental circumstances and limitations, which affect the operational of national competition policy, the application and enforcement of competition law in different countries in ASIA. This book is useful for the findings, analysis and recommendations under the Chapter 3, 4 and 5 in the context of the main selected ASEAN countries: Thailand, Indonesia, Singapore and Vietnam and the country with the oldest antitrust system in Asia: Japan. Each chapter of this book is written by the local competition experts in different Asian countries, who have experiences and know the real competition problems.

To understand the competition problems of each country and provide suitable recommendations, these political economy factors cannot be ignored. The relevant political economy factors are various and the interplay of these factors affect the successful or failure of the competition policies, laws and enforcement in ASIAN countries in the different ways. The interplay of history, culture, politics, economic, social, the role of government in the market economy, level of rule of law and corruption, the nexus between the government and the vested interests in the country and the background behind the introduction of competition law, architectures of enforcement machinery of each country are examined. This book helps finding and understanding the reasons behind the national competition problems in Thailand, Indonesia, Singapore and Vietnam. It can be used as a ground for the analysis of impediments in implementing the ASEAN Regional Guidelines on Competition Policy in these four ASEAN members. The recommendations in the Chapter 5 of this dissertation are provided by taking into account these common environmental factors.

4. Pornchai Wisuttisak, Nguyen Ba Binh, ‘ ASEAN Competition Law and Policy; Toward Trade Liberalization and Regulation Market Integration (Paper Presented at ICIRD 2012 International Conference, Chiangmai Thailand 2012)

This paper shows an importance of ASEAN competition policy and law toward ASEAN liberalization and facilitate regional market integration through the role and function of competition policy and law in level playing field and reduce market barriers. This helps proving that the role of the competition policy and law are significant to the achievement of the AEC’ s goals. Moreover, some challenging issues of the ASEAN competition policy and law are addressed as

1. ASEAN having unbinding competition rules and policy and weak implementation and enforce of competition law and policy

2. ASEAN does not have main supranational institutions for implementation of competition law and policy:

3. A disregard on the state enterprises which are main market players in the ASEAN region;

These addressed issues can be used as the grounds for further analysis under this dissertation concerning the current ASEAN competition policy and law and their possible development under the ASEAN Competition Action Plans 2016-2025.

CHAPTER 2
ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY AND THEIR OBLIGATIONS

2.1 ASEAN Regional Guidelines on Competition Policy

2.1.1 Background

For ASEAN to be highly competitive economic region, competition policy and competition law are the necessary factors because they used to level playing field and prevent the distortion of competition by prohibiting anti-competitive conducts to ensure the fair competition environment that support the well-functioning market. It is expressly indicated in the AEC Blueprint 2025 that

"For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective.The fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base, as well as to support the formation of a more competitive and innovative region."[44]

The ASEAN Regional Guidelines on Competition Policy was completed with the assistance from InWEnt-Capacity Building International, Germany and support from the ASEAN Experts Group on Competition (AEGC) and relevant ministries in ASEAN Member States. Then the Guidelines was adopted by the AEGC, which composed of representatives from ASEAN Member States in 2010. The Guidelines is ASEAN public document used as a living reference for ASEAN Member States to introduce, implement and develop their competition policies basing on countries experiences and international best practices. The ASEAN Member States are enabled to adopt the Guidelines in accordance with specific legal and economic contexts of each member.[45]

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[44] AEC Blueprint 2025, B. A Competitive, Innovative and Dynamic ASEAN

[45] ASEAN Regional Guidelines on Competition Policy, Preface and Background

The role of the Guidelines has become more prominent and influential in the AEC Blueprint 2025 since the first strategic measure imposing AMSs' obligations to effectively implement their domestic competition laws basing on the agreed-upon ASEAN Guidelines.

"...effectively implement national competition laws in all ASEAN Member States based on international best practices and agreed-upon ASEAN guidelines;"[46]

2. 1. 2 Objectives and Goals of the ASEAN Regional Guidelines on Competition Policy

The objective of the Guidelines is being used as the common framework guide for all ASEAN Member States to introduce, implement and develop their competition policies and competition laws with the view to create fair competition environment in ASEAN.

2.1.3 Roles of the ASEAN Regional Guidelines on Competition Policy

This ASEAN Regional Guidelines on Competition Policy functions as general framework guide for ASEAN Member States, which have no specific competition laws in force, to introduce and implement competition policy. While countries that have already enforced competition rules; Singapore, Thailand, Indonesia, Malaysia and Vietnam, the Guidelines works as common framework guide for them to implement and further develop their competition policy and laws.[47]

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[46] AEC Blueprint 2025, B. A Competitive, Innovative and Dynamic ASEAN, Strategic measures

[47] ASEAN Regional Guidelines on Competition Policy, Chapter 1.2

[*] "The ACAP which will guide the work of the AEGC for the next 10 years contains the following strategic measures:

1. Establish effective competition regimes by putting in place competition laws for all remaining ASEAN Member States that do not have them, and effectively implement national competition laws in all ASEAN Member States based on international best practices and agreed-upon ASEAN guidelines;
2. Strengthen capacities of competition-related agencies in ASEAN Member States by establishing and implementing institutional mechanisms necessary for effective enforcement of national competition laws, including comprehensive technical assistance and capacity building;
3. Foster a "competition-aware" region that supports fair competition, by establishing platforms for regular exchange and engagement, encouraging competition compliance and enhanced access to information for businesses, reaching out to relevant

By implementing the Guidelines into AMSs' s competition system, it can be ensuring that there will be consistency in regional development of competition laws according to the common timeframe and plans of the AEC Blueprint. During 2008-2015 the Guidelines facilitate the achievement of Strategic Schedule for ASEAN Economic Community of the AEC Blueprint by being a reference source of best practices in the context of competition policy and law for ASEAN members in introducing competition policy. The Guidelines continues to play a vital tool in the context of competitive region in ASEAN in the post 2015. According to the ASEAN Competition Action Plan (ACAP) 2016-2025, the Guidelines still be used as an important tool to enable the effective implementation of national competition laws in all AMSs by providing basic legal and institutional framework for narrowing the disparities between national competition laws of AMSs in order to create more convergence and enhancing competition policy and law in ASEAN basing on the framework indicated in the Guidelines.* Therefore, implementing the Guidelines is a way to create the initial step of more convergence in competition laws across ASEAN. The Guidelines helps enhancing more evenly developed competition regime among AMSs for deeper cooperation in competition policy in the future.

As a result of the Guidelines are carefully drafted basing on the compilation of international best practices around the world, this helps the competition laws of all AMSs being developed basing on international best practices and conforming to international standards. By AMSs implementing the Guidelines, the competition law of all AMSs will automatically enhanced in the same direction to the global international

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stakeholders through an enhanced regional web portal for competition policy and law, outreach and advocacy to businesses and government bodies, and sector-studies on industry structures and practices that affect competition;

4. Establish Regional Cooperation Arrangements on competition policy and law by establishing competition enforcement cooperation agreements to effectively deal with cross-border commercial transaction;
5. Achieve greater harmonisation of competition policy and law in ASEAN by developing a regional strategy on convergence;
6. Ensure alignment of competition policy chapters that are negotiated by ASEAN under the various FTAs with Dialogue Partners and other trading nations with competition policy and law in ASEAN to maintain consistency on the approach to competition policy and law in the region; and Continue to enhance competition policy and law in ASEAN taking into consideration international best practices."

standard and best practices because the Guidelines itself was drafted basing on country experiences and international best practices.[48]

2.1.4 Benefits of the ASEAN Regional Guidelines on Competition Policy

The benefits from implementing the ASEAN Regional Guidelines on Competition Policy can be divided into two groups.

2.1.4.1 The Benefits of the ASEAN Regional Guidelines on Competition Policy towards the AEC's Goal: Competitive Economic Region and Economic Efficiency

The purpose of the ASEAN Regional Guidelines on Competition Policy is to create the fair competition environment and enhance competitive process in all ASEAN Members States.[49] By effectively implementing what recommended in the Guidelines, the AMSs can enhance their competition policy and competition law to reach the ASEAN common acceptable standards and being able to create fair competition environment as set in the goal of the Guidelines. The implementation of effective competition policy and law positively affect the intensity of competition in that country and the expansion of more efficient private companies.[50] The Guidelines clearly identifies the objective and benefits of competition policy in chapter 2.2:

> ***" The most commonly stated objective of competition policy is the promotion and the protection of the competitive process. Competition policy introduces a " level-playing field" for all market players that will help markets to be competitive. The introduction of a competition law will provide the market with a set of " rules of the game" that protects the competition process itself, rather than competitors in the market. In this way, the pursuit of fair or effective competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare."***[51]

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[48] ASEAN Regional Guidelines on Competition Policy, Preface

[49] ASEAN Regional Guidelines on Competition Policy, chapter 1.2.1 and chapter 1.2.2

[50] Mark A. Dutz, Maria Vagliasindi OECD Global Forum on Competition 'Competition Policy Implementation in Transition Economies: An Empirical Assessment' 2002, 2

[51] ASEAN Regional Guidelines on Competition Policy, chapter 2.2

Companies in the society that has the fair competition environment will be more competitive in providing better quality of goods or services in order to gain the market shares. Consequently, more varieties of choices and promotions will be proposed to consumers. Fair competition protects the competition process and encourages the functioning of market mechanism and then leading to more efficient resources allocation. The function of market mechanism will decide the real winners and expel the losers out of the market. The problem of government picking up the winners and rescuing the losers will be lessened if the competition policy and law is effectively implemented in that country.

Competition policy protects competition process and guarantee the free market access by eliminating monopoly and other anti- competitive behaviors. Therefore, competition policy brings about economic efficiency in production. Consumers will be better off from the lowered prices of goods and services and better quality of products.[52] Strengthening competition policy and applying competition law can lead to greater production, an increase of consumer and producer welfare, economic growth and dynamic efficiency. [53] More competition helps ensuring the more efficient allocation of resources and promote consumer well-being. [54] Furthermore, competition policy creates fair business environment. Fair competition among companies provides many benefits to the economy and consumer. Consumers can benefit from fair competition because it creates constant pressure for companies to offer best price and quality product.[55] Since competition creates fair pricing and better quality of products, consumers can afford to purchase satisfying quality of products at reasonable price. By having demand in the market encourages entrepreneurs within

[52] Cornelius Dube, ‘Competition Policy and Economic Growth – Is There a Causal Factor?’, CUTS Centre for Competition, Investment & Economic Regulation No. 4/2008, <http://www.cuts-international.org/pdf/CCIER-2-2008.pdf > accessed 19 May 2016

[53] UNCTAD, Empirical Evidence of the Benefits from applying Competition Law and Policy Principles to Economic Development in order to attain Greater Efficiency in International Trade and Development, (Report, 18 September 1997.)

[54] Maurice E. Stucke; Is competition always good?. *J Antitrust Enforcement* 2013; 1 (1): 162-197.,162 doi: 10.1093/jaenfo/jns008,

[55] Antony Seely, ‘The UK Competition Regime: The Purpose of Competition Law’ <http://www.parliament.uk/business/publications/research/briefing-papers/SN04814/the-uk-competition-regime> accessed 29 November 2014

[55] ASEAN Regional Guidelines on Competition Policy, chapter 2.2.2

the market to produce. The increase of production, investment will constantly flow to different channels involved, such as more employment and manufacturing workers. The more production is increased, the more salary and overtime payment. With the increase of income, it will create more spending within the market. This flow of money generally boosts economy.

Developing countries, particularly in the period of privatization and liberalization of market, can enjoy the benefits of competition policy because the competition policy is necessary to monitor the growing role of private companies by ensuring that public monopoly are not replaced by private monopoly.[56] Competition policy complements trade and industrial policy.[57] Competition policy creates fair competition environment, which helps increasing foreign investors' confidence because free market access and no benefits of trade lost from anti-competitive conducts are guaranteed.[58] Moreover, competition policy can accommodate other policy objectives, for instance promotion of consumer welfare, integration of national markets, promotion of regional integration, promotion of product innovation and technological advancement.[59]

Competition policy not only renders economic benefits but also social benefits. "Competition policy also promotes good governance in corporate sector as well as in government by diminishing the opportunities for rent-seeking behavior and the corruption that often accompanies it."[60] All of these benefits cannot happen in the monopoly market without fair competition.

In summary, competition policy help leveling the playing field and ensuring there is a competition in the market. Open and competitive market brings about lower prices and better products, services and choice for consumers, make businesses more efficient and innovative, enhance productivity and also help small businesses to grow

[56] ibid, chapter 2.2.4

[57] ibid, chapter 2.2.4

[58] ibid, chapter 2.2.3

[59] Pradeep S. Mehta, 'Competition Policy in Developing Countries: An Asia-Pacific Perspective' [2002] Bulletin on Asia-Pacific Perspective 2002/03, 82

and capable of entering into new markets.[61] In conclusion, by implementing the Guidelines into competition policy and law, ASEAN can be ensured that that competition policy of every ASEAN Member State will have the common objective, which is to enhance competitive process and create fairer competition environment and thus potentially leading to the efficient allocation of resources.[62] If all the AMSs can effectively implement the Guidelines, ASEAN can be ensured that the promotion of fair competition will be an engine of economic efficiency and economic development in ASEAN.[63] The Guidelines is also benefiting as the pioneer attempt to set the competition common framework among all AMSs. If the AMSs can implement the Guidelines effectively, in the future AMSs will be able to achieve the one step further of the competition strategic goal of ' moving towards greater harmonization of competition policy and law in ASEAN'.[64]

[61] BIS, 'A Competition Regime for Growth: a consultation on options for reform' (March 2011 para 1.1) in Antony Seely, 'The UK Competition Regime: The Purpose of Competition Law'
<http://www.parliament.uk/business/publications/research/briefing-papers/SN04814/the-uk-competition-regime> accessed 29 January 2015

[61] Pradeep S. Mehta, 'Competition Policy in Developing Countries: An Asia-Pacific Perspective' [2002] Bulletin on Asia-Pacific Perspective 2002/03, 79

[61] Akash Bhatt, Eritriya RoyFair, 'Competition: An Engine of Economic Development' Econ World 2016 Barcelona 01-03 February 2016

[62] Pradeep S. Mehta, 'Competition Policy in Developing Countries: An Asia-Pacific Perspective' [2002] Bulletin on Asia-Pacific Perspective 2002/03, 79

[63] Akash Bhatt, Eritriya RoyFair, 'Competition: An Engine of Economic Development' Econ World 2016 Barcelona 01-03 February 2016 <http://barcelona2016.econworld.org/programme_papers/papers/Bhatt_Roy_Fair.pdf> accessed 18 May 2016

[64] AN ASEAN COMPETITION ACTION PLAN (2016-2025) It must be noted that this one step further goal of greater harmonization of competition policy and law in ASEAN will only be fulfilled after the first and second competition strategic goals under the AEC Blueprint has already achieved, which are establishing effective competition regimes in all ASEAN Member States and competition authorities have capacities to effectively enforce their competition rules.

2.1.4.2 The Benefits of the ASEAN Regional Guidelines on Competition Policy towards the Process of ASEAN Economic Integration

The ASEAN Regional Guidelines on Competition Policy clearly states its benefits to the process of building firmer ASEAN economic integration as follows:

> ***" The Regional Guidelines endeavour to help in the process of building stronger economic integration in the region, by acting as a common reference guide for future cooperation to enhance the competitive process in the AMSs."***[65]

Competition policy plays a vital role in helping in the process of building stronger ASEAN economic integration in terms of highly competitive economic region.[66] By implementing and adhering to the Guidelines, ASEAN Member States would have a tool to cope with trade and investment barriers occurring from private anti-competitive conducts. Lowering barriers in trade and investment would significantly help fostering firmer ASEAN economic integration because merely the adoption of government measures in reducing trade barriers could not perfectly achieve single market, production base and highly competitive economic region. It is also necessary to reduce trade and investment barriers occurring from the actions of private sectors. The goals of the AEC Blueprint cannot be fully achieved unless the public and private barriers to trade and investment in ASEAN are eliminated at the same time. This is a rationale behind the competition policy and law come to play an important role in getting rid of anti-competitive conducts that obstruct the free and fair trade in ASEAN. The examples of anti-competitive behaviors that could impede the competitive market in ASEAN and hinder process of economic integration includes cartels, abuse of dominant positions, anti-competitive mergers and other restraints to competition.[67] This is the reason why the Guidelines recommend all ASEAN Member States to prohibit these

[65] ASEAN Regional Guidelines on Competition Policy, chapter 1.2.2

[66] ASEAN Regional Guidelines on Competition Policy, chapter 1.2.2

[67] Wiran Pupphavesa et al, 'Competition Policy, Infrastructure, and Intellectual Property Rights' in Michael G Plummer and Chia Siow Yue (eds), Realizing the ASEAN Economic Community: A Comprehensive Assessment (2009)

anti- competitive conducts. The establishment of competition agency to enforce competition laws in accordance with what stated in the Guidelines is the way that AMSs implementing the Guidelines. If all ASEAN Member States can successfully implement the Guidelines into their competition policies and laws without any impediment, anti-competitive conducts will be detected; fair competition environment and more opportunity to achieve the goal of ASEAN: highly competitive economic region will be created. Firms in one country will have more opportunities to compete in other ASEAN countries regardless of their nationality because having competition law leveling the playing field.[68]

2.1.5 Structure of the ASEAN Regional Guidelines on Competition Policy

The structure of the ASEAN Regional Guidelines on Competition Policy is divided into ten chapters:

Chapter 1: Objectives of Regional Guidelines

Chapter 2: Objectives and Benefits of Competition Policy

Chapter 3: Scope of Competition Policy and Law

Chapter 4: Role and Responsibilities of Competition Regulatory Body/ Institutional Structure/

Sector Regulators

Chapter 5: Legislation and Guidelines/ Transitional Provisions

Chapter 6: Enforcement Powers

Chapter 7: Due Process

Chapter 8: Technical Assistance and Capacity Building

[68] Claus-Dieter Ehlermann, 'The Contribution of EC Competition Rules to the Single Market' (1992) 29(2) Common Market Review in Pornchai Wisuttisak, The ASEAN competition policy guidelines and its compatability with ASEAN member countries competition law, (paper submission to 3rd Biennial Conference of Asian Society of International Law Beijing, 27-28 August 2011).

Chapter 9: Advocacy/ Outreach

Chapter 10: International Cooperation/ Common Competition Related Provisions in Free Trade Agreements

2.2 Obligations under the ASEAN Regional Guidelines on Competition Policy

This dissertation categorizes all the contents of the Guidelines into four main obligations. These four obligations enable the better understandings of what kinds of obligations that ASEAN Member States should follow under the ASEAN Regional Guidelines on Competition Policy.

1. Obligation to create fair and equal competitive conditions to all market participants

2. Obligation to create the highly competitive economic region

3. Obligation to eliminate barrier to entry of trade and investment for ensuring free and open markets

4. Obligation to establish transparency and fairness in competition regulatory process

The composition and details of each obligation are elaborated as follows:

2.2.1 Obligation to Create Fair and Equal Competitive Conditions to All Market Participants

The obligation to create fair and equal competitive conditions to all market participants helps enhancing regional economic performance in the long run. It also makes ASEAN an attractive destination for investment because fair and equal competitive market is a desirable environmental factor. This obligation includes many parts of the Guidelines.

2.2.1.1 Prohibition of Abuse of Dominant Position

The prohibition of abuse of dominant position can be found in the Chapter 3.3 of the Guidelines. Possessing the dominant position is not illegal because dominant position can be obtained because of something unique about the products the company serves in the market, such as the advance in technology invested in its products. In this way, this company obtaining the dominant position results from the big investment for the exchange of high technology, know-how or research facilities. As long as the dominant firm plays the fair game and respect the competition law, it deserves no punishment of being successful market player.

The concept of prohibition of abuse of dominant position is about preventing a single firm, or a few firms from exploiting market power or use inappropriate ways to attain or retain market power. The prohibition of abuse of dominant position recommended in the Guidelines includes both the exploitative behaviors and exclusionary behaviors. For the sake of flexibility for all ASEAN Member States, the Guidelines simply recommends that AMSs should outlaw the behaviors that are considered being in the scope of abuse of dominant position. However, the Guidelines does not indicate the specific criteria for proving the status of dominant position of firms. ASEAN Member States; thus, are left to decide what criteria whether prescriptive or indicative are used to decide the possessing of dominant position in the market. Some ASEAN countries may use the market share threshold test for deciding what firms possessing dominant position in the market, for example Thailand and Vietnam. While Singapore does not have the strict criteria but rather deciding what firm possessing dominant position in the market on the case-by-case basis. The Guidelines gives the examples of behaviors that fall within the scope of these two types of abuse of dominance prohibition as follows:

2.2.1.1.1 Exploitative Behaviors towards Consumers[69]

A Dominant firm may use exploitative behaviors in order to maximize profit. A clear example of exploitative behavior is excessive pricing. Excessive pricing occurs when the dominant firm sets price that is not proportionate to the production cost and not relevant to the economic value of the service. Consumers are then forced to pay excessive price because they do not have any other choices. This is an abusive action towards consumer, which is the rationale behind the prohibition of excessive pricing. The prohibition and enforcement action against this kind of exploitative behaviors are believed to lower prices and thereby increases consumer surplus.

Setting Unfair Sale Price

The set of unfair pricing harms consumers directly as it decreases consumer welfare. This situation will be even worse if there is no other substitute products or services for consumers. This means there is no comparison for consumers during the decision-making process. Without the substitute products or services, consumers are forced to buy what is available within the market at the unfair price. The set of unfair sale price is usually the high price in order to gain the maximum profit at the cost of consumers. The set of high sale price does not relate to production cost and usually set by looking at maximum profit. The high price is usually set above the competitive price by set by restricting output or raising the price. This leads to less overall consumer welfare or surplus. This is the reason why the Guidelines recommend ASEAN Member States to prohibit the set of unfair sale price in their competition law.

[69] ASEAN Regional Guidelines on Competition Policy, Chapter 3.3.2.1

Setting Unfair Trading Conditions

The set of unfair trading conditions whether directly or indirectly to customers in order to restrict customers normal business practices could harm consumers because the competition could not fully happen due to the restrictions under the trading conditions imposed by the dominant firms. The Guidelines recommend the ASEAN Member States to outlaw this behavior.

Tying

Tying creates unequal competitive conditions to other competitors because tying is a kind of unfair condition forcing consumers to buy both tying and tied goods together. This is why the market share of the tied products are increased unfairly, not conforming to market. Dominant firm may use various resources to create tying such as distribution channel. The dominant firm may force their distributors to only distribute their new product by threatening to stop distributing renowned product that usually has a great sale volume and create high profit. Thus, the distributors will have no other choice so they have to buy both the tying and the tied goods. The tying also affects the competitors in the market of the tied goods. Therefore, ASEAN Member States should prohibit tying because it does not only badly affect consumers but also cause an unequal economic condition to other competitors.

Limitation of Production or Technical Development to Prejudice Consumers

Limitation of production and technical development should be prohibitive for dominant firms. The limitation of production harms consumers because the goods or services should have been produced according to market demand at the feasible production capacities. In some cases, producing at mass quantity reduces overhead cost towards production, which resulting in lower production cost. With low production cost, consumers will be able to purchase product at reasonable price.

Similarly, the limitation of technical development is also harm consumers because quality of goods or services should have been improved if the dominant firm does not limit the technical development. The purchase of new technological development to improve process of production and increase quality of goods and services are essential in production point of view because it creates the effectiveness and efficiency in production process that result in lower production cost and better quality of goods. All firms in the market should have access to the technological advancement in order to effectively compete with other firms. However, dominant firm may find ways to increase difficulties in acquiring the new technological developments towards their competitor to gain its competitive advantage in production. Therefore, the limitation of production or technical development to prejudice consumers are regarded as exploitative behaviors towards consumers.

2.2.1.1.2 Exclusionary Behaviors towards Competitors[70]

Predatory Pricing

Predatory pricing is committed by a dominant firm setting very low price for its products for a specific period of time in order to drive its competitors out of the markets. After that it will set a higher price to recover the losses. The potential benefits to the predator were not limited to future gains in the market where it predated, potential benefits could come in the form of an investment in reputation which could pay dividends in other geographic or product markets by deterring entry or disciplining competitors. Accordingly, the predatory conducts need to be monitored by competition laws in every ASEAN member to maintain the level playing fields for all market participants and keep the market open. However, the predation is costly and the predator has a risk that even the competitors are driven out of the market, new entrants may be attracted to the market by the high set of monopoly price. Then the predator might have to use predatory pricing tactics again and again.[71]

[70]ASEAN Regional Guidelines on Competition Policy, Chapter 3.3.2.2

[71] Posner and Richard A, Economic Analysis of Law, 8 ed. (Aspen Publishers, 2010)., 396

Discriminatory Behaviors

The discriminatory behaviors are related to the application of dissimilar pricing to equivalent transactions. This also includes the application of dissimilar conditions to equivalent transactions.

2.2.1.2 Prohibition of Anti-Competitive Mergers

Chapter 3. 4 in the ASEAN Regional Guidelines on Competition Policy recommends AMSs to introduce prohibition of anti-competitive mergers because they can lead to dominant position and monopoly. Merger could lead to monopoly and facilitate unilateral price increase not in accordance with to market price mechanism. In fact, mergers between companies can have both positive and negative effects. In most cases, business merges because they want to be more efficient in operation and production while try to increase innovations to products. On the other hand, merger that leads to dominant position or monopoly should be prohibited to avoid negative effects on competition and protect consumer welfare. The merger is likely to reduce competition in that market. Therefore, the merger control is necessary to filter out the mergers that harm competition. Without the merger control system, the merger can be used as a back door to gain the dominant position or monopoly. Mergers that leading to monopoly or dominant position might lead to the set of unfair trading conditions, price fixing, lowering product quality, which are very harmful to competition process within the market. If the effect of merger creates the dominant position in the market, there will be the possibility that consumers having fewer choices or having to pay higher price or the occurring of misuse of market power as a result. These will create a range of effects on the market and consumer.[72] The mergers increase the more chance of turning the market into oligopoly or monopoly market. It will also create higher risk of collusion. Furthermore, merger facilitates coordinated interaction.[73]

[72] Ibid. p. 333-335

[73] Herbert Hovenkamp, Federal Antitrust Policy the Law of Competition and Its Practice, 3 ed. (Thomson West publishing)., p. 516

According to Chapter 3.4.1.1 of the Guidelines, the anti-competitive mergers can be found in many forms as follows:

2.2.1.2.1 Acquisitions

Acquisition is the takeover of other firm to acquire their resources, such as distributing channels in various countries, technological know-how or brand. Many firms are using this method to take a short route to success by acquiring firm that have their desiring resources, for example entering a new market in other countries. This is why the large firm is willing to purchase and takeover a company to gain faster access to the new market.

2.2.1.2.2 Joint –Ventures

Joint-venture is a kind of business agreement between firms to start a new entity by sharing each other resources. Without each other, it is highly unlikely to succeed because each firm is not specialized in every aspect. Therefore, firm chose to corporate with each other by sharing resources to achieve the goal. The joint-ventures could be agreement to set up a new company to produce new products or provide services.

2.2.1.2.3 Interlocking Directorates

The characteristics of interlocking directorate is where members of board in a firm is also part of board in other firms. If it is a company in totally different market category then there will not be any issue. But being member of board in various companies in the same market category can raise an issue of action. The board of member can exert decision in many companies within the industry to create unfair trading conditions within the market.

2.2.1.3 Prohibition of Anti-Competitive Agreements

Prohibition of anti-competitive agreements are found in the Chapter 3.2 of the Guidelines. The Guidelines divides the anti-competitive agreements into two types, which are horizontal agreements and vertical agreements. The international best practices also divide the anti-competitive agreements into two types too. This shows that the standards regarding the prohibition of anti-competitive agreements conform to the international best practices and competition law principles of many countries that have matured competition regimes. This part will briefly identify both types of anti-competitive agreements that are indicated in the Guidelines.

2.2.1.3.1 Horizontal Agreements

Horizontal agreements are situation when two enterprises at the same level of production chain reach certain agreements to cooperate to gain maximum market power. This will reduce market efficiency and further harm consumer welfare. The Guidelines divides the horizontal agreements into two types which are hardcore cartel restrictions that should be basing on the *per se* illegal and other horizontal agreements that should be based on the rule of reason analysis.[74] The hardcore cartels are anti-competitive conducts that cause adverse effect to competition. This is why the Guidelines highly recommends all AMSs to outlaw the hardcore cartels basing on the *per se* illegal rule.[75] The rationale behind the prohibition of cartel behaviors are based on the economics theory that the cartelists will not jump in to the contract to fix price or limit the output unless the contract make them all better off. However, the gains they get injure consumers. In other words, "the social costs exceed cartelists' gain."[76] Therefore, hardcore cartel agreements should not be enforceable and should be treated as *per se* illegal under all AMSs' competition regimes. This conforms to the principle of most of modern competition laws today that realize the detrimental effects of hardcore cartels

[74] ASEAN Regional Guidelines on Competition Policy, Chapter 3.2.2- 3.2.3

[75] Ibid. Chapter 3.2.2

[76] A, P. a. R., Economic Analysis of Law. p. 369

and treated them as *per se* illegal conducts. The Guidelines raises some examples of hardcore cartels, which are price-fixing, bid-rigging, market sharing and limiting or controlling production or investment.[77]

2.2.1.3.2 Vertical Agreements

Vertical agreements are situations when two enterprises at different levels of production or distribution chain made certain agreements to trading conditions. This type of agreement can cause limited choices for consumer. The content of prohibition of vertical agreements is found in the Chapter 3.2.1.2 of the Guidelines. The vertical agreements are different from the horizontal agreements in terms of the vertical agreements are entered by the two or more companies that are operating at the different level of production or distribution chain. Distribution agreements, agency agreements and franchising agreements are the example of vertical agreements raised in the Guidelines. The negative effects of vertical agreements are the creation of barriers to market entry, the reduction of inter-brand and intra-brand competition and the creation of obstacles to cross-border trade.[78] That is why ASEAN should prohibit vertical agreements to make sure that undertakings do not use vertical agreements to restrict competition on the market. Furthermore, the prohibition of vertical agreements is also help achieving the process of ASEAN single market by ensuring that private barriers are not created while ASEAN Member States try to reduce governmental barriers between them. The analysis of the vertical agreements is recommended by the Guidelines to be basing on the rule of reason.[79] This conforms to the international best practice because in some vertical agreements have economic reason to support. Thus, they are generally fall within the rule of reason analysis rather than fall in the scope of *per se* rule. Today some pro-competitive effects of vertical agreements receive

[77] ASEAN Regional Guidelines on Competition Policy, Chapter 3.2.2.1-3.2.2.4

[78] Ibid, Chapter 3.2.1.2

[79] Ibid, Chapter 3.2.3

growing recognition among competition laws and competition agencies in many jurisdictions. Therefore, different jurisdiction might have different views towards striking the balance of positive and negative effects of vertical agreements.[80]

2.2.2 Obligation to Create the Highly Competitive Economic Region

As clearly stated in the AEC Blueprint, ASEAN aims to be highly competitive economic region. If this goal is achieved, it will benefit not only investors and businesses but also consumers. Towards this end, ASEAN leaders commit to pursue the concerning regional agreements, workplans, and relevant national laws and policies. The culture of fair competition is a necessary base for turning ASEAN into highly competitive economic region; therefore, strengthening the application of competition policies and competition laws of each ASEAN members is an important obligation for ASEAN leaders. This obligation could not be fully achieved if there is no merger control within ASEAN. This is because mergers eliminate competition that exists between the merging parties and reduce a number of firms competing in the market. This reduction of the numbers of competing firms has a substantial effect on overall market competition because the market will be less oriented to consumer and efficiency' goals, even in the absence of breaches of competition law. This is the reason why mergers in ASEAN need to be controlled. If any merger causes anti-competitive effects, it will not be allowed. This obligation is reflected in the Guidelines in chapter 3.4 under the prohibition of anti-competitive mergers.

2.2.3 Obligation to Eliminate Barriers to Entry of Trade and Investment for Ensuring Free and Open Markets

In order to become fully integrated into single market, all ASEAN Member States are required to eliminate all kinds of trade barriers both tariff barriers and non-tariff barriers whether they are entry barriers created by government or privates. Barriers to trade do not come only in the form of barriers created by governments. Private

[80] Helen Jenkins Gunnar Niels, James Kavanagh, Economics for Competition Lawyers (Oxford University 2011)., p. 331

sectors can also create the big barrier to entry into the domestic market. Some business tactics are not unlawful but badly affect the entry of trade and investment, which are the ultimate goal of AEC. Consequently, if the dominant firms try to obstruct other firms from entering into the market either by creating the barrier to entry or setting unfair low sale price in order to exclude new competitors, they will be punished by the competition law. The Guideline mentioned about this issue in Chapter 3.3, which is in the scope of the prohibition of abuse of dominant position.

2.2.3.1 Creating the Barrier to Entry into the Market by Private Sector

A firm unfairly forcing its trading partners not to do business with new competitors or boycott with the aim to prevent these firms from entering a market or to disadvantage new competitors. This kind of boycott may appear in the form of prohibiting the new competitors from getting into the necessary resources used in its production. The competitors could prevent a new firm from coming into the markets by forcing or inducing the resources vendors not to sell its resources to their new competitors in the exchange of some unreasonable benefits or future business deals.

2.2.3.2 Unfair Maintaining Low Sale Price to Exclude the New Competitors

This illegal conduct is not predatory pricing but rather a conduct restricting competition by means of unreasonable maintaining low sale price or price-cutting to discourage new competitors.

2.2.4 Obligation to Establish Transparency and Fairness in Competition Regulatory Process

To achieve the goal of competition policy and competition law, having only comprehensive competition law is not enough. It is necessary to establish an effective and transparent in the enforcement mechanism of competition law.

This is to ensure the effectiveness and fairness of every competition case handling. The Guidelines clearly emphasizes this obligation that **" the effective enforcement of competition law is an important factor in the establishment of competition policy in the territory of the AMSs."**[81] Therefore, ASEAN Member State are encouraged to improve its enforcement mechanism through capacity building and technical assistance as well as improving the due process in investigation, case-handling and decision making of competition authorities and courts. This obligation can be seen in the two areas of the Guidelines, which are in the enforcement mechanism under chapter 6 and role and responsibilities of competition regulatory body under chapter 4, respectively.

While establishing transparency and fairness in competition regulatory process is related to the issue of enforcement mechanism and due process, which is found in the Chapter 7. This issue of procedural fairness and transparency also important for the obligation of the AMSs to establish transparency and fairness in competition regulatory process**.** It is clearly stated in the Guideline **that "sound institutional and due process are fundamental in ensuring the effective application of competition law"** [82]. It is emphasized in the Guidelines that procedure in judicial authority and competition authority should be transparent, consistent, accountable and not unduly burdensome. Moreover, the timeliness in handling cases and the system of check and balance through the review of administrative authority and judicial review are also important factors that AMSs should consider.

[81] ASEAN Regional Guidelines on Competition Policy, Chapter 6.1

[82] ASEAN Regional Guidelines on Competition Policy, 34

[*] ASEAN Regional Guidelines on Competition Policy, Chapter 6. 7- The ASEAN Regional Guidelines on Competition Policy does not force AMSs to apply specific sanctions in case of competition law violation. Rather it gives the AMSs freedom to introduce the whole range of sanctions, which are 1. Criminal Sanction 2. Administrative Sanction 3. Civil Sanction 4. Corrective Measures 5. Periodic Penalty Payments 6. Contempt Orders. Therefore, there is no impediment relating to the implementation of the ASEAN Regional Guidelines on Competition Policy in this issue.

2.2.4.1 Enforcement Mechanism

To foster the effective enforcement mechanism, AMSs should consider equipping the competition agency with the enough investigation and enforcement powers. Beyond the formal procedure of investigation and enforcement, AMSs may consider introducing the settlement that enable parties under investigation to reach settlement with competition agency. The parties must stop violating competition law in the exchange of competition agency call off the investigation. However, the proceeding can be reopened if the parties do not comply with the term of settlement. Moreover, the AMSs may consider enabling the private enforcement to allow the suffered parties to recover damages from the infringement of competition law.

Sanctions should be imposed to create the deterrence and ensure the compliance with competition law. According to the Guidelines, AMSs are not obliged to have the same sanction system of the violation of competition law. The Guidelines leaves the room for AMSs to decide which types of sanctions are appropriate to the competition system of each ASEAN member. The Guidelines instead provides the types of sanctions that AMSs may consider adopting in accordance with the international best practice sanctions for the infringement of competition law. ASEAN Member States may impose criminal sanction, administrative sanction and/or civil sanction for the violation of competition law. The sanctions can be imposed if there is the substantive law infringement and/or procedural law infringement. Sanction can be imposed in the form of punitive sanction and/or non-punitive sanction. However, the sanction imposed for the violation of competition law should be subject to the judicial review. The Guidelines raises some examples of sanction, which are administrative financial penalties, civil financial penalties, criminal sanctions, periodic penalty payments, corrective orders and contempt orders*. While the Guidelines recommends that the calculation of fine imposed for the violation of competition should be taken into account various factors, including the seriousness and duration of the competition law violation, the impact on the relevant market, some aggravating circumstances, some

mitigating factors, deterrent value, turnover of the undertakings involved, restitution or disgorgement principles and possibility of imprisonment for individuals.[83]

2.2.4.2 Roles and Responsibilities of Competition Regulatory Body

The competition regulatory body plays the main role in the enforcement of competition law. Competition law will be effectively enforced or not depends on the capability of the enforcement body like competition agency. The Guidelines identifies the main roles and responsibilities that competition agency should be mandated to do. This includes not only the enforcement but also the interpretation and elaboration of competition law for all stakeholders, advocating competition policy and law, providing advice for government, policy and law makers about the competition policy and law. Finally, competition agency must the representative of the country in the cooperation regarding international competition matters.[84]

Without the international cooperation, the development of competition laws and their enforcement are not fully complete. Competition law enforcement in each country will not be effective if they can catch only domestic anti- competitive conducts. Unfortunately, under the Guidelines there are little details about the international cooperation. Only objectives and benefits of cooperation are provided and some brief details of cooperation between competition agencies and common competition related provisions in FTA are mentioned in Chapter 10 of the Guidelines.

2.2.4.2.1 Institutional Structure of Competition Regulatory Body

The Guidelines does not oblige the AMSs to choose the specific institutional structure for their competition agencies. Rather the Guidelines provides three models for the institutional structure of competition regulatory body. The Guidelines does not compare the pros and cons between these three models of institutional structures. It leaves the room for AMSs to make

[83] ASEAN Regional Guidelines on Competition Policy, Chapter 6.8

[84] ASEAN Regional Guidelines on Competition Policy, Chapter 4

their own decisions. However, the Guidelines emphasizes that the administrative independence should be granted as much as possible to avoid the political influence that can affect the performance of competition agencies.[85]

2.2.4.2.2 Adequacy of Resources

The Guidelines emphasizes that competition regulatory body should have adequacy of resources because it is an important factor to build the effective enforcement and perform all of its responsibilities. However, there is no further recommendations on this issue. The Guidelines seems to recommend only broad framework and leaves the details on how to ensure adequacy of resources to ASEAN Member States.

2.2.4.2.3 Prioritization

The set of enforcement prioritization should be introduced to make the best use of available resources in the competition agency. The Guidelines warned all AMSs that the set of enforcement prioritization should not allow for *de facto* exemptions. Thus, even some anti-competitive conducts fall outside the scope of enforcement priority, they should not be totally ignored. The non-priority anti-competitive behaviors should be engaged within the limitation of competition agency's available resources. The Guidelines does not impose what kinds of anti-competitive conducts that AMSs should pursue. AMSs can set different competition law enforcement priorities depending on the specific situation of different countries. The Guidelines instead provides various factors for AMSs to take into account for the set of each country enforcement priority including,[86]

[85] ASEAN Regional Guidelines on Competition Policy, Chapter 4.3

[86] ASEAN Regional Guidelines on Competition Policy, Chapter 4.2

Human resources

Financial resources

Time

Types of anti-competitive conducts

Seriousness of an infringement

Impact of anti-competitive conducts on the relevant market

Impact of the possible intervention of competition agency

Complexity of the investigation

Likelihood of establishing an infringement

Cessation or modification of the conduct complained of

Possibility of the complainant bringing the case through private enforcement channel

Whether the resource requirements of the work are proportionate to the benefits from doing the work

Whether the work fits into the strategic significance of the competition regulatory body's plans

Whether the complaint concerns specific legal issues already in the process of being examined (or already examined by the competition regulatory body) in one or several other cases, and/or subject to proceedings before a judicial authority.

2.2.4.2.4 Capacity Building and Technical Assistance

The content relating to capacity building and technical assistance is in the Chapter 8 of the Guidelines. Capacity building is " a process of putting in place sustainable competition policy frameworks and process necessary for

effective competition policy administration, enforcement, advocacy and the future development of the competition regulatory body. ” [87] Technical assistance is a way to strengthen its capacity and effective enforcement through receiving and sharing knowledge, skills, best practices between competition agencies, donor agencies and international organizations. The Guidelines provides the guiding principles on capacity building and technical assistance while emphasizing that AMSs should consider the different needs of different ASEAN members in order to meet the real demand in organizing the capacity building and technical assistance programs.[88]

2.2.4.3 International Cooperation in the Field of Competition Law and Common Competition Related Provisions in Free Trade Agreement

This obligation is found in the Chapter 10 of the Guidelines by identifying benefits of cooperation in promoting competition culture and consistency in the implementation of competition policy in ASEAN, building consensus and convergence on sound competition policy, sharing information. The Guidelines supports the cooperation between competition agencies by establishing regional platform to discuss competition issues, promoting common approaches, exchanging experiences and identifying best practices. AMSs should align common competition related provisions in Free Trade Agreement with the ASEAN regional competition provisions and approaches.

[87] ASEAN Regional Guidelines on Competition Policy, Chapter 8.1.2

[88] ASEAN Regional Guidelines on Competition Policy, Chapter 8.3

2. 3 Monitoring Mechanism for the Implementation of the ASEAN Regional Guidelines on Competition Policy

ASEAN has created the 'ASEAN style' of monitoring mechanism and how to deal with the non-compliance with the ASEAN members' obligation to implement the Guidelines as follows:

2.3.1 Monitoring Mechanism under the AEC Blueprint 2015

The AEC Blueprint clearly states that " a strategic schedule that includes key milestones for a comprehensive and deeper economic integration shall form an integral part of this Blueprint."[89] The ASEAN Regional Guidelines on Competition Policy is one of the deliverables of the strategic schedule in the AEC Blueprint, mechanism to monitoring the implementation of the Guidelines should follow the mechanism indicated in the AEC Blueprint. The monitoring mechanism of AMSs implementing the Guidelines have two levels: national level and regional level.

The monitoring mechanism starts at the national level. The implementation of the AEC Blueprint obliges relevant national government agencies to be responsible for overseeing the implementing and preparing of more detailed action plans at the national level with the coordination of the relevant ASEAN sectoral bodies.[90] This includes the task of ensuring the participation of all stakeholders, for example the private sector, industry associations and the wider community at the national level.[91]

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[89] AEC Blueprint 2015: III. Implementation

[90] AEC Blueprint Implementation Article 68. "Relevant ASEAN sectoral bodies will coordinate the implementation of the above programmes and measures while relevant government agencies will be responsible for overseeing the implementation and preparation of more detailed action plans at the national level."

[91] AEC Blueprint 2015: III. Implementation

[*] The ASEAN Experts Group on Competition (AEGC) established by the endorsement of the ASEAN Economic Ministers (AEM) as a regional forum for discussing and coordinating competition policies and laws. The objective of the AEGC is to promote a competitive environment in the ASEAN region. The AEGC is composed of representatives nominated by all the AMSs from competition authorities and from the agencies, which are most directly involved in competition policies in those ASEAN Member States in case competition authorities have not been established yet. In order to perfectly establish the AEC by 2015, the AEGC has set its priorities as follows; strengthening the regulatory environment in ASEAN, institutional capacity building and law enforcement of competition policy and law in ASEAN, developing a strategy and tools for regional competition advocacy and finally building cross-cutting regional initiatives. For more information of the AEGC

Whereas the monitoring mechanism at the ASEAN regional level belongs to the relevant ASEAN sectoral body concerning competition policy, which is the ASEAN Experts Group on Competition (AEGC)*. The AEGC acting as the relevant ASEAN sectoral bodies is responsible for discussing and coordinating competition policies and laws in ASEAN, which includes the obligation to the coordination the implementation of the Guidelines and related measures. Because of being one of the deliverables in the AEC Blueprint, the implementation of the Guidelines will be overseen by the AEGC. [92]The AEGC is also responsible for overseeing the implementation of the tasks and activities concerning competition policy as targeted in the AEC Blueprint. Accordingly, the AEGC is responsible for both coordinating and overseeing the implementation of the Guidelines at the regional level.

Beyond the relevant AEGC, which is the ASEAN sectoral body, there is upper level of ASEAN bodies to oversee the implementation of the Guidelines. This is the responsibility of the relevant sectoral Ministerial bodies.

According to Article 70 of the AEC Blueprint,

"Relevant sectoral Ministerial bodies shall be responsible for the implementation of the Blueprint

and monitoring of commitments under their respective purview.

The ASEAN Economic Ministers (AEM), as the Ministers-in-Charge of Economic Integration in the Council of ASEAN Economic Community, shall be accountable for

the overall implementation of the Blueprint."

[92] ASEAN Regional Guidelines on Competition Policy, Background

Relating to competition policy in ASEAN, the ASEAN Economic Ministers (AEM) is the relevant sectoral Ministerial body in the meaning of Article 70. Because competition policy is one of the sectoral bodies under the purview of the ASEAN Economic Ministers.[93] Therefore, the AEM must be responsible for monitoring all commitments under competition policy and implementing the Blueprint. The AEM is also empowered as the Ministers-in-Charge of Economic Integration; thus, it is responsible for the overall implementation of the AEC Blueprint.[94]

Furthermore, the AEC Blueprint requires concerned Ministers to fulfill the tasks in implementing the AEC Blueprint and regularly report the progress of implementation. [95] Therefore, the progress of implementation relating to the competition policy has always been reported in ASEAN Economic Ministers meetings. The AEC Blueprint imposes that the progress in the implementation of the programmes and measures concerning the AEC building by Member Countries needs to be monitored, reviewed and disseminated to all stakeholders. [96] The details of implementation progress appeared in the post-briefing of the meetings.

2.3.2 Monitoring Mechanism under AEC Blueprint 2025

Under the AEC Blueprint 2025 contains the implementation part that is more specific and detailed than those indicated in the AEC Blueprint 2015. The ASEAN Economic Community Council (AECC) is imposed the responsibility to be the principal body to accountable for the overall implementation of the strategic measures in the AEC Blueprint 2025.[97] Therefore, the new strategic measures imposed under the AEC Blueprint 2025 will have separated monitoring mechanism from those of the AEC Blueprint 2015. ASEAN aims to see the effective implementation of the new AEC

[93] "Sectoral Bodies under the Purview of Aem ", [Online] Accessed: 12 June 2016. Available from: http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/

[94] AEC Blueprint Implementation, Article 70

[95] DECLARATION ON THE ASEAN ECONOMIC COMMUNITY BLUEPRINT

[96] AEC Blueprint 2015: III. Implementation (paragraph 73)

[97] AEC Blueprint 2025: III. IMPL EMENTATION AND REVIEW (A. Implementation Mechanism) (paragraph 81)

Blueprint 2025; thus, imposing the ASEAN Economic Community Council the liability to monitor and enforce compliance of all measures agreed in AEC Blueprint 2025 with the help of the established special task forces or committees in facilitating resolution of non-compliance concerning the implementation of these agreed upon measures.[98] While the AEGC as the relevant ASEAN sectoral bodies will have responsibility in coordinating the implementation of work plans. The ASEAN Secretariat, with the support from the ASEAN Community Statistical System (ACSS), will be the ASEAN body that conduct the monitoring or tracking of the implementation and compliance of all strategic measures and action lines to be able to monitor the outcomes and impacts of the implementation of the AEC Blueprint 2025 and its strategic measures and action plans. [99]

At the national level, the AEC Blueprint obliges all ASEAN Member States to translate milestones and targets of the AEC Blueprint 2025 into national milestones and targets. The relevant government agencies in all ASEAN members shall follow up and oversee the implementation and preparation of more detailed action plans under the strategic measures in the AEC Blueprint 2025. [100]

2.3.3 The Non-Compliance with the Implementation of the ASEAN Regional Guidelines on Competition Policy

In case of non-compliance with the Guidelines as one of the deliverable tasks of AEC Blueprint, the ASEAN Secretariat takes account for reviewing and monitoring compliance of implementing the AEC Blueprint.[101] Non-compliance of the AEC Blueprint is considered violating one of the obligations of ASEAN membership indicated

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[98] AEC Blueprint 2025: III. IMPL EMENTATION AND REVIEW (A. Implementation Mechanism) (paragraph 82)

[99] AEC Blueprint 2025: III. IMPL EMENTATION AND REVIEW (A. Implementation Mechanism) (paragraph 82)

[100] AEC Blueprint 2025: III. IMPL EMENTATION AND REVIEW (A. Implementation Mechanism) (paragraph 82)

[101] AEC Blueprint Implementation, Article 73

[*] ASEAN CHARTER, ARTICLE 5 RIGHTS AND OBLIGATIONS 1. Member States shall have equal rights and obligations under this Charter. 2. Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership. 3. In the case of a serious breach of the Charter or noncompliance, the matter shall be referred to Article 20.

in the Article 5 of the ASEAN CHARTER*. The ASEAN CHARTER sets the mechanism in case of non-compliance by referring to Article 20.

"ARTICLE 20 CONSULTATION AND CONSENSUS

1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.

2. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.

4. In the case of a serious breach of the Charter or noncompliance, the matter shall be referred to the ASEAN Summit for decision."

Article 20 states that in case of non-compliance, it will be referred to the ASEAN Summit for decision. This conforms to the power of the ASEAN Summit identified in the Article 7(e). However, the decision making of ASEAN Summit is still basing on the basic principle of ASEAN, which appear in Article 20(1): consultation and consensus.

This monitoring mechanism of the implementation of the Guidelines clearly shows the ASEAN highly criticized concept of 'ASEAN Way'. Non-implementation of the Guidelines is considered as that ASEAN Member State is non-complying with one of the commitments under the AEC Blueprint. ASEAN has its own specific way to deal with the non-compliance issue that relying on the relationship-based system rather than rule-based system. It must be noted that ASEAN mechanism dealing with non-compliance is dissimilar to the European Union (EU). There is no supranational body responsible for dispute settlement and empowered to impose sanctions to non-complying Member States. This is because ASEAN is inter-governmental organization. ASEAN Member States do not pool their sovereignties to establish supranational organization for common goal like the European Union. Therefore, every ASEAN

Member State is equal. Decision- making is generally based on consultation and consensus. [102] Similar to dispute settlement in ASEAN, it is basing on dialogue consultation and negotiation.[103] There is no formalized dispute settlement mechanism that delegates the third independent body in interpreting and applying the regional rules.

2.3.4 The Influence of ASEAN Way to the ASEAN Regional Guidelines on Competition Policy

The 'ASEAN Way' is related to this dissertation because ASEAN Way is also one of the influential factors behind the selection of the legal status of the ASEAN Regional Guidelines on Competition Policy. The rationale behind selecting the soft law approach like the Guidelines without any legal binding is partly from the flexibility element of the ASEAN Way. ASEAN Way clearly reflects in the characteristics of the Guidelines in terms of flexibility in trying to provide many possible approaches for AMSs to choose. ASEAN realizes that it is inappropriate to provide the one-size-fits-all approach and solution for competition policy and law in ASEAN. That is the reason why the Guidelines was issued as a broad framework on competition system with variety of approaches for AMSs to follow as they regard appropriate. In fact, the ASEAN Way does not only affect the selection of the legal status of the Guidelines, but also the strategic measures and action plans for competition policy in ASEAN.

The 'ASEAN Way' is *modus operandi* or a set of diplomatic norms shared among AMSs. These diplomatic norms have long rooted in the history of ASEAN to avoid dominance of a single state in this region.[104] The ASEAN Way has become the

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[102] ASEAN CHARTER, ARTICLE 20

[103] ASEAN CHARTER, ARTICLE 22

[104] Lee Leviter, "The Asean Charter: Asean Failure or Member Failure?," Internatioal Law and Politics 43. p. 170

[*] *"Article 2 In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles :*

a. Mutual respect for the independence, sovereignty, equality, 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;

unique culture of ASEAN. It was incorporated into Article 2 of the Treaty of Amity and Cooperation in 1976.* According to the fundamental principles in Article 2, it can be extracted into six principles as follows:

1. respect for state independence, sovereignty, equality, territorial integrity and national identity of all nations;

2. free from external interference;

3. non-interference in internal affairs;

4. peaceful dispute settlement;

5. renunciation of the use of force; and

6. cooperation.

These principles have long been followed by the AMSs and influenced the integration of ASEAN until now. This can be seen in the ASEAN Charter, which is the constitution of all AMSs, codifying similar principles indicated in the Treaty of Amity and Cooperation. The ASEAN Charter obliges all members to adhere to the fourteen fundamental principles as follows:

"Article 2. Principles

1. In pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.

2. ASEAN and its Member States shall act in accordance with the following Principles:

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e. Renunciation of the threat or use of force;

f. Effective cooperation among themselves."

(a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

(b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;

(c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

(d) reliance on peaceful settlement of disputes;

(e) non-interference in the internal affairs of ASEAN Member States;

(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

(g) enhanced consultations on matters seriously affecting the common interest of ASEAN;

(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

(j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

(l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity;

(m) the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and

(n) adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy."

Main principles that represent the ' ASEAN Way' are extracted into four main principles, which are related to this dissertation, which are consultation, consensus, non-interference and flexibility. These principles influence the ASEAN' s economic integration and its pathway. ASEAN Way is reflected in the ASEAN Charter in relation to rights and obligations of members, integration, decision-making process and dispute settlement mechanism.

ASEAN Way influences the process of ASEAN integration and its institutional framework. This is the reason why ASEAN Way is widely criticized as an integral challenge for ASEAN integration and institutional change to be more rule-based system.[105]

However, it is arguable that the ASEAN Way has long been adhered in ASEAN because it is consistent to what all AMSs really want to design their own way of economic integration without yielding sovereignty to establish supranational bodies and maintain flexibility through the process of consultation and consensus in decision-making and dispute-settlement. The related principles; consultation, consensus, non-

[105] Ibid. p. 170

interference and flexibility, which are extracted from the ASEAN Way will be briefly elaborated in order to draw the interconnection between the competition policy in ASEAN, characteristics of the ASEAN Regional Guidelines on Competition Policy and the ASEAN Way.

Consultation and Consensus

Decision-making process in ASEAN highly bases on consultation and consensus of inter-governments of member states.[106] Consultation appears in both formal and informal way. Sometimes, consultation occurs in informal and personal between diplomats, which later facilitate decision on consensus base. Basing on consensus, all decision making of ASEAN must be agreed by all ASEAN Member States. If one member disagrees, consensus decision cannot be reached. When the consensus cannot be reached, decisions are deferred. [107] A rationale behind ASEAN adopting consensus-based decision is avoiding divisiveness caused by voting, which always exposes winners and losers.[108]

Non-Interference

While non-interference in the internal affairs of ASEAN Member States has long rooted in ASEAN. Since ASEAN aims to pursue its integration without yielding individual sovereignty, each member state is equal in the eyes of the international law. What consider internal affairs within its sovereignty should not be intervened. ASEAN will break this non-interference principle only when such internal problems affecting other member states or ASEAN region as a whole.[109]

[106] AEAN Charter, Article 20

[107] Leviter, L., "The Asean Charter: Asean Failure or Member Failure?," Internatioal Law and Politics. p. 167

[108] Rodolfo C. Severino, Asean: What It Cannot Do, What It Can and Should Do, in Lee Yoong Yoong, Asean Matters: Reflecting on the Association of Southeast Asian Nations (World Scientific Publishing Co. Pte. Ltd)., p. 5

[109] Ibid. p. 5

Flexibility

Flexibility is allowed within the process of ASEAN integration and appears in many forms. Flexibility usually found in the ASEAN agreements in the form of lengthy timelines and ability to opt out from commitments whether temporarily or permanently.[110] Even in the ASEAN Charter, which is like the constitution of ASEAN, is also found some flexibility. This can be seen in no clear sanction imposed in case of non-compliance with the obligations as ASEAN member states. If any member would like to raise the issue of non-compliance, it must be processed through the peaceful dispute settlement: dialogue, consultation and negotiation.[111] Here again one of the element of ASEAN Way, which is consultation, plays a role in dispute settlement mechanism. Therefore, dispute settlement in ASEAN is different from the European Union that has a supranational body obtaining an authority to interpret and settle dispute. Therefore, the dispute settlement in ASEAN is unique because it is more likely to be conflict management approach rather than conflict resolution approach.

Another flexibility is the ASEAN's preference towards the use of soft law approach. What is consider a soft law must be evaluated by three dimensions, which are obligation, precision and delegation.[112]Obligation means the nature and level of binding rules, legal binding or non-legal binding. Precision is how the rules define the specific conduct in varied levels, for example, being a vague principle or precise and highly elaborated rule. The spectrum of delegation is in between a third party empowered to interpret and settle the disputes through court system with binding decision or employing the diplomatic channel.[113] The soft law stands at the other end of this spectrum of the hard law. The soft law has vaguely worded and/or has weaken enforcement provisions than the hard law.

[110] Leviter, L., "The Asean Charter: Asean Failure or Member Failure?," Internatioal Law and Politics. p. 177

[111] ASEAN Charter, Article 22

[112] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," International Organization 54, 3 (2000). p. 421-422

[113] Robert O. Keohane Kenneth W. Abbott, Anne-Marie Slaughter Andrew Moravcsik, and and Duncan Snidal, "The Concept of Legalization," International Organization 54, 3 (2000). p. 31-33

Analysis of ASEAN Way in the ASEAN Regional Guidelines on Competition Policy

The characteristics of the ASEAN Regional Guidelines on Competition Policy clearly reflects the preference towards the adoption of soft law approach and the influence of ASEAN Way. The Guidelines is designed to be a guiding principle rather than a binding rule, which is the nature of the soft law. For precision element, the Guidelines is a broad framework with variety of options provided for AMSs to choose and adopted as they deem appropriate to their specific contexts. The Guidelines is; thus, enables flexibility in the implementation because it allows AMSs to choose the most appropriate measure from available options in the Guidelines to adopt. ASEAN realizes that one-size-fit-all approach for ASEAN competition policy is not appropriate and desirable for the early period of ASEAN economic integration. Thus, designing the Guidelines to be used as the broad framework for competition policy and law conforms to the ASEAN Way's principles in respecting states' sovereignty, flexibility and non-interference in internal affairs.

The monitoring mechanism of implementation of the Guidelines is established with the delegation for ASEAN bodies and national related government to oversee the implementation of the Guidelines. However, in case of non-implementation, there is no clear and specific dispute-settlement procedure or sanction. Consultation and consensus between AMSs play an important role in case of non-implementation of the Guidelines.

Although the Guidelines is not the hard law with specific legal binding in itself, it does not mean the Guidelines is worthless. There are many reasons behind ASEAN designs the Guidelines to base on the soft law approach.

First, the soft law is characterized by horizontal power relationship[114] between members that is more suitable for and consistent with the characteristics of ASEAN economic integration, which no pooling sovereignty and no intention to establish supranational organization in ASEAN. The nature of ASEAN members is very protective of their sovereignty. Although they are all agreed to become the ASEAN Community, the AMSs may not willing to yield their individual sovereignty for common goal like the European Union.[115] ASEAN has no supranational authority to issue the single community of competition law like the EC competition law. There is no doctrine of direct effect and supremacy in ASEAN. Therefore, the hard law approach for competition law like the EU style is impossible in ASEAN, unless all ASEAN Member States agree to do so.

Second, the soft law is in accordance with the stage of competition policy development in each AMS now. As earlier mentioned, there are some great diversities between competition policy and law development among AMSs. Some countries are new and immature competition regimes because they just recently introduced competition rules. Consequently, it is necessary for ASEAN competition policy to leave a room for flexibilities to allow national differences to continue to exist.[116] Forcing all AMSs to adopt the single competition law and enforcement mechanism without taking into account their diverse competition law developments is extremely difficult task to achieve. High cost is expected if imposing same competition rule for all AMSs today. Furthermore, disagreement and resistance from some members are highly possible. Thus, consensus from all ASEAN members concerning the ASEAN competition policy and law might not be reach in the first place. Creating the same harmonized competition law in the beginning step of ASEAN economic integration is hardly

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[114] Annie-Marie Slaughter, Government Networks: The Heart of the Liberal Democratic Order' in Fox, Gregory H & Roth, Brad R (Eds), Democratic Governance and International Law (Cambridge University Press: Cambridge, 2000)., p. 199

[115] Shaun Narine, "Asean in the Twenty-First Century: A Sceptical Review," Cambridge Review of International Affairs 22, 3 (2009). p. 384

[116] F., J., "Globalization, Competition and Trade Policy: Convergence, Divergence and Co-Operation," in Competition Policy in the Global Trading System: Perspectives from the Eu, Japan and the USA

possible. Therefore, ASEAN needs a tool to create a common framework and lessen the diversity and divergence in competition policies and laws of its members in the first place before pursing the greater harmonization. This is why the Guidelines is introduced to be a common framework and make competition laws of all AMSs more evenly developed.

Third, the soft law approach conforms to the objective of the Guidelines in being the pioneer attempt in enhancing and expediting of national competition laws and policies of all AMSs while taking into account the different stages of competition policy development and specific legal and economic contexts of each member. In order to achieve this objective of the Guidelines, flexible implementation of the Guidelines must be allowed. Otherwise, AMSs cannot take into account their particular legal and economic condition when implementing the Guidelines. The soft law approach is; thus, more appropriate than the hard law approach because the soft law allows flexibility in the implementation in the way that hard law cannot provide.

Since the hard law approach does not conform to the characteristics of ASEAN and different levels of economic and competition law development among AMSs. Furthermore, the hard law is too strict to provide the room for flexibility, which is one of the main elements of ASEAN Way. Adopting the hard law approach will create the regional binding rules, which may not fit the particular context of each ASEAN member currently. It is also very costly to force all AMSs to have the binding competition policy and law in the situation of wide diversity in competition regimes of each ASEAN member. According to Gunnar NIELS and Adrian Ten KATE, " the lack of substantive convergence in some areas of antitrust across jurisdictions (particularly but not exclusively in the area of monopolization) may suggest high costs for a binding commitment."[117]

[117] Gunnar NIELS and Adriaan Ten KATE, "Introduction: Antitrust in the U.S. And the Eu Converging or Diverging Paths?," Antitrust Bulletin (2004).p. 12-15

Another reason to consider is the establishment of ASEAN common competition policy and law can negatively affect the national interest of some AMSs in some areas, for example the exemptions of competition law. Accordingly, it is difficult to persuade ASEAN members to be bound by the binding agreements on competition policy and law, which potentially affect their national interest or against their national trade and industrial policies.[118] Therefore, adopting the soft law is the most appropriate legal basis for the ASEAN Regional Guidelines on Competition Policy in the context of ASEAN these days.

ASEAN integration has unique characteristics with the distinctive role of the ASEAN Way that cannot find in other integrations. This ASEAN unique characteristics affects the ASEAN Economic Integration and its all elements. Competition policy in ASEAN is also unavoidably affected and influenced by the ASEAN unique characteristics of economic integration. Understanding the unique characteristics of ASEAN is important for the further analysis of this dissertation. To draw a clear picture of ASEAN unique characteristics of integration, this dissertation compares the main elements of ASEAN Integration with those of the European Union Integration.

The Comparison between ASEAN Integration and the European Union Integration

ASEAN is the new and unique economic integration that the whole world is watching. There have been many comments and critiques about ASEAN Way in impeding the success of ASEAN economic integration. Some are too pessimistic and do not really understand the true context of ASEAN, that is different from the European Union. Some understand that ASEAN does not aspires to follow the EU model. In order to understand the unique characteristics of ASEAN economic integration and the ASEAN Way better, the comparison between similarities and differences between ASEAN and European Union will be discussed in this part. The comparison will be divided into five parts as follows:

[118] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321

1. Background of ASEAN is different from the European Union

ASEAN and EU have different backgrounds. However, they share similar initiatives in integration, which are to overcome past conflicts. These different backgrounds must be taken into account when analyzing the characteristics of ASEAN and EU. For example, AMSs are very protective of their sovereignty because some of them just got independence from being western colonies. Consequently, they are not willing to pool their sovereignty together for the sake of common gains like the EU. ASEAN does not have the good background of rule-based system and good governance like EU.[119]

2. Different Pathways toward Economic Integration

ASEAN chose to pursue its economic integration without yielding sovereignty of individual member state. It can be interpreted that ASEAN does not intend to follow the EU conventional way of integration. The ASEAN economic integration bases on the horizontal relationship between all member states through the entering into the web of economic agreements.

This is supported by the statement of Rodolfo Severino; the Former Secretary-General of ASEAN in 2006

"ASEAN does not intend to follow the EU all the way. But it can learn many things from EU experience by way of practical measures. It is up to ASEAN members to adopt and apply those measures that are necessary for integrating the Southeast Asian economy."[120]

[119] Thanadsillapakul, L., "The Harmonisation of Asean Competition Laws and Policy from an Economic Integration Perspective."

[120] Rodolfo Severino, "Asean Expectations, Myths and Facts," [Online] Accessed: 28 December 2015. Available from: http://www.aseannews.net/asean-expectations-myths-and-facts/

3. Different Institutional Structures

The nature of ASEAN is just an inter-governmental organization that just has clear legal personality through Article 3 of the ASEAN Charter. By being the inter-governmental organization means ASEAN is an association among governments. ASEAN does not establish supranational institution. As a result of this nature, ASEAN's decisions must come from compromises among all members.[121] Unlike the EU that pooled sovereignty for common gains and established supranational institutions. The European Parliament functions as a regional legislature. The European Commission is the regional executive and the European Court of Justice is regional judiciary. When there is a conflict between national law and European law the doctrine of direct effect and supremacy is utilized resulting in the European law prevails national law. It can be seen that the establishment of supranational institutions in the EU creates the legal *hierarchical* organizations and relationship, which is different from the horizontal relationship of ASEAN inter-governmental organization. The different natures of organization lead to different capabilities between ASEAN and EU.

With regards to the principles, the EU strictly adheres to the rule of law. Although the rule of law is one of the principles in the ASEAN Charter, some people criticized that in practice the relationship-based system also plays an important role in ASEAN. The ways ASEAN people and European people deal with problems are also different. The approach adopted by the EU is more confrontation basing on formal rules and procedures with specified sanctions. Whereas ASEAN prefer less confrontation approach, for example personal discussion, negotiation and consultation.[122] It can be seen that ASEAN is based on weaker legalized system when comparing to the EU.[123] However, it is possible that the further strengthening economic

[121] Severino, R. C., Asean: What It Cannot Do, What It Can and Should Do, in Lee Yoong Yoong, Asean Matters: Reflecting on the Association of Southeast Asian Nations. p. 4

[122] Paul J. Davidson, "The Asean Way and the Role of Law in Asean Economic Cooperation' 2004 Singapore Year Book of International Law and Contributors," [Online] Accessed: 18 July 2016. Available from: http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2004/10.pdf

[123] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321

integration in ASEAN might lead to the move towards more rule based system in the same way as international trend.[124]

4. Different Level of Economic Integration.

The degree of regional integration does affects the ability to create common rules, common institutions, delegation of authority to be supranational authority and level of co-operative framework.[125] ASEAN is still at the beginning level of economic integration. Some people believe that ASEAN is more likely to be FTA plus. While the counter part is European Union, which is the economic and political union.[126] The European Union is ranked as the highest and sophisticated level of integration. Therefore, it is not surprising that EU that have very deep regional integration and pool sovereignty is able to establish supranational authorities and being bound under the common rules. In mark contrast, ASEAN is still at the initial and looser degree of integration so it is difficult to share the similar capacity to European Union.

5. Level of Disparities between Member States

ASEAN Member States have greater diversities in terms of economic development, political regimes and variety of religions and belief system than the EU Member States. The high level of disparity between member states is another factor obstructing the success of economic integration.

In conclusion, ASEAN is different from the EU in many aspects, including its background of integration, institutional structure, developing level of member states and stages of economic integration. Therefore, it is difficult to expect ASEAN to achieve the highest level of economic integration like the EU if these constraints still exist. In order to strengthen ASEAN economic integration, ASEAN should lessen these

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[124] Davidson, P. J., "The Asean Way and the Role of Law in Asean Economic Cooperation' 2004 Singapore Year Book of International Law and Contributors."

[125] OLARREA Marcelo BILAL Sanoussi, Regionalism, Competition Policy and Abuse of Dominant Position' Working Paper, European Institute of Public Administration (Netherlands1998).

[126] "The Eu in Brief ", [Online] Accessed: 12 June 2016. Available from: http://europa.eu/about-eu/basic-information/about/index_en.htm

constraints by relying on more rule-based system and imposing certain sanctions for ensuring the implementation of AMSs' commitments and obligations. These aforementioned characteristics of ASEAN are quite unique for the general regional integration. This is the reason why understanding the unique characteristics of ASEAN is important for the further analysis of this dissertation.

Considering all the unique characteristics of ASEAN economic integration and the influence of ASEAN Way, ASEAN has chosen the right pathway for ASEAN competition policy by selecting the soft law status for the ASAEN Regional Guidelines on Competition Policy. The Guidelines is one of the important tools to level playing field and create fair competition environment in ASEAN. Therefore, it is necessary that all AMSs should implement the Guidelines since the Guidelines is one of the action tasks and strategic measure of the AEC Blueprint 2015 and 2025 respectively that oblige all AMSs to implement. Without the Guidelines, there will be no regional common framework to direct AMSs to foster fair competition environment within ASEAN.

2.4 The Support from ASEAN in Helping ASEAN Member States Implementing the ASEAN Regional Guidelines on Competition Policy and Developing their Competition Systems.

The process of implementing the Guidelines into competition policy of each AMS is important; thus, ASEAN cannot just impose the Guidelines and let its members struggling how to implement it. Help and support from ASEAN is necessary to ensure that all AMSs can practically implement the Guidelines. All the helps and supports also ensure that expected opportunities in implementing the Guidelines will be seen. This part will briefly identify supports given to all ASEAN members in implementing the Guidelines both from ASEAN and other external bodies, including ASEAN's Dialogue Partners and donor organizations. The supports appear in the form of funding and supporting programs from matured competition agencies outside ASEAN. The supporting programs has ranged from the technical assistance in investigation, case-

handline, legal and economic analysis to setting prioritization to study visit in competition authorities in France, Germany and the United Kingdom.[127] The benefits of visit study are not only building more caliber and experiences to staffs but also creating the personal contacts and linkages between competition agencies. While capacity building activities and training workshops are the main supporting activities since it can broaden and deepen the participants' knowledges and understandings in approaches, techniques and methodologies related to competition system.

In general, there are two levels of training and workshops. The first level is concerning the ASEAN regional specific training activities as follows:

> "(a) the impact of competition policy on economic development generally and with special reference to ASEAN;
>
> (b) major aspects of competition policy in the context of AEC formation;
>
> (c) key elements in the regional guidelines on competition policy in ASEAN;
>
> (d) the needs for regional cooperation in competition-related enforcement, including information exchange in ASEAN
>
> (e) the interface among competition, industrial, and consumer protection policies and the related options in policy coordination to maximize policy synergies and minimize tensions, generally and in AMSs' context."[128]

The second level is more policy- or institution-specific, including the areas as follows:

> "(a) the design and framing of appropriate competition rules and regulations in general, and in the context of small developing economies;

[127] Thitapha Wattanapruttipaisan, "A Note on International Co-Operation in the Development of Competition Policy in Asean' from Improving International Co-Operation in Cartel Investigations," [Online]. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2012)16&docLanguage=En, p. 273-283

[128] Ibid. p. 273-283

(b) the costs and benefits of competition policy and competition regulatory bodies;

(c) the setting up and reform of competition regulatory bodies;

(d) investigation and enforcement (including leniency, sanctions and private action options);

(e) analysis and investigation of anti-competitive business conduct (including case studies on monopolies, cartels and dominance, and on horizontal agreements such as price fixing, bid rigging, market division and customer allocation); and

(f) the strategic use of outreach and advocacy to promote compliance and mobilize support from various groups of stakeholders."[129]

Between the mid-2008 and the end-2010, 17 capacity building activities and 14 training workshops were organized with 600 ASEAN professional participants. The main target groups were high-level managers and senior technical staff of competition regulatory bodies and competition-related sectoral agencies from AMSs. The number of participants were fairly large relative to the pool of human resources in competition field available in the ASEAN. This reflects that ASEAN regards competition as the important field that need to further develop. The feedbacks and suggestions gathered after the trainings and workshops can help identifying the future need and emphasis in the future capacity and competencies building.[130]

[129] Ibid. p. 273-283

[130] Ibid. p. 273-283

CHAPTER 3
THE CHALLENGES AND OPPORTUNITIES IN IMPLEMENTING THE ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY IN THAILAND, INDONESIA, SINGAPORE AND VIETNAM

Introduction

Definition of Challenges and Opportunities in Implementing the ASEAN Regional Guidelines on Competition Policy

Challenges in the implementation of the Guidelines can be defined as all impediments obstruct the process of implementing the Guidelines in Thailand, Indonesia, Singapore and Vietnam. The impediments come from various factors, which obstruct the implementation of the Guidelines. The common cause is from the implementation of the Guidelines contrasts with the national interest and vested interests. Some impediments are caused by the inappropriateness, vague or unclear obligations of the Guidelines imposing on the ASEAN Member States. It must be noted that the word 'challenges' will be used interchangeably with the word 'impediments' under this dissertation.

Opportunities in the context of this dissertation mean what ASEAN and ASEAN Member States get from implementing the Guidelines without obstacles. When all the AMSs can implement the guidelines as a common competition framework for their competition systems without obstacles, the Guidelines can practically function and direct all AMSs towards the creation of free and fair competition environment in ASEAN. Opportunities arriving from AMSs implementing the ASEAN Regional Guidelines on competition policy to their competition regime can be divided into two layers, which are the opportunity in the ASEAN level and opportunity in national level. The

opportunities in ASEAN level is creating fair competition environment, which help turning ASEAN into highly competitive economic region and facilitating ASEAN economic liberalization in terms of single market, production base and free flow of goods and services. Whereas ASEAN Member States will get main opportunities in the development of the whole competition system, including the change in national competition environment in each ASEAN Member State to have fair competition and stronger competition culture. Fair competition environment in ASEAN regional level cannot occur if every ASEAN Member State does not have fair competition environment. This is why it is necessary to improve competition system development both at ASEAN regional level and national level at the same time.

If AMSs implements the Guidelines, this will make the whole competition system; namely, competition policy, competition law, enforcement, competition advocacy and international cooperation basing on international best practices and consistent within the common framework of the Guidelines. This will help ensuring that all the competition development of all AMSs aligns with the goals and timeframe of ASEAN Competition Action Plans. Having the Guidelines as the common framework for competition system' s development is an external factor that fasten the development of competition systems of all AMSs. Some countries, which are the least developed countries, are forced to introduce the competition policies and competition laws, for example Myanmar, Laos and Cambodia. While some ASEAN members that have already had applicable competition laws will benefit from having the regional framework for rushing the development process of their national competition systems.

Rationales and Benefits of Identifying Challenges and Opportunities in Implementing the ASEAN Regional Guidelines on Competition Policy

A rationale behind this dissertation pointing out important impediments, which are considered the challenges in implementing the Guidelines is for the attempt to find the appropriate solutions to overcome them for the sake of operational and

effective implementation of the Guidelines in Thailand, Indonesia, Singapore and Vietnam. The Guidelines cannot fully play its role and fully achieve its goals if there are some impediments in implementing the Guidelines. This is the reason why it is necessary to identify these impediments. If these impediments are not identified, no one can realize that the implementation process of the Guidelines is obstructed.

While the main benefit of identifying the impediments in implementing the Guidelines is being able to provide appropriate solutions to overcome these impediments. Otherwise, the appropriate solutions cannot be suggested because the real causes of challenges in implementing the Guidelines are not explored. This also obstructs the goals indicated in the Guidelines and opportunities from AMSs implementing the Guidelines.

The identification of main impediments also helps the implementing plan of the Guidelines in each ASEAN Member State operational in practice. Data related to impediments found in the implementation of the Guidelines will encourage ASEAN members, particularly Thailand, Indonesia, Singapore and Vietnam to reconsider the policies and measures taken to implement the Guidelines whether they work or not. If they do not work, these countries will be able to adapt them in order to ensure the effective implementation of the Guidelines.

The Groups of Challenges and Opportunities in the Implementation of ASEAN Regional Guideline on Competition Policy

In order to be able to identify and analyze impediments and opportunities in implementing the Guidelines in Thailand, Indonesia, Singapore and Vietnam, this study divides these impediments and opportunities according to the competition's tasks into five main categories:

1. Competition Policy

2. Competition Laws

3. Enforcement Mechanism

4. The Lack of Competition Culture, Competition Awareness, and Competition Advocacy

5. International Cooperation

Within a category of impediment, there are some sub- categories of impediments ranging from commonly found problems in almost jurisdictions across the world to unique impediments found within the socio- economic of ASEAN countries. Some impediments are common among Thailand, Indonesia, Singapore and Vietnam while some impediments are quite unique in a single country. This part explores and discusses all the impediments and opportunities in the implementation of the Guidelines in Thailand, Indonesia, Singapore and Vietnam according to the five main categories.

3. 1 Impediments Faced in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Competition Policy

3.1.1 The Conflict between Pursuing other National Economic Policies and Competition Policy

Many governmental policies and regulations are contrary to the principles of competition policy and law, for instance policy to create national champions, protection of employment, redistribution of income and the need to achieve economy of scale through monopoly and collaboration.[131] Petersman remarks this situation as government is another source of competition restriction " by means of industrial policies aimed at enhancing economies of scale and positive externalities of national industries, strategic trade policies aimed at shifting rents away from foreign to domestic industries, or by means of investment policies designed to attract scarce foreign capital through tax incentives and favourable investment conditions."[132]

[131] Thanadsillapakul, L., "The Harmonisation of Asean Competition Laws and Policy from an Economic Integration Perspective."

[132] Petersmann, "International Competition Rules for the Gatt-Mto World Trade and Legal System," Journal of World Trade 27, 6 (1993). p. 35-86, 35

Pursing other national economic policies sometimes affect the principle of competition. To achieve the goals of other economic policies, sometimes it restricts or distorts competition. While competition policy generally aims to create and maintain economic efficiency. Sometimes pursing economic efficiency drives less efficient market players out of the market and replaces by more efficient one. This unavoidably affects some interested groups and possibly leads to corporate lobbying from threatened groups. This part explores the problems relating to this issue, which can be identified as follows:

3. 1. 1. 1 Industrial Policy and Trade Policy Affecting The Principle of Competition

Trade policy can influence competition. If the tight trade policy is set and there is a restriction of competition in the market, it leads to the manipulation of the market by dominant firms. In marked contrast, trade liberalization encourages competition in the market.

Industrial policy also plays a role in shaping competition in the economy. If any country has the restrictive industrial policy in monitoring the entry and growth of the firms and the imposition of stringent conditions, the competition as well as investment will be low. The protectionist approach can be another source of conflict between competition policy and other economic policies. Developing countries have to protect their local companies against foreign domination in some critical sectors of the economy to protect national interest. Therefore, some businesses are protected and exempted from the application of competition law.[133]

Industrial and trade policy sometimes are obstacles to the enforcement of competition policy, for example in the area of merger control. In order to increase the competitiveness of local firms to successfully compete with the foreign firms in international market or create the national champion, sometimes the lax of merger

[133] Mark Williams, The Political Economy of Competition Law in Asia (Edward Elgar Publishing Limited, 2013)., p. 10

control system may be forced to facilitate these objectives. These are the examples of conflict in pursing both trade policy and competition policy, particularly in the developing countries or countries with small economies. [134]Indonesia can be raised as an example to show this conflict between competition policy and other policies. Before Indonesia moving to the market economy and the introduction of competition law, Indonesian government strongly controlled its market by protecting some industries and creating barriers to entry. This caused the oligopolistic market, inefficiency and low competition culture. During the early stage of enforcing Indonesian competition law (Law No. 5/ 1999), the principle of competition was not well recognized, which render the inconsistency between industrial policy and competition policy. It could be seen from policies or regulations providing protection to few conglomerate groups that control strategic industries or favorable treatment for state-owned enterprises. This situation was exacerbated with the Indonesian political economy of having bureaucracy inefficiency, crony, corruption, law enforcement problem and regional autonomy authorizing local governments to issue their own regulations, which are in conflict with the principle national competition policy. [135]

The best example of inconsistency between competition policy and industrial policy in Indonesia was shown in the *Temasek case*. [136]The *Temasek case* involves divestiture and selling the shares to foreign investors by the allowance of Indonesian government. This divestiture and share selling was a part of the privatization process in 2002. Without the careful study of the Indonesian government in allowing this divestiture and selling the shares to foreign investors, this allow these foreign investors to own shares in several telecommunication companies.

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[134] Ibid. p. 10

[135] Ningrum N. Sirait, "Brief Glance on Competition Law Enforcement in Indonesia (1999-2010)' (Acf Hong Kong 6-7 December 2010) " [Online] Accessed: 25 April 2016. Available from: http://www.asiancompetitionforum.org/docman/6th-annual-asian-competition-law-conference-2010/power-point-slides/83-2-04-acf-hongkong-december-2010/file.html

[136] "Icc Decision Case No. 07/Kppu-L/2007 ", [Online] Accessed: 3 May 2016. Available from: http://www.kppu.go.id/docs/Putusan/putusan_temasek_eng.pdf

The KPPU later found that the divestiture and selling shares results in Temasek Business Group possessing cross ownership in Telkomsel and Indosat. The cross ownership is the violation of Article 27 of the Law No. 5* Consequently, the KPPU ordered Temasek to sell some of its shares to non-affiliated firms. The Temasek appealed to the Supreme Court but it was reversed. With this final decision of the Supreme Court, the case ended quietly and the fine was finally paid in 2010. This case ended in dramatic way because finally Temasek left Indonesia and sold its entire shares to Qatar Telcom. This is not a happy ending story.

This case reflects the practice of Indonesian government that comes from pursuing the industrial policy through privatization is directly inconsistent with the competition law of Indonesia. This is another lesson learnt for Indonesian government that even though this kind of enforcement had never happened before in the Indonesia, it does not mean that foreign investors and their companies can be out of the scope of application of competition law.[137]

3. 1. 1. 2 Policies Favoring State-Owned Enterprises or Local Business Practitioners

In some countries, there are some policies, laws, regulations, measures or practices that give more favorable treatment to state-owned enterprises or local business practitioners to foreign companies. This is against the principle of competition and the Guidelines. ASEAN Member States should level playing field for all market players regardless of their nationality, which is the aim of the single market and production base of ASEAN.

* Law No. 5, Article 27 Share Ownership " Entrepreneurs are prohibited from holding majority shares at several firms engaged in the same business sector in the same relevant market, or establish several firms engaged in the same business activities in the same relevant market, if the said ownership causes: a. one entrepreneur or a group of entrepreneurs to control 50% (fifty percent) or more of the market share on one type of goods or service; or b. two or three entrepreneurs or groups of entrepreneurs to control 75% (seventy five percent) or more of the market share on one type of certain goods or services.

[137] Sirait, N. N., "Brief Glance on Competition Law Enforcement in Indonesia (1999-2010)' (Acf Hong Kong 6-7 December 2010) "

Thailand

Thailand protects state-owned enterprises from competition. This can be seen from the exemption clause of competition law in Thailand that exclude state enterprises from the application of competition act.[138] Under the Thai Trade Competition Act 1999, state owned enterprises under the law on budgetary procedure are exempted from the application of this act.[139] Some state-owned enterprises, which do not operate for commercial purposes have justification to be exempted from the application of competition law. However, some state- owned enterprises function as private firms and works for commercial purpose should not be exempted from the application of competition law. Rather they should be in the scope of the application of competition law. This exemption makes some state - owned enterprises in Thailand that engaging in commercial economic activities and directly competing with private companies not being monitored under the competition act. Some of these state-owned enterprises were privatized and turn to be public companies doing business for the purpose of making profit. They compete directly in the same market with private companies, for example, Thai Airways International Public Company Limited and PTT Public Company Limited. This exemption is highly controversial because it is against the principle of general consensus that competition law should be applied to all market participants including any SOEs or GLCs that involve in commercial activities to ensure they compete in the same level playing field.[140] In conclusion, the states-owned enterprises in Thailand are not treated in the equal position as the other private companies.*

[138] Section 4 of the Thai Trade Competition Act 1999

[139] Thai Trade Competition Act, Section 4

[140] "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025," [Online] Accessed: 9 July 2016. Available from: https://law.nus.edu.sg/asli/pdf/WPS025.pdf

* The new amendment of this in 2017 reduces this problems by prescribing that the state-owned enterprises that fall within the scope of exemptions must operate for the purpose of maintaining the security of state, national interest and public interest. This also includes state-owned enterprises that provide public utilities.

Note: The amendment of the Thai Trade Competition Act in 2017 is out of the scope of this dissertation. This dissertation will focus only on the challenges in implementing the Guidelines under the application of the Thai Trade Competition Act 1999 only.

Indonesia

Indonesia has some local policies that are contrary to the principle of competition, for example policy prioritizing local state-owned enterprises (BUMD) and policy blocking other businessmen beyond local business practitioners from entering into local markets.[141] Similar to other ASEAN members, industrial sectors in Indonesia is concentrated with state-owned enterprises and also family-controlled conglomerates. Even though Article 1 point 5, and Article 51 of the Law of the Republic of Indonesia No. 5 of 1999 clearly state that state-owned enterprises are included in scope of the Law No. 5's application. In practice, there is no level playing field among these state-owned enterprises and other private companies since the state-owned enterprises receives protection, privileges and special treatment from the government.

Besides the conflict between governmental policy and competition policy, there are also some governmental regulations, which conflict with the principle of competition law. The government's special treatment also provides for a few specified conglomerates in strategic industries. Therefore, there is a request from a scholar to harmonize competition policy and other governmental policies in Indonesia.[142]

[141] Ningrum N. Sirait, "Brief Glance on Competition Law Enforcement in Indonesia (1999 - 2010)" [Online] Accessed: 18 January 2016. Available from: http://www.asiancompetitionforum.org/docman/6th-annual-asian-competition-law-conference-2010/power-point-slides/83-2-04-acf-hongkong-december-2010/file, p. 300

[142] Sirait, N. N., "Brief Glance on Competition Law Enforcement in Indonesia (1999-2010)' (Acf Hong Kong 6-7 December 2010) ", p. 300.

Singapore

Although Singapore is small open economy, Singapore government plays a big role in economy through state-owned enterprises and government-linked companies. It can be seen from the big amount of assets and shares that Singapore government has in these companies. The examples can be seen in the major two companies; Government of Singapore Investments Co (GIC) and Temasek Holdings Pte. Ltd. (Temasek).[143] Under this situation, the Government of Singapore plays the contrasting roles as the market regulator and market players at the same times through ownerships or control over state-owned enterprises and government-linked companies. This is the political economy in Singapore. It is interesting to study that with the characteristics of this political economy in Singapore, the application and enforcement of the Singapore competition act will be effective or not when dealing with the competition cases relating to state-owned enterprises and government-linked companies.

Under the Singapore Competition Act, there are some exclusions from the application of competition law. These exclusions base on the general accepted idea that commercial or business activities of the government should fall under the application of competition law but non-commercial activities do not have to. The exclusion from the application of the Singapore competition act are for the conduct of Government, statutory body or a person acting on behalf of the Government or statutory body.[144]

However, state owned enterprises and government-linked companies fall under the application of Singapore competition law.[145] In practice, their actions are under the supervision of the competition agency in Singapore. The

[143] Deborah Healey, "Application of Competition Laws to Government in Asia: The Singapore Story, 20Working Paper Series No. 025Asian Law Institute," [Online] Accessed: 22February .2015Available from: http://law.nus.edu.sg/asli/pdf/WPS.025pdf

[144] Singapore Competition Act, section 33(4)

[145] Daren Shiau, ", Competition Law in Asia Pacific: A Practical Guide: Singapore " in Competition Law in Asia-Pacific: A Practical Guide, ed. Caitlin Davies Katrina Groshinski (Kluwer Law International 2015).p. 573

SISTIC case[146] is the best example that is often raised to show an investigation and proceeding had been initiated against the Singapore government linked companies by the Competition Commission of Singapore; after this will be called CCS. The SISTIC is a company, set up in 1991 under the Singapore Sports Council (SSC), which is a statutory body in Singapore. The SISTIC operates in the market as a big ticket-service provider company in Singapore. The CCS showed the interpretation of the exclusion under this act by ruling that SISTIC was not acting on behalf of any statutory body in relation to the activity, agreement or conduct as specified in its Exclusive Agreements. According to the CCS's decision, it shows that SISTIC merely entering into an agreement with a statutory body does not, in itself, exclude an entity from the Competition Act. This case is a landmark case in Singapore by showing that the Competition Act applies to all the commercial and economic activities without any discrimination whether they are carried out by public sector or being companies owned by statutory boards, they all will fall under the application of the Singapore Competition Act. The CCS shows the intention to enforce the competition act without discrimination to all undertakings whether they are local entities, foreign entities or even companies owned by statutory boards like it appears in the SISTIC case. This case is an example of competition neutrality in the enforcement of competition law in Singapore.[147] It also a good indicator to show the level of independence in the operation of the CCS in handling competition cases against government, its statutory bodies, and government-linked companies, although the status of the CCS is incorporated as a statutory board under the Ministry of Trade and Industry.[148] The issue of independence of competition regulatory body will be discussed in the later parts of the Chapter 3 and 4.

[146] SISTIC.com Pte Ltd vs. Competition Commission of Singapore

[147] CUTS Institute for Regulation&Competition, "Case Study 09: Sistic.Com Pte Ltd Vs. Competition Commission of Singapore (Case of Abuse of Dominant Position in Singapore) " [Online] Accessed: 17 July 2017 Available from: https://www.circ.in/pdf/Case_Study_09.pdf

[148] About CCS, "Competition Commission of Singapore," [Online] Accessed: 17 July 2017 Available from: https://www.ccs.gov.sg/about-ccs

Vietnam

This study found that Vietnam faces the unique dilemma between socialist ideology and the transformation into market economy. This is regarded as the important impediment, which is unique and found only in Vietnam as a socialist republic. Even Vietnam committed to move towards more market-based economy through a gigantic transformation of legislations, its socialist ideology roots deep in the society and seems to be a big challenge for Vietnam in transitional phrase towards liberalization and globalization. 149 This can be seen from a conflict between government maintaining the control over the economy and the objective of Vietnam competition law, which aims to create a level playing field to all market participants. The will of Vietnamese government is in clash with the ideal of competition regime because the government does not want to be only a facilitator but also posing itself as a player in the market150through state-owned enterprises, which generally gain special advantages when comparing with private companies. [151] Moreover, sometimes market operation is intervened by the state in order to maintain communist ideological in controlling over economy. [152] These strategies are in accordance with the policy of Vietnam in the attempt to build national champions, particularly in major industries like civil aviation, heavy industries, electricity generation and telecommunication. [153] There is some criticism that state-owned enterprises are likely to receive special treatments or favorable dealings, which are not easily available for other private companies.[154]

[149] Alice Pham, "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business 26, 3 (2006). p. 547-548

[150] Ibid. p. 560

[151] David Fruitman, The Political Economy of Competition Law in Asia: Indonesia (Edward Elgar Publishing Limited, 2013)., p. 131

[152] Pham, A., "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business. p. 561

[153] John Gillespie, "Localizing Global Competition Law in Vietnam: A Bottom-up Perspective," International & Comparative Law Quarterly 64(October 2015). p. 935-975, 944

[154] T. T. Nguyen, M. A. von Dijk, "Corruption, Growth, and Governance: Private Vs. State-Owned Firms in Vietnam," Journal of Banking and Finance 36, 11 (2012).

Although Article 2 of the Law on Competition (No 27-2004-QH11) prescribes that state-owned enterprises are in the scope of competition law application, the law enforcement against them faces obstruction. Due to some of the state-owned enterprises are held or controlled by different lines ministries[155], these ministries are likely to protect their own state-owned enterprises. Investigation and law enforcement against state-owned enterprises face some hindrance in the form of political intervention. Some cases are quietly dropped.[156] This presents the ineffective enforcement towards state-owned enterprises in practice.[157]

3.1.1.3 Limitations in the Implementation of ASEAN Regional Guidelines on Competition Policy into National Competition Systems of ASEAN Member States

The result of the in-depth interviews of competition agencies' officials: both economists and legal officials, from Thailand, Indonesia, Singapore and Vietnam show that these countries do not fully implement the ASEAN Regional Guidelines on Competition Policy into their national competition systems effectively[*]. According to the interview, similar results were reached that the Guidelines are not used as the

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[155] Pham, A., "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business. p. 559

[156] Gillespie, J., "Localizing Global Competition Law in Vietnam: A Bottom-up Perspective," International & Comparative Law Quarterly. p. 935-975, 944

[157] Rijit Sengupta and Cornelius Dube, ", Competition Policy Enforcement Experiences from Developing Countries and Implication for Investment," [Online] Accessed: 18 January 2016. Available from: http://www.oecd.org/investment/globalforum/40303419.pdf, Luu Huong Ly, ed. Sathita Wimonkunarak, General Affairs Division Civil and Economic Law, Department Ministry of Justice of Vietnam (Bangkok 2016).

[*] The interviewees were asked the question as follows:

1. Do you think the ASEAN Regional Guidelines on Competition Policy plays any role in your competition regime?

2. Do you have any action plan in implementing the ASEAN Regional Guidelines on Competition Policy in your country?

If the question is yes, please elaborate it?

[**] Interview with Dr. Luu Huong Ly , Legal Officer at the Civil and Economic Law Department, Ministry of justice of Vietnam (Thailand, 22 July 2016), Interview with Mohammad Reza, Head of the International Cooperation Division, Komisi Pengawas Persaingan Usaha (KPPU) (Thailand, 4 August 2015), Interview with Kong Weng Loong, Senior Assistant Director (Business & Economics), Head of Commitments and Remedies Unit, Competition Commission of Singapore (CCS), The Miracle Grand Hotel (Bangkok 15 July 2015), Interview with Cao Xuan Hien, Head of Antitrust Division Vietnam Competition Authority (VCA), The Rama Garden Hotel (Bangkok Thailand 5 August 2015), Mr. Wattanasak Suriam

framework or reference in their daily operation of competition agencies and their staffs. They rather focus on the substantive and procedures under their national competition rules. The Guidelines may play the role when these countries want to amend or reform their competition laws[**]. This shows that the Guidelines have not been effectively implemented into their competition law systems**.** It appears that there is no formal measure or order to force the competition agencies in these four countries to take into account the competition standards imposed under the Guidelines. This reflects the problem of low political will in Thailand, Indonesia, Singapore and Vietnam.

Without the political will, the effective implementation of the ASEAN Regional Guidelines on Competition Policy is difficult because there is no specific legal binding and procedures on how to make AMSs implement the Guidelines. Thus, political will is considered the primary requirement in the implementation of the Guidelines. If there is no political will, there will be no top-down order to all relevant stakeholders to implement the Guidelines. Without the top-down orders, there will be no action plan or measures from the governments of ASEAN Member States to force the implementation of the Guidelines into national competition systems of ASEAN members.[158] This can finally lead to unsuccessful implementation of the Guidelines.

For the effective implementation of the Guidelines, it is necessary to make government aware of the potential gains from implementing the Guidelines as a part of fulfilling the commitment concerning competition policy under the AEC Blueprint. It is necessary to make all politicians and rule-makers realize the benefits of competition policy to the economic development not only in the aspect of ASEAN as a whole, but competition policy could also bring about the economic development in national level as well. Politicians should be well informed about this, which will help growing their willingness to lay down a road-map and measures for promoting competition in their jurisdictions.

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[158] Dube, R. S. a. C., ", Competition Policy Enforcement Experiences from Developing Countries and Implication for Investment."14

[*] ASEAN Regional Guidelines on Competition Policy, Chapter 3. Note: The Guidelines does not give further details on other restrictive trade practices so it intentionally leaves the rooms for AMSs to design about this prohibition. Therefore, the dissertation cannot assess the impediments in implementing the Guidelines in this area.

On the other hand, there are some opportunities arriving from implementing the Guidelines to competition policy.

3.1.2 Opportunities in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the context of Competition Policy

Opportunities in ASEAN Level

- Greater convergence in ASEAN competition policy
- Turning ASEAN into highly competitive economic region.
- Facilitating ASEAN economic integration

Opportunities in National Level

- Review other competition restrictive policies, laws and regulations to be competition-friendly
- Less conflicts between competition policy and other economic policies

3.2 Impediments Faced in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Competition Law

Divergences and Inconsistencies between National Competition Laws of ASEAN Member States and the ASEAN Regional Guidelines on Competition Policy causing Impediments in Implementing the ASEAN Regional Guidelines on Competition Policy

Divergences and inconsistencies in national competition laws across ASEAN Member States, particularly in AMSs that have already had competition law applicable before the introduction of the ASEAN Regional Guidelines on Competition Policy, make it difficult to implement the ASEAN common competition framework like the Guidelines. If the substance of domestic competition law is highly contrast with the content of the Guidelines, implementing the Guidelines will be more difficult because implementing the Guidelines will come with the cost. The amendment of competition law may be necessary to make the domestic competition law conforming to the Guidelines. This is regarded as an impediment in implementing the Guidelines in the context of competition law.

This is not the problem faced by ASEAN. There was an attempt to push the idea of international competition law framework into the World Trade Organization' s agenda (WTO). However, the main obstruction is on difficulties in building international consensus on competition rules resulting from a vast divergence in the substantive, procedural and development of competition regimes of WTO members. This is a reason why the attempt of introducing WTO agreements in the field of competition law was unsuccessful. This failure in pushing competition law into multilateral framework like WTO, shows that the main impediment in creating international competition law is on divergences in competition laws across the globe.

This is similar to the situation in ASEAN that ASEAN Member States have differences in competition laws. The differences can be divided into three main groups, which are differences in legal systems, substantive law and procedural law. This part of the dissertation will examine the main elements in the domestic competition laws in Thailand, Indonesia, Singapore and Vietnam to assess whether they are conforming to the standard set by the Guidelines or not.

3.2.1 Divergences in Legal Systems for Competition Law among Thailand, Indonesia, Singapore and Vietnam

Different legal systems for competition law leads to different proceedings, procedures and sanctions under competition laws in these four countries. Thailand has criminal and civil system for competition law. Indonesia has administrative and criminal system. Singapore has administrative and civil system. No criminal liability for violating the main prohibitions under the Singapore Competition Act. However, criminal liability can be imposed for offences concerning non-compliance with the powers of investigation, where a person fails to cooperate with the CCS during investigations.159 Vietnam has administrative and civil system for competition law. Cartel was recently criminalized under Article 217 under the Vietnam's Penal Code where criminal sanctions can be imposed both on individuals and business organizations.

[159] Singapore Competition Act, Section 83

3.2.1.1 Inconsistency between Substantive Laws in Thailand, Indonesia, Singapore and Vietnam and the Guidelines as an Impediment in Implementing the ASEAN Regional Guidelines on Competition Policy

3.2.1.1.1 Competition Laws: Similarities and Differences between National Competition Laws in ASEAN Member States and the Guidelines

Roots of Competition Rules in Thailand, Indonesia, Singapore and Vietnam

The root and the development of competition law in each country could partly explain the competition problems in that jurisdiction. Therefore, it is worth studying the root and objectives of competition laws in all four selected countries.

Thailand

There were three main reasons behind the introduction of the Trade Competition Act 1999. The first reason concerns internal requirements to reduce barriers to entry, improve market activities, and eliminate monopoly. Second, the Constitution and the 8th National Development Plan stated that monopolization must be eliminated; thus, the competition law should be introduced to conforming to what stated in the Constitution. Lastly, there were many complaints from business operators about some anti-competitive conducts in Thailand, which considered illegal in foreign countries.[160]

During the drafting period of this act, with the weak competition culture making Thailand had little knowledge about competition law. Thus, the process of drafting until the introduction of Thai competition law experienced many problems. There were a lot of discussion, criticization and hesitation. The process of drafting this act faced many obstructions. However, it was finally introduced after taking a long period of drafting, negotiations and compromising with all relevant stakeholders in the society. Therefore, this act is can be called 'the Product of Political Compromise'

Indonesia

[160] Siripol Yodmuangchareon, "Toward Effective Implementation of Competition Policies in East Asia : Thai's Perspective," [Online] Accessed: 28 October 2016. Available from: http://www.jftc.go.jp/eacpf/06/6_02_13_01.pdf

The Law No.5 or Indonesian competition law was introduced as one of the intentions to complement economic reform process in Indonesia.

Singapore

The Singapore Competition Act was introduced because of the force of signing the Free Trade Agreement with the US as well as the Singapore's government policy to create an attractive legal environment for foreign investors to attract foreign investment and exposing the domestic companies to higher level of competition.[161]

Vietnam

The Competition law in Vietnam was forced to introduced as a result of the legal obligation for entering the World Trade Organization. Another related reason behind this act's introduction results from the internal economic reform policy.[162]

The Comparison of Objectives of Competition Laws in Thailand, Indonesia, Singapore and Vietnam

Under the Guidelines, the AMSs are free to set one or more objectives for their competition laws. However, setting multiple objectives to pursue has a high risk of causing conflicting objectives. In fact, the set of competition law's objectives is important because it can influence the direction of implementation and enforcement of competition law.[163] This study found that none of these four ASEAN countries put ASEAN regional integration as one of their objective. Unlike the European Union, national competition laws in the EU Members States set the regional integration as one of their objectives. The possible explanation is some ASEAN countries have competition laws applicable before the binding of the AEC Blueprint and its action plans on competition policy. Furthermore, there is no obligation binding AMSs to

[161] May Fong Cheong and Yin Harn Lee, "The Political Economy of Competition Law in Asia: Malaysia and Singapore,," in The Political Economy of Competition Law in Asia, ed. Mark Williams (Edward Elgar, 2004)., p. 234-235

[162] Pham, A., "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business. p. 551

[163] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy.", p. 10

include the goal of ASEAN region integration into their competition laws. This could partly explain why Thailand, Indonesia, Singapore and Vietnam do not include this regional objective into their competition law but rather making their objectives of competition law responding mainly on each country specific demands.

This table below shows

Table 2 the comparative objectives of Competition Law under the ASEAN Regional Guidelines on Competition Policy with the objectives of competition laws in Thailand, Indonesia, Singapore and Vietnam

Objectives of Competition Law under the ASEAN Regional Guidelines on Competition Policy[164]	**Thailand** [165]	**Indonesia** [166]	**Singapore**[167]	**Vietnam***
Protection of Competition Process, Foster Competition, Fair Competition Environment	✓	✓	✓	✓
Efficient markets	✓	✓	✓	✓
Promote of Productivity and Innovation	✓	✓	✓	✓
Increase Consumer Welfare	✓	✓	✓	✓
Protection of State's Interests and Public Interest	✓	(Public Interest)		✓[168]

[164] ASEAN Regional Guidelines on Competition Policy, Chapter 2.2

[165] Thai Trade Competition Act 1999

[166] The Law No.5/1999 on Prohibition of Monopoly Practices and Unfair Business Competition, Article 3

[167] Burton Ong, "The Origins, Objectives and Structure of Competition Law in Singapore," World Competition 29, 2 (2006). p. 269-284, 269-275

* Under the Vietnam competition law, its objectives are not directly stated in the objective clause. However, Cao Xuan Hien, who works in the Investigation Division in charge of Competition Restricting Cases Vietnam Competition Administration Department, MINISTRY OF TRADE, pointed out the objectives of Vietnam competition policy as follows: controlling and regulating anti-competitive conducts, creating and developing the fair competition environment on the non- discrimination basis, protection of legitimate rights and interests of businesspersons, consumers and finally contributing on the socio-economic development.

[168] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321, 318

It is worth noting that the objectives of Indonesia competition law are quite unique in the way that pull in other objectives such as guaranteeing the consumer welfare, preserving the public interest and promoting efficient economy into the competition law. Prioritizing and balancing interests between various objectives may be problematic. Furthermore, setting various objectives to pursue could cause the conflicts between these objectives. [169]

The Comparison of Exemptions from the Application of Competition Laws in Thailand, Indonesia, Singapore and Vietnam

There is a consensus that the application of competition law should be general while the granting exemptions should be limited to minimal, well considered and well defined.[170] In general, the competition law should be applied to all economic activities with only necessary and specific exemptions. The exemptions should be narrow and clearly identified. However, it is acceptable that some activities should be exempted from the application of competition laws if they are necessary to achieve the specific economic, social or political policies of the nations.

In the context of the ASEAN Regional Guidelines on Competition Policy, Chapter 3 mentions that competition policy should have general application applying to all economic sectors and businesses that participate in commercial economic activities including state-owned enterprises. However, exemptions could be granted by stating in the law.[171]It can be seen in the Guidelines that very brief details are

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[169] Ningrum Natasya Sirait, The Political Economy of Competition Law in Asia: Indonesia (Edward Elgar Publishing Limited 2013)., p. 299

[170] Healey, D., "Application of Competition Laws to Government in Asia: The Singapore Story, 20 Working Paper Series No. 025 Asian Law Institute.", p. 4

[171] The ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.2, 6

* "The activities that have been excluded in the Third and Fourth Schedules of the Competition Act include:

Services of general economic interest;

- Activities necessary to comply with legal requirements or to avoid conflict with Singapore's international obligations;
- Activities arising from exceptional or compelling reasons of public policy;
- Specified activities such as the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act, the supply of piped potable water, the supply of wastewater management services, the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act, the supply of rail services carried out by a person licensed and regulated under the Rapid Transit Systems Act, cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act;
- Conduct relating to the clearing and exchanging of articles undertaking by the Automated Clearing House or activity of the Singapore

provided for exemptions of competition laws. There is no further guidance on what activities should or should not be exempted by the competition law.

A table below illustrates

Table 3 the comparison of exemptions from the application of competition laws of Thailand, Indonesia, Singapore and Vietnam.

Exemptions under the ASEAN Regional Guidelines on Competition Policy	**Thailand**	**Indonesia**	**Singapore***	**Vietnam**
Government Authorities	✓	✓	✓	✓
State Owned Enterprises	✓		Statutory Bodies are excluded but government-linked companies falling within the scope of competition law application	
Public Policy	✓	✓	✓	✓
Selected Industries			✓	
Farmers' Cooperatives	✓	✓		
Research and Development		✓		✓
Intellectual Property Rights		✓		

Clearing Houses Association in relation to its activities regarding Automated Clearing House;

- Vertical agreements, i.e. arrangements between businesses at different levels of the production or distribution chain;
- Agreements or conduct directly related and necessary to the implementation of a merger;
- Agreements with net economic benefit (enjoys exclusion only from the section 34 prohibition). Such agreements are those that improve production or distribution, or promote technical or economic progress, and in which restrictions are absolutely necessary to achieving these benefits and do not substantially eliminate competition. Where relevant, a block exemption order may also be issued by the Minister for Trade and Industry at CCS' recommendation to exempt a particular category of agreements that yield net economic benefit; and
- Goods, services and mergers regulated under any other law or competition codes, and other specified activities. You can find the list of sectoral exclusions here. The sectors have been excluded based on public interest considerations such as national security, defence and other strategic interests or because existing sectoral competition frameworks are already in place. Cross-sectoral competition matters will be dealt with by CCS, in consultation with the sectoral regulators."

Competition Commission of Singapore

Whether the grant of some forms of exemptions is contrast to the principle of fair competition or not will be discussed in Chapter 3: under the topic "Nexus between Government and State-Owned Enterprises or Government-Linked Companies"

The Comparative Behaviors Prohibited under Thailand, Indonesia, Singapore and Vietnam Competition Laws and Main Prohibitions identified in the ASEAN Regional Guidelines on Competition Policy

The Guidelines clearly states that the competition law is an integral part of competition policy. The Guidelines indicates that the main anti-competitive conducts that ASEAN Member States should prohibit are the prohibition of anti-competitive agreements; horizontal and vertical agreements, abuse of dominant position, anti-competitive mergers and other restrictive trade practices. These recommended prohibitions in the Guidelines are compatible with the main prohibitions in international standard and best practices.

This study found that overall Thailand, Indonesia, Singapore and Vietnam have already incorporated the main prohibitions; the prohibition of anti-competitive agreements; horizontal and vertical agreements, abuse of dominant position and merger control that recommended under the ASEAN Regional Guidelines on Competition Policy into their competition laws. However, there are some differences in details among these countries, which are different legal systems, legal standards; *per se* or rule of reason, threshold and quantum of sanctions, approaches taken between these four ASEAN Member States.[172] These differences come from many factors, including but not limited to the influence of different model laws, negotiation between relevant stakeholders during the law drafting process in each country, pursuing different competition law's objectives and the adoption of best-practices.[173] This part will explore the main important prohibitions under the competition laws in Thailand, Indonesia, Singapore and Vietnam and compare them with the standard

[172]Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy.", p. 9

[173] Ibid. p. 9

framework imposed in the Guidelines. For clearer illustration of comparison between recommended prohibitions in the Guidelines and prohibitions under competition law in the four selected countries will be represented by the table below

The Table showing

Table 4 The comparison between recommended prohibitions in the Guidelines and prohibitions under competition law of Thailand, Indonesia, Singapore and Vietnam

Prohibitions under the ASEAN Regional Guidelines on Competition Policy	**Thailand**	**Indonesia**	**Singapore**	**Vietnam**
Prohibition of Anti-Competitive Agreements (Horizontal Agreements)	✓	✓	✓	✓
Per se illegal of Horizontal Agreement e.g. price fixing agreements	✓[174]	✓[175]	✓*	✓[176]
Prohibition of Anti-Competitive Agreements (Vertical Agreements)	✓	✓	X Vertical Agreements as defined in the Third Schedule are excluded from Section 34 prohibition. (Unless, vertical agreements amount to abuse of dominant position, they will be prohibited under Section 47 of Singapore Competition Act)	✓

[174] Thai Trade Competition Act, Section 27(1) -(4)

[175] The Law No.5 1999, Article 5(1), Article 6, Article 10 and Article 15

[*] (a) the fixing (whether directly or indirectly) of purchase or selling prices or any other trading conditions; (b) the limitation on or control of production, markets, technical development or investment; (c) the sharing of markets or sources of supply; (d) bid-rigging or collusive tendering.

[176] The Competition Law No. 27/2004/QH11, Article 8 paragraph 6, 7 and 8

Prohibition of Anti-Competitive Agreements

Horizontal Agreements[177]

Under the Guidelines, there are only definition of horizontal agreements and a few examples of horizontal agreements provided, which are as follows:

The Table showing

Table 5 The comparison between Types of Horizontal Agreements under the ASEAN Regional Guidelines on Competition Policy and Types of Horizontal Agreements under Indonesia, Thailand, Singapore and Vietnam

Types of Horizontal Agreements under the ASEAN Regional Guidelines on Competition Policy	Thailand[178]	Indonesia[179]	Singapore[180]	Vietnam[181]
Restrict Output	✓	✓	✓	✓
Fixing Prices	✓	✓	✓	✓
Market Sharing through Geographical Area	✓	✓	✓	
Bid Rigging	✓	✓	✓	✓

Under the Thai Trade Competition Act, the prohibition of horizontal agreements is in the Section 27*, which bases on the conduct control.[182] Some horizontal agreements appear not conclusively illegal because Section 35 allows business operators for submitting the applications for exemption. The Trade Competition Commission is empowered by Section 37 to decide whether the submitted horizontal agreements for exemption falling within the scope of "reasonably necessary in the business, beneficial to

[177] G. Sivalingam, "Competition Policy and Law in Asean," The Singapore Economic Review 51, 02 (2006). p, 241

[178] Thai Trade Competition Act, Section 27

[179] The Law No.5 of 1999, Article 4

[180] Singapore Competition Act, Section 34

[181] Vietnam Law on Competition, Article 8

* This provision was modeled after both MRFTA of the South Korea and FTL of Taiwan in undue collaborative activities and the prohibition of non-price vertical restraints and exclusionary practices, respectively.

[182] Yodmuangchareon, S., "Toward Effective Implementation of Competition Policies in East Asia : Thai's Perspective."

business promotion, has no serious harm to the economy and has no effect on material and due interests of general consumers"[183] or not If the submitted horizontal agreement falls within this scope of exemption, the Commission shall issue a written order granting permission in favor of such business operator.

In Singapore, the main prohibition of anti-competitive horizontal agreements is in Section 34. Whereas block exemptions might be given by the Competition Commission according to Section 41. Agreements specified in the Third Schedule are the excluded agreements from the application of Section 34.[184]

In Vietnam, competition restrictive agreements are identified in Article 8 of the Vietnam Law on Competition. Article 9 of this act points out that agreements that indicated in Article 8(6), (7) and (8) are *per se* illegal*. Moreover, agreements that identified in clauses 1, 2, 3, 4 and 5 of Article 8 will be prohibited only if parties to the agreement have a combined market share of 30 per cent or more of the relevant market.[185] These agreements are as follows:

"Agreements either directly or indirectly fixing the price of goods and services"; (Article 8, Paragraph 1)

" Agreements to share consumer markets or sources of supply of goods and services"; (Article 8, Paragraph 2)

" Agreements to restrain or control the quantity or volume of goods and services produced, purchased or sold"; (Article 8, Paragraph 3)

"Agreements to restrain technical or technological developments or to restrain investment"; (Article 8, Para- graph 4);

[183] Thai Trade Competition Act, Section 37

[184] Singapore Competition Act, Section 35

* Vietnam Law on Competition, Article 9 Prohibited agreements in restraint of competition

1. The agreements stipulated in clauses 6, 7 and 8 of article 8 of this Law shall be prohibited. [Article 8(6) Agreements which prevent, impede or do not allow other enterprises to participate in the market or to develop business; 8(7) Agreements which exclude from the market other enterprises which are not parties to the agreement 8(8) Collusion in order for one or more parties to win a tender for supply of goods and services.

[185] Vietnam Law on Competition, Article 9 (2)

“ Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract”; (Article 8, Paragraph 5).

Article 10 generates the exemptions for agreements falling in the scope of Article 8(1-5) by setting the conditions that “ …if it satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers:

(a) It rationalizes an organizational structure or a business scale or increases business efficiency;

(b) It promotes technical or technological progress or improves the quality of goods and services;

(c) It promotes uniform applicability of quality standards and technical ratings of product type

(d) It unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors;

(dd) It increases the competitiveness of medium and small sized enterprises;

(e) It increases the competitiveness of Vietnamese enterprises in the international market.”[186]

Regarding the Indonesian Competition Law, some price-fixing agreements are exempted if they are entered into in the context of joint venture or they are entered into basing on prevailing laws.[187] Further exclusions from the application of this law can be found in the Chapter IX MISCELLANEOUS PROVISIONS**:** Article 50

“ 1. actions and or agreements aimed at implementing applicable laws and regulations; or

2. agreements related to intellectual property rights, such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or

[186] Vietnam Law on Competition, Article 10 (1)

[187] The Law No.5 of 1999, Article 5 (2)

3. agreements for the stipulation of technical standards of goods and or services which do not restrain, and or do not impede competition; or
4. agency agreements which do not stipulate the resupply of goods and or services at a price level lower than the contracted price; or
5. cooperation agreements in the field of research for raising or improving the living standard of society at large; or
6. international agreements ratified by the Government of the Republic of Indonesia; or
7. export-oriented agreements and or actions not disrupting domestic needs and or supplies; or
8. business actors of the small-scale group; or
9. activities of cooperatives with the specific aim of serving their members."[188]

Vertical Agreements[189]

Similar to the horizontal agreements, the prohibitions of vertical agreements under the Guidelines provides AMSs with only definition of vertical agreements and their few examples of vertical agreements relating to the set of sell or resell condition of the distribution, agency and franchising agreements.

Among these four countries, Singapore is the only country that excludes the vertical agreements as defined in the Third Schedule from the application of this act unless specified by the Minister.[190] This results from the CCS's view and general consensus among economists believing that vertical agreements generally produce pro- competitive effects rather than anti- competitive effects.[191] It is believed in Singapore that most of vertical agreements has net pro- competitive effect by way of improving production or distribution, promoting economic progress or technical

[188] The Law No.5 of 1999, Article 50

[189] Sivalingam, G., "Competition Policy and Law in Asean," The Singapore Economic Review. 241

[190] Section 34 of Singapore Competition Act

[191] CCS, "Ccs Guidelines on the Section 34 Prohibition," [Online] Accessed: 25 February 2015. Available from: https://www.ccs.gov.sg/404?404;https://www.ccs.gov.sg:80/content/ccs/en/Legislation/CCS-Guidlines.html

progress.[192] However, if these vertical agreements are committed by dominant firms, these conducts will be proceeded under provision of the abuse of dominant position.

This is not against the principle of the Guidelines because not every vertical agreement between undertakings has detrimental anti-competitive effects. Some have pro- competitive effects or some produce far more benefits than bad effects to competition. Therefore, The Guidelines recommends that AMSs should evaluate these vertical agreements basing on the rule of reason and assessing whether they have object and/or effect in preventing, distorting or restricting competition or not[*].

Prohibition of Abuse of Dominant Position

This dissertation found that Thailand, Indonesia, Singapore and Vietnam share the same approach by not prohibiting the companies from being dominant position in the market. Firms will only be penalized when they abuse their dominant position. This is consistent with the recommendation of the Guidelines.[193]

[192] "Overview of the Section 34 Prohibition ", [Online] Accessed: 6 August 2016 Available from: http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-27

[*] ASEAN Regional Guidelines on Competition Policy, chapter 3.2.2: " Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessary mean that the agreement is anti-competitive. Therefore, AMSs should evaluate the agreement by reference to its object and/or its effects where possible. AMSs may decide that an agreement infringes the law only if it has as its object or effect the appreciable prevention, distortion or restriction of competition."

[193] ASEAN Regional Guidelines on Competition Policy, Chapter 3.3

The Table showing

Table 6 The comparison between types of abuse of dominant position behaviors under the ASEAN Regional Guidelines on Competition Policy and types of abuse of dominant position behaviors

Prohibitions of Abuse of Dominant Position under the ASEAN Regional Guidelines on Competition Policy	**Indonesia**[194]	**Thailand**[195]	**Singapore**[196]	**Vietnam**[197]
Definition of dominance	✓	✓	✓	✓
Restrict market, access to technology	✓		✓	✓
Restrict entry	✓	✓	✓	✓
Predatory pricing	✓	✓	✓	✓
Dissimilar Conditions or Pricing to Equivalent Transaction	✓	✓	✓	✓
Interfere with other businesses	✓	✓		✓
Reduce quantity/ Limiting Production/Restricting Output		✓	✓	✓
Supplementary obligations (tie-ins or bundling)		✓	✓	✓
Changing trade terms	✓			

[194] KPPU, 'Guideline on the Abuse of Dominant Position (Article 25)' Commission Regulation Number 6 Year 2010 (April 9, 2010)

[195] OTCC, "Guidelines under Section 25," [Online] Accessed: 18 July 2017 Available from: http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-25.pdf

[196] Singapore Competition Law, Section 47

[197] Vietnam Competition Law, Article 13

It is worth noting that the dominance position under the Singapore Competition Act is defined under Section 47(3) to cover both dominant position in Singapore and anywhere else since the unique nature of Singapore; small but open economy that rely on import for domestic consumption, could be easily attacked by anti-competitive behaviors from foreign firms.

Prohibition of Anti-Competitive Mergers

Thailand

Section 26 of the Trade Competition Act (1999) (TCA) prohibits mergers of businesses that potentially result in monopoly or unfair competition, unless a merger permission is granted by the Trade Competition Commission (TCC). This Section is modeled after Article 6(1) of the Fair Trade Law (FTL) of Taiwan.[198] However, to make the merger control under this provision enforceable, the TCC is required to issue the secondary legislation, which are notifications concerning the specific process of merger control, including the details of which kinds of mergers will be examined and/or approved, setting a minimum threshold of market shares, total sales, amount of capital, number of shares or quantity of assets that will be subject to the control under this prohibition. However, since 1999 until 2017, which is eighteen years of application, the minimum thresholds had not been set. Hence, the merger control in Thailand under Section 26 is unenforceable in practice. Businesses; thus, were free to merge without the control of competition authority. In fact, a notification regarding the merger control were drafted and the minimum market threshold was set. However, the draft was opposed by many stakeholders, particularly from the view of business sectors.[199] The big flaw under the Thai Trade Competition Act 1999 is no specific period requirement forcing TCC to issue the necessary notifications regarding the merger control under Section 26.

[198] R. Ian McEwin and Sakda Thanitcul, "The Political Economy of Competition Law in Asia: Thailand," in The Political Economy of Competition Law in Asia, ed. Mark Williams (Edward Elgar, 2013)., p. 277

[199] Santichai Santawanpas, ed. Sathita Wimonkunarak, Ministry of Commerce (2015).

Indonesia

Indonesia's Anti-Monopoly and Unfair Competition Law requires that mergers and acquisition activities that meet certain thresholds must be notified to the Business Competition Supervisory Commission (KPPU). The thresholds that fall in the scope of mandatory notification are any share acquisition, merger or consolidation that results in:

- a company with assets exceeding 2.5 trillion rupiah (approximately A$240 million);

- a bank with assets exceeding 20 trillion rupiah (approximately A$1.92 billion); or

- a company with sales exceeding 5 trillion rupiah (approximately A$480 million),

The main criteria that the KPPU uses when considering whether the merger and acquisition activities cause monopolistic or unfair competition or not basing on an analysis of:

- market concentration;

- barriers to entry the relevant market;

- the potential for anti-competitive behavior;

- a comparison of any resulting efficiency compared to the anti-competitive impact;

- the intentional avoidance of bankruptcy of one of the relevant companies; and

- any other reasons under the KPPU's rules in the future

Singapore

Section 54 of the Competition Act prohibits mergers that may result or may be expected to result in a substantial lessening of competition, unless they are excluded or exempted. The CCS's Guideline on the substantive assessment of mergers further clarifies the recognition of the CCS's view towards the mergers that not every merger must cause bad effects to competition. There are also pro-competitive mergers or competitively neutral mergers. Therefore, violating section 54, the mergers must give substantial lessening of competition and have no net economic efficiencies.[200] While the notification regime for mergers in Singapore is on voluntary basis.

Vietnam

Under the Vietnamese Competition Law, the merger control falls in the scope of an economic concentration, which is defined to include the following types of transactions: merger, consolidation, acquisition and joint venture. Article 20.1 of the Vietnamese Competition Law said that if the parties to a merger have a combined market shares in a relevant market from 30% to up to 50%, then the parties must notify the Vietnam Competition Authority of the enterprise acquisition before completing the merger. While the economic concentration with a combined market share of more than 50% is prohibited unless it is falls in the scope of exemption. The exemption is provided on the condition that the parties to the merger are still considered a small and medium enterprise after the merger. However, to be in the scope of small and medium enterprises under Vietnamese law is subject to different criteria based on its business lines.

[200] Singapore, C. C., "Ccs Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel."

The Table showing

Table 7 The comparison of merger control under Indonesia, Thailand, Singapore and Vietnam competition laws

Merger Control	Indonesia	Thailand	Singapore	Vietnam
Legal Provision	Article 28-29	Section 26	Section 54	Section 3 (Article 18)
Type of Merger Control	Voluntary pre-merger notification	Compulsory pre-merger notification	Voluntary self-assessment for pre-merger and post-merger	Compulsory pre-merger notification
Threshold	Consolidated assets Rp.25 trillion Consolidated turnover Rp. 5 trillion	Under the application of Thai Trade Competition Act, the merger threshold was not issued until the act was amended in 2017. This meant that the merger control was unenforceable in practice during the life of Thai Trade Competition Act 1999.	No determinative threshold like other jurisdictions. The CCS issued merely market share indicators as follows: market share of 40% or more or a merged entity with a market share of between 20% to 40% and a post-merger CR3 ratio of 70% or more.	Market share of 30%-50%

This study found that the main prohibitions; the prohibition of anti-competitive agreements, abuse of dominant position and merger control of Thailand, Indonesia, Singapore and Vietnam's competition laws conform to the standard imposed under the ASEAN Regional Guidelines on Competition Policy. Divergences are found in the prohibition of unfair trade practices, extraterritorial application and some issues regarding inappropriate laws in some countries. This part will address these issues.

Inconsistencies in the Scope of Unfair Trade Practices of Competition Laws in Thailand, Indonesia, Singapore and Vietnam

Although unfair trade practices are not given details and recommendations under the Guidelines, it is considered one of the main prohibitions that AMSs should incorporate into the national competition laws. This study found that the prohibition of unfair trade practices is quite different in scope among these four jurisdictions, particularly Vietnam because some consumer protections related prohibitions are included in the scope of unfair trade practices under the Vietnam competition law. This is quite different from other three jurisdictions and diverging from the international best practices. The example is on Article 45 where advertisement for the purpose of unfair competition is prohibited.[201] False advertising is one of the types of conducts falling under Article 45, including advertising using fraudulent information or advertising leading to mislead clients about the price, quantity, quality, usage, design, type, packaging, date of manufacture, use expiry, origin of goods, manufacturer, place of manufacture, processor or place of processing and utility. Imitating advertisements of

[201] Article 45 Advertisement aimed at unfair competition

Enterprises shall be prohibited from conducting the following advertising activities:

1. Comparing directly their own goods and services with those of the same type of another enterprise;
2. Imitating another advertising product in order to mislead customers;
3. Providing false or misleading information to customers about one of the following matters:
   (a) Price, quantity, quality, usage, design, type, packaging, date of manufacture, use expiry, origin of goods, manufacturer, place of manufacture, processor or place of processing;
   (b) Manner of use, method of service, warranty period;
   (c) Other false or misleading information;
4. Other advertising activities prohibited by law

other products to confuse the clients and comparing directly goods and services with those of the same type of another enterprises also violates Article 45. These types of advertising for the purpose of unfair competition have accounted for a big proportion of unfair competition cases.[202] This kind of prohibition often categorized as consumer protection issue in other jurisdictions rather than competition law issue. However, it is in the scope of unfair competition acts in Vietnam. It can be seen that the design of unfair competition acts under Vietnam competition law is quite broad in scope by being defined as " business practices, which run counter to common standards of business ethics and cause actual or potential damage to State' s interests, legitimate rights and interests of other enterprises or consumers. "[203] The conducts that can fall within the scope of unfair competition acts includes[204]

• misleading indications (Article 40);

• infringement of business secrets (Article 41);

• coercion in business (Article 42);

• discrediting other enterprises (Article 43);

• disturbing business activities of other enterprises (Article 44);

• advertising for the purpose of unfair competition (Article 45);

• sale promotion for the purpose of unfair competition (Article 46);

• discrimination by associations (Article 47);

• illicit multi-level sale (Article 48);

• other unfair competition acts as prescribed by the Government (Article 39, Paragraph 10)

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[202] CUTS Hanoi Resource Centre, "Unfair Trade Practices in Vietnam, ," [Online] Accessed: 28 September 2017. Available from: http://cuts-hrc.org/images/stories/cuts-utp/to%20tam.ppt

[203] Article 3, Vietnam Competition Act

[204] Handbook on Competition Policy and Law in ASEAN for Business 2013: Vietnam

It can be seen that the scope of unfair trade practices under the Vietnam competition law diverges from other jurisdictions and international best practices. This might make the cooperation and attempt of converging competition laws among AMSs more difficult in the future.

3.2.1.1.2 The Lack of Legal Clarity on the Extraterritorial Application in Some Countries

Under the ASEAN Regional Guidelines on Competition Policy, the extraterritorial application of competition rule is mentioned in the Chapter 5. 1. 3, which is shortly identifying that the extraterritorial application of competition law is another issue that should be included in the competition law or secondary legislation for creating the clear and effective competition rule. No further detail or explanation about the extraterritorial application is elaborated in the ASEAN Regional Guidelines on Competition Policy. This shows that the content of the Guidelines is not complete in this point because the extraterritorial application is important for the effective enforcement of national competition law. The Guidelines should make clearer explanation on this issues to ASEAN Member States because most of them are young and inexperienced competition authorities to deal with the complicated and sensitive issue like extraterritorial application.

Thailand

Thai Trade Competition Act 1999 is silent on the issue of extraterritorial application. There is no interpretation from the competition authority or court to clarify whether extraterritorial application is enabled under this act or not.

Indonesia

The Law No.5 does not explicitly mention about the extraterritorial application. However, the case law shows the adoption of the single business entity, or known as the single economic entity in the European Union, to allow the

extraterritorial application of competition law. There were two cases relating to the extraterritorial application. The *KPPU's case no. 07/KPPU-L/2004: Tender on VLCC of PT Pertamina* was the first case concerning the extraterritorial application through the adoption of the single business entity. This KPPU's decisions was then affirmed by the Supreme Court Decision *No. 04K/KPPU/2005*. In this case even the Frontline Ltd. was not the Indonesian company and not even doing business in Indonesia but it was decided violating the Law No.5 by participating in the collusive tendering through the PT. Equinos Shipping Company. The Equinos was considered only as an arm of the Frontline in participating in the collusive tendering so these two companies are considered as one company under the principle of the single economic entity.[205] The second case was the *Temasek* case, which was also related to the single economic entity doctrine and the violation of article 27.[206]

Singapore

Singapore is the only jurisdiction among these four selected ASEAN members that extraterritorial application is explicitly states in the law. Singapore Competition Act is specifically designed to have extraterritorial reach for anti-competitive agreements in Section 33 and abuse of dominant position in Section 47.

Vietnam

Whether Vietnam has extraterritorial application or not is still unclear in Vietnam.[207] It is stated in the public review report of Vietnam Competition Legislation that the Competition Law No. 27/2004/QH11 limits the scope of

[205] Kurnia Toha, "Extraterritorial Applicability of Indonesia Business Competition Law as an Efforts Dealing Asean Single Market," Dinamika Hukum 15, 1 (21 January 2015). p. 21

[206] Case No. 07/KPPU-L/ 2007

[207] LUU Huong Ly, "Vietnam's Competition Law," ใน Seminar Proceedings of Competition Law in Mainland ASEAN: Cambodia, Laos, Myanmar, Thailand and Vietnam (The Sukosol Hotel Bangkok 2016).

activities only within the territory of Vietnam.[208] Most of the scholars also believe that the interpretation of competition law in Vietnam does not allow extraterritorial application.[209] However, there is no official interpretation or court decision confirms that competition law in Vietnam has no extraterritorial application.

3.2.1.1.3 Inappropriate Law

Thailand: Delay in Introduction of the Secondary Legislations

Thailand faces a big problem in the delay in the introduction of the secondary legislations, which are related to the two main important provisions namely: the abuse of dominant position and the merger control. The delay in issuing these secondary legislations made the main provisions unenforceable in practice.

The delay in the application of the secondary law regarding ' the Notification of Trade Competition Commission on Criteria for Business Operator with Market Domination 2007' highly affects the application of Section 25. During 8 years of delay in the application of this notification made actions of abuse of dominant position that should have breached Section 25 unenforceable because of the unavailability of criteria concerning business operator possesses dominant position.

There are two socio- political reasons behind this delay. First, the introduction of criteria to determine which company is in the scope of dominant position received strong opposition from large businesses in Thailand. Second, the close relationship between Thai government and those large

[208]Vietnam Competition Authority in collaboration with Japan International Cooperation Agency, "Review Report on Vietnam Competition Law," [Online] Accessed: 25 March 2015. Available from: http://www.vca.gov.vn/NewsDetail.aspx?ID=1429&CateID=244, p. 5

[209] Alice Pham, "Extraterritorial Application in Vietnam," ed. Sathita Wimonkunarak, Researcher with the Consumer Unity & Trust Society (CUTS International), Centre for Competition, Investment & Economic Regulation (C-CIER), and Coordinator of the "Advocacy and Capacity Building on Competition Policy and Law in Asia. (2015).

businesses influences the use of political will in obstructing the effective enforcement of competition law.[210] Thai governments at that time seemed to be lacked interest in encouraging the introduction of Criteria for Business Operator with Market Domination. This implies the lack of political will in enforcing the competition law in Thailand due to the close relationship between government and big firms in Thailand. A big flaw from the delay in the introduction of this secondary law made all abuse of dominant position conducts were not regulated for 8 years after the application of Thai competition act 1999. This could be seen from the allegation of abuse of dominant position in cable television that the commission found that Section 25 should have been applied to this case if the criteria of being the dominant position had been available at that time. There were a lot of complaints that cannot be brought into the lawsuit because of the delay in issuing the threshold of dominance. These could be seen from the issue of tying of sale between whiskey and beer in 2002.[211]

Not only the delay in the criteria of Business Operator with Market Domination, the notification regarding the merger has not been issued until the new amendment act was introduced in 2017. Almost two decades of having no criteria for controlling mergers in Thailand, which was a serious delay. This makes the mergers and acquisitions are absolutely free from the control. It was like happy hours in Thailand for mergers because competition restriction impact from merger was not assessed.

[210] Deunden Nikomborirak, "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business 26, 3 (2006). p. 600.

[211] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy." , p. 20

Indonesia: No general Prohibition of Anti - competitive Horizontal Agreements

No general provision in the Law No. 5 prohibits horizontal agreements that restrict or lessen competition. The existing provisions under this law are specifically designed to catch only specific forms of anti-competitive conducts. Therefore, there are some anti-competitive agreements that cannot be caught by this law. This is against the objective of the Guidelines that require AMSs to include prohibition of anti-competitive agreements in their competition rules.[212] Moreover, having many specific provisions creates more difficulty for business to understand and comply with the law rather than one simple and general provision, which focus on whether there is an agreement in question is anti-competitive or not. This issue was discussed within the KPPU and there was an idea of integrating these provisions into one main provision.[213]

Indonesia: The Unparalleled Imposition of *Per se* Illegal concerning Anti-competitive Agreements Between Indonesia Competition Law and International Best Practices

According to the UNCTAD report, there are many Indonesian offences, which are treated in international best practices as "*per se*" illegal offences, but are designed to be subject to the analysis of the "rule of reason" under the Law No. 5.[214] The examples appear in Article 9 (market allocation) and Article 11 (cartels), which are wildly treated as *per se* illegal in the international standard and many other jurisdictions within and outside ASEAN. However, they are subjected to the rule of reason under the Law No.5[*]. This makes the Law No.5 inconsistent with the Guidelines because the Guidelines suggests that cartels and market allocation should be treated as *per se* illegal.

[212] ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.1

[213] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy " [Online]. Available from: http://www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf , p. 24-26

[214] Ibid. p. 24-26

"AMSs may consider identifying specific "hardcore restrictions", which will always be considered as having an appreciable adverse effect on competition (e.g., price fixing, bid-rigging, market sharing, limiting or controlling production or investment), which need to be treated as per se illegal."[215]

This issue is an obstacle in taking action against these anti-competitive conducts and lowering the level of successful enforcement rates since it allows defendants to ask the KPPU to conduct competition analysis and challenge their findings of competition analysis.[216] Moreover, it increases higher burden for the KPPU to prove anti-competitive effects in every single case before rendering decision. The more burden means more officials and budgets are required to put in order to conducting competition analysis. This makes the situation of constraints in human and financial resources get worse. Despite the fact that market allocation, price-fixing and output restriction agreements is generally accepted that they should be categorized as *per se* illegal without any necessity to prove anti-competitive effects.[217] In addition, this unparalleled imposition of the *per se* illegality concerning anti-competitive agreements makes it harder to harmonize the competition laws among the ASEAN Member States.

Indonesia: The Lack of Exceptions to Existing Prohibition to Specifically Allow Pro-Competitive Conducts

Some commercial conducts, which do not fall within the scope of *per se* illegal, render more pro-competitive effects than anti-competitive effects. Therefore, the prohibition of all anti-competitive conducts without weighing between pros and cons to the competition seems inappropriate. The ASEAN

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[*] The Law No.5, Article 9 and Article 11: Any conduct will fall within the scope of both provisions only if the condition that "…can cause monopolistic practices and/or unfair business competitions" is satisfied. This condition affects the interpretation of these two provisions because before deciding whether Article 9 or Article 11 is violated or not, the last important element that needs to be satisfied is the particular case potentially leads to a monopolistic practice or unfair business. The requirement of potential in monopolistic practice or unfair business make these two provisions subject to the rule of reason rather than per se rule, which is different from international best practices. This is why there is a recommendation to solve this impediment by proposing the amendment of Article 9 and Article 11 by deleting the words "… that can cause monopolistic practices and/or unfair business competitions" from these provisions

[215] ASEAN Regional Guidelines on Competition Policy, Chapter 3.2.2

[216] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy "

[217] Ibid. p. 24-26

Regional Guidelines on Competition Policy exemplifies the way to analyze the agreements by "rule of reason" through market share thresholds and efficiency considerations and provide " safe harbours provisions" through appreciablility test.[218] However, under the Law No.5, there is no equivalent provision to allow the pro-competitive conducts. Thus, the Law No. 5 is inconsistent with the standard of the ASEAN Guidelines in this area.

Clearly establishing exceptions to prohibitions or exemplifies some conducts that fall out of the scope of the prohibitions in the KPPU's guidelines to let the businesses and public know can solve this problem. A publication of approaches that KPPU adopted in determining whether such conducts render adverse effects to competition or not is also important for companies in operating their businesses not to violate the competition law.

Indonesia: Prohibition of Abuse of Dominant Position is Too Specific to Catch other Important Forms of Abuse of Dominance Behaviors

Under Indonesian competition law, there is more than one prohibition regarding abuse of dominant position. However, Article 25 is the most direct provision concerning the prohibition of abuse of dominant position in Indonesia.[219] The wordings in the Article 25 are quite specific and not broad enough to allow flexible interpretation*. Therefore, the conducts that fall within the scope of this provision is quite limited. For example, refusal to supply can prejudice consumers so it should be outlaw according to the illustrative list provided in the ASEAN Regional Guidelines on Competition Policy in Chapter 3.3.2.4. However, the problem is the application of Article 25 cannot catch the

[218] ASEAN Regional Guidelines on Competition Policy, Chapter 3, Section 3.2.3

[219] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy "

* Article 25(1) Business actors shall be prohibited from using dominant position either directly or indirectly to: a. determine the conditions of trading with the aim of preventing and or impeding consumers from obtaining competitive goods and or services, both in terms of price as well as quality; or b. restrain the market and technology development; or c. hamper other potential business actors from entering the relevant market

refusal to supply and no other provision can catch this anti- competitive conduct because Article 17, 18,19 or 20 are also have specific scope and cannot catch the refusal to supply too.[220]

Having many provisions regarding the abuse of dominant position and each provision has its own approach. This makes the Indonesian competition law complex and difficult to interpret as raised in the OECD Reviews of Indonesia Regulatory Reform that *"Where provisions are differently worded for no explicit reason, the courts are required to interpret what the law is intended to mean and they may strive to identify a distinct role and a distinct meaning for each provision in order to explain why Parliament decided to include multiple provisions that could cover similar situations. This dynamic can end with unpredictable and unfortunate results. It could result in some of these overlapping provisions being interpreted in an expansive or idiosyncratic way. The duplication, likely over-reach and the sheer complexity of these provisions gives rise to the potential for discouraging some forms of pro- competitive conduct."*[221]

As a result of the too specific wordings in Article 25 and complex interpretation of many provisions regarding the abuse of dominant position, there is a comment that Indonesia should consider amending the competition law by combining all abuse of dominant position into one main clear provision like other countries.[222]

[220] Ibid. p. 24-32

[221] Ibid. p. 24-32

[222] Ibid. p. 24-32

Indonesia: Duplication, Overlap and Inconsistency between Provisions in Competition Laws

In order to make the interpretation of the law unambiguous, it is better to lessen duplication, overlap and inconsistency between provisions in the Law No. 5.[223] It is important to rearrange prohibitions on anti-competitive conducts in a clearer and more logical thematic structure to facilitate the enforcement, which is the medium-term plan for the amendment of Indonesian competition law.[224]

3. 2. 1. 2 Inconsistency between Procedural Laws in Thailand, Indonesia, Singapore and Vietnam and the Guidelines as an Impediment in Implementing the ASEAN Regional Guidelines on Competition Policy

Inconsistencies between different legal proceedings; namely criminal, administrative and civil proceedings of each AMSs will not be discussed in this dissertation because it is out of the scope of the Guidelines. It is also mainly related to the issue of domestic procedural laws of each country, which are hardly converged. Therefore, the focus will be on the due process, which is within the framework of the Guidelines.

The Lack of Due Process

The importance of due process is mentioned in Chapter 7.1 of the ASEAN Regional Guidelines on Competition Policy. Due process is fundamental in ensuring the effective application of competition law.[225] Due process is important for guaranteeing the justice and impartiality in competition cases so competition agencies in all ASEAN members are encouraged to incorporate the due process in their operations. According

[223] Ibid. p. 24-32

[224] Ibid. p. 24-32

[225] ASEAN Regional Guidelines on Competition Policy, Chapter 7.1

to Chapter 7.2 of the Guidelines, the guiding principles of due process that AMSs should follow are

1. *"**Accountability**: The competition regulatory body could have processes supporting the accountability of its activities, such as obligations to report on a regular basis to a Minister(s) and/or the national legislative body, and/or the Head of State; and to publish annual reports/plans that are available to the public.*
2. ***Administrative review:** AMSs may allow the competition regulatory body to review its own decisions, when circumstances prompting the decision have changed or have ceased to exist.*
3. ***Confidentiality:** The competition regulatory body should be required to maintain the confidentiality of information provided by third parties or identity of third parties where necessary, unless disclosure is required by the law. Adequate sanctions should be imposed on any member of the board and administrative staff of the competition regulatory body for violation of confidentiality of parties of the proceedings, complainants and any third parties providing information under competition law.*
4. ***Independence**: The independence of a competition regulatory body would enhance its credibility and efficiency in implementing competition policy. The appropriate level of independence of the competition regulatory body may differ from country to country. Some measures of independence include budgetary independence, administrative autonomy from the government and the existence of a fixed term of reasonable duration for the competition regulatory body's board of commissioners, without the possibility of being dismissed.*

5. ***Natural Justice****: The competition regulatory body should take into consideration the rules of natural justice, such as informing people of the case against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule), or a similar legal concept under the laws of the jurisdiction.*
6. ***Transparency and Consistency****: The transparency of the competition regulatory body's policies, practices and procedures may be strengthened by such a means as the publication of procedural and enforcement guidelines, guidelines on the competition regulatory body's policies and priorities in the application of the substantive rules, and competition regulatory body/judicial authority decisions. These means would help to promote consistency in the competition regulatory body's decision making and to encourage compliance with competition law.*
7. ***Timeliness****: The competition regulatory body could be required to comply with legislative pre-determined time periods for the handling of cases. The competition regulatory body should have internal procedures, such as timeline projections, in order to ensure that decisions are not unduly delayed, or consider having a set of case screening criteria. This would allow sieving out cases which are unlikely to raise competition concerns and allocate resources to more important cases.*

8. ***Check and balance****: Decisions made by the competition regulatory body should not be without recourse. Provisions should be made in the applicable competition laws that would allow reasonable appeal procedures to any aggrieved party."*[226]

The Guidelines gives the guiding principles of due process that AMSs should follow to ensure that there is the effective application of competition law. However, some new competition agencies found it hard to ensure the due process in every step of proceedings.

The Lack of Accountability

The lack of accountability could be seen by the inability of the public to know responsibilities, rights and obligations of the competition agencies including the inability to know who is responsible for decisions and what are reasoning behind them. In order to guarantee accountability within the competition agencies, several safeguards are designed to achieve this goal. Approaches taken to promote accountability is publishing competition law or any rules to clearly identify the responsibilities, obligations, rights and goals of competition agencies. Ensuring that all the decisions are subjected to the review of judiciary or non- political entities, publishing the reasons and justification behind decisions, establishing a review system of performance of competition agencies by independent auditors or oversight committees of legislatures and removal mechanism of commissioners when there is some evidence of misconduct or incompetent are the examples of measures to ensure accountability in the operation of competition agency.[227]

[226] ASEAN Regional Guidelines on Competition Policy, Chapter 7.2

[227] UNCTAD, " The Foundation of an Effective Competition Agency," [Online] Accessed: 8 October 2017. Available from: http://unctad.org/en/Docs/ciclpd8_en.pdf, p. 12

Thailand

The level of accountability in the Office of Thai Trade Competition Commission (OTCC) is assessed by the independent auditors; TRIS.[228] The result found that within the constraint budget the OTCC has tried to publish and disseminate information about its organization, objectives, roles and content of competition law. However, there are some issues that the OTCC need to improve is publishing annual report and decisions of commission with the reasons behind them.[229]

Indonesia

Accountability in terms of the publication of decisions of the KPPU reaches the Guidelines' standard because there is the compilation of the KPPU' s decisions since 2001 till now available in the KPPU website. The KPPU issues the guidelines and reports concerning its operations.

Singapore

Overall, the CCS operation is not criticized about lacking due process. Accountability is ensured in the CCS operation through the publications of the responsibilities, obligations, rights and goals of the CCS in its website. There are many CCS Guidelines published to make public know about the CCS approaches and internal principles in its operation. Decisions and justification behind decisions are established and subjected to a review system. The use of budget is examined by independent auditors and clearly reported in the CCS annual report. Ensuring accountability in the operation of the CCS is better than other ASEAN Members and reaching the international standard.

[228] ศักดา ธนิตกุล และคณะ, รายงานฉบับสมบูรณ์ โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 หน้า. 209

[229] Ibid. p. 209

Vietnam

Ensuring accountability in terms of the publication of the VCC' s duties and obligations, performance reports is acceptable.

Transparency

While the level of transparency affects the quality and legitimacy of competition law enforcement. The lack of transparency adversely affects the credibility of competition agencies in the eyes of interested parties and public. There is some evidence that the lack of transparency is found in Thailand, Indonesia and Vietnam.

Thailand

Transparency in the system of Thai competition agency is questioned because there is no publication about complaints, minutes of commission' s meetings. Jurisprudence and legal reasonings in the decisions of Thai Trade competition commission could not be made available to the public.[230] This is against with the due process principle under the ASEAN Regional Guidelines on Competition Policy. According to the Guidelines, transparency can be encouraged by the publication of the competition regulatory body' s and judicial authority's decisions. These publications should be made available on the website freely accessible by the public.[231] Thailand fails to implement this obligation because no publication of decisions and justification behind the decision of commission available to the public both in the website and the annual report. The information available on the website is just the brief of decisions or the result of the cases and complaints. Therefore, there are some doubts about the jurisprudence and legal reasoning that the commission has employed in deciding the cases. In 2015, the complaints were just published through the website after the

[230] UNCTAD, "Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries Thailand, Lao, Kenya, Zambia, Zimbabwe " [Online]. Available from: http://unctad.org/en/Docs/ditcclp20052_en.pdf, p. 21

[231] ASEAN Regional Guidelines on Competition Policy, Chapter 7.2.1.6.1

sixteen years of application. Unfortunately, no detail of the complaints was provided as well as no information to support the Committee's decisions in the competition cases. There was just the brief summary of the complaints. Similar to the commission's decisions, there is no reason behind their decision available to the public. The view of each commissioner is not made to the public, only a record of which commissioners attend the meetings. This situation reflects the lack of transparency in the operation of Thai competition authority, which is against to the afore-mentioned principle in the Guidelines about transparency.

Moreover, Thailand is the only jurisdiction among other competition jurisdictions in ASEAN that has no annual report to present the summary of all the tasks and works of competition authority in each year until 2015 the OTCC just started to launch the annual report through its website. However, there are only 2 annual reports published through the website, which are the report in 2013 and the report in 2014.[232]

The recommendation to the Office of Thai Trade Competition Commission (OTCC) in increasing the level of transparency is the higher attempt to publish complaints, minutes of commission's meetings and commission's decisions and their justification. If publication of complaints affects parties, the name of the parties should be excluded. The publication of annual report is also necessary task to present the public about all the information relating to enforcement of competition law and advocacy.[233] The annual report should be done every single year and make it available to the public, particularly through the OTCC's website.

[232] Office of Trade Competition Commission, "2014 Annual Report," [Online] Accessed: 20 July 2017 Available from: http://otcc.dit.go.th/?page_id=286

[233] ศักดา ธนิตกุลและคณะ, รายงานฉบับสมบูรณ์ โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 หน้า. 210

Indonesia

The lack of due process has long been the problem of the KPPU. One of the reasons for appealing the KPPU's decisions to the Supreme Court concerns the due process issues.[234] Furthermore, Indonesia recognized its problem about transparency; thus, there is an attempt to bring more transparency into the operation of competition law. For example, it is expected that in most cases the arguments of the Commissioners, associated opinions of individual Commissioners, including dissenting opinions will be published to the public. This could raise the transparency in the process of decision-making. Moreover, to be able to conform to due process as recommended in the ASEAN Regional Guidelines on Competition Policy, the Commission has to notify the complainant if the complaint is not complete. Lawyers can be brought into the proceedings and the final decision must be read in an open hearing.[235]

The Problem concerning Timeliness

A clear timeliness is important for competition agency in handling cases to ensure that all the proceedings are not unduly delayed. Therefore, the ASEAN Regional Guidelines on Competition Policy recommends that there should be legislations pre-determining time periods in the handlings of cases of competition agencies. It is necessary to impose the appropriate timeliness for competition agency because some competition cases are quite complex and relating not only to legal provisions but also economic analysis. Consequently, the competition agencies require a lot of time to gather information and evidence and analyze them to make the right decisions. Therefore, setting the too tight timeliness can affect the quality and accuracy of investigation and decision-making. On the other hand, spending a long time

[234] Mohammad Reza, "Challenges in the Applicationa and Enforcement of Indonesia Competition Law," ed. Sathita Wimonkunarak, Head of the International Cooperation Division, Komisi Pengawas Persaingan Usaha (KPPU) (2015).

[235] Indonesia to the Competition Committee, "Annual Report on Competition Policy Developments in Indonesia 2012 " [Online] Accessed: 4 January 2015. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)40&docLanguage=En

investigating or handling specific cases could open competition agencies to criticism about the lack of timeliness. The quality of testimonial evidence's will lessen overtime and these witnesses might not be easily available.[236]Therefore, the right balance need to be struck between guaranteeing that cases will be finished within the clear and specific timeframe to follow the good due process and ensuring that timeframe given is long enough for competition agency to do all the important proceedings before handling the accurate decision. There are three jurisdictions facing the problem of timeliness, which are Thailand, Indonesia and Vietnam.

Thailand

The timeliness in the investigation and case-handling process before the prosecutor bringing the case to the court is the big problem in Thailand. This appears in the complaint against Honda Company that Honda company forces its customers to do the exclusive agreement. Under the terms in this exclusive agreement, Honda prohibits its customers from selling the goods of other competitors. This case should have been the milestone for the OTCC. However, it ends in the dramatic way because the delay in investigation resulting from changing chairmen in the investigation committee. When the result was reached and the Commission decided to sue Honda to the court, the case handling process was delay again because the prosecutors decided not to sue the Honda Company. Then the investigation needed to start over again, the same result was reached and sent to the prosecutor to bring the competition case against the Honda Company. The prosecutor decided not to sue Honda Company when the case was close to the deadline of ten-year prescription by giving the reason that there was an inadequate evidence to bring the case to the court. [237] The decision not to sue by the prosecutor made an end to the almost ten-year attempt of the OTCC and commissioners. Nothing can be done more since the prosecution was

[236] ICN, "Anti-Cartel Enforcement Manual," [Online]. Available from: http://internationalcompetitionnetwork.org/uploads/library/doc834.pdf

[237] เดือนเด่น นิคมบริรักษ์, การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย (กรุงเทพฯ: เปนไท 2555), หน้า.24

precluded by ten-year prescription. The dramatic end of this case has been widely criticized until now about why the case handling process took almost ten years and why the prosecutors decided not to sue.

Indonesia

Although there are deadlines associated with each step of the process are clearly identified to the public to ensure that every stage of proceedings will be finished on time,[238] the timeliness imposed is tight. The KPPU has long faced the problem of delay during the investigation process. Most of investigation was undertaken behind the timeliness.[239] There is a proposal to extend the investigation timeframe of the KPPU.[240]

Vietnam

The impediment found in Vietnam is the VCA faces too tight of timeliness in official investigation and in issuing the decisions on handling competition restriction cases. The timeliness provided for the VCA is inadequate for official investigation. "In addition to 30 days of initial investigation, 150 days (including extended time) with regard to unfair competition cases and 300 days (including 2 times extending) with regard to competition restriction cases is too short for VCA to collect all the necessary information to make the accurate conclusion."[241] Similarly, timeliness provided for Competition Council is only 30 days after receiving the competition case dossier from the VCA before the issuing of decision whether to open a hearing or return the dossier for additional investigation or stop settling the competition cases. The Competition Council is a separated organization from the VCA so it is difficult to catch up all the investigation processes. Furthermore, competition cases are quite complex, especially in the case of monopoly position or abuse of dominant position, therefore, some case

[238] Committee, I. t. t. C., "Annual Report on Competition Policy Developments in Indonesia 2012 "

[239] Reza, M., "Challenges in the Applicationa and Enforcement of Indonesia Competition Law."

[240] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 17

[241] Agency, V. C. A. i. c. w. J. I. C., "Review Report on Vietnam Competition Law." , p. 14

dossiers could include of thousands of book records.[242] Therefore, it is extremely difficult for the Competition Council to understand all details in the case dossiers only within 30 days comparing with nearly a year of official investigation process. Providing too limited time for the Competition Council to decide might affect the accuracy in the decision-making.

Check and Balance

Thailand, Indonesia, Singapore and Vietnam all reach the standard of check and balance as provided in the ASEAN Regional Guidelines on Competition Policy because decisions made by competition regulatory body are subject to the review of judiciary body. These four countries provide the basic rights allowing aggrieved party to appeal.

3. 2. 2 Opportunities in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Competition Law

On the other hand, there are some opportunities arriving from implementing the Guidelines to competition law.

Opportunities in ASEAN Level

- Greater convergence of competition laws among ASEAN Member States

Opportunities in National Level

- Develop national competition law basing on the international best practices

Implementing the Guidelines help enhancing the standard of competition laws in all ASEAN member states to reach the acceptable international standard and international best practices.

[242] Ibid. p. 14-15

3.3 Impediments Faced in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Enforcement Mechanism

Enforcement: The Highest Impediments in the Implementation of the Guidelines

There are a variety of factors, which cause the impediments in the implementation of the Guidelines in the context of enforcement. Some impediments are from the internal problems of enforcement agencies and the way they are established. While others are from exogenous factors. Even the contents and the way the competition laws were drafted could affect the performance of competition agencies in enforcing competition laws. To make it easier to understand impediments faced in the implementation of the Guidelines concerning enforcement, which are considered the highest impediment comparing with other impediments, this dissertation divides the impediment concerning enforcement into three groups. The first group is the impediments resulting from the content of competition law themselves. The second group is the impediments found within the competition agencies. The third group is the impediments results from the external factors.

3.3.1 Impediments Resulting from the Content of Competition Laws

3.3.1.1 Inappropriate Legal Tools to Support Enforcement

3.3.1.1.1 Low Investigation Powers and Enforcement Powers

Empowering the clear, formal and delineation of investigation and enforcement powers to the competition agencies is like incorporating them teeth for competition agencies to bite. These powers are necessary for effective enforcement. Moreover, the competition agencies should have the ability and willingness to exercise these powers.[243] It is recommended that investigation powers should be adequately provided to competition agencies and effectively to facilitate the evidence gathering in proving the violation of competition rules.

[243] UNCTAD, "Foundations of an Effective Competition Agency," [Online] Accessed: 24 March 2017. Available from: http://unctad.org/en/Docs/ciclpd8_en.pdf8

From a global perspective, the fundamental investigation powers that should be granted are the power to request information, power to carry out interviews to receive testimony and power to enter and search business premises.[244]

William Kovacic emphasizes that the problem of competition agencies lacking effective powers to obtain important information and evidences to crack the cases generally happens in countries with transitional economies as follows:

"New antitrust enforcement agencies in transition economies seldom will enjoy ready access to business data needed to prove that antitrust prohibitions have been violated. In some instances, business managers in transition economies simply refuse to respond to compulsory process requests, or may assert falsely that the information demanded does not exist. Many transition countries lack smoothly functioning judicial systems that expeditiously review and enforce compulsory process requests. It may take years of litigation for the new competition agency to establish its right to obtain business records and to convince business that the country's court will sustain the use of a compulsory process and punish efforts to control or destroy records subject to a document request. At least in the early years of a new competition agency' s operations, compulsory process is likely to be an unreliable tool for obtaining important business records."[245]

It is stated in the ASEAN Regional Guidelines on Competition Policy about the investigation power in Chapter 6. 2 that ASEAN Member States could provide competition agencies or other law enforcement authorities with investigation powers. The examples of such powers are exemplified as the power to require natural or legal persons to provide information, power to take original or copies of documents or make reproductions, power to require explanation of the document and power to enter and

[244] Horacio Vedia Jerez, "Competition Law Enforcement & Compliance across the World: Systems, Institutions and Proceedings" (Doctoral dissertation, DEPARTAMENTO DE DERECHO PRIVADO Getafe, Mayo University of Buenos Aires 2014).

[245] Ignacio De Leon, "An Institutional Assessment of Antitrust Policy: The Latin American Experience," Wolters Kluwer International 38. p. 67

search business premise with or without warrant. If the competition agencies are not empowered to search or dawn raid the business premise, the collection of evidence will face the big impediment. It can be seen that these exemplified powers of investigations are similar to fundamental investigation powers in the global perspective. If ASEAN Member States implement the Guidelines in this area of investigation powers, this will make investigation powers of ASEAN countries in accordance with the international best practice. Equipping the competition agencies with the adequate investigation powers will improve the capability of competition agency in investigation.

This study found that some ASEAN Member States do not have adequate investigation powers to effectively carry out their investigation.

Thailand

Under Section 13, 14, 15, 19, 20, 21, 21, 23 and 24 of the Thai Competition Act provide adequate powers for specialized sub-committee, the commission, officials of competition agencies, appellate committee, sub-committee and secretary general to investigate and execute this act as officials under the Thai Penal Code. Therefore, there seems to be no problem about conducting dawn raids, gathering evidences by requiring a person to give statement, facts or explanation or taking original or copies of documents or making reproductions of them.[246]

Indonesia

There is some uncertainty about the power in conducting dawn raids, search and interception of the KPPU's officials. This problem arises from the unclear status of the KPPU's officials whether they could be regarded as civil servants or not. This unclear status affects the KPPU's officials in the use of power. Thus, there is a request to explicitly empower the officials of the KPPU in dawn

[246] Thai Competition Act Section 13, 14, 15, 19, 20, 21, 21, 23 and 24

raid, interception, demand documents and order witnesses to answer questions no matter they are civil servants or not.[247]

Singapore

The CCS, which is the main competition enforcement authority in Singapore is legally equipped with adequate investigation powers to conduct investigations. Under Chapter 50B of the Singapore Competition Act gives the CCS various powers to investigate suspected anti-competitive behavior, which may violate the main prohibitions: anti-competitive agreements, abuse of dominant position and merger in Section 34, 47 and 54 respectively. These powers are the power to require the production of specified documents or specified information, the power to enter premises without a warrant and the power to enter and search premises with a warrant. The CCS clearly specify the details and limitations of each investigative power, how to use the powers, procedures relating the use of these powers and sanction in case of non-compliance with these powers in 'the CCS GUIDELINES ON THE POWERS OF INVESTIGATION 2016'[248]

Vietnam[249]

Under Article 77 of the Vietnam Competition Act , the investigators have the powers to request related organizations and individuals to supply necessary information and documents concerning competition cases, power to request the investigated parties to supply documents and give explanations concerning competition cases, power to propose the head of the competition-managing

[247] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy ", p. 49

[248] Competition Commission Singapore, "Ccs Guidelines on the Powers of Investigation 2016," [Online] Accessed: 21 July 2015. Available from: https://www.ccs.gov.sg/~/media/custom/ccs/files/legislation/ccs%20guidelines/guidelines%20finalise%20apr%202017/ccs%20guidelines%20on%20the%20powers%20of%20investigation%20apr%2017.ashx.

[249] Luu Huong Ly, Competition Law in Asia Pacific: A Practical Guide: Vietnam in Katrina Groshinski, Caitlin Davies (Eds.), Competition Law in Asia Pacific: A Practical Guide (Kluwer Law International 2015)., p. 760-763

agency to request expertise and power to propose the head of the competition managing agency to apply administrative preventive measures to competition cases. The dawn raids can be conducted with warrant from the Vietnam Competition Authority. The VCA has authority to decide whether to grant the warrant for conducting the dawn raids or not. [250] However, in practice the dawn raid has never been conducted because most competition cases require the initial important information before opening the investigation. Furthermore, the VCA prefers the cooperative approach in requesting the evidence rather than the use of aggressive compulsory approach in gathering evidence.[251]

It seems to be that these AMSs except Indonesia are equipped with enough legal powers to investigate competition cases as recommended in the ASEAN Regional Guidelines on Competition Policy. However, in practice the willingness to use the power or not, particularly the conduct of dawn raid, depends on the decision of each ASEAN Member State.

3.3.1.1.2 No Leniency Programme to Facilitate Cartels Detection

It is not compulsory for ASEAN Member States to adopt the leniency programme since the ASEAN Regional Guidelines on Competition Policy leaves them to decide whether it is appropriate to incorporate the leniency programme in its enforcement strategy or not. AMSs must consider whether the leniency programme outweighs the policy objective of sanctioning financial penalties or not. [252] The leniency program is created to build private monitoring between the market players since the cartel information is generally highly kept in secret and it is difficult for competition agency to find the evidence to crack the case. It is widely accepted that the application of the leniency program

[250] Ibid. p. 760-763

[251] Faculty of Law DIT and the ASEAN Law Study Centre, Chulalongkorn University "Seminar Proceedings of the Enforcement of Competition Law in Indonesia, Singapore, Malaysia and Vietnam "(The Rama Garden Hotel, Bangkok 2015).

[252] ASEAN Regional Guidelines on Competition Policy, Chapter 6.9

significantly increases the level of cartels detection. This can be seen from the statistics of a lot of countries, which adopt this leniency programs.

Thailand

Today there is no leniency programme applicable in Thailand under the Thai Trade Competition Act 1999. There is a research conducted by the Chulalongkorn University suggested that the Thai Trade Competition Commission needs to show the potential in the enforcement and gain confidence in the eyes of public before adopting this leniency programme.[253]

Indonesia

Similar to Thailand, there is no leniency programme in Indonesia. However, there is a debate about whether the leniency programme should be introduced into Indonesia or not as a part of the plan to reform the Indonesian competition system.[254]

Singapore:

Singapore has applied the leniency programme to facilitate one of the enforcement priorities of Singapore Competition Act, which is cartels. The CCS issued 'the Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases 2009' to elaborate this programme.[255] The leniency program successfully increases the hardcore cartel enforcement rate. Lately, the leniency programme helps the CCS caught the international cartel; the ball bearing case.[256]

[253] Chulalongkorn University, "The Feasibility Study on Comparing of Competition Law and Theirs Penalties Including Leniency Program," [Online] Accessed: 28 March 2015. Available from: http://www.aseancompetition.org/events/2013-09/seminar-leniency-program-competition-law

[254] Handbook on Competition Policy and Law in ASEAN for Business 2013, p. 23

[255] Ibid, p. 61

[256] Singapore, C. C., "Ccs Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel."

Vietnam:

There is no leniency programme that is equivalent to the international standard in Vietnam. However, according to Article 85(1.a) of Decree 116/2005/ND-CP, a voluntary declaration of prohibited acts before they are detected by competent agencies will be treated as attenuating circumstances.[257] However, during the period of application of Article 85(1.a) proves not to be successful since it cannot provide motivation for businesses to report and provide information regarding anti-competitive conducts they participate in. Therefore, there are some requests for supplement provisions on direct leniency programme that is conforming to the leniency program in the international standard to enhance enforcement of competition law.[258]

3.3.1.1.3 Limitation in Private Enforcement

The private litigation is another way to help competition agencies in detecting anti-competitive behaviors. The allowance of private enforcement will be another available option for injured parties to recover damages suffered from the violation of competition. There are many benefits of private litigation including the increase of enforcement rates, the reduction of public funds in undertaking enforcement actions and more interpretation of competition rules and precedence, which help pushing the development of competition law.

The private enforcement is specifically mentioned in the Guidelines Chapter 6.11 about the objectives, benefits and roles of the private enforcement as follows:

" AMSs may entitle any applicant to bring a specific law suit before the appropriate judicial authorities for breaches of competition law, in order to recover the damages suffered (including costs and interests accrued). By allowing damage claims for breaches of competition law, the AMSs not only strengthen the enforcement of competition law, but also make it easier for applicants who have

[257] Handbook on Competition Policy and Law in ASEAN for Business 2013, 82

[258] Agency, V. C. A. i. c. w. J. I. C., "Review Report on Vietnam Competition Law.", p. 33

suffered damages from an infringement of competition law to seek redress and recover their losses."[259]

Some countries have legal systems that favors private litigations while some countries have unsupported legal system to private litigation, including complexity of the proceedings, high burden of proof and the requirement of specific evidence in proving injury. The low level of incentives in filing the private suit and long proceedings are factors that bar the use of private litigation. To file a private suit has its own cost both legal fees and time consuming. If the return gets from winning the case is low, it is expected that people will have less incentive in participating in private suit.

The United States has significant success in the private enforcement of its antitrust laws. The allowance of private litigation proves to be highly successful in increasing the enforcement rates in the United States through an important encouraging factor, which is treble damages. The US Supreme Court made a metaphor of treble damages as " a chief tool" in the antitrust enforcement, which creates the substantial deterrence. The private enforcement in the US outnumbers the public enforcement.[260] Successful antitrust private enforcement brings about wide ranges of benefits.

In contrast to the US, private enforcement in competition among AMSs is limited. AMSs do not have factors to facilitate private enforcement of their competition laws

[259] ASEAN Regional Guidelines on Competition Policy, Chapter 6.11.1-6.11.2

[260] Alexandra Merrett and Rhonda Smith, "The Public Benefits of Private Litigation," 【Online】 Accessed: 7 October 2017 Available from: https://gallery.mailchimp.com/a19845714e72d615771c64903/files/74525c01-4147-44d7-a553-815586e9e3d4.pdf4

[*] The statement of the US Assistant Attorney-General Bill Baer identifies a wide ranges of benefits in private suit in the US *"A high volume of private litigation in the United States means a constant flow of new competition law decisions. We still rely on decades old court decisions, but we also have the benefit of new judicial glosses on them. And our courts are constantly presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking the rationale of older decisions and restating core principles with added clarity. Competition law in the United States is constantly evolving.*

Thailand

Private litigation claiming for compensation is allowed pursuant to Section 40 of the Trade Competition Act 1999 for anyone, who suffers from injury resulting from the violation of Section 25, 26, 27, 28 or 29. The Consumer Protection Commission or an association under the law on consumer protection can come to play the role for filing the lawsuit on behalf of consumers or members of the association depending on the case.[261] The private action is allowed only for claiming for civil damages whereas bringing the criminal cases to the court is restricted only for the competition commission.[262] In Thailand, the class actions are also allowed. However, there has been no private litigation brought to the court until now.

Indonesia

Private litigation is not available in Indonesia.[263] However, there is a request for separate enforcement channel from the public enforcement for injurious parties to claim damages.[264]

Singapore

Pursuant to Section 86 of the Singapore Competition Act individuals, who suffer loss from the infringement of Section 34, 47 and 54 have the right to sue for damages in the civil court against the violators or parties to such infringement. The right to sue for damages is available only after the CCS has made an infringement decision.[265] Class action is also available for multiple claimants, which suffer losses resulting from an infringement.

[261] Thai Trade Competition Act 1999, Chapter V Initiation of an Action for Compensation, Section 40

[262] ศักดา ธนิตกุล, คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน), หน้า.255

[263] Handbook on Competition Policy and Law in ASEAN for Business 2013, p. 24

[264] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy ", p. 45-46

[265] Singapore Competition Act, Section 86

Vietnam

The right of private action is found in Article 117(4) of Section 8 of the general civil procedural law. In the same way as Singapore, individuals, who suffer loss, can bring cases to the court for damages against the infringing parties after the VCC has made an infringement decision.

3.3.2 Impediments Within the Competition Agencies

3.3.2.1 Institution: Institutional Constraints in National Competition Agencies

The institutional designs and capabilities of the competition agencies affect the effectiveness of the competition agencies' performance. This part will identify impediments in implementing the Guidelines relating to the institutional constraints within competition regulatory bodies in Thailand, Indonesia, Singapore and Vietnam.

3.3.2.1.1 The Inadequacy of Resources of Competition Regulatory Bodies

The Lack of Human Resources and/or Inexperienced Human Resources

Under the ASEAN Regional Guidelines on Competition Policy, the importance of adequate resources to carry out responsibilities of competition agency is emphasized in Chapter 4.1.3. The Guidelines recommends that competition agency should be equipped with necessary resources.

However, the lack of human resources and/or inexperienced human resources are common problems faced by new competition agencies in developing countries. Lacking human resources working in the competition agencies may result from either skilled resources do not present in ASEAN countries or salary structures are not attractive enough to attract them.[266] It must be noted that the inadequacy of resources does not only affect enforcement function, but also competition advocacy.[267]

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[266] UNCTAD, "Foundations of an Effective Competition Agency.", p. 11

[267] Michal S. Gal and Eleanor M. Fox, "Drafting Competition Law for Developing Jurisdictions: Learning from Experience," [Online]. Available from: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1378&context=nyu_lewp, p. 20

The main important human resources in competition agencies are related to legal expertise and economic expertise.

Legal Expertise

In order to drive the institution, competition agency must have an adequate number of officials, who are specialized or well-trained in the field of competition law. Otherwise, the competition agency will face many problems since the beginning of the investigation until the end of case.

Economic Expertise

Unlike other fields of law, competition law is highly linked and based on the economic analysis. The understanding of economic theories and analysis are important for accuracy in case-handling and deciding-making of the competition cases. Therefore, adequate number of economic specialists are required for the operation of every competition agency.

Thailand

The competition law concept was quite new for the Thai legal system in the beginning period of the application of the Trade Competition Act 1999. The Office of Trade Competition Commission (OTCC), which is the competition regulatory body was established as a part of the Ministry of Commerce. At the beginning period application, the OTCC's officials were transferred from the duty under the Act Relating to Price of Merchandise and Service to new duty under the Competition Act.Consequently, these officials are inexperienced and do not have expertise in the competition law. During the beginning period of the introduction of the Trade Competition Act, it was reported to OECD Global Forum on Competition that operational officials are not familiar with competition law and have no deep understanding about how to apply the

Trade Competition Act. Therefore, the Internal Trade needed to organize many seminars and trainings for operational officials during the very first years. [268]

Thailand is broadly criticized about the failure in the enforcement of competition law. This problem is partly from the OTCC experiences human resources problems, which highly impede the application of competition act.

First, the number of officials within competition agencies is inadequate comparing with the responsibilities and obligations of competition agency. There are roughly 40 officials working within the Office of Thai Trade Competition Commission (OTCC). The number of legal officials is considerably low; thus, affecting the number of investigators within the competition agency.[269] Only about 40 officials have to carry on all the obligations imposed by the law, including enforcement and advocacy, which is considered quite overloaded. This number is considered very low comparing to the number of officials working in competition agencies in other jurisdictions.

Second, the lack of qualified and experienced officials is another obstacle. [270] Duties and obligations of competition agency are quite complicated and requiring special knowledge and expertise, particularly in the handling competition cases. After investigation and gathering all evidences, all information needs to be analyzed not only in the legal context but also economic analysis. Therefore, Thai competition agency requires officials, who have specialized skills to guarantee the accurate analysis and decision making to guarantee the effective performance. Thai competition authority realizes this impediment. It can be seen from the attempt of learning by doing and adapting knowledges, technical assistance and experience from foreign countries into

[268] OECD, " Competition Law and Policy in Thailand," [Online] Accessed: 7 October 2017. Available from: https://www.google.co.th/search?q=Competition+Law+and+Policy+in+Thailand+OECD&rlz=1C1CHZL_enTH697TH698&oq=Competition+Law+and+Policy+in+Thailand+OECD&aqs=chrome..69i57.5494j0j4&sourceid=chrome&ie=UTF-8#

[269] ศักดา ธนิตกุลและคณะ, รายงานฉบับสมบูรณ์ โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 หน้า. 211

[270] ibid. p. 211

developing the enforcement of competition law.[271] Some in-house learning, training and technical assistance from foreign competition agencies, for example JFTC and Taiwan FTC have been organized.[272]Some of the OTCC's officials were sent to participate in the training projects organized by international organizations or technical assistance programs from the bilateral agreements.[273]

Third, the OTCC's officials sometimes are required to help the urgent tasks of the Department of Commerce that are not related to the competition issues, for instance the Blue Flag project aiming to decrease price of food and consuming goods.[274] Therefore, the OTCC's officials cannot fully focus on their main job. This could lower their performance because unrelated workload can distract them from the main competition job.

Indonesia

The number of the KPPU secretariat officials is quite high comparing with the number of officials in other ASEAN competition agencies. However, the current officials are still considered inadequate comparing with the broad areas with very high number of business actors and business sectors that the KPPU has to monitor. This results in a big number of complaints and competition cases that the KPPU has to handle annually.[275]

Similar to other jurisdictions in ASEAN, Indonesia faces the lack of qualified officials to investigate all the complaints, focus on prioritization in enforcement and then continue doing non-enforcement works and advocacy at the same

[271] Yodmuangchareon, S., "Toward Effective Implementation of Competition Policies in East Asia : Thai's Perspective."

[272] Ibid.

[273] เดือนเด่น นิคมบริรักษ์, การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย, หน้า.50-51

[274] Santawanpas, S.

[275] OECD, "Annual Report on Competition Policy Developments in Indonesia " [Online] Accessed: 2 January 2015. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)40&docLanguage=En

time. Moreover, today the competition cases are increasingly more complex. The human resource problem in Indonesia is presented as:

"Fighting cartel cases that involve corruption has generated an enormous work-load for the KPPU in responding to allegations of bid rigging, predominantly in government tenders. Although this work is important, it appears that the level of resources required to carry this work out does not leave the KPPU with enough resources to undertake other important activities that have the potential to generate substantial additional national wealth such as:

- A systematic programme of preventative work in relation to bid rigging which, as the statistics on bid rigging cases demonstrate, should be a priority for Indonesia;

- The significant advocacy efforts in relation to new laws which also should be a priority because the other parts of government who propose regulations do not appear to have a solid awareness of the importance of competition policy; therefore, new laws frequently contain impediments to competition;

- The market studies to address the substantial back-log of anti-competitive regulations

- The fighting abuse of dominance cases and controlling mergers."[276]

In addition, an unclear status of the KPPU's officials is another impediment in implementing what the Guidelines recommends that competition agencies in AMSs should ensure the adequacy of resources necessary to carry on their obligations. The KPPU's officials are employed by state but do not have the status as public servants like other officials working in other public services. Being a public servant is deemed to be incentives for working with the KPPU because of having the long term career prospects. However, the unclear status

[276] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy ", p. 45-46

creates uncertainty about whether conditions of employment, remuneration and retirement benefits of the KPPU's officials are the same as those of public servants or not.[277] This unclear status of the KPPU officials affects the potential in recruiting and retention qualified officials in the KPPU and imposes difficulty for the KPPU in competing with the private sectors in recruiting skilled and experienced human resources[*].

Singapore

Similar to the newly-established competition agency, during the initial years the CCS faced the lack of experienced and qualified human resources in the field of competition law and economics. However, over the past few years the CCS has been actively in the recruitment and training of new officials to develop their skills through the invitation of scholars and practitioners from successful and matured competition agencies to share experience and train their officials. The CCS also has sent their officials to participate in conferences concerning the international competition policy and law and providing scholarship to study abroad.[278] The CCS's attempt is successful because currently the CCS does not face the big problem in the adequacy of human resources.[279]

[277] Ibid. p. 45

[*] In order to solve this unclear status of KPPU's officials problem, it is suggested in the OECD Reviews of Regulatory Reform INDONESIA COMPETITION LAW AND POLICY that it is important to clearly identify in the law that the KPPU's officials have the same employment conditions and powers as what the public servants have.

[278] OECD, "Questionnaire on the Challenges Facing Young Competition Authorities " [Online] Accessed: 4 January 2015. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2008)55&docLanguage=En

[279] Kong Weng Loong, "Impediment in the Enforcement of Competition Law in Singapore," ed. Sathita Wimonkunarak, Senior Assistant Director (Business & Economics), Head of Commitments and Remedies Unit, Competition Commission of Singapore (2015).

Vietnam

The lack of human resources in Vietnam is an impediment in implementing the ASEAN Regional Guidelines on Competition Policy. The inadequacy of resources obstructs the process of investigating and dealing with the violations of Competition Law. Handling competition cases require more than legal expertise. Economics, financial and investment expertise are also important in competition cases. This implies the requirement of high standard of workforces since the beginning stage of receiving information to open investigation, cases-handling process and enforcement. These works are quite complex and require both specialized knowledge, expertise and experiences. These kinds of qualified human resources are difficult to find in Vietnam. Dr. Dinh Thi My Loan; General Director Competition Administration Department Ministry of Trade of Vietnam confessed that the big impediment in the enforcement of competition law is officials of Vietnam Competition Administration Department lack of skills and experiences.[280]

Furthermore, with the high standard of investigator' s qualifications set by the provisions of Article 52 of Vietnam Competition Law, the qualifications of investigators require the five years or more years of actual working experience in one of the areas of law, economics or finance. The investigators must be undertaken training in professional investigations[*]. However, in practice more than 80% of the VCA officials are new graduates or having less than five years of working experience. [281] Accordingly, this high qualification of investigators set by Article 52 makes it more difficult to appoint investigators, particularly in the

[280] Dinh Thi My Loan, "The Development of Competition Law in Vietnam," [Online] Accessed: 11 January 2015. Available from: http://www.jftc.go.jp/eacpf/06/6_03_13.pdf

[*] Article 52 Standards for investigators: " Persons who satisfy the following standards may be appointed to act as investigators: 1. Having good ethics and being honest and objective; 2. Having a bachelor degree in law or in economics or in finance; 3. Having five or more years work experience in one of the sectors stipulated in clause 2 of this article; 4. Having undertaken training in professional investigations."

[281] Nguyen Anh Tuan, "Review of Competition Law Enforcement in Vietnam Does Substance or Procedure Count?," [Online] Accessed: 4 January 2015. Available from: <https://www.google.com/?client=safari&channel=mac_bm#>

circumstances of lacking qualified human resources to deal with more and more severe competition environment in Vietnam.[282]

The Lack of Financial Resources (Budget Constraint)

Under Chapter 4.1.3. of the ASEAN Regional Guidelines on Competition Policy requires all AMSs to ensure that they have necessary resources to carry out responsibilities of competition agency.

Financial resource is undeniably necessary to fund and drive all the performance of the whole competition agency. Without the sufficient financial resources, the performance of competition agency will be impeded. Budget constraint is another main important problem faced by many competition agencies across the world.

The source of institution's budget can be a factor behind the problem of budget constraint. If the source of institution's budget is duly from government budget, the level of budget received each year could be fluctuated depending on the government policy whether to support or to reduce the importance of competition agency, particularly during the fiscal austerity. This would allow the political intervention to the operation of competition agencies. Therefore, the budget should be adequately allocated in accordance with the obligations of the competition agencies and their officials. Otherwise, the lack of financial resources would definitely weaken the performance of competition agencies. The lack of financial resources affects the monetary incentives, particularly the low salary and non- monetary incentives for the recruitment and retention of high quality officials for competition agencies. This problem is commonly faced regardless of the reputation and size of competition agencies.[283] Moreover, the low salary of competition officials might lead to the corruption.

[282] Agency, V. C. A. i. c. w. J. I. C., "Review Report on Vietnam Competition Law."

[283] International Competition Network, "Agency Effectiveness Competition Agency Practice Manual Chapter 4 Human Resources Management in Competition Agencies," [Online] Accessed: 8 October 2017. Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc969.pdf, p.38

This part will assess whether Thailand, Indonesia, Singapore and Vietnam face the budget constraint or not. The result of the assessment will show that these four countries have impediments in implementing the Chapter 4.1.3 of the Guidelines or not.

Thailand

Budget allocated to Thai competition agency is inadequate and incompatible with all obligations, which is not only law enforcement but also advocacy and capacity building.[284] The limited resource constraints deeply affects the whole operation of competition agency, including the capacity building and the program to build more experience and expertise for competition officials.[285]

Another point to consider is about the low remuneration for the commissions and officials working in the Office of Thai Trade Competition Commission (OTCC). The compensation for the commissioners, sub-committees and other experts is also very low. As a result of being an entity within the Ministry of Commerce, the OTCC's officials have governmental officials status. Thus, the salary rate of officials, who work within the Thai competition agency, is the same as the salary rates of ordinary governmental officers that are quite low. With this rate of salary, it is difficult to attract qualified and experienced human resources and encourage the current experienced officials to continue to work in the competition agency. It is also difficult to attract good human resources in the field of competition law because the private companies would definitely pay more.

Indonesia

[284] ศักดา ธนิตกุล และคณะ, รายงานฉบับสมบูรณ์ โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 หน้า. 217

[285] Santawanpas, S.

Even though the KPPU is an independent organization, the main source of budget is still from government fund. The reduction of annual budgets affects its operation. The budget was reduced from Rp. 89 billion in 2007 to Rp. 82 billion in 2009 despite the fact that the KPPU- levied fines that the KPPU contributed to the government significantly exceeded the budget it received.[286] This budget constraint also links to the lobbying of unsatisfied industrial sectors, which lose benefits from the more effective enforcement of competition law.[287] Therefore, the increase of budget in accordance with all the functions and obligations of the KPPU is necessary to help the KPPU carrying all the functions and tasks more effectively.

Singapore

The CCS's budget comes from the government allocating budget. According to the OECD questionnaire on the challenges facing young competition authorities held on 19 and 20 February 2009, Singapore submitted that the budget provided by the Ministry of Trade and Industry is adequate.[288] This is supported by the interview of a CCS' s official, who was interviewed about whether the CCS' s financial support is adequate or not. Mr. Kong replied that the CCS' s budget received currently is quite fine comparing with the CCS's obligations.[289]

Vietnam

In practice, the VCA does not have adequate budget to fulfill all of its obligations. For example, during the investigation stage investigators have to collecting information and verifying evidence, protecting evidence and taking testimony. Budget is necessary for active investigation. According to experiences from experienced competition agencies across the globe, to be able to

[286] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 300

[287] Ibid. p. 303

[288] OECD, "Questionnaire on the Challenges Facing Young Competition Authorities "

[289] Kong Weng Loong, "Impediment in the Enforcement of Competition Law in Singapore."

effectively gather and verify evidence of competition law violations, on-the-spot inspection is required. The inspection of the premises of all of suspected violators simultaneously has to be done by many investigators. Interviewing to collect and verify evidences could take place both at the office of the VCA and outside. In conducting all of these activities, the expenses such as transportation fee, postal fee and others necessary expenses are unavoidable.[290] Therefore, there is a call for increasing the funding rate of competition investigation to adequately covers all the real costs of investigation.[291]

Moreover, the VCA is obliged to review current laws and legislations documents whether they are in conformity with the competition law or not. The problem is the VCA is not funded for doing this task according to the regulations of Ministry of Finance. It could be seen that budget provided for the VCA is not enough comparing to the tasks it need to carry out.

Last but not least, expenditure indicated in the regulations of Ministry of Finance for organizing workshops, seminars or conference is inconsistent with the prices on the market today. Fortunately, some of the VCA' s activities are supported by international organization and foreign competition agencies.[292]

In conclusion, the lack of human resources and inexperienced human resources and inadequacy of financial resources are considered the big impediment that bar Thailand, Indonesia and Vietnam from effectively implementing the ASEAN Regional Guidelines on Competition Policy. Singapore is the only jurisdiction that can reach the standard imposed by the Guidelines. These resource constraints are the big problems that could lead to many other consequential problems and impeding effective enforcement of competition rules in AMSs.

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[290] Agency, V. C. A. i. c. w. J. I. C., "Review Report on Vietnam Competition Law." , p. 213-214

[291] Ibid. p. 226

[292] Ibid. p. 226

3.3.2.1.2 Ineffective Enforcement Mechanism

There are many reasons behind the ineffective enforcement. It can be the way the competition law was drafted, ineffective in competition regulatory body or the lack of powerful legal tools to facilitate enforcement or even rooted in the weak competition culture of that country or strong political intervention in the enforcement.

Thailand and Indonesia share the common problems in the difficulty in enforcing competition laws to big companies; conglomerates and crony companies, that have strong supports or good relationship with the governments.[293] In Thailand, corporate lobbying is a reason behind the weak enforcement of competition law in Thailand. Whereas in Indonesia the main problem is about corruption in the government procurement.[294]

Thailand, Indonesia, Singapore and Vietnam have different levels of effectiveness in competition laws enforcement. It appears that among these jurisdictions the worst enforcement is found in Thailand. The best indicator can be seen from no single case has been brought to the court during almost twenty year of Trade Competition Act 1999's application.

The Guidelines does not specifically mention ineffective enforcement issue in particular, it rather broadly describes about the whole system of enforcement power.[295] However, it is understandable that the Guidelines issue in 2010 is just a pioneering attempt; thus, the Guidelines begins with overall recommendations about the main elements in enforcement system to all the AMSs without specify the ineffective enforcement issue. It would be better if the AEGC adds the concerns about ineffective enforcement into consideration when updating the new-updated version of the ASEAN Regional Guidelines on

[293] Binh, P. W. a. N. B., "Asean Competition Law and Policy: Toward Trade Liberalization and Regulation Market Integration "., p. 11

[294] Ibid.

[295] The ASEAN Regional Guidelines on Competition Policy, Chapter 6

Competition Policy. This is because there is a criticism that the Guidelines cannot reflect the real situation of the application of competition laws in ASEAN Member States in spite of its functions as a pilot in regional competition policy.[296]

Thailand

Thailand has been widely criticized about its ineffective enforcement mechanism in competition law. Since 1999 until now it is almost two decades of the application of Thai Trade Competition Act 1999, there is no single case to the court. The various factors behind the failure in enforcement mechanism in Thailand are widely discussed. This part will briefly identify these factors. The first common discussion is about the Thai Competition Commissioners do not work full time and seems not to free from the influences of businesses and government. It is criticized that there are too many representatives from business sectors and they are likely to have conflict of interest between their job in business sectors and working as commissioners at the same time.[297]

Furthermore, the placement of Thai competition agency within the Ministry of Commerce affects its functions because this institutional model makes it harder to avoid the political influence.[298] All the head directors and officials are civil servants in the Internal Trade Department Ministry of Commerce; thereby, problems regarding the lack of institutional independence cannot be avoided. The status of officials in the office of competition commission is government subordinate under the Ministry of Commerce, which means they can be transferred to the other government unit by the order of Minister. In general, transferring of officials occurs when they do not obey the order from political

[296] Pornchai Wisuttisak, "The Asean Competition Policy Guidelines and Its Compatibility with Asean Member Countries Competition Law,"(2011)., p. 9

[297] Nikomborirak, D., "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business , p. 600-601

[298] Ibid. p. 600-601

government so transferring to the less important job is a kind of punishment.[299] As a result of this insecure status of the officials in the office of competition commission, it might hinder the willingness in performing enforcement functions that is against the political will. Finally, the lack of specialized and experienced human resources could be another factor impeding the successful enforcement in Thailand.

Indonesia

In contrast to Thailand, the competition law in Indonesia has been more effectively enforced. In terms of experience in enforcement, Indonesia has the longest experience in the enforcement of competition law among these four countries. There are many reasons that can explain this. The KPPU is the independent authority so adopting this institutional model can insulate the direct political influence in its operation. The KPPU has continuously accumulated knowledge, experience and credibility in the enforcement through time. The human resources in the KPPU has been significantly increased about ten-fold from 31 officers in 2000 to 353 officers in 2010 to respond the increasing number of cases and obligations. Most of cases are related to collusive bidding concerning government authorities. The rest of the cases involve cartels and abuse of dominant position. The growth in workforce of the KPPU' s officials helps enhancing the case-handling capability and improving enforcement rate. [300]

Singapore

The CCS has progressively proved that enforcement mechanism in Singapore goes well. Overall, the CCS has investigated wide ranges of anti-competitive conducts and able to successfully close the cases, which bring about more and

[299] Wisuttisak, P., "The Asean Competition Policy Guidelines and Its Compatibility with Asean Member Countries Competition Law.", p. 8

[300] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy.", p. 16

more credibility.[301] The CCS started with domestic cases and reached another level of enforcement by being able to catch two international cartels by the facilitation of leniency program. By being able to catch and enforce international cartels, it reflects the effective enforcement and the CCS has gained more credibility and reputation because Singapore is the first country in ASEAN that is able to detect and enforce international cartels.

Vietnam

As a young competition agency with the inadequate of resources limits the capability of Vietnam competition authority in effectively enforcing all prohibited anti-competition conducts under the competition law. Therefore, the VCA uses the good strategy by beginning with the uncomplicated and easier cases first in order to make a landmark case and gradually building confidence in the eyes of the public. Therefore, Vietnam started with the explicit hard-core cartels and unfair trade practices that do not demand complicated economic analysis. It seems to be gradually improve its enforcement little by little. Currently, thee VCA is moving towards to the more complicated competition cases like the abuse of dominant position cases.[302]

Another problem regarding the enforcement of competition law in Vietnam concerns the issue of selective enforcement of competition law. Vietnam faces big problem with enforcing competition law against state owned enterprises through political intervention. Political intervention in the enforcement of competition law is somehow made cases dropping quietly.[303] There is a wide range of government intervention in enforcing competition law to these protected state-owned enterprises even in the form of merger that directly approve from the prime minister and just simply pass the process of pre-merger control of Vietnam competition agency.[304]

[301] Ibid. p. 18

[302]DIT and the ASEAN Law Study Centre, F. o. L., Chulalongkorn University "Seminar Proceedings of the Enforcement of Competition Law in Indonesia, Singapore, Malaysia and Vietnam ".

[303]David Fruitman, "Vietnam," in The Political Economy of Competition Law in Asia (Edward Elgar 2013)., p. 119

[304] Ly, L. H., "Competition Law Enforcement Towards State Owned Enterprises in Vietnam."

3.3.2.1.3 Performance in Cases Handling

A good performance in handling cases requires many factors including specialized and experienced human resources, supportive legal powers for competition agencies and effective enforcement mechanism. The new competition agencies might not have a good performance in handling cases for the beginning period as a result of lacking expertise and experience. However, their performance in case handling should be developed by time.

Thailand

If the performance in case handling of the Thai competition agency is assessed, it is ranked in the lowest position among Indonesia, Singapore and Vietnam. Although Thailand is the first country that introduce competition law, there is no milestone case issued to build public confidence. According to the statistics of complaints from October 1999 to March 2015, there had been 95 complaints in total. There was only one complaint regarding exclusive dealing of the big motorcycle company that the commission decided that this exclusive dealing conduct violated of the Trade Competition Act 1999. However, the case was not brought to the court. There were 84 complaints that the commission found no violation under the competition law while only 11 complaints are in the case handling process according to the statistics in 2015.[305] These figures are considered quite low comparing with the performance of other competition agency in the consideration of complaints. From 2000 to 2013, the KPPU had finished considering 283 complaints within 13 years.[306] Most of complaints being brought to the consideration of the commission concern unfair trade practices (section 29), which are considered 56% of the total complaints. The collusive practices, which are indicated in section 27, occupy 25% of the total

[305] สำนักงานเลขาธิการสภาผู้แทนราษฎรปฏิบัติหน้าที่สำนักงานเลขาธิการสภาปฏิรูปแห่งชาติ, วาระปฏิรูปที่ 12: การผูกขาดและการแข่งขันที่เป็นธรรม: การปฏิรูปกฎหมายแข่งขันทางการค้า และ การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย (กรุงเทพฯ: สำนักการพิมพ์ สำนักงานเลขาธิการสภาผู้แทนราษฎร, สิงหาคม 2558 หน้า 15)

[306] Ibid. p. 15

complaints. While the rest of the complaints, which are 19% belong to the abuse of dominance specified in section 25.[307]

The unsuccessful performance in case handling in Thailand can be shown in these cases:

The accusation of the abuse of dominance in the cable TV market in 2001 and tying of sale of whiskey and beer in 2002 were terminated as a result of no threshold of dominance was issued at that time. The low performance in case handling is more emphasized on the exclusive dealing issue whereby the Honda company forces its customers to do the exclusive agreement, which the term in this agreement prohibits its customers to sell the goods of other competitors. This case should have been the milestone for the OTCC. Unfortunately, the case handling process and investigation was delay and the prosecutor decided not to sue the Honda Company with the reason of inadequacy of evidence when the case was close to the deadline of 10 year prescription. Finally, nothing can be done since the prosecution was precluded by prescription. [308]It is widely criticized that why the case handling process took almost ten years.

Indonesia

Since the establishment of the KPPU until now, there is an overall increase in the performance of case handling of the KPPU.[309] Most of cases handled by the KPPU are related to collusive bid-rigging cases.[310] Indonesia has the policy

[307] Ibid. p. 15

[308] เดือนเด่น นิคมบริรักษ์, การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย, หน้า.24

[309] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy.", p. 16

[310] Ibid. p. 16

* Singapore has successfully investigated and concluded cases according to the CCS annual report 2012/2013 and the CCS annual report 2013/2014 since 2008 the collusively tendering infringement committed by the pest control companies was found. In 2009 found infringement on the price-fixing cartels by express bus operators. In 2010 the first infringement decision on the abuse of dominance case by a ticket service provider was issued and followed by the infringement decision related to collusive tendering by electrical and building works companies. In 2011 the CCS found two price-fixing infringements committed by the employment agencies and modeling agencies, respectively. In 2012 the CCS issued the infringement decision related to the unlawful sharing of price information to the ferry operators.

to use competition law as a tool to combat against the widespread bid-rigging problems within Indonesia. Therefore, the collusive bid-rigging cases have been prioritized. However, the KPPU has progressively shown performance in case handling in the other areas of anti-competitive conducts.

Singapore

Enforcement mechanism in Singapore is quite impressive. It can be seen from the increasing enforcement rate of internal cases in anti-competitive business practices to the reach of recent international cartel enforcement*.

Vietnam

Even though the performance in the competition law enforcement in Vietnam is not impressive like Singapore, which implemented the competition law in the same year; 2005, Vietnam has showed the good signal that competition law has come to life. During 2005-2006, the VCA spent its resources in the establishment of agency, recruitment, training and setting up related rules and procedures. In the following year, the VCA contributed its resources for competition advocacy. [311] From 2006-2012, there were 6 cases related to competition restriction acts regarding abuse of dominant position and monopoly position and competition restriction agreements. The review report on Vietnam competition law informed that during 2006-2011, there was 94 unfair competition cases were investigated. Among that figure the VCA made 83 handling decisions with the fine up to 4 billion 256 million dong. [312]

In 2013 there was a bid-rigging case at the public auction committed by the motor vehicle traders. In 2014 the CCS successfully caught the first international price-fixing cartel in the ball bearing case.

[311] DIT and the ASEAN Law Study Centre, F. o. L., Chulalongkorn University "Seminar Proceedings of the Enforcement of Competition Law in Indonesia, Singapore, Malaysia and Vietnam ".

[312] Agency, V. C. A. i. c. w. J. I. C., "Review Report on Vietnam Competition Law." , p. 9

According to the overall observation, it can be seen that more and more suspected acts are scrutinized as well as the increase in the number of cases.[313]

The gradualist approach has been adopted in Vietnam; therefore, the VCA started with the uncomplicated cases concerning the unfair trade practices and gradually moved to the more complicated cases, for instance the anti-competitive agreements.[314] This shows that the VCA has followed the gradualist approach by gradually building its expertise step by step while building its reputation in the public's eyes at the same time. Overall, the VCA has been successful in bringing some cases investigated to a close and gradually increase its credibility.

3. 3. 2. 1. 4 The Lack of Enforcement Prioritization and Resource Allocation in some ASEAN Member States

The enforcement prioritization is the process of selecting to spend limited resources available within the competition agency to specific anti-competitive conducts, which can be the serious breach of competition law or have the likelihood to be remedied and punished. [315]Setting the enforcement prioritization helps achieving more effective allocation of human and financial resources within competition agencies. It also improves productivity. If immature competition agencies deal with every kind of complicated violation of competition law, it will be very difficult because of having limited expertise, experience and resources. Prioritization is; thus, an important strategy that allows the competition agencies to concentrate their limited resources on the most harmful anti-competitive conducts or cases that will set precedent.[316]

[313] DIT and the ASEAN Law Study Centre, F. o. L., Chulalongkorn University "Seminar Proceedings of the Enforcement of Competition Law in Indonesia, Singapore, Malaysia and Vietnam ".

[314] Cao Xuan Hien, ed. Sathita Wimonkunarak, Head of Antitrust Division Vietnam Competition Authority (2015).

[315] Wouter P J WILS, "The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles," World Competition 31(2008). p. 15-17

[316] Philip LOWE, "The Design of Competition Policy Institutions for the 21st Century: The Experience of the European Commission and Dg Competition," Competition Policy Newsletter (2008)., p. 2

Chapter 4.2 of the ASEAN Regional Guidelines on Competition Policy suggests that the introduction of prioritization criteria could help competition agencies make the best use of available resources. For setting the prioritization criteria ASEAN Member States may take into account various factors not only time, financial and human resources but also

“ 4.2.2.1 The type of agreement, conduct and apparent seriousness of an infringement and its impact on the relevant market, e.g., per se illegal infringements.

4.2.2.2 The extent or complexity of the investigations required, e.g., international cross-border cartel investigations requiring coordination with overseas competition regulatory bodies.

4.2.2.3 The likelihood of establishing an infringement.

4.2.2.4 The cessation or modification of the conduct complained of, e.g., the undertaking has made commitments to the competition regulatory body to cease anti-competitive aspects of the conduct.

4.2.2.5 The possibility of the complainant bringing the case before judicial authority, e.g., the case can be the subject of private enforcement in a parallel right of private action.

4.2.2.6 Whether the complaint concerns specific legal issues already in the process of being examined (or already examined by the competition regulatory body) in one or several other cases, and/or subject to proceedings before a judicial authority.

4.2.2.7 The impact of the competition regulatory body's possible intervention, e.g., on consumer welfare.

4.2.2.8 Whether the resource requirements of the work are proportionate to the benefits from doing the work.

4.2.2.9 Whether the work fits into the strategic significance of the competition regulatory body's plans."[317]

In some countries like Singapore, Indonesia and Vietnam have already implemented the Guidelines that recommend AMSs to introduce prioritization criteria. These countries realize that it is impossible to deal with all violations at the same time with the limited resources and little experience.

Thailand

It seems to be no formal enforcement priority in Thailand. It is partly because of very low and unsuccessful enforcement rate in Thailand. However, Dr. Siripol Yodmuangchareon, who was the former Director-General of Department of Internal Trade and the Secretary-General of the Office of the Competition Commission stated that the focus on the law enforcement has been changed depending on the time-period. In the past, the focus was on the fixing of prices by wholesalers and retailers. Currently, the concentration has shifted to anti-competitive practices of suppliers, manufacturers and distributors. In the future, the focus might be more on international entrepreneurs to encourage more investment in Thailand.[318]

An unavoidable important question is what kinds of prohibition should be put in priority. If the highest adverse effects to the market and competition is used as a measure to set prioritization, hardcore cartels should be put in the first priority list. Hardcore cartels are usually categorized as the highest enforcement priority in many countries. [319] Accordingly, prioritizing enforcement of Thai competition law at hardcore cartels is in accordance with international best practices.

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[317] ASEAN Regional Guidelines on Competition Policy, Chapter 4.2

[318] Yodmuangchareon, S., "Toward Effective Implementation of Competition Policies in East Asia : Thai's Perspective."

[319] OECD, " Effective Action against Hard Core Cartels," [Online] Accessed: 27 March 2015. Available from: http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False

On the other hand, considering the ineffective enforcement rate in Thailand and no leniency programme as the important tool to facilitate the detection of cartels, it is extremely difficult for Thailand to catch hardcore cartels. Therefore, there is a research suggests that the starting point for enforcement in Thailand should be on Section 29 and then expanding to Section 28, 27(5)-(10), 25, respectively and putting Section 26 into the last prohibition that Thai competition agency should focus. While Section 27 (1)-(4), which are hardcore cartels, can cause adverse effect to the economy, the commission should employs Section 16 to submit opinion for prosecution to the public prosecutor.[320] The lists of prioritization proposed by this group of researchers seems to be practical and have more possibility to be successfully implemented because it takes in to account the current performance and institutional constraints within Thai competition agency in handling competition cases. By enforcing the easy and uncomplicated cases first is a good start to gain confidence from the public and also suitable for the limited resources within Thai competition agency.

Indonesia

As a result of enormous complaints and limited case handlers, setting the prioritization and resource allocation are important for the operation of the KPPU. Due to the high corruption problem in Indonesia, bid rigging in public procurement is set to be the top priority of the KPPU.[321] Before setting priority the KPPU must take into account both internal and external factors such as national economic priority, Indonesian leader's policy objectives and frequency of complaints, investigations and public opinion and level of institutional

[320] ศักดา ธนิตกุลและคณะ, รายงานฉบับสมบูรณ์โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 (สำนักงานกองทุนสนับสนุนการวิจัย 2559), หน้า.213

[321] Sébastien J. Evrard, "Indonesia: Kppu Developing Credible Competition Regime," [Online] Accessed: 23 March 2015. Available from: http://www.mondaq.com/x/308690/Antitrust+Competition/KPPU+developing+credible+competition+regime

development. The KPPU focuses its activities on four high impact sectors, which are:

(i) sectors that closely related to public interest;

(ii) highly concentrated industry;

(iii) market with price sensitive;

(iv) public infrastructure and services.[322]

The KPPU also adopted the best practices from more matured competition agencies and international organizations particularly OECD and UNCTAD as a reference in developing its own prioritization and strategic planning. [323] Prioritization and strategic planning are also linked to the annual budget of the KPPU.

Singapore

In Singapore the detection and enforcement against hard-core cartels, which mainly focus on price-fixing and market allocation, are the high enforcement priority as a result of their adverse effects. Hardcore cartels are also considered unanimity in the international competition community as the most harmful anti-competitive conducts.[324] Singapore has made an impressive enforcement against hard-core cartels, especially with the recent international cartel case with the help of the leniency program and the exercise of extraterritorial application of its competition act.[325] This reflects the real intention of Singapore

[322] UNCTAD, "Prioritization and Resource Allocation as a Tool for Agency Effectiveness: Contribution by Indonesia " [Online] Accessed: 23 October 2015. Available from: http://unctad.org/meetings/en/Contribution/IGE2013_RT3_Indonesia_en.pdf, p. 2

[323] Ibid., p. 2

[324] Han Li Toh, " The Asia- Pacific Antitrust Review 2014 Singapore," [Online] Accessed: 20 January 2015. Available from: http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2328/singapore-ccs/

[325] Singapore, C. C., "Ccs Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel."

to combat against hard- core cartels as indicated in the top priority enforcement.

Vietnam

The set of enforcement priority of the Vietnam Competition law started with the uncomplicated cases like unfair competition cases. It then moved to anti-competitive agreements.[326] Merger review is now another priority in Vietnam Competition Law. As the result, the VCA will keep an eye on businesses, which failed to fulfill their obligations to pre-notify their economic concentrations as required under the Law on Competition (No. 27/2004/QH11).[327]

3.3.2.1.5 Independence Level of Competition Agency

The level of independence of competition agency is the important component of effective enforcement of competition law. The independence level of competition agency affects the degree of transparency and impartiality of competition agency[328] The ASEAN Regional Guidelines on Competition Policy recommends all ASEAN members to grant the as much administrative independence as necessary as possible to avoid the exertion of political influence.[329] However, the Guidelines does not force ASEAN members to choose any specific institutional model. The rationale behind this is no international consensus about the single model of competition agency that can ensure independence and suitable for all countries. In other words, no one size fits all for the models of competition agencies. The institutional design of

[326] DIT and the ASEAN Law Study Centre, F. o. L., Chulalongkorn University "Seminar Proceedings of the Enforcement of Competition Law in Indonesia, Singapore, Malaysia and Vietnam ".

[327] David Fruitman Hoang Phong, "Focus on Merger Activity by the Vietnam Competition Authority," [Online] Accessed: 31 March 2017 Available from: http://www.lexology.com/library/detail.aspx?g=0cba5ab2-91f7-438a-8914-9fd56c38898a

[328] OECD, "Independence of Competition Authorities – from Designs to Practices," [Online] Accessed: 31 March 2017 Available from: https://one.oecd.org/document/DAF/COMP/GF/WD(2016)56/en/pdf , p. 2

[329] ASEAN Regional Guidelines on Competition Policy Chapter 4.3.3

competition agency in each country should be tailored to be able to be operational and suit the environment of the society.[330]

Furthermore, ASEAN Member States should consider making the budgets of competition agencies free from political considerations.

"AMSs may determine that the competition regulatory body's budget should be free from political considerations. One method is to separate the competition regulatory body's budget from that of other governmental functions and making it transparent to the public. Another method consists of making at least part of the budget dependent upon income that is generated by the competition regulatory body, e.g., on fees charged for notification clearance or other proceedings and on fines imposed for anti-competitive conduct. A potential negative effect of this method is that it might create incentives for the competition regulatory body to use broader notification standards to increase notifications or bring in more cases and to impose higher penalties. Appropriate checks and balances should be put in place to curtail such potential negative effects." [331]

Political interference can be inserted through budget mechanism of competition authority. The decrease of budget can cause resource constraints and finally badly affect the capacity of competition authority in performing its functions. Thus, the determination of competition agency's budget should also be free from political consideration. It can be seen that the level of institutional independence depends on many conditions and not limited only to competition agency having independent legal status from the government. Independence can be reflected through many factors, including competition agency having financial autonomy to manage and fund its resources, having tenure stability in appointing officials of competition agency and insulating measures to prevent political influence in the operation of competition agency.

[330] UNCTAD, "The Foundation of an Effective Competition Agency.", p. 14

[331] ASEAN Regional Guidelines on Competition Policy Chapter 4.3.4

3.3.2.1.6 Institutional Structure of Competition Agency

While the institutional structure of competition regulatory body depends on the AMSs to decide which structure is the most suitable for their competition systems. Under this issue the Guidelines simply raises three institutional models for AMS to consider:

"1. Establish a standalone independent statutory authority responsible for competition policy administration and enforcement;

2. Create Different statutory authorities respectively responsible for competition policy administration and enforcement within specific sector

3. Retain competition regulatory body functions within the relevant Government department or Ministry."[332]

This study found that institutional structures of competition authorities in Thailand, Indonesia, Singapore and Vietnam fall within the three models of institutional structures provided in the Guidelines. In this area, these three jurisdictions basing their competition institutional structures within the framework of the Guidelines. Thus, there is no impediment in implementing the Guidelines in this area. Among these three models, the standalone independent statutory authority is the best institutional structure, which can prevent political intervention. Indonesia is the only country that adopted this model for the KPPU.

Thailand

The Office of Trade Competition Commission was set up within the Department of Internal Trade, Ministry of Commerce. With this institutional model, it makes the operation and enforcement of the Thai competition authority vulnerable to the political influence. There is a criticism that the application of Thai Trade Competition Act has suffered from political intervention and corporate

[332] ASEAN Regional Guidelines on Competition Policy Chapter 4.3.1

lobbying explicitly and behind the scene, particularly during the investigation stage.[333] This is a serious issue that widely discussed among Thai and foreign scholars. This is the reason why there is a request in the competition law reform to make the Thai competition authority having more independence in its administrative operation. Providing more independence to Thai competition agency will make Thailand better implementing the principle under the ASEAN Regional Guidelines on Competition Policy.

Moreover, the source of budget of the Thai competition authority is solely from the state. Allocation of budget process in Thailand cannot avoid the political influence because the budget preparation from the Ministry of Commerce will be decided by the Budget Committee and approved by the Parliaments. This means that the determination of competition agency' s budget is in the hands of politicians. Therefore, political influence through the budget process and budget allocation is a common problem in Thailand. [334]

This reflects that Thailand cannot reach the standard imposed by the Guidelines in making competition regulatory body's budget free from political considerations. The politicians can exert political influence through the disapproval of the request of more budget for the Thai competition authority. This conforms to the real situation of the competition authority in Thailand that being allocated inadequate budget from the state. The request of more budget for Thai competition agency is difficult according to the interview with the former Deputy Director-General Mr. Santichai Santawanpas Department of Internal Trade, Ministry of Commerce.[335]

[333] NIPON POAPONGSAKORN, "The New Competition Law in Thailand: Lessons for Institution Building," Review of Industrial Organization 21, Special Issue: Market Power in East Asian Economies: Its Origins, Effects, and Treatments (September 2002) (2002)., p. 185

[334] Kristhyada Kerdlapphon, "Allocation of Budget Process in Thailand ", ed. Sathita Wimonkunarak, Former Budget Analyst at the Bureau of the Budget The Prime Minister' s Office, Thailand. Current work: Law Lecturer specializing in the field of budget law at the faculty of law, Sukhothai Thammathirat University (2017).

[335] Santawanpas, S.

Indonesia

In marked contrast with other three ASEAN jurisdictions, Indonesia competition agency (KPPU) was established as an independent regulatory commission. Therefore, the KPPU does not face the similar impediments as other three competition agencies about the political intervention and lack of independence in their operation. However, being an independent competition agency does not guarantee that the KPPU can work without any obstacle. The KPPU faces the problem of budget being cut from the Indonesian Government although its fine contributes to the government exceeding the budget received from the government. The reduction of budget of competition agency can be used as a kind of political influence.

This budget constraint partly links to the lobbying of unsatisfied industrial sectors that lost benefits from the operation of the KPPU. [336]

Singapore

The Competition Commission of Singapore (CCS) was established as an independent statutory body under the Ministry of Trade and Industry (MTI).[337] Despite having the institutional structure within the MTI, the CCS has robust process to guarantee independence and impartiality in its operation, including investigation, adjudication of possible violation of the competition act. The CCS independently administers and enforces the competition act. This can be seen from the power of the CCS to independently decide whether or not there is a "reasonable suspicion" that an infringement has occurred. After the investigation, the CCS can independently make the decision whether the investigated conducts violate the competition act or not. The CCS can independently impose the appropriate penalty. The MTI will be informed about

[336] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 300

[337] Competition Commission Singapore, "Asean Competition Policy and Law: Singapore," [Online] Accessed: 28 March 2015. Available from: http://www.aseancompetition.org/aegc/aegc-members/singapore

the outcome of the case only after the Commission has already made the infringement decisions. Therefore, it is difficult for the MTI to influence the result of the case.

Although the competition act enables the Minister to give the CCS general directions, these directions must be consistent with the competition act. Since the application of the competition act till 2016, the Minister has never given this kind of direction to the CCS. Furthermore, there is a variety of statutory safeguards to ensure that the CCS properly exercise its powers. [338]

The CCS' s budget is not solely comes from the government because its fund comes from two sources, which are the budget granted by the parliament and money form discharging of its duties collected under the Competition Act. Having two sources of funds make the CCS having more insulation from the political pressure through the threat of cutting budget. All of these factors indicate that the CCS possesses the *de facto* independent in its operation and decision making, which is consistent with what recommended in the ASEAN Regional Guidelines on Competition Policy.

Vietnam

Similarly, Vietnam places the Competition Administration Agency under the purview of Ministry of Trade. [339] Maintaining the control of competition issues within the Ministry of Trade not only impedes the capacity of the agency but also implies the political intention of the Vietnam government. Even the more liberalized and market-oriented transformation has been adopted, Vietnam government still wants to remain control over economy as the result of the ideology of socialist country. Therefore, the wide criticism about the inappropriate placement of the Competition Administration Agency under the

[338] OECD, "Independence of Competition Authorities – from Designs to Practices."

[339] Pham, A., "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business. p. 557

control of the Ministry of Trade from public, researchers and other government agencies could not obstruct the victory of the Ministry of Trade in the National Assembly.[340]

Unlike competition agencies in Thailand, Indonesia and Singapore, the Vietnam Competition Authority has to fulfill three important tasks namely; Competition, Consumer Protection and Trade Safeguards according to the Decree no 06/2006/ND-CP on 9/1/2006 of the Government. In Vietnam, three important managing agencies are included in the single agency, which is the Vietnam Competition Authority. These tasks are in fact different in natures and usually separated into the responsibility of specific state management agency.[341]

3.3.2.2 Commission

3.3.2.2.1 Independence Level of Commissioners

The qualification of the commissioners should be independent from any kind of influence to guarantee the fairness in the decision-making process. Otherwise, there would be doubt about the conflict of interest and impartiality in the decisions of commissioners. Under the ASEAN Regional Guidelines on Competition Policy

"*AMSs may appoint independent commission members to be in charge of the competition regulatory body"* [342] This reflects that the Guidelines requires 'independence' as the main qualification of the commission.However, this study found that Thailand and Vietnam have commission' s structure that cannot ensure the independent qualification of commission members.

[340] Ibid. p. 560

[341] Agency, V. C. A. i. c. w. J. I. C., "Review Report on Vietnam Competition Law.", p. 213-214

[342] ASEAN Regional Guidelines on Competition Policy, Chapter 4.3.3

Thailand: The Vulnerable Structure of the Thai Trade Competition Commission to the Political Intervention and Corporate Lobbying

Criticism about independence level of the Thai Trade Competition Commission has been widely discussed.

A) The Vulnerable Structure of the Thai Trade Competition Commission to the Political Intervention

Bureaucrats occupied almost half of the commission. They are the representatives of many government sectors. The Minister of Commerce is the chairperson by his position, the Permanent- Secretary for Commerce is the vice-chairman.[343] which open the gap for political intervention. While other commissioners are nominated by the Minister of Commerce under the approval of the Cabinet.[344] By positioning these bureaucrats into the commission, it makes the commission vulnerable to the political intervention because the nature of the positions of these bureaucrats. Every time there is a change of the government in Thailand, all the new ministers will be appointed including the major minister like the Minister of Commerce. As a result of the nature of these bureaucrats highly depend on the government and the political parties; the criticism about the political intervention in the commission operation is often raised.

B) Too Many Representatives from the Private Sectors in the Commission

According to the Section 6 of the Trade Competition Act 1999, it specifies the structure, quality and quantity of the Trade Competition Commission that at least one - half of the commissioners must be appointed from the qualified members from the private

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[343] Trade Competition Act, Section 6

[344] Deunden Nikomborirak , "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business , p. 605

[*] Trade Competition Act 1999, CHAPTER I, Section 6. " There shall be a Trade Competition Commission consisting of the Minister of Commerce as Chairman, Permanent-Secretary for Commerce as Vice-Chairman, Permanent-Secretary for Finance and not less than eight, but not more than twelve, qualified persons with knowledge and experience in law, economics, commerce, business administration or public administration appointed by the Council of Ministers, provided that at least one-half must be appointed from qualified members in the private sector, as members and the Secretary-General shall be a member and secretary. The appointment of qualified persons under paragraph one shall be in accordance with the rules and procedure prescribed in the Ministerial Regulation."

sectors*. Allowing private representatives to occupy half of the commissioners are rarely found in other competition regimes. In practice, the representatives from the private sectors are nominated from the Federation of Thai Industry (FTI) and the Thai Chamber of Commerce. Each institution can nominate three commissioners equally.[345] Most representatives, who are nominated from the private sectors, are the executives from the big companies, therefore, these commissioners, are widely criticized about their impartiality. According to the Duenden and Suneeporn some commissioners have direct link and some have indirect link with the companies that are related to the anti-competitive behaviors' complaints.

These kinds of links can be illustrated as follows: a big cement company in Thailand, which was alleged in the complaint concerning the participation in the cement price-fixing cartel had a direct link with a commissioner, who used to be one of the commission in 2000 and 2004, because that commissioner also worked as the important legal official in that cement company at the same time. Another case is a board of the Major Cineplex Group public company limited was one of the commissioners in 2002 and 2004 while this Major Cineplex Group public company limited was filed the complaint relating to movie ticket price-fixing cartel.[346]

As a result of Section 6, it presents a problem of excessively allowing the representatives from the private sectors to be a part of trade competition commission. Half of the commissioners are from private sectors enables the more influence to be asserted in the decision-making process of the commission. It also increases more chance of the conflict of interest because the commissioners may have to make decisions in the issue related to the companies they work for. It will reduce the transparency in the decision-making process of the Thai Trade Competition Commission in the eyes of the public.

[345] Deunden Nikomborirak, "Project: Building Constituency in Competition Policy: Thailand Competition Law & Policy, Thailand Development Research Institute," [Online] Accessed: 29 September 2015. Available from: http://siteresources.worldbank.org/INTTHAILAND/Resources/333200-1163047690503/3140686-1163047766322/2006thailand_competition_law_and_policy.pdf

[346] เดือนเด่น นิคมบริรักษ์, การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย, หน้า 38.

In fact, Thai commission structure is different from the structure of other commissions in the international level.[347] Therefore, this kind of structure not only impedes performance in enforcing competition law by increasing more risk of intervention and influence from the private companies, but also affects the level of transparency.

Vietnam

In Vietnam, the selection of Competition Council board members is from the representatives of various Ministers for example, Ministry of Industry and Trade, Ministry of Justice, Ministry of Finance, Ministry of Planning and Investment, Ministry of Transport, Ministry of Construction. Similar to Thailand, putting a lot of bureaucrats in the commission will make the structure of commission vulnerable to political intervention. The criticism about the impartiality occurs when the Competition Council has to decide cases involving enterprises under the control of Ministries. This is because these representatives from ministries have two roles to play and they are in conflict.

3.3.2.2.2 Structural Problems of Commissioners

Inability of Commissioners to Work Full-Time: The Case of Thailand

The worst case of inability of commissioners to work full time is found in Thailand. Commissioners in Thailand working as an *Ad Hoc,* which they tend to work only when they have cases or meeting. The frequency of working as an Ad hoc has lesser degree than working as a part time job.[348]This affects the performance of the commission as a whole. By taking responsible for many jobs, the commissioners cannot fully focus on their job. Their meetings are also hardly organized. During 2001-2007, the commissioners' meetings were organized only nine times.[349] These figures are

[347] Ibid. p. 35

[348] ศักดา ธนิตกุลและคณะ, รายงานฉบับสมบูรณ์โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 หน้า 209.

[349] Nikomborirak, D., "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business , p. 601

* Trade Competition Act, Section 8. The Commission shall have the powers and duties as follows:

considered too low comparing to the meetings of commissioners in other competition agencies. This low number of meetings obviously show the bad effect towards their performance in the consideration of complaints, making decisions as well as other kinds of duties specified in Section 8*. The inability of working full- time as commissioners makes Thai Trade Competition Commission in Thailand look like amateurs in the eyes of foreign scholars.[350]

Vietnam faces similar situation in Thailand that the commission cannot work full time because the Vietnam Competition Commission consists of 11- 15 commissioners from different Ministry and the Chairman is the Deputy Minister of Industry and Trade. While the structure of the commission in Indonesia is quite equivalent to the ideal structure of commission in the international level.[351]

1. to make recommendations to the Minister with regard to the issuance of Ministerial Regulations under this Act;
2. to issue Notifications prescribing market share and sales volume of any business by reference to which a business operator is deemed to have market domination;
3. to consider complaints under section 18(5);
4. to prescribe rules concerning the collection and the taking of goods as samples for the purposes of examination or analysis under section 19(3);
5. to issue Notifications prescribing the market share, sales volume, amount of capital, number of shares, or amount of assets under section 26 Paragraph two;
6. to give instructions under section 30 and section 31 for the suspension, cessation, correction or variation of activities by a business operator;
7. to issue Notifications prescribing the form, rules, procedure and conditions for an application for permission to merge businesses or jointly reduce and restrict competition under section 35;
8. to consider an application for permission to merge businesses or jointly reduce or restrict competition submitted under section 35;
9. to invite any person to give statements of fact, explanations, advice or opinions;
10. to monitor and accelerate an inquiry sub-committee in the conduct of an inquiry of offences under this Act.
11. to prescribe rules for the performance of work of the competent officials for the purpose of the execution of this Act;
12. to perform other acts prescribed by the law to be powers and duties of the Commission;
13. to consider taking criminal proceedings as in the complaint lodged by the injured person under section 55.

[350] Mark Williams, "Competition Law in Thailand: Seeds of Success of Success of Fated to Fail," World Competition 27(3)(2004)., p. 469

[351] KPPU, "Board of Commissioners," [Online] Accessed: 3-4 August 2017 Available from: http://eng.kppu.go.id/board-of-commissioners/

3. 3. 3 Impediments Resulting from the External Factors: Intervention and Corporate Lobbying

3.3.3.1 Nexus between Government and Big Firms

Under most of Asian political economy, the problem about the big firms being the main financial sponsors for the political parties is often found, particularly in developing countries with the problem of rent- seeking, good governance and corruption.[352] This can lead to the corporate lobbying impeding the implementation of pro-competitive policies, the development of competition law and its enforcement. Corruption distorts competition by providing favorable advantages to one company or a group of companies over the competitors regardless of their comparative advantages.[353] Rent- seeking relationship between businesses that seek for political support and protection from government and government officials and pay some benefits in return are found in some AMSs.[354]

Thailand

The problems of corruption and corporate lobbying have long rooted in the Thai society. Large businesses have long been the main sponsorship of political parties in Thailand.[355] The close link between businesses and government can lead to the corporate lobbying the government to weaken the enforcement of competition law. The big companies that are related to the complaints of anti-competitive conducts had the linkage with the political parties and government in many forms, for instance, some of their boards or the family of their board were politician or had a position in the political parties that were government at that time.[356] This seems to be one of the reasons behind the ineffective

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[352] Transparency International, " Corruption Perceptions Index 2012," [Online] Accessed: 21 November 2016 Available from: http://www.transparency.org/cpi2012/results

[353] Fox, M. S. G. a. E. M., "Drafting Competition Law for Developing Jurisdictions: Learning from Experience.", p. 16

[354]Marleen Dieleman and Wladimir M Sachs, "Coevolution of Institutions and Corporations in Emerging Economies: How the Salim Group Morphed into an Institution of Suharto' s Crony Regime," [Online] Accessed: 28 November 2016. Available from: http://www.academia.edu/29187237/Coevolution_of_Institutions_and_Corporations_in_Emerging_Economies_How_the_Salim_Group_Morphed_into_an_Institution_of_Suhartos_Crony_Regime, 1283-1285

[355] Nikomborirak, D., "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business , p. 606

[356] เดือนเด่น นิคมบริรักษ์, การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย, หน้า 40.

competition law enforcement in Thailand. According to Nipon Poapongsakorn, the application of Thai Trade Competition Act has suffered from political intervention and corporate lobbying both explicitly and behind the scene, particularly during the investigation stage.[357] This close link between Thai government and businesses lessen the political will to enforce competition law in Thailand.

Indonesia

Indonesia is known as having the high rate of corruption. Therefore, bribery is considered common when doing business in Indonesia[358] Businessmen get used to paying bribes for doing business in Indonesia, which can be in return of awarding public contracts and licenses or connection with import and export.[359] The corruption is also found in the political parties where their power is used to be vehicles to benefit from bogus government projects and public procurement.[360] The corruption problem is deemed to be a high obstacle in enforcing competition law and fostering the fair competition environment in Indonesia.

An example of nexus between government and big firms in Indonesia appears in the form of conglomerates in many economic sectors that have politically strong support. With the government support these conglomerates are able to maintain significant market power or some possess dominant position in the market.[361] Today this issue in Indonesia can be described as " ... over time ownership concentration under conglomerate tend to rise and, thereby, creating a few large firms and powerful, well-connected crony groups engaging in a rent- harvesting conducts and wield their political power to influence

[357] POAPONGSAKORN, N. , "The New Competition Law in Thailand: Lessons for Institution Building," Review of Industrial Organization. , p. 185

[358] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 287

[359] "The Global Competitiveness Report 2010-2011," [Online] Accessed: 14 January 2015. Available from: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf

[360] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 289

[361] Thomas B. Pepinsky, Economics Crises and the Breakdown of Authoritarian Regimes: Indonesia and Malaysia in Comparative Perspective (Cambridge University Press2009).

government policy in their business favor."[362] Another example of this problem is reflected in the KPPU's attempt to develop and review the competition law both in substantive and procedural rules facing the big obstacle in the House of Representatives where corporate lobbying from several industrial sectors are the influential factors in the decision of the House of Representatives.[363]

3. 3. 3. 2 Nexus between Government and State- Owned Enterprises or Government-Linked Companies

The distortion of competition cannot duly from the anti- competitive business conducts. It can result from the government acting as market participants through State-Owned Enterprises (SOEs), Government-Linked Companies (GLCs) and control of commercial entities. The greater role of government in the economy, the greater risk of distortion in the market unless there is an effective application of competition law or other mechanisms to deal with it.[364] OECD mentioned about this problem as follows:

"Governments may create an uneven playing field in markets where [a State-owned enterprise ("SOE")] competes with private firms, as they have a vested interest in ensuring that state-owned firms succeed. Accordingly, despite its role as regulator the government may, in fact, restrict competition through granting SOEs various benefits not offered to private firms. While in some areas this preferential treatment will be direct and obvious, there may also be indirect preferential treatment through other means."[365]

This study found that the nexus between government and state- owned enterprises or government- linked companies are the common problem among four selected countries. These SOEs and GLCs sometimes get various kinds of preferential

[362] Wisuttisak, P., "The Asean Competition Policy Guidelines and Its Compatibility with Asean Member Countries Competition Law."

[363] Ibid.

[364] "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025." "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025."

[365] Antonio Capobianco & Hans Christiansen, "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options (Oecd) in Deborah Healey, Application of Competition Laws to Government in Asia: The Singapore Story," [Online] Accessed: 22 February 2015. Available from: http://law.nus.edu.sg/asli/pdf/WPS025.pdf

treatments over other private companies. Some preferential treatments are in the scope of competition law; exemption from the application of competition law whereas others are not, for example special rights, lower costs of capital, lesser tax burdens and lower risks of bankruptcy[*].

The main discussions in this part will be divided into two folds.

The first part is whether the SOEs and GLCs falls within the scope of competition law application, which concerns the substantive competition law.

The second part assesses deeper into the law enforcement of each country in practice. If SOEs and GLCs are within the scope of application of competition law, will the competition authority can effectively enforce the competition law against them.

Regarding the first issue, the ASEAN Regional Guidelines on Competition Policy imposes the appropriate scope of application of competition law as follows:

"Competition policy should be an instrument of general application, i.e., applying to all economic sectors and to all businesses engaged in commercial economic activities (production and supply of goods and services), including State-owned enterprises, having effect within the AMSs' territory, unless exempted by law. The concept of commercial economic activities refers to any activity that could be performed in return for payment and normally, but not necessarily, with the objective of making a profit. The exercise of sovereign powers is not a commercial economic activity."[366]

"Businesses engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality, transparency, consistency and non-discriminatory treatment under the law."[367]

These principles laid down in the Guidelines are consistent with the international best practices, which are now generally accepted that competition law should apply to all market participants engaging in commercial activities with only some necessary exemptions or exclusions. Exemptions should be limited as much as

[*] OECD, State Owned Enterprises and the Principle of Comparative Neutrality, Policy Roundtable 2009, 11 The special treatments granted to SOEs and GLCs beyond the scope of competition laws and regulations are outside the scope of this dissertation and it will not be discussed.

[366] ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.2,

[367] ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.3

possible with sound justifications behind. The process and analysis before granting these exemptions should be transparent and accountable. There should be well-considered, well-supported justification behind these exemptions. [368] Nevertheless, the problem of granting inappropriate exemptions, which are not based on sound economic or logic, can be found in many jurisdictions, not only ASEAN countries. Even in the US, which its antitrust law is used to be one of the greatest influential model law for other countries, there are some exemptions that are criticized as allowing economic benefits flowing to few concentrated interest group at the expense of the rest of the public.[369]

Thailand

Under the Thai Trade Competition Act 1999, state enterprises under the law on budgetary procedure are exempted from the application of this act. [370] This exemption makes some state-owned enterprises engaging in commercial economic activities and directly competing with private companies not being monitored under this act. Some of these state-owned enterprises were privatized and turn to be public companies doing business to make profit and competing directly in the same market with private companies, for example, Thai Airways International Public Company Limited and PTT Public Company Limited. By having this exemption means, these state-owned enterprises do not play by the same rule with their competitors, which are private companies.

This exemption is highly controversial because it is against the general principle of competition law that is supposed to apply to all market participants including any SOEs or GLCs that involve in commercial activities to ensure they compete in the same level playing field.[371] It is also against what recommended

[368] "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025." "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025."

[369] Ibid. p. 4

[370] Thai Trade Competition Act, Section 4

[371] "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025." "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025.", p. 1

in the Guidelines in Chapter 3.1.2 as specified above. This exemption is contrast with the principles and objectives of competition law, which is supposed to have general application and level playing field for all market players to protect competitive process, not competitors.[372] It also shows inequality in the application.

With regard to the law enforcement, there is no evidence to prove whether the competition authority in Thailand effectively enforce the Trade Competition Act because there is no single decisions relating to state-enterprises or government linked companies. The enforcement is remained to be seen after the reform of this act.

Indonesia

According to the Law No.5, Article 1 point 5, and Article 51, SOEs are included in its scope of application. Similar to the situation of other ASEAN countries, industrial sectors of Indonesia are concentrated with state-owned enterprises and also family-controlled conglomerates. Privatization of the state-owned enterprises did not seem to bring about more competitive environment since the state monopoly is just simply changed into the private monopoly, particularly in the hands of foreign investors.[373] In this context Ningrum Natasya Sirait opined that " SOEs and privatized monopolies contributed to corruption, collusion, and nepotism."[374]

[372] ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.2, 6

[373] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 295

[374] Ibid. p. 296

[*] Singapore Competition Act, section (4) Nothing in this Part shall apply to any activity carried on by, any agreement entered into or any conduct on the part of —

(*a*) the Government;

(*b*) any statutory body; or

(*c*) any person acting on behalf of the Government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

Singapore

The conduct of the Government, the statutory bodies, persons acting on behalf of the Government or statutory bodies are exempted under Section 33(4) of the Singapore Competition Act*. This concern is raised because many statutory bodies seem to participate in commercial activities or linked to commercial subsidiaries.[375] Therefore, there is a concern that granting exceptions and block exemptions might give undue advantages to some state-owned enterprises or government-linked companies and create unleveled playing field.[376] The general exemption for all statutory bodies might be too sweeping if these statutory bodies engage in commercial economic activities, particularly, in the context of Singapore because Singapore government plays the conflicting roles as market regulator and market participants at the same time through government-linked companies, especially the major two companies; Government of Singapore Investments Co (GIC) and Temasek Holdings Pte. Ltd. (Temasek).[377] The government holds substantial shares in Temasek, which are invested in aviation industries. Temasek and Temasek-linked companies are account for the significant part of GLCs in Singapore through various businesses for example, telecommunication, power, gas services, port operations, property development, heavy industries, construction, trading firms and even food supplies.[378] Government also involves in telecommunication through Singtel.[379]

This study found that other exemptions or exclusion from the application of Singapore Competition Act are quite sound because they fall in the scope of necessary traditional activities of government*.

[375] Ibid. p. 19

[376] Jackie WU, "Competition Policies in Selected Jurisdictions' (Hong Kong Legislative Council 2010)," [Online] Accessed: 22 February 2015. Available from: http://www.legco.gov.hk/yr09-10/english/sec/library/0910rp02-e.pdf

[377] "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025." "Deborah Healey Application of Competition Laws to Government in Asia: The Singapore Story Asian Law Institute Working Paper Series No.025.", 1

[378] Ibid. p. 9

[379] Ibid. p. 9

However, exceptional and compelling reasons of public policy under the Third Schedule is regarded as quite a broad ground for exemption allowing Minister to override the application of this act and no guidance has been given.

Furthermore, it is doubt whether the impartiality and transparency will be delivered or not when the CCS has to deal with the complaint concerning the government- linked companies. Moreover, the placement of Singapore competition agency within the Ministry of Trade and Industry stimulates this doubt in the eyes of the public. Due to some of statutory boards of Ministry of Trade and Industry are also the senior executives of many government-linked companies at that time. This is an unavoidable conflict of interest.[380]

In spite of these concerns about the capability of the CCS in enforcing competition act to SOEs and GLCs, there is a landmark case; *SISTIC Case*, which shows the positive sign that CCS will initiate the action against GLC like the SISTIC.com Pte Ltd (SISTIC)[*].

[*] Other exemptions are found in section 35, 48, which addresses some specified activities in the Third Schedule are outside the scope of section 34 and section 47 application. These specified activities mainly involve traditional activities of governments for example, services concerning letter, supply of water and wastewater management and rail and bus. Agreements contributing to net economic benefits: improvement of production and distribution and promotion of technical or economic progress. Other grounds for exemptions include compliance with international obligations and written legal requirements. Section 34 and 47 of this act will not be applied to agreements or conducts concerning clearing and exchange undertaken by the Automated Clearing House under the Banking Regulations or any activity of Singapore Clearing Houses Association.

[380] Burton Ong, "The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape," Singapore Journal of Legal Studies (2006). p. 189

[*] This case examines clearly about the exemption under section 33(4). The result of this case is the CCS found an infringement decision against SISTIC.com Pte Ltd, which is the corporatized government body but not part of the government or statutory body or acting on behalf of them. Therefore, SISTIC does not fall within the exemption under section 33(4) even 65 of its shares are owned by a statutory body: Singapore Sport Council and the rest of 35% by corporatized government body operating on the non-profit status: The Esplanade Co Ltd (TECL). This is because SISTIC can enjoy economic independence from SSC and TECL. SISTIC is not form the single economic entity with the SSC or ECL because it has freedom to decide its own actions. By conducting the exclusive agreements for ticket services with venues restricting the promoters' choices of ticket service providers beyond SISTIC and ability to increase ticket price by 50% violates the abuse of dominance under section 47. 9

Vietnam

Article 2 of the Law on Competition (No 27-2004-QH11) prescribes that SOEs are in the scope of competition law application. Vietnam's economy is socialist-oriented economy dominated with state-owned enterprises playing the important role in operating socialism oriented market economy. It is in accordance with the policy of Vietnam to create national champion, particularly in major industries like civil aviation, heavy industries, electricity generation and telecommunication.381 SOEs are widely criticized that they tend to receive special treatments or favorable dealings, which are not easily available for other private companies, as a result of having close link with the government.382

Thus, one of the challenges to competition law enforcement in Vietnam is dealing with dominant position of state-owned enterprises.[383] Some of the state-owned enterprises are held and controlled by different lines ministries, which represent the link between state-owned enterprises and government.[384] These ministries are likely to protect their own SOEs rendering the ineffective enforcement problem in practice.[385]The structure of the Vietnam competition commission is also open for political intervention because it consists of commissioners from different Ministry. The Chairman is the Deputy Minister of Industry and Trade. It is not surprised that why investigating and enforcing competition law to some SOEs faces hindrance in the form of political intervention or in some cases the cases are quietly dropped.[386]

[381] Gillespie, J., "Localizing Global Competition Law in Vietnam: A Bottom-up Perspective," International & Comparative Law Quarterly. p. 935-975, 944

[382] Nguyen, T. T., M. A. von Dijk, "Corruption, Growth, and Governance: Private Vs. State-Owned Firms in Vietnam," Journal of Banking and Finance. p. 2935-48

[383] Tuan, N. A., "Review of Competition Law Enforcement in Vietnam Does Substance or Procedure Count?"

[384] Pham, A., "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business. p. 559

[385] Ly, L. H., "Competition Law Enforcement Towards State Owned Enterprises in Vietnam."

[386]Gillespie, J., "Localizing Global Competition Law in Vietnam: A Bottom-up Perspective," International & Comparative Law Quarterly. p. 935-975, 944

Although the Vietnamese competition law includes the SOEs within the scope of application, the close nexus between ministers and SOEs in Vietnam negatively affects competition law enforcement in practice. In conclusion, the enforcement of competition law to SOEs in Vietnam is sometimes selective.[387] These situations are against the principle of fair competition underlying in the Guidelines.

3.3.4 Opportunities in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Enforcement

On the other hand, there are some opportunities arriving from implementing the Guidelines to enforcement mechanism of AMSs.

Opportunities in ASEAN Level

- Effectively deal with cross-border anti-competitive behaviours in ASEAN
- Develop common ASEAN enforcement strategies

Opportunities in National Level

- Competition law is enforced in the vigorous and effective manner
- Strengthening capacity building of competition agency
- Enhancing the level of independence of competition regulatory body
- Set appropriate enforcement priority

[387] Ibid. p. 935-975, 944

3.4 Impediments faced in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Competition Advocacy

3.4.1. The Lack of Competition Culture

Competition culture is defined as *" A set of institutions that determine individual and/or group behaviour and attitudes in the sphere of market competition. These are influenced by wider social institutions and public policy choices and include customs impacting the degree of business competition and cooperation within a jurisdiction."*[388]

Level of competition culture can be roughly evaluated by consumer attitude. If consumers easily surrender to monopolistic abuse, abuse of dominant position or cartels, this represents the weak competition culture in that society. If consumers do not tolerate these kinds of anti-competitive behaviors and actively seek for better options, this on the other hand, shows the strong competition culture. Intensity of competition also reflects the level of competition culture in that society. [389]

The lack of competition culture is a basic problem that leading to many other problems, such as insufficient political will in the application of competition law, the inadequate legislation to prohibit anti-competitive conducts, ineffective enforcement, low compliance rate and insufficient budgets provided for competition agencies. The lack of competition culture in one country stems from the competition environment in that country, market characteristics as well as belief system and individual ideology in that country. Most of ASEAN countries do not have a strong competition culture. The reasons behind the lack of competition culture among these ASEAN countries are briefly raised as follows:

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[388] ICN, "Advocacy and Competition Policy," ใน the Advocacy Working Group ICN's Conference (Naples, Italy 2002). , p. 9

[389] Ibid. p. 31-32

Thailand: The Problem concerning Rent-Seeking, Corruption and Patron-Client Relation

Thailand faces the problem of rent-seeking, corruption and patronage system. Rent-seeking, corruption and patron-client relationship in Thailand have shaped Thai's political economy and become the practice of how to do business in Thailand.[390] These problems show that Thailand does not have good foundation of competition culture, which impedes the principles of free and fair competition.

The rent seeking is the process of spending resources for trying to influence the outcome of public policies or persuade bureaucrats to grant access to economic sector or give favorable and special treatment for entrepreneurs.[391] Rent-seeking comes in many forms. Rent-seeking behaviors include the bribery, lobbying, underwriting of the campaigns of legislators and political violence.[392] The rent seeking imposes costs on the economy, for example rent seeking can create monopolization in some specific sectors. Monopoly causes a loss of consumer surplus and transfer of wealth from the economy to a few group of people. The society having politicized resource allocation will allow successful rent-seekers despite of they are inefficient entrepreneurs, maintaining in the market indefinitely. The rent-seeking is also considered socio-transaction cost baring the development of market efficiency.[393]

According to John Mukum Mbaku, the recent literature on bureaucratic corruption shows that "bureaucratic corruption is primarily a rent-seeking behavior that is related to the scope and extent of government intervention in private exchange."[394] The more government intervention in private exchange, the higher opportunities of rent seeking. The illustration of bureaucratic corruption, which resulting from rent-

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[390] R. Ian McEwin and Sakda Thanitcul, "The Political Economy of Competition Law in Asia: Thailand," in The Political Economy of Competition Law in Asia., p. 268

[391] John Mukum Mbaku, Corruption and Rent Seeking' in the Political Dimension of Economic Growth (London: Macmillan/St. Martin's Press, 1998)., p. 195-196

[392] Ibid. p. 196

[393] Anthony Downs, An Economic Theory of Democracy (1957)

[394] Mbaku, J. M., Corruption and Rent Seeking' in the Political Dimension of Economic Growth , p. 194

seeking behavior is an entrepreneur bribes a civil servant or a politician to get benefits or favors or important permit that entrepreneur would not otherwise received. The bureaucratic corruption includes the bribery or other pressure to persuade bureaucrat to grant access to some economic sector, to receive license or public subsidy or minimizing burden imposed by regulations on companies.[395]

Thailand has have long rooted of the patron-clientele economy since the past and continued until now. The Patron- Client Relation is quite common political economy characteristic in South- East Asia where patrons; usually be political leaders provides benefits or jobs or services in return of bribery or other kinds of benefits. The case of patronage system in Thailand was quite obvious in the past as a result of the *Sakdina* caste system[*]. The Patron- Client Relationship has remained until now in the form of reciprocal benefits between political leaders, bureaucrats or military leader and big businesses. The political economy of Thailand is the strong relationship between government and businesses.[396] The Patron-Client Relationship always comes with corruption, which is hardly exposed in Thailand.[397] According to Suehiro, since 1960 a few of big conglomerates controlled by tycoon family groups have enjoined privileges from the government industrial policy. These conglomerates occupied the majority of total Thai business assets.[398] There are a few ways that businesses can influence the politics in order to create or maintain their power and wealth. The first channel is funding the candidates personally.[399] The second channel is funding the national election in return of the big position in government. During 1983- 1986 there was the high number of businessmen in the House, which was outnumbered the

[395] Ibid. p. 197

[*] Basing on the *Sakdina* caste system, there was an exchange of administrative protection and security of income of rents, interest and bribe between Thai's elites and businessmen mainly the Chinese.

[396] R. Ian McEwin and Sakda Thanitcul, "The Political Economy of Competition Law in Asia: Thailand," in The Political Economy of Competition Law in Asia., p. 268

[397] Ibid., p. 269

[398] Akira Suehiro, Capital Accumulation in Thailand 1885-1985 (Chiang Mai: Silkworm, 1996)., p. 269

[399] Richard Doner and Ansil Ramsay, "Competitive Clientlelism and Econoimic Governance: The Case of Thailand," in Business and the State in Developing Countries, ed. Sylvia Maxfield and Ben Ross Schneider (Cornell University Press, 1997).

bureaucrats by three to one.[400] The existence from the past until now of the rent-seeking, corruption and patron-client relation problems made Thailand having weak competition culture and also obstructing the growth of competition culture in Thailand.

Indonesia: Conspiracy, Corruption and Cronyism[401]

Strong culture of conspiracy, high corruption rate and cronyism are common behaviors for doing business in Indonesia.[402] This makes Indonesia does not have a good competition culture and cause wide ranges of competition problems. Indonesia's main competition problem is related to bid-rigging, which has been set to be competition law enforcement priority. Most of KPPU cases are bid-rigging in public procurement, which can indicate the strong culture of conspiracy within Indonesia and low competition culture.[403]

"*Most competition problems in Indonesia stem from Government actions. State-created monopolies were ubiquitous in the Suharto era and many continue to exist due to local government regulations. Many public policy makers and regulators are unfamiliar with the goals or benefits of competition policy. Moreover, they are not used to incorporating competition as a goal of their public policy*"[404]

[400] Anek Laothamatas, "Business and Politics in Thailand: New Patterns of Influence," Asian Survey 28(1988).

[401] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 299

[402] Soy M Pardede, "Development of Competition Policy and Recent Issues in East Asian Economies (the Indonesian Experience)," ใน The 2nd East Asia Conference on Competition Law and Policy (2005).

[403] Indonesia Competition Commission (KPPU), "Annual Report of 2012 " [Online] Accessed: 18 April 2016. Available from: http://www.apeccp.org.tw/htdocs/doc/Indonesia/Statistics/03-KPPU-ANNUAL-REPORT-2012.pdf, p. 25

[404] UNCTAD, "Voluntary Peer Review on Competition Policy: Indonesia " [Online]. Available from: http://unctad.org/en/Docs/ditcclp20091_en.pdf, p. 48

3.4.2 Low Public Awareness in the Benefits of Competition

Having low public awareness in benefits of competition represents the weak competition culture in that society. As a result of no good background of competition culture, most of developing countries are not familiar with the benefits of the competition and competitive market. [405] Therefore, promoting the benefits of competition and the importance of competition law to the economic system are the important task of competition agencies as much as the law enforcement in developing countries.

Public awareness in the benefits of competition should be built, especially for the beginning period of introduction of competition law because it could bring about more compliance with the law and increase the will to co-operate with enforcement actions. [406]

A significant challenge in implementing the Guidelines into the national competition regimes of Thailand, Indonesia, Singapore and Vietnam is the view that the Guidelines is not the important document. It includes the view that the Guidelines is simply an ASEAN document that AMSs will only refer to when they would like to amend the competition law. This reflects the low recognition and awareness of the Guidelines as the ASEAN's document as well as the passive compliance with the ASEAN regional competition commitments in these four ASEAN Member States.

This study found that this perception is the real challenge affecting the degree of implementation of the Guidelines in each country because this view either comes from the law makers or officials in competition agencies could detrimentally affect the willing in implementing the Guidelines into their competition policies and laws.

[405] Dube, R. S. a. C., ", Competition Policy Enforcement Experiences from Developing Countries and Implication for Investment.", p. 10

[406] ICN, "Advocacy and Competition Policy."

According to the deep interview of officials from competition agencies in Thailand, Singapore, Indonesia and Vietnam, they reflected the similar answers that they focus only on their domestic competition laws. The ASEAN Regional Guidelines on Competition Policy will come to play a role only where there are competition law reforms or amendments.[407] The interview's result shows that some important parts of the Guidelines that concern the daily operation of competition agency, particularly beyond the substantive parts, have not been effectively implemented in their competition law systems, for example those related to enforcement, due process and private enforcement.

Thailand

In the early application of Trade competition act, Thailand has low public awareness in the benefits of competition. The concept of competition was not well-known for public at large. Therefore, this act was perceived to be regarded as ' business dispute' . Businesses were not well- educated about the competition law even the large businesses.[408] Ordinary people, medias and the government authorities had little knowledge about competition policy and law. In the academic field, there was very limited courses and research about competition law and competition-related issues.[409] NGOs in Thailand also did not focus on the competition issues. All of these situations represent the low public awareness in the benefits of competition in Thailand.

[407] Ly, L. H., "Competition Law Enforcement Towards State Owned Enterprises in Vietnam.", Reza, M., "Challenges in the Applicationa and Enforcement of Indonesia Competition Law.", Kong Weng Loong, "Impediment in the Enforcement of Competition Law in Singapore.", Hien, C. X., Wattanasak Suriam, ed. Sathita Wimonkunarak, Director of Trade Competition Bureau (2015).

[408] Yodmuangchareon, S., "Toward Effective Implementation of Competition Policies in East Asia : Thai's Perspective."

[409] Nikomborirak, D., "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business , p. 610

Indonesia

There is low competition awareness among public authorities, ministries and government in Indonesia. Despite the KPPU's effort in to advocate these stakeholders, competition is still not the prioritized issue for the Indonesian parliament and government. The perception among the government and central agencies is competition is the exclusive and narrow domain of the KPPU. Competition may be related to their policies but competition could be addressed as an after- thought. Competition is not one of the pillars of Indonesian economic system.

To foster the fair competition environment in all regulatory aspects in Indonesian requires an aware of the value of competition. On the other hand, the awareness of such value is not practically widespread among lawmakers and government. The significant evidence of this impediment is found where competition is not incorporated in the spirit of the overall economic policies. Rather it is only incorporated as a part of a mission to strengthen the development of the domestic economy with global orientation. Therefore, fair competition is not one of the important values of economic policy. This results in many economic policies ignore competition value. Sometimes the policies and laws are inconsistent with the principle of fair competition. Indonesian government seems to be unaware of incorporating the principle of competition into economic regulations both the macro and micro levels. Moreover, the KPPU does not adequately involve in the policy making process with the government.[410] This decreases the KPPU's opportunities to provide recommendation about how to make policies and law consistent with the principles of fair competition. Therefore, the KPPU expressed its necessity to expand competition advocacy throughout the government and public authorities.[411]

[410] OECD, "Annual Report on Competition Policy Developments in Indonesia " , p. 40

[411] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy "

Singapore

Although Singapore has small and dynamic economy, there remains an overall lack of competition awareness among individual and corporate in Singapore. Similar to other ASEAN countries, cooperation, even among businesses, is often viewed favorable. Singapore does not have the long history of competition heritage like the US. Singapore competition culture is not strong even among businesses. A cartel of four "Fa Gao" manufacturers in Singapore issuing a public announcement on a uniform price increase in 2008 can prove this statement.[412] The public announcement shows a clear price-fixing cartel that violate the competition act. However, these four manufactures do not realize that their actions infringe the competition law so they issued the announcement. They believe that it is the acceptable conduct. The general consumers also do not have good knowledge about competition law. This situation alerts the CCS about the necessity to conduct more competition advocacy and provide education to public.[413]

Vietnam

There is low level of public awareness of the competition in Vietnam. This includes the main relevant stakeholders like business community that still have low awareness and understanding in the concept of competition, competition law and their benefits. Some businesses aware only the contract laws when doing business without realizing that their actions violate competition act. Different types of firms in Vietnam responds and complies with competition

[412] Competition Commission of Singapore, "Ccs Stops Price Increase Agreement between Four "Fa Gao" (发糕) Manufacturers," [Online] Accessed: 29 October 2016. Updated: 27 November 2014. Available from: https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-stops-price-increase-agreement-between-four-fa-gao--manufacturers

[413] Competition Commission of Singapore, "Competition Policy in Singapore – Opportunities and Challenges Towards an Autochthonous System of Competition Law," [Online] Accessed: 1 August 2017 Available from: https://www.ccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/ccs%20campaigns/ccs%20essay%20competition%202014/open%202nd_towards%20an%20autochthonous%20system%20of%20competition%20law.ashx

law in Vietnam differently. Large private firms tend to comply with competition law more than any other groups since they are likely to connect with transnational corporation through production chains; thus, more familiar with global regulatory idea of competition law. In contrast, SMEs, which privately owned are the less likely to comply with competition law. While about 40% of state-owned enterprises and state-controlled firms believe that competition law does not apply to them.[414]

There are many factors behind this different degree of compliance among different kinds of firms for example, types of business networks, educational background of key personals, the level of exposure to international market and international regulations, ownership structure, connection to the party-State and the social construction.[415] Moreover, there is the monopoly mindset among business sectors in Vietnam. Consumers do not have adequate knowledge about competition law. Public has limited interest in competition issues partly from insufficiency of public education on competition issues. As a result of limited knowledge on competition law, public still has limited access to resolutions of competition authorities. These factors show the low public awareness situation in Vietnam.[416]

[414] Gillespie, J., "Localizing Global Competition Law in Vietnam: A Bottom-up Perspective," International & Comparative Law Quarterly. p. 935-975, 945

[415] Ibid. p. 935-975, 944, 961

[416] Dr. Tran Viet Dung and Dr. Nguyen Ngoc Son, "Laws and Culture of Competition in Vietnam: A Critical Analysis from Landmark Competition Cases Suggestions for Future Development," [Online] Accessed: 23 July 2017 Available from: http://www.asiancompetitionforum.org/docman/7th-annual-asian-competition-law-conference-2011/powerpoint-slide/55-21-tran-viet-dung-presentation/file

3.4.3 The Lack of Competition Advocacy

Competition advocacy is all non-enforcement activities of competition agency that aim to promote competition both through the initiative towards other public entities to influence them to work in the competition-friendly ways and increase public awareness about the benefits of competition and the roles of competition policy. [417] The main common objective of competition advocacy is fostering or strengthening competition culture in that country to discourage anti- competitive conducts and competition restrictive in laws and regulations.[418]

Although competition advocacy is separated from enforcement activities, it helps strengthening enforcement. Effective enforcement also reinforces advocacy.[419] The overall success of competition policy depends on both enforcement and advocacy.[420] This is why competition advocacy is considered a major task for competition agency. [421]

Competition Advocacy under the ASEAN Regional Guidelines on Competition Policy

According to the ASEAN Regional Guidelines on Competition Policy, there is a specific chapter contributed for advocacy and outreach. [422] The Guidelines clearly indicates that advocacy and outreach can be used as a way to achieve the objectives of competition policy. The objectives and benefits of competition advocacy are elaborated briefly in the Guidelines. The Guidelines recommends that ASEAN Member States should mandate competition regulatory body to conduct competition advocacy in both types of advocacy. The Guidelines dividing competition advocacy into two types, which is consistent with the international best practices.[423]

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[417] ICN, "Advocacy and Competition Policy."

[418] ASEAN, "Toolkit for Competition Advocacy in Asean," [Online] Accessed: 12 January 2016. Available from: http://www.asean-competition.org/file/post_image/Toolkit%20on%20Competition%20Advocacy%20in%20ASEAN.pdf, p. 4

[419] ICN, "Advocacy and Competition Policy."

[420] ASEAN, "Toolkit for Competition Advocacy in Asean.", p. 6

[421] Dube, R. S. a. C., ", Competition Policy Enforcement Experiences from Developing Countries and Implication for Investment.", p. 9

[422] ASEAN Regional Guidelines on Competition Policy, Chapter 9

[423] ICN, "Advocacy and Competition Policy."

The first type is competition advocacy for public and governmental authorities specified as follows:

"AMSs may entrust the competition regulatory body with the role of advising the Government or other public authorities on national needs and policies related to competition matters. In particular, regulatory barriers to competition resulting from economic and administrative regulation should be subjected to a transparent review process prior to its adoption, and assessed by the competition regulatory body from a competition perspective."[424]

The second type of advocacy is raising competition awareness to rest of the stakeholders including the role and benefits of competition policy and law. The crucial element of the second type of advocacy is the encouragement of business compliance program, which is specifically mentioned in Chapter 9. 3 of the Guidelines. The compliance programmes are encouraged in the Guidelines: *"AMSs may consider encouraging businesses to establish competition compliance programmes, in order to promote a culture of compliance and to reduce the risk of engaging in anti-competitive conduct by preventing businesses (i.e., management, officials and individual employees) from unintentionally violating competition law."*[425]

The objective of the business compliance program is promoting the culture of compliance and lower the risks of businesses involving with anti-competitive conducts. The business compliance program can help preventing businesses from violating competition law through many means, for example, providing practical training to employees in complying with competition law, providing information to employees on the requirement of competition law concerning business' behavior and introducing measures to guarantee that business management does not violate competition law.[426]

[424] ASEAN Regional Guidelines on Competition Policy, Chapter 9.1.4

[425] ASEAN Regional Guidelines on Competition Policy, Chapter 9.3.1

[426] Ibid, Chapter 9.3.2

Designs of the business compliance programs are not strictly imposed in the Guidelines. The Guidelines rather open businesses to design their compliance program conforming to the structures of companies and the relevant markets where they participate. However, the Guidelines specifies the common features of compliance program that every companies should include[427]

1. Relations with competitors

2. Relations with customers and suppliers

3. Individual conduct of the company on the market

The ASEAN Regional Guidelines on Competition Policy recommended that to successfully conduct competition advocacy, the AMSs should have adequate resources pooling all specialists in legal, economic, communications, marketing and media relations in conducting advocacy.[428]

In spite of its importance of competition advocacy, some countries do not realize that it is the significant part of building competition culture. Most agencies do not have specialized division or bureau for competition advocacy. It rather scatters in many divisions or bureaus. Thus, no precise allocation of human and financial resources dedicated to advocacy work.[429] Thailand and Vietnam do not have specialized division or bureau for competition advocacy. While the CCS does not have specific division for competition advocacy but advocacy work is separated between policy and market division and international and strategic planning division.[430] Indonesia is the only country that has the specific Division of Advocacy within the competition agency.

[427] Ibid, Chapter 9.3.3

[428] Ibid, Chapter 9.2.1

[429] ICN, "Advocacy and Competition Policy."

[430] CCS division, [Online] Accessed: 15 September 2016. Available from: https://www.ccs.gov.sg/about-ccs/organisation-structure/ccs-divisions

The level of competition advocacy can be evaluated on the basis of quantitative and qualitative measures including, the feedbacks from stakeholders, the number of recommendations of competition agency that are accepted or followed, advocacy leading to detectable changes in market or market behaviors, assessment of competition awareness by public or relevant targets, media coverage and internet exposure.[431]

The part will show the assessment of Thailand, Indonesia, Singapore and Vietnam in implementing the Guidelines concerning advocacy and outreach. The outcome of the study found that every country has conducted advocacy activities. However, the scope and content of competition advocacy are various among these four jurisdictions. This study found that competition activities might not be adequate in some AMSs. Thailand is the only country that does not conduct both types of competition advocacy as recommended in the Guidelines. Thai Trade Competition Act 1999 does not mandate the power to the Thai competition authority to provide recommendations or advise government and other public authorities on competition issues.

Thailand

The Office of Trade Competition Commission (OTCC) is responsible for conducting competition advocacy in Thailand. However, Thailand cannot perform both types of advocacy as indicated in the Guidelines. This is because the Thai Trade Competition Act 1999 does not mandate the power to provide recommendations or advise government and other public authorities on competition related issues to the commission and the Office of Trade Competition Commission (OTCC).[432] It seems to be no direct provision under the Trade Competition Act allowing Thai competition authority to advise public authority before issuing regulations or reviewing the existing ones like other jurisdictions. While the provision that allow the OTCC to cooperate

[431] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, p. 70

[432] Section 8 and 18 of the Trade Competition Act 1999

with government agencies and relevant agencies for the performance of duties under this act are not used as a provision to allow the OTCC to advise or give recommendation to shape regulatory framework in practice.[433] There is no other relevant regulations empower the commission or the OTCC to conduct competition advocacy. However, it is not prohibited for other public authorities to seek some advice from the OTCC. In practice, public authorities seeking some advices from the OTCC is hardly seen.[434] It can be concluded that Thailand cannot fully implement the ASEAN Regional Guidelines on Competition Policy because Thai competition authority conducts only the second type of advocacy, which are raising competition awareness to stakeholders except government and public authorities.

Regarding the second type of advocacy, the OTCC have initiated various kinds of advocacy activities.[435] The OTCC has tried to raise competition awareness and enhance the competition knowledge on the Trade Competition Law to various targets; business operators, sectoral regulators, lawyers, consumers and public in many provinces of Thailand. The OTCC conducted the evaluation of these activities through the questionnaires and interviews of participants after the seminars and conference. The result of overall evaluation of these activities are the positive feedbacks in terms of better understanding of competition law among participants.[436]

There are other advocacy activities by means of focus group seminars and conference for specific market players, including transportation group, vehicle group, and cassava group.[437] A variety kinds of materials and media are employed to promote the principle of fair competition to public, for instance, brochures, video and media

[433] Section 18(6) of theTrade Competition Act 1999

[434] Aramsri Rupan, "Competition Advocacy in Thailand," ed. Sathita Wimonkunarak, Director of Expert Group, Business Competition Bureau, the office of the competition commission (OTCC) Department of Internal Trade, Ministry of Commerce, Thailand

[435] Aramsri Rupan, " Enhancing on Competition Advocacy in Thailand " [Online] Accessed: 28 October 2016. Available from: http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2006/Group2/Aramsri_Thailand.pdf

[436] Office of Trade Competition Commission, "News from the Department of Internal Trade," [Online] Accessed: 4 November 2016. Available from: http://otcc.dit.go.th/?page_id=991

[437] Commission, O. o. T. C., "2014 Annual Report."

coverage; scoop on newspaper and electronic media. The OTCC regularly issued the pamphlet called the OTCC 'Competition Focus' to disseminate different aspects of competition law.[438] These pamphlets are available on the OTCC official website. In addition, the OTCC is also act as a consultation service for advising competition related issue on telephone whether to private sectors or other public authorities. However, in practice, the businesses are hardly consult the OTCC unless they would like to file a complaint. One of the reason behind is they do not want their conducts to be captured by the OTCC.[439]

Competition advocacy in the field of academic has been done through the creation of academic network by OTCC entering into official Memorandum of Understanding with five universities in Thailand. The focus of advocacy is not only limited in the urban areas of Thailand. It can be seen from the OTCC has tried to disseminate competition related-information through organizing academic seminars in many venues and universities across Thailand.

Regarding the business compliance program is found in the form of seminars organized for specific companies. The senior staffs of the OTCC and Department of Internal Trade were invited to educate some companies about competition laws and the main prohibitions.[440]

Despite there have been a growing number of advocacy activities targeting at more different types of stakeholders in the society, competition awareness is not quite wide-spread in Thailand. Competition advocacy in Thailand seems to be not enough to build competition culture and culture of compliance because public at large is still not well-educated about competition and competition law.

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[438] Office of Trade Competition Commission, "Competition Focus," [Online] Accessed: 2 November 2016. Available from: http://otcc.dit.go.th/?p=2621

[439] Rupan, A., "Competition Advocacy in Thailand."

[440] Commission, O. o. T. C., "2014 Annual Report."

The main impediment of in implementing the Guidelines concerning advocacy in Thailand is the inadequacy of resources in terms of both human and financial resources.[441] The limited number of the OTCC staffs and restrictive budget received annually are the main problems. While expertise, experience and connection with the media are also important in effectively conduct competition advocacy as indicated in the Guidelines. It appears that competition issues are not likely to appear in the main media coverage, which able to create high impact of advocacy. They tend to be found in the form of small news telling about seminars, conference or workshop.

In conclusion, Thailand cannot effectively implement the ASEAN Regional Guidelines on Competition Policy in the competition advocacy part since the competition agency is not empowered to shape unnecessary competition restrictive laws and regulations. Therefore, public competition awareness is not high and competition culture are not well-fostered in Thailand.

Indonesia

The KPPU is empowered to perform competition advocacy task. The KPPU has a specialized division responsible for competition advocacy, which is the Division of Advocacy. The KPPU conducts both types of competition advocacy as recommended in the ASEAN Regional Guidelines on Competition Policy.

One of the obligations of the KPPU is providing suggestions and consideration to government about the policy concerning monopolistic practices and/or business competition.[442] This is considered the significant obligation of the KPPU because of the existing of significant number of competition restrictive laws and regulations in Indonesia. *" Most of the competition problems in Indonesia come from the government. State-created monopolies were ubiquitous in the former President Suharto's era. However, many monopolies persist due to local government*

[441] Santawanpas, S.

[442] Artcile 35(e) of the Law No.5/1999

regulations. Many public policymakers and enforcers are unfamiliar with either the goals or the effects of competition policy. They are not used to considering competition as a goal of public policy."[443]

The role of competition advocacy in shaping regulatory framework has increased its importance, particularly in the period of having rapid reform programs in Indonesia in the recent years both through its own initiatives called the KPPU's self-identification and invitation from the parliament asking the KPPU to comment draft laws in some cases.[444] In practice, the KPPU has engaged in a wide range degree of competition review in primary legislation either proposed or existing laws both at national and sub-national level. The KPPU can also review regulations, orders and licenses. After the review, the KPPU may make an argument to modify or remove provisions to lessen anti-competitive impacts of such laws and regulation to public agencies responsible for developing such legislations or even provide its comment directly to the President of Indonesia. By having the ability to propose comments directly at the highest political level reflects the high level of influence, which the KPPU can assert into the decision-making process of legislations. If the revocation or modification of anti-competitive provisions are not possible, the KPPU will try to minimize the anti-competitive effects to competition as much as possible.[445]

The evaluation of the KPPU in the conduct of the first type of competition advocacy found that some of the KPPU's recommendations have been influential in lowering unnecessary restrictive competition effects. This can be found in the set of tariff in domestic airlines. After being recommended from the KPPU, the Ministry of Transport in Indonesia prohibited the setting of domestic airline tariff through the Indonesian National Air Carriers Association.[446]

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[443] UNCTAD, "Voluntary Peer Review on Competition Policy: Indonesia ", p. 13

[444] OECD, "Reviews of Regulatory Reform Indonesia Competition Law and Policy "

[445] Ibid. p. 8-15

[446] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy."

Unfortunately, not every KPPU' s recommendation receive the positive response. Some of the recommendations are ignored or unfollowed.[447] The barriers in conducting the first type of advocacy are the participation at the too late stage to influence regulatory framework and resources' constraints within the KPPU. This issue happens when the KPPU does not aware of the legislative proposals and thus involve in legislative proposal at the too late stage to effectively advocate to influence regulatory framework. Thus, the opportunities in shaping the draft of legislations and regulations are quite limited. In addition, the nature of reviewing legislations requires the sophisticated analysis and expertise to address and balance their competitive implications. This task requires expertise and resource intensive. Consequently, the existing resource constraints problems significantly impede the capability of the KPPU to conduct the first type of advocacy. In Indonesia, there are a high number of existing legislations, which unnecessarily producing anti-competitive effects. While the majority of KPPU' s resources have been put to the priority of the Law No. 5' s enforcement, which is the fight against bid riggings.[448] Thus, there is the calling for an increase of the roles and resources of KPPU in reviewing and commenting laws and regulations to develop more effective competition advocacy.[449]

Regarding the second type of competition advocacy, Indonesia also widely conducts the second type of competition advocacy. It appears in the form of disseminating information to all stakeholders through communication programs and various kinds of advocacy materials, for instance newsletters, electronics and printed socialization materials.[450] The KPPU has a good connection with the media, which is helpful for delivering competition messages to the public. The KPPU establishes the

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[447] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, "Reviews of Regulatory Reform Indonesia Competition Law and Policy] "Online [Accessed :2 November 2016 .Available from :
https//:www.oecd.org/indonesia/chap%203%20%20competition%20law%20and%20policy.pdf

448 Ibid., p .16-17

449 Ibid. p .47

[450] Andi Zubaida Assaf, "Competition Advocacy in Indonesia (Apec Training Course on Competition Policy 8 – 10 August 2006, Bangkok, Thailand)," [Online] Accessed: 4 November 2016. Available from:
http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2006/Group2/Zubaida_Indonesia.pdf

conferences inviting many journalists to discuss competition issues. Moreover, every single week, there is the meeting between the KPPU staffs and journalists to discuss the recent cases and recommendations to competition in order to update the latest competition issues to the public.[451] The KPPU also participate in the Memorandum of Understanding with many academic and research institutions to create a project of co-research on competition issues.[452]

The KPPU reached the recommendation of the Guidelines in encouraging the business compliance program. The KPPU has initiated a project related to business compliance program with the grant of award as an incentive. This project is an interesting way to gain business compliance with the Law No.5 by setting the award as an incentive to enhance more attention and cooperation from companies. The project begins when the KPPU announces that this company is to be monitored for certain suspected violation. This company then has to report the KPPU every six months and give information requested by the commission to fulfill the process of monitoring. The project and monitoring will take three consecutive years. If the KPPU finds that this company does not violate the competition law, the award will be granted. The granting of award is under the careful consideration to prevent the disincentive of law enforcement in the future.[453]

Although the KPPU has conducted a wide range of competition advocacy activities, the KPPU can carry on these advocacy activities more effectively and more wide-spread if there is no problem of resource's constraints within its institution.

Singapore

[451] UNCTAD, "Voluntary Peer Review on Competition Policy: Indonesia' (United Nations New York and Geneva, 2009) " [Online] Accessed: 26 November 2016 Available from: http://unctad.org/en/Docs/ditcclp20091_en.pdf , p. 15

[452] Ibid. p. 15

[453] OECD, "Promoting Compliance with Competition Law 2011: Indonesia' (Daf/Comp(2011)20) 30 August 2012 " [Online] Accessed: 26 November 2016 Available from: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf , p. 217

Singapore has different competition environment from any other ASEAN Member States. Singapore has consistently been ranked among the world's most competitive economies despite its small size country. Consequently, Singapore uses the competition policy and law as the major tools to maintain competitive process, level playing field and stimulate the function of the market to create opportunities for businesses and more variety of choices to consumers and building stronger competition culture.[454]

Singapore conducts both the first and second type of advocacy as suggested in the Guidelines. The CCS sets the target groups to perform advocacy tasks into four groups, namely[455]

1. private sector (i.e. local businesses and competition practitioners)

2. general public

3. public sector (i.e. government agencies)

4. overseas competition authorities.

In performing the first type of advocacy in advising the government and public authorities on national needs and policies relating to competition is incorporated as one of the statutory duties of the CCS[456]. The advocacy to government appears in the forms of providing competition advices. With the legal mandated power, the CCS can provide a wide range of advices, including the competition impact of specific government initiatives in the affected markets, government divestment, the structure of public procurement and the supply of goods and services by the government.[457]

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[454] Competition Commission of Singapore, "Better Business with Competition Compliance Programme," [Online] Accessed: 2 November 2016. Available from: https://www.ccs.gov.sg/~/media/custom/ccs/files/education%20and%20compliance/conducting%20a%20compliance , p. 1

[455] Eugene Chen & Weilu Lim EeMei Tang, "Competition Commission of Singapore: Our Competition Advocacy Journey," [Online] Accessed: 26 November 2016 Available from: https://www.ccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/publications/journal/scc%20antitrust%20chronicle%20%2017%20apr%202016.ashx

[456] Section6 (1) of the First Schedule,

[457] "The Past Advices of Ccs ", [Online] Accessed: 26 September 2016. Available from: https://www.ccs.gov.sg/approach-ccs/seeking-advice-by-government-agencies/ccs-past-advices

The CCS recommends all authorities to assess competition impact before issuing laws, regulations or measures. The CCS facilitates this competition impact assessment through publishing 'Competition Impact Assessment Checklist' and 'Government and Competition: A Toolkit for Government Agencies'.[458] The examples of CCS's Competition Advice to Government Agencies is the advice to MOM and WDA on JobsBank.[459] The establishment of the Policy and Markets Division in January 2014 to specifically dedicate resources advising government agencies on competition matters, and to conduct market studies and research resulted in the growing numbers of advisory requests from 8 requests between 2012 and 2013 to 31 requests between 2014 to 2015. This is the four-time increase.[460]

Moreover, advocacy to government also appears in the development of new collaterals including publishing the '*Competition Act and Government Agencies*' booklet for public officers and developing specific website for government agencies. The other forms are found in the seminars for sectoral regulators to network and share best practices, technical workshops and joint market study.[461] Furthermore, there is an establishment of an inter-agency platform between the CCS, sectoral regulators and other government agencies aiming to be the platform to share best practices and experiences on competition and regulatory matters, which is called 'the Community of Practice for Competition and Economic Regulations' ("COPCOMER") in December 2013 is another kind of the first type competition advocacy*.

Regarding the second type of advocacy, the CCS has enthusiastically raised competition awareness to all stakeholders in the society including seminars, workshops and conferences for general public and private practice lawyers and economists. The CCS uses both traditional and digital media to advocate. The website of the CCS

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[458] Competition Commission of Singapore, "Competition Impact of Government Initiatives," [Online] Accessed: 1 November 2016. Available from: https://www.ccs.gov.sg/tools-and-resources/competition-impact-of-government-initiative

[459] EeMei Tang, E. C. W. L., "Competition Commission of Singapore: Our Competition Advocacy Journey.", p. 3-5

[460] ibid. p. 3-5

[461] Ibid. p. 3

* The CCS facilitates regular activities for the COPCOMER agencies including hosting gathering annually for senior representatives from COPCOMER agencies to discuss emerging competition and regulatory issues in Singapore, organizing seminars for government agencies to share their experiences on competition and regulatory issues and workshops to provide COPCOMER officers with the necessary technical knowledge.

provides a wide range of information on competition. Social media is another outreach effort of the CCS including Facebook, Twitter and YouTube targeting the general public. Whereas the Competitive Edge e- Newsletter is used to target the local business community. The competition practitioners or professionals will be reached through the CCS blog linking from the CCS official website. The CCS has creative ways in advocating, for example organizing the contest of animation to present competition law and awarding the prize for the winner as the incentive. This contest has become more and more popular with the growing number of contestants, particularly young generation. This is considered a way to promote competition law to young generations. The CCS does not only benefit from this successful advocacy project, but also can to use these animation videos to disseminate competition act to the public.[462] For more academic activities, the essay contests on competition issues have been consecutively organized each year to encourage the discussion on competition policy and law in Singapore.[463]

Business compliance program is encouraged by the CCS with publication of 'Better Business with Competition Compliance Programme'. It explains the merit of competition compliance programme and elaborate to what extent companies should introduce the business compliance programmes. An interactive training module has also been developed for businesses to educate their staff on the "Dos and Don'ts" under the Singapore Competition Act. This training module is designed to be useful for Small and Medium Enterprises ("SMEs"), which might suffer from trying to understand the necessary expertise and resources to initiate the business compliance programmes. The CCS also enable businesses to seek advice and further information about the compliance programme from the CCS.[464] Overall, Singapore performs well in the competition advocacy task. This is clearly proved by being awarded as the winner of the 2014 Competition Advocacy Contest organized by the International Competition

[462] Competition Commission of Singapore, "Ccs Animation Contest " [Online] Accessed: 4 November 2016. Available from: https://www.ccs.gov.sg/media-and-publications/ccs-campaigns/ccs-animation-contest

[463] Competition Commission of Singapore, "Ccs-Ess Essay Competition 2016," [Online] Accessed: 22 September 2016. Available from: https://www.ccs.gov.sg/media-and-publications/ccs-campaigns/ccs-ess-essay-competition-2016

[464] EeMei Tang, E. C. W. L., "Competition Commission of Singapore: Our Competition Advocacy Journey.", p. 3-5

Network and the World Bank Group for the CCS's advocacy in promoting competition in the taxi industry.[465]

The CCS is the only jurisdiction comparing with Thailand, Indonesia and Vietnam that does not face the problem of resource constraints in conducting competition advocacy. [466] Together with the fact that there are CCS' s divisions responsible for competition advocacy. This helps improving the ability of the CCS to advocate more effectively. The CCS evaluates its performance in advocating by conducting the Stakeholder Perception Survey in 2016 to do a "dip-stick" test among various key stakeholder groups to measure the level of awareness and competition culture in Singapore. The evaluation also benefits the CCS in indicating the areas for advocacy improvement.[467]

Vietnam

Vietnam Competition Agency is equipped with the power to conduct both types of advocacy as suggested in the ASEAN Regional Guidelines on Competition Policy. The Decree 06/2006/ND-CP on the establishment, functions, power and structure of the Vietnam Competition Authority imposes obligation of the Vietnam Competition Authority concerning competition advocacy by means of identification and providing comments and recommendations to the relevant state agencies about the legal documents that against the law and regulations on competition and affect the fair competition environment. The distinctive example is the publication of the VCA Report on Review of competition related regulations in sectorial regulatory laws in 2014. The Report analyzes the compatibility and conflict between competition policy and law with other twenty specialized policies and laws in the aspect of their contents and forms and then proposes some solutions and specific applications to solve the conflict between competition laws and other laws.[468] The VCA is also

[465] Ibid. p. 3

[466] Kong Weng Loong, "Impediment in the Enforcement of Competition Law in Singapore."

[467] EeMei Tang, E. C. W. L., "Competition Commission of Singapore: Our Competition Advocacy Journey.", p. 8

[468] VCA, "Annual Report 2014 " [Online] Accessed: 26 November 2016 Available from: http://vca.gov.vn/books/VCAAnnualReport2014-En(final).pdfp., p. 18

required to establish training for government officials working on issues relating to competition.

While the second type of advocacy is still under the VCA's obligation to undertake advocacy measures and other legal educational activities on competition.[469] During an early period of competition law application, the VCA put its effort and priority on competition advocacy to raise competition awareness.[470] In Vietnam, businesses and public at large have limited knowledge about competition. Accordingly, the VCA was required to advocate enterprises and associations about competition law through many means including seminars, conference, workshops, training courses. Seminars focusing on specific sectors; on pay TV, construction, pharmacy and marine transportation was organized in 2013.[471] The VCA also uses the advocacy materials like brochure, pamphlet and internet. The VCA regularly issues the "Competition and Consumers Bulletin in both English and Vietnamese language to disseminate information, knowledge and experience about competition law and policy among all stakeholders.[472]

Business Compliance Program appears in the forms of seminar, workshop and training as well as cooperation between the VCA and companies. The VCA also acts as the contact point of receiving request for consultation relating to competition law and policy from domestic and foreign enterprises.[473] However, with the weak competition culture in Vietnam, competition advocacy is required to continue to foster competition culture in Vietnam.

Similar to Thailand and Indonesia, the VCA does not have adequacy of resources and expertise to conduct effective competition advocacy.[474]

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[469] Article 2 on Tasks and Powers of the Decree 06/2006/ND-CP

[470] Hien, C. X.

[471] Vietnam Competition Authority, "Annual Report 2013," [Online] Accessed: 2 November 2016. Available from: from http://www.vca.gov.vn/books/AnnualReport2013.pdf. p. 22.

[472] Ibid. p. 19

[473] Vietnam Competition Authority, "Authority and Mission," [Online] Accessed: 26 November 2016 Available from: http://www.vca.gov.vn/extendpages.aspx?id=9&CateID=194

[474] Hien, C. X.

The table below shows

Table 8 the comparative findings of Thailand, Indonesia, Singapore and Vietnam in implementing the Guidelines concerning competition advocacy

Guidelines	Thailand	Indonesia	Singapore	Vietnam
Competition Authority should conduct competition advocacy	**Yes**	**Yes**	**Yes**	**Yes**
1. For public and governmental authorities	**No** No legal mandated power to advise laws and regulations that potentially restrict competition	**Yes**	**Yes** - Competition Impact Assessment Checklist' / A Toolkit for Government Agencies.	**Yes**
2. For the rest of all stakeholders	**Yes**	**Yes**	**Yes**	**Yes**
Encourage Business To Establish Compliance Program	**Yes** In the form of Seminar conducting for specific companies OTCC as the Contact Point	**Yes** Seminars Monitoring the suspected violation and companies provide requested information for a specific period of time	**Yes** The Publication of Business compliance program Allowing businesses to seek advice and further information about the compliance programme from the CCS.	**Yes** Cooperation between the VCA and companies The VCA is the contact point of receiving request for consultation relating to competition law and policy from domestic & foreign enterprises.

Adequacy of Resources and Expertise	Not enough	Not enough	ok	Not enough

3. 4. 4 Opportunities in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of Competition Advocacy

On the other hand, there are some opportunities arriving from implementing the Guidelines to competition advocacy of AMSs.

Opportunities in ASEAN Level

- Help creating fair competition environment in ASEAN

Opportunities in National Level

- Review the unnecessary competition restrictive policies, laws and regulations
- Create the culture of compliance with competition law among businesses
- Create and foster competition culture in ASEAN Member States
- Strengthening competition advocacy activities
- More watchdogs on the violation of competition Law
- More complaints
- Gaining more public cooperation with investigation and enforcement of competition law

3.5 Impediments Faced in the Implementation of ASEAN Regional Guidelines on Competition Policy in the Context of the International Cooperation between the ASEAN Member States

The major impediment commonly faced by these four ASEAN members is the lack of cooperation and coordination between AMSs in the application and enforcement of competition law.

3. 5. 1 The Lack of the International Cooperation between the ASEAN Member States in the Application and the Enforcement of Competition Law

Cooperation in the context of competition policy and competition law between ASEAN Member States is quite limited only to informal cooperation agreements between some of ASEAN members now. The formal cooperation among the ASEAN members is not developed yet. Even the cross-boarder Memorandum of Understanding (MOU) is not possible in the context of ASEAN as a whole. Most of the cooperation is about the academic seminars or the sharing of experience. The cooperation related to competition law in ASEAN can be divided into three groups basing on the types of the sponsors.

First, the cooperation sponsored by the AEGC.

Second, the cooperation sponsored by the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA).

Third, the cooperation sponsored by the GIZ.[475]

However, competition cooperation between ASEAN Member States is necessary for dealing with international competition cases, where evidences to prove the unlawful behaviors of cases are situated in more than one country. From the beginning of the proceeding until the end of the proceeding require the assistance and cooperation from other countries. Without the competition cooperation between

[475] Pongkun Supavita, "Cooperation Related to Competition Law in Asean ", ed. Sathita Wimonkunarak, Trade Officer, Foreign Affair Unit, Business Competition Bureau, Office of Thai Trade Competition Commission, Thailand (2015).

related jurisdictions, competition agency would face difficulties in collecting evidences to crack cases. Today, most experienced competition agencies heavily rely on the cooperation and coordination agreements as the main tools to enhance the sound and effective enforcement of competition laws in dealing with competition cases with international dimensions. Furthermore, the trend is moving towards the better cooperation and coordination between jurisdictions.[476] The rationales behind the importance of cooperation agreements between the ASEAN competition agencies are the necessity in obtaining the evidence located abroad in order to prosecute the anti-competitive conducts with international dimension.

Unfortunately, the ASEAN Regional Guidelines on Competition Policy mentions very briefly about the international cooperation and common competition related provisions in Free Trade Agreements (FTA) in Chapter 10. There is only general information regarding objectives of cooperation and the lists of its benefits.[477] Whereas Chapter 10.3 points out that the establishment of a regional platform or understanding or arrangement could be ways to facilitate cooperation between ASEAN competition agencies. The benefits of regional platform could facilitate the protocols for information sharing, the exchange of experiences, promoting the common approach and best practices, implementing the cooperative competition policy and arrangements of competition agencies for providing harmonization in the future. The ASEAN regional platform is not recommended to function on rule-making system. Consensus building is instead suggested in the Guidelines to adopt. The regional platform may reach consensus on recommendations and best practices and leave competition agencies in ASEAN decide on how to implement them through unilateral, bilateral or multilateral arrangement, where they deem appropriate.

[476] Jörg Philipp Terhechte, International Competition Enforcement Law between Cooperation and Convergence (Springer, 2011)., p. 47

[477] ASEAN Regional Guidelines on Competition Policy, Chapter 10.1 and 10.2

The Guidelines recommends that the common competition provisions in FTA should not be in contrast with the provisions and approaches already agreed within ASEAN regional level.

After reviewing the Guidelines in the context of international cooperation, it seems to me that what is stated in the Guidelines is not enough to guide the ASEAN Member States on how to cooperate in the field of competition law and enforcement because the Guidelines provides inadequate details to support AMSs in entering into international cooperation regarding competition law and enforcement. Today there is a growing number of bilateral agreements and multilateral agreements related to the competition law enforcement. Even in the free trade agreements competition clauses are considered another important part that cannot be ignored. However, according to the Guidelines, there is merely a rough information regarding cooperation. There are only broad objectives and benefits of cooperation indicated in chapter 10.1 and chapter 10.2 respectively. While chapter 10.3 specifies about cooperation between competition regulatory bodies, it merely a general introduction of what is the cooperation agreement in the field of competition law for ASEAN Member States. Regional Platform is raised to show the ability of discussing competition issues and promote common approach. However, there is no recommendation or details on how to do it.

Another big issue is about the sharing of information that the Guidelines only mentioned "AMSs may consider developing protocols for the exchange of information between competition regulatory bodies." [478] The AMSs cannot clearly see a common approach to what extent the information could be exchanged. In fact, the exchange of information is considered an important issue because it could help competition law enforcement more effective. As a result of limited details of cooperation indicated in the Guidelines, there should be more details to recommend ASEAN Member States on

[478] ASEAN Regional Guidelines on Competition Policy, Chapter 10.3.2

how to cooperate and coordinate in the field of competition law application and enforcement. The information provided in the Guidelines is not enough to encourage and guide AMSs for entering into competition cooperation agreement in practice. Some AMSs are young and not familiar with the principle of competition cooperation so in this part the Guidelines does not function as a good reference guide for AMSs.

There are also some main principles missing out from the Guidelines, for example, the kinds of cooperation agreements with pros and cons and principles of cooperation agreements from the international best practices. There are many kinds of cooperation regarding competition enforcement that could help facilitating the enforcement of competition law. It could be listed as follows:

Information Sharing

Co-Investigation

Positive Comity

Negative Comity

Cooperation regarding Technical Assistance and Capacity Building

As a result of inadequacy of principles and details concerning international competition cooperation between AMSs provided in the Guidelines, the Guidelines cannot fully be used as a main competition reference for AMSs to develop their competition systems. Therefore, this study will propose how to improve the content of the ASEAN Regional Guidelines on Competition Policy by suggesting the details and principles of cooperation agreements that are supposed to add in the next updated version of the ASEAN Regional Guidelines on Competition Policy at the end of this paper. While this part will assess whether there are international cooperation or coordination in the competition application and enforcement of competition law established in Thailand, Indonesia, Singapore and Vietnam or not.

Thailand

Thailand still does not enter into any formal competition cooperation agreement with any specific competition agency or country. Therefore, most of cooperation is on informal basis and quite limited to the competition study, the sharing of best practice and experience from more mature competition regime.[479] Thailand also engages in the international cooperation through the form of supporting the OTCC staffs to participate in many international competition forums.

Indonesia

The role of the KPPU in ASEAN regional engagement is similar to Thailand by means of informal cooperation limited only to sharing experience, knowledge, and information. [480] Regarding cooperation outside ASEAN, the KPPU has established cooperation with various competition agencies, including the US Federal Trade Commission, the Japan Fair Trade Commission and the Korean Fair. Nonetheless, these kind of cooperation is limited to the sharing of experience and the information exchange merely on competition cases. The cooperation stills not cover to the specific merger control. [481] The KPPU is the competition agency that have long and enthusiastically participated to the international competition forum, for example OECD and ICN. However, the cooperation between KPPU and other AMSs are quite limited to informal cooperation agreement.[482]

[479] Supavita, P., "Cooperation Related to Competition Law in Asean ".

[480] UNCTAD, "Prioritization and Resource Allocation as a Tool for Agency Effectiveness: Contribution by Indonesia ", p. 4

[481] Edwin Aditya Rachman and HMBC Rikrik Rizkiyana and Wisnu Wardfhana, "The Asia-Pacific Antitrust Review 2012: Indonesia: Overview," [Online] Accessed: 22 May 2016. Available from: http://globalcompetitionreview.com/insight/the-asia-pacific-antitrust-review-2012/1065753/indonesia-overview, p. 68

[482] Reza, M., "Challenges in the Applicationa and Enforcement of Indonesia Competition Law."

Singapore

The CCS is empowered to cooperate with the other foreign counterparts to promote competition by means of " 1. Entering into agreements with foreign competition agencies/governments e.g. negotiating FTAs with competition chapter to establish a level-playing field for businesses;

2. Forging strategic engagements with key foreign counterparts to foster closer cooperation in competition related matters;

3. Participating and contributing actively at the various international competition fora to shape the development and implementation of best practices in competition policy and law; and

4. Monitoring emerging competition trends and developments, and identifying international best practices, to operate a robust and enlightened competition regime in Singapore."[483]

Singapore does not only engage in specific competition agreements. In Singapore, these days there are more than 15 FTAs, both implemented agreements and agreements under negotiation, that include competition chapters/provisions. The CCS is responsible for negotiating competition chapter or provisions containing in the FTAs[*].

Moreover, the CCS also participates in many international forums, for example ICN and OECD by contributing papers and sharing experiences in the meetings. For the OECD activities, the CCS joins the OECD activities including the Global Forum on Competition, which is held annually gathering high level competition officials around

[483] CCS, "International Relations," [Online] Accessed: 27 November 2016 Available from: https://www.ccs.gov.sg/about-ccs/international-relations

[*] The examples of recent negotiations are the Transpacific Partnership Agreement (TPP), The European Union-Singapore Free Trade Agreement (EUSFTA) and the Regional Comprehensive Economic Partnership or (RCEP).

the world. Regarding the regional competition forum, the CCS participates in the competition-related activities of the APEC as the Competition Policy and Law Group and AEGC initiatives and publications.[484]

Vietnam

Regarding the bilateral cooperation agreement in the field of competition law, Japan is the important cooperation partner of the VCA by providing technical assistance and capacity building to Vietnam competition authorities*.

The VCA is mandated to participate as a member in the Negotiation Team on competition policy, state-owned enterprises and subsidy in the Trans-Pacific Partnership Agreements (TPPs), Vietnam-European Union Free Trade Agreement and Vietnam-EFTA Free Trade Agreement. The VCA is empowered to conclude the negotiations concerning the content of competition policy in two free trade agreements; namely Viet Nam-Customs Union of Russia, Belarus, and Kazakhstan Free Trade Agreement and Vietnam and South Korea Free Trade Agreement.

For cooperation in the context of ASEAN, the VCA participates in the ASEAN Experts Group on Competition (AEGC) and activities of working groups. The VCA also joins the activities, workshops and share experience in international competition forums, including the ICN.[485]

[484] CCS, "International Competition Fora," [Online] Accessed: 4 December 2016 Available from: https://www.ccs.gov.sg/about-ccs/international-relations/international-fora

* There was an international cooperation on competition between the VCA, JFTC and Japan International Cooperation Agency (JICA) called 'JICA Project for the Improvement of the Legal Framework for Competition Law and Policy in Vietnam' and 'Training Course on Investigation Skills in Hanoi. This project leads to many activities including studies, issuing the guidance for investigators concerning conducting investigations, assessment reports on competition and conducting competition advocacy workshop. The significant report is the '10 years of competition law enforcement in Vietnam' was finished with the kind cooperation of Japan. The VCA in collaboration with the JICA completed and published a report called ' Review of Competition Law related regulation in sectoral regulatory laws'. The staffs of the VCA can learn some experience in investigation skills for handling competition cases from the JFTC from the dispatching study visits. The JFTC helps the VCA in publishing 'Competition and Consumers Bulletin' with the purpose of advocacy the competition legislation and policies. Furthermore, the VCA is supported by the JFTC in being the agency to host the East Asia Top Level Officials' Meeting on Competition Policy in 2015.

It can be concluded that the VCA has become gradually play a role in competition international cooperation with the international cooperating partners. However, the cooperation between AMSs are still quite limited comparing to bilateral cooperation agreements with other non-ASEAN members.

The Rationales Behind the Lack of International Cooperation

After the assessment of international cooperation and coordination concerning competition policy and law in Thailand, Indonesia, Singapore and Vietnam, this study found that the level of competition cooperation among these four ASEAN countries is low. There are many rationales behind the lack of cooperation and coordination between AMSs in the field of competition law as follows:

A. The Lack of Political Will and Competition Awareness in Benefits of Cooperation in the Field of Competition Law

The lack of political will towards the benefits in competition cooperation leads to the low political support in the entering into the cooperation agreements with other jurisdictions. In order to cooperate with other countries or other competition agencies, it is necessary to have the political will from government to support the cooperation. The political will could be expressed through the policy to support the cooperation with other countries. Without the political will, developing bilateral agreements or multilateral protocols from bottom-up level is difficult. This links to the lack of awareness in benefits of international cooperation. Therefore, it is essential for competition agency in trying to raise awareness of competition to the government and politicians, who are in charge of making decision about international cooperation.

[485] VCA, "Vietnam International Cooperation," [Online] Accessed: 6 December 2016 Available from: http://vca.gov.vn/books/VCAAnnualReport2014-En(final).pdf

Furthermore, most of the ASEAN Members States are quite new jurisdictions for the application of competition law so most cases are related to domestic breach of competition law. Some countries have never experienced the international competition cases before. Therefore, it could be expected that ASEAN countries might not be fully aware of the possible damages resulting from the international cases, especially international cartels. This probably be a reason why benefits of competition enforcement cooperation are not fully aware.

B. The Diversity in Economic Conditions and Competition Policies Impeding the Ability to Enter into Competition Cooperation Agreement

i) The Diversity in Economic Conditions

In ASEAN, there is a variety level of economic developments. Singapore is the only country in ASEAN that is developed country with the market-oriented and open economy. However, Singapore has its self- interest in liner shipping because this business belongs to local people and brings about significant benefits to Singapore economy. This is why the liner shipping industry is in the block exemption from the prohibition on anti-competitive agreements. This is an illustration of economic condition is Singapore. Similar to other ASEAN Member States, different countries have different economic conditions to protect their own national interests. By having different economic conditions make it more difficult for the ASEAN Member States to cooperate because there will be conflicting national interests between them. Each country must prioritize its own national interest over the interest of other countries.

Furthermore, the divergence in economic development and economic conditions affect the way they draft and implement competition policies and competition laws. It is more difficult to cooperate if the competition policies and competition laws of the cooperating countries are totally different. On the other hand, the cooperation is likely to be successful if the competition policies and competition laws between the cooperating parties are similar.

However, the diversity in economic conditions and competition policies and laws are not the exhaustive factors to consider. There are a variety of factors that need to be considered whether to join the competition cooperation with another country or not. It is extremely rare to find that two countries can share exactly the same economic development, economic conditions and equivalent competition law. If the cooperating countries believe that the benefits of competition cooperation outweigh the drawbacks, they will tolerate these differences. Otherwise, the competition cooperation agreements in this world will never be signed.

ii) The Diversity in Competition Laws

Competition agencies in ASEAN Member States do not have equal investigatory and enforcement powers. Some competition agencies have limited powers. This can bar the effective competition cooperation with other countries. The lack of power to conduct dawn raids without announcement obstructs the ability to conduct co-ordinated dawn raids with cooperating agencies.

C. The Institutional Constraints within the Competition Agencies

The lack of human and financial resources and experience, particularly in the new and immature competition agencies, impede the ability to cooperate. The resource constraints will get worse if the officials are detracted to respond the request of other jurisdiction. It is possible that existing officials in some jurisdictions are not enough to handle all the duties imposed for competition agencies; therefore, it is difficult to allocate these valuable resources to facilitate cooperating activities. After the review of problem in resource constraints within Thailand, Indonesia, Vietnam, the result shows that all of them share a common important problem in lacking qualified and experienced human resources to carry out all of their tasks. Therefore, if the resource constraints cannot be solved in these countries, it will obstruct the ability to

cooperate with other competition agencies. While other practical problems are related to the use of different languages that may impede a good communication. Sometimes translation is necessary and it is costly and time-consuming.

D. The Lack of Confidence between Cooperating Jurisdictions

Insufficient safeguard measures on information and due process may put the foreign competition agency at risk of litigation. Before cooperating with other country all of these factors tend to be highly considered. There will be no effective cooperation if there is no trust between two cooperating parties.

Another point to consider is the lack of confidence that cooperating parties could not be able to provide information that reaches the required standards or important enough to facilitate the enforcement could be one of the reasons reducing incentives in cooperation between competition agencies in ASEAN.[486] If the cooperating agreement does not lead to adequate benefits comparing with significant burdens that competition agencies have to bear, the willing in cooperation will be lessened. No competition agency wants to be only giver without receiving anything because it wastes the valuable resources.

3.5.2 Opportunities in the Implementation of the ASEAN Regional Guidelines on Competition Policy in the Context of International Cooperation

On the other hand, there are some opportunities arriving from implementing the Guidelines to international competition cooperation between AMSs.

ASEAN Level and National Level

- Entering into competition enforcement cooperation agreements with other AMSs to effectively deal with cross-border commercial transactions

[486] OECD, "Improving International Co-Operation in Cartel Investigations," [Online] Accessed: 30 December 2016. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2012)16&docLanguage=En, p. 45-47

- More formal and informal cooperation between ASEAN Member States in the exchange of information, experiences and technical assistance
- More consistency of the approaches under competition policy chapters of the FTAs entered by AMSs with other trading nations.

The Table Below Shows

Table 9 The Summary of Impediments Faced by Thailand, Indonesia, Singapore and Vietnam in the Implementation of the ASEAN Regional Guidelines on Competition Policy

Types of Impediments	Thailand	Indonesia	Singapore	Vietnam
Institutional Constraints in National Competition Agency				
- The Lack of Human Resources	Yes	Yes	No	Yes
- Inexperienced Human Resources	Yes	Yes	No	Yes
- The Lack of Financial Resources	Yes	Yes	No	Yes
Structural Problems of Competition Agency - Independence Level of Competition Agency	Under ministry	KPPU is the Independence Competition Agency	Under ministry But having *De facto* independence	Under ministry
Legal Limitations in Private Suit	No But no private case has brought to the court yet.	Yes Private enforcement is not available	Yes only after the CCS had made infringing decision	Yes only after the VCC had made infringing decision
Inappropriate Legal Tools to support Enforcement - Low Investigation Powers and Enforcement Powers	No	Yes Unclear ability of the KPPU's officials to dawn raid	No	No

- Leniency Programme to Facilitate Cartels Detection	No	No	Yes	No
Impediments faced in The Implementation of Competition Policy The Conflict between Pursuing Competition Policy and other National Economic Policies	Yes	Yes	Yes	Yes
Intervention and Corporate Lobbying - Nexus between Government and State-Owned Enterprises or Government-Linked Companies.	Yes	Yes	Yes	Yes
Impediments Found in Substantive Laws in Indonesia, Thailand, Singapore and Vietnam				
- The Lack of Legal Clarity on Extraterritorial Application	Yes	No	No	Yes
- Thailand: Delay in Introduction of the Secondary Legislation	Yes			
- Indonesia: No general Prohibition of Anti-competitive Horizontal Agreements		Yes		
- Indonesia: The Lack of Exceptions to Existing Prohibition to Specifically Allow Pro- Competitive Conducts		Yes		
- Indonesia: Duplication, Overlap and Inconsistency between Provisions in Competition Laws		Yes		
- Indonesia: Prohibition of Abuse of Dominant Position (Article 25) is Too Specific to Catch other Important Forms of Abusive Conducts		Yes		

Low Competition Awareness and Competition Culture	Yes	Yes	Yes	Yes
Low International Cooperation between ASEAN Member States	Yes	Yes	Yes	Yes

Conclusion

This study found that different countries have different levels and different kinds of impediments; therefore, some impediments might be significant problems in some countries while they might not be any obstacle in other countries. The lack of resources is the main problem for competition agencies in Thailand, Indonesia and Vietnam while it is not a problem for the CCS in Singapore. Institutional structure in the KPPU is independent agency, which can guarantee the independence and avoid political influence in its operation. In contrast, competition agencies in Thailand and Vietnam are bound within the ministries so their institutional design are vulnerable to political intervention. Although the CCS is under the ministry, there are measures to guarantee its operation from political influence. Consequently, each ASEAN Member State may face different degree of challenges in implementing the Guidelines. The common challenges are on the issue of the lack of competition culture, the conflict between competition policy and other economic policies and the lack of competition cooperation between ASEAN Member States.

This study found that a common cause of these identified impediments is implementing the Guidelines is against the national interest and vested interests in each AMSs. This conflict of interest is the primary cause of five groups of impediments in implementing the Guidelines in terms of unwilling and inability in fully implement the Guidelines among Thailand, Indonesia, Singapore and Vietnam.

The examples of national interest and vested interest as the main cause behind impediments in implementing the Guidelines can be found in state owned enterprises, government-linked companies and major industries that bring about high incomes to states or sponsoring political parties. They are usually protected in terms of exclusion from the application of competition law, falling under the block exemptions, or receive preferential treatments that are not available for other competitors. This is against the competition principle and objective in creating level playing field for all market participants.

State-owned enterprises under the law on budgetary procedure are excluded under the application of the Thai Trade Competition Act 1999. This clearly presents the protection of national interest and vested interests in Thailand because income generated from state-owned enterprises partly belong to states and vested interest that support Thai governments and political parties. This exclusion of the whole set of state-owned enterprises is widely criticized about inappropriateness and against the principle of the ASEAN Regional Guidelines on Competition Policy as well as international best practices that competition law should have general application to all economic sectors and businesses engaging in commercial economic activities, which includes state-owned enterprises. This exclusion cannot create the level playing field in the market because some state-owned enterprises, such as Thai Airways International Public Company Limited and PTT Public Company Limited engages in commercial activities with the aim to making profit and directly competing with other private competitors are excluded from the application of this competition act. Fortunately, the new competition act 2017 solves this issue and makes the exclusion of competition law more consistent with the Guidelines by categorizing only state-owned enterprises and public organizations, which operating for actions in accordance with the laws or Cabinet Resolutions by reason of national security, public interest, or public utility falling under the scope of exclusion. The new exclusion concerning state-owned enterprises seems to be sound and basing on the framework of the Guidelines

and international best practices. This issue remains to be seen whether the interpretation of this exclusion can serve the real objective of the competition law amendment in creating the level playing field for all market players or not.

Similar situation is found in Vietnam where state-owned enterprises that are the main players in the market are protected.[487] This is consistent with the economic policy of Vietnamese government in controlling the economy and creating national champions. This creates difficulty in the enforcement of the competition law towards state-owned enterprises in practice as result of political intervention in investigation, case-handling, decision-making and merger control. The situation in Vietnam presents the problem of level playing field appears only in the substantive law but cannot fully be created in practice because level playing field is contradict with the national interest of Vietnam.

The grant of block exemption for shipping liner businesses since 2006 in Singapore also reflects national interest and vested interests in Singapore because the high degree of connectivity and availability of liner shipping services in Singapore highly benefit the state's importers and exporters and maintain Singapore's status as a hub for shipping. The effect of being granted block exemption exempts a category of liner shipping agreements from the prohibition against anti-competitive agreements under section 34 of the Competition Act, including allowing liner operators to enter into individual confidential contracts and offer their own service arrangements.[488]

[487] Ly, L. H., "Competition Law Enforcement Towards State Owned Enterprises in Vietnam."

[488] Competition Commision of Singapore, "Block Exemption Order," [Online] Accessed: 19 October 2017. Updated: 11 September 2017. Available from: https://www.ccs.gov.sg/legislation/block-exemption-order

In case of Thailand, the protection of national interest and vested interest of ASEAN Member States also appears in the form of the unduly delay in the introduction of secondary laws under the competition law 1999 in Thailand. The unduly delay in the introduction of dominant criteria and merger criteria made the main prohibitions of abuse of dominance and merger control inapplicable and unenforceable in practice. The inapplicable main prohibitions benefits vested interests, such as the big dominant firms in Thailand from being controlled by the competition law. During eighteen-year of unavailability of merger criteria in Thailand enables firms to freely merge without any control and being assessed the impact of competition by competition authority. Thus, there has been no structural control in Thailand since 1999, which is against the obligation of AMSs under the Guidelines to ensure that their competition laws prohibit four main prohibitions, including merger control and abuse of dominance. Former governments in Thailand realize the importance of this obligation, however, implementing this obligation is inconsistent with the vested interests, particularly big firms in Thailand that have long been supported governments and political parties. Therefore, this causes unwilling or ignorant to fully support the introduction of secondary rules to complement the competition act.

Inadequacy of support in financial resources for competition agency in conducting enforcement and advocacy linked with the problem of corporate lobbying of unsatisfied private sectors that lost benefits from the effective enforcement of the KPPU[489] is another example showing the influential role of the consideration of vested interests that could impede the implementation of the Guidelines in Indonesia.

Among these four ASEAN countries have different national interest and different vested interests to protect. The majority of gross domestic product (GDP) and major industries can be indicators to reflect national interest and vested interest of each ASEAN country. Thailand is an export-dependent country with automobiles, transport

[489] Sirait, N. N., The Political Economy of Competition Law in Asia: Indonesia , p. 303

equipment, electronics and petrochemicals as the major industries.[490] Indonesian's major industries are transport equipment, machinery, petrochemicals, mining, textile and food.[491] In Singapore, government-linked companies playing important role in economy through the sovereign wealth fund and Temasek Holdings owning many big companies in Singapore so competition law was introduced to ensure foreign investors about the level playing field in Singapore and attract the foreign direct investment. The major industries in Singapore are electronics, biomedical, petrochemicals and precision engineering.[492] The major industries in Vietnam are textile, garments, food and electronic products.[493]

Each ASEAN country wants to protect these major industries that presents national interest and vested interests so this leads to the cause of impediments in implementing the Guidelines. The goal of the Guidelines; level playing field and create fair competition environment, sometimes negatively affect the national interest and vested interest. Implementing the Guidelines with the aim to create level playing field in ASEAN single market represents the recognition of common interest of all AMSs and achievement of ASEAN Economic Community, which is somehow against national interest and vested interests. Some sectors or businesses that used to be protected or enjoy preferential benefits from the governments will be exposed to real competition and forced to play under the same rule, which is competition law basing on the ASEAN Regional Guidelines on Competition Policy. This causes the conflict of interest between national interest of each ASEAN Member State and common interest of ASEAN as whole. Considering only national interest is the main source of impediments in implementing the Guidelines in Thailand, Indonesia, Singapore and Vietnam as

[490] Asian Development Bank, "Thailand Industrialization and Economic Catch-up Country Diagnostic Study," [Online] Accessed: 1 October 2017 Available from: https://www.adb.org/sites/default/files/publication/178077/tha-industrialization-econ-catch.pdf

[491] MINISTRY OF INDUSTRY REPUBLIC OF INDONESIA, "Industry Facts & Figures 2014," [Online] Accessed: 1 October 2017. Available from: file:///C:/Users/lwaswsat/Downloads/Fact%20&%20Figures%202014.pdf

[492] Singapore-German Chamber of Industry and Commerce, "Singapore – Manufacturing & Engineering Industry," [Online] Accessed: 1 October 2017 Available from: http://www.sgc.org.sg/fileadmin/ahk_singapur/DEinternational/IR/diffIR/Manufacturing_Engineering_2014.pdf

[493] Vietnam Briefing Business Intelligence from Dezan Shira & Associates, "An Introduction to Vietnam's Import & Export Industries," [Online] Accessed: 1 October 2017 Available from: http://www.vietnam-briefing.com/news/introduction-vietnams-export-import-industries.html/

elaborated in this chapter through the findings of five categories of impediments in implementing the Guidelines.

Considering only national interest and benefits of vested interests causes the impediments and making the Guidelines unable to function properly. The expected goals and opportunities for ASEAN and ASEAN Member States that identified in this chapter cannot fully take place. This is why this dissertation wants to find solutions on how on to overcome these impediments and make the Guidelines operational by considering the international best practices' approaches and solutions of matured and experienced competition jurisdiction, which will be presented in the next chapter.

CHAPTER 4

INTERNATIONAL BEST PRACTICES AND COMPARATIVE APPROACHES OF UNITED STATES, EUROPEAN UNION AND JAPAN TO SOLVE COMPETITION PROBLEMS

This part will explore and examine whether there are international best practices to deal with some similar competition impediments faced by Thailand, Indonesia, Singapore and Vietnam, which are identified in the Chapter 3. The principles and approaches reflected in the international best practices can be used as the benchmarks for all AMSs to solve their competition problems. This chapter will also explore, analyze and compare the approaches and solutions taken by matured competition jurisdictions; namely, the United States, European Union and Japan on how to solve their competition problems. These solutions, approaches and experiences from the review of the international best practices as well as those of matured competition jurisdictions will be assessed and analyzed in the final chapter of this dissertation whether they can be appropriately applied in the context of the ASEAN or not.

4. 1. Approaches Taken to Overcome Competition Impediments Concerning Competition Policy

4. 1. 1. International Best Practices and Recommendations on Interface between Competition Policy and Other Economic Policies

ICN: Report on Interface between Competition Policy and other Public Policies[494]

The main problem to the interface between competition policy and other public policies is no clear rule or criteria in balancing the conflict between different

[494] ICN, "Report on Interface between Competition Policy and Other Public Policies," [Online] Accessed: 30 March 2017 Available from: http://www.rekabet.gov.tr/File/?path=ROOT/1/Documents/General+Content/SP_BackgroundReport(1).pdf

policies. Therefore, there is nothing guarantee that competitive principle will be upheld in other policies. Conflict between the objectives of competition policies and other policies is unavoidable. The impact of different policies objectives can be seen in the exemption and exclusion of the application of competition law for the sake of public policies and public interest. Having laws or regulations that have restrictive impact on competition is another impact.

This ICN document explores the approaches taken by many countries in balancing between competition policy and other public policies. The outcome of the survey is no criteria or standard commonly adopted across jurisdictions. Most countries allow competition authorities to present their views or propose alternative options that are more competition-friendly during the preparatory stages of the policy or legislation through different mechanisms, including participation in the various levels of the administrative or legislative meetings or issuance of opinions, to lessen this conflict. However, these competition advocacy efforts might not always successful because the ultimate decisions belong to the upper decision makers. They might not uphold the competition principles as advocated by competition agencies.

Another mechanism that some countries use to balance conflicting policy objectives is the introduction of ‘ competition assessment’ mechanisms. The competition assessment helps identifying competitive concerns in the drafts laws and regulations. The result of competition assessment gives the competition authorities the opportunities to propose alternatives, which still can satisfy policies, laws or regulations’ objectives while produce the least negative effects on competition. Some countries also have the guidelines for competition assessment.

For those countries, which want to ensure that any regulations issued have procompetitive, they enable the competition authority to bring the case to the court to annul anti-competitive regulations. For the existing anti-competitive regulations, some competition authorities are empowered to request to repeal or amend them.

There are many factors affecting the degree of success in conducting competition advocacy to government and legislatures. Participation of competition authorities in high level administrative structures is a relevant factor. It will be beneficial if the government, law makers or regulators are obliged to explain the reason behind the non-compliance with the recommendation of competition authority about the competition concern in the policies, laws or regulations and which policy concerns are considered behind their decisions making.

Challenges in advocating for pro-competitive policies and laws are addressed as follows:

- The lack of competition culture among law makers and government
- The situation of having state intervention in the economy
- Difficulty in convincing the administrative or legislative organs that competition-friendly laws and regulations are possible without compromising other policy objectives
- The absence of compulsory mechanisms to make administrative and legislative bodies consulting the competition authority concerning draft legislations or regulations, which might affect competition
- The necessity of lenient treatment during economic crises
- The absence of formal mechanisms to force the conduct of the competition assessments and to balance differing policy objectives.

OECD: Competition Policy, Industrial Policy and National Champions[495]

This OECD document defines the industrial policy as a variety of different instruments used for implementing industrial policy, including providing state aid, subsidies, access to credit and easy access to commodity. The objectives behind a state adopting the industrial policy are to correct market failure or create more employment, foster economic development or export as well as lower the dependence of importation. Not every country needs to implement the industrial policy. The scope of industrial policy does not necessarily include national champion policy.

The industrial policy can affect competition policy by means of providing exemptions from the application of competition law, regulatory barriers to competition. However, the industrial policy does not always conflict with the competition policy if the implementation of industrial policy helps enhancing the long-term consumer welfare and efficiency.

While the national champion policy is implemented for various reasons, for instance the necessity to protect the infant companies, enhancing productivity, innovation or to correct short-term market failures or prevent the unemployment. The national champion policy affects competition policy by means of granting state aid or encouraging domestic mergers. Drawbacks of implementing national champion policy in small and developing economies are addressed as making the domestic firms less efficient resulting from they are shielded from the competition. Without the state support, these domestic firms will face some difficulty when competing in the globalized market.

[495] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 " [Online] Accessed: 30 March 2017 Available from: https://www.oecd.org/daf/competition/44548025.pdf

This OECD document provides recommendations on how to make industrial policy and national champion policy producing complementary effects rather than contradictory effects to competition policy

- Industrial policy should respect the sound competition principles. The principle of free market should be maintained despite the adoption of the industrial policy.
- Competition policy can be designed to be flexible enough for some necessary and appropriate state intervention in order to achieve the other policy's objectives.
- Despite the period of crisis, competition policy and law should be continuously applicable.
- Policy makers must recognize that robust competition is good for economy in the long run.
- Industrial policies, which have effects in picking winners or to reward losers should be avoided.
- Providing general support to all market participants tends to be less contradictory to the principle of competition than giving selective support to specific sectors or specific companies.
- Competition policy enforcers can use their prosecutorial discretion in the manner that supports the industrial and social policy objectives of government.
- Competition advocacy is the important tool to raise competition awareness in the harmful consequences of undermining market process from the implementation of industrial policy.

- The implementation of necessary industrial policy and national champion policy requires the careful assessment of competitive costs. If restrictive effects to competition are justified, the scope and duration of industrial and national champion policy should be proportionate.

- To ensure the least contradiction between competition policy and national champion policy, there are some accumulating requirements that should be satisfied before implementing the national champion policy:

  (1) The existence of market failure

  (2) The aid that ought to provide is necessary and proportionate to remove the market failure

  (3) Implementing these policies must render the positive effects, which outweigh the negative effects from restricting competition.

  (4) Adopting these policies should be transparent and temporary.

OECD: Competition Assessment Toolkit[496]

The main purpose of this toolkit is to inform that many laws and regulations have unnecessary restrictive effects to competition. These unnecessary competition restrictions can be reduced by applying the competition assessment. The advantages of conducting competition assessment are the economic benefits where the market activity is not unduly restricted and there is a greater promotion of competition.

This toolkit gives the methodology for addressing unnecessary restraints on competition and how to develop alternative approaches that can achieve the policy objective without unnecessary affect competition. The competition assessment can be applied to both new and existing policies, laws and regulations. Competition

[496] OECD, "Competition Assessment Toolkit' (Volume I: Principles) " [Online] Accessed: 30 March 2017 Available from: http://www.oecd.org/daf/competition/46193173.pdf

authorities should play an important role in advising and providing training on competition assessments as well as performing selective competition assessments. Political will is highly required in conducting competition assessment.

The first step of competition assessment is to assess whether policies, laws or regulations have tendency to impede competition or not by answering the set of questions called 'Competition Checklist' This Competition Checklist will help revealing the potential competition issues at an early stage in the policy development process. After conducting the Competition Checklists, if the policies, laws or regulations produces one of these four effects:

(A) Limits the number or range of suppliers

(B) Limits the ability of suppliers to compete

(C) Reduces the incentive of suppliers to compete

(D) Limits the choices and information available to customers

Then the further competition assessment is recommended to conduct.

If the competition assessment is not compulsory, the policy and law makers should be realized that conducting competition assessment is not the unnecessary burden. It rather helps improving their policies or laws. Various approaches have been taken to encourage the conduct of competition assessment, including incorporating the competition assessment in Regulatory Impact Analysis (RIA), providing financial rewards and establishing best- practice training. Some countries realize that competition assessment require special expertise; thus, empower the competition authorities to review new laws or regulations that are expected to have an economic impact before their enactment.

UNCTAD: The Importance of Coherence between Competition Policies and Government Policies[497]

This UNCTAD document emphasizes the importance of coherence between competition policies and other government policies to improve the overall welfare. In developing countries, their governments may pursue many policy objectives. Among these pursued policy objectives, they might not always compatible with each other. Not every problem can be solved through market mechanism and free competition that basing on competition principles.

States have to pursue many other goals, including social, political and economic goals, which requires other solutions and approaches to enhance total welfare. This could cause the incoherence between policies. Some incoherence between different policies impedes the expected results of each policy and possibly renders the ineffective policies. That is the reason why coherence between policies is important.

There are many countries adopting a system to create coherence between competition policy and other policies, for example, the United Kingdom, Australia, the Republic of Korea, Brazil and Indonesia. However, the coherence between different government policies does not mean that competition policy must be the panacea to all economic and social challenges. In fact, competition policy is one of the tools of the government. In some circumstances, resorting other policies might be more appropriate to solve the problems.

There are many factors affecting coherence between policies, which are legal mandate provided by instruments for bringing policies into actions and the way these policies are implemented.

The important issue is on how to create coherence between different policies. This document identifies some strategies for achieving policy coherence as follows:

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[497] UNCTAD, " 'The Importance of Coherence between Competition Policies and Government Policies' (Eleventh Session Geneva, 19–21 July 2011)," [Online] Accessed: 7 April 2017 Available from: http://unctad.org/en/Docs/ciclpd9_en.pdf

- Setting policy objectives and determining which objectives are prioritized. Then it is essential to determine whether there are incompatibilities between competition policy and other policies.
- The policy makers are required to take into account the inconsistencies in the different policies when planning to issue the new policies.
- The policymakers must be aware of possible negative and positive impacts on the economies when implementing domestic policies.
- Competition agencies should encourage government and other regulators to assess the regulatory impacts before issuing the policies.
- Competition agencies should consider the principle of proportionality in the enforcement of competition law by taking into account the whole policy spectrum and other policy actors in order to strike the right balance.
- In order to reduce conflict and promoting policy coherence, systems and mechanisms enabling dialogue and information exchange among policy makers and operatives should be established to encourage discussion between related authorities.
- Making the more coherence between different policies should not change the core objectives of competition policy, which are the protection of competition process and consumer welfare.
- Establishing a policy coordination mechanism or forum gathering all policy makers to share and discuss their policy objectives, contents and the way these policies are implemented. It can happen in the form of a one-stop shop for policy coordination and development or policy coordination unit. This would create more understanding among different policy makers in different policy areas and might lessen potential policy conflict.

Competition agencies should participate in this policy coordination mechanism to assess whether proposed policy affects competition policy or not. If the proposed policy raises competition concerns, then the competition agencies should discuss and suggest the most appropriate approach that achieve the proposed policy objective while produce the least restrictive effect to competition.

- Encouraging strong collaboration between related agencies helps avoiding inconsistencies in policy regulations and in the enforcement of relevant laws.
- The publication of guidelines concerning the interaction between competition policy and other policies also helps ensuring the coherence between related policies.
- Competition advocacy is the necessary tool to enhance the coherence between competition policies and other policies through many means. In case of incoherence between policies, competition authority should strike the right balance and explain how competition policy fits into the big picture.
- Transparency helps enhancing coherence in policy development and enforcement. Transparency plays the role in forcing policy makers to have some justifications behind the interference in the competition process.
- Accountability can enhance policy coherence in two ways. First, accountability helps guaranteeing that every policy development is accountable and circumvents policy shopping by vested interest groups[*]. Second, incorporating the accountability mechanism in policy enforcement agencies through annual reports and information sharing enables other enforcing agencies easier address the area of policy inconsistency.

UNCTAD: The Relationship between Competition and Industrial Policies in Promoting Economic Development[498]

The relationship between competition policy and industrial policy, they have both synergies and tensions. The synergies occur when the competitive market is required for effective industrial policy. In the case that industrial policies aim to promote productivity, efficiency and competitiveness of economic activities, competition policy and law are the tools for the overall achievement of industrial policy. The synergy also occurs when the industrial policy goals aim to promote export competitiveness. Some countries, including Finland and Brazil, show congruent relationship between these two policies.

While the tension between competition policy and industrial policy is found in the area of subsidies. Companies, which receive subsidy expand in the market at the expense of their competitors. This makes the expansion of subsidized companies displacing the lower- costs competitors and potentially reduce economic welfare. Another tension appears where government supports cartelization between their infant industries to increase international competitiveness. Recession cartels in declining industries may be encouraged by government in the recession period. Some other necessary industrial policies may be included in the exemptions of competition law.

[*] The example of using accountability to enhance policy coherence appears in one of the UNCTAD's country members; policy proposal in Botswana, must be presented together with an account of how the policy fits into the macroeconomic framework and the national development plan. The policy proposals are also required to elaborate their impacts on the whole economy and the people. These policy proposals must show accountability before being approved by the Cabinet and subsequently into the implementing laws.

[498] UNCTAD, "The Relationship between Competition and Industrial Policies in Promoting Economic Development," [Online] Accessed: 8 April 2017 Available from: http://unctad.org/en/Docs/ciclpd3_en.pdf

4.1.2 United States' Approaches to Lessen Conflict between Competition Policy and Other Economic Policies

The competition policy in the US is strong because it is regarded as the principal component of the US economic constitution. The US competition policy was embodied on the American values: fairness, free enterprises and individualism.[499] There is a statement about the US antitrust policy and antitrust law that American antitrust policy and laws are not only simply policies and laws but also a socio-political statement about the American's society.[500] This makes the competition policy in the US different from other countries. The antitrust policy in the US has the central role in the design of economic laws and regulations.[501] The characteristics of antitrust policy in the US is designed to have pro-business to push the robust functioning of the market. The statement of Rudolph J.R. Peritz supports this argument:

"Competition policy has been one of twentieth-century America's most durable goods. Whether in business, politics, sports, or speech, a vision of robust rivalry-of free competition- has inspired our social theories, directed our practices, and informed our public discourse."[502]

The US has different background of socio-economy from most of ASEAN countries. The free trade and fair competition has long been profound in the US. The US emphasizes free and fair trade and the functioning of market mechanism. It also supports private companies to do businesses without a history of state ownership.[503]

[499] Michelle Cini and Lee McGowan, Competition Policy in the European Union (PALGRAVE MACMILLAN PUBLISHER 2009)., p. 9-12

[500] Sullivan T, The Political Economy of the Sherman Act: The First One Hundred Years 1991 (Oxford: OUP, 1991).

[501] United States, "The Role of Competition Policy in Regulatory Reform (1998) " [Online] Accessed: 15 February 2017. Available from: http://www.oecd.org/unitedstates/2497266.pdf

[502] Rudolph J.R. Peritz, Competition Policy in America: History, Rhetoric, Law (Oxford University Press: Oxford, 2000)., p. 3 and 301

[503] E. Fox, "Economic Development, Poverty and Antitrust: The Other Path," 13(2007). p. 10

The Interaction between Competition Policy and Other Policies

Although there is no clear rule or criteria in balancing the conflicting between different policies in the US. The competition authorities play an important role in advocating the strike of the right balance between competition policy and other policies.[504] Even when the government changes the major policies, the FTC must be ensured that they will not reshape the competitive landscape of the country. The FTC must ensure that competition policy in the US is set to be competitive with other competing policy and regulations to ensure the free and fair market.[505]

The tension between competition policy and other policies in the broader aspect of US lying on the two main fundamental principles of the US, which are liberty and equality. The liberty represents the individual liberty, the private interest, the freedom of contract and the call for free market; the competition free from government power. While the equality involves the more general public interest to the desire of fair competition, the competition free of excessive economic power and consumerism. The commitment of equality appears in the form of the sense of economic fairness resulting from governmental imposed limitations. In other words, the liberty represents individual while equality represents collectivity.[506] The historical study of the US competition policy shows the tension between these two commitments: liberty and equality. Sometimes, they are in conflict and sometimes one commitment appropriates the other. In different period of time, the shift of prioritization between the liberty and equality can be observed. However, in the last century some observes the collision between these two commitments.[507]

[504] ICN, "Report on Interface between Competition Policy and Other Public Policies."

[505] Timothy J. Muris, "Creating a Culture of Competition: The Essential Role of Competition Advocacy," [Online]. Available from: https://www.ftc.gov/public-statements/2002/09/creating-culture-competition-essential-role-competition-advocacy, p. 1-2

[506] Peritz, R. J. R., Competition Policy in America: History, Rhetoric, Law , p. 3 and 301

[507] Ibid. p. 9-299

Relying only on competition policy cannot drive the whole United States of America. The US competition authorities recognize that the legislative and regulatory bodies must take into account a wide range of public policy objectives. The public policy objectives granted priority may differ in different situations. Sometimes the competition advocacy is not always successful in removing the restricted laws and regulations since the protection of public justification is over competition policy.[508]

With regard to the interaction between the competition policy and the industrial policy, the United States claims that industrial policy that defined by the economist Lawrence White[*] does not exist in the US. The definition of industrial policy in the US is rather perceived as

" Rather, our broad policy is free competition and, concomitantly, vigorous antitrust enforcement. That policy necessarily co- exists with other government policies, such as those short term measures that are intended to ease the economic shocks that affect particular industries in troubled times. At various times, measures favouring specific industries have been implemented, at both national and sub-federal levels, that some might see as constituting industrial policy. Nevertheless, competition policy, not industrial policy, is the main organising principle of the United States' economic policy, not just a special detail engrafted onto one form of industrial intervention or another."[509]

[508] ICN, "Report on Interface between Competition Policy and Other Public Policies.", p. 30-31

[*] " In current use, the term ' industrial policy' denotes the promotion of specific industrial sectors rather than industrialization overall... Industrial policies are direct, micro, and selective; they are an attempt by government to influence the decision making of companies or alter market signals;thus they are discriminating... Industrial policy has sometimes sought to support the losers, delaying or retarding their decline; in other cases the goal is to succor or catalyze maturing sectors or to stimulate advancing sectors. " [508] See Robert Driscoll and Jack Behrman, eds., National Industrial Policies, Cambridge, Mass., 1984, at 5, quoted in Lawrence J. White, "Antitrust and Industrial Policy: A View from the U.S.," Working Paper 08-04, Reg-Markets Center, January 2008.

[509] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 ", p. 141-142

US's Approach to Strike the Right Balance between Competition Policy and other Policies

The relationship between the competition policy and industrial policy as defined by the US' s perspectives seems to be more potential conflicts than complementarities. Consequently, the US have employed many measures to strike the right balance between the conflict in different policy objectives. Although no clear rule or criteria in balancing the conflicting between different policies in the US, the US federal agencies consider the competitive aspects of their policy and law initiatives. This can be seen from the requirement of the 'Competition Assessment' as a part of comprehensive evaluation of the action proposed and alternative options. This includes the assessment between benefits and costs involved. Although there is no formal competition policy assessment procedure, the US competition authorities can give opinions on the potential impacts on competition in the policy or law initiative.[510]

4.1.3 European Union' s Approaches on How to Lessen Conflict between Competition Policy and other Economic Policies

Competition policy is one of the essential policies underlying the European Community because it has interconnected relationship between the creation of European Single Market, which is the ultimate goal of the European Union and competition policy. The competition policy and law in the EU is designed to facilitate the common market by having pro-open market.[511] The European competition policy is found in the Article 3(g) of the EEC Treaty aiming to ensure that competition in the common market is not distorted. The underlying objectives of the EU competition policy are the regional integration and the unity of the EU single market.[512] Therefore, the competition policy is a means to an end of achieving the EU' s ultimate goals. Competition policy is linked to the Lisbon Agenda, which is a ten-year strategy for

[510] ICN, "Report on Interface between Competition Policy and Other Public Policies.", p. 30-31

[511] Fox, E., "Economic Development, Poverty and Antitrust: The Other Path." , p. 10

[512] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321, 300

improving the competitiveness of the EU economy launched in Lisbon in 2000.[513] There is the establishment of the EC common competition rule, applying whenever trade between the EU Member States being affected, which is used as the key instrument for ensuring the integrity of the internal common market. For competition cases that do not have inter-states dimension will fall within the scope of national competition law of each EU Member States[*].

The European competition policy is considered the supranational policy and has become the flagship of the EU. The development of the EU competition policy is based on the incrementalism approach. In other words, the EU competition policy has gradual development from the past until now. The influences of the development of the EU competition policy come from both internal and external factors[*]. Before being ranked as one of the most matured competition regimes, the EU competition policy underwent the big policy reform in both substantive and procedural to improve more transparency in the competition policy and increase the speed of decision making through the decentralization enforcement of the EU competition rules. [514] The incremental growth of the EU competition policy can be a valuable lesson for ASEAN competition policy.

[513] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 "

[*] It must be noted that the national competition policy and law of each EU Member State is beyond the scope of this dissertation.

[*] The internal factor includes the accumulated experience and expertise of staffs and the vision, personal reputation of the EU competition commissioners for efficiency, decisiveness and conviction influencing the policy development in the EU. The EU Commission has the important role in competition policy development in the EU comparing to the marginal role of the EU Council and the European Parliament. The policy statements, decisions of the Commission and accumulation of case law all regarded as factors influencing policy development. The external factor, such as the impact of economic crisis during the mid-1970s caused the recessionary pressure, which retarded the competition policy development in the EU. Whereas the external factors that supports the competition policy development in the EU was the influence of neo-liberal economics among economic policy makers at the end of 1970s and the visibility of the Chicago monetarist

[514] McGowan, M. C. a. L., Competition Policy in the European Union. p. 23-30

The Interaction between Competition Policy and Other Policies

Similar to the US's situation, there is no explicit law or criteria in the European Union level to tackle with conflict between competition policy objectives and other public policy objectives. However, in practice the legal framework of the Treaties balances the different policy objectives between the European Commission and other EU institutions according to the political priorities. [515]

Competition Policy and Industrial Policy in the European Union[516]

In the view of the European Commission, the European competition policy is not in conflict with the European industrial policy. The competition policy is rather perceived as a part of the industrial policy providing open market with free competition to support the strong industries.[517] The interconnection between competition policy and industrial policy is unavoidable. Sometimes, the other policy objectives are justified although having restricted competition effects. This can be seen in the allowance of 'crisis cartels' to allow the continuing existence of some industries in the European Union. The other areas are in the state-aid policy.[518] The conflict in different policy objectives is not a surprising issue. It depends on what policy objective is on the top list of the operation of the EU at different period of time.[519]

Competition Policy and National Champion Policy in the European Union[520]

In the past, the EU adopted the interventionist industrial policy and promoted the national champion policy. The situation was changed between 1980s and 1990s because of the neo-liberal agenda in liberalization and privatization. The Commission

[515] ICN, "Report on Interface between Competition Policy and Other Public Policies." , p. 25-30

[516] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 " , p. 143-147

[517] Paul Geroski, "Competition Policy and National Champions," [Online]. Available from: http://www.regulation.org.uk/library/2006_geroski_essays.pdf, p. 6

[518] Barry J Rodger and Angus Macculloch, Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited (2009). , p. 14

[519] McGowan, M. C. a. L., Competition Policy in the European Union. p. 224

[520] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 " , p. 143-147

played an important role in injecting competition into sectors that previously being excluded from the application of competition rules, which included sectors that considered natural monopoly and national prestige, for example motor vehicles.[521] Under the European Union level, there is no *per se* objection to national champions if the national champion status is achieved basing on the operation of free-market competition. Consequently, the Commission is not totally against the national champion policy because as long as the national champion policy is achieved by conforming to the EC competition law and state aid principle.

The EU Commission affirms the view that the concept of fostering the champion cannot be raised whether explicitly or implicitly to justify the setting aside of the EC competition law.[522] The competition policy that levels playing field and creates competitive market is rather the central driver for the growth of economy and industry in Europe.

European Union's Approach to Strike the Right Balance between Competition Policy and other Policies

Similar to the US, the competition assessment plays as an important tool to balance competition policy and other policies during the process of issuing new policy. The competition assessment, which is a part of the comprehensive impact assessment in terms of economic, social and environmental impact assessment, must be conducted. The process of competition impact assessment aims to assess competition impact resulting from the policy proposal in the internal market and assess whether the policy proposal renders disproportionately restrict competition or not. The 'European Commission's Impact Assessment Guidelines' is established to elaborate more on this issue, including which situations raise competition concerns, for example

[521] McGowan, M. C. a. L., Competition Policy in the European Union. p. 223-225

[522] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 " , p. 143-147

the policy proposal that exempt a market or sector from competition laws, raising barriers to entry or exit or introducing special commercial rights.

The DG Competition plays the main role in exercising its advocacy powers within the European Commission to assess the impact on competition of the policy proposal during the work of an "impact assessment steering group" or in the course of a subsequent inter-service consultation in case a policy proposal prepared by another DG.

The opinion expressed by the DG Competition might not be able to block the policy proposal. However, in practice the DG Competition's opinion is influential because it can exert the significant pressure on the relevant DG to amend the criticized policy proposal. If any of the EU Member State is found to facilitate any anti-competitive behaviors in contrast to the Treaty on the Functioning of the EU, the European Commission is empowered to challenge a Member State in front of the European Court of Justice.[523]

4.1.4 Japan's Approaches on How to Lessen Conflict between Competition Policy and other Economic Policies

The Interaction between Japanese Competition Policy and Other Economic Policies

The concept of competition used to be something new in Japan since the Japanese society in the past believed in harmonious cooperation rather than competition between competitors. Therefore, the concept of free and fair competition was not well developed in the past Japanese society. The Japanese economic development was from the strong government control instead of the result of competition. The main market players were the large industrial conglomerates called

[523] ICN, "Report on Interface between Competition Policy and Other Public Policies." , p. 25-39

‘zaibatsu’. The incorporation of competition concept was highly influenced by the United States in the form of ‘Occupation Forces’ after the end of the World War. [524]

The development of competition policy in Japan took a long period and faced the big combat with industrial policy that used to be prioritized over competition policy during 1950s-1960s. During this period, Japan was under the industrialization stage leaded by the strong industrial policy of the Ministry of International Trade and Industry (MITI). There were many measures that were against the principles of competition adopted, including the subsidies and import tariffs, the encouragement of cartels and mergers in some industries to promote investment and increase productivity.[525]

The enforcement of the AMA during this period was relaxed resulting from the 1953 AMA’s amendment. It could be said that this period was the rise of the industrial policy over the competition policy. [526]However, later when competition proved itself in being beneficial to market, economy and consumers. This urged Japan moving towards more competition-based economic policy. There were both internal and external factors behind this change*.

Until now the importance of competition policy and law are widely recognized in the economic society of Japan even though it had been faced the rocky journey from the period of industrialization stage and government encouraging the economic growth after the World-War II. While national champion policy was found in Japan but it was not the real issue of causing policy conflict in Japan because it was not the core of industrial policy in Japan.[527]

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[524] Mitsuo Matsushita, International Trade and Competition Law in Japan (Oxford University Press, 1993)., p. 76

[525] UNCTAD, "The Relationship between Competition and Industrial Policies in Promoting Economic Development."

[526] Matsushita, M., International Trade and Competition Law in Japan. p. 80

* The internal factors are from the accumulating outcomes of the JFTC in competition advocacy and enforcement of the AMA. The Japanese government shifted to give more support to competition policy, competition law and its enforcement agency as expressed by Prime Minister Koizumi’s speech to the Diet in 2001 concerning the political will to strengthen the competition law enforcement authority to actively promote competition policy and function as the “guardian of the market. While the external factors were from the impact of deregulation and trade liberalization.

Japan's Approach to Strike the Right Balance between Competition Policy and other Policies

Similar to the US and EU, Japan uses 'the formal regulatory impact assessment' to evaluate the competition impact from laws and regulations whether in the process of regulatory enactment, revision or abolition. The regulatory impact assessment is specified in the 'Guidelines for Ex-Ante Evaluation of Regulations' as compulsory in Japan since 2007. If the outcome of competition impact is apparent, the competition impact must be taken into account before issuing, revising or abolishing the relevant laws and regulations. Beyond this compulsory regulatory impact assessment, the JFTC trains the relevant personnel and administrative organs for conducting the impact by relying on the OECD's Competition Assessment Toolkit.[528]

Other measure that JFTC adopts to ensure the coherence between other policy objectives and competition policy objective is creating the close relationship and good coordination between the JFTC and other public authorities.[529] This makes the implementation of other policies responsible by these public authorities more consistent with the competition policy and competition law.[530]

4.1.5 The Similarities between the US, EU and Japan's Approaches in Lessening the Conflict between Competition Policy and other Economic Policies

The US, EU and Japan share the common objectives of competition policy in protecting consumers and ensure that free and fair competition will finally benefits consumers.[531] This is why competition policy is another main policy in these three jurisdictions.

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[527] OECD, "Competition Policy, Industrial Policy and National Champions' 2009 " , p. 123-124

[528] ICN, "Report on Interface between Competition Policy and Other Public Policies." , p. 29-32

[529] Ibid. p. 43

[530] Ibid. p. 123-124

[531] Neelie Kroes, "European Commissioner for Competition Policy, Antitrust in the Eu and the Us-Our Common Objectives 1 " [Online] Accessed: 11 March 2017 Available from: http://ec.europa.eu/commission_barroso/kroes/antitrust_eu_us.pdf.

In case of conflict between competition policy and other economic policies, US, EU and Japan do not have the direct and explicit law or criteria to balance the conflict between competition policy objectives and other public policy objectives. However, these countries also employ similar measures to strike the right balance in case there is a conflict between competition policy and other policies, which are the use of competition impact assessments before issuing the new policies, laws and regulations.

The US, EU and Japan all empowering their competition agencies to play the important role in facilitating other authorities to use the competition impact assessment. The competition agencies in these three countries also play the important role in competition advocacy targeting at policy and law makers to consider the competition impact before issuing policies and laws. These competition agencies in three jurisdictions try to give opinions and/or recommendations on the impacts to competition and may propose the use of the alternative measures that still able to achieve other policy's objectives while causing the least restrictive effect to competition.

4.1.6 The Distinction between the US, EU and Japan's Approaches in Lessening the Conflict between Competition Policy and other Economic Policies

The process of US, EU and Japan adopted for implementing the competition impact assessment before issuing the new policies, laws and regulations are different, including which situations competition impact assessment should be conducted and the use of competition impact assessment is on the voluntary basis or compulsory basis.

Unlike other western competition agencies, Japan competition authority shows the unique Asian- style strategy in conducting competition advocacy to other government authorities. The JFTC tries to create the good relationship and coordination with other government authorities to encourage them to take into

account competition impact before implementing other laws and policies that potentially cause impact to competition. The JFTC expects to see the implementation of other policies and laws in practice is done in a consistent way with the principle of competition policy and law. The status of the JFTC is under the Prime Minister's Office so it is not difficult to cooperate and advocate other public authorities.

4.1.7 Analysis of Approaches to Lessen Conflict between Competition Policy and Other Economic Policies

The Use of Competition Impact Assessment to Reduce the Unnecessary Competition Restriction in Case of Incoherence between Competition Policy and other Economic Policies' Objectives

To lessen conflict between competition policy and other economic policies, competition impact assessment has been used in the US, EU and Japan to solve this problem. It also conforms to the recommendations and best practices of international organizations.

Enabling Competition Agencies to Present Views or Recommendations on the Effects of Competition during the Preparatory Stages of Issuing Polices and Legislations

This is a kind of competition advocacy to government and public authorities to shape domestic policies and legislations to have more competition-friendly and lessen unnecessary competition restricted effects. This can be done by allowing competition agencies to provide recommendations on the effects of competition during the preparatory stages of issuing polices and legislations. This process should include enabling competition agencies to propose alternatives that can achieve specific policy' s objective but have less competition restricted impacts. Views and recommendations of competition agencies will be respected or not depending on whether there are mechanisms to ensure that recommendations of competition

agency will be followed, including obligation to explain the reasons and necessity behind the non-compliance with the recommendations of competition agencies.

Conducting Competition Advocacy to Government and Public Authorities Helps Creating Coherence between Competition Policy and other Economic Policies and Making the Implementation of Laws and Regulations basing on Competition Principles

Government and public authorities should be a main target of competition advocacy because they can issue policies, laws, regulations and all their implementation process, which restrict competition. Therefore, the competition agency should educate and suggest these authorities to consider competition effects before issuing policies and laws. Competition agency should also advocate the public authorities not to create unnecessary competition restriction during the implementation of policies and laws.

The JFTC's approach is interesting by creating the good relationship with other public authorities makes it easier for JFTC to conduct competition advocacy and encourage them to follow the JFTC's recommendations.

4.2 Approaches Taken to Overcome Impediments Concerning Competition Law

This part will explore the structures of main prohibitions under competition law in international best practices, the US, EU and Japan. Some valuable experiences of the US, EU and Japan will be raised to show the development of their competition laws through the law amendments and cases laws. It must be noted that only substantive part of competition laws will be discussed in this chapter[*].

4.2.1 International Best Practices and Recommendations on Model Law of Substantive Competition Law

UNCTAD: MODEL LAW ON COMPETITION: PART I Substantive Possible Elements for a Competition Law[532]

The key contents of this UNCTAD MODEL LAW is reviewed and summarized as follows:

CHAPTER I Objectives

The competition laws should set the objectives of the law. The UNCTAD MODEL LAW exemplify the objectives of competition law as to control or eliminate main anti- competitive conducts between undertakings in the form of restrictive agreements, abuse of dominant position, mergers, which affects domestic or international trade or economic development.[533]

CHAPTER II Definitions and scope of application

The key important definitions should be clearly defined in the competition law. These key terms are

[*] The discussion of process and procedural laws is out of the scope of this dissertation.

[532] UNCTAD, "Model Law on Competition' Substantive Possible Elements for a Competition Law, Commentaries and Alternative " [Online] Accessed: 24 March 2017 Available from: http://unctad.org/en/Docs/tdrbpconf5d7rev3_en.pdf

[533] Ibid. p. 3

‘Enterprises’ This term is also known as ‘Undertakings’, ‘Dominant position of market power’, ‘Mergers and acquisitions’, and ‘Relevant market’.

Scope of application

The competition law should be applied to all enterprises relating to their commercial activities. Both natural persons acting as the owners of business, managers or employees and juristic persons can violate competition law. However, exemptions should be provided for actions that are regarded as sovereign acts of the State or conducts of local governments, or acts of natural persons or enterprises, which are compelled or supervised by the State or by local governments or branches of government by acting within their delegated power.

CHAPTER III Anti-Competitive Agreements

The competition law should prohibit agreements or arrangements that restrict competition whether it is formal or informal agreements/arrangements or in written or oral. This model law gives some examples of restrictive agreements and arrangements as follows:

(a) Agreements fixing prices or other terms of sale

(b) Collusive tendering

(c) Market or customer allocation

(d) Restraints on production or sale

(e) Concerted refusals to purchase or to supply

(f) Collective denial of access to an arrangement, or association, which is crucial to competition

Some agreements that fall under the examples may be authorized or exempted if competition agencies consider that that they create net public benefit.

CHAPTER IV Abuse of Dominance

The abuse of a dominant position of market power should be prohibited. The question is raised when the enterprises can have the dominant position in the market. This model law indicates that the enterprises, either by itself or acting together with a few other enterprises, have the dominant position when they are able to control the relevant market whether goods or services. When the enterprises can limit the market access or able to unduly restrict competition or any actions consider producing adverse effects on trade or economic development. The example of actions fall within the scope of abuse of dominant position includes predatory behaviors to eliminate competitors, discriminatory pricing or setting terms or conditions in the supply or purchase of goods or services discriminatory, fixing resale price, import restrictions, refusal to deal, tying or bundling. However, the competition law should not completely prohibit the abuse of dominance. Enterprises should be allowed to request authorization or exemption in accordance with the objective of competition law.

CHAPTER VI Merger Control

The competition law should impose the obligation to notify mergers, acquisitions, takeovers, interlocking directorships whether in the level of horizontal or vertical to competition agencies if at least one of the enterprises is established within the country and the merger is likely to create market power. This is particularly important where that market already has the high degree of concentration or having barriers to entry or lacking the substitute products. After receiving the notification of merger, the competition agency should review the notification and prohibit it if the result of proposed merger will significantly increase the ability to exercise market power and the proposed merger leads to creating of dominant firm or significantly reduce competition in the market.

4.2.2 US Antitrust Laws

This part will identify the overview of the US antitrust law and some of the important elements that can provide some lessons learnt for ASEAN. The scope of this dissertation focuses only on the US federal antitrust law and will not cover the antitrust law in states level.

The Structure of US Federal Antitrust Law

The US antitrust law is composed of many legislations and rules. The three main Federal antitrust legislations are[534]

The Sherman Act

The Sherman Act has been the first antitrust law in the US enacted since 1890. It aims to be the comprehensive charter of economic liberty to preserve free and fair trade, aiming to protect the process of competition for the benefit of consumers, creating strong incentives for businesses to compete and operate efficiently by enhancing quality while lowering the price. This act prohibits all contracts, cartels, collusions, conspiracies, which unreasonably restraint trade interstate trade and conducts concerning trade or commerce with foreign countries.[535] This act also criminalizes monopolization and attempted monopolization on any part of interstate commerce.

The Clayton Act

The Clayton Act prohibits the concentration; mergers or acquisitions or interlocking directorates, which tends to lessen competition. The merger that tends to increase prices to consumers will be challenged under this act. This act controls the concentration by imposing the duty to notify the Antitrust Division and the FTC for

[534] The United States Department of Justice, "Antitrust Laws and You," [Online] Accessed: 23 March 2017 Available from: https://www.justice.gov/atr/antitrust-laws-and-you

[535] Federal Trade Commission, "The Antitrust Laws," [Online] Accessed: 23 March 2017 Available from: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

mergers and acquisitions that fall within the specified criteria. The Clayton Act also outlaws the business practices that harm competition in some certain circumstances. Unlike the Sherman Act, the Clayton Act imposes only civil sanction without any criminal sanction. This act allows private parties to bring the lawsuit for triple damages under either the Sherman Act or the Clayton Act. These private parties can ask for court order to prohibit the anti-competitive conducts in the future.[536]

The Federal Trade Commission Act

This act outlaws any unfair methods of competition and unfair or deceptive acts or practices that related to interstate commerce. This act empowers the FTC to monitor any conducts that could violate this act. There is no criminal sanction under this act.

The Main Prohibitions under the US Antitrust Laws

1. Cartels and Collusions

Cartels are considered very harmful conducts in the US. They are regarded as the criminal felonies. The US has strong commitment to fight against cartels. With the support of the US congress to pursue this purpose, there was the antitrust law enactment to increase higher penalties for cartels. The leniency program was invented to be the main facilitator for revealing cartels and increase cartels enforcement.

2. Monopoly

Monopoly is under Section 2 of the Sherman Act " Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."[537]

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[536] Ibid.

[537] Section 2 of the Sherman Act

3. Mergers

Mergers and acquisitions, which their effects may be substantial lessen competition or tend to create a monopoly are prohibited under the Section 7 of the Clayton Act. Mergers or acquisitions between direct competitors, which are known as horizontal mergers are the primary concern. The FTC and DOJ provided the Horizontal Merger Guidelines to further clarify the merger control in the US as well as providing the agencies' analytical framework towards merger control. According to the Horizontal Merger Guidelines, the mergers should not be permitted if it enhances market power. By having the enhanced market power, firms tend to raise price, reduce output, diminish innovation; thus, reduce overall economic efficiency and harm US customers. These effects will harm competition.[538] Another related document is the 'Commentary on the Horizontal Merger Guidelines' developed by the FTC and DOJ to give some examples to what extent the merger principles have been applied to merger reviews by the agencies.[539] The FTC has developed the 'Merger Best Practices' for improve the overall merger review process to be able to quickly clear transactions and challenge mergers that violate the antitrust law.[540]

The Role of Economic Theory Influencing the Development of US Antitrust Law

The distinctive characteristics of the US antitrust laws uniquely allow the high influence of economic theory to play the important role in the application and enforcement of their antitrust laws.

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[538] U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," [Online] Accessed: 24 March 2017 Available from: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf

[539] U.S. Department of Justice and the Federal Trade Commission, "Commentary on the Horizontal Merger Guidelines," [Online] Accessed: 24 March 2017 Available from: https://www.ftc.gov/sites/default/files/attachments/mergers/commentaryonthehorizontalmergerguidelinesmarch2006.pdf

[540] Federal Trade Commission, "Reforms to the Merger Review Process," [Online] Accessed: 24 March 2017 Available from: https://www.ftc.gov/sites/default/files/attachments/mergers/mergerreviewprocess.pdf

"No other country has adopted an antitrust statute that contains equally broad substantive provisions and relies heavily on a common law method of judicial interpretation to implement them. The consciously evolutionary quality of the U.S. antitrust statutes, with their implicit recognition of the need to adjust doctrine overtime in light of experience and new learning, gives economists considerable power to influence competition law and policy."[541]

Both US competition agencies have specialized economic divisions for providing the economic analysis in competition cases: DOJ's Economic Analysis Group and FTC's Bureau of Economics.[542]

Close relationship between the economic theories and the US antitrust laws are elaborated by William Kovacic:

"Today the links between economics and the law have been institutionalized with increasing presence of an economic perspective in law schools, extensive and explicit judicial reliance on economic theory, and with substantial presence of economists in the government antitrust agencies"[543]

Before the US antitrust law reaches the maturity, it had long been developed through cases law, new economic learning and some introduction of new rules and mechanisms complementing the US antitrust regime. The judicial bodies in the US also play the significant role in interpreting and developing the US antitrust laws. It can be said that the evolution of the US antitrust law is from the process of US courts learn

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[541] William E. Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," Journal of Economic Perspectives 14(2000)., p. 58

[542] William E Kovacic, "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International," [Online] Accessed: 5 May 2017. Available from: https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf , p. 19

[543] Shapiro, W. E. K. a. C., "Antitrust Policy: A Century of Economic and Legal Thinking," Journal of Economic Perspectives., p. 58

[*] Chicago School Economic Theory was developed at the University of Chicago. It is influential to the US antitrust system. The Chicago School Economic Theory believes that free market is the most effective way for the resource allocation. It prefers the non-interventionist approach of laws and regulations over the free market. The Chicago School economic theory led by many prestigious persons, including Posner, Bork and Demsetz leaded to the big revolutions of US antitrust law between 1970s and 1980s.

more about the economic implications for the precise interpretation of the US antitrust law. This process of US antitrust law development has been highly influenced by the economic theories, particularly the Chicago School*, which has become the 'ground rules' or the 'first principles' for US antitrust law. The influence of Chicago School leaded to the adoption of less interventionist approach to business practices and mergers.[544] This leads to the abandon of many policies, which do not promote consumer welfares to adopt the new policies that are better.[545]

It can be seen that the outstanding feature of the US antitrust laws is its dynamic. The antitrust law changes according to the change in legal science and economics theories. The main feature of the US antitrust law also highly relies on economic theories. Therefore, the emergence of new and sound economic theories alters the perspective and approach of the US antitrust law. The clear example appears in the issue of vertical agreements, the US used to consider vertical agreements as the harmful conduct subjecting to the *per se* rule. Later, there are more and more empirical evidence supporting the benefits and efficient of vertical agreements. Currently, the vertical agreements are subject to the scrutiny of the rule of reason instead of the *per se* rule.[546]

The ground rules of US antitrust law can be summarized as follows:[547]

1. Competition is an intermediate goal. The real ultimate goal is consumer welfare.

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[544] William Kovacic, "The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy," [Online] Accessed: 14 October 2017. Available from: http://heinonline.org/HOL/LandingPage?handle=hein.journals/waynlr36&div=47&id=&page=

[545] Doughlas Melamed A, "International Cooperation in Competition Law and Policy: What Can Be Achieved at the Bilateral, Regional, and Multilateral Levels," International Economic Law (1999). p. 423-433, 432

[546] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321, 317

[547] Gunnar Niels and Adriaan Ten Kate, "Introduction: Antitrust in the U.S. And the Eu-Converging or Diverging Paths?," The Antitrust Bulletin Spring- Summer 2004(2004)., p. 10

2. Competition policy protects the process of competition but not individual competitors.

3. Profit maximization is not bad because it is the principle of market economy even it is done by dominant firms.

4. Vertical Restraints and vertical agreements should not be subjected to the *per se* rule because they sometimes have procompetitive effects and bring about efficiency. Therefore, they should be under scrutiny of rule of reason analysis.

5. Sometimes antitrust intervention might result in counterproductivity, impeding innovation and welfare- enhancing ways of doing business.

Later in the mid-1980s, the US antitrust law has been influenced by the 'Post-Chicago' economic theory that is considered as more modern economic theories of industrial organization. It influenced the many antitrust cases.[548]

In conclusion, the economic theory has made two contributions to the US antitrust system. First, it has made competition as the superior mechanism for governing the US economy. Second, economic theory has guided the formation of antitrust policy and antitrust enforcement.[549]

Extraterritorial Application of Antitrust Laws in the United States

The US is the first country that introduced the 'effect doctrine' and applied it to enable the extraterritorial application in antitrust law. The effect doctrine was introduced in the *Alcoa* case. [550] " According to the effect doctrine, any state may impose liabilities, even upon persons not within its allegiance, for conducts outside its borders that have consequences within its borders. In other words, any agreements made outside the US would have been in breach of the US antitrust law, if there were

[548] Ibid.,p. 10

[549] Shapiro, W. E. K. a. C., "Antitrust Policy: A Century of Economic and Legal Thinking," Journal of Economic Perspectives., p. 58

[550] United States V. Aluminum Company of America [1945] 148 F.2d 416 2nd Cir.

intended to affect imports or US consumers and there were actual effect**.** The effect doctrine has become the main principle to enable the application of domestic antitrust law extraterritorially in the US.**"** [551] The US is the leader among other jurisdictions in the application of antitrust law extraterritorially. [552] The exertion of extraterritorial application in the US antitrust law reflected the US economic policy. The US legal system also uniquely support the extraterritorial application. By employing the US pre-trial discovery rule, it favors plaintiffs in gathering the important evidences to prove law infringement. The effective competition agencies in the US that have enough experienced staffs and technical supports facilitate the handling process of the complex international cases. Private suits are incentivized by the treble damages provisions. Class actions are also available for antitrust cases.[553] From these afore-mentioned factors, it shows that the US antitrust system is suitable for the application of its antitrust law extraterritorially than any other jurisdictions.[554] The extraterritorial application in the US has long development through many case laws*. Although the US effect doctrine of is widely criticized about its appropriateness in exerting the application of antitrust law extraterritorially, nowadays more and more countries follow or consider following the US pathway by enabling the extraterritorial application in their competition laws because it is the important tool to increase more effective enforcement of antitrust law conforming to the globalized business era.[555]

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[551] Sathita Wimonkunarak, "Enforcement of Competition Law in Globalized Economy: Limitations of Extraterritorial Application in Small and Developing Countries," Chulalongkorn J.S.D Journal 1(2557). p. 1-9

[552] Brenden Sweeney, "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?," [Online] Accessed: 2 January 2013. Available from: http://www.law.unimelb.edu.au/files/dmfile/downloada4041.pdf, p. 53

[553] Michal S. Gal, "Antitrust in Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions," Fordham Int'l L.J 2(2009). p. 35

[554] Sweeney, B., "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?", p. 53

* In the past, the US strongly pursued its aggressive enforcement of antitrust law through the exertion of extraterritorial application. However, the US effect doctrine was widely criticized from other countries about an uncertainty of quantity and quality of the effect doctrine as well as and its too broad scope for other countries to tolerate. Other affected countries perceived the US antitrust enforcement through extraterritorial application as violations of their sovereignty. This leaded to the retaliation by the introduction of the blocking statutes and claw back statutes in many countries, including the UK, Australia and Canada. Many precedence set the hard line of the effect doctrine that caused many problems to the US. Therefore, there was an attempt to moderate the hard line of effect doctrine in *Timberlane I and II* by using 'balancing principle'**.** Under this case the Tripartite Analysis was introduced to set the three prerequisite

4.2.3 Competition Rules in the European Union

Before the introduction of the EC competition law, there are imperfect competition environment and many anti-competitive behaviors, particularly cartels and geographical price discrimination, which harm the goals of European Union integration. Thus, the competition law in EU was developed in parallel with the European Union because EC competition rule was considered the important tool to facilitate the single market integration, ensure the level playing field and reduce national trade barriers that distort the goal of becoming the European Union.[556]

The EC competition law is the community law, which takes precedence over national law. This is known as the 'principle of supremacy of community law' or 'the doctrine of precedence' as elaborated in the ECJ judgements in *Van Gen den Loos* and *Costa v ENEL*.[557] This community competition rule applies to both governments, firms and private citizens throughout the European Community.[558] The EC community competition law is highly strengthened with the specific supranational body

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conditions that need to satisfy before being able to apply the US antitrust law extraterritorially. These three prerequisite conditions are as follows:

1. There must be some effects whether actual or intended, on the American Commerce.

2. The effect must be sufficiently large to injure the plaintiff and constitute an infringement of the US Antitrust law.

3. The US interest must be sufficiently compelling comparing to those of other nations. This condition is used to justify the assertion of extraterritoriality by considering the principle of comity and fairness. This last condition is new and important in moderating the hard line of the effect doctrine because it takes into account the interest of other countries.

However, the US precedence concerning the extraterritorial application of the US antitrust law did not always basing on the balancing principle from the *Timberlane I and II*. It switched between the balancing principle and the hard line of effect doctrine. After the *Timberlane I and II*, the hard line approach of effect doctrine that take into account only foreign conduct that was meant to produce and did in fact produce some substantial effect in the US was adopted again in *Hartford* case. The court ruled that the extraterritorial application should be applied to the foreign conduct as long as there is no conflict between the US law and the foreign law. The court seemed to avoid adopting the balancing principle that consider the foreign sovereignty interests against the US interest. In contrast, the recent case; *Empagran* switched back to the balancing approach. Therefore, it is unsettled that the US precedence will follow the hard line or the balancing approach in the extraterritorial application of antitrust law. The further development of the US case law concerning this issue is worth following.

[555] ibid. p. 52

[556] Laurent Warlouzet, "The Rise of European Competition Policy, 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere," [Online] Accessed: 19 October 2017. Available from: http://cadmus.eui.eu/handle/1814/14694, p. 7

[557] Angus Macculloch and Barry J Rodger, Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited (2009)., p. 43

[558] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 22

responsible for its enforcement. The combination between having common competition law and supranational body for its enforcement is essential for the effective competition regime in European Union.[559]

The Structure of EC Competition Law

The fundamental objective of the EC competition law is preventing the distortion of competition. However, there are other significant objectives of EU competition law; namely achieving the free, dynamic internal market and promotion of general economic welfare.[560] The EC competition law has unique feature because it is designed for speeding up market integration with the establishment of common regulatory framework and supranational enforcement authority; namely the EU Commission and the European Court of Justice.[561] The main competition provisions is found in the Treaty of the Functioning of the European Union (TFEU) Article 101, 102, 106 and 107. It is applied whenever there is a case affecting trade between EU Member States.

Article 101 Prohibits the Comprehensive Ban on Anti-Competitive Agreements or the Collusion

All agreements between undertakings, decisions by associations of undertakings and concerted practices whether having their object or effect prevention, restriction or distortion of competition within the internal market and which may affect trade between Member States are prohibited.[562] The legal status of these anti-competitive agreements prohibited under this article are automatically void.[563] This article gives

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[559] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321, 308

[560] European Parliament, "Fact Sheets on the European Union: Competition Policy," [Online] Accessed: 23 March 2017 Available from: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.2.1.html

[561] Lino Briguglio, "Competition Law and Policy in the European Union-Some Lessons for South East Asia," [Online] Accessed: 15 January 2016. Available from: https://www.um.edu.mt/__data/assets/pdf_file/0007/177163/ASEAN_competition_law_and_policy_of_the_EU_031102.pdf , p. 1-2

[562] Treaty of the Functioning of the European Union (TFEU) Article 101 paragraph 1

[563] Treaty of the Functioning of the European Union (TFEU) Article 101 paragraph 2

the non-exhaustive examples of anti-competitive agreements, which constitute the violation of this article as follows:

"(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[564]

While this article provides the exemption in paragraph 3 to any agreements that contribute to improve the production or distribution of goods or to promoting technical or economic progress on the conditions that consumers are allowed a fair share of the resulting benefit and that the agreements do not impose unnecessary restrictions or aim to eliminate competition for a substantial part of the products in question[565]

The block exemptions to groups of similar specific agreements as specified in the Article 101, paragraph 3 are allowed in EU to lessen the administrative burden of the EU commission.[566] The *de minimis* principle is adopted in the EC competition law for certain agreements with minor importance and producing little impact on the market, which will not fall under the exemption, will not be regarded as infringement.

[564] Treaty of the Functioning of the European Union (TFEU) Article 101 paragraph 1

[565] Treaty of the Functioning of the European Union (TFEU) Article 101 paragraph 3

[566] Parliament, E., "Fact Sheets on the European Union: Competition Policy."

The rationale behind this is these minor important agreements are considered beneficial for cooperation between small and medium-sized enterprises.[567]

Article 102 Controls the Abuse of Dominant Positions

The conducts that constitute the abuse of dominant position whether by one single dominant firm or collective dominant firms within the internal market or in a substantial part is prohibited under the Article 102 if these abuse of dominance conducts affect trade between the EU Member States. A dominant position is defined as " a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers (Case 27/76, United Brands)." [568] In assessing what firms possess the dominant power and have the dominant positions or not must be considered in relation to the internal market as a whole or at least its substantial part. While other related factors must be taken into account, for example, the nature of the product, product availability, readiness to switch to alternative products and consumers' behaviors. The non-exhaustive examples of abuse of dominant position is identified in Article 102*.

Merger Regulation (Regulation (EC) No 139/2004)

Under the Article 2(3) of the Regulation (EC) No 139/2004, any concentration, which will significantly impede effective competition in the common market or in its substantial part must be declared incompatible with the common market. The EU adopts the pre-merger control since the

[567] The *de minimis* notice was recently revised in 2014 (2014/C 291/01).

[568] Parliament, E., "Fact Sheets on the European Union: Competition Policy."

* Treaty of the Functioning of the European Union (TFEU) Article 102 "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Commission must be notified of planned mergers. Furthermore, the merger may not be completed until the Commission has given its authorization.[569]

The emphasis of this Merger Regulation is on the concentration that create or strengthen the dominant position. What constitute the concentration with community dimension are clarified under Article 1 of this Regulation.

> "A concentration has a Community dimension where:
>
> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
>
> (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
>
> unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
>
> 3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
>
> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
>
> (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
>
> (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
>
> (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

[569] Article 7, Regulation (EC) No 139/2004)

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."[570]

The rationales behind the necessity of merger regulation and its close interconnection with the EU internal market are expressed as follows:

" For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market... Mergers are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community." [571]

The EU commission also issued the White Paper on ' Towards more effective EU merger control', in 2014 with the objective to enhance the combined effectiveness of the rules at EU level and at national level and indicate possible review of non-controlling minority shareholdings.[572]

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[570] Article 1, Regulation (EC) No 139/2004)

[571] Council Regulation (EC) No 139/2004 of 20 January 2004

[572] Parliament, E., "Fact Sheets on the European Union: Competition Policy."

[*] State aid or any support that are prohibited under the Article 107 includes all kinds of direct financial state-funded from public authorities of the EU Member States, including non-repayable subsidies, loans on favorable terms, tax and duty exemptions, and loan guarantees, preferential treatment that are likely to distort, competition and adversely affects trade between Member States.

[**] DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive)

Article 105 Mandates the Commission and Gives Extensive Investigation Powers

Article 106 Determines the Scope of Application to Include both Private and Public Undertakings with some Exceptions for Public Undertaking Operating of Service for General Public Interest

Article 107 Prohibits State-Aid or other Support from Government to Businesses, which Distort Competition[*].

It must be noted that unfair commercial practices appear to be related to consumer protection issue rather than competition law issue. There is no uniform European community rule on unfair commercial practices but it appears in the form of ' Unfair Commercial Practices Directive[* *] ' and ' GUIDANCE ON THE IMPLEMENTATION/APPLICATION OF DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICE' (2016)

The EU competition law is also supported by many regulations, directives and EU commission Guidelines, for example the guidelines of the European Commission states the position of the EU Commission and ensure that all jurisdictions adopt the same approach in applying community competition law.

While the domestic competition law in each EU member still have differences in some areas, there is higher convergence on both substantive and procedural competition laws in the EU members as a result of the alignment of domestic competition laws to community law.[573] The Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition in Article 81 and 82 of the Treaty helps creating more convergence by forcing national competition law applying to conducts affecting trade between member states in accordance with the EU competition law.[574]

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[573] Philip LOWE, Competition Cases from the European Union (London: Sweet&Maxwell, 2012).

[574] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321, 302

The Emerging Role of Economic Theory Influencing the Development of EC Competition Law

In the past, economic advice and theories had only marginal effect to competition cases. The Commission tended to rely on the analysis of the letter of law and neglect the economic analysis. The request of more economic analysis in the decision-making of the EU Commission was the big issue criticized by the EU courts.[575] With this pressure, the EU competition policy has started to rely more on economic theory since the late 1980s.

Employing the more robust economic analysis improvement can be clearly reflected in appointment of the Chief Economist position.[576] The introduction of Chief Economist position and his team in 2003 reflects the big step of realizing the important role of economic and advancing the economic analysis of EU competition cases. This new position helps providing the DG Commission with the guidance on economics and econometrics in the application of the EC competition rules. The economic guidance helps improving not only the economic analysis of decision making but also in the general competition policy development and related instruments.[577]However, the number of economist working with the DG Comp is still quite low comparing to the number of economists working with the US antitrust authorities.[578]

To sum up, the role of economic theory in the EC competition law has been moving toward the converging way as the US. It can be seen from the development of economic standards since the mid-1990s, which are similar to those applied in the US, including the market definition, vertical and horizontal agreements.[579]

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[575] McGowan, M. C. a. L., Competition Policy in the European Union. p. 216-217

[576] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International."

[577] McGowan, M. C. a. L., Competition Policy in the European Union. p. 217

[578] United States, "Annual Report on Competition Policy Developments in the United States," [Online] Accessed: 8 March 2017 Available from: www.oecd.org/dataoecd/53/15/2406946.pdf

[579] Kate, G. N. a. A. T., "Introduction: Antitrust in the U.S. And the Eu-Converging or Diverging Paths?," The Antitrust Bulletin , p. 17

Extraterritorial Application in the European Union

The EC competition law has been applied extraterritorially but the EU has employed different principles from the controversial effect doctrine to avoid the resistance from other trading countries.[580] Extraterritorial application under the EC competition law bases on the principle of 'single economic entity' and 'implementation approach'. [581] One of the rationales is the EU is one of many countries that criticized the wide scope of US effect doctrine. Consequently,

The economic entity was introduced in the *Dyestuff case*[*]. The court in this case ruled that non-EU parent company exercising its the power to control its EU subsidiary companies was considered as the allegation of illegal pricing fixing within the EC. Even though the EU subsidiary companies have separate legal entity from the non-EU parent company, the subsidiary companies follow, in all material respects, the instruction given by the parent company. These subsidiary companies did not decide independently upon its own conduct on the EU market. The ECJ; thus, declared these separate legal entities to be one and the same economic entity for the purpose applying competition law against the non-EU parent companies extraterritorially. The ability to hold all or the majority of the shares in those subsidiaries or able to exercise decisive influence over the policy of the subsidiary are the criteria showing that the parent company and the subsidiary should be treated as the single economic entity.[582]

[580] Rimantas Daujotas, "Extraterritorial Application of Competition Law: Different Angles – Same Conclusion," [Online]. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1866193.

[581]Wimonkunarak, S., "Enforcement of Competition Law in Globalized Economy: Limitations of Extraterritorial Application in Small and Developing Countries," Chulalongkorn J.S.D Journal. p. 1-9

[*] European Communities v. Imperial Chemical Industries, Ltd. 30 12 J.O. COMM. EuR. (No. L 195) 11,8 Common Mkt. L.R. D23 (1969), a J'd, 1972 C.J. Comm. E. Rec. 619, 11 Common Mkt. L.R. 557.

[582] Trevor C. Hartley, International Commercial Litigation (Cambridge University Press 2009)., p. 854

[**] A. Ahlstrom Osakeyhtid v. Commission Cases 89/85, 114/85. 116-117/85, 125-129/85

The implementation approach is another principle that the ECJ uses to exert its jurisdiction extraterritorially**.** The implementation approach was introduced in the *Wood Pulp case*[**]. The economic entity did not cover all possible situations that require the extraterritorial application of the EC competition rules. More comprehensive approach than the economic entity was required but the EC wanted to ensure that the solution had to be somehow different from the effective but controversial effect doctrine from the US. To this response, the European Court of Justice came up with the formulation of the so-called 'implementation approach'. Its principle is the concerted practice agreement had been implemented in the EU and therefore the EC competition law can be applied extraterritorially. The ECJ ruled that the parties to the cartel could not escape the prohibition of Article 85 by forming their agreements outside the EU. The agreement is still regarded as implemented in the EU resulting from the exportation of these wood pulp to the EU. [583]

To sum up, the EU avoid the resort of the US effect doctrine but rather introduced the two new principles; namely the single economic entity and the implementation approach in order to enable the extraterritorial application of its EC competition law.

4.2.4 Japan Antimonopoly Act

The Structure of Japan Antimonopoly Act

According to the Japan Antimonopoly Act or AMA, there are four main prohibitions as follows:

1. the prohibition of unreasonable restraint of trade, for example cartels and bid rigging

2. the prohibition of private monopolization

[583] Ibid. p. 857

3.the prohibition of unfair business practices, including refusal to deal, boycotts, sale below costs, exclusive dealing, tie-in, excessive premium offering, false advertisement.

4. regulations on business combination: mergers and acquisitions

This study found that Japan takes the more lenient approach in dealing with merger comparing to US and EU.

The JFTC seems to take the lenient view towards the merger control. Some comment that the JFTC accepts commitments or conditions that unlikely to ensure that competition problems will be corrected. The JFTC also seldom issues the formal decision rejecting merger. Instead, the JFTC takes the advantage of the pre-notification consultation procedures to indicate problematic transactions and negotiates corrective measures. In practice, if the JFTC found the problematic merger, it will inform its concerns, the merging parties then will either correct the problem or abandon their plans.[584]

These four prohibitions under the AMA are common prohibitions that are conforming to the international best practices of competition law prohibitions. However, there are some unique regulations in Japan created to solve specific problem in Japan. This includes the measures to monopolistic situation created to destroy and prevent the potential bad effects from highly oligopolistic industries in Japan. While the limitations on the aggregated amount of stock held by big firms are designed to prevent excessive concentration of power. Another unique provision is on the requirement of reporting reasons of parallel price increase.[585]

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[584] Deirdre Shanahan, "The Development of Antitrust in China, Korea and Japan' (International Competition Law: Real World Issues and Strategies for Success June 16-17, 2005 Montreal, Canada) " [Online] Accessed: 8 February 2017 Available from: https://www.ftc.gov/system/files/attachments/key-speeches-presentations/shanahanmontreal.pdf, p. 3-5

[585] Akinori Yamada, "Japan: The Anti-Monopoly Law," Journal of International Business and Law (1997)., p. 461

Beyond the AMA, the JFTC has promulgated a lot of guidelines and policy statements to make public better understand the goal, content and interpretation of AMA as well as the JFTC's enforcement policy.[586]

The Gradual Development of Japan Antimonopoly Act through Many Law Amendments

The Antimonopoly Act was not perfect since its enactment. There has long been developed many times through law amendments. This part will examine the experience and to what extent Japan developed its competition law to be a lesson learnt for ASEAN.

The Antimonopoly Act (AMA) was enacted in 1947 after the World War II during the Japan' s big political and economic reform. The AMA is aimed to create fair competition environment with the level playing field for all market players. The Japanese market was perceived by foreigners as difficult to penetrate because it was dominated by *' zaibatsus'* , which were " the very large industrial conglomerates composed of many enterprises engaged in various industries controlled by a head company and linked through mutual stock holdings and interlocking directorates" [587] Japan appeared to promote monopolistic system.[588]Hence, the AMA has an objective to bring about the free and fair competition in Japanese market and dismantle the *'zaibutsus'*.[589] The AMA was highly influenced and modelled after the US antitrust law: the Sherman Act, Clayton Act and the Federal Trade Commission Act. During the early life of the Antimonopoly Act, there were some provisions that were not appropriate and then leaded to the law amendments. Some provisions appeared to be more stringent than the US model law.[590] These stringent provisions were incompatible in the Japanese society at that time. The goal of AMA seems to be too ambitious for the

[586] JFTC, "Legislation&Guidelines," [Online] Accessed: 18 February 2017 Available from: http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.html

[587] Matsushita, M., International Trade and Competition Law in Japan. p. 76

[588] Mitsuo Matsishita, "The Antimonopoly Law of Japan," [Online]. Available from: https://piie.com/publications/chapters_preview/56/5iie1664.pdf , p. 151

[589] Oda Hiroshi, Japanese Law (Oxford: Oxford University Press, 2009)., p. 327

[590] Ibid. p. 328

Japan at that time. This was why in 1953 right after the end of the occupation period there was a sudden amendment of the AMA to relax some provisions.[591] This could provide the valuable experience to ASEAN that adopting the whole foreign model of competition law and their approaches, which are seemed to be good might not appropriate in the context of ASEAN.

There was the dark age of the Antimonopoly Act where the industrial policy was over competition policy and law. The Ministry of International Trade and Industry (MITI) encouraged cartelization and there was the introduction of enormous competition law exemptions. These significantly reduced the role of competition policy and law in Japan. The enforcement of the AMA was also weak for the first twenty years of its application.[592]

In order to improve the role of competition law in Japan, the JFTC played an important role by employing many strategies. The JFTC resorted the situation where there was the pressure from the US and other countries requiring Japan to open and encourage more competitive in Japanese market in setting the long-term advocacy plan to all stakeholders, particularly the Japanese government and businesses. The task force was also introduced during the continuous rising of consumer prices resulting from price fixing cartels and resale price maintenance.[593] These situations in Japan and the JFTC' s efforts finally produced the positive outcomes by raising more competition awareness from consumes and government. The JFTC took theses opportunities to review the necessity of the exemption system. This resulted in the gradual reduction of the number of competition law exemptions over time. With the support from the Japanese government, there were many measures implemented to strengthening the competition regime in Japan, including strengthening the role and capacity of the JFTC as the main enforcement authority and able to effectively promote competition policy.[594]

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[591] Alex Y. Seita and Jiro Tamura, "The Historical Background of Japan's Antimonopoly Act," University of Illinois Law Review(1994). p. 167

[592] Vande Walle and Tadashi Shiraishi Simon, "Competition Law in Japan," [Online] Accessed: 1 January 2015. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219881

[593] Kameoka Etsuko, Competition Law and Policy in Japan and the Eu (Edward Elgar Publishing, 2014)., p. 15

[594] Shanahan, D., "The Development of Antitrust in China, Korea and Japan' (International Competition Law: Real World Issues and Strategies for Success June 16-17, 2005 Montreal, Canada) ", p. 3-5

The lists of development in the Antimonopoly Act are as follows:

- The incorporation of a leniency program
- The introduction of surcharge payment system in accordance with statutory standards to confiscate cartelists' extra profit
- The introduction of compulsory investigatory powers – a search warrant power
- for criminal investigations where a criminal accusation is being pursued.[595]
- Structure Control: divestiture order against monopolistic businesses
- Increase in criminal penalties
- The use of maximum criminal fines
- Price-reporting system requiring the reasons behind the simultaneous price increase in oligopolistic market and supporting data

Extraterritorial Application in Japan

Under the AMA, there is no direct provision about extraterritorial application. However, the effect doctrine is adopted in Japan as the international customary law. Thus, the AMA can be applied extraterritorially.[596] It is not necessary to amend the competition law to explicitly allow the extraterritorial application of competition law in Japan. This Japan' s approach is used for the effective application of its competition rule in international dimension cases without amending its Anti-Monopoly Act. The effect doctrine is now regarded as the international customary law that countries can be adopted into its national legal system.

[595] Ibid. p. 3-5

[596] ศักดา ธนิตกุลและคณะ, รายงานฉบับสมบูรณ์โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 หน้า 11.

4.2.5 The Similarities between the US, EU and Japan's Approaches in Developing Competition Law

Similarity in the Main Objectives of Competition Laws

The first similarity appears in the general objectives of competition laws in these jurisdictions, which commonly aim to create the free and fair competition and consumer welfare. Although there are some distinctions in any other objectives that each competition regime wants to pursue to reflect its own national interest and economic, social and political aspects, including market integration, SMEs protection, level up employment and productivity growth.

US and EU Treat Hardcore Cartel as the Serious Anti-Competitive Conducts and Imposing the *per se* Rule on Hardcore Cartels

Both US and EU jurisdictions treat hardcore cartels the most harmful conducts as reflected in the EU and DOJ officials' speeches.[597] Both jurisdictions impose some form of strict liability or per se on hardcore cartels. However, the scope and exceptions of this strict liability may be different among these two countries, which are the detailed of their competition rules. Regarding the US, the hardcore cartels are treated as very serious and harmful conduct. The Supreme court labelled cartels as "the supreme evil of antitrust*". Price fixing, bid-rigging, output fixing, market allocation and boycott are per se illegal.[598] Whereas the EC Treaty has been interpreted to hold that price fixing and boycott conduct are per se illegal**. This afore-mentioned similarity is supported by the view of William E Kovacic. He observes a significant convergence between the substantive laws of the US and EU in the treatment of cartels.[599]

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[597] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International.", p. 9

[*] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

[598] Jacqueline Bos, "Antitrust Treatment of Cartels: A Comparative Survey of Competition Law Exemptions in the United States, the European Union, Australia and Japan," [Online]. Available from: http://openscholarship.wustl.edu/law_globalstudies/vol1/iss1/16

[**] See Competition Rules Relating to Horizontal Cooperation Agreements, 2000 O.J. (C118)

[599] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International."

Whereas the situation is different in Japan because there is no distinction made between hardcore cartels and others less harmful cartels in the AMA. In Japan, cartels are in the scope of Article 2(6) 'unreasonable restraint of trade'. The concept of hardcore cartels is not clarified under Japanese competition law. In principle, the JFTC must be required to prove that cartel has caused a substantial restraint of competition in any particular field of trade.[600]

More Convergence between the US and EU on Horizontal Merger

The US and EU used to face the divergence in their merger reviews, which cause significant effects to multinational firms that operate in both the US and EU, including the landmark case like the GE/Honeywell Merger Case*. Therefore, the effort had been put to create more convergence between two big economic markets. The convergence of horizontal merger between the US and EU results from the long cooperation between both jurisdictions in merger review. The revision of the merger guidelines in both the US and EU during the late nineteenth century to the beginning of twentieth century produced the extensive convergence on merger analytical framework.[601] The key reform of the EC merger regulation, which revising the EC substantive standard of merger review, is made very similar to the standard of the US. Moreover, in 2004 the 'EC Horizontal Merger Guidelines' contains the similar elements and analytical approaches to the 1992 'DOJ-FTC Horizontal Merger Guidelines'.[602]

[600] ICN, "Cartels Working Group Subgroup 2: Enforcement Techniques, Japan" [Online] Accessed: 15 November 2015. Available from: http://www.jftc.go.jp/en/policy_enforcement/cartels_bidriggings/anti_cartel.html

* Filling for merger between General Electric Co. and Honeywell International Inc.

[601] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International.", p. 10

[602] Pamela Jones Harbour, "Developments in Competition Law in European Union and the United States: Harmony and Conflict," [Online] Accessed: 11 October 2016. Available from: https://www.ftc.gov/sites/default/files/documents/public_statements/developments-competition-law-european-union-and-united-states-harmony-and-conflict/051021competitionlaw.pdf , p. 20

Some Similarities between the US and Japan in the Substantive Competition Laws

The substantive laws of the US antitrust law and the Japan Anti-Monopoly Act (AMA) are roughly similar. This is because the introduction of the AMA was mainly from the political-economic agenda during the US-led Allied Occupation Forces, which governed Japan after the end of the World War II. With the high influence from the US, the content of the AMA was highly based on the the US Antitrust law; Sherman Act.[603] There is a metaphor that the AMA is the Japan's Sherman Act. However, after some amendments in the AMA, the competition law in Japan begins to reflect and response more of the internal necessity and situation of Japan. Furthermore, remedy and sanctions between the US antitrust laws and the AMA are different. Japan has no treble damage like the US. [604]

The Ability to Apply National Competition Law Extraterritorially of the US, EU and Japan

The US, EU and Japan are all have extraterritorial application in their competition laws. These jurisdictions realize that limiting the enforcement only to their national borders are no longer suitable for the business world nowadays. Business transactions are cross-borders with the more important role of big multinational firms. Extraterritorial application is; thus, regarded as the beneficial tool for dealing with foreign anti-competitive conducts, which affect internal market and economy. The US and Japan commonly rely on the effect doctrine for enabling the extraterritorial application in competition laws. While the EU avoided the adoption of the US style of effect doctrine and chose to create the new principles, which are the single economic entity and implementation approach for enabling the extraterritorial application of the EC competition rules.

[603] Brendan Sweeney, Giving Content and Effect to Competition Rules: Contrasting Australia and Japan in Regulation in Asia: Pushing Back on Globalization Edited by John Gillespie, Randall Peerenboom (Taylor&Francis e-Library, 2009)., p. 98-101

[604] Ibid. p. 98-99

Somebody believes that there is no significant difference between the US effect doctrine and the EU implementation approach because they sometimes render the similar result. The main discussion is on what constitute implementation in the EU, which is still unclear until now. On the other hand, the others believe that although the implement approach might deliver a similar result to the US effect doctrine, it has narrower scope than the US effect doctrine.[605] There is no settled agreement on this issue.

It seems to me that the implementation approach from *Wood Pulp* case is different from the effect doctrine's approach because it has more limited possibility in establishing jurisdiction comparing with the effect doctrine, particularly the hard line of effect doctrine. The implementation approach emphasizes the requirement that the conduct must *directly* affect the Common Market in the *Wood Pulp case*. The court interpreted the direct effect in the *Wood Pulp* case that a defendant must be in somehow a party to actual sales to an EC purchaser. Furthermore, the EC is quite worried about following the US effect doctrine. The ECJ tends to employ the alternative measures. This can be seen from the ECJ's unwillingness to adopt the effect doctrine and compelled to comply with recognized principles of international law. Moreover, the EU used to criticize the broad scope of the US effect doctrine so it will be awkward if the ECJ itself accept and follow the rule of the effect doctrine.[606]

The Important Role of Economic Analysis in the Application of Competition Laws in the US and EU

Comparing the role of economic theory in the US, which has longer history and development, the role of economic theory in influencing the EC competition is not as significant as the US. However, there has been a significant growing in the economic sophistication of EC competition law' s application and enforcement with more consultation with economists. Another indication appears in the establishment of the

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[605] Wimonkunarak, S., "Enforcement of Competition Law in Globalized Economy: Limitations of Extraterritorial Application in Small and Developing Countries," Chulalongkorn J.S.D Journal. p. 1-9

[606] Ibid. p. 1-9

chief economist team in the DG Comp, which significantly increases the number of economists. It seems to be that the EC is converging with the US approach enabling influential role of economic theories in competition cases. The Commission and the courts have played an important role in enhancing the role of economic analysis in European Union, which is similar to the US experience. The Commission incorporates the economic analysis in its decisions and through the amendment of the statute to allow more economics friendly implementation. The role of economic theories also appears in soft laws. While the courts reviewed the economic analysis of the Commission in many well-known cases; *Airtours, Tetra Laval/Sidel, GE/Honeywell and Schneider/Legrand*.[607]

In conclusion, the EU is following the US pathway in recognizing and relying more and more on the economic analysis for the application of competition law. Even though the role of economic analysis influencing the EC competition law is right back behind the longer developed US antitrust system, these two jurisdictions are taking the same pathway by allowing the economics playing the influential role in their competition systems.

4.2.6 The Distinction of Approaches taken in the US, EU and Japan in Developing Competition Law

The main distinctions between competition laws of the US, EU and Japan are the differences on the abuse of dominance and non- horizontal agreements, procedural laws, philosophy and analytical techniques.[608] This dissertation will raise only key substantive law distinctions, which are relevant to the objective of this dissertation.

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[607] Damien J. Neven, "Competition Economics and Antitrust in Europe'competition Economics and Antitrust in Europe," [Online] Accessed: 8 March 2017. Available from: http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf

[608] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International.", p. 11-13

Rationales behind the Introduction of Competition Law

The preliminary distinction is from the root and rationales behind the introduction of competition law in each jurisdiction. The rationales for the introduction of competition law of each jurisdiction will affect the content, design and priority of competition law. Unlike the US and EU, which initiated competition laws to response their internal problems and foster common market in the EU, Japan was, in mark contrast, forced to introduce competition law after the end of the World War II as a result of the big political and economic reform under the supervision of the Occupational Forces, mainly under the influence of the US. The principle of initial Japanese competition law was very stringent. Some scholars believe that the provisions of the AMA in the early period were more stringent than those of the US, which was adopted as the main model. The competition concept under the AMA in the beginning period was contrast to the traditional Japanese belief system of ideal business environment.[609] Therefore, the application of the AMA and its enforcement at the beginning are not as smooth and effective as the other two jurisdictions.

Although the rationale behind the introduction of competition law in Japan was from external pressure, this does not destine that the AMA will fail or being unsuccessful. It instead depends on the later development of competition law. The AMA have gone through many developments to make it suitable for the Japanese context. Until now Japanese competition regime is regarded as one of the developed and matured competition regimes, which is adopted as the model law for other countries.

[609] Tamura, A. Y. S. a. J., "The Historical Background of Japan's Antimonopoly Act.", p. 167

US's Anti-Monopoly Model v EU's Abuse of Dominance Model

The US is the main model law for the prohibition of monopolization. While the EU chose the different approach from the Sherman Act when drafting its competition law. The reason behind is the view that the structural control under the prohibition of monopoly or market dominance per se might not be appropriate because in somehow the attempt of firms to acquire market power can be a force to create dynamic competition environment. Therefore, the prohibition of abuse of dominance was created for the first time in the EU. Merely having the status of dominant firm does not violate the EC competition law; the Treaty on the Functioning of the European Union, Article 102. The dominant firm must abuse its dominant power so it will be considered the violation of the EC competition law. The concept of abuse of dominance was vague in its application since it was never tested in any other jurisdictions. However, now it has been proved that the abuse of dominance is the successful model law for other jurisdictions. Many ASEAN countries adopted this model, including Thailand and Singapore.

Furthermore, the approaches taken by the US and EU in this unilateral conduct is also different. It is best reflected in Microsoft case and British Airways case. 610The EU court seems to be more stringent in the analysis of abuse of dominance than the US rendering the more liability to the dominant firms than the US decisions. The US took the Chicago School of economic approach while the EU prefers the Post-Chicago School.

The percentage of market share indicating the dominant position between the EU and US is different. In the European Union, the finding of possessing dominant position can occur at or below 40 per cent of market shares. While the equivalent US offence, which is the attempt monopolization, usually regards firms having below 50

[610] Harbour, P. J., "Developments in Competition Law in European Union and the United States: Harmony and Conflict.", p. 22

per cent of market shares as having inadequate substantial market power.[611] The US does not have an equivalent prohibition on excessive pricing like appearing in the EC competition law in Article 82.[612]

One rationale behind the different degrees in the treatment of the unilateral conducts between these two matured competition jurisdictions can be reflected in the different socio-political backgrounds of the US and EU. The US seems to take more lenient approach towards monopolization or attempt to monopolization, which is consistent to the 'American Dream', which is the socio-cultural value in the US*. Therefore, the US approach towards the unilateral conduct is more lenient comparing to the more intervening approach taken by the EU.[613]

It must be noted that the US model and the EU model are both widely adopted by other competition regimes. It cannot compare which model is superior than the other model. It depends on what countries views which model is more appropriate to their countries' specific context.

[611] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International.", p. 11

[612] Ibid. p. 11

[*] American dreams refer to the American individual entrepreneurial dream to success and wealth.

[613] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 14

4.2.7 Analysis of Main Elements in Competition Laws and Approaches to the Development of Competition Law

The Adoption of the Foreign Model Law to Improve Competition Law in ASEAN Member State

This part will examine to what extent the US, EU and Japan model laws can be adopted in the context of ASEAN and ASEAN Member States. Whether distinctiveness of each model law is suitable for most developing countries in ASEAN or not will be analyzed in this part.

The US model of antitrust law was based on the American robust market function and mechanism without the history of SOEs like most of ASEAN Members States. Therefore, there will be no problem about the SOEs like generally found in most of ASEAN member states. The size of US economy is the big industrialized country, which is totally different from all ASEAN countries. The other important thing that should bear in mind is the US antitrust law has long been developed. It is thus difficult to imitate the US successful antitrust system since there are many factors behind its successfulness, including but not limited to strong competition policy, economic influence, effective competition enforcers and strong competition culture among the US citizens.

The important lesson that ASEAN can learn from the US is the advanced substantive law analytical approaches for ASEAN with the significant influence of economic theories. The US also invented many investigation techniques and tools to enhance its enforcement, for example the leniency program.[614] Another point to consider is the US pursues the aggressive enforcement against hardcore cartels with the use of criminal sanction, including imprisonment of executives of companies, which is considered the strong deterrence. While some AMSs have just recently developed

[614] William E. Kovacic, "Competition Policy in the European Union and the United States: Convergence or Divergence?," [Online] Accessed: 11 March 2017. Available from: https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf, p. 4

towards more market-oriented economy and some in transitional stages. Some ASEAN members do not have criminal sanction for the violation of substantive competition law, for example Singapore. The US enforcement of cartel is highly enhanced by the creation of the leniency program, which is proved to be highly successful in creating more incentive to reveal the US competition agencies about the existing cartels. However, not every ASEAN members adopt the leniency program. The antitrust enforcement in the US is highly effective both through the public enforcement and private enforcement. The private enforcement in the US is uniquely advanced because of the award of treble damages; punitive damages and unique discovery rules, which is facilitate the gathering of evidence far more than any other jurisdictions. Thus, the private suit is commonly found in the US because of good incentives and high chances to win. In mark contrast, some AMSs do not allow the private suit or allow with some limitations. In ASEAN, there is no high incentive to bring the private suit like in the US. Some AMSs do not have the effective enforcement of competition law and face many constraints within competition authorities, including the lack of resources, expertise and experiences.

Regarding the prohibitions on monopolization, the US seems to be less intervention because the US has the assumption that the market force achieves an efficient outcome. This assumption is different from the reality of the ASEAN situation. However, it does not mean that the US model law and its approaches should not be applied to ASEAN. ASEAN should learn from the experiences of the US and choose to apply some approaches in the way that suitable for the ASEAN context, for example the introduction of leniency program to increase the possibility to catch hardcore cartels. If the public enforcement of competition law does not work well enough or have overloaded cases; thus, private enforcement should be unlocked or more encouraged to fulfill this task by easing the procedures to bring the private suit and facilitating evidence gathering process as well as providing some incentives for

damaged parties to sue. Granting punitive damages or allowing the class actions are all the factors that can encourage the private suit in ASEAN.

Whereas adopting the EU model seems to be better fit in the context of most developing countries in ASEAN in terms of having provisions to control anti-competitive conducts of state acts, which the US model does not have one.[615] The EU Member States used to have state- owned enterprises and undergone the process of privatization even long time ago but the situation was more similar to the ASEAN than the US that have no state role in the market. The EU use competition policy to pro-open market, which is similar to the objective of ASEAN single market. The EU competition law is the prominent model for the prohibition of abuse of dominance that many countries follow. The simple possessing dominant position is not prohibited by the law. There must be the abuse of its dominant position. It is not the structural control like the US prohibition on monopolization. Therefore, the conduct control of the EU abuse of dominant position model is more suitable for many AMSs that currently have monopoly markets and oligopoly markets in some sectors. The structural control to dismantle the monopoly market will receive abundant resistance from private sectors and SOEs and GLCs. The vested interests tend to lobby the government to not adopt the draft law. Thus, adopting the abuse of dominant position, which base on conduct control is more compatible with the ASEAN context and consistent with what recommended in the Guidelines. Furthermore, the EU model of competition law (administrative enforcement) is more compatible with the institutional platforms of most civil law legal system in developing countries than the US adversarial prosecution model.[616]

[615] Ibid. p. 67

[616] Ibid. p. 4

While the Japanese model of competition law was originally influenced by the US antitrust law model. It was later developed and amended many times to fit the context of Japan economic system. The AMA started to develop in the way that conforming to the need of the Japanese society during the 1953 amendment when the unfair business practices provision was strengthened rather than following the US imposed model of antitrust law.[617] The interesting element of the Japanese model is on the administrative surcharge. The AMA enables the JFTC to impose the administrative surcharge on enterprises, which participate in cartel activities. This administrative surcharge has been increased to combat the cartel participation rather than the use of criminal sanction. It has proved to work well in Japan. Therefore, the use of high administrative surcharge is interesting to be applied in the context of some AMSs that have no criminal sanction for competition law violation. The high rate of administrative surcharge can lower the incentive of cartelists in the cartel participation by making it not worth to participate in the illegal cartels.

Extraterritorial Application Helps Improving More Effective Enforcement towards International Competition Cases

Extraterritorial application is an important tool to deal with competition cases with international dimension for the more effective enforcement of competition in the globalized era. Extraterritorial application broadens the application of national competition law. It extends the jurisdiction beyond the state boundary. In the absence of the global competition law, extraterritorial application is one of the main tools that states choose to tackle foreign anti-competitive conducts.[618] The US, EU and Japan all adopt the extraterritorial application in their competition laws. They use extraterritorial application to stop cross-border anti-competitive conducts and seek for damages.

[617] Matsushita, M., International Trade and Competition Law in Japan. p. 81

[618] Sweeney, B., "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?", p. 36

However, the US and EU are powerful developed countries so the ability to exert extraterritorial application is higher comparing with the small and developing countries like most of ASEAN Member States. This leads to a question whether extraterritorial application in competition law can be applied effectively in small and developing countries like the powerful countries; the US and EU. Most developing countries with small size of economy like most of ASEAN Member States have commonly face some significant factors that undermine the effectiveness of extraterritorial application. The application of competition law extraterritorially in the national competition laws of ASEAN Member States tends not to be as effective as the big industrialized jurisdictions. Although there is the legal clarity in competition law about extraterritorial application, there are some limitations of small and developing countries in asserting extraterritorial application, which come from practical problems concerning economic consideration and practical constraints.[619] These constraints includes the difficulty in creating a credible threat of competition law enforcement and lower level of fines comparing with the large economies resulting from the use of turnover level only in their small jurisdictions as a base.[620] Moreover, criminal sanction, particularly imprisonment is not the credible deterrence because is hardly possible to get the violators without extradition treaty.[621] While the economic costs of enforcement are quite high. According to Gal, the tendency of low level of enforcement rates among developing countries might not badly affect the big firms when comparing to the benefits they may receive from participating in anti-competitive conducts. Difficulty in collecting evidences are another constraint. Gathering evidence abroad is time-consuming and has a high cost. Foreign witnesses rarely give the voluntary cooperation with other jurisdictions' competition agencies. Another common constraint is about the limited and inexperienced human resources and budget

[619] Michal S. Gal, "Antitrust in Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions," Fordham International Law Journal 2(2009). p. 12

[620] Ibid. p. 33-34

[621] Sathita Wimonkunarak, "Enforcement of Competition Law in Globalized Economy: Limitations of Extraterritorial Application in Small and Developing Countries," Chulalongkorn J.S.D Journal. p. 1-9

constraints make it more difficult for immatured competition agencies in small and developing countries to deal with international cases even they have sound cases against big multinational firms. [622] Finally, it is difficult to enforce the judegement abroad without the recognition of foreign judgement treaty. Divergence between the competition laws in the country, which the enforcement is sought, and the foreign judgment could lead to the blocking of such enforcement. [623] Enforcing monetary sanctions against foreign firms in case they already have assets within the affected jurisdiction is not difficult comparing with the resort of enforcement abroad. It can be seen that enforcement will be effective or not depends on how many assets the defendants have in the jurisdiction. This is the reason why this dissertation concludes that the US and the EU will have higher rates of success in the extraterritorial application comparing to other small and less developed countries in the South-East Asia

To sum up, the differences between the size of jurisdictions and economic development affect the effectiveness of exerting the extraterritorial application of competition law. Therefore, the effectiveness of extraterritorial application varies in different countries.

Although there are some constraints in the application of competition law extraterritorially, it is still considered the important element that can enhance the more effective enforcement in international competition cases among ASEAN Member States. It is better for AMSs to allow the extraterritorial application of national competition law than tolerating the competition law infringement without the capability to do anything to stop the harm.

[622] Michal S. Gal, "Antitrust in Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions," Fordham International Law Journal. p. 34

[623] Sweeney, B., "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?", p. 113

The Influential Role of Economic Theories and Analysis in the Application and Enforcement of Competition Laws

Sound competition law should be based on sound economic analysis. This is a lesson learnt from the two matured competition systems, namely the US and EU. The economic theories and analysis play an influential role in the development of the US antitrust laws. The interpretation and enforcement of the US antitrust laws are based on the sound economic analysis so it can function as the economic constitution of the US' economy. There are separated economic divisions in both the DOJ and FTC with the sufficient specialized economists to facilitate the economic analysis in competition cases. The EU also follow the pathway of the US by realizing more and more on the role of economic analysis in the application and enforcement of the EU competition cases. This can be seen from the pressure of the EU courts to the EU Commission to incorporate more economic analysis in its decisions. The introduction of the Chief Economist and his team to provide economic guidance to EU Commission can reflect the importance of economic role in the EU competition system. To summarize, economic analysis should be incorporated in the interpretation and decision-making of competition laws.

4.3 Approaches Taken to Overcome Impediments Concerning Enforcement Mechanism

4. 3. 1 International Best Practices and Recommendations to Enhance Enforcement Mechanism and Solve Institutional Constraints within Competition Agencies

OECD RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS[624]

This OECD recommendation urges OECD members to ensure that their domestic competition laws can effectively deter hardcore cartels, particularly imposing effective and adequate sanctions to deter the participation of cartels. The procedures and competition agencies should be equipped with enough legal power to investigate, detect and impose penalty on hardcore cartels. Furthermore, this recommendation encourages members to cooperate and coordinate with each other in combating hardcore cartels, including though consultation, cooperation agreement and positive comity request.

OECD: Policy Brief: Using Leniency to Fight Hard Core Cartels[625]

The leniency program is necessary to incentivize cartel participants to blow the whistle and reveal the cartels. Having the leniency program is not difficult but how to make it work and effective is far more important. Therefore, this OECD document provides the key factors that facilitate the effective function of the leniency program. First, it is necessary to provide the clear and reliable promise of amnesty for the first cartel conspirator that comes forward to competition agency. If the amnesty is unclear or required interpretation, it will be difficult to incentivize cartelists to join the leniency program. Thus, benefits of participating the leniency

[624] OECD, "Recommendation of the Council Concerning Effective Action against Hard Core Cartels," [Online] Accessed: 14 December 2016. Available from: https://www.oecd.org/daf/competition/2350130.pdf

[625] OECD, "Policy Brief: Using Leniency to Fight Hard Core Cartels," [Online]. Available from: http://www.oecd.org/daf/competition/1890449.pdf

program should be clear and higher than benefits of remaining in the cartels. Imposing the penalties on individuals may be another motive for joining the leniency program. The US used to experience the unattractive leniency program because granting the unattractive general offer, which could not incentivize firms to blow the whistle. This leaded to the big revision in the US leniency program. The risk of tough penalties and the increase of penalties highly incentivize cartel participants to the race of blowing the whistle and joining the leniency program. The strict protection of confidentiality is necessary to protect witnesses and information under this leniency program. Therefore, there should be the strong protection of any confidential information submitted in this program. Otherwise, the lenient applicants might risk the liability in other countries or retaliation. These risks can bar the potential applicants in joining the program.

OECD: Report on Leniency Programmes[626]

The key factors for an effective leniency program are a high degree of predictability, transparency and certainty. Low burden of proof, heavy penalties imposed on hardcore cartels and an emphasis on priority are also important for effective leniency program.

ICN: INTERACTION OF PUBLIC AND PRIVATE ENFORCEMENT IN CARTEL CASES[627]

This ICN documents states the role of private enforcement as it complements the public cartel prosecution. The private enforcement itself also brings about the deterrence. Private enforcement applying in parallel with the public cartel enforcement can bring more and more deterrence. Competition principle and competition culture can be strengthened through private enforcement. The competition authorities benefit from the private enforcement through more

[626] OECD, "Report on Leniency Programes " [Online]. Available from: http://www.oecd.org/LongAbstract/0,3425,en_2649_40381615_2474436_119666_1_1_1,00.html

[627] ICN, "Interaction of Public and Private Enforcement in Cartel Cases," [Online] Accessed: 3 March 2017. Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf

concentration of limited resources on more significant cases with higher economic impact. The level of private enforcement will be high or low depends on the degree of competition awareness and the revision in the law for more encouragement in bringing private action, particularly the procedural evidence requirement. In most ICN members for hardcore cartel enforcement, the lawyers generally advice their clients to wait for the outcome of public enforcement or contact competition authority because it is equipped with investigatory power; thus, more capable of proving hardcore cartel infringement.

OECD: THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT[628]

The key relationship between the public and private enforcement is mutual reinforcement effects between the public and private enforcement of competition law to support effective compliance of competition law despite their different objectives. The public enforcement aims to serve public interest while the private enforcement aims to compensate damages to the private suffered parties form the violation of competition law. Private enforcement also positively complements the public enforcement by strengthening deterrence by empowering the suffered parties to bring an action to anti-competitive behaviors directly. The active private enforcement produces some effect to increase more incentives to join the leniency program. Public enforcement also facilitates the private action by helping suffered parties to easier bringing the lawsuit by using the findings, evidences collected and established infringement of competition agency to prove the causation and damages suffered. Many countries allow competition agency to give non-binding opinions to the courts about the amount of damages or act as *amicus curiae* during the court proceedings. Therefore, it can be seen that public and private enforcement reinforce each other. It must be noted that encouraging private enforcement is not wrong but the right

[628] OECD, "The Relationship between Public and Private Antitrust Enforcement," [Online] Accessed: 18 August 2016. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&doclanguage=en

balance need to be struck not to make private enforcement adversely affect the main public enforcement, particularly undermining the on-going investigations or leniency settlement program through the granting access of evidence for the merit of private enforcement. The way to lessen the risk of undermining the public enforcement is categorizing the types of information that can be revealed for private action and the type of information that should be kept in confidential. Putting the judges some responsibility to consider the allow or disallow the use of information on the case-by-case basis is another approach. If public and private enforcement are launched in parallel, it will be possible that court proceedings can be co-ordinated with public investigations. For the sake of undisturbed, efficient public enforcement, it might be required to a stay of private proceedings. Furthermore, the decisions of both public and private enforcement should be consistent.

The US is the best example of jurisdiction with long-standing tradition and intensity of private enforcement. More countries are considering adopting measures to promote more vigorous private enforcement. However, there is no one-size-fit-all for private enforcement system. Factors determining the effectiveness of the private enforcement is adequately incentivizing suffered parties to bring the lawsuits, providing easier access to evidence, having binding effect to final infringement decisions and finally imposing clear and sufficient limitation periods to bring the private suit. Having the punitive damages whether double or treble damages and the allowance of class actions to collectively bringing lawsuit to minimize legal costs are the approaches taken to promote private suit. Some jurisdictions have employed the opt-in and opt-out collective redress mechanisms. Then allowing suffered parties, which are consumers to assign their claims to an association that will file a complaint on their behalf is another encouraging factor. The limitations of private enforcement are identified as the complexity of damages claims, the partial unsuitability of general civil procedure rules to private competition claims and the application of general rules based on fault requiring the high burden of proof of the fault of the defendant, the existence of damages, which must then be quantified, and a causal link between the

competition law infringement and the damages. These burdens of proof are rooted in the application of general rules that does not appropriate to the particularities of competition claims. The competition cases are characterized as fact-intensive and it is extremely difficult for claimants, especially consumers, to get all the necessary information and evidences to successfully demonstrate the claims before the courts. Most of information consumers required to prove the private claims is generally in possession of the defendant. Without the coordination from competition authority or expansive discovery rules, it is quite difficult to get the necessary information to win the case. Some information is confidential; thus, is prohibited from disclosure.

Finally, time- consuming private enforcement proceedings, cost intensive, uncertain about the outcome and subject to tight limitation periods are relevant factors that obstruct the effective private enforcement system.

ICN: Agency Effectiveness: Strategic Planning and Prioritization[629]

Strategic Planning

Good practice of competition agency is having strategic planning. The strategic planning is making articulated about the missions, legislative mandate and set the expected outcomes that consistent with the competition agency's resources. The set of strategic planning should be on the specific duration and ensure that the missions could be accomplished within the timeframe. After the set of strategic planning, it is necessary to communicate it to all staffs and public. The implementation process of strategic planning is also important. It is necessary to evaluate the progress and achievement of the strategic planning on a regular basis. It is also beneficial to point out the constraints whether in terms of legal, institutional constraints that may impede the goals of strategic planning.

Prioritization

[629] ICN, "Agency Effectiveness: Chapter 1 Strategic Planning and Prioritisation," [Online] Accessed: 7 March 2016 Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc744.pdf

Prioritization is a process of deciding whether to grant priority to an individual project or not. The set of prioritization can be varied from one competition agency to another. The prioritization should fit and consistent with the agency's strategic planning. Prioritization should be reviewed periodically and communicated to all staffs and publicized to the public. Many factors that should be taken into account before setting the priority, for example the potential impact of a project on consumer welfare or the economy, particular sectors of the economy and the likelihood of success in the case or project.

International Best Practices and Recommendations from the OECD/ ICN/ UNCTAD to Solve Institutional Constraints

UNCTAD: Foundations of an Effective Competition Agency[630]

The 'effective competition agency' is defined as the competition agency that can fulfill its objectives by the appropriate use of resources. There are many factors determine the effectiveness of competition agencies that can be used in both developed and developing countries are:

- institutional design
- setting the clear objective
- setting the prioritization
- appropriate resource allocation
- environment where the competition agency being placed
- empowering with adequacy of investigative and enforcement powers
- ability to gain compliance through the use of sanctions and remedies
- independence
- transparency

[630] UNCTAD, "Foundations of an Effective Competition Agency."

- accountability
- assuring due process
- adequacy of human and financial resources
- well-funded in proportion to the mandate
- being staffed by well-educated, well-trained and non-corrupt persons
- having the well-structured and noncorrupt appellate process
- competition agency's performance being under evaluation

It is important to set out objectives, priorities and then allocate resources accordingly. The objectives set out in the competition law is the overall objectives. The competition agencies are required to set the more specific objectives for their staffs and make the public known.

Nowadays there is the increasing numbers of independent competition authorities around the world. Independence from political interference is desirable, particularly by having independence on day-to-day operational activities, decision making and competition advocacy. It is also necessary that competition agency should be independent from business influences. The grant of adequate budget or having financial independence, having clear and transparency criteria for appointment, dismissal, tenure of head of competition agency, commission and staffs contribute to the more independence level in competition agency.

However, guaranteeing independence of competition agencies needs to be well-balanced with accountability[*]. Competition agencies should be subject to government oversight and have checks and balances systems.

Accountability can be granted through the allowance of public and all stakeholders in the society know the decisions of competition agency, their reasons behind and who are responsible for the decisions. Guaranteeing the impartiality in decision making process and protecting the right of interested parties in the cases handling process are another means to ensure accountability.

Effective competition agency cannot be achieved without the transparency. The transparency in competition agency increases the confidence among interested parties and strengthens its legitimacy in its actions. Therefore, it is recommended that all rules, regulations, decisions should be publicized and make them in the form of public records except there are sensitive commercial information related. Screening process to classify which information can be made in public record or not should be introduced.

Having the clear, formal and delineate of investigative and enforcement powers of competition agency is like giving the teeth for competition agency for its operation. Not only the legal mandated powers, the willingness to exercise such powers is also required.

Regarding the issues of human resources, high qualified and enough staffs are necessary. Incentives must be provided for the recruiting and retaining staffs of competition agency since the salary is not competitive comparing with working in the private sectors. Training is employed to lessen the problem of skill shortage in competition agency. Financial resource is also important for the performance of competition agency. If the annual budget is not enough to carry on all tasks, it is suggested the imposing fees for mergers or receiving a part of the fine imposed can be used as the alternative as financial source to fund competition agency. However, the issue of conflict of interest must be considered when competition agency can be funded through the imposition of fines.

The evaluation of competition agency's performance in all the obligations, including decisions making, advocacy, studies and issuing the guidelines is recommended. The evaluation can be conducted by the competition agency itself or by the third parties. The result of evaluation can be publicized in the annual report.

The UNCTAD paper specifically mentions the special challenges of young competition agencies as conducted by the ICN survey[631]

"(a) Legislation was inadequate in terms of not properly addressing the anti-competitive conduct actually engaged in the domestic economy, and not allowing effective enforcement by the agency;

(b) Cooperation and coordination with particular government ministries and other regulatory bodies was not sufficient;

(c) Budget was not large enough for the agency to operate effectively;

(d) There were too few skilled professionals; they were either not present in the country or were not attracted to the agency given the civil service salary structures;

(e) Judiciary was unfamiliar with competition law and its economics;

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* Several safeguard measures are recommended to strike the right balance between guaranteeing independence and accountability of competition agency.

(1) Legally equipping the competition agency with a distinct statutory authority and power to operate freely operate day-to-day work without ministerial control

(2) Having well-defined professional criteria for appointments

(3) Make both executive and the legislative branches of government in the appointment process

(4) Appointing the director-general and the commissioners for a fixed period and clearly defining their conditions for dismissal

(5) Staggering the terms of each commissioner to avoid being replaced by the decision of single government

(6) Adequately fund competition agency. Empowering the competition agency to charge for specific services can reduce the political interference through the budget cut

(7) Exempting the competition agency from civil service salary to attract and retain the qualified staff to work with the competition agency

(8) Prohibiting the executive from overturning the agency's decisions

[631] ICN, "Lessons to Be Learnt from the Experiences of Young Competition Agencies. Competition Policy Implementation Working Group, Subgroup 2," [Online] Accessed: 24 March 2017. Available from: http://www.internationalcompetitionnetwork.org

(f) A "competition culture" among the business community, government, media and general public had not developed."[632]

The solutions to lessen these challenges can be done through benchmarking institutional profiles authorities and their ability to undertake effective enforcement to the international best practice, amending competition laws, procedures and guidelines, developing a competition culture and introducing appropriate evaluation mechanism.

OECD: CHANGES IN INSTITUTIONAL DESIGN[633]

One of the important element of successful competition policy and law is from the institutional design of competition agencies. There are various designs of competition agencies. One institutional design may work well with one jurisdiction but not in other jurisdictions. There is no optimal institutional model of competition agencies. Therefore, this OECD document discusses both benefits and drawbacks of all the competition agencies' models. The key main competition agencies models are raised; namely multifunction agencies, independent competition agencies and internal governance agencies

1. Multifunction Agencies

The competition authorities in some jurisdictions have additional functions more than the enforcement of competition law. Most of them are related to consumer protection, unfair trade practices, public procurement or sectoral regulation. Different policies may be separated in different divisions but still being in the same agency. There are both opportunities and challenges in multifunctional agencies. More attractive in recruitment and retaining staffs. The human resource management within the multifunction agency can facilitate the common pool of economic and legal expertise and the assembling of cross-policies teams to work together on specific cases when in need. The more achievable of cost saving, efficient scale of operations and

[632] UNCTAD, "Foundations of an Effective Competition Agency.", p. 11-16

[633] OECD, "Changes in Institutional Design," [Online]. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En

more flexibility in resource management in multifunction agencies are higher than the stand-alone agency. It results in the synergies from sharing information and market information across different policy areas. It is also convenient for information providers as the one-stop service. Whereas the challenges are found in the risk of conflicts in different policies objectives and the difficulty in the set of agency's priority and imbalance efforts put in different policies' goals. The lesser degree of focus is possible in the multifunction agencies when comparing with standalone competition agency. Allocating the right and appropriate resources is the concerned issue because it might affect the important competition obligatory tasks if there is the misallocation of resources.

2. Independent Competition Agencies

Independent competition agency is a desirable institutional design because it guarantees the non-intervention, influence or pressure from politics, which make the whole obligations of competition agencies basing on the sound competition policy, legal and economic principles. The independence characteristic helps enhancing the consistency and predictability of decisions. Thus, there is more confidence in the eyes of the public for independent competition agencies.

The independence of competition agencies can be divided into *de jure* and *de facto* independence. The *de jure* independent might not be truly independent in practice if the safeguarding mechanism for independence is not respected. On the other hand, competition agencies can be independent in practice even its institutional design allowing the exertion of influence but there is no exercise of such influence in practice.

There are many factors affecting the independence of competition agencies.

(A) Governance

The legal status, institutional design and place where the competition agencies are established within can affect the degree of independence. However, the completely isolated independence without the administrative oversight is not recommended since monitoring mechanism is required. Furthermore, some obligations will be carried out more effective if there is the relationship with government, for example competition advocacy to influence policy making process.

The process of how the head of competition agencies, commissioners are appointed or dismissed affects the degree of independence of competition agencies. Therefore, the clear and transparent process for appointment and dismissal are required to ensure the appointment of qualified persons without political ties or conflict of interest. Some countries believe that parliamentary committee or the senate is more appropriate for the appointment of these positions than the head of the state. The conditions and situations behind the dismissal should be clear. Putting the term length of the head of competition agency and commissioner longer than the political term is another recommendation to reduce political influence.

(B) Enforcement and Decision-making

There should be the mechanism to prevent the exercise of undue influence over the competition agency' s enforcement decisions. Directing the outcome of investigation or decisions should be prohibited. This process also includes the autonomy over the decision to initiate the investigation or not.

(C) Budget

Adequacy of financial resources to effectively enforce competition laws and the autonomy on how to spend the budget are important for achieving independence and agency' s effectiveness. If the government is able to unjustifiably cut or threaten to cut the budget, it will directly affect the operation of competition agency and

influence independence. Therefore, the competition agency should have a separate budget allocation in the overall state budget. Some tries to relieve the budget constraints by generating their own revenues through the imposed fines or fees from merger filling.

(D) Accountability.

Although the degree of independence in competition agencies is important, the accountability is also necessary to ensure that they do not work beyond the scope of relevant laws. Therefore, the independent competition agencies are still subjected to the checks and balances, including procedural safeguards and judicial review, to enhance the credibility[*].

3. Internal governance agencies

The internal governance agencies are bound within a part of government or ministry. A benefit of this institutional design is the close link with the government. This makes the competition agencies better influence the policies and laws to have competition-friendly content. Most of young competition agencies are likely to be established under a part of ministry first. However, having this institutional design does not mean it will always lack independence. If there is the mechanism to prevent the exertion of political influence and they are indeed respected, these kinds of agencies possibly achieve the *de facto* independence.

OECD: INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES[634]

Competition agencies that are independent from political pressures has long been recognized as an important element for ensuring and strengthening competence of competition agency. The independence from political influence ensures that

[634] OECD, "Independence of Competition Authorities – from Designs to Practices."

competition law is applied to serve the larger society' s wellbeing not the interests of specific group.[635]

However, Gal specifically indicates that the term ' independence' does not mean that competition agencies need to have a complete separation from other governmental agencies or being autonomous agency outside ministries or not regarded as a part of an executive branch ministry. It might not be appropriate to isolate competition agencies too far from the center of power and make it unable to perform the advocating role to government effectively since the big portion of anti-competitive conducts are from government actions. This idea is strongly supported by Kovacic and Winerman. Therefore, the right balance is necessary to be struck between maintaining independence and not being completely isolated and disconnected. If the competition agency is structurally separated from government and ministries, there should be laws, regulations or procedures ensuring that competition agency is well-informed about the process of law and regulation drafting and be a part to influence the outcome. Furthermore, independence should not prohibit the sharing of information and expertise with other regulatory bodies.

The general recommendation in enhancing independence concerns the issue of transparency and systematic recruitment and dismissal of top management, the status of competition agency, the source of competition agency' s resources, the set of reviewing mechanism and competent reviewing body. However, Gal emphasizes other conditions, which are the tools that limit political pressures from the outset and tools that strengthen the ability and motivation of the competition authority to confront pressures. Maintaining transparency in procedure and decision-making process can reduce political pressures because any attempt to unduly affect the decision will be revealed. Furthermore, governmental and public advocacy, creating the pro-competitive pressure within government and finding international allies to support the

[635] William E. Kovacic and Marc Winerman, "The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness," 100 Iowa L. Rev., 2015 (2015).

reduction of political pressure, for example, OECD, UNCTAD and World Bank are considered the means to limit political pressure from the outset. Another emphasis is on the tools for strengthening the ability and motivation of the competition authority to confront pressures. The measure that competition agencies can adopt is creating a wide basis of support from the public. To confront unjustified reduction of the budget of competition agency, some competition agencies utilize the publication of the cost savings achieved through the application of the competition law in comparison to the agency' s budget. This helps avoiding the insertion of political influence through the budget cut.

ICN: Agency Effectiveness: Human Resources Management in Competition Agencies[636]

This ICN document is about the human resource management in competition agencies, which links to the strategic goal of competition agencies and a part of making them more effective and efficient. The important part that can provide lessons learnt for ASEAN is on the human resource management in small competition agencies, which reflect the situation of many competition agencies in AMSs. The general problem of small competition agencies is the budgetary constraints. Losing one main employee can affect the ability to enforce competition law and competition advocacy. Therefore, the human resource management should focus on the ability to attract, train and retain key employees. The human resource budget should be the last if it is necessary to cut the budget.

Incorporating the human resource management into the competition strategic planning helps ensuring that human resource management helps the competition agency achieving the institution's goals, for example the recruitment and training must be conforming to the need of competition agencies and the required positions. The

[636] ICN, "Agency Effectiveness: Chapter 1 Strategic Planning and Prioritisation."

staffs of competition agencies are like the valuable assets. The competition agencies will achieve their goals and missions or not depend highly on the recruitment and retaining the right staffs. However, the general problem of recruiting and retaining staffs is the unattractiveness of compensation for working with competition agencies, particularly those bound within the public or government sectors regardless of its size or reputation. The technique to retain the experienced staffs is to provide other incentives, including the mid-to long-term career development opportunities.

4.3.2 Vigorous Competition Law Enforcement Approaches of the US

This part will explore and assess the factors that make the US antitrust enforcement effective. The effective system of cartel enforcement will be raised to show how the US tackle with the most detrimental anti-competitive conduct like cartels.

The Policy to Pursue Aggressive Enforcement of US Antitrust Law

The reputation of the US antitrust enforcement is the aggressive and stringent.[637] Both the DOJ and FTC have shared the same direction and policy in their active and stringent enforcement.

The Effective US Competition Agencies

The federal antitrust law is enforced in three main ways.

First, the criminal and civil enforcement actions brought by the Antitrust Division of the Department of Justice (DOJ). The DOJ is regarded as the executive branch agency responsible for all criminal proceedings in the antitrust law. In some specific industries; telecommunications, banks, railroads, and airlines, the DOJ has the sole jurisdiction in the antitrust cases.

Second, civil enforcement actions brought by the Federal Trade Commission (FTC). The FTC is the independent authority for the enforcement of unfair methods of

[637] Muris, T. J., "Creating a Culture of Competition: The Essential Role of Competition Advocacy.", p. 1-2

competition and deceptive business practices.[638] The FTC is responsible for the two missions; protecting consumers and promoting competition. An institutional structure of the FTC is designed to be an independent and bipartisan agency to limit the ability of an industry to capture it. There are five commissions appointed by the president of the United States with the approval of the Senate.[639] The direction of the FTC is publicized through many channels, for example through the remarks FTC Chairman or in its website[*]. FTC has no authority to bring the criminal cases because this is the sole responsibility of the DOJ. However, the FTC can refer evidence of criminal antitrust violation to the DOJ.[640]These two enforcers; DOJ and FTC, complement each other in the enforcement.[641] In some areas of overlapping authorities, the FTC and DOJ will consult each other before opening the investigation to avoid duplicating efforts. Therefore, in practice having two enforcing authorities in the US is not problematic. Rather both two enforcement authorities complement each other and develops its own expertise in different areas. In some areas, for example merger control, the DOJ and FTC jointly developed the Horizontal Merger Guidelines.

Third, private parties could file the lawsuit to enforce the federal antitrust laws to seek for damages and injunctive relief from the violation of the Sherman Act or the Clayton Act. However, individuals and businesses cannot file the lawsuit under the FTC

[638] สถาบันนโยบายสังคมและเศรษฐกิจ, โครงการศึกษาเปรียบเทียบกฎหมายการแข่งขันทางการค้าของสหรัฐอเมริกา สาธารณรัฐเกาหลี ญี่ปุ่น สหภาพยุโรป และไทย เล่มที่ 2 การศึกษาทางด้านกฎหมาย, หน้า.2-22

[639] Federal Trade Commission, "What We Do," [Online] Accessed: 25 March 2017. Available from: https://www.ftc.gov/about-ftc/what-we-do

[*] Remarks of Chairman Deborah P. Majoras before the 32rd Fordham Corporate Law Institute, New York, Sept. 22, 2005 (forthcoming).

"The job of the antitrust enforcer is, of course, to apply the competition laws fairly and consistently, without regard to "political" interests, meaning partisan interests, as the term is generally used. In this sense, apolitical application is vital to maintaining the effectiveness of our competition laws, and to garnering public support for a culture of competition. This does not mean, however, that competition enforcers operate in a vacuum tube, isolated and immune from the political process. Far from it. The policies of and actions taken by antitrust enforcers can have a significant impact on elected policymakers; and, similarly, the political actions produced by legislatures and regulatory agencies can have a significant impact on our work."

[640] Federal Trade Commission, "The Enforcers," [Online] Accessed: 25 March 2017. Available from: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers

[641] Ibid.

Act. Unlike other jurisdictions, most of the antitrust suits in the US are brought by the private parties.[642] This part will focus on the two main public bodies co-responsible for competition law enforcement in the US; namely the FTC and the DOJ. [643]

Two main public authorities: DOJ and FTC, responsible for the enforcement of the US antitrust law reflect the check and balance system and the desire to reduce the president's influence on the US antitrust enforcement.[644]

Wide-Ranging Investigative Powers and Tools of US Competition Authorities

The DOJ is equipped with the wide-ranging investigative tools, including the use of consensual monitoring, wiretap, hidden microphones and video cameras. The DOJ also has a good collaboration with the FBI in cartel investigation since the FBI also prioritize cartels as its top of white collar crimes. Currently, the FBI agents are assigned to all of the Divisions that engage in international cartel investigation.[645] The DOJ also works with the INTERPOL in placing the 'Red Notice', which is an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested and then being extradited to the US trial for antitrust crimes and related offenses.[646]

With regard to the FTC, the investigative powers of the FTC commission are provided in the FTC Act. The commission is empowered with the general investigative powers to "prosecute any inquiry necessary to its duties in any part of the United States" [647]. The additional investigative powers of the commission to persons,

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[642] Ibid.

[643] Section 4C-4H of the Clayton Act, 15 U.S.C. § §15 c-15h.

[644] Baldev Raj Ping Lin, Michael Sandfort and Daniel Slottje, "The Us Antitrust System and Recent Trends in Antitrust Enforcement," [Online] Accessed: 9 March 2016. Available from: http://www.ln.edu.hk/econ/staff/plin/JES-us%20antitrust%20system.pdf

[645] SCOTT D. HAMMOND, "From Hollywood to Hong Kong --Criminal Antitrust Enforcement Is Coming to a City near You," [Online] Accessed: 16 November 2016. Available from: https://www.justice.gov/atr/speech/hollywood-hong-kong-criminal-antitrust-enforcement-coming-city-near-you

[646] Ibid.

[647] FTC Act Sec. 3, 15 U.S.C. Sec. 43

partnerships or corporations are found in the FTC Act Sec. 6(a), 15 U.S.C. Sec. 46(a).[648] While the specific investigative powers of the commission appear in Sections 6, 9, and 20 of the FTC Act. These provisions authorize the commission many compulsory process and investigations.[649]

The Set of Enforcement Prioritization

Both the DOJ and FTC have set their enforcement prioritization. The enforcement prioritization can be changed through times and made consistent to the competitive environment issues. The prioritizations are usually clearly demonstrated by the head of two US enforcing authorities. The recent prioritization of antitrust enforcement was on March 9, 2016 the Assistant Attorney General Bill Baer from Department of Justice (DOJ) and Federal Trade Commission (FTC) by Chairwoman Edith Ramirez delivered remarks to the US Senate on the DOJ's and FTC's current antitrust enforcement priorities.[650]

The DOJ enforcement priority are on the prevention and detection of cartels and the anti- competitive mergers. While the DOJ wants to ensure that penalties imposed are high enough to punish and deter antitrust law infringement. The DOJ' s priority is linked to the strategic planning and overall workload management of the

[648] FTC Act Sec. 6(a), 15 U.S.C. Sec. 46(a) **"(a) Investigation of persons, partnerships, or corporations**: To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations."

[649] Federal Trade Commission, "A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority," [Online] Accessed: 25 March 2017 Available from: https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority

[650] Practical Law Antitrust, "Doj and Ftc Officials Testify before Senate on Enforcement Priorities and Accomplishments," [Online] Accessed: 11 October 2017. Available from: https://content.next.westlaw.com/w-001-5199?transitionType=Default&contextData=(sc.Default)&__lrTS=20171020033240902&firstPage=true&bhcp=1

DOJ. The prioritization is reviewed periodically by senior management to ensure it maintains appropriate to the DOJ's overall mission and fulfill its objectives.[651]

The set of prioritization in the FTC reflects the formal strategic goals of the FTC, which are the prevention of anti-competitive mergers and other anti-competitive business practices. The set of prioritizations takes into account anti-competitive practices, which produce the greatest injury to consumer welfare and where government intervention is appropriate. Before setting the prioritization the FTC must conduct the internal research and development through studies and workshops. Prioritization comes from the work experience and understanding of specific issues in specialized divisions. It also come from complaints and merger notifications. However, the FTC prioritization is non-exclusive and flexible enough to address new problems when they arise.[652] In 2015 the FTC set the enforcement prioritization on robust merger enforcement and anti-competitive conducts.[653]

The Widespread of Private Action and Class action

The US has the uniquely successful private antitrust law enforcement with the enormous number of private cases annually. The success can contribute to the US procedures, including the US discovery rules, which highly facilitate the evidence gathering. Class actions or representative actions also allowed. The extraordinary high incentive to sue from the award of treble damages. Moreover, the nature of the US economy is pro-competition; thus, competition awareness and competition culture is higher than other jurisdictions. The familiarity of American citizens in private litigation for economic and social policy, which is the distinctive US culture. There are many expertized private attorneys in the field of antitrust law together with the well-

[651] ICN, "Agency Effectiveness: Chapter 1 Strategic Planning and Prioritisation."

[652] Russel W. Damtoft, "Priority Setting and Resource Allocation in the United States," [Online] Accessed: 25 March 2017. Available from: http://unctad.org/meetings/en/Presentation/IGE2013_PRESPrior_USA_en.pdf

[653] Antitrust, P. L., "Doj and Ftc Officials Testify before Senate on Enforcement Priorities and Accomplishments."

organized and sophisticated plaintiffs' bar to support in the US.[654] These afore-mentioned factors make the private action widespread and successful in the US.

Extensive Procedural Law: The US Discovery Rules to Gather Evidences

The US discovery rule are employed both in administrative investigation and private action. Therefore, not only public enforcement benefits from the discovery rules, private actions also have significantly increasing opportunities to win from the help of special discovery rules. Civil law countries do not have discovery rules. Even in other common law countries, the US discovery rules are also uniquely wide in scope and compulsive force, which importantly facilitate investigation and evidence gathering.[655]

Financial Resources

Even the matured competition agencies like the DOJ and FTC, the financial and human resources play an important role in its capacity building. Recently, there was the request for more budget of the DOJ. The Assistant AG Baer emphasized the importance of the DOJ's antitrust enforcement work and asked the Congress to approve President Obama's request for $16 million in additional funding for the DOJ in Fiscal Year 2017.[656] Overall, the DOJ has been granted the increased budget for spending since 2013-2015.[657]

[654] Edward Marcellus Williamson, "Procedural Issues & Private Damages Actions," [Online]. Available from: https://www.lw.com/presentations/cartel-enforcement-and-litigation-in-us-and-eu

[655] John O. Haley, "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter ?," Pacific Rim Law and Policy Association (1995)., p. 309

[656] Antitrust, P. L., "Doj and Ftc Officials Testify before Senate on Enforcement Priorities and Accomplishments."

[657] United States Department of Justice, "Budget and Performance," [Online] Accessed: 25 March 2017 Available from: https://www.justice.gov/about/budget-and-performance

Similar to the FTC, which overall has been granted gradually increase in its budget since 2015- 2017. This can be seen from the Congressional Budget Justification of the FTC that have been publicized annually.[658] By having the clear budget justification, it can show the clear justification behind the request of increased budget. However, the budget granted might not be increased every single year. However, the FTC has special mechanism to find special sources of funding for competition agency, which is enabling collecting fees from pre-merger notification filing.[659]

In conclusion, both the DOJ and FTC seem not to have big problem in their budget in general. The DOJ and FTC have the clear budget justification and report subjecting to the review of audits. The request of budget has been clearly demonstrated how budget being allocated in the consistently with its obligations and activities in both enforcement and advocacy. This could set the example for AMSs in producing financial document and justification behind the use of budget in order to make it more justifiable and easier in the request of more budget.

Strategies on Human Resource Management

Human resource is the valuable assets of the competition agencies. The performance of competition agencies depends highly on the capability and working-performance of their staffs. Therefore, the recruitment of expertise and experienced staffs to work with competition agencies is important. The DOJ and FTC employs the similar strategies to retain the experienced staffs by providing career development opportunities.

[658] Federal Trade Commission, "Financial Documents: Budget Justifications and Reports," [Online] Accessed: 25 March 2017. Available from: https://www.ftc.gov/about-ftc/budgets/financial-documents

[659] Federal Trade Commission, "Fiscal Year 2017 Congressional Budget Justification," [Online] Accessed: 25 March 2017 Available from: https://www.ftc.gov/system/files/documents/reports/fy-2017-congressional-budget-justification/2017-cbj.pdf, p. 8

The FTC employs the technique to create more incentive to work within the FTC by publicizing the reason why working within the FTC is great in its official website as follows:

> *"A career at the FTC can provide exceptional opportunities to obtain excellent training, development, and professional growth. We value, and seek to promote and support the diversity of our communities.*
>
> *We strive for, and generally attain, a healthy work/life balance through family friendly alternative work schedules and telecommuting opportunities."*[660]

The DOJ and FTC staffs can try working in other sections or divisions to gain experience whether in internal or external, for example the temporary working in different law enforcements or legal policies settings in the U.S. Attorney's Office to gain valuable litigation skills and experiences. The staffs of both DOJ and FTC are allowed to try working in different subject matter, type of case, or policy.

Moreover, the US has more expansive strategy, which allow the staffs exchange with externality; between antitrust officials, private sector practitioners and academics. The staffs exchange can be in both legal and economic fields. This exchange program is called 'revolving door process' brings about the enhancement of expertise and experience of staffs.[661] This gives the staffs more opportunities to gain experiences outside the agencies. It also brings the circulatory process of bringing private practitioners and academics into competition agencies.[662]

In general, the DOJ and FTC do not have the problem of resource constraints. This is partly from the use of human resource management strategy of the DOJ to balance workload among components.[663] The DOJ has the policy of flexibility of

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[660] Federal Trade Commission, "Careers at the Ftc," [Online] Accessed: 25 March 2017 Available from: https://www.ftc.gov/about-ftc/careers-ftc

[661] Kate, G. N. a. A. T., "Introduction: Antitrust in the U.S. And the Eu-Converging or Diverging Paths?," The Antitrust Bulletin , p. 17

[662] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International.", p. 16

[663] ICN, "Agency Effectiveness: Chapter 1 Strategic Planning and Prioritisation.", p. 17

staffing across different components during the period of human resource constraints. The flexibility of staffing has two-folds benefits. First, it lessens the problem of resource constraints and workload. Second, the flexibility itself provides the great professional development opportunities to work in other areas beyond the assigned area[*].

Competition agencies in the US have specialization of staffs, most of their staffs are attorney resulting from litigious nature of antitrust law enforcement in the US. While the economists with high caliber of deputy assistant attorney general responsible for economic analysis since 1989 and some qualified economists with doctorate degree also employed to handle antitrust cases in both agencies.[664]

The Tools to Enhance Cartel Enforcement

The US has a special program to combat cartel namely, the Antitrust Division's anti- cartel enforcement program. The establishment of specialized criminal enforcement team in DOJ for handling hardcore cartel cases shows the active enforcement of hardcore cartels in the US.[665]

According to Thomas O. Barnett (Assistant Attorney General Antitrust Division, U.S. Department of Justice), there are seven practices contributing to the successful result of this program:[666]

[*] The example is the DOJ attorneys and paralegals are assigned to work in specific components on particular set of industries like Transportation can have the opportunities in working on another civil section focusing on other industries. In the criminal case handling process, the attorneys and paralegals from several offices routinely work together on large cartel investigations or providing assistance and support for the other requested offices.

[664] Ignacio De Leon, "An Institutional Assessment of Antitrust Policy: The Latin American Experience' International Competition Law Series," Wolters Kluwer International 38. p. 543

[665] Gerald F. Masoudi, "Cartel Enforcement in the United States (and Beyond)," [Online] Accessed: 16 March 2016. Available from: https://www.justice.gov/atr/speech/cartel-enforcement-united-states-and-beyond

[666] Thomas O. Barnett, "Criminal Enforcement of Antitrust Laws: The U.S. Model," [Online]. Available from: https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.

(1) Prioritize prosecutors on hard core cartels

The DOJ has set hardcore cartels as the criminal enforcement priority. By setting the clear priority, all stakeholders, particularly businesses will be apparently informed. Furthermore, setting hardcore cartel priority helps staffs and prosecutors to be more focus. The more focus, the more expertise will be increased among staffs and prosecutors. Hardcore cartels are treated as *per se* illegal under the US antitrust law, thus, complexity of proof is lessened. It is necessary to prove the existence of an agreement to establish the violation. This makes the criminal enforcement of hardcore cartels less complex than its the civil enforcement.

(2) Treating cartels as serious crimes

Sometimes just monetary fines are not enough to cause effective deterrence for cartel participants because they can calculate the cost- benefits between the potential benefits in participating the cartels and its potential fine risk. Thus, the US believes that just monetary sanction is not enough to deter harmful hardcore cartels, substantial imprisonment for responsible individuals were introduced. The DOJ has employed the strategy of focusing on the jail sentence for responsible individuals to increase deterrence.[667]

(3) The Application of Leniency Program and Leniency Plus

The big and developed country like the US faced the difficulty in the cartel enforcement. The problems normally found in cartel enforcement is the difficulty in finding adequate evidence to prove the existence of cartels in courts. This is the reason why the US pioneered the mechanism called ‘ Leniency Program’ or ‘ Amnesty Program’ to enhance the cartel enforcement in 1978. The leniency program incentivizes cartel participants to betray other cartel members and being a cooperative

[667] Marc Hansen and Edward Marcellus Williamson Abbott "Tad" Lipsky, "Cartel Enforcement and Litigation in the Eu and the Us," [Online] Accessed: 23 March 2016 Available from: https://www.lw.com/presentations/cartel-enforcement-and-litigation-in-us-and-eu

witness by providing background information, testimony and important documents for successful conviction. The leniency program functions by shifting the cost-benefits calculation of cartels. There are two kinds of leniency policy; the corporate leniency policy and individual leniency policy.

There are three requirements for the effective US leniency program.

1. There must be severe sanctions for firms and individuals, which do not join the leniency program. This makes the participation of leniency program bringing about high benefits as compared with other choices, such as keep staying in the cartel.

2. There must be a credible threat to discover cartel behaviors. If the risk of being caught is small, high penalty and leniency program will not work well. The credible threat of discovering the cartels will increase the higher possibility of joining the leniency program. Moreover, the US expands the scope of leniency program to have an individual leniency policy to create the race between one single cooperation and between their conspired employees.

3. There must be predictability and transparency in the amnesty program. There are two US documents; the ‘Corporate Leniency Policy’ and the ‘Individual Leniency Policy’, which make the participation of the leniency program predictable by ensuring potential leniency applicants that they will get some benefits if they come forward and join the program. While transparency is also important factor for potential applicant in deciding whether to join the leniency program or not.

According to the US experience, the revision of the US leniency program in 1993 made the clearer and broader scope in the leniency program. The key revision in 1993 was granting automatic complete amnesty to the first lenient applicant, if required conditions are being fulfilled. Furthermore, the leniency program was made possible even the investigation has begun if the ongoing

investigation can be facilitated significantly from the confession. The 1993 revision clearly makes the US leniency program more effective. It can be seen from the multiplied the number of the leniency applicants and brought about the collection of enormous fines total over $1 billion. In the Vitamins cartel, with the help of the leniency applicant's co-operation, fines of $500 million and $225 million were ordered against two other firms.[668]

Leniency Plus

Not only the individual leniency policy was created, the US also introduced the 'Leniency Plus' or 'Amnesty Plus' program to further detect the other cartels in other markets. By adopting the Leniency Plus, the exposure of the cartel by a single cartel member potentially lead to the number of other cartels in other markets. Because of most cartelists are big multinational companies that tend to sell different kinds of products. According to the DOJ's experience if these multinational firms have policy to engage in cartel in one market, they are likely to participate in cartels in other markets. The leniency plus will allow the prosecutors to offer the leniency applicant, who have already disclosed the existence of previous cartel to report the other cartels that the firm engage in other markets. This allows the lenient applicant to clean the house and increase more opportunities to catch other cartels. Approximately half of the DOJ's current international cartel investigations were initiated by evidence obtained from completely separated market. The leniency plus program has worked well in the US.

This leniency program has been proved to be highly successful in the US in catching both internal cartels and many international cartels negatively affecting the US market. Approximately 90 percent of the US total cartel investigation are resulting from the application of this program. It also leads to the striking of the criminal fine record. Since 1997, firms have been subjected to the enormous fine over 2.5 billion

[668] OECD, "Policy Brief: Using Leniency to Fight Hard Core Cartels."

dollars. The success must be contributed to the whole US system that vigorously facilitate the cartel enforcement. Even the interview and interrogation techniques are assisted by the highly-trained FBI agents. The DOJ also receives assistance from many authorities, including but not limited to INTEROL and national immigration authorities to track, question, search and detain cartel members.[669] With the significant success of US leniency program, therefore, it is not surprising that many countries adopt or plan to adopt the leniency program model of the US and apply to its competition regimes.

(4) Vigorous Prosecution of Conducts Impeding Cartel Investigation

To effectively prosecute cartels, it is important to make sure that the investigation process is operational without obstruction. The US wants to protect the integrity of cartel investigation. Therefore, any conducts that obstruct the justice will be prosecuted. The US follows the ICN Cartel Working Group's recommendation (2006) that punishment for any conducts impeding cartel investigation should be on par with punishment for the original offense.

(5) Charging Cartels in Conjunction with Other Offenses

Prosecutors should not hesitate to combine antitrust charges with charges of other crimes, for example obstruction of antitrust investigations, illegal wire transfers or evidence destruction, mail and wire fraud, bribery, money laundering and tax offenses.

(6) Transparency and Predictability in Cartel Enforcement

The key success of the US cartel enforcement is providing transparency and predictability in cartel enforcement. These will help drawing the clear line for businesses and building more confidence in joining the leniency program. Transparency

[669] Scott D. Hammond, "Cornerstones of an Effective Leniency Program' Icn Workshop on Leniency Programs Sydney, Australia (November 22-23, 2004) From " [Online]. Available from: https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program

and predictability also make the prosecutor' s job easier and fairer because there are the clear internal procedures to follow and fairness basis for their actions.

(7) Publicizing Cartel Enforcement Efforts

All the effort put in cartel enforcement should be publicized to bring about more deterrence. The deterrence can be seen from the result of harsh penalty both in criminal and civil. High incentive from other cartelists to expose the cartels by participating in leniency program is another factor that cartelist should think about before engaging in cartel, if the cartel enforcement effort is widely publicized. The deterrence brings many benefits, including preventing the participation of cartel in the first place.

Other Tools to Increase Effectiveness in Cartel Enforcement in the United States

US has extraordinary tools to facilitate the antitrust enforcement. These tools are the application of treble damages, high incentive and wide-spread of private suit at affordable cost, wide scope of discovery rules, two matured enforcing authorities and prominent role of judiciary in developing the US antitrust law.

4.3.3 Supranational Enforcement of Common Competition Rules in the European Union

Specific Supranational Institutional to Enforce EC Competition Law

The key success of EC competition law enforcement is having the supranational bodies to enforce the common set of competition rules. According to LUU Huong Ly's research leads to the conclusion that **" a binding set of common competition law and policy will not be effective without a supranational body to enforce them, or at least a mechanism for dispute resolution."**[670] The supranational bodies in the context of the European Union is the European Commission's Competition Directorate

[670] Ly, L. H., "Regional Harmonization of Competition Law and Policy: An Asean Approach," Asian Journal of International Law. p. 291-321, 319

and the European Courts: the European Court of Justice and the Court of First Instance are regarded as the pivotal actors in the enforcement and evolution of European competition policy.[671]

With regard to enforcement of the EC competition law, the enforcement was first centralized by the EU commission but later has been decentralized to the National Competition Authorities (NCAs). A distinctive characteristic of the EU competition policy is the strong relationship and interdependencies between related competition authorities, whether in the form of formal and informal coordination.[672] The EU commission closely cooperates and coordinates with the NCAs through the European Competition Network (ECN).[673]

The European Commission's Competition Directorate or (DG Comp), which is the supranational institution is the main EC community competition law enforcer. It is given powers and autonomy in enforcing the EC competition rules.[674] It is the important authority that shape the EC community competition system. The missions of the DG Competition are primarily on the antitrust and cartel policy, merger control, promoting competition culture and international cooperation in the area of competition policy and state aid control.[675]

The Member States Competition Authorities (NCAs) have been allocated the competence in the enforcement and responsible for the EU competition enforcers in parallel with the EU Commission resulting from the decentralization of EC competition law enforcement since 1 May 2004. The big reform in the EC enforcement was found

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[671] McGowan, M. C. a. L., Competition Policy in the European Union. p. 54-55

[672] Antonio Nicita and Maria Alessandra Rossi Antonio Manganelli, "The Institutional Design of European Competition Policy," [Online] Accessed: 23 March 2017. Available from: http://cadmus.eui.eu/bitstream/handle/1814/14676/RSCAS_2010_79.pdf, p. 2

[673] Parliament, E., "Fact Sheets on the European Union: Competition Policy."

[674] McGowan, M. C. a. L., Competition Policy in the European Union. p. 39

[675] European Commission, "Eu Competition Policy in Action," [Online] Accessed: 26 March 2017. Available from: http://ec.europa.eu/competition/publications/kd0216250enn.pdf

in the Regulation 1/2003.[676] Article 5 of the Regulation 1/2003 empowers the NCAs to apply Article 101 and 102 of the Treaty in the similar manner like power held by the EU commission in Article 7.[677] According to the decentralization of enforcement of EC competition law, the case allocation is on the principle of ' single well- placed' authority, which is the competition authority that is regarded as being the most appropriate competition authority*. While the EU Commission still play the role as the best place to deal with anti- competitive conducts that affect more than three EU Member States.[678]

The decentralization of enforcement power is a part of modernization of competition policy in the European Union.[679] This decentralization of enforcement helps reducing the workload of the Commission both in the grant of exemptions and dealing with complaints, which allow the Commission to focus on more serious competition infringement and developing competition policy.[680] However, the Commission still has to co- ordinate and monitor the enforcement of the NCAs. The role of the Commission is shifted from the day- to- day enforcement to the more supervisory role to make the enforcement decentralized to the NCAs is conforming to community competition law, the broader EU community competition policy and norms.[681] Furthermore, the Commission tries to create the common competition

[676] Regulation 1/2003/EC on the implementation of the rules on competition laid down in Article 81 and 82 of the EC Treaty, OJ 2003, L1/1

[677] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty

* According to the Commission Notice on co- operation within the Network of Competition Authorities, there are three factors used to determine the most appropriate authority in dealing with the case:

1. The area in which anti-competition conducts have substantial, actual or foreseeable effects are implemented or originated

2. The authority that is able to effectively bring the violation of EC competition law to an end as well as impose appropriate sanction

3. The authority that is able to gather evidence to prove the violation of the EC competition law

[678] The Commission Notice on co-operation within the Network of Competition Authorities paragraph 14

[679] Christiansen, A. C. H., "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options (Oecd) in Deborah Healey, Application of Competition Laws to Government in Asia: The Singapore Story."

[680] McGowan, M. C. a. L., Competition Policy in the European Union. p. 214-215

[681] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 48

culture across the EU to build the common understandings and interpretation of the community competition rules among all relevant enforcement authorities.[682]

In order to facilitate the new decentralized enforcement system, the Commission has adopted some procedural regulations and notices. [683] The Regulation 1/ 2003, Article 11 establishes the close cooperation principles between the Commission and the NCAs, which set out the exchange of information and consultation mechanism. The Regulation 1/2003 includes the exchange of confidential information. The exchange of information between the competition authorities can be the existing information and the request from one authority to the other authority for assistance in gathering information.[684]Furthermore, the Regulation 1/2003 highly increase the level of cooperation between all related authorities in the enforcement of community competition law, which operates through the 'European Competition Network' or ECN. Part of the success of the new decentralized enforcement regime is from the operation of the ECN. [685] ' The Commission Notice on co- operation within the Network of Competition Authorities' is issued to supplement the Regulation 1/2003 on this area.

While the General Court of First Instance (CFI) and European Court of Justice (ECJ) are the supranational enforcers responsible for appealing the EU competition cases and rendering judgements, which binding all the EU Member States. The appeal of the Commission Decision will be made to the CFI. After that the further appeal on the point of law will be made to the ECJ. [686] In this way, the ECJ can establish precedent. Another way to shape competition environment in the EU is when the national courts refer specific questions to the ECJ. The ECJ will provide preliminary ruling or judicial interpretation of European law to national courts during their national

[682]McGowan, M. C. a. L., Competition Policy in the European Union. p. 217

[683] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 37-41

[684] Regulation1/2003, Article 22

[685] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 392

[686] Ibid. p. 36

proceedings. Hence, it can be seen that the European courts also play an important role in the enforcement of the EU competition rules.

Independence of Competition Authorities

The assessment of independence level of the competition authorities within the EU will be divided into two parts. The first part is the independence of the EU Commission and the second part is the independence of national competition authorities.

The EU commission is the supranational enforcement authority so it is the independent authority free from any single member state influence or pressure in its operation, policy-making and decision making.[687]

" The Commission can act independently in competition matters (in policy-making, as well as decision-making), but it does so within a framework and in a policy environment determined by the goodwill of the member states, and based on underlying consensus about the merits of competition and necessity of European-level competition policy"[688]

Another issue of independence is on the national competition authorities, which are being empowered to enforce the EU competition rules. There is no explicit requirement for the independence of competition authorities under the EC competition rule. However, the level of independence of NCAs affect their functions and their effective enforcement ability. Therefore, on 9 July 2014, the European Commission adopted a ' Communication from the Commission to the European Parliament and the Council' , which includes the minimum guarantee of the independence of the NCAs.[689]

[687] McGowan, M. C. a. L., Competition Policy in the European Union. p. 41-48

[688] Ibid. p. 227

[689] Jeroen Capiau and Ailsa Sinclair Sofia Alves, "Principles for the Independence of Competition Authorities," [Online] Accessed: 13 March 2017. Available from: file:///C:/Users/User/Downloads/CLI_11_1_April_2015_Alves_Capiau_Sinclair.pdf

"In order to ensure effective enforcement of the EU competition rules, it is generally accepted that NCAs should be independent when exercising their functions. Independence means that the authority's decisions are free from external influence and based on the application and interpretation of the competition rules relying on legal and economic arguments. In the vast majority of Member States, the NCAs benefit from a certain degree of independence but the extent of their independence and equally the degree of supervision exercised by other state bodies varies. Many NCAs are designated in national law as independent state bodies and formally established as either an administrative authority or an agency. In addition, around half of the NCAs have legal personality"[690]

This Commission Communication indicates the important aspects of independence in the NCAs as merit-based, ensuring the transparent appointment procedures and clearly defined objective grounds for dismissals of the top management and having sufficient and stable resources with a budgetary autonomy; rules on conflicts of interest and incompatibilities.

Adequacy of Investigation Powers of the Commission and Good Cooperation from the National Competition Authorities

The Commission has extensive investigation powers. These powers are supported by the close cooperation from the NCAs and European Competition Network. In the investigation process, the EU Commission has the wide investigatory powers to perform its duties according to Regulation 1/2003 mainly in the Article 18-20. The Commission has the power to gather information, which include the power to collect information from the third parties, the power to request for information (Article 18), power to interview consented persons for taking of statements (Article 19), power to conduct simultaneously dawn raid on multiple businesses across the European Union for the alleged violation of Article 81 (Article 20). During the inspection or dawn

[690] European Commission, "Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues," [Online] Accessed: 5 May 2017. Available from: http://ec.europa.eu/competition/antitrust/swd_2014_231_en.pdf

raid, the Commission possess the wide range of powers, for example entering any premises, land and means of transport, examining the books and other records related to the business, taking, or obtaining in any form, copies of, or extracts from books or records, sealing any business premises and books or records for the period necessary for the inspection and requesting representatives or staffs of the undertaking for explanations of facts or for documents for the purpose of the inspection and able to record the answers.[691]

In addition, Article 21 empowers the Commission to inspect other premises, for example homes of the directors or managers of undertakings, on the condition that there is a reasonable suspicion that records concerning the serious violation of EC competition law; Article 81 or 82, are kept in the premises. Exercising the Commission's power under Article 21 requires the order made in the form of decision and search warrant made by the judicial authority within related EU Member States. [692]Moreover, the EU Commission has the power to request relevant authorities of the EU Member States to investigate the alleged violation of community competition rules according to the Article 22. While the power of the EU Commission in the investigation of mergers is found in the Regulation 139/2004/EC, OJ 2004, L24/1, Article 11-13.

Private Action

There is no private action available under the EC competition law system in the community level. The only way to stop the anti-competitive behaviors is through the public enforcement. However, bringing the cases for damages is allowed in some EU members' national private laws, which recognize the violation of EC competition law as delicts or torts. Unlike the US, private action is not common in the EU.[693] During 2006 to 2012, there was less than 25% of the Commission's infringement decisions

[691] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 53

[692] Ibid. p. 53

[693] Haley, J. O., "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter ?," Pacific Rim Law and Policy Association., p. 310

were followed by damage actions in a few EU Member States; mostly found in United Kingdom, Germany and the Netherlands. The private litigants face some obstacles in bringing private suits for damages, for example in the area of evidence gathering, court discovery procedures concerning establishing jurisdiction of the court, quantification of loss and causation.[694] These obstacles in private litigations were confirmed by the *Ashurst Report* in 2004, which was the study on the conditions of claims for damages in case of infringement of EC competition rules.[695]

In order to solve these constraints, the EU is following the US pathway to encourage the private action more and more. The EU Commission then solves this problem by issuing ' the Green Paper on damages actions for breach of EC Antitrust rules'[696] This was followed by the issuing of 'the White Paper on Damages actions for breach of the EC Antitrust rules' in 2008.[697] Finally, the struggle of the EU in the encouragement of the private suits in competition cases can be seen from the EU Directive 2014/104/EU on antitrust damages actions, which identifies the common standards for disclosure of evidence, limitation periods, the effect of national decisions, standing of indirect purchasers, quantification of harm, joint liability and dispute resolution based on mutual consent of the parties. This is expected to bring about the increased number of private action for damages in the EU.[698]

[694] S and Maxwell A Kon, "Enforcement in National Courts of the Ec and New Uk Competition Rules: Obstacles to Effective Enforcement," European Competition Law Review (1998).

[695] Donald Slater and Gil Even-Shoshan Denis Waelbroeck, "Study on the Conditions of Claims for Damages in Case of Infringement of Ec Competition Rules," [Online] Accessed: 8 May 2017 Available from: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

[696] EU Commission, "Green Paper on Damages Actions for Breach of Ec Antitrust Rules' (2005)," [Online] Accessed: 8 May 2017. Available from: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0672

[697] EU Commission, "The White Paper on Damages Actions for Breach of the Ec Antitrust Rules' (2005) " [Online] Accessed: 8 May 2017. Available from: http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf

[698] OECD, "The Relationship between Public and Private Antitrust Enforcement."

The Leniency Program in European Union to Enhance Cartel Enforcement

The EU's situation is similar to the US's situation that face cartel enforcement problem. The 1996 Commission Notice on the Non-imposition or Reduction of Fines in Cartel Cases was the first document setting the principle of the leniency program. The DG COMP is in charge of administering the EU leniency program, which is only for corporate leniency applicant.

The first version of EU leniency program was not attractive enough to draw the leniency applicants because the main drawback is on an uncertainty on the level of fine reduction. This leaded to the revision of the EU leniency program in 2002 by the issuing of the Commission Notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03). The 2002 revision had the main objective to make the EU leniency program more attractive by including the key changes, which were the guarantee of 100% immunity from fine, granting almost automatic immunity from fines to the first reporting cartel members, accepting the oral applications and evidence in hypothetical terms. The 2002 revision of the leniency program could encourage more leniency applicants. It could be seen from the clear statistics that during 2002 till 2006, there were 167 leniency applicants exposed cartels to the Commission.[699]

The latest revision of the EU leniency program is found in the 2006 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases entering in force on December 8, 2006. This 2006 Commission Notice aims to make the existing EU leniency program more attractive, transparent and predictable to get more and more firms to join the program. By these objective, the 2006 Commission Notice clarifies what type of information and evidence should be submitted and the conditions for

[699] European Commission, "Commission Leniency Notice – Frequently Asked Questions," [Online] Accessed: 2 March 2017. Available from: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/470&format=HTML&aged=1&language=EN&guiLanguage=cs

information and cooperation and introducing a marker system and new procedures for protecting corporate statements from civil litigations.[700]

Furthermore, to ensure consistency in the application of the leniency programs and reduce discrepancies between the existing leniency programs between the EU Member States, the ECN published the 'Model Leniency Policy Programme' to identify best practices concerning the leniency program. [701] The ECN Model Leniency Programme provides the common framework for substantive and procedural requirements that are supposed to contain in the leniency program to create soft convergence. [702] This ECN Model asks all the EU members to align their respective programmes with the ECN Model Programme. The more consistency in the national leniency programs in all EU Member States, the more encouragement for the potential lenient applicants to apply the leniency programs in more than one EU Member States.

In conclusion, the EU has long developed its leniency program to be more attractive, predictable and transparent through many revisions. According to the experience of the EU Commission the effectiveness of the leniency program will be higher from the increase of the legal certainty and overall transparency of the leniency system. The granting of complete immunity from fines for the first company that blow the whistle makes the EU leniency program more attractive.[703] The leniency applicant

[700] Sari SUURNÄKKI and María Luisa TIERNO CENTELLA, "Commission Adopts Revised Leniency Notice to Reward Companies That Report Hard-Core Cartels," [Online] Accessed: 25 February 2016. Available from: http://ec.europa.eu/competition/publications/cpn/2007_1_7.pdf

[701] European Competition Network, "Ecn Model Leniency Programme' (2012 Revised Version) " [Online] Accessed: 8 May 2017. Available from: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

[702] S. Brammer, Cooperation between National Competition Agencies in the Enforcement of Ec Competition Law (Oxford: Hart Publishing, 2009).

[703] OECD, "Policy Brief: Using Leniency to Fight Hard Core Cartels."

* There are some prerequisite conditions for leniency applicant to satisfy as follows:

"- The leniency applicant must submit information and evidence in relation to the alleged cartel first.

- The submission of information and evidence enables the European Commission to conduct an inspection in relation to the alleged cartel or find an infringement of Article 101 of the Treaty on the Functioning of the European Union.

- The applicant co-operates genuinely, fully, expeditiously and on a continuous basis with the Commission from the moment of the application and throughout the administrative procedure.

- The applicant terminates its involvement in the cartel immediately following its application, unless doing so would, in the Commission's view, jeopardise the inspection.

will get the immunity from the administrative fine, which would otherwise have been imposed from the participation of horizontal agreements between competitors. There are some certain requirements to satisfy in order to receive immunity from fine*. It is noticeable that the EU leniency program had been improved to render effective result as happening today.

The Set of Enforcement Priority in European Union

The set of EU prioritization is linked with the DG COMP strategic planning in terms of annual policy strategies and the five-year strategic objectives.[704] Cartel has been set as the top priority of the EU Commission since 1998. With the set of this priority, it leaded to the human resource management by doubling the number of cartel enforcement staffs.[705] It can be seen that the set of priority highly relates to resource allocation and management of competition agency.

Human Resources

The big part of success in the enforcement of EU competition rules must be contributed to the maturation of legal powers and staff competence. This involves the accumulated experience and expertise of the competition officials as well as the sufficiency of these experienced and specialized officials.[706]This part will assess the issues concerning the human resources only within the DG-Competition. It will not include the resources within the NCAs.

The European Commission's Directorate General for Competition has 802 staffs according to the data in 2015.[707] There is the link between the DG Competition's operational goals and the human resource management by pooling the skills and

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- The applicant must not have destroyed, falsified or concealed evidence of the alleged cartel when contemplating making its application.
- The applicant must not inform others that it has applied for immunity.
- The applicant must not have coerced others to join or remain in the cartel"

[704] Commission, E., "Eu Competition Policy in Action." , p. 9

[705] EU Commission, "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2015," [Online] Accessed: 26 March 2007. Available from: http://ec.europa.eu/competition/publications/annual_report/2015/part2_en.pdf

[706] McGowan, M. C. a. L., Competition Policy in the European Union. p. 30-31

[707] Commission, E., "Eu Competition Policy in Action." , p. 3

knowledges in need for operational goals. The DG-Competition hires the mix amount of resources between attorneys, economists and generalists.[708] The establishment of the Chief Economist has increased the number of economists in the DG-Competition. However, the number of economists in the DG-Competition is still lower comparing with the number of economists hired by the US antitrust enforcers. The trainings to improve staffs' expertise are established in consistent with the requirement of specific need of each unit.[709]

For the recruitment, the similar techniques to the US are employed to create more incentives to work within the DG-Competition. The DG-Competition also organized the internship program for young people to be the trainees and gain some experiences and expertise from day-to-day work of DG-Competition. These trainees can become the future employees of the DG-Competition.[710]

EU Approach to Solve Resource Constraints

Regarding the issue of resource constraint, the EU Commission used to face the big problem about resource constraints and administrative overload before the introduction of decentralization of enforcement of the community competition rules. The number of staffs is not sufficient to effectively enforce community rules comparing with the enormous cases and burdensome obligations from the increasing number of the EU Member States. The EU Commission admitted that inadequacy of resources impeding the capability to enforce the competition policy and law effectively. This problem causes the backlog of cases became the permanent problem of competition policy enforcement since 1960s. According to the Goyder, " the chief continuing weakness of…[DG Competition]… in the enforcement of competition policy is that its inadequate resources both financial terms and in numbers of officials, have prevented

[708] Ignacio De Leon, "An Institutional Assessment of Antitrust Policy: The Latin American Experience' International Competition Law Series," Wolters Kluwer International , p. 543-544

[709] ICN, "Human Resources Management in Competition Agencies," [Online] Accessed: 26 March 2017. Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc896.pdf

[710] Ibid. p. 34

it from ever completely digesting the workload" [711] The Commission; thus, has to prioritize its decision-taking. [712]This problem was later solved by the decentralizing enforcement role from the EU Commission to the NCAs and national courts with the introduction of the systematic case allocation between the Commission and NCAs.[713]

Other Factors Influencing the Enforcement of the EU Competition Rules

The development of case-law and the incremental growth of the EU competition policy help improving the enforcement mechanism in the EU.[714]

In conclusion, the EU used to experience some problems in the enforcement of its community competition rules. The main approaches that the EU took to enhance its enforcement is the prioritization of cases, decentralization of enforcement and incorporating more economic analysis in the application of the EC competition laws. Moreover, there is the effort to level up more accountability and transparency into the competition system.[715]

[711] Goyder and D.G., Ec Competition Law (Oxford: Clarendon, 1993)., p. 493

[712] McGowan, M. C. a. L., Competition Policy in the European Union. p. 214-215

[713] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 47

[714] McGowan, M. C. a. L., Competition Policy in the European Union. p. 30-31

[715] Ibid. p. 227

4. 3. 4 Lessons and Approaches from Japan to Enhance Enforcement Mechanism

Enforcement Structure of the Anti-Monopoly Act

The authorities responsible for the enforcement of the AMA is the Japan Fair Trade Commission or JFTC and the courts; Tokyo High Court and the Supreme Court. The JFTC is solely responsible for the enforcement of the Anti-Monopoly Act in Japan. It is an administrative, quasi-legislative and quasi-judicial authority.

The enforcement of the AMA begins with the investigation of the JFTC in the suspected violation of the AMA and then administrative hearing of the case before rendering the decision whether the suspected conduct violates the AMA or not. The decision of the JFTC will be reviewed by the Tokyo Hight Court, which has the exclusive jurisdiction as the court of first instance to review the JFTC's decisions. The further appeal of the Tokyo High Court's decision must be made before the Supreme Court, which is the final court in the form of a petition. [716]

Japan Approach to Solve Ineffective Enforcement in Japan

The original version of enforcement of the AMA was modelled the US antitrust enforcement with the three main elements: elimination measures (cease-and-desist order), criminal fines and imprisonment and finally private suit. However, the application of criminal fines, imprisonment and private suit was proved to be ineffective in the context of Japan. [717] The JFTC preferred to take the administrative process.

During 1950-1970 is the dark age of competition law enforcement in Japan because majority of cases were dismissed as the result of insufficiency of evidence and the lack of the JFTC's powers and supports to enforce the Japan competition law. The

[716] Matsushita, M., International Trade and Competition Law in Japan. p. 98, 110-111

[717] Matsishita, M., "The Antimonopoly Law of Japan."

private enforcement also failed. This leaded to the significant amendment of the AMA between 1950s-1960s.[718]

The rationales behind the ineffective enforcement during the early application of the AMA was no support from almost all local stakeholders in the society. The AMA was viewed as the US strategy in preventing Japanese firms becoming more competitive. Approximately for the first twenty years of AMA's application, there was the strong opposition of the AMA from major policymakers, bureaucrats and business sectors. There were some ideas to abolish and weaken the AMA. Particularly after the Allied Occupation Forces left Japan in 1952, Japan moved back to same political-economy before the war, which employed the priority of governmental policy in industrial development. Thus, the new industrial linkage (keiretsu) emerged to replace the zaibatsu. Private cartels were used by the MITI to organize industrial activities through the introduction of exemptions under the AMA.[719]

The big amendment of the AMA was partly help the problem of ineffective enforcement in Japan. The JFTC was equipped with the more powers for investigation and enforcement.[720] The introduction of compulsory investigatory powers, including a search warrant powers for criminal investigations.

To sum up, the enforcement of AMA was not perfect at the beginning; however, it has been developed and strengthened overtime. Today the enforcement of the AMA has matured and become the model of competition regime for other jurisdictions.

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[718] Sweeney, B., Giving Content and Effect to Competition Rules: Contrasting Australia and Japan in Regulation in Asia: Pushing Back on Globalization Edited by John Gillespie, Randall Peerenboom. p. 99-100

[719] Ibid. p. 99-101

[720] Ibid. p. 99-100

Strengthening the JFTC's Institutional Capacity for More Effective Enforcement

The early period of AMA enforcement was not effective as it was supposed to be. With the pressure from other countries, particularly the US to see Japan having more open and competitive market, The Japanese government, thus, implemented many measures to amend the AMA and strengthen the enforcement agency like the JFTC to be able to function as the "guardian of the market" and being able to vigorously promote competition policy according to the speech of the Prime Minister Koizumi to the Diet in May 2001. This speech showed the political will to support the competition law enforcement authority. This included the measure of transferring the JFTC as a subsidiary agency in the Ministry of Public Management to be an *de facto* independent agency under the Prime Minister's Office.

***De Facto* Independence of Japan Fair Trade Commission**

Despite the structure of the JFTC is being tied under the Prime Minister's Office, in practice the JFTC has administrative independence and absolute independence from political influence in deciding the competition cases. The JFTC can exercise its powers independently from other ministries and government. No authority can control the decision making, imposition of sanction and measures. It also has separated annual budget under consideration of the Japan parliament*.

This Japan's institutional model of competition authority proves that the structure of the competition authority is not necessary to be completely independent. The important thing is it must be independent in practice or *de facto* independent in order to have effective operation and law enforcement.

Appropriate Number of Commissioners

The number of the commissioners is proportionate for performing their obligations. The JFTC is composed of one chairman and four commissioners and one secretariat appointed by the Prime Minister with the approval of the parliament. Only the chairman must be granted approval from the King of Japan.[721]

The Set of Enforcement Priority in Japan[722]

The enforcement priority in Japan is set in the ‘Grand design for Competition Policy’. The enforcement priority in Japan is on: 1. Stringent action against price-fixing cartels and bid riggings in national level and international level.

2. Stringent action against exclusionary conducts

3. Prompt and stringent action against unfair trade practices, which harm small and medium sized enterprises

4. Merger Reviews Improvement

The JFTC also try to strengthen cooperation with foreign competition authorities for multi-jurisdictional merger reviews.

The AMA Amendments for the Incorporation of a Leniency Program to Enhance Cartel Enforcement

The Rules on Reporting and Submission of Materials Regarding Immunity Form or Reduction of Administrative Fines or (*Fair Trade Commission Rule No. 7, 2005*) indicates the detailed procedures for leniency program. The Japanese leniency program only applies to administrative surcharges but not to criminal liabilities.

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* This measure of having independent competition agency followed one of the US Government’s primary recommendations in the ongoing U.S.- Japan Regulatory Reform and Competition Policy Initiative.

[721] Matsishita, M., "The Antimonopoly Law of Japan."

[722] JFTC, "Grand Design for Competition Policy’ " [Online] Accessed: 1 March 2017. Available from: http://www.jftc.go.jp/en/policy_enforcement/index.files/grand_design.pdf

However, in practice, the JFTC states its position clearly in the *Guideline of the JFTC Concerning Criminal Accusation and Investigation Regarding the Breach of the AMA dated 7 October 2005* that the JFTC will not bring the criminal accusations against the first leniency applicant since the JFTC has an exclusive power to file a criminal accusation to the Public Prosecutor General. Without the JFTC accusation, the criminal trial cannot be initiated under the AMA. While the later applicants will be accused or not is subjected to the consideration basing on case-by-case basis. This position of JFTC in not bringing the criminal accusation against the first leniency applicant has received a good collaboration from a Chief of Criminal Affairs Bureau of the Ministry of Justice. Therefore, in practice, the first lenient applicant can enjoy the complete amnesty from the administrative surcharge and criminal sanction.

In Japan, there is only one type of leniency program, which is the self-employed and corporate leniency program. There is no individual leniency program for employees of the corporation like in the US leniency system.[723] The first leniency applicant that satisfy the conditions will be granted 100% immunity from the administrative surcharge, whereas the second and third applicants receive 50% and 30% immunity respectively.

After incorporating the leniency program into its competition regime, the JFTC experienced the early success in its application with the satisfactory number of leniency applicants; 26 applicants during January 4, 2006 to March 31, 2006. [724]

Japan Private Action

Private action for damages is allowed in Japan through the special provision in AMA and through the civil action through general tort provision.[725]

[723] Japan Fair Trade Commission, "Overview of the Jftc Overview of the Jftc's Leniency Program and Practices," [Online] Accessed: 19 October 2017. Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc731.pdf

[724] Barnett, T. O., "Criminal Enforcement of Antitrust Laws: The U.S. Model."

[725] Haley, J. O., "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter ?," Pacific Rim Law and Policy Association., p. 309

Human and Financial Resources

The JFTC considers that human and financial resources of JFTC are critical factors to achieve the goal in promoting free and fair competition as well as enhancing consumer interest. Therefore, the enhancement of JFTC capacities is put as a part of reinforcement of competition policy infrastructure in the Japanese grand design of competition policy. The JFTC must enhance its human resources in terms of quality and quantity. The Japanese government approved an increase of staffs and budget of the JFTC. The number of JFTC's staffs and budget have been increased in 1990s as a part to strengthen the AMA.[726] The JFTC has put some effort in recruiting experienced legal experts and economists to work with the JFTC.

Furthermore, the JFTC established a 'Competition Research Policy Center' in its General Secretariat to promote theoretical studies of competition policy from economic and legal perspectives. This establishment helps the JFTC in bolstering its economic analysis abilities through joint studies with outside experts. [727] The JFTC has been improved its expertise and analysis through the use of Competition Policy Research Center and outside experts. [728]

The data from the table shows the gradual increase in terms of number of staffs, investigators and budgets of the JFTC since 1995 till 2012. Therefore, the increase of JFTC human and financial resources have gone according to the reinforcement of competition policy infrastructure's plan.

[726] Yamada, A., "Japan: The Anti-Monopoly Law," Journal of International Business and Law.

[727] Shanahan, D., "The Development of Antitrust in China, Korea and Japan' (International Competition Law: Real World Issues and Strategies for Success June 16-17, 2005 Montreal, Canada) "

[728] JFTC, "Grand Design for Competition Policy' "

The Table of JFTC Staff and Budget from 1995 to 2012[729]

Year	Number of total staff	Number of Investigators	Budget (Billion Yen)
2012	799	456	8.74
2011	799	452	8.92
2010	791	451	8.96
2009	779	442	8.45
2008	795	429	8.66
2007	765	409	8.42
2006	737	383	8.34
2005	706	360	8.13
2004	672	331	7.82
2003	643	318	7.85
2002	607	294	6.16
2001	571	269	6.04
2000	564	263	5.90
1999	558	260	5.78
1998	552	254	5.62
1997	545	248	5.56
1996	534	236	5.38
1995	520	220	5.24

[729] JFTC, "About Jftc: Staff and Budget," [Online] Accessed: 1 March 2107. Available from: http://www.jftc.go.jp/en/about_jftc/statistics.html

4.3.5 The Similarities between the US, EU and Japan's Approaches in Overcoming Enforcement Problems

Measures Ensuring Independence of Competition Agencies in the US, EU and Japan in the Enforcement of their Competition Laws

The main competition agencies in these three jurisdictions have measures to ensure that their operation, particularly on the deciding competition cases are made independently without political influence. The FTC and DG Competition have the independent institutional design. The model of the US Federal Trade Commission (FTC) is used as the model for the JFTC.[730] However, the JFTC is the authority within the Prime Minister's Office but it has de facto independence with the introduction of measures guaranteeing the independence in practice. The institutional designs of competition agencies do not accurately reflect their independence level and effectiveness in their operations. Although the DOJ is in the Department of Justice and the JFTC are bound within the Prime Minister's Office, both agencies have measures to insulate political interventions and ensure the de facto independence in practice. With this institutional design, they are considered the effective and successful competition agencies in the world.

The Application of Leniency Program to Increase Cartel Enforcement in US, EU and Japan

The US, EU and Japan all regards cartels as the very harmful conducts. Therefore, these jurisdictions put cartels as one of their enforcement priorities.[731] However, cracking cartels cases is not easy tasks even for these matured competition agencies. The US is the first jurisdiction that pioneered the leniency program. It has been clearly proved that incorporation the leniency program into competition system

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[730] Sweeney, B., Giving Content and Effect to Competition Rules: Contrasting Australia and Japan in Regulation in Asia: Pushing Back on Globalization Edited by John Gillespie, Randall Peerenboom. p. 98

[731] McGowan, M. C. a. L., Competition Policy in the European Union. p. 216-217

highly increases the cartel enforcement rate. Many jurisdictions then adopt the leniency program including the EU and Japan.

The EU leniency program was modified in 2002 to be similar to that of the US in order to be able to cooperate with the DOJ's leniency program, including the similar grant of complete amnesty to the first corporate that blow the whistle. More convergence appears in five main areas as follows: the guaranteed amnesty, the written confirmation of conditional immunity, the guaranteed fine bands for later reporting companies, assessing applicant' s role in the infringement and more flexible evidence requirements.[732]

Cooperation in cartel investigation between the US and EU are often seen. Because of the convergence between the US and EU leniency program, the number of international cartelists decide to join the leniency program in both the US and EU has been increased. This benefits the closer cooperation between enforcement authorities help gaining valuable information and evidence to crack the case, which would have been unlikely available in the past.[733]

In spite of the big change in the EC leniency program, some differences have remained between the EC and US leniency programs, including the types of leniency. The US grants the leniency program for both corporate and individual whereas only corporate leniency program in the EU. No advanced version of leniency plus program is found in the EU like existing in the US.

The US, EU and Japan adopted the leniency program to increase the capacity in cartels enforcement. They all achieve the successful increase in cartel detection after adopting the leniency programs.

[732] D. JARRETT ARP AND CHRISTOF R.A. SWAAK, "Immunity from Fines for Cartel Conduct under the European Commission's New Leniency Notice," [Online]. Available from: http://www.gibsondunn.com/fstore/documents/pubs/EU_Leniency_Notice.pdf, p. 2-4

[733] Thomas O. Barnett, "Criminal Enforcement of Antitrust Laws: U.S. Model," [Online]. Available from: https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model

The Set of Enforcement Priority in the US, EU and Japan

The US, EU and Japan all have the enforcement priority. Setting priority in enforcement is the beneficial tactic to improve the enforcement effectiveness since the competition agencies can realize in what areas of anti-competitive conducts should be put special attention, efforts and resources in. This will help competition agencies having more focus, better resource allocation and setting clear enforcement plan and strategies. These three jurisdictions also share the same approach in revising the set of enforcement priority periodically. When the anti-competitive conducts, which are set as the priority, are eliminated or reduced, then these enforcement priorities can be shifted to other more important or harmful anti-competitive behaviors according to the competition environment in different time periods.

The Growing of Global Dimension in Competition Law Enforcement in the US, EU and Japan

Globalization of business transactions affects the enforcement of national competition law in both the US, EU and Japan. More and more cases are related to international dimensions, for example international cartels. One merger is being reviewed by more than one jurisdiction or abuse of dominant position in one country may affect the market in other country. It is undeniable that cooperation between affected jurisdictions is necessary for the effective enforcement of competition cases relating to international dimensions. According to the practices of the US, EU and Japan, they all resort the cooperation and coordination with other jurisdictions in their investigation, case handling and enforcement. The more details of cooperation between competition agencies is on the topic of international cooperation.

Ensuring the Adequacy of Human Resources and Financial Resources and Adopting Resource Allocation Plan

The matured competition agencies in these three developed countries have adequate resources in terms of financial and human resources to operate. They all have resource allocation plans. Their staffs are qualified and well-trained in both legal and economics fields. The number of staffs are incomparable between the US, EU and Japan because there are significant differences in sizes and institutional structures among these competition agencies. The US with two matured competition authorities are outnumbered both legal and economic staffs comparing to the DG Comp and JFTC.

However, US, EU and Japan face a common challenge with developing countries, which is the rotation of qualified staffs from competition agencies to private consulting firms, which provide higher salaries. Therefore, the US and EU have commonly designed strategies to retain the experienced human resources by providing career development opportunities and chances to work in other units or divisions. The training whether inside or outside competition agencies are established to develop existing staffs to be more expertise and skillful in the US, EU and Japan.

4.3.6 The Distinction of Approaches Taken in the US, EU and Japan in Overcoming Enforcement Problems

There are some differences in the enforcement mechanism among these three systems: US, EU and Japan. There are various rationales behind these differences, including different legal systems; namely the common law and civil law, contrasting goals and priority of each national competition policy, political influence, level of competition culture and different aspects of economic, social and history of each jurisdiction. All of these factors result in the US, EU and Japan have developed their own competition enforcement regimes according to its own specific national aspects. It is beyond the scope of this dissertation in comparing the whole enforcement regimes of these three countries. Instead the focus of this dissertation is to study and compare

the approaches taken between these jurisdictions in overcoming the problem of ineffective enforcement and institutional constraints.

Among these three competition regimes, the US seems to be the jurisdiction that vigorously enforce its antitrust law with the impressive numbers of successful cases annually. There are many tools and mechanisms that uniquely found in the US in facilitating the effective antitrust enforcement, which are the treble damages, private suit, discovery rules, two matured enforcement authorities with broad investigative powers and prominent role of judiciary in developing the US antitrust law. This argument is supported by John O. Haley by comparing the US competition enforcement with the enforcement of European Union and Japan.

"Effective government action to enforce legal rules requires that public enforcement authorities have access to information to determine compliance. The investigatory powers of U.S. enforcement authorities are considerably broader and more coercive than any of their counterparts in Japan or Europe. The combination of reporting requirements, extensive discovery powers, and the availability of judicial contempt sanctions for their enforcement enables significantly greater access to evidence in both public and private law enforcement actions in the United States, with, it should be added, equally greater costs for both prosecution and defense. Unable to compel full disclosure as effectively as their U.S. counterparts, both Japanese and European competition law authorities are forced to rely on surprise site searches as the principal means of gathering evidence of violations. The costs and personnel required, however, preclude frequent resort to these means. As a result, it appears that evidentiary problems alone reduce considerably the effectiveness of enforcement."[734]

[734] Haley, J. O., "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter ?," Pacific Rim Law and Policy Association., p. 303-325, 312

US, EU and Japan: Different Methods of Competition Law Enforcement

The US adopts criminal, administrative and civil enforcement

The EU adopts administrative enforcement

Japan adopts administrative, criminal and civil enforcement

JFTC had similar methods of enforcement to those of the US because of adopting the US model law. However, the criminal enforcement and private enforcement are not successful in Japan like those of the US. Nowadays the JFTC creates its own enforcement style by using informal style of enforcement by relying on informal measures, which are only the administrative guidance without any forcing power to ensure compliance, such as issuing warning instead of cease and desist order, which is the formal measure, a widely use of merger consultation prior to prior notification. These informal measures are more favorable than investigation, the JFTC does not spend too many human resources and budget while able to effectively identify competition issues to general industry. Informal measures can be issued even in the case of lacking adequate evidence of the alleged violation. The JFTC's informal measures appear on the media coverage as well so it is capable of creating the public awareness and pressure in the similar level as the adoption of formal measures.[735] Whereas, the clear formal measures only are more frequently seen in hardcore cartels, which cause detrimental effects.

However, employing these informal measures rather than formal measures are widely criticized about the guarantee of due process, transparency and procedural rights of respondents. Informal measures also cannot secure compliance, which is the drawback of employing the informal measures.[736]

[735] Makoto Kurita, "Effectiveness and Transparency of Competition Law Enforcement—Causes and Consequences of a Perception Gap between Home and Abroad on the Anti-Monopoly Act Enforcement in Japan," [Online]. Available from: http://openscholarship.wustl.edu/law_globalstudies/vol3/iss2/11 , p. 395

[736] ibid. p. 389, 395-400

While the administrative surcharge, which was later introduced to improve Japan enforcement is more resemble to the administrative fine in the EU. However, they are not totally similar since the Japanese administrative surcharge is not the penalty like the EU administrative fine, but merely administrative measure to collect extra profits gained by cartelists during the implementation of cartel. The calculation of Japanese administrative surcharge is also different from the EU because it is the fix rated by the law from the estimated extra profit, not actual extra profit and cannot be above the actual extra profit. While the administrative fine in EU is considered a kind of penalty so it can exceed the actual extra profit of cartel participants during the implementation of cartel. Its calculation bases on the entire sales of violating parties in the preceding years.[737] Therefore, the amount of administrative fine in EU can be a lot higher than those of Japanese administrative surcharge. One drawback of the Japanese administrative surcharge is from its estimation not from the actual extra profit; thus, if the estimation is lower than the real actual extra profit. The cartelists might have incentive to engage in cartels.

To sum up, even though the Japan's enforcement was originally modelled after the US antitrust enforcement, overtime it has developed its own methods, which are more suitable and work in the context of Japan. Therefore, the methods for enforcement between US, EU and Japan are different.[738] Although the US, EU and Japan have some differences in their enforcement systems, these differences do not affect the degree of fairness in enforcement. Each jurisdiction employs the appropriate approaches to its economic, political and legal context to guarantee fairness and effectiveness in enforcement.

[737] Matsishita, M., "The Antimonopoly Law of Japan."

[738] Ibid.

Disparity in the US, EU and Japan Competition Enforcement Authorities/Agencies

In the US, there are dual public authorities responsible for antitrust law enforcement. While under the EC Competition rules, there are the supranational body responsible for enforcement of competition cases involving international dimension between EU Member States: DG Competition. The EU also has the unique decentralization of enforcement of cases affecting trade between EU Member States to national competition authorities (NCAs) to lessen the overloaded cases of the DG Competition. In contrast, Japan has the exclusive enforcement agency, which is the JFTC.

Different Degree of Private Action's Widespread and Success

The US has the most successful private enforcement. This is because the legal infrastructure and the US substantive and procedural system uniquely favors the private action. The private action in the US is the most widespread comparing to EU and Japan. The number of the US private actions are quite high and they account for approximately 90% of the whole competition enforcement.[739] The US private action is facilitated by many factors including, special procedural rules, discovery rules, high incentive of bringing lawsuit and treble damages. These facilitated factors are not commonly found in other jurisdictions. Class action under the US procedural rules are not common for other EU Member States, even in the countries that have common law systems.

On the other side of the Atlantic, the pure private action under the EC competition law is not allowed but suffered parties can claim for damages for the violation of community competition law under some national tort laws. The number

[739] Ailsa Sinclair and David Ashton Donncadh Woods, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead', Competition Policy Newsletter," [Online]. Available from: http://ec.europa.eu/competition/speeches/text/2004_2_31_en.pdf

of private litigations for the violation of EC competition law under national laws in EU Member States are quite limited.[740]

Under the AMA, the private action is available both under the AMA and under the tort law. Under Article 25 and 26 of the AMA, the competition private suit can be brought to the Tokyo High Court for damages recovery with the prerequisite condition that the JFTC has already acted and rendered final decision against the anti-competitive conducts. This action is based on no-fault liability. While bringing the action under the tort law, the plaintiff needs to prove tortious intent or negligence. However, the plaintiff does not have to wait for the final decision of the JFTC.

With the prerequisite conditions for filing the private suit under the AMA and the stringent burden of proof under the tort law requiring the plaintiff to prove the amount of damage and the casual link between the damage and the violated conducts, it is quite difficult for the plaintiff to fulfill the requirements. Therefore, private action is not frequently found in Japan.[741] The number of private litigation in the Japan during 1947 until 1970 was very low.[742] However, the private litigation was gradually increased since 1986.[743] The main users and beneficiaries of private antitrust litigation in Japan have been local governments and government entities in bid-rigging cases with the enormous damages from bid-riggers. While in other violation of AMA beyond bid-riggings, businesses have been much less successful awarding damages, Finally, Japanese consumers unfortunately have recovered almost nothing.[744]

Even though Japan adopted the model of private action from the US, the level of success in private actions between the US and Japan is totally different. Unlike the US, Japan does not have appropriate legal systems facilitating the private suit like the

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[740] Ibid. p. 2

[741] Matsishita, M., "The Antimonopoly Law of Japan."

[742] Simon Vande Walle, "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis," 8 Competition Law Review (2012)., p. 7-28

[743] Tom Ginsburg and Glenn Hoetker, "The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation," The Journal of Legal Studies 35(2006)., p. 56

[744] Walle, S. V., "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis," 8 Competition Law Review., p. 27

US. The number of Japanese private action is hardly compared to those number in the United States with a thousand of cases filed in the US annually. However, it must be noted that the number of private action is not the only indicator. It is necessary to take into account the different size of country, economy and population between the US and Japan. Overall, the private litigation has grown significantly with approximately twelve of private action cases each year. Surprisingly, the private action in Japan seems to be more robust than some jurisdictions in the European Union.[745]

4. 3. 7 Analysis of Factors and Approaches Required for Enhancing Enforcement Mechanism

Independence of Competition Agency Is Important for Enforcement

Independence is one of the desirable factors to build effectiveness of competition agencies. Independence is an important factor for ensure that obligations of competition agencies are carried out independently without the influence of external pressures. The degree of independence can help ensuring that investigation, case-handlings and decision-making are justified. The competition agencies in US, EU and Japan enjoy independence in its administration and operation. This part will discuss how to guarantee independence of competition agencies basing on experiences and solutions from international best practices and those of the US, EU and Japan. After extracting the means to guarantee independence of competition agencies from international best practices and approaches of matured competition agencies, this study divides means to ensure independence into two means: independence obtained through institutional design of competition agency and measures insulating external influence.

[745] Ibid., p. 28

A. The Degree of Independence Obtaining through Institutional Design of Competition Agency

Designs and structures of competition agencies affect the level of independence of competition agency. The Guidelines emphasizes in the Chapter 4.3.3 that competition authorities in AMSs should be granted administrative independence as necessary as possible to insulate political influence. However, the Guidelines does not force AMSs to choose any specific institutional design for competition authorities to guarantee the independence. According to the Guidelines, there are three models of institutional structures of competition regulatory body that ASEAN Member States can choose to adopt[746]

1. Standalone independent statutory authority responsible for competition policy administration and enforcement (Monist Administrative Model)

A single competition authority investigates cases and takes the enforcement decision. This model is mostly used in EU Member States; however, when this model is applicable to the developing countries like ASEAN Member States might be problematic. It is because investigative and adjudicatory functions are combined within an authority enables that authority to act as judge, jury and executioner. This absolute power allows the misuses of power and the problem of internal check and balance.[747] The KPPU adopts this institutional model.

2. Establishing different statutory authorities responsible for competition policy administration and enforcement within specific sectors (Dualist Administrative Model)

Investigative and decision- making functions are separated into different institutions. This model can be clearly seen in Vietnam where the investigative

[746] ASEAN Regional Guidelines on Competition Policy, Chapter 4.3

[747] Pradeep S. Mehta, "Competition Policy in Developing Countries: An Asia-Pacific Perspective," [Online] Accessed: 16 January 2016. Available from: http://www.unescap.org/sites/default/files/Bulletin02-ch7.pdf p. 82

function is under the responsibility of the Vietnam Competition Authority (VCA) and decision- making function of competition restrictive acts is under the responsibility of the Vietnam Competition Council (VCC). Only the investigation and adjudication regarding unfair competition practices fall within the scope of the VCA. These two authorities are separated. [748]

3. Placing competition regulatory body within government or ministry. The competition authority in Thailand adopts this model.

It is great that the Guidelines provides the variety of competition agencies' institutional designs for AMSs because there is still no consensus on the optimal institutional design of competition agencies. One institutional design might be suitable for one jurisdiction but not for the others. The adoption of one- size- fits- all model is not work in the context of vast differences in competition regimes development among AMSs.

After analyzing the pros and cons of different institutional designs of competition agency, this study found independent statutory authority is the recommended model to guarantee the independent operation from the political influence and corporate lobbying. Incorporating the competition agency within the governmental or public body makes it more vulnerable to the political influence because the officials of competition authorities must follow the direct orders from commanders.

[748] Authority, V. C., "Authority and Mission."

Independent Competition Agency is the Recommended Model

Ideally, competition agency should be an independent organization to avoid the political intervention and business influences. In the global trend today, there is a steady rise of the independent competition agencies in both developed and developing countries.[749] The more independence the competition agency belongs, the more effective and well-functioning it can be in handling cases.

By being an independent competition agency means having the safeguard mechanism and measures to ensure that the process of implementing competition policy, investigation, deciding to pursue the case or not and decision-making process are insulated from political influence.[750] Therefore, competition agency can perform its obligations without the external influence and based the application, interpretation and enforcement of competition law on sound legal and economic basis. The complete independence from all political process and influence in every single way might not be possible in practice since the process or appointment the head of competition agency, commission and providing the budget are somehow related to the engagement of legislative, executive or administrative branch.

However, being independent agencies does not mean the complete free from being monitored. The independent competition agencies are still expected to be subject to government oversight and a system of checks and balances. [751] Some believe that the complete independent may not be desirable in practice since it will make the conducting competition advocacy to government and other public authorities more difficult comparing with the competition authority that are a part of the public authorities. It is more influential for competition agency to conduct competition advocacy and reduce other unnecessarily competition restrictive policies

[749] UNCTAD secretariat, "Foundations of an Effective Competition Agency," [Online]. Available from: http://unctad.org/en/Docs/ciclpd8_en.pdf, p. 7

[750] William E. Kovacic, "Competition Agencies, Independence, and the Political Process," [Online] Accessed: 1 May 2017 Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)86&doclanguage=en

[751] William Kovacic, "Aec and Competition Laws: Opportunities and Challenges,"(Chulalongkorn University 2013).

and laws if the competition agency has a close and good relationship with government and other public authorities. By being independent competition agency is different from being completely isolated institution from government. Independent competition agency is still required to subject to government monitoring mechanism to maintain its accountability.

Not every competition agency can be organized as the standalone independent competition agency. Making decision for the institution design of competition agency in each country depends on many other factors beyond guaranteeing the independence of competition agency, for example the legal system, socio-political economy, specific conditions of each country. Therefore, different countries have different designs of competition agencies. It can be said that no-one-size-fits-all for selecting the institutional design of competition agency. This is compatible with the situation of ASEAN countries that adopted the different institutional designs for their competition agencies.

Therefore, the recommendation for ASEAN countries that do not have the standalone independent competition agency is adopting other mechanism to guarantee the degree of administrative independence as much as possible in practice. In other words, creating the *de facto* independent competition authorities. Mechanisms to ensure *de facto* independence of competition agency are analyzed in the following part.

B. The Degree of Independence Obtaining through Measures Insulating External Influence

External influence could be exerted to influence the operation of competition agency in many ways, for example the appointment and dismissal process of the head of competition agency and commissioners, the budget allocation from state, inability of competition authority to manage its human resources, the possibility that the legislature will amend the law to curb the competition agency's powers. This part will

discuss and analyze the important factors that are related to the degree of independence of competition agency beyond institutional design of competition agency and suggest some measures that can help improving the level of independence of competition agencies.

The Transparency and Appropriate Procedures for the Appointment and Dismissal of Commissioners and Head of Competition Agency

The transparency and appropriate procedures for the selection and dismissal commissioners and the head of competition agency are the important element for ensuring the independence of competition agency. It is a safeguard measure to guarantee that competition agency despite of its institutional design is insulated from the political process. The process of nominating and appointing can be used by the appointing authority to filter out the candidates that tend to resist or ignore external political preference. This can be used to select other persons who are likely to obey and share the similar political preference or shared values with the appointing authority. The head of the competition agency is the important position that lead all the implementation of the competition policy and law enforcement. It can be seen from the experience of the United States that the competition concept and the will to apply and enforce competition law of the head of the agency is so important, which affect the rise and low of competition system during the tenure of his or her position. Therefore, it is necessary to make sure that the process of appointment of this position is transparency and having less political influence as much as possible. This helps preventing the head of the competition agency respond to the request of the political entities or return the favor.

However, it is quite difficult to make the appointment process completely free from political influence since the nominating entity, approving entity and appointing entity are likely to concern the executive branch, head of the state and legislative branch or parliament. Hence, the emphasis is on how to reduce the political influence

and pressure during the appointment process as much as possible. This can be done by ensuring the transparent in appointment procedures. The less discretion in selecting the head of the competition agency and the commissioners, the less political influence can be exerted.

The set of clear and transparent prerequisite conditions in applying for the positions of the head of competition agency and commissioners can filter out the unqualified and inappropriate persons. The degree of independence from political influence can be further by requiring the qualification of the commission board from the different political background. This approach is used by the FTC.

The term of each commission should be staggered by years to avoid the whole change of the commission from political influence. This also guarantee the continuous operations of competition policy and the commission's tasks. If the reappointment is allowed, there should be a process to prevent the reappointed persons returning the favor to the appointing authority and thus change the policy or enforcement behavior.

The clear and transparent criteria in dismissal these positions are an element to ensure independence of the head of competition agency and commissions in performing their duties. The conditions for dismissal should be pre-specified in the transparent way. They are supposed to be good reasons for dismissal. Otherwise, it will be raised to interfere or pressure the head of the agency and commissions in carrying on their obligations. Having the specified fixed term in the operation of the head of agency and commissions is also important.

Sources of Funding

The source of funding of competition agency is the channel that can be used to exert influence or pressure by the political bodies. Influence can be exerted through funding by the threat of augment or reduce the next budget of the competition agency on the condition that the competition agency must response to the preference of authority who has the power to control the budget of the competition authority.

Therefore, it is required that the funding of the competition agencies should not depend solely on the discretion of the head of state, executive ministries, or the legislatures. The clear criteria in calculating the annual funding is required to avoid the unreasonable cut of competition agencies' budget or impose the restricted mean of giving financial support.[752]

In some countries, the calculating of funding is sometimes depending on the competition agency' s performance. This criterion is acceptable. However, for developing and young competition agencies in ASEAN Member States that do not have experience in enforcement; thus, having a small number of investigation and cases will have the bad performance in the view of others. This will make it more difficult for competition agency to request for more budget, which impede the development of overall institution and enforcement. This problem raised here is faced by the Thai competition authority that have the low performance in the law enforcement in the eyes of outsiders. The request of more budget is denied resulting from the low performance of the competition authority. It faces the big problem of inadequacy of budget to improve its enforcement. Accordingly, the ineffective enforcement cannot fully solve partly from the insufficiency of budget to make further improvement.[753]

The Measures Insulating the Direct Influence in the Operation of Competition Agencies

The measures to prevent the commands or customs, which allow the head of state, government, ministers, or parliament from taking direct or indirect steps to determine or influence the operation of competition agency in issuing the secondary legislation, guidelines, daily administrative operation, prosecuting cases, should be introduced. However, these safeguard measures should not prevent the political institutions from recommending the set of broader competition policy in order to make it conform to the broader national economic policy or offering the general view

[752] Kovacic, W. E., "Competition Agencies, Independence, and the Political Process."

[753] Santawanpas, S.

towards the set of secondary rules. These kinds of recommendation is acceptable because it aims to create coherence between competition policy and other policies.

Measures Enabling the Competition Agency to Resist Unjustifiable Suggestions from Political Branches or Government

Sometimes, the operation of competition agency is subject to some recommendation from the political branches or government. They might demand the competition agency to respond to their commands or recommendations. These recommendations may be regarded as a kind of political influence over the operation of the competition agency. Therefore, this part will discuss to what extent the competition agency can resists these recommendations in a suitable manner.

The first approach is to clearly give the legal mandated powers to the competition agency to solely perform the important obligations, for example the investigation, case- handling process and decision making. Secondly, the legal mandated power should have a detailed specification of powers. If the details and conditions for exercising these powers are clearly elaborated, it will improve the more confidence of the competition agency in exercising the given powers within the legitimate scope. This will be the good ground for competition agency in exercising its powers and make it legitimate in the eyes of the public. Then competition agency can rely on the policy statement, elaboration of legal mandated power to be reasonable arguments in resisting unjustifiable recommendations from external authorities. This will make it more difficult to insert political influence in the operation of competition agency because competition agency can confirm that it legitimately exercises the power according to the detailed specification and elaboration of legal mandated power. By making all the process transparent and publicizing decisions after the end of the case will help competition agency having reasonable reasons to resist the unjustifiable recommendations from political branches or government.

Structural Independence V *De Facto* Independence

As discussed in the previous part that independence is the necessary element for effective operation of competition agencies. The further analysis is on the appropriate level of independence of competition agencies among AMSs. Whether the structural independence by being the standalone independent body is the only necessary model will be analyzed.

The indicators used for measuring the level of independence of competition agencies indicated by the OECD are divided into the independence of competition agency into two types, which are structural independence and *de facto* independence.[754]

According to the international best practices, the ideal model to guarantee the optimal transparency and independence of competition agency is the standalone independent competition agency. More and more competition agencies across the whole is moving towards being the independent competition agency.

However, some new-born competition agencies face many problems in being independent agency. Competition law and its concept are something new in most AMSs. Thus, some competition agencies are established in one of the ministries first, such as Thailand, Singapore and Vietnam to be close to government oversight and able to use the current officials and start working without concern about resources. These countries do not choose the ideal structural model of being independent competition agency in the first place because of their internal conditions. The proposed recommendation for these countries are guarantee the *de facto* independence with the introduction of measures to insulate political influence in its operation. After that the competition agencies should gradually separate themselves from the government overtime. This circumstance may not happen within a short

[754] OECD Secretariat, "Independence of Competition Authorities-from Design to Practices'," [Online] Accessed: 19 January 2017. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf(2016)5&doclanguage=en p. 3

period of time since the establishment. It could take five, ten or fifteen years to gradually get more and more distance from the government oversight.[755]

With the big constraints in changing the institutional design of competition authority to be more independent within the short period of time because changing the institutional model of competition agency may require the amendment of competition law. This dissertation proposes that AMSs should adopt *de facto* independence approach by trying to ensure that competition authorities having administrative independence and lessen political influence and corporate lobbing as much as possible. This can be done by introducing the measures to ensure that the competition authority has the high degree of independence in its main operations; investigation, case-handling, decision-making, imposing sanction and enforcement.

Furthermore, the *de facto* independent of competition agency should have powers to control its own staffs whether in selecting, dismissal, awarding or punishing and rotating staffs. Otherwise, the political bodies can use the powers to control the staffs of competition authorities to insert pressure and/or influence in the operation of the disobedient staffs of competition authorities. This will affect the overall operation of competition authority and can be disincentive of the staffs in carrying on its works on the sound principles of competition law.

Another recommendation is having the clear and transparent criteria for determining the budget of competition authority based on obligations of competition authorities. Determining the budget basing on discretion of any political body should be avoided whether they are from legislative body, executive, the parliament or the head of the state. Otherwise, the competition authority will be opened for the exertion of political influence through the budget allocation or the threaten to reduce the next year budget.

[755] Kovacic, W., "Aec and Competition Laws: Opportunities and Challenges."

Finally, introducing mechanisms ensuring that there is no law or custom allowing the head of the state, ministers, legislatures or any other political body or person taking direct or indirect steps to influence competition authority in exercising its mains powers: issuing secondary rules, prosecute cases or enforce law.

The JFTC institutional structure model as the *de facto* independent authority under the Prime Minister's Office can be an example for AMSs. The distinctive features of the JFTC that AMSs can adopt are the mechanisms to guarantee the administrative independence with the absolute independence in decision making of competition cases and having separated annual budget. The JFTC can exercise its powers without influence or pressure from any other authorities. This reflects that competition authority like the JFTC that has the structural tied within the public authority can be effective and independent in enforcing competition law. If there is the formal and reliable mechanism to guarantee the independence in practice, the competition agency can effectively perform its function as the independent enforcer like other structural independent authority.

By adopting the *de facto* independence model, it is important that competition authorities must have functional and administrative independence by being able to perform the daily-work, investigation, decision-making and imposing sanctions without receiving authorization from superior authority. However, they are still being monitored and having *ex-post* reporting duties. Last but not least, it is also necessary for competition agency to build independent image from political intervention and business influence to gain more credibility in the eyes of the public.

Using Private Enforcement as a Complementary Enforcement Mechanism

Private enforcement of competition law can be another mean to increase the level of competition law's enforcement and deterrence. Private enforcement can be enabled in parallel with the public enforcement to allow suffered parties to claim

damages from the violation of competition law. It can complement public enforcement in competition agencies, which facing resource constraints.

The example of effective private action in antitrust law is clearly seen in the United States. Rome cannot be built in one day so as the private enforcement system in the US. The early enforcement of the Sherman Act was leaded by the federal government. The start of private litigation was just picked up what the federal government left off. However, the situation has been changed dramatically today. Currently the US private enforcers are generally viewed as the important enforcer who push the US antitrust to its limit.[756] However, the effective and successful private action in the US is exceptional and rarely find in other competition regimes since there are many factors encouraging the private action, including the US legal infrastructures, discovery rules, treble damages, high incentive to sue in the US. Even the Japan, which have adopted the US antitrust model, including private action, cannot reach the extraordinary outcome of private litigations as appearing in the US.

Considering the ASEAN's context, it is quite ambitious to expect the effective private enforcement in the near future because ASEAN Member States do not have the same facilitators as appearing in the US. The successful and effective private enforcement as happening in the US also takes long development and many facilitating factors. Moreover, the culture in ASEAN is different from American culture. The ASEAN people wants to avoid litigations. Therefore, the recommendation to encourage private enforcement under competition laws in AMSs can be the pioneer attempt leading to further development in the future. If some advantages from the private enforcement appear, it will encourage the suffered competitors and consumers to initiate more private enforcement to indemnify damages. Therefore, enabling the private action to complement the public enforcement of competition law is recommended. However, to foster successful private enforcement requires some

[756] Hovenkamp, H., Federal Antitrust Policy the Law of Competition and Its Practice. p 59

factors, for example incentives for bringing the private suit in terms of damages or punitive damages that worth the damages suffered and all legal fees, rules or mechanisms helping plaintiffs to gather evidence and enabling the class-action.

Empowering Adequate Legal Powers for Competition Agencies for Investigation and Enforcement

Adequate power to investigate and enforce competition laws is a key to successful enforcement in the US, EU and Japan. Without these powers, the competition agencies face difficulty in carrying on their operation. The lack of adequacy of JFTC's powers to investigate and enforce competition law was an obstruction during the early application of the AMA. Japan realized this problem so there was an amendment of the AMA to equip the JFTC with compulsory investigation powers, including the search warrant power. Therefore, lesson that ASEAN should learn from the US, EU and Japan is the necessity to equip adequate legal powers to competition agencies for effective investigation and enforcement of competition rules.

Ensuring the Adequacy of Resources and Human Resource Management with Well- Trained Staffs

The function of competition agencies requires both budget and competence of human resources. It can be seen that the competition agencies in the US, EU and Japan do not have significant problem of resource constraints. They realize that budget and human resources are the main drive of institution. Therefore, they ensure that competition agencies have sufficient resources; financial and human resources, to fulfill all obligations through many means, including the request of more budget and adopting the human resource management for recruit and retention of specialized and experienced staffs. In Japan, the improvement of JFTC's staffs in quality and quantity is a big part of the enhancement of JFTC's capacities plan. The trainings and workshops for staffs of competition agencies in the US, EU and Japan are widely provided both internal and external. In the US, staffs are open to engage in other competition-field

of works to gain new experiences and staff exchange program with external bodies is possible through the revolving door process. Therefore, a lesson learnt is adequacy of resources and well-trained staffs should be ensured to foster effective enforcement mechanism.

Setting Strategic Planning, Enforcement Prioritization and Resource Allocation Plan

Strategic planning, including enforcement prioritization should be set according to the objective of competition policy and law and then resource should be allocated accordingly. These factors are considered the factors for building effective competition agency. Setting the enforcement prioritization and resource allocation plan also helps lessening the resource constraints within competition agencies.

The Use of Leniency Program to Improve Hardcore Cartel Enforcement

Adopting the leniency program or amnesty program is strongly recommended by many international organizations to help improving hardcore cartel enforcement. The leniency programs have been proved to bring about the increasing number of successful hardcore cartel detection in the US, EU and Japan. However, there are some prerequisite conditions that need to be fulfilled to foster the effective function of the leniency program.

Firstly, ability of competition agency to create credible threat in cartel enforcement and successfully prove the existing of cartels. The competition law that categorizes hardcore cartels as *per se* illegal will lower the burden of proof of competition agency than proving hardcore cartels under the rule of reason analysis.

Secondly, it is necessary to make the leniency program attractive by granting the clear and reliable full amnesty for the first lenient applicant that blow the whistle on the condition that they can fulfill all conditions of participating in the leniency

program. The level of fine reduction for subsequent lenient applicants should be clear and made available to the public.

Thirdly, guaranteeing predictability, certainty, transparency and strong protection of confidential information in the application of the leniency program.

Fourthly, high penalties imposed for hardcore cartels to make it not worthy for cartelists to participate in hardcore cartels. Criminal sanction imposed on individuals can be a motive for participating in the leniency program.

4.4 Approaches Taken to Overcome Impediments Concerning the Lack of Competition Culture, Competition Awareness within the ASEAN Member States

Competition advocacy produces a wide range of benefits to competition system. It plays an important role in helping an achievement of the objective of competition policy.[757] Thus, competition advocacy is one of the most necessary tasks of competition agency. There is no one size fits all approach and how to conduct competition advocacy. However, there some common principles and international best practices on how to conduct competition advocacy effectively as follows:

4. 4. 1 International Best Practices and Recommendations to Build Competition Awareness and Competition Culture

International Competition Network identifies the requirements of effective competition advocacy[758]

1. The first requirement is the legal mandated power to conduct competition advocacy. For more effective operational of competition advocacy, competition agency should be able initiate competition advocacy activities without asking other' s permission or approval.

[757] ASEAN Regional Guidelines on Competition Policy, Chapter 9

[758] International Competition Network, "Advocacy and Competition Policy," [Online] Accessed: 1 November 2016. Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf

2. In order to be able to shape the regulatory framework to lessen unnecessary competition restrictive effects and make them as competition-friendly as possible, participation of competition agency's representatives in the process of drafting and reviewing laws and regulations is necessary. Effectiveness of this participation depends on many factors whether this kind of participation is compulsory or discretionary. The degree of influence in the regulatory framework and to what extent the recommendations of competition agency will be adopted are influential factors. Whether there is the requirement to clarify reasons in case of non-adoption of competition agency's recommendations is related because government and public authorities must demonstrate strong and sound arguments behind the non-adoption. This will lessen the inappropriate discretion in issuing competition restrictive laws and regulations. Further discussion between related authorities and competition agency is recommended in case of non-compliance with the competition agency's recommendations in order to find the least competition restrictive available options.

3. The existing laws and regulations should also be reviewed whether they cause restrictive competition effects or not.

4. If participation in the drafting and reviewing process of law and regulation is not possible, other available options are recommended to enabling competition agency to meet legislatures, government and public authorities on an occasionally basis to discuss competition concerns.

5. Tailoring the competition advocacies activities is necessary. The appropriate competition advocacy activities and techniques must be selected to conform to the nature and interest of different targets.

6. The reputation and image of competition agency affects the capability in advocating. Political neutrality, transparency, autonomy and credibility of competition agency are the examples of significant elements that help making other public authorities accept its comments and recommendations.

OECD indicates some similar prerequisites of competition agency in conducting effective competition advocacy:

1. The degree of independence of competition agency, either structural or operational from political influence
2. Adequate resources in carrying on competition advocacy. The strike of right balance in devoting efforts and resources in performing both enforcement and advocacy at the same time must be taken into account.
3. Impartiality and effectiveness of competition agency in the eyes of public and private sectors affects the capability in advocating sound competition policy. [759]
4. Competition advocacy, particularly in developing and transitional countries, is the critical role of competition agency. Due to these kinds of countries do not have a good basis of competition culture like developed countries. Competition agency should put far more efforts in competition advocacy during the transitioning period for undergoing fundamental changes in economic policies, laws and regulations as a result of the process of liberalization, privatisation and regulatory reform.

According to the UNCTAD's Guidelines for Implementing Competition Advocacy

There are some recommendations for facilitating competition agencies in implementing competition advocacy.

1. Identifying competition advocacy issues first

2. Tailoring the competition advocacy tools according to the relevant types of stakeholders in order to maximize its impact. The selection of tools and activities depends on the type and degree of competition knowledge of the targets as well as

[759] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, "Competition Advocacy: Challenges for Developing Countries," [Online] Accessed: 2 November 2016. Available from: http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf, p. 1

their possible interests arriving from competitive market. Competition agency should use an easy and understandable language to communicate and present information in a more interesting way if general consumers are the target. The channel for disseminating information to consumers can be through traditional media, such as mass media and digital media; internet, website, Facebook and Tweeter. While public authorities, big companies and associations are targeted, different tools and approaches must be employed by using more professional language. Presenting in-depth information and shows some reference through statistics and surveys.[760]

3. In digital era, internet and website are another important channel for advocating. The main official website of competition agency can be used to target many types of stakeholders directly. The main components of competition agency' s website should include the interactivity by developing user- friendly website, interactive learning tools in audio, video and animation. The website should allow the users to subscribe to receive electronic notifications of competition updated information, events, newsletters, reports, guidelines and decisions.761

4. The evaluation of the effectiveness of competition advocacy both ex ante and ex post are beneficial to set the competition advocacy' s strategic in the future. The surveys of advocacy recipients, public opinion polls, media coverage, internet exposure can be used in the evaluation. Hiring independent experts to conduct competition advocacy's evaluation is another option.762

[760] United Nations Conference on Trade and Development, "Guidelines for Implementing Competition Advocacy," [Online] Accessed: 2 November 2016. Available from: http://unctad.org/meetings/en/Contribution/ccpb_SCF_AdvocacyGuidelines_en.pdf

[761] Ibid.

[762] Ibid.

4.4.2 US' s Approaches to Build Competition Awareness and Competition Culture through Competition Advocacy

The United States of America has better foundation of competition culture than AMSs resulting from history reasons and political culture that promote competition. The US has developed institutional and legal infrastructures that embrace free markets and competition.[763] Despite of having a profound competition culture, competition advocacy is a continuous task that must be kept going on to reinforce competition culture. A reason behind this is governments can make policy change that will fundamentally reshape the competitive environment of the country; therefore, competition advocacy is required to monitor the policies, laws and regulations not to be unnecessary restrict competition.

Competition advocacy is the obligation of the Federal Trade Commission (FTC) to persuade governmental authorities at all levels to carefully design policies, not to restrict competition while promote competition and consumer choice at the same time. As a result, the FTC will advocate and promote competition policy to every forum, including national and local legislatures and regulatory agencies. Empowering the FTC to conduct advocacy directly to policy production mechanism helps protecting competition and consumer welfare. If the FTC finds the governmental created barriers to competition, its role is to suggest the alternative approaches that able to achieve the same goals while produce the least restrictive effects to competition and consumer welfare. The FTC's approach for competitive assessments bases on the broad cost- benefit framework, which considers various effects of alternative regulatory options.[764]

[763] Todd J. Zywicki and James C. Cooper, "The U.S. Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy," [Online] Accessed: 12 November 2016. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=960893

[764] Office or Management and Budget, "Economic Analysis of Federal Regulations under Executive Order 12866," [Online] Accessed: 11 November 2016. Available from: http://www.whitehouse.gov/omb/inforeg/riaguide.html

Types of competition advocacy in the US can be found in the form of formal and informal advocacy.[765] Filing written comments to other administrative agencies, submitting amicus briefs in litigation, presenting testimony before legislative bodies and submitting letter comments by the request of federal and state legislative or administrative bodies are regarded as formal advocacy. Whereas, conversations with administrative agencies, legislator are the informal way of advocacy.[766] The FTC has actively intervened a number of legislations on telecommunications, airlines, rail transportation, food labeling and the restructuring of the electricity industry and the financial services market as a result of adopting the Competition and Consumer Advocacy Programme (CCAP).[767]

In the United States, competition advocacy is an important task as much as aggressive enforcement since the US has repeatedly experienced the benefits of successful competition advocacy during the application of antitrust law. Experience of competition advocacy in the US will not be complete without mentioning about one of the first contemporary competition advocacy activity through the speech of the chairman Lewis Engman about the big economic problem regarding higher transportation costs resulting from the lack of sound competition policy in the US. This speech caught significant media coverage even appeared on the front page of the New York Times.[768] This speech was marked as the big success of competition advocacy in the US and showed that the FTC would aggressively conduct advocacy. It was also truly influential because later it encouraged the new interest in deregulating the transport sector.[769]

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[765] JAMES C. COOPER and PAUL A. PAUTLER and TODD J. ZYWICKI, "Theory and Practice of Competition Advocacy at the Ftc," [Online] Accessed: 5 November 2016. Available from: https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/040910zywicki.pdf

[766] Cooper, T. J. Z. a. J. C., "The U.S. Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy."

[767] Budget, O. o. M. a., "Economic Analysis of Federal Regulations under Executive Order 12866."

[768] "Speech of the Chairman Lewis Engman," (New York Times 1974).

[769] Muris, T. J., "Creating a Culture of Competition: The Essential Role of Competition Advocacy." , p. 1-2

Competition advocacy in the US has a variety of focus. Regulations of professions, which are regarded as barriers to competition are one of the target*.

Despite of the FTC's attempt in carrying on competition advocacy, it is noticeable that the number of annual advocacy filings of the FTC between 1980 and 2004 has varied.[770] There are many factors behind the big variation of the number of advocacy fillings in different period of time.

1. The Political and Economic Developments

The focus on competition advocacy effort has been changed depending on the significant competition issues in different time period. During 1970s- 1980s transportation and telecommunication were the targets of competition advocacy; therefore, the high number of advocacy filing was seen. In the mid-1990s, most of these competition restrictive regulations were significantly changed or eliminated; therefore, there was less necessity to advocate in this field. This resulted in the lower number of advocacy fillings in the mid-1990. After that the number of the FTC's advocacy filling increased again to deal with new anti-competitive issues in the age of Internet and e-commerce because some laws limit the competition on the internet.

2. The Lack of internal and external political support

Both internal and external political support affects the level of advocacy. With regard to internal political support, different chairman of FTC has different internal policy in driving the FTC. It can be seen when the Chairman Janet Steiger started to lessen tension between the FTC and other states and federal regulators by de-emphasizing the FTC advocacy programs in 1989. While the lack of external political

* In some states, there is a requirement to hire an attorney to handle real estate and mortgage closings. Some states allow only funeral directors to sell caskets. These requirements and measures distort free and fair competition. The FTC has tried to advocate policymakers in these states to revoke or change such requirements and measures. The FTC also try to promote competition in the healthcare sector: medical services, pharmaceuticals, and health insurance by aggressively destroy restraints on advertising by bringing cases, advocate in front of other government bodies and persuade state governments to avoid granting antitrust exemptions that allow medical professionals to fix prices. Many workshops are organized to level up awareness of competition and consumer protection issues among health care policymakers and in the health care industry.

[770] Ibid. p. 3

support was observed when there were congressional critics that advocacy program was sufficiently resource intensive and baring the Commission from aggressively pursuing predation and other non-merger antitrust activities.

3. Internal Resource Constraints

In the late-1990s was the era of merger. The resources of the Bureau of Economics was used to examine the high number of mergers. This resulted in the distraction of staffs from contributing to the primary research necessary to perform effective advocacies. [771]

The nature of competition advocacy requires the detailed analysis of competition effects; therefore, expertise is the key success of competition advocacy in the US. The FTC has a big number of highly trained staffs to conduct competition advocacy. These staffs are trained both through academic programs and on-the-job experience in competition law and academics. This is the contrasting point between the developed and mature competition regime like the US and other competition regimes, particularly in developing countries with resources constraint and lack of expertise. Rigorous and aggressive antitrust law enforcement in the US also produces the interdependent effect to competition advocacy.[772]

According to the US long experience, competition advocacy is the difficult and complex process. It is hardly see the outright success; therefore, it is necessary to put constant effort in advocating. There are many challenges in conducting advocacy. Pressure from interested groups, private sectors and their government allies to maintain or even allow the creation of new anti-competitive behaviors is unavoidable. The inadequate resource and expertise bars the effective competition advocacy. The competition agency should be empowered by legal provisions to conduct competition advocacy as well as there must be mechanism to ensure that its recommendation to

[771] Ibid. p. 8-12

[772] Cooper, T. J. Z. a. J. C., "The U.S. Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy."

other public authorities will likely to be followed. This presents the degree of influence the competition agency can insert in regulatory review. [773]

Although the independent status of the competition agency is not highly beneficial for carrying on advocacy task like the enforcement task, it helps strengthen the effectiveness of the FTC in advocating by mean of lowering political pressure that may hamper FTC's advocacy effort. However, this strength also put the FTC with a disadvantage in lacking close inter-governmental relationship with other bodies when trying to perform competition advocacy.

4.4.3 Competition Advocacy in the European Union

It is clearly set in one of the objectives of the Treaty on the European Community that EU must be 'an open market economy with free competition' [774] Thus, the EU has a clear mandate to make sure that competition in the internal market is not distorted and promote competitive markets. Therefore, competition policy aspects are necessary to be considered when drafting new EU legislations.

An approach taken by the EU to monitor the impact of competition restriction is the introduction of a 'competition screening'. It functions by requiring all proposals of policies and legislations that set out in the Commission's Legislative and Work Programme are subject to Regulatory Impact Assessment (RIA). Therefore, before issuing any policies or legislations the law and policy makers need to consider the competition restriction either directly or indirectly flow from the proposals. They are required to take into account other alternatives means that are less restrictive but being able to achieve the same policy and law objectives. The Directorate General for

[773] Muris, T. J., "Creating a Culture of Competition: The Essential Role of Competition Advocacy."

[774] Article 4.1 of Treaty on the European Community

* These are the examples of laws and regulations that are likely to be assessed the competition impact before issuing.

1. Legislation on liberalization

2. Industrial policy and internal market measures

3. Legislation introducing special commercial rights or exempting certain activities from the application of the competition regime

4. Legislation on sectors pursuing environmental, industrial or regional policy goals having an effect on economic activities

5. General regulation having a commercial impact, notably by limiting the number of undertakings in a certain sector

Competition issued the ‘Revised Impact Assessment Guidelines for EC legislation’. It was endorsed by the Commission on 15 June 2005 and aims to apply to EC legislative and policy proposals*. Under this Guidelines, it explicitly requires the assessment of competition impacts and facilitates this competition assessment by including a specific test used to assess competition impacts as part of the overall economic assessment. In the Annex IX of the Guidelines in its chapter 9.2 describes different impacts on competition in the internal market and helps informing the law drafters about distortions of competition. There is also the ‘BETTER REGULATION: A GUIDE TO COMPETITION SCREENING’ aiming to suggest on how competition impacts could be identified and addressed when drafting legislation.[775]

The competition screening does not only apply at the community level, but also at the national level of EU Member States. The advantage of the requirement of competition screening is the establishment of constant dialogue between legislators and competition authorities to shape the regulatory framework. In practice, some national competition authorities have enthusiastically employed the competition screening to open heavily regulated markets in their jurisdictions.[776]

After extracting the EU experience on how to conduct successful competition advocacy for competition-friendly regulations, this study found that the EU experience in improving competition advocacy is similar to the aforementioned recommendations of international best practices on this issue*.

[775] BETTER REGULATION, "A Guide to Competition Screening," [Online] Accessed: 1 December 2016 Available from: http://ec.europa.eu/competition/publications/legis_test.pdf

[776] Geraldine EMBERGER, "How to Strengthen Competition Advocacy through Competition Screening," [Online] Accessed: 30 November 2016. Available from: http://ec.europa.eu/competition/publications/cpn/2006_1_28.pdf

* The EU experience on how to conduct successful competition advocacy to shape other legislations to be competition-friendly legislations are as follows: 1. Competition authority should be given a clear mandate in competition law in performing competition advocacy and its rights and duties in this respect. 2. Competition agencies should be able to propose alternative solutions, which meet the purported legislative objectives to reduce unnecessary competition restrictive impact. 3. In case that competition agencies have limited resources, setting the clear priorities when engaging in competition advocacy is highly recommended by identifying certain types of rules and sectors, which generally cause impact on competitive conduct or market structures, which they want to monitor.

Regarding other types of advocacy, the EU Commission has engaged in a wide ranges of competition advocacy activities through the use of speeches, seminars, workshops and both traditional media and social media. The publication of reports, handbooks, brochures and factsheets and studies on the various competition matters are used as another mean to advocate. The frequently competition update is also provided through the publication of the 'competition weekly news summary' gathering the updated competition development, speeches and the judgements of the European Court of Justice.[777]

Another main advocacy is the business compliance program, which is designed to make businesses in the EU proactively respecting competition rules. The EU Commission clearly states that it welcomes and supports businesses' efforts to ensure compliance with EU competition rules.[778] There are some speeches and brochures to support business compliance available in the European Commission's website. 'Compliance Matters' is the publicized brochure facilitating businesses in developing their proactive compliance strategies. It concludes the key competition rules and provides the general methods to ensure compliance with the EU competition law.[779] This business program works well in the EU according to the survey of several lawyers indicating that they currently help their clients developing the business compliance with competition law. This reflects the good performance of the EU Commission in setting the standard for businesses in measuring their compliance programs.[780]

[777] European Commission, "Competition Weekly News Summary," [Online] Accessed: 11 September 2017. Available from: http://ec.europa.eu/competition/publications/weekly_news_summary/index_en.html

[778] European Commission, "Compliance with Competition Rules: What's in It for Business?," [Online] Accessed: 30 November 2016. Available from: http://ec.europa.eu/competition/antitrust/compliance/

[779] European Commission, "Compliance Matters," [Online] Accessed: 30 November 2016. Available from: http://bookshop.europa.eu/en/compliance-matters-pbKD3211985/?CatalogCategoryID=8BYKABstR7sAAAEjupAY4e5L

[780] European Commission, "Dg Competition Stakeholder Survey," [Online] Accessed: 1 December 2016. Available from: http://ec.europa.eu/public_opinion/archives/quali/stakeholder2014_aggregate_report_en.pdf , p. 48-52

The last lesson from the EU is competition advocacy needs to be evaluated. The EU conducts the evaluation of competition advocacy. The evaluation of competition advocacy by DG Competition received a good feedback and was rated as doing good job. The majority of stakeholder groups; namely economic consultancies, law firms, national competition authorities of EU Member States and Member State ministries, were very aware of DG Competition's activities in promoting the competition culture.[781]

4. 4. 4 Long- Term and Gradualist Approaches to Build Competition Awareness and Competition Culture in Japan

Competition advocacy is ranked as one of the top priorities of the JFTC.[782] In the early period of the competition law application, the JFTC faced many difficulties in performing its obligations. Consequently, the JFTC adopted the persistent long-term advocacy strategy, especially to solve a number of inappropriate exemptions under the Antimonopoly Act. There had been the adoption of various advocacy activities all along six decades since 1947 until JFTC reached the satisfactory result in 2011. From up to 1079 of exemptions were introduced in 1950s-1960s to only 28 exemptions in 2011, which is an impressive decrease of exemptions resulting from the competition advocacy of the JFTC.

Moreover, there was an introduction of competition assessment allowing the JFTC to assess competition evaluation conducted by other ministers. The JFTC has gradually increased its role in competition. The JFTC chose to envisage advocacy actions by following the OECD Recommendation on the need to reform government regulation and exemptions under its Antimonopoly Act and then issued reports on regulated sectors and recommendations to revoke some exemptions and government regulations on sector-specific. The advocacy received good feedback from government.

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[781] Ibid. p. 48-52

[782] Yoshihisa Takahashi, "Advocacy of Competition Policy in Japan," [Online] Accessed: 1 December 2016. Available from: http://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2006/Group2/Takahashi_Japan.pdf

It can be seen from the government issuing the ‘Deregulation Action Plan’ aiming to review most of exemptions granted under the Antimonopoly Act. The JFTC had employed various advocacy activities and through many channels towards the government until the objective of long term advocacy strategy were fulfilled, including

- A sector study on regulated and antitrust-exempted industries, based on fact finding surveys;

- An Expert Council “Study Group on Regulation and Competition Policy”;

- Joint guidelines for liberalized industries with sector regulators;

- Consultation with sectoral regulators to adopt more pro- competitive regulation in the process of drafting policies.[783]

The JFTC has established a forum with main Japanese business associations. It also organizes conferences and seminars to educate the related stakeholders. For academic activities, there is the Competition Policy Research Center cooperating with the JFTC in conducting joint- researches, workshops, seminars and international symposium on various competition issues.[784]

In order to promote the compliance with the Antimonopoly Act, the JFTC provides the consulting service for businesses, publishing a pamphlet called ‘Guidebook on the AMA’, educational competition video program called ‘STOP the DANGO’[785]

The JFTC provides the valuable lessons for ASEAN that for countries that have weak competition culture, the attempt in conducting competition advocacy to all stakeholders in the society must be double. Competition advocacy might not be successful in the short period of time. Rather the carefully designed of long-term

[783] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, 67-68

[784] Takahashi, Y., "Advocacy of Competition Policy in Japan."

[785] Ibid. p.

advocacy plan and support from the government are required for the successful competition advocacy.

4.4.5 The Similarities between the US, EU and Japan's Approaches in Building Competition Awareness and Competition Culture

Overall, these three jurisdictions have similar approaches in overcoming impediments faced in conducting competition advocacy. They all realize that harm of competition can appear in the form of private anti-competitive conducts and state intervention in the economy. 786 Thus, they commonly employ both types of competition advocacy targeting both in reducing unnecessary restrictive policies, laws and regulations and advocating businesses and other related stakeholders at the same time. These jurisdictions adopted the competition assessment to shape the new legislations not to produce competition restrictive effects. While business compliance programs are encouraged by the US, EU and Japan.

4.4.6 The Distinction of Approaches Taken in the US, EU and Japan in Building Competition Awareness and Competition Culture

The main distinction approaches taken by these three jurisdictions are from the competition environment in that country, political support as well as the legal mandated power and capability in conducting competition advocacy. Each country experiences different kinds of barriers. The FTC performance in regulatory review is affected by external political pressure and political will within the institution when changing the chairman of the FTC. Even the US has the good competition culture, the FTC keeps continuing the competition advocacy task to ensure the protection of competition process.

[786] Kovacic, W. E., "Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms? Competition Law International." , p. 10

The EU is better off from having the clear objective of the Treaty on the European Community in promoting ‘ an open market economy with free competition’ [787] With the strong EU legal mechanism in implementing this objective, there is community legislation binds the EU Members States to introduce competition screening before issuing laws and regulations. This obligation is endorsed by the judgement of the European Court of Justice. This shows that competition impact assessment in EU is compulsory and necessary for facilitating the community goals. In order to effectively carry on competition advocacy both at community level and national level of EU Member States, the EU Commission closely cooperates and coordinates with the national competition agencies. This is the unique characteristics of the EU that cannot be found in the other two jurisdictions; US and Japan.

Japan seems to experience quite high barriers in the early period of its Antimonopoly Act application. With the little political support and weak competition culture; thus, the JFTC has long struggled to educate all stakeholders in the society. The JFTC employed the long-term consistent competition advocacy plan to deal with the unnecessary competition restrictive policies, laws and regulations. This long-term plan finally proves that it brings about the good result and foster competition culture in Japan.

[787] Article 4.1 of Treaty on the European Community

4.4.7 Analysis of Approaches in the Use of Competition Advocacy to Build Competition Awareness and Competition Culture

International best practices and approaches of the US, EU and Japan recognize that competition agencies should play an important role in conducting competition advocacy. For effective competition advocacy, it is necessary to give adequate legal-mandated powers to competition agencies. Otherwise, it will be difficult for competition agencies to initiate competition advocacy activities.

Another lesson is creating the clear plan for competition advocacy' s activities for being able to fulfill objectives and conducting post evaluation for advocacy activities for shaping the strategic planning in the future. Competition advocacy should be tailored to suit different target groups. Advocating competition to public authorities or big companies should use the formal competition advocacy in the form of seminar or workshop by providing competition-related information with the clear evidences and statistics to support. While advocating competition to SMEs information and main prohibition under competition laws should be made simple and easy to understand. Including raising examples and case-study. Competition advocacy to consumer at large about the benefits of competition should be conducted in the more interesting ways with the animations or short video clips broadcasting in the traditional media and social media.

Sufficient resources in terms of budget and human resources should be given for conducting competition advocacy to all competition agencies. Sometimes specialized skilled staffs are required for competition advocacy, for example communication. The connection with different media channels: newspaper, television and radio is useful for broadcasting competition issues through these media coverage.

In case of resource constraints, identifying main competition advocacy issues and then setting the priority list of competition advocacy are recommended.

Competition assessment program should be encouraged as a tool for conducting competition advocacy to policy and law makers before introducing new policies and legislations not to cause unnecessary competition restricted impacts. Competition assessment can be conducted to existing legislations. Competition agencies should play an important role in facilitating the operation of competition assessment program, including training staffs of other public authorities to conduct competition assessment and providing recommendations about the result of competition assessment whether there are other alternatives that have less negative impact on competition or not.

However, this type of advocacy will be effective or not depending on many factors.[788]

1. Whether participation or consultation is compulsory or discretionary. If participation of competition agency is compulsory with the ability to influence the final outcome and it is organized in the formal way at the early stage of drafting process, it will produce the direct impact to normative environment.
2. Level of participation. To what extent competition agency can influence the final outcome of laws and regulations in case they are contradict to the principle of competition policy and law. To effectively shape government regulatory framework, competition agencies should be allowed to provide comments, recommendations and proposing alternative means that have less competition restrictive effects while still able to achieve the policies or legislations' objectives.
3. Timeliness of competition agency's participation should be early enough to give opinions, feed-backs and recommendations to influence the outcome. Competition agency should be informed at an early stage of new policy initiatives so it will get strategic advantage in timely and information of new government policies and policy reform to reflect its opinion.

[788] ICN, "Advocacy and Competition Policy." p. vii-viii

4. Whether it is necessary to clarify reasons in case of non-adoption of competition agency's recommendations or not affects the effectiveness of competition agency. The reasons behind the non-compliance must be justifiable.

Encouraging business compliance program should be another focus of competition advocacy to create the culture of compliance with competition law among the market players. Therefore, it will be beneficial if competition agencies can encourage companies as many as possible to incorporate competition in their operations to prevent them from engaging in anti-competitive conducts. The effective competition advocacy and enforcement can mutually reinforce each other.

The lesson that can be learnt from Japan is creating the long-term advocacy plan for building competition awareness and competition culture for countries having weak competition culture. Furthermore, double efforts must be made in a consistent way in conducting advocacy to all stakeholder both government, public authorities, businesses and consumers. Even in the US that is considered a country having good competition awareness and competition culture, competition advocacy still be a work in progress that must keep continuing in order to guarantee the protection of competition process.

4.5 Approaches Taken to Overcome Impediments concerning International Cooperation

This part of the dissertation will explore the approaches and experiences taken by foreign competition jurisdictions on how to overcome the lack of competition cooperation agreements in the field of competition law and enforcement. The focus is on the specific international cooperation agreements on competition law only. It will not include competition related provisions or chapter in the Free Trade Agreement or Economic Partnership Agreements.

4.5.1 International Best Practices and Recommendations on International Competition Cooperation Agreements

The Revised Recommendation of the Council Concerning Cooperation between Member countries on Anti-Competitive Practices affecting International Trade (1995)[789]

This 1995 OECD recommendation has been an important instrument for international co-operation in the enforcement of competition laws until now. It provides recommendations on basic provisions of notification, information sharing, consultation and conciliation. It contains some guiding principles on confidentiality of information disclosed and the general principle of cooperation as follows:

1. Sending the notification about investigation, which affects the significant interest of other countries is encouraged.

2. When more than one jurisdiction is investigating the same competition cases, these related jurisdictions should coordinate each other about this case, including the exchange of information related to anti-competitive conducts, the assistance in an investigation or proceeding of other countries.

[789] OECD, "Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anti-Competitive Practices Affecting International Trade 1995," [Online] Accessed: 14 December 2016. Available from: https://www.oecd.org/daf/competition/21570317.pdf

3. The form of cooperation between countries in competition cases can be either in the form of positive comity or negative comity.

Recommendations of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings[790]

The OECD recognizes that investigations and proceedings of anti-competitive conducts of one country can affects the important interest of other country. Cooperation in competition investigations and proceedings between two or more related countries benefit all by reducing regulatory costs, delays and limiting the risk of inconsistency in analysis and remedies. Thus, this OECD recommendation encourages the cooperation between related countries to effectively investigate and enforce competition cases.

- It encourages the effective international cooperation and urges countries to lessen direct and indirect barriers to effective enforcement cooperation between competition agencies through minimizing the impact of legislations restricting cooperation and inconsistency between their leniency programs that badly affect cooperation.

- There should be consultation between competition agencies in case investigation or proceeding of one country affects the important interest of the other country. The consultation could lead to positive comity on a voluntary basis.

- Notification should be provided to other country if it is expected that investigation or proceeding will affect the important interest of that country.

- Coordination is encouraged when two or more competition agencies investigate or proceed against the same or related anti-competitive conduct.

[790] OECD, "Recommendations of the Oecd Council Concerning International Co-Operation on Competition Investigations and Proceedings " [Online] Accessed: 14 December 2016. Available from: https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf

- The exchange of information between competition agencies are recommended for effective investigation and actions.

- If the simple exchange of information cannot facilitate the cooperation, the related competition agencies may consider sharing confidential information through the use of confidentiality waiver or information gateway that enable the exchange of confidential information without the prior consent from the source of the information.

- The exchange of confidential information between countries can be subject to appropriate safeguard or restrictions on the use and disclosure. Sanctions can be imposed if there is the violation of confidentiality conditions and restriction.

- This recommendation supports the investigative assistance to the investigation and enforcement of other country. Whether to provide investigative assistance or not is based on voluntary basis and taking into account of available resources and priorities of each country. Investigative assistance includes providing public domain information, assisting foreign competition agency in obtaining information, compelling the production of information on behalf of the requesting country, ensuring the information and documents are served in a timely manner and searching to gather evidence on behalf of requesting country, particularly for hardcore cartels cases.

The Hearing on Enhanced Enforcement Co-operation[791]

This hearing emphasizes the importance of international cooperation to increase effectiveness of enforcement. During the last two decades, international cooperation in competition law enforcement increases significantly mainly through bilateral relationships between competition authorities. The international cooperation should not be limited to the level of cooperation between competition agencies, but also include the role of the courts participating in international enforcement co-

[791] OECD, "The Hearing on Enhanced Enforcement Co-Operation," [Online] Accessed: 14 December 2016. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)2/ANN2/FINAL&doclanguage=en

operation. While the trend of new method of cooperation is on the development of cooperation in multilateral level. There are many recommendations for some new mechanisms to improve the more effective means of international cooperation, which are a reliance on foreign cartel decision to lower enforcement costs of resource constraints jurisdiction and increase cartel deterrence and adopting the lead agency models by enabling the lead agency to investigate and make a decision on cross-broader cases on behalf of all affected jurisdictions.

However, these proposed mechanisms are unlikely to work in the context of ASEAN. The reliance on foreign cartel decision requires the high convergence in both substantive and procedural competition laws in both countries. Otherwise, it will face obstacles in adopting the competition decision of foreign authorities. Moreover, the deep understanding and trust of foreign country' s competition law and due process are required before adopting its competition decisions.

The lead agency model involves the sensitive sovereignty issues between ASEAN Member States since they are not willing to sacrifice part of its sovereignty to others. Therefore, this lead jurisdiction model is hardly possible in the context of ASEAN that its members are highly guarding its sovereignty. Furthermore, the lead jurisdiction model is pioneer idea that has not yet proved to be successful in anywhere else in the world. Thus, ASEAN is unlikely to adopt this idea.

Strengthening personal ties and relationships between staffs of different competition agencies is the important factor to enhance cooperation among competition authorities, for example building ' pick- up- the- phone' relationship between investigators. This personal relationship between staffs from different competition agencies can be built through the exchange staffs programs. The US is raised as an example for having the Visiting International Enforcer Program. Sending staffs to participate in the international competition forum such as OECD and ICN is another way to build personal relationship between staffs from different countries.

Developing the joint enforcement activities is considered the enhanced form of cooperation between competition agencies. This includes face-to-face negotiation of merger remedies in mergers with cross-border effects, case teams attending other agency's interview of key witnesses, joint discussion of econometric models between competition agencies and joint assessment of expert reports.

Recommendation of the Council concerning Effective Action against Hard Core Cartels 1998[792]

This 1998 Recommendation on Hard Core Cartels lays down the principles of when and how countries should cooperate to deal with hard core cartels.

BEST PRACTICES FOR THE FORMAL EXCHANGE OF INFORMATION BETWEEN COMPETITION AUTHORITIES IN HARD CORE CARTEL INVESTIGATIONS[793]

This best practice encourages the information sharing in hard core investigations between countries. It also identifies the safeguard measures that are required to protect shared information and due process rights of the parties. The principle of legal professional privilege and self-incrimination also pointed out in this best practice.

Recommendation of the Council on Merger Review 2005[794]

This recommendation aims to reduce inconsistency or merger review in cross-border merger cases and create greater convergence of merger review procedures, including cooperation among competition authorities. The benefits of this recommendation are making merger review procedures more effective, while helping competition authorities and merging parties to lessen unnecessary costs in multinational merger transactions.

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[792] OECD, "Recommendation of the Council Concerning Effective Action against Hard Core Cartels."

[793] OECD, "Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations," [Online] Accessed: 14 December 2016. Available from: http://www.oecd.org/competition/cartels/35590548.pdf

[794] OECD, "Recommendation of the Council on Merger Review," [Online] Accessed: 14 December 2016. Available from: https://www.oecd.org/daf/competition/mergers/40537528.pdf

4. 5. 2 International Competition Cooperation Agreements as a Way to Pursue Vigorous Competition Law Enforcement in the US

The US is the powerful jurisdiction that have faced a wide criticism about the aggressive enforcement of its antitrust law to international anti- competitive conducts that harm the US internal market basing on the effect doctrine. As a result of the US's effort in aggressive enforcement through the controversial extraterritorial application, it has experienced a lot of problems and resistance from other affected jurisdictions concerning the issues of sovereignty concerns. This leaded to the introduction of blocking statutes and claw-back provisions by its trading partners in the past[795]

The US finally realized that the sole use of extraterritorial application of its antitrust law does not always work as a result of resistance of other countries. In order to overcome the US's greatest challenge in investigating and prosecuting cross-border anti- competitive conducts, particularly international cartels is obtaining evidence and information located in other jurisdictions. Cooperation with other jurisdictions has proved to be effective way in overcoming this challenge of the US.[796]

The lesson that can be learnt from the US is the US chose to lessen this problem to reduce tensions and conflicts between the US and other trading partners while being able to increase the effectiveness in the enforcement of competition cases with international dimensions by seeking international cooperation and coordination with other concerned countries. The US has employed many strategies to improve the capability and effectiveness of international cooperation in antitrust matters both in civil and criminal cases. The US enjoys both informal and formal cooperation even sometimes information received from informal cooperation cannot be satisfied as evidence in the US antitrust criminal trial. It still helps the US to advance its investigation.[797]

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[795] Sweeney, B., "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?" , p. 52

[796] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 267-272

[797] Ibid. p. 270-271

[*] The US enters into bilateral antitrust cooperation agreement with the Federal Republic of Germany in 1976, which is the first bilateral agreement. After that the US entered into this kind of agreement with Australia in 1982, Canada in 1984 (superseded by a new agreement

This part will explore the US experience in cooperating with other countries in the field of competition law.

Firstly, the US enters into bilateral cooperation arrangements with other countries. These kinds of bilateral cooperation arrangements sometimes called the 'Executive Agreements'. Under the US laws, these bilateral agreements are formal and binding international agreements. However, they have not been ratified by the United States Senate as treaties. As a result, they cannot override any inconsistent US law. The examples of these kinds of bilateral agreements are the bilateral antitrust cooperation agreement between the US and the Federal Republic of Germany, Australia, Canada, European Commission and Japan[*].

The content of these agreements can be found in three themes:

1. enforcement cooperation

2. the avoidance or management of disputes,

3. technical cooperation

The characteristics of these bilateral agreements can be ranged from communications between competition authorities, notification of specific competition enforcement affecting the important interest of the cooperating party, the exchange of non-confidential information, positive comity to enforcement in specific cases.

However, there are some limitations in these kinds of agreements, such as they do not override existing US laws, limited capability in the sharing of confidential or privileged information without the provider's consent, including statutorily protected information, commercially sensitive or privileged information.

Secondly, in order to lessen some limitations contained in the aforementioned bilateral cooperation agreements, the US' s approach in facilitating the deeper

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in 1995) and the European Commission in 1991 (supplemented by a new agreement in 1998) The similar agreements are found with the Israel, Japan and Brazil.

international cooperation is through the introduction of the International Antitrust Enforcement Assistance Act or IAEAA in 1994.[798] This act was introduced in order to facilitate the enforcement of its antitrust law with international dimension. Before the introduction of this act, the US cannot enter into this type of bilateral cooperation agreements concerning the enforcement of antitrust law since it was prohibited by the law. By having this act, it enables the US entering into competition cooperation agreement with other jurisdictions on bilateral basis. This act is the important tool to increase the enforcement of the US antitrust law in international level by enable the mutual legal assistance in investigation and the exchange of confidential information though subjecting to certain conditions.

However, the pre-requisite to satisfy this act is quite high because the requirement of reciprocal commitments to US antitrust authorities in response to a similar qualified request, adequate protection of shared confidential information and dual criminality in both cooperating countries. This results in not so many countries can enjoy this act. The example of the output of this act is the US-Australia Mutual Assistance Agreement in 1999.[799] The two important factors enabling the entering of this cooperation agreement with Australia are the allowance of the laws between two countries and Australia having a strong protection of confidentiality laws.

Third, bilateral mutual legal assistance treaties or MLATs is another way the US resorts to deal with criminal antitrust matters. The US is a party to roughly 70 MLATs.[800] It must be noted that the scope of MLATs is broader than specific competition matters but rather includes a variety of criminal matters through the facilitation of obtaining evidence located abroad for the benefits of other country's criminal law enforcement. The Antitrust Division reports positive experiences using the MLATs in antitrust cases.

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[798] United States Department of Justice, "U.S. Experience with International Antitrust Enforcement Cooperation," [Online] Updated: 25 June 2015. Available from: https://www.justice.gov/atr/annex-1-c

[799] The United States antitrust law in the cases engaging international dimensions Department of Justice, "U.S. Experience with International Antitrust Enforcement Cooperation," [Online] Accessed: 14 December 2014. Available from: https://www.justice.gov/atr/annex-1-c

[800] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 267-272

There was the report of the Antitrust Division that the US enjoyed the benefit of the MLATs in obtaining the documents and witness testimony located abroad concerning several international cartels investigations, particularly the MLAT with Canada. [801]

Finally, the US also actively participates in many regional cooperation agreements, for instance the North American Free Trade Agreement (NAFTA) and the Asia-Pacific Economic Cooperation (APEC) to develop competition policy and law among members, including the set of benchmarks.[802]

With regard to the issue of resources for international cooperation, the US faces similar concern to other jurisdictions that it is necessary to contribute more financial and human resources for international cooperation[*].

The Issue of the Exchange of Information in the United States

The US experiences some legal and practical constraints when requesting information located outside the US's territory from foreign competition agencies. The fundamental constraint is the constraints in sharing confidential information. In the same way, the US has legal limitations when other country request the information from the US too. The example is the information collected by the DOJ for antitrust criminal investigation is statutorily protected from disclosure.[803] Under the US leniency program, information received from the applicants either corporates or individuals cannot be exchanged in the absence of confidentiality waiver or appropriate court orders.

[801] Justice, T. U. S. a. l. i. t. c. e. i. d. D. o., "U.S. Experience with International Antitrust Enforcement Cooperation."

[802] Ibid.

[*] This is expressly reflected by the US Department of Justice report to the Congress in 2012: "In a 2012 report to Congress the US Department of Justice noted the difficulties international co-operation entails: "In our enforcement efforts we find parties, potential evidence, and impacts abroad, all of which add complexity, and ultimately cost, to the pursuit of matters. Whether that complexity and cost results from having to collect evidence overseas or from having to undertake extensive inter-governmental negotiations in order to depose a foreign national, it makes for a very different, and generally more difficult investigatory process than would be the case if our efforts were restricted to conduct and individuals in the U.S. . . . Consequently, the Division must spend more for translators and translation software, interpreters, and communications, and Division staff must travel greater distances to reach the people and information required to conduct an investigation effectively and expend more resources to co-ordinate our international enforcement efforts with other countries and international organizations", US DoJ (2012)."

[803] Rule 6(e) of the Federal Rules of Criminal Procedure

4.5.3 International Competition Cooperation Agreements among European Member States and other Countries

The assessment of EU's cooperation will be divided into two-folds; namely the Competition Cooperation Agreements between EU Member States and Cooperation Agreements between EU and other countries.

Competition Cooperation Agreements between EU Member States

These close cooperation agreements between the EU Member States could be used to identify the good experience for ASEAN when establishing the competition cooperation agreements between ASEAN Member States.

1. Regional Agreement: The European Union

EU is considered having the strong cooperation regarding competition rules. The European Competition Network (ECN) is the forum established in 2004 by aiming to make the application of the EU competition law between NCAs and the EU commission coherent and effective. To ensure that the EU competition law is applied coherently and consistently a number of mechanisms have been introduced.

First, EU commission and NCAs are able to exchange information, including confidential information.[804] The Regulation 1/2003 is the regulation, which brings about more systematical cooperation in the field of competition law between the EU members. This regulation indicates some forms of cooperation that are obligatory. [805] Article 12 empowers the EU competition agencies to share information and confidential information: documents, statements and digital information for the purpose of applying the EC competition law without requiring the consent of the parties. This takes precedence over the contrasting national law of the EU Member States.

[804] Briguglio, L., "Competition Law and Policy in the European Union-Some Lessons for South East Asia.", p. 4

[805] International Competition Network Cartels Working Group Subgroup 1 – general framework, "Co-Operation between Competition Agencies in Cartel Investigations," [Online] Accessed: 14 January 2016. Available from: http://ec.europa.eu/competition/international/multilateral/2006.pdf, p. 20

Article 12(1) of this Regulation 1/2003 empowers competition authorities to share information irrespective of the different nature of competition proceedings: criminal or administrative nature and irrespective of whether sanctions are imposed on individuals.

Second, there is a close cooperation between European Commission and the national competition authorities. The European Competition Network (ECN) is the forum established in 2004 aiming to make the application of the EU competition law between NCAs and the EU commission coherent and effective. The ECN is composed of EU commission and competition agencies of EU Member States. Moreover, the ECN is the forum for NCAs to share experience, exchange information, share knowledge of best practice and assist each other in investigations and fact-findings. Giving framework for cooperation between the EU commission and NCAs is another task for the ECN.

The nature of EU cooperation is quite direct between competition agencies and can occur in every phase of cartel investigation; pre-investigatory, investigatory and post-investigatory. [806] In spite of different types and levels of sanctions and leniency programs among EU Member States, the exchange of information is possible with some restricted conditions for the use of such information.[807]

Prior to an inspection of the European Commission, any NCAs which have sufficient information about the companies targeted and the possible location of the information will provide support to the EU Commission officials. This cooperation includes providing advice regarding the investigative strategy, the timing of inspections, the choice of the premises and the size of the inspection team. During the inspection, the EU Commission can ask the NCAs to conduct inspection for it. One NCA in European Union can ask the other NCA to conduct inspection for it too. The role of NCA where company targeted is located will provide some assistance through the contact of local police or asking for court orders in case where the targeted company refuses to be raided or impede the inspection.[808]

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[806] Ibid., p. 20.

[807] Ibid., p. 21.

[808] OECD, "The Hearing on Enhanced Enforcement Co-Operation."

Third, the question of which case should be dealt by the NCA or the EU Commission could be avoided by the usage of parallel competence principle. To solve the problem of jurisdictional conflicts among the EU Member States this principle allocates cases on the well-placed agency*.

It is noticeable that the successful in enhancing EU cooperation between EU Member States is the strong legal requirements under the competition community rules and mutual trust between ECN jurisdictions.

Cooperation Agreements between EU and other Countries

The EU through the European Commission has long cooperated with other foreign agencies; mostly matured and some of new competition agencies, both on competition policy and enforcement matters. It can be seen from the entering of many cooperation agreements in the field of competition with many jurisdictions, including the US, Canada, Japan and South Korea. These types of cooperation agreements are the first-generation agreements, which exclude the sharing of confidential information if no consent of the undertakings concerned.[809] Any information obtained by the Commission through its investigation powers cannot be exchanged without a waiver granted from the company providing information. Most of these agreements, in general, involve consultations, meetings, positive and negative comity, mutual notification of enforcement activities, exchange of non-confidential information.

* To satisfy the requirement of the well-placed principle, the conducts or agreements must be substantially affect competition mainly in its territory or the competition agency has the effective ability to bring the violation to an end. Whereby the parallel proceedings of two or more NCAs is possible only if it is clear that the single action by one NCA could not bring the violation to an end. Regarding the allocation of cases between NCAs and the EU commission, the EU Commission is responsible where the conduct or agreement affects competition in more than three EU Member States.

[809] OECD, " Limitations and Constraints to International Cooperation," [Online] Accessed: 28 January 2017. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2012)8&docLanguage=En, p. 7-8

As a result of the limitations in sharing confidential information in the first-generation agreement with other countries, the EU develops the closer cooperation agreements by entering into the second-generation agreement with Switzerland, which is the **Agreement concerning cooperation on the application of their competition laws**. The distinctive character of the second-generation agreement is the exchange and use of certain confidential information is enabled without the requirement of consent from undertakings concerned between the EU Commission and the Swiss Competition Commission. The competition agency may inform each other about enforcement activities and coordinate investigation procedures. By entering into this agreement, both parties benefit from easier access to evidence, ensure due consideration of mutual interest and become more rigorous competition enforcement.

However, the second- generation agreements contain some limitations. The use of exchanged information is limited only for the purpose of competition law enforcement in the EU and Switzerland. The exchange of information will only happen where both parties investigate the same or related conduct or transaction. Then both parties will consult to decide the relevant information that can be exchanged.[810] The discussed or transmitted information will not be used to impose sanctions on natural persons.[811] It is prohibited to discuss or exchange information received from the leniency program or settlement procedures, unless there is prior express consent in writing from undertakings.[812] It is also prohibited to discuss or exchange information protected under procedural rights and privileges guaranteed under the relevant laws of both parties.[813] It must be noted that the rationale behind the successful closer agreement between the EU and Switzerland is both parties have similar substantive

[810] AGREEMENT between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Article 7 Exchange of information

[811] AGREEMENT between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Article 8 Use of information

[812] AGREEMENT between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Article 7(6)

[813] AGREEMENT between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Article 7(7)

rules, comparable sanctions, recognizing similar procedural rights of the parties and right to legal privilege and non self-incrimination.[814]

Cooperation with other countries can be related to the main common prohibitions between cooperating countries. The significant matters are on international cartels and mergers with international dimensions. There are significant cases reflect the successful cooperation between the US and EU, for example in acquisition of Sanofi and Aventis leading to non-conflicting remedies between two jurisdictions.[815] The cooperation between the EU and US reflects the deepest level of cooperation in both matters and gradually create more convergence between these two jurisdictions.

The EU Commission often works with other competition authorities in parallel since each jurisdiction must pursue its own investigation. However, the cooperation appears in the form of the preparation or coordination for inspection or dawn raids and informal discussion on the scope of investigation.[816] Lastly, the EU also concluded some Memoranda of Understanding with other foreign competition agencies, which are Brazil, China, and Russia. [817]

According to, the EU experience in international cooperation providing a lesson learnt that it is easier to cooperate with the foreign competition authority with the same type of competition system rather than the contrasting ones because they are more likely to share the same competition principles*. The constraint of cooperation between different competition systems are on the standards for collecting evidence to be used in a criminal procedure against individuals are usually stricter than those employed in an administrative procedure concerning companies.[818]

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[814] OECD, "Limitations and Constraints to International Cooperation.", p. 8

[815] Harbour, P. J., "Developments in Competition Law in European Union and the United States: Harmony and Conflict.", p. 16

[816] European Union, "Improving International Co-Operation in Cartel Investigations " [Online] Accessed: 18 January 2017 Available from: http://ec.europa.eu/competition/international/multilateral/2012_feb_cartels.pdf

[817] Ibid.

* The same competition principles are the rights of defence, the rights of non-self incrimination, legal professional privilege and privacy. The rationale behind this is " to deal with issues associated with such rights of the defence, certain safeguards need to be provided if information were to be exchanged.

[818] Ibid.

4.5.4 International Competition Cooperation Agreements in Japan

The number of cases violating the provisions of competition laws of more than one country is increasing in Japan. If the JFTC finalizes that the foreign anti-competitive conducts constitute violations of the Antimonopoly Act. Then the JFTC will cooperates with foreign competition authorities for case investigation. It can be seen that the JFTC realizes the importance of international cooperation in the field of competition enforcement. Therefore, the JFTC commits to create close cooperative relations with other competition agencies. The JFTC engages in international cooperation through the exchange of opinions between the JFTC and foreign competition agencies, entering into Bilateral Antimonopoly Agreements and Economic Partnership Agreements. The main objectives of executing Bilateral Antimonopoly Agreements are dealing with international anti-competitive cases involving many jurisdictions[**]. Furthermore, it allowed the exchange of information and opinions between cooperating competition agencies.[819] Article 43 Paragraph 2 of the AMA enables the JFTC to cooperate and share information with other foreign competition agencies even though there is no formal cooperation agreements concerning on anti-competitive activities with the Japanese government.[820]

Regarding the issue of information exchange, Japan unlocks its law to allow the JFTC in exchanging information with foreign competition agencies through the amendment of the AMA in 2009[*]. Japan does not only facilitate inter-agency cooperation through the law amendment to enable the JFTC to exchange information,

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[**] The JFTC has entered into Anti-Monopoly Cooperation Agreements with the important economic partners, for example United States, European Communities, Canada

[819] JFTC, "Japan Fair Trade Commission," [Online] Accessed: 8 December 2016. Available from: http://www.jftc.go.jp/en/about_jftc/role.files/1009role_all.pdf, p. 7-8

[820] AMA, Article 43 Paragraph 2

[*] Japan Anti-Monopoly Act, Article 43-2 (1) The Fair Trade Commission may provide any foreign authority responsible for enforcement of any foreign laws and regulations equivalent to those of this Act (hereinafter referred to in this Article as a "foreign competition authority") with information that is deemed helpful and necessary for the execution performance of the foreign competition authority's duties (limited to duties equivalent to those of the Fair Trade Commission as provided in this Act; the same applies in the following paragraph); provided, however, that this does not apply if the provision of said information is found likely to interfere with the proper execution of this Act or to infringe on the interests of Japan in any other way.

but also impose legal requirement to the exchanged information under Article 43-(2), (3) of the AMA, including the level of information protection law must be equivalent to the level of legal protection in Japan and information must not be used in criminal proceedings.[821] It can be seen that Japan recognizes the importance of information sharing but at the same time recognize the bad consequences of the exchange of information. This is why the amended provision must include adequate protection measures for the information that will be shared by the JFTC.

While the Cooperation Agreement with the Australian Competition and Consumer Commission based on the free trade agreement between Australia and Japan (2015) is the Second-generation agreement, which allow the various level of information exchange and discussion between JFTC and Australian Competition and Consumer Commission. This is the first time that the JFTC can share confidential information without getting the waiver to the Australian Competition and Consumer Commission.[822]

For lower level of cooperation, the JFTC has entered into many Inter-Agency Cooperation Memorandums or Arrangements with many countries, including China, Philippines, Vietnam, Brazil and Korea[823] The JFTC also provides technical assistance related to competition law to some developing countries by dispatching experts, organizing seminars and accepting trainees.[824] In conclusion, as expressed by one of the former Fair Trade Commission; Akinori Yamada, the JFTC has a strong commitment and will make effort towards the closer international cooperation on competition policy.[825]

[821] OECD, "Improving International Co-Operation in Cartel Investigations." , p. 196

[822] Masayuki Matsuura Saori Hanada , Tatsuo Yamashima and Setsuko Yufu, "Japan: The Enforcement Agency " [Online] Accessed: 21 January 2017. Available from: http://globalcompetitionreview.com/chapter/1067068/japan

[823] JFTC, "International Agreements," [Online] Accessed: 8 December 2016. Available from: http://www.jftc.go.jp/en/int_relations/agreements.html

[824] JFTC, "Japan Fair Trade Commission." , p. 7-8

[825] Yamada, A., "Japan: The Anti-Monopoly Law," Journal of International Business and Law.

It is noticeable that the JFTC took more than fifty years after the date of enactment of the Antimonopoly Act (1947) before entering into the first bilateral cooperation agreement with the USA in 1999. The negotiation period took time as well as the JFTC must have necessary conditions for cooperating and coordinating with other jurisdictions. This is what AMSs should bear in mind and prepare themselves to be capable of cooperating with other countries.

4.5.5 The Similarities of Approaches and Factors Required for Entering into International Competition Cooperation Agreements in the US, EU and Japan

The overall similarities between the US, EU and Japan is they all moving towards the more cooperative pathways for the effective enforcement of competition cases with international dimensions. The competition agencies in three jurisdictions tend to engage in more cooperation and coordination with other countries.

The first similarity between the US, EU and Japan's approaches in international cooperation concerns the structure and provisions in bilateral cooperation agreements in competition. Most main structures and provisions in competition cooperation agreements are similar between the US, EU and Japan because they were influenced from the OECD Recommendation 1995, which has been widely used as the model for most competition cooperation agreement. As a result, the main structures and provisions of the most bilateral agreement concerning competition are similar though they have different details and conditions.[826] The OECD Recommendation 1995 is perceived as satisfactory for the first-generation agreement, although the issue upon the exchange of confidential information is relatively weak.[827]

[826] framework, I. C. N. C. W. G. S. g., "Co-Operation between Competition Agencies in Cartel Investigations.", p. 17.

[827] Rainer Geiger, The Development of the World Economy and Competition Law (Edward Elgar Publishing Limited). , p. 246

Another similar approach between the US, EU and Japan is in selecting the cooperating partners. They tend to cooperate with matured competition agencies, which mostly situating in important developed countries rather than new competition agencies in developing countries. Big trading partners are frequently the target because the more international business transactions between both jurisdictions, the more anti-competitive conducts are likely to affect the market and distort competition of other trading partners. However, the cooperation and coordination with less- matured competition agencies in some developing countries can be seen in the US, EU and Japan in the form of providing technical assistance and sharing experience rather than cooperation in the enforcement of competition law.

Last but not least, the US, EU and Japan, particularly between the US and EU cooperate and coordinate with each other with the view to reduce the conflict and create more convergence between their competition regimes. Currently, there is a global trend towards more convergence in competition policy and law.[828] It must be noted that convergence is in the lesser degree than harmonization. Harmonization of global competition rules is hardly possible in the near future and might not be desirable for some aspects.

4.5.6 The Distinction of Approaches and Factors Required for Entering into International Competition Cooperation Agreements in the US, EU and Japan

Distinction is hardly found between approaches taken by the US, EU and Japan in the aspect of international cooperation in the field of competition law application and enforcement. The level of cooperation that each country is willing to cooperate can be ranged from the informal cooperation, cooperation basing on MOU and formal first- generation cooperation agreements to the deeper level of cooperation, which is the second-generation agreement, and MLATs.

[828] Harbour, P. J., "Developments in Competition Law in European Union and the United States: Harmony and Conflict.", p. 11

The US, EU and Japan are all concluded the first and second- generation agreements with their cooperating partners. The distinction bases on the time each country entering into the second-generation agreements. The US and EU are regarded the most matured and long developed competition regimes so they can conclude the second- generation agreement without too much constraints. While Japan, which has developed its competition regime later than the US and EU, recently concluded the second-generation agreement with Australian Competition and Consumer Commission in 2015, which is slower comparing to the US and EU.

Overall, the US and EU have the matured competition regimes and ability of competition agencies in engaging in international cooperation; therefore, both US and EU are able to enter into the deeper level of antitrust cooperation that allow the exchange of confidential information without getting the waiver. As a result of powerful industrialized countries with big markets and countless business transactions between these two jurisdictions, both the US and EU often investigate the same anti-competitive conducts. Therefore, cooperation and coordination between the US and EU is necessary for the effective enforcement of competition law in both countries. Parallel investigation, the exchange of information, collecting evidence on behalf of the other agency, cases discussion and the request of positive comity are all happened and tends to continue more and more in the future. The close cooperation between the US and EU not only increases their effectiveness in enforcement but also produces more convergence across Atlantic. It is particularly prominent in horizontal merger that the law of these jurisdictions has a lot more convergence than ever before. Parallel decisions can be seen in many merger cases between the US and EU.

4. 5. 7 Analysis of Approaches in the Improvement of International Competition Cooperation Agreements between Countries

In the era of globalization of business, there is growing number of international businesses. More and more competition issues are related to international dimension; international cartels and mergers that go beyond one country' s border. These competition issues are not easily handled by one competition authority. It is, thus, necessary to cooperate with other competition agencies to effectively investigate and enforce domestic competition law to foreign anti-competitive conducts that badly affects internal market and consumers. One of the important challenge of competition law enforcement to foreign anti-competitive conducts is the inability of competition agencies to find information to crack the competition cases. Most of the evidences and witnesses sometimes locating abroad and it is extremely difficult to ask the other country to collect evidences for the law enforcement of other jurisdiction without the cooperation agreements between these two related countries. Without mechanisms between countries to facilitate the exchange of information, competition agencies in the affected country will face a big obstacle in investigation.[829]

This is the reason why cooperation agreements have become more and more prominent role nowadays. All international organization, for example ICN, OECD, UNCTAD and APEC encourage their members to cooperate and coordinate in the competition law application and enforcement. The benefits of cooperation have become prevalent. Currently, the trend is moving towards more cooperation than unilateral aggressive enforcement of competition law through extraterritoriality. The US is the best illustration. The US is the main jurisdiction that emphasizes the aggressive its antitrust law enforcement has turned to resort more on cooperation agreements with other countries instead of the use of highly controversial extraterritorial application of its antitrust law. Cooperation in the application and enforcement of antitrust law between the US and other countries helps reducing the tension between

[829] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 11-13

countries in the past. More coordination and cooperation creates more trust and lead to the consideration of positive comity, which is clearly seen between the US and EU.

The objectives of cooperation agreements between competition agencies are broadly divided into three types. First, cooperation for the purpose of exchanging, discussing competition issues and technical assistance to enhance expertise. Second, cooperation for the purpose of seeking enforcement assistance in specific cases. Third, cooperation to develop the common views on the same competition issues.830

The experiences of the prominent competition regimes; namely the US, EU and Japan provide lessons for ASEAN that bilateral cooperation agreements highly benefit cooperating countries in the application and enforcement of competition laws in cross-border competition cases. The US, EU and Japan widely employ the bilateral cooperation agreements as the main tool to for improving more effective enforcement for cases related to international dimension.

Another potential benefit of cooperation agreement between countries is creating the more understanding and convergence in competition policy and law among cooperating countries. This is supported by the US experience in realizing the important role of bilateral cooperation, which was described by a commissioner, Pamela Jones Harbour; that the US has learnt that never underestimate the significance of bilateral cooperation both in fostering cooperation in law enforcement and in developing more convergence in competition policy.[831] The successful and deep transatlantic cooperation agreement between competition authorities of the US and EU helps the enforcement of many big international competition cases, particularly in cartels and merger controls. The close cooperation between these big competition regimes also being developed into more convergence in competition policy and law and then expanded into the level of multi- lateral relationship in the form of multilateral competition forum like the OECD and ICN.[832]

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[830] A, D. M., "International Cooperation in Competition Law and Policy: What Can Be Achieved at the Bilateral, Regional, and Multilateral Levels," International Economic Law. p. 425

[831] Harbour, P. J., "Developments in Competition Law in European Union and the United States: Harmony and Conflict.", p. 16

[832] Ibid., p. 18

Regarding the level of cooperation, this analysis begins with the deepest level of international cooperation in competition matters, which is competition cooperation between the US and EU. Their cooperation is not limited only to cooperation in many international anti-competitive cases resulting in the creation of convergence in their outcome of decisions but go to the enhanced 'positive comity' agreement between the US and EU.[833] The positive comity appears in the Article V of the Agreement Between the Government of the United States of America and the Commission of the European Communities regarding the application of their Competition Laws 1991. Positive comity is the heart of the 1991 agreement between US and EU, which is in Article V. This agreement encourages the exchange of information that tends to have impact on European and American markets, which appears in Article III. The notification of cases being handled by competition authorities of one party that affect the important interest of the other party is indicated in Article II. Cooperation and coordination of the actions of competition authorities of both parties is in Article IV. While the traditional comity is found in the Article VI. The US and EU have resorted this 1991 cooperation agreement in many big cases like the *Microsoft* case, which resulted in the parallel orders in 1994 and many more on merger cases.[834]There are some other cases demonstrating the close cooperation between the FTC and EC in competition cases; namely Sanofi/Aventis and Sony/BMG.[835]

The possibility to enjoy the positive comity either the informal or formal one under the existing international cooperation agreement depends on the very close contact between the staffs of cooperating agencies reflecting the high level of cooperation and the ability to share confidential information pursuant to a waiver like appears in the *AC Nielsen* case. These factors made the U.S. Department of Justice

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[833] Randolph W. Tritell, "International Antitrust Convergence: A Positive View' 19 Antitrust 18 (2004-2005) 2005 American Bar Association. Reprinted from Antitrust Magazine, Summer 2005, a Publication of the Aba Section of Antitrust Law," [Online] Accessed: 24 January 2017. Available from: https://www.ftc.gov/system/files/attachments/key-speeches-presentations/tritellpositiveview.pdf

[834] Donald I Baker, "Us: International Cooperation on Competition Law Policy," International Business Lawyer 25(1997)., p. 474

[835]Harbour, P. J., "Developments in Competition Law in European Union and the United States: Harmony and Conflict.",p. 16

closed its investigation in this case because it became clear that it made more sense to allow the DG-COMP takes the lead. This case is the best example of informal positive comity between the US and EU. After this case, the DOJ announced its first formal positive comity request to the EC by resorting the 1991 international cooperation agreement between the US and EU.

The successful cooperation between the US and EU shows other countries that cooperation can work well despite of their necessity to defend sovereign interest and their differences in economic policy, some elements in competition policy and law between two major competition regimes. This is reflected in Financial Times

" The growth of US- EU co- operation on antitrust policy shows different methods can coexist, provided objectives are broadly shared – or at least understood – and agencies do not retreat into territorial defensiveness."[836]

This comparative study shows that the important conditions for successful conclusion of cooperation agreement between two jurisdictions require many prerequisites. The political will is one of them because political will supports competition agency or state to do cooperation agreements. Some countries need to amend their law to be able to cooperate and implement the cooperation agreement.

Another condition is the similarity in both substantive and procedural laws, exemptions, sanctions and similar level of due process of cooperating jurisdictions. The differences and divergences in competition laws of cooperating countries are a big obstacle for cooperation. The differences that impede the cooperation appear in the form of differences in substantive and procedural laws, analytical approaches as well as the legal systems between cooperating countries. This will make it more difficult to cooperate. On the other hand, countries, which have more convergence in competition laws and share the similar legal systems for competition law will be easier to cooperate. It is easier to share information between countries commonly having similar

[836] FINANCIAL TIMES, "Rules for Regulators: What Is Good for the Eu Is Good for Us Trade Relations,"(2003)., p. 18

legal systems and legal standards. This is because some evidences collected and procedures under administrative competition system are not acceptable to prove criminal sanctions.

Therefore, one lesson that ASEAN should learn from these matured competition jurisdictions is about difficulty to cooperate and share information between the jurisdictions that have contradictory laws and legal principles. If competition laws in each AMSs are totally different, it will be difficult for AMSs to enter into the deeper cooperation in the field of competition law and its enforcement. This is why the ASEAN Regional Guidelines on Competition Policy is used as the important tool in helping AMSs achieving the preliminary degree of convergence. More convergence among competition laws of AMSs means more opportunities to successfully cooperate in the enforcement of cross broader commercial transactions as set in the fourth ASEAN Competition Action Plan 2016-2025.

Other factors that obstruct competition cooperation between countries include the lack of political support, having legislations prohibiting cooperation in the competition matters or exchanging information between competition agencies, internal institutional constraints within competition agencies impeding ability to cooperate with other countries; resource constraints and language barriers and no trust in the protection of confidential information and due process between competition agencies.

Liberalizing domestic laws to enable the exchange of information between competition agencies is another important factor for successful cooperation. Inability of the exchange of confidential information seems to be the big and unsolvable problem of cooperation today. There are some limitations under the national laws for sharing confidential information. There is no international legal binding obligation for ASEAN countries to share their confidential information. Therefore, it depends on the parties to agree or disagree on sharing confidential information. Most of the bilateral cooperation agreements usually put the limitations or the conditions upon the

exchange of information. Provisions concerning information sharing tend to rely on discretion of the requested country. If the share of information is against the national laws or national interest, the requested jurisdiction generally refuses to share the information. The exchange of information also should not undermine the cartel investigation. For example, for the effectiveness of amnesty program, most jurisdictions have policies that information obtained from amnesty applicants would not be shared unless the amnesty applicant provides prior permission.

One of the reasons why many jurisdictions highly concern about how to safeguard the exchange of information comes from the business pressure[*]. According to the OECD best practices for the formal exchange of information between competition authorities in hardcore cartel investigation, the reasons for refusing to provide the requested information include:

A. The requested information related to conducts that is not considered as hardcore cartels in the requested jurisdictions
B. The information sharing cause unduly burdensome to the requested jurisdictions
C. The information sharing undermines an ongoing investigation of the requested jurisdictions
D. The requested jurisdictions believe that confidential information may not be sufficiently safeguarded in the requesting jurisdiction
E. Providing the requested information is contrary to the public interest of the requested jurisdiction

Another problem obstructing the exchange of confidential information is related to the definition of "confidential information". Without the universal agreed definition on confidential information, this could lead to the disagreement upon what information should be considered confidential or not. To create the mutual common definition of confidential information is a time-consuming process because a little

misunderstanding means legal liabilities of the requested authority. The requested authority might be reluctant and unwilling to put itself into the risk of litigation; thus, the information requested might not be provided.[837]

On the other hand, the inability to obtain confidential information from abroad can significantly obstruct competition agency's ability to investigate cases, particularly in international cartels. This can lead to inability to find enough evidence to prove the violation of competition law.

Finally, a close relationship between staffs of cooperating jurisdictions is important. The close relationship build trust and make the process of cooperation easier. It can be seen from the US and EU's cooperation. Both jurisdictions emphasize the benefit of close contact and relationship between staffs of cooperating countries is one of the important factors leading to more effective international cooperation. It is also possibly enhancing the level of cooperation between competition agencies from informal to formal one. The great coordination between the staffs of the U.S. DOJ and the DG-COMP in the *Microsoft* cases brought about the parallel investigations of anti-competitive conduct of *Microsoft*, which finally resulted in a single, jointly negotiated and coordinated remedy, implemented by a virtually identical court decree in the US and an undertaking in Europe. [838]

*There are many reasons why businesses pressures governments not to weaken the law concerning confidential information and information sharing.

1. It is important to keep the good image and reputation of business.

2. Competition cases rely heavily on the information; therefore, there must be a mechanism to protect whoever gives important information from retaliation or harassment. Confidentiality is even more important to cartel investigation especially leniency programs.

3. Allowance of dissemination of confidential information to other jurisdictions would increase the possibilities of exposure of antitrust liabilities in multiple jurisdictions. Therefore, firms hardly give confidentiality waiver. Unless, they are also interested to apply for amnesty program in that jurisdiction. See: Trade Practice Act Review Committee, Review of the Competition Provisions of the Trade Practice Act, (2003) 184 (Dawson Report) in Brendan J. Sweeney, The internationalization of Competition Rules, 299

[837] OECD, "Limitations and Constraints to International Co-Operation," [Online] Accessed: 11 January 2016. Available from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2012)8&docLanguage=En, p. 8

[838] World Trade Organization, Communication from the United States, *Approaches to Promoting Cooperation and Communication among Members including in the Field of Technical Cooperation*, WT/WGTCP/W/116 (April 15, 1999).

The Table Summarizing Similarities and Distinctions of the US, EU and Japan's Approach to Solve Competition Problems

Similarities of Approaches of the US, EU and Japan in Overcoming Competition Problems	Distinctions of Approaches of the US, EU and Japan in Overcoming Competition Problems
Competition Policy: Lessening the Conflict between Competition Policy and other Economic Policies 1.US, EU and Japan share the common objectives of competition policy in protecting consumers and ensure that free and fair competition will finally benefits consumers. 2. Competition policy is a main policy in these three jurisdictions. 3. No direct and explicit law to balance the conflict between competition policy objectives and other public policy objectives in the US, EU and Japan. 4. Similar measures are adopted in these three jurisdictions to strike the right balance in case there is a conflict between competition policy and other policies, which are the use of competition impact assessments before issuing the new policies, laws and regulations. 5. Competition agencies play the important role in facilitating other authorities to use the competition impact assessment. 6. The competition agencies play the important role in competition advocacy targeting at policy and law makers to consider the competition impact before issuing policies and laws.	**Competition Policy: Lessening the Conflict between Competition Policy and other Economic Policies** 1.The process of the US, EU and Japan adopted for implementing the competition impact assessment are different, including which situations competition impact assessment should be conducted and the use of competition impact assessment is on the voluntary basis or compulsory basis. 2. Japan competition authority shows the Asian-style strategy in conducting competition advocacy to other government authorities by creating the good relationship and coordination with other government authorities to encourage them to take into account competition impact before implementing other laws and policies that potentially cause impact to competition.

The Similarities in Substantive Competition Laws of the US, EU and Japan	**The Distinctions in Substantive Competition Laws of the US, EU and Japan**
1. Similarity in the main objective of competition laws among US, EU and Japan: create the free and fair competition and consumer welfare. 2. US and EU treat Hardcore Cartel as the Serious Anti-Competitive Conducts and Imposing per se Rule on Hardcore Cartels 3. More convergence on merger analytical framework between US and EU on Horizontal Merger results from the long cooperation between both jurisdictions in merger review and the revision of the merger guidelines in both the US and EU during the late nineteenth century to the beginning of twentieth century. produced the extensive convergence The key reform of the EC merger regulation, which revising the EC substantive standard of merger review, is made very similar to the standard of the US. The 'EC Horizontal Merger Guidelines' (2004) contains the similar elements and analytical approaches to the 1992 'DOJ-FTC Horizontal Merger Guidelines' 4. US, EU and Japan can apply national competition law extraterritorially. 5. US and EU recognize the important role of economic analysis in the application of competition Laws.	1.Different Rationales behind the Introduction of Competition Laws in US, EU and Japan. 2. US Anti-Monopoly Model vs EU Abuse of Dominance Model 3. Approaches taken by the US and EU in this unilateral conduct is different. The US approach towards the unilateral conduct is more lenient comparing to the more intervening approach taken by the EU. The EU court seems to be more stringent in the analysis of abuse of dominance than the US rendering the more liability to the dominant firms. This is best reflected in Microsoft case and British Airways case.
The Similarities between the US, EU and Japan's Approaches in Overcoming Enforcement Impediments	**The Distinction of Approaches Taken in the US, EU and Japan in Overcoming Enforcement Impediments**
1.Having Measures Ensuring Independence of Competition Agencies in the US, EU and Japan in the Enforcement of their Competition Laws	1.Different Methods of Competition Law Enforcement The US adopts criminal, administrative and civil enforcement The EU adopts administrative enforcement

2. The Application of Leniency Program to Increase Cartel Enforcement in US, EU and Japan 3. The Set of Enforcement Priority in the US, EU and Japan 4. Ensuring the Adequacy of Human Resources and Financial Resources 5. Competition Agencies in the US EU and Japan Adopts Resource Allocation Plans	Japan adopts administrative, criminal and civil enforcement 2. Disparity in the US, EU and Japan Competition Enforcement Authorities In the US, there are dual public authorities responsible for antitrust law enforcement. While under the EC Competition rules, there are the supranational body responsible for enforcement of competition cases involving international dimension between EU Member States: DG Competition. The EU also has the unique decentralization of enforcement of cases affecting trade between EU Member States to national competition authorities (NCAs) to lessen the overloaded cases of the DG Competition. In contrast, Japan has the exclusive enforcement agency, which is the JFTC. 3. Different Degree of Private Action's Widespread and Success The US has the most successful private enforcement. The US private action is facilitated by many factors including, special procedural rules, discovery rules, high incentive of bringing lawsuit and treble damages. The pure private action under the EC competition law is not allowed but suffered parties can claim for damages for the violation of community competition law under some national tort laws. The number of private litigations for the violation of EC competition law under national laws in EU Member States are quite limited. In Japan, the private action is available both under the AMA and under the tort law.

	With the prerequisite conditions for filing the private suit under the AMA and the stringent burden of proof under the tort law requiring the plaintiff to prove the amount of damage and the casual link between the damage and the violated conducts, it is quite difficult for the plaintiff to fulfill the requirements. Therefore, private action is not frequently found in Japan. The number of private litigation in the Japan during 1947 until 1970 was very low. However, the private litigation was gradually increased since 1986. The main users and beneficiaries of private antitrust litigation in Japan have been local governments and government entities in bid-rigging cases with the enormous damages from bid-riggers. While in other violation of AMA beyond bid-riggings, businesses have been much less successful awarding damages, Finally, Japanese consumers unfortunately have recovered almost nothing.
- The Similarities between the US, EU, Japan's Approaches in Overcoming Impediments in Competition Advocacy 1. Commonly employ both types of competition advocacy targeting both in reducing unnecessary restrictive policies, laws and regulations and advocating businesses and other related stakeholders. 2. These three jurisdictions adopt the the competition assessment as an important tool to help conduct the first type of competition advocacy to shape the new legislations not to produce competition restrictive effects.	**The Distinction of Approaches in the US, EU and Japan in Overcoming Impediments in Competition Advocacy** 1. The main distinction of approaches taken by these three jurisdictions are from the different level of competition culture, competition environment and political support. Each country experiences different kinds of barriers. The FTC performance in regulatory review is affected by external political pressure and political will within the institution when changing the chairman of the FTC. The EU is better off from having the clear objective of the Treaty on the European Community in promoting 'an open market economy with free competition'With the strong EU legal mechanism in

3. Business compliance programs are encouraged by the US, EU and Japan as a tool to foster culture of compliance among private companies.	implementing this objective, there is community legislation binds the EU Members States to introduce competition screening before issuing laws and regulations. Competition impact assessment in EU is compulsory and necessary for facilitating the community goals. To effectively carry on competition advocacy both at community level and national level of EU Member States, the EU Commission closely cooperates and coordinates with the national competition agencies. This is the unique characteristics of the EU. Japan seems to experience quite high barriers in the early period of its Antimonopoly Act application. With the little political support and weak competition culture; thus, the JFTC has long struggled to educate all stakeholders in the society. The JFTC employed the long-term consistent competition advocacy plan to deal with the unnecessary competition restrictive policies, laws and regulations. This long-term plan finally proves that it brings about the good result and foster competition culture in Japan.
The Similarities between the US, EU and Japan's Approaches in International Competition Cooperation 1. They all moving towards the more cooperative pathways for the effective enforcement of competition cases with international dimensions. US and EU cooperate and coordinate with each other with the view to reduce the conflict and create more convergence between their competition regimes. 2.They face a growing of global dimension in their competition laws enforcement	**The Distinction of Approaches in the US, EU and Japan in International Competition Cooperation** Distinction is hardly found between approaches taken by the US, EU and Japan in the aspect of international cooperation in the field of competition law application and enforcement. The level of cooperation that each country is willing to cooperate can be ranged from the informal cooperation, cooperation basing on MOU and formal first-generation cooperation agreements to the deeper level of cooperation, which is the second-generation agreement, and MLATs.

According to the practices of the US, EU and Japan, they all resort the cooperation and coordination with other jurisdictions in their investigation, case handling and enforcement. 3. Most main structures and provisions in competition cooperation agreements are similar between the US, EU and Japan because they were influenced from the OECD Recommendation 1995. There are some different details and conditions though. 4. Deep competition cooperation is found between the US and EU. Their cooperation goes deeper to the enhanced 'positive comity' agreement. 5.The US, EU and Japan share the common prerequisite conditions for entering into competition cooperation agreement; 5.1 Political will to do cooperation agreements. Some countries even need to amend their law to be able to cooperate and implement the cooperation agreement. 5.2 Similarity in substantive and procedural laws, exemptions, sanctions and similar level of due process of cooperating jurisdictions. It is extremely difficult to cooperate and share information between the jurisdictions that have contradictory laws and legal principles. 5.3 The close relationship between staffs of cooperating jurisdictions is important. 6. US, EU and Japan tend to cooperate with matured competition agencies, which mostly situating in important developed countries rather than new competition agencies in developing countries.	The US, EU and Japan are all concluded the first and second-generation agreements with their cooperating partners. The distinction bases on the time each country entering into the second-generation agreements.

However, the cooperation and coordination with less-matured competition agencies in some developing countries can be seen in the form of providing technical assistance and sharing experience rather than cooperation in the enforcement of competition law.	

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The competition policy, which includes competition law and its enforcement, facilitates the goals of the ASEAN economic integration by level playing field for all market participants regardless of their nationalities to create fair competition environment and protect competition process, which help turning ASEAN into highly competitive economic region and facilitate liberalization in ASEAN. The vital roles of the competition policy and competition law to ASEAN economic integration results in the commitment under the AEC Blueprints forcing all AMSs to introduce national competition policy and competition law. The establishment of the Guidelines shows the ASEAN effort in ensuring that competition policies and competition laws in all ASEAN Member States will commonly bring about fair competition environment in national and regional level and moving towards the common direction, which is turning ASEAN into competitive economic region according to the goal of the AEC Blueprints. Thus, the ASEAN Regional Guidelines on Competition Policy is designed to functions as a common framework for competition policy and competition law to create fair competition environment. The content of the Guidelines is based on the international best practices and consistent with the economic theories of competition. ASEAN uses the Guidelines to provides the framework of the whole competition system, including how the competition policy, law and the enforcement are supposed to be to introduce level playing field and finally lead to the fair competition environment. What are the necessary provisions for competition law to be the rule of the game to create free trade and fair competition. The Guidelines is a good framework for competition system to generate the level playing field and fair competition. Therefore, implementing the Guidelines into their national competition systems will help creating fair competition environment in AMSs.

Implementing the Guidelines also helps developing the whole competition regimes in AMSs. By aligning competition policy and law within the Guidelines' framework, it will create more regional convergence in competition policy and law among AMSs. When the development gap of competition policy and law among all AMSs is reduced, moving on the next stage of more convergence to further economic integration will be more achievable in the context of ASEAN. The compatible competition policy and law among ASEAN Member States is significant for further ASEAN economic integration.

However, competition policy is comparatively a new area in the ASEAN regional economic integration. It is also the new area for some AMSs. Consequently, the development plan of ASEAN competition policy should be the gradual work in progress to be consistent with the different levels of competition development of each ASEAN Member State. It is impossible to create the harmonization or unification of ASEAN competition law partly because of the lack of supranational organizations in ASEAN and it is too costly considering the vast divergence of competition laws among AMSs currently. Furthermore, the unification and harmonization of competition policy and law might not be desirable for all the AMSs since they are related to sensitive and jealous guarded sovereignty and national interests of the ASEAN Member States.

Hence, the choice for ASEAN competition policy must considers these implications. Otherwise, the ASEAN competition policy will not be all agreed from all AMSs and cannot reach the principle of ASEAN consensus-based. This is the reason why ASEAN adopted the soft approach for ASEAN competition policy rather than the hard-law approach that is expected to get disagreement among members. By using the soft law approach, it is appropriate to the level of economic integration and competition development in ASEAN because it gives more flexibility than the hard law approach. It is easier to persuade all ASEAN Member States to oblige themselves under the soft law that providing some flexibilities during the early ASEAN economic integration. With these conditions and influence of the ASEAN Way, the soft law

approach on competition policy was chosen and delivered into the ASEAN Regional Guidelines on Competition Policy aiming to be the pioneer attempt in setting the common framework on competition policy and law for all AMSs basing on the soft law approach. The flexibility can be seen through the content of the Guidelines with a variety of models and approaches provided for AMSs to select as it deems appropriate to the context of each ASEAN country.

However, this study found that the Guidelines cannot fully function because there are impediments in implementing the Guidelines in Thailand, Indonesia, Singapore and Vietnam. The reason behind this is some competition standards in the Guidelines are contradict with the national interest and vested interests of these AMSs, which include the big companies. Some frameworks of the Guidelines are inconsistent with some specific conditions of the AMSs. These factors are impediments in implementing the Guidelines. This dissertation divides these impediments into five main groups, namely competition policy, competition law, enforcement, competition advocacy and international cooperation. The comparative study found that some problems faced in Thailand, Indonesia, Singapore and Vietnam are quite common, particularly having weak competition culture and the conflict between competition policy and trade policy and industrial policy These countries face similar problem of providing unequal playing field, particularly special treatments and privileges towards state- owned enterprises. While the problems concerning inexperienced and inadequacy of human resources in competition authorities to deal with complex competition cases and the inadequacy of budget are found in Thailand, Indonesia and Vietnam. Political intervention in the application and enforcement of competition law can be seen in Thailand and Vietnam. The problem of delay in the application of secondary laws is uniquely found in Thailand regarding the criteria for determining the dominant position and merger control.

The main source of these impediments is common, which is implementing the Guidelines is contrast to the national interest, including vested interest in AMSs. Therefore, these countries cannot completely implement the Guidelines into their national competition systems. In other words, AMSs considering only national interest causes impediments in implementing the Guidelines. These impediments in the implementation of the Guidelines in these four ASEAN countries obstruct the operational function of this Guidelines. The non-operational implementation of the Guidelines obstructs the goal of the Guidelines in the effort to create fair competition environment. The impediments in implementing the Guidelines will reduce the expected opportunities of implementing the Guidelines as identified in Chapter 3. These impediments that obstructing the implementation of the Guidelines cannot be ignored otherwise the goals of Guidelines and the AEC Blueprint will not be achieved. This is the reason why this dissertation proposes some recommendations on how to lessen impediments in implementing the Guidelines to make the implementation process of the Guidelines operational.

This study found that there are three necessary factors that can bring about the operational implementation of the Guidelines, which are political will, AMSs prioritizing and complying with the ASEAN regional competition commitment, and the existence of competition awareness among all stakeholders in the society. In order to create these three crucial factors, changing the perception of AMSs from considering only national interest to common interest of all AMSs and ASEAN as a whole will help generating these factors. The change of perception to common interest will help by solving at the source of impediments in implementing the Guidelines, which is from the consideration and protection of national interest only. Considering only national interest is the main source of impediments in implementing the Guidelines; thus, it is necessary to consider what all AMSs and ASEAN will get from implementing the Guidelines instead to make the implementation of the Guidelines operational. Considering the common interest will be a good incentive for all AMSs to create the

willing in implementing the Guidelines. It is necessary to make all AMSs aware that implementing the Guidelines is the important tool to create common interest. ASEAN economic integration can be metaphor as a big jigsaw puzzle, which cannot be completed if there is a missing piece of puzzle. Competition policy and law are like an important piece of puzzle. Without incorporating competition policy and law in all AMSs and introducing common framework of ASEAN competition policy, the goals of ASEAN economic integration will not be fully complete. In other words, competition policy and law are the significant tool to create common interest among AMSs. Competition policy and law, plays multifunctional roles towards the achievement of the expected goals of the AEC, which are the common interest of all AMSs.

The first role of competition policy and law is creating level playing field for all market players irrespective of nationality or business' sizes and reducing market barriers in the forms of prohibiting private anti-competitive conducts to ensure free and fair competition in all AMSs and in ASEAN single market. By having fair competition in all AMSs will foster fair competition in the ASEAN regional single market.

This role helps achieving one of the AEC's goals, which is turning ASEAN into competitive economic region. By being competitive economic region, ASEAN will gain more competitiveness in international trade and investment, which finally bring about common benefits among AMSs.

The second role is competition policy helps enhancing the process of ASEAN economic integration. The good function of competition policy, law and enforcement ensures that ASEAN keeps its regional market open for both intra- and extra- regional trade and investment without barriers to trade. The barriers to trade can be caused by tariff barriers and non-tariff-barriers. Private anti-competitive conducts are a kind of non-tariff barriers caused by firms in the domestic market. These private barriers, for example exclusionary agreements, predatory pricing, exclusive dealing, and any unfair trade practices aim to create barrier to entry into markets, impede the degree of success of ASEAN trade liberalization. Bid-rigging in tendering could bar entry to non-

members of cartels to win the bid. The elimination of internal barriers to trade among the ASEAN countries to promote regional economic integration will not be successful if private companies in AMSs still creating territorial protection through abuse of a dominant position or unfair trade practices. To prevent private anti- competitive business conduct from negating the anticipated common interest of all AMSs from the elimination of governmental barriers to trade and investment, this is why competition law prohibiting private anti- competitive conducts is necessary to ensure that market barriers caused by private are reduced in parallel with the agreements between AMSs to reduce tariffs.[839] This means market barriers from governments and privates are reduced at the same time. Only entering into a web of ASEAN agreements to liberalize trade will not be fully achieved if private anti-competitive behaviors are not prohibited and kept creating new market barriers to entry. Despite tariff barriers being removed and free flow of goods, services and investment expected, businesses could nullify this interest by colluding to divide up markets geographically and maintaining national markets for the sake of their own benefits. Then ASEAN economic integration cannot fully achieve.

Thus, this role of competition policy and law in prohibiting anti- competitive conducts of businesses complements the ASEAN liberalization, the entry of trade and investment intra and extra ASEAN as well as the regional economic integration.

Competition advocacy plays another role in complementing ASEAN economic integration by shaping other internal laws and regulations not to unnecessary restrict competition and ensure the principle of competition being maintained in other government's policies, laws and regulations as well as their implementation of those. Proposals or applicable unnecessary competition restrictive laws and regulations will be reviewed through competition advocacy. Competition agencies may give opinions or recommendations to possible alternatives that have less competition restricted effects.

[839] Martyn Taylor, International Competition Law: A New Dimension for the Wto? (Cambridge University Press, 2006).

The complementarity role of competition policy and law to ASEAN economic integration helps ensuring that the expected common interest from the ASEAN economic integration will be achieved. Another related question is what is the common interest among all AMSs.

- The common interest means interests that all AMSs commonly share, which are the benefits and opportunities AMSs will get from the achievement of ASEAN economic integration, including ASEAN's slogans as 'SHARED MARKET, SHARED BENEFITS', 'TRADING ON A BIGGER STAGE' and the benefits deriving from the achievement of four main goals of ASEAN Economic Community:

1. ASEAN becoming the single market and production base with the free flow of goods, services, investment, capital and skilled labour. Being a single market means bigger market with US$2.6 trillion and over 622 million people, which offers a wide ranges of business opportunities for both internal and external traders and investors.
2. ASEAN becoming competitive economic region that provide level playing field for all market players regardless of their nationality under the function of market mechanism. Protection of competition process, free and fair competition will be ensured by the sound competition policies and laws in all AMSs.
3. Having equitable economic development to enable businesses and people in ASEAN engaging into the economic integration process to enjoy the benefits of the ASEAN Economic Community.
4. ASEAN's integration into the globalized economy

A further common interest is more competition makes consumers in AMSs better off. Unlike monopoly, competition will force firms to compete by offering better quality and more varieties of goods and services at the lower prices for consumers. More innovations will be initiated from the pressure of competition to improve products and services, which finally benefit consumers. Businesses need to reorganize their business activities to improve their cost structure, productivity and products.

Common interest can be derived from more business opportunities in ASEAN because the reduction of import and export costs means it is being easier and cheaper for many businesses to export and import their goods to the other countries in the ASEAN single market.

Common interest also comes from more investment in ASEAN because one of the ASEAN commitments is building an investment environment to attract businesses through commitments towards the liberalization and protection of cross- border investments operations, together with best practices for the treatment of foreign investors and investments. More investment, particularly foreign direct investment in ASEAN will generate economic growth and more employment. More employment means an increasing of the level of production of goods and services, which benefits economic growth. Furthermore, more employment results in both economic and social benefits in terms of higher income security for employed, improving living standards and reducing poverty.[840] Foreign direct investment may bring about the transfer of technology. Then, the increase of economic activities in ASEAN will make economy and Gross Domestic Product (GDP) grow. To sum, the increasing of investment in ASEAN results in many economic benefits, including economic growth, which are the potential common interest for all AMSs.

[840] Mathew Forstater, "Working for a Better World: The Social and Economic Benefits of Employment Gurantee Schemes " [Online] Accessed: 14 October 2017 Available from: http://www.economistsforfullemployment.org/knowledge/presentations/Session1_Forstater.pdf

It is necessary for ASEAN member countries to have comprehensive competition policies and laws, including effective enforcement to guarantee the fair competition by regulating anti-competitive behaviors to ensure the level playing field, no market barriers created by businesses in parallel with the implementation of trade and investment liberalization in ASEAN. Currently, laws and policies dealing with restrictive business practices differ from one ASEAN country to another that is why the Guidelines is necessary to ensure that all competition policy and law in AMSs are sound, effective and leading to the same goals, which are ensuring that all benefits of ASEAN economic integration; common interest in all AMSs, will occur in practice. Although some might believe that ASEAN common interest seems to contrast with national interest, in the long run there will not be conflict between the national interest and common interest. ASEAN is on the beginning of economic integration so the common interest is not fully appears but in the future all AMSs can benefit from more trade and investment flow in larger single market.

By having common interest as the main drive of political will, prioritizing and complying with ASEAN obligations and competition awareness among all stakeholders in the society, these three crucial factors can function by making the implementation of the Guidelines operation. Political will is the main tool for the operational implementation of the Guidelines into national competition system because the legal status of the ASEAN Guidelines is not the hard law, which can directly force the AMSs. The ASEAN Guidelines is rather based on the soft law approach. The competition action plan under the AEC Blueprint imposes only that the AMSs should implement national competition laws basing on the ASEAN Guidelines. ASEAN imposes only obligation for the AMSs to implement the Guidelines without imposing how to implement the Guidelines and leaving the room for AMSs to design on how to implement the Guidelines. Therefore, the implementation of the Guidelines also bases on the soft law approach. There is a monitoring mechanism for implementing the Guidelines but it bases on self-assessment of each ASEAN member that the progress will be reported

to the ASEAN Economic Minister Meeting. Without the political will to implement the Guidelines, it will be difficult to implement the ASEAN competition policy to national competition policy, particularly in the context of implementing the Guidelines, which having the soft law status. Moreover, the characteristics of ASEAN is an inter-governmental organization without supranational institution. All AMSs engage in the ASEAN economic integration basing on the horizontal relationship by entering into the web of economic agreements. In case of non-implementation of the Guidelines is regarded as non-compliance with the commitment under the AEC Blueprint. This issue will be referred to the ASEAN Submit but all the decision will be based on the consultation and consensus. This ASEAN mechanism is unlike the formal dispute resolution basing on the rule-based system with clear procedures and sanctions. The ASEAN mechanism is rather the conflict management basing on the less confrontation approach by relying on negotiation and consultation between leaders of the AMSs. With these unique characteristics of the ASEAN economic integration, ASEAN monitoring mechanism to deal with non-implementation of the Guidelines, the status of the ASEAN Regional Guidelines and some flexibilities provided in the content of the Guidelines and its implementation makes political will of each ASEAN Member State even more important in pushing the operational implementation of the Guidelines into national competition system. Political will can lead to the top-down orders from the leaders of the ASEAN Member States to related authorities to implement the Guidelines whether in the form of competition law reform, supporting enforcement and capacity building for competition agencies. In summary, the political will is the crucial tool for the operational implementation of the Guidelines basing on the top-down approach. The political will can issue policy or measures obliging all related authorities to prioritize and comply with ASEAN obligations on competition, which includes implementing the Guidelines and supporting competition agencies in building competition awareness among all stakeholders in the society.

On the other hand, the use of the bottom-up approach to push forward the operational implementation of the Guidelines can be done through the use of competition awareness among all stakeholders, consumers, SMEs, private companies that are suffered from the competition problems in that country to force the competition agencies and government to develop the whole competition system basing on the international best practices and within the framework of the Guidelines. This bottom-up approach is likely to work on the condition that stakeholders have competition awareness and realize the benefits of the effective competition policy and law. The realization of the potentials benefits and interests from having fair competition will drive these stakeholders to push government to prioritize and comply with the ASEAN obligation and generate political will to implement the Guidelines. The successful application and enforcement of Singapore Competition Act can be used as an example for other ASEAN Members to see the benefits of detecting these anti-competitive conducts, particularly on the hardcore cartels and abuse of dominant position for consumers and suffered parties.[841] What Singapore get from having fair competition environment is making Singapore an attractive place for foreign investment, and in 2017 Singapore is ranked second country behind New Zealand in the Ease of Doing Business, according to the findings of Word Bank's annual "Doing Business" 2017 report.[842] These benefits can help generating more competition awareness among all stakeholders, including the governments to put more effort in fostering fair competition environment in their countries. When all stakeholders see the benefits of fair competition in the national level, it will be easier to push forward the creation of fair competition environment in the ASEAN regional level as the single market with shared benefits among ASEAN Member States.

[841] SISTIC.com Pte Ltd vs. Competition Commission of Singapore

[842] Singapore Government, "Singapore Ranks 2nd in Ease of Doing Business," [Online] Accessed: 19 August 2017 Available from: https://www.acra.gov.sg/Statistics/Rankings/Rankings/

The final chapter of this dissertation proposes the more detailed recommendations to lessen the impediments in implementing the Guidelines basing on the five types of impediments. To provide these recommendations, international best practices, experiences and lesson learnt of the US, EU and Japan as well as the experiences from AMSs are comparatively studied to find what solutions they use to solve them. This dissertation found that the approaches took by foreign jurisdictions cannot be completely adopted in the context of ASEAN since there are many differences in many contexts, for examples legal systems, capacity of competition agency, political support, economic and social conditions, level of competition culture, level of economic and market development, political-economy conditions, level of government intervention in the market and corruption rate between the US, EU, Japan and ASEAN countries.[843] These different factors affect the development of competition regimes in each country in the different ways. However, it does not mean that these differences between ASEAN and the US, EU and Japan will obstruct ASEAN from learning the beneficial experiences from these matured competition regimes to develop competition policy and law in ASEAN. Therefore, the recommendations proposed on how to overcome impediments and strengthen the opportunities from implementing the ASEAN Regional Guidelines on Competition Policy will consider the various specific factors of ASEAN members that are mostly regarded as developing countries, with Singapore as the exception. The recommendations will be proposed by considering the ASEAN's context to provide the most suitable recommendations for ASEAN Member States as a whole.

[843] Fox, M. S. G. a. E. M., "Drafting Competition Law for Developing Jurisdictions: Learning from Experience.", p. 11-32

5.2 Three Necessary Factors for the Operational Implementation of the ASEAN Regional Guidelines on Competition Policy

Political will, ASEAN Member States prioritizing and complying with the commitment under the AEC Blueprint and competition awareness among all stakeholders are crucial factors to overcome challenges in the implementation of the Guidelines. These factors can be generated by changing the perception of the AMSs from considering only the national interest to the common interest, which is the opportunities and benefits that all AMSs will receive from the achievement of ASEAN economic integration as well as ASEAN liberalization. It must be noted that these three factors are crucial for overcome challenges in implementing the Guidelines but they are non-exhaustive factors. There can be other factors that can help overcoming the challenges. This part will show to what extent these three crucial factors can make the implementation of the Guidelines operational.

Political Will is Necessary for the Effective Implementation of the ASEAN Regional Guidelines on Competition Policy into National Competition Policy of the ASEAN Member States

The political will is necessary for the effective implementation of the ASEAN Regional Guidelines on Competition Policy to competition policy and competition law in each ASEAN Member State. Political will in this sense means the political intention to support the implementation of the Guidelines into the national competition system through reforming competition laws, issuing measures, orders or plan to implement the Guidelines in practice. This includes monitoring all the process of implementing the Guidelines to ensure that it is operational in practice.

Without political will, the implementation of the Guidelines is not likely to get full support from the government and national competition authorities in the AMSs. Although there is the specific obligation with the legal biding is imposed under the Action Plan on Competition Policy incorporated in the AEC Blueprint 2016-2025 that AMSs should implement their national competition laws basing on the principles of the Guidelines, there is no further suggestion to what extent the AMSs should refer to the Guidelines. This aims to give flexibility to all AMSs in developing its competition system within the broad ASEAN competition framework, which is the unique characteristics of ASEAN Way. This flexibility enables all AMSs to choose by themselves how to implement the Guidelines.

The flexibility in the implementation of the Guidelines cannot guarantee that the approaches taken by the AMSs to implement the Guidelines are sufficient or effective enough. This study found that AMSs do not take it seriously in aligning their competition regimes within the framework of the Guidelines. Implementing the ASEAN Guidelines into national competition laws is not a part of the action plans in any Thailand, Indonesia, Singapore and Vietnam. This is contrast with the obligations imposed under the AEC Blueprints and their action plans.

This is the reason why the political will is required to fulfill this gap and make the implementation of the ASEAN Regional Guidelines on Competition Policy operational and more effective. Otherwise, the allowance of flexibility in implementing the Guidelines possibly bars the effectiveness in the implementation of the Guidelines in practice. The ultimate goal of the AEC Blueprint to use competition policy and competition law as the main tool to create fair competition environment and facilitate ASEAN economic integration and single market will not be fulfilled.

Political will is also a crucial factor for supporting the development of national competition system. The lack of political will and political support weaken the competition law and its enforcement. Thailand is an example to show that problems in the competition law enforcement in Thailand comes from no political support to push to application of this act. The delay in enacting the secondary laws, the structure of commission opening for political influence, corporate lobbying and various intervention in investigation and enforcement result from the lack of political support and corporate lobbying effect weakening this act.[844] This emphasizes that the ASEAN regional commitment basing on flexibility in its implementation will not be achieved unless there is political support from the government of AMSs.

One important thing that ASEAN can learn from the EU is the EU has set the competition policy as one of the fundamental tool for the achievement of EU regional integration and single market. This reflects the consensus among all the EU Member States to create and implement the common competition policy and community competition rules for the sake of achieving the goal of EU regional integration. This presents the political will in the EU community level and political will of all leaders of in the EU Member States to support the EU competition policy and laws.

The EU does not only have political will to support common EU competition policy, but also there is a strong legal mechanism to monitor the implementation of EU competition policy basing on rule-based mechanism and supranational organization to enforce EU competition law. The EU realizes that the competition policy and law play a vital role in the function of the EU single market by allowing firms to compete on a level playing field. That is why the EU has taken the hard approach towards competition policy and law. If any EU Member State does not respect the EU competition policy and laws, sanctions will be imposed.

[844] วันรักษ์ มิ่งมณีนาคิน, รายงานพระราชบัญญัติว่าด้วยการแข่งขันทางการค้า พ.ศ. 2542: ข้อจำกัดและการปฏิรูป (ทีดีอาร์ไอ 2554), หน้า.10

Unlike ASEAN, despite realizing that competition policy and law is the fundamental policy for the achievement of ASEAN economic integration, ASEAN opted for the more lenient or soft approach towards competition policy and law in ASEAN. It can be seen from the ASEAN simply adding the competition policy as the important sector in the AEC Blueprint. However, its broad action plans and the choice of non-legal binding status of the Guidelines can reflect the soft approach towards competition policy and law in the context of ASEAN. The soft and lenient approach is more appropriate to the context of emerging ASEAN economic integration and consistent with the ASEAN Way.

Comparing between the approach taken by the EU and ASEAN, the EU takes competition policy in the hard law approach and invent many essential mechanisms to ensure that the EU competition policy will be effectively implemented in all the EU Member States. In contrast to ASEAN, ASEAN does not take competition policy as seriously as the approach of the EU. ASEAN opts for more lenient view of the soft law approach and seeks for soft cooperation in the field of competition policy in ASEAN. ASEAN has its own mechanism to deal with the non-compliance of its members related to the competition obligations under the AEC Blueprint like non-implementation of the Guidelines. However, the ASEAN mechanism is more flexible basing on the consultation and consensus in dealing with the non-compliance with AMSs' obligations. Basing on the consultation and consensus, ASEAN relies on the relation-based system instead of the rule-based system like the EU. Therefore, it is uncertain that what kinds of sanctions will be imposed.

Relying on the flexible ASEAN mechanism cannot completely guarantee that the standards imposed by the Guidelines will be effectively adopted, this is why political will is essential in pushing the implementation of the Guidelines within each ASEAN member. The political will can give the top-down policy and order to the specific national competition authority to implement and refer to the Guidelines in developing its national competition system. By adhering to the Guidelines, all AMSs

can develop their competition systems in the same direction within the mutual framework imposed by the Guidelines. If all AMSs implement the Guidelines into its national competition policy and law, it will fasten the development of competition policy and law within all AMSs comparing with having no Guidelines at all. At least the Guidelines ensures that all development of competition policies and laws within all AMSs are developing in the same direction basing on the international best practices and what agreed upon the Guidelines.

An example of necessity of political will in developing competition laws conforming to the Guideline's framework appear in the competition law reform in Thailand. The Thai Trade Competition Act 1999 has been criticized about its drawbacks in many areas. However, there seems to be no political support from the former governments in developing the competition law, including improving its ineffective enforcement and the inadequacy of resource.[845] This shows that political will is important for developing competition law in Thailand. Without pollical will, the application and enforcement of Thai competition act has not been developed for almost twenty years. Until the new military government from the coup d'état governs Thailand, the plan to reform competition law was accepted because it is consistent with the government's policy: Thailand 4.0. The plan to reform competition law got political support so it can amend many inappropriate provisions and enhance more effective competition enforcement authority by making it more independent from political intervention. The structure and qualification of commission are specifically designed to be insulated from political process and corporate lobbying and they have to work full time. Without the political will to support this competition law reform, it will be difficult to develop competition law according to the Guideline's framework and the international standard. Higher competition awareness in the Thai society is also a factor for the successful competition law reform in Thailand. More and more

[845] Ibid.10

public criticism about the ineffectiveness of Thai Trade Competition Act, particularly among scholars helps motivating public pressure and political will to reform this act.

Similar example is found in Indonesia where political will is the main drive for the amendment of competition law in Indonesia. The new draft law contains the main areas that make competition law in Indonesia more conforming to the Guidelines' standard: clearly allow the extraterritorial application in the law, the introduction of leniency program, improve many areas for more effective enforcement. This draft law got the political support from the parliament because it was approved in April 2017. This shows that the process of competition law amendment in Indonesia depends highly on the political support to ensure that the competition law amendment can practically develop competition law basing on the ASEAN Guidelines and international best practice.[846]

ASEAN Member States Prioritizing and Complying with the Competition Commitments under the AEC Blueprint is Necessary for the Effective Implementation of the ASEAN Regional Guidelines on Competition Policy

As being ASEAN Member States, ASEAN Member States should prioritize and comply with the commitment of the AEC Blueprints relating to competition issues. The AMSs should keep in mind that the obligations as being the ASEAN Member States are as important as the national obligations. The ASEAN obligations should not be ignored. If all AMSs are willing to adhere to the ASEAN commitment under the AEC Blueprints, it will help the implementation process of the Guidelines more effective.

The set of ASEAN obligations as one of the priorities in competition policy and law can make the process of implementation of the Guidelines operational. By setting the ASEAN obligation as the priority, the implementing plan and timeframe will be clearly initiated for the responsible bodies and make it easier to comply with the ASEAN competition obligations. The competition authorities in AMSs as the main

[846] Indonesia Competition Agency, "The Parliament Finished Drafting Its New Competition Law," [Online] Accessed: 25 July 2017 Available from: http://eng.kppu.go.id/the-parliament-finished-drafting-its-new-competition-law/

responsible bodies for implementing the Guidelines can realize that implementing the Guidelines is one of their obligations so they can put it in the strategic planning and initiate measures to execute the plan. This study found that the main problem in implementing the Guidelines in four countries partly comes from the ignorant of ASEAN competition obligations so ASEAN regional competition policy are not fully implemented into national competition policies of AMSs. The focus of competition agencies is on national competition policy and law. This is why it is necessary to prioritize and comply with the ASEAN competition commitments under the AEC Blueprints and its action plans. Otherwise, the goal of ASEAN competition policy will not be achieved.

By prioritizing and complying with the ASEAN competition commitments can increase the workload so the competition agencies can rely on this priority to ask for more budget, human resources and more supports from the government. This will not make the problem of resources constraints in Thailand, Indonesia and Vietnam even worse.

Competition Awareness is Necessary for Effectively Implementation of National Competition Law basing on the ASEAN Regional Guidelines on Competition Policy

The building of competition awareness among these stakeholders will result in the better understanding in the importance of competition policy and law within the national level and regional level. The more understanding among stakeholders could lead to the more support of competition policy and law. Raising competition awareness among governments of AMSs will make them realize the necessity of implementing the Guidelines. Competition awareness among the governments in the AMSs helps generating political will to implement the Guidelines. Coherence of ASEAN competition policy and national competition policy is important for the achievement of the ASEAN economic integration. By realizing this, the governments in AMSs will have more political will and support to the process of implementing the Guidelines into their national competition systems.

Competition awareness in this context must come from all stakeholders in the society not limited only to government or policy makers. Competition awareness can be increased through competition advocacy to make all stakeholder realize what benefits will they get from having competition in the markets. If all the relevant stakeholders in the society have the competition awareness, it will gain more support and cooperation in the implementation of national competition policy and law as well as the implementation of the ASEAN Regional Guidelines on Competition Policy into national competition system. The related question to this point is how to gain competition awareness among all stakeholders. The competition advocacy can be used as the main tool to gain competition awareness among all these relevant stakeholders. The recommendations on how to conduct competition advocacy among different stakeholders will be discussed in the part of recommendation to competition advocacy.

The relevant stakeholders include private sectors that are the main players in the market, all state-owned enterprises, government-linked companies and other groups of undertaking that fall within the application of competition law. Other relevant stakeholders are policy and law makers and other public authorities. Competition awareness among consumers and media about benefits of competition can insert some pressures towards the more effective implementation of national competition law basing on the good standard of the Guidelines.

The necessity of competition awareness in implementing the Guidelines is reflected in the support of competition law reform in Thailand and Indonesia by the governments and parliaments in Thailand and Indonesia. They must have high competition awareness enough to realize that there are unsolvable problems in their competition systems and the main way to solve them is through the competition law reform. The competition awareness among competition agencies, scholars and the public are important to support the law reform.

Competition awareness among public authorities is important for shaping secondary legislations and regulations not to unnecessary restrict competition. The more competition awareness, these public authorities will be more willing to listen and comply with recommendations of competition agency and try not to make the regulations negatively affect competition. This depends on the capacity of competition agency in advocating them. The situation of competition advocacy to public authorities in Singapore and Indonesia can prove this. Due to the efforts of competition advocacy to public authorities in Singapore and Indonesia, there are more and more authorities following the recommendations of competition agencies in shaping the regulations not to negatively affect competition. This makes competition advocacy in these countries more consistent with the ASEAN Guidelines' framework. It can be seen that competition awareness is another crucial factor for the operational implementation process of the Guidelines.

The further recommendations in the following part will go deeper on more details on how to overcome the challenges in implementing the Guidelines, which will be divided into five main areas: competition policy, competition law, enforcement, competition advocacy and international cooperation. Grouping recommendations on how to overcome impediments in implementing the Guidelines into five areas are consistent with the groups of challenges identified in Chapter 3. The success of these further recommendations will also depend on the existence of political will, AMSs prioritizing ASEAN regional commitments and competition awareness among stakeholders.

5.3 Recommendations to Overcome Specific Challenges concerning the Implementation of the ASEAN Regional Guidelines on Competition Policy

5.3.1 Competition Policy

Recommendations to Overcome the Conflict between Pursuing Competition Policy and Industrial Policy and National Champion Policy

Conflict between pursing industrial policy, national champion policy and competition policy is sometimes unavoidable in some countries. Different policies have different objectives and justifications behind. The state might not be able to rely on only competition policy to achieve the other socio-economic objectives at least in the short run. It is particularly true in some developing countries or countries during economic transition where the promotion of industrial policy and national champion are implemented to promote economic growth, greater employment or income distribution. This statement is supported by scholars like Michelle Cini and Lee McGowan that " competition policy is shaped as much by domestic considerations, such as historical traditions, cultural attitudes towards industry"[847]

In the context of ASEAN Member States, the implementation of industrial policy is quite common. Industrial policy may be perceived as the central part of development strategy.[848] The industrial policy and national champion policy, which favor or give unequal special treatments through many channels only to a few specific companies is against the principle of competition policy that providing the equal opportunities to all market participants. AMSs should not pursue only industrial policy and ignoring the competition policy. While competition policy cannot be the panacea to solve all social problems.

[847] McGowan, M. C. a. L., Competition Policy in the European Union. p. 9-12

[848] R. Hausmann, and D. Rodrik, "Doomed to Choose: Industrial Policy as Predicament," [Online]. Available from: https://www.hks.harvard.edu/index.php/content/download/69495/1250790/version/1/file/hausmann_doomed_0609.pdf, p. 37

Consequently, this part proposes some solutions of striking the right balance between these conflicting policies since it cannot weigh which policy is more important than others. Different policies pursue different objectives and help achieving different goals. In the context of ASEAN, the right balance need to be struck in order to make these policies mutually reinforcing and render less conflicting effects. These recommendations are proposed specifically to the context of ASEAN because the approaches from the developed countries may not be able to fit the ASEAN context. This is because developing jurisdictions, with limited governance capacities, require different approaches to competition policy from developed jurisdictions.[849] The proposed recommendations are:

1. Where industrial policy is necessary and will promote dynamic efficiency in the long run, competition policy should be designed to be flexible enough to accommodate industrial policy whether through the competition law's exclusion or exemptions. However, AMSs should ensure that the grant of exclusion or exemptions should be transparent and have adequate justifications behind. These exclusion and exemptions should not be granted to weaken the application of competition law. Some exemptions can be granted for a specific period of time for specific necessities and then switched back to be under the application of competition rules. Exemptions should appear in the form of publicized and formal rules and open to public hearings and regulatory oversight.

2. The measures adopted to implement the industrial policy and national champion should be based on competition principle as much as possible.

[849] Eleanor Fox and Abel Mateus, Economic Development: The Critical Role of Competition Law and Policy (Edward Elgar 2011). in Michal S. Gal and Eleanor M. Fox, "Drafting Competition Law for Developing Jurisdictions: Learning from Experience," ใน New York University Law and Economics Working Papers(New York: New York University 2014). p. 3-5

3. It is necessary to strike the right balance between other policies' objectives and those belonging to competition policy. However, the right balance between competition policy and industrial policy may be changed according to different time, emphases and circumstances of the country.[850]

4. The interpretation and application of competition law might need to take into account efficiency, dynamic and developmental consideration as well as national and public interest.[851]

5. AMSs should conduct competition assessment before implementing industrial and national champion policy to assess the potential negative effects to competition. Then weighing between the benefits of other policies' objective and those of competition policy. If industrial policy has higher benefits and necessary comparing with the detrimental effects to competition, other policies might be given precedence over competition policy. However, it is important to implement industrial policies and/or national champion policy in the way that render the least restrictive effect to competition as much as possible. If there are alternative approaches that can achieve the same policies' objectives while producing lesser degree of competition restriction, these alternative approaches are more appropriate to adopt.

6. The conflict and tension between industrial, national champion policies and competition policy could be lessened by competition advocacy by raising awareness of benefits of competition among policy and lawmakers and governments. They should realize that competition should be a factor to consider before introducing policies, laws or regulations concerning the economic sector at the macro and micro level.[852]

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[850] Doughlas H Brooks, ", Industrial and Competition Policy: Conflict or Complementarity? ," [Online]. Available from: https://www.adb.org/sites/default/files/publication/157265/adbi-rpb24.pdf, p. 6

[851] Simon J. Evenett, "Would Enforcing Competition Law Comprise Industrial Policy Objectives?," [Online] Accessed: 10 Novermber 2015. Available from: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.581.7920&rep=rep1&type=pdf 47-70

[852] Committee, I. t. t. C., "Annual Report on Competition Policy Developments in Indonesia 2012 " p. 23

7. Competition agencies in AMSs should play an important role in providing advices regarding competition concerns before issuing polices, laws and regulations, which potentially render negative competition effects. This can be done by allowing representatives from competition agency to participate in the process of policy making, the enactment of laws and regulation as well as the law reform. The law makers will be informed about competition concerns in the laws and regulation. This will be another way to lessen the impacts of laws and regulations in distorting competition and shape them to be more competition-friendly. Regarding the applicable laws and regulations, there should be the review and reform of these laws and regulations, which significantly and unnecessary restraint competition. This recommendation conforms to the request of some competition agencies in ASEAN, for example the KPPU is requesting to establish the coordination between the KPPU and policy makers to enable the policy makers to consult the content of such policies in the competition aspect before their implementation.[853]

If competition agency is not allowed to participate or influence the policy and law- making process, competition agency should establish ' competition impact assessment manual' guiding the policy and law- making authorities. Competition assessment requires the specialized knowledge and expertise; thus, competition agency should play an important role in advising and provide recommendations regarding this issue.

Without the political will of ASEAN Member States' leaders, it is quite difficult to solve this problem because the initiative in introducing competition assessment before issuing policies and laws is hardly possible without the political support.

[853] Ibid. p. 27

5.3.2 Competition Laws

5.3.2.1 The Modification and Improvement of the ASEAN Member States' Domestic Competition Laws Basing on the Standards imposing in the Guidelines and International Best Practices.

This recommendation is not too ambitious and can be applied to all AMSs in practice because the Guidelines provides the broad and flexible standards of competition laws for AMSs to adopt. No one-size-fits-all model is the main concept of the Guidelines so all AMSs, whether having civil or common law systems, developed or developing countries, having more or less experiences in competition system, can select the right approach that they consider appropriate and then apply to its competition regime. All the approaches appear in the content of the Guidelines base on international best practices so they are good approaches that help developing the competition laws in all AMSs. Implementing what recommended in the Guidelines into national competition law will help developing the competition law in each ASEAN Member in the same direction and more conforming to the international best practices.

The main prohibitions in competition laws of all members should be composed of three main prohibitions: prohibition of anti-competitive agreements, prohibition of abuse of dominant position and prohibition of anti-competitive mergers. In conclusion, as long as ASEAN ensures that the all anti-competitive conducts that harm economy are prohibited either in the form of anti-monopolization provisions, attempt to monopolize or abuse of dominance provisions, it is considered conforming to the Guidelines because ASEAN does not need the uniform or harmonization of competition rules to achieve the ultimate goals of the ASEAN Regional Guidelines on Competition Policy and the AEC Blueprints. ASEAN just requires the alignment of competition laws of all AMSs within the framework of the Guidelines. While leaving the rooms for AMSs to decide the details of each prohibition.

5.3.2.2 The Direct Legal Transplant from the Model Laws of Successful Competition Jurisdictions Might Not Appropriate in the Context of ASEAN as a Whole. The Adoption of the Model Law Should be Tailored to Match the Unique Characteristics of ASEAN.

According to the finding and analysis in the previous chapter, none of the US, EU and Japanese model best fits in the context of ASEAN. There are many country-specific factors that foster the development of competition laws in these countries, including the legal system, economic environment, socio-economy, political-economy, political support, history, level of competition culture and competition awareness, strength and design of competition agency and even corruption rate.

The experience of Japan can be lesson learnt for ASEAN. The original Japanese Anti-Monopoly Act was highly influenced and modelled after the US Antitrust Laws. However, the US model of antitrust laws did not fit in the context of Japanese society and belief system. The concept of competition is something new for Japan. Unlike the American society, competition has long been embodied as one of the American values. The competition law is regarded as the economic constitution in the US. However, the model influenced by the United States was too stringent so after the end of the control of the United States in Japan, this act was amended to make it less stringent. The AMA was amended many times until it fits in the context of Japanese society while competition culture was gradually built in Japan at the same time.

This is what ASEAN should learn that the ready to use model of competition law from matured competition regimes might not be fit in the context of some AMSs. Even it is the model law from successful competition jurisdiction, it might not appropriate in the context of ASEAN as a whole and individual ASEAN Member State because there is no-one-size-fits-all for the design of competition law. Adopting the whole set of the US antitrust laws to Thailand might not make the Thai competition law successful as the US antitrust laws because there are other relevant factors in the United States that facilitate the good function of US antitrust system, which Thailand does not have, for example strong competition policy, effective competition enforcers and strong competition culture.

It is clear that ASEAN has dissimilar conditions from the US, EU and Japan; thus, it is inappropriate to adopt the whole model of these countries to directly apply in the context of ASEAN. Rather it is more appropriate to adopt only some beneficial elements that can be applied to the existing legal infrastructure and specific conditions of each ASEAN member. It is also necessary to build necessary legal infrastructures and supporting factors to enable the function of competition law in each ASEAN Member State.

5.3.2.3 Enable the Extraterritorial Application of Competition Law in ASEAN Member States

Extraterritorial application is an important tool for the more effective enforcement of competition law in competition cases related to international dimension in an increasing in transnational commercial activities in the globalized era. The more cross-border commercial activities take place, the higher growth in cross-border anti-competitive conducts is expected. Hence, limiting the enforcement of competition law only to the internal anti-competitive conducts is not an effective and up-to-dated way of competition law enforcement.[854]

Therefore, it is necessary to allow the extraterritorial application of competition law for effectively dealing with international competition cases. The ASEAN single market means more international business transactions between companies in AMSs. More international business transactions mean the higher tendency of anti-competitive conducts in ASEAN. ASEAN members should seek for ways to combat cross-border anti-competitive conducts and impose remedial strategies. Otherwise, cross-border anti-competitive conducts will cause the wealth being transferred from one jurisdiction to another resulting from cross-border anti-competitive conducts. Therefore, it is necessary to extend the application of domestic competition law to cover the foreign anti-competitive conducts occurring outside the state boundaries but cause the

[854] Won-Ki Kim, "The Extraterritorial Application of U.S. Antitrust Law and Its Adoption in Korea," Singapore Journal of International & Comparative Law (2003). p. 388

adverse effects inside. By adopting objective territoriality principle or effect doctrine, the suffered state is enabled to expand its jurisdiction to stop and remedy effects deriving from foreign anti-competitive through the extraterritorial application of its competition law

To what extent AMSs should adopt extraterritorial application into their competition systems. There are two approaches to allow the extraterritorial application in competition law. First, some countries amend its competition law to specifically incorporate the provision to allow the extraterritorial application of competition law basing on the principle of the effect doctrine. This mean gives more legal clarity to the status of extraterritorial application in these jurisdictions. One of the ASEAN Member States, which is Singapore, adopted this approach.

The second approach is the adoption of the effect doctrine as the international customary law into the legal system is another way to allow the exercise of extraterritoriality in competition law. In common law systems, the adoption of the effect doctrine can be done by the court decisions setting the precedence bind the later court decisions with the same fact findings by explicitly adopt the effect doctrine. Both approaches can be applied in the context of ASEAN depending on the suitability of each legal system.

Encouraging more Convergence in Merger Control among ASEAN Member States

It is expected that ASEAN economic integration will increase the number of merger or acquisition across ASEAN. One merger proposal of multinational firms may have to file merger notifications to competition agency in more than one ASEAN Member State. The convergence, particularly in horizontal merger control among AMSs will reduce the possibility of conflicting decisions of different competition agencies in ASEAN.

5.3.3 Enforcement Mechanism

5. 3. 3. 1 Recommendation to Overcome Institutional Constraints within Competition Agencies

5.3.3.1.1 Recommendations on How to Overcome the Lack of Human Resources, Inexperienced Human Resourced and Budget Constraints

Resources are important element in providing high quality and satisfying performance of competition agency. If competition agency has a great performance, it will increase the more credibility in the eyes of public. Adequacy of resources are considered a big element of competition agency' s effectiveness. However, there is no global consensus on the formula of how many human resources and how much budget are required in one competition agency.[855] It depends on many internal factors of each country, including responsibilities of the competition agency, the set of internal strategies and level of competition culture in each country.

Human Resources

Human Resources are the valuable assets of competition agencies because their capacities can help achieving the goals of competition agencies. Therefore, it is worth investing in human resources. The assessment of human capital and the human resource management should be incorporated in competition agencies and linked with the broader goals of competition agency's priority and resource allocation plan.

It is essential to routinely assess the degree of workload and the number of available staffs to better allocate the resources for effective operation. Whether expertise of available resources fit the tasks of competition agency must be assessed to organize the suitable trainings and workshops. The enhancement of human capital is a continuous task that competition agency needs to carefully consider. The following recommendations are proposed to lessen the problem of resource constraints and inexperienced resources within competition agencies.

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[855] Leon, I. D., "An Institutional Assessment of Antitrust Policy: The Latin American Experience' International Competition Law Series," Wolters Kluwer International. p. 543

The Recruitment of Competent and Experienced Officials Proportionately with the Responsibility and Workload of Competition Agency

It is essential for competition agencies to have adequate and competent staffs to carry on their obligations. Competition agencies cannot function by themselves but rather use their staffs in functioning the institutions. Hence, it is necessary to ensure that there are enough qualified staffs to operate every task effectively. Some tasks require the specialized knowledge and experiences, for instance in laws and economics. Therefore, it is necessary to make the best use of these skilled and experienced staffs.

There are many models to organize the staffing strategies. Some competition agencies divide different groups of expertise into different units or departments. This helps fostering the more expertise in that unit, for example the cartel unit, the merger unit and the economic unit. The separation of economic unit also helps ensuring the independent of economic analysis. While some competition agencies adopt a more flexible model by creating a mixed case team. The mix case team is the combination between different staff expertises, which the big challenge relies on the good collaboration and teamwork between different specialized staffs, for example between the legal and economic staffs. The competition agencies also require other skills beyond the legal and economic skills to complement the effective function of the agency, for example public policy, management, communication, business and accountancy expertise.

According to the finding of this dissertation, competition authorities in Thailand, Indonesia and Vietnam lack human resources to perform the obligations of competition agencies. These countries share the common problem in recruiting and retaining the qualified and experienced staffs because there are only a few groups of people, who have knowledge in competition law and its economics available in their countries. The situation in recruiting and retaining the qualified staffs is even worse in

Vietnam and Thailand where the institutional design of competition authorities is bound within a part of public authorities that have the lower salary base comparing to the salary of private sectors. Low salary cannot attract the specialized and qualified staffs. Therefore, this dissertation will recommend the approach on how to overcome the impediment in human resource constraints as follows:

Creating More Incentives to Work with Competition Agencies

The creation of incentives to attract qualified officials is necessary. Monetary compensation for working with the competition authorities that placed within public authorities is not as high as working for private firms. Therefore, other kinds of incentives and benefits, for example job security, the guarantee of professional growth, scholarship and the possibility to reconcile work and family life are necessary to be raised as the incentives to attract qualified human resources to work with the competition authorities.Publicizing these incentives is a must to do, particularly on the official websites of competition authorities. This is the strategies that the US and EU competition agencies adopt.

This recommendation is possible to be adopted in ASEAN context because it is not difficult to follow. The CCS employs similar strategy to this recommendation in solving the lack of qualified officials. The CCS attracts new officials by publicizing the job opportunities in the CCS official website together with the reasons why people should work with the CCS. The clear professional growth and leadership, compensation and benefits are clearly provided to attract new comers. Moreover, the scholarship and internship are also available. There are also some interviews of current officials to show their experience in working with the CCS. This can produce more incentive for working with the CSS.

More Trainings and Seminars for Improving Knowledge and Skills for Existing Staffs

The seminars and training should be organized internally to build higher knowledge, skills and expertise for staffs in competition agency. However, most of competition agencies in ASEAN face budget constraints, thus, the training should be consistent with the real competition agency's necessity and prioritization. Encouraging the staffs to participate in external seminars or international conferences inside and outside the country is another way to improve the human resource capacity and create more opportunity for the exchange of experience in competition law application and enforcement. This also help creating personal connection between staffs of different competition agencies that may facilitate future cooperation and coordination.

Financial Resources

No one can deny that sufficient financial resource is another important key to the effective enforcement. Without the sufficient budget to support, the whole enforcement mechanism will not be operated as effectively as it is supposed to be. The inadequacy of budget to fund the competition agency tends to negatively affect the enforcement mechanism. As a result of budget constraint, the money allocated for investigation process, evidence gathering, the consultation with the external specialists and enforcement will be limited. The lack of financial problem in competition agency is highly related to human resource problem. The number of staffs in competition agency might not be increased despite the increasing of workloads. This will cause the workload problem to the staffs. The training and workshops to build capacity of the staffs will be limited since no enough budget to fund them. The following recommendations are proposed to lessen the problem of financial resource constraints, particularly in most of developing countries in ASEAN.

Budget Allocation Mechanism Should be Transparent and Subject to the Obligations, Responsibilities and Outcomes of Competition Agency and not on Discretion.

The process of budget allocation should be transparent and basing on the certain criteria to avoid the exertion of political influence through the threatening of decreasing budget of competition agency. The budget allocation is beyond the control of competition agency. The authority, which has the power to approve, increase or decrease the budget of competition agency is different among different ASEAN members. The cut of budget should not be used as a political tool to lessen the capacity of competition agency for the sake of vested interest groups. The budget should not be granted basing on the sole discretion to avoid political influence through the threatening to cut the competition agency's budget. The use of discretion in budget allocation should be avoided since it is possibly enable the political influence through the budget allocation.

To reduce the exercise of political influence through the threat of competition agency's budget decrease, it is recommended that the budget allocation process should be transparent and basing on the clear pre-determined criteria, which is proportionate with the competition agency's obligations and responsibilities. Some young ASEAN competition agencies might begin with the competition advocacy for the early period of the application of national competition law. It might have to deal with few and uncomplicated cases. However, the situation can be changed according to the further development of competition regime. The competition agency tends to deal with higher competition cases with more complex in investigation and case analysis, particularly those related to merger control and rule of reason analysis. Specialists and high experienced human resources are sometimes required from external in case that competition agency's staffs are unable to reach requirement. The use of external resource comes with compensation. The low compensation will not effectively attract the specialists with high caliber.

The cut of budget results from the state budget constraints period is acceptable but it is necessary to make sure that the decrease of budget is reasonable and will not badly affect the operation of competition agency. The cut of budget that make the competition agency unable to function must be contested. The head of competition agency must stand for the whole competition agency and explain the reasons why the budget should not be cut. The head of competition agency should also play an important in convincing for the increase of budget of competition agency.

Accordingly, the budget of competition agency should not be fixed. Rather the budget allocation process should be conforming to the higher obligations and more responsibilities in increasing competition cases. The competition agency should be allowed to request the increase in budget by demonstrating the rationales behind its request. Otherwise, the constraints in budget of the competition agency is likely to impede the whole enforcement of competition agency as well as other areas, such as competition advocacy and international cooperation on competition-related issues. To make it more transparent, the competition agency should publish the financial statement and make it available to the public. The clear and transparent financial statement can be used as a rationale behind the request of more budget because all the costs and expense are clearly elaborated. The CCS clarifies its financial statement every year in its annual report.

Finally, the budget of competition agency should be clearly separated from other field agencies in case competition agency is incorporated as a part of one multi-functional agency like in the case of Vietnam Competition Authority.

The Collection of Fee May be Used as Another Source of Competition Agency's Funding beyond the Budget Received from State

According to the result of this study, Thailand, Indonesia and Vietnam all face the budget constraints. Relying solely on the state funding might not be enough to effectively operate the competition agency. The request of more budget in the next

fiscal year might not be successful. However, the competition agency needs more money to operate. This is the reason why the competition agency should be enabled to find alternative source of funding. The possible solution is enabling the competition agency to collect some fee or taking part of the financial sanctions to fund the competition agency. The common fee that competition agency can take as the alternative funding resource is the collected fee from the review of merger control. While a part of the financial sanction can be taken as a part of the budget. However, taking sanction to be a source of competition agency' s funding can be criticized as creating the bad incentive for competition agencies in the attempt to find competition law's violation to get financial sanction, which means its competition agency's funding. This is why competition agency should not use all the financial sanction to be its alternative funding.

This approach is taken by many matured competition agencies. In ASEAN, the CCS adopted this approach. The new Trade Competition Act 2017 in Thailand also allows the collection of fee from the merger review to be a part of competition authority's budget to solve the budget constraints.[856]

It should bear in mind that the collection of fee and fine are variable and cannot be fixed annually. It is difficult to expect the amount of fee collected from the merger review and fine imposed for the violation of competition each year. Relying only on these variable amount of money is risky for the whole operation of competition agency. Thus, they should be just alternative financial funding that help reducing the inadequacy budget funded by the state but they should not be considered as the main source of funding.

[856] Thai Trade Competition Act 2017, Section 44

5.3.3.1.2 More Administrative Independence of Competition Agency is Required

More administrative independence is required to avoid political influence and support more effective enforcement. The degree of independence can be reflected both through the institutional structure of competition authority and measures insulating external influence in its operation.

However, not every competition authority can have independent institutional structure. Competition authorities in some AMSs are established under the Ministry or as a government's branch so in the short run these competition authorities should emphasize the *de facto* independent in its operation because it is more practical recommendation for most AMSs that already incorporated their competition enforcement authorities within the ministries. This recommendation is consistent with the situation in many ASEAN members that the policy and law makers concern about the newly introduced competition law so making it within the eyesight of relevant ministry. There are also many domestic issues obstructing the competition authority from turning into independent competition agency. Hence, one thing that ASEAN can do is ensuring and supporting *de facto* independence within competition authorities in all AMSs. These competition authorities should develop the stronger measures to ensure *de facto* independence.

The subsequent recommendation is when they are ready, they can gradually separate themselves from the control of government little by little. This recommendation is consistent with the view of Professor Williams Kovacic.[857]

[857] Kovacic, W., "Aec and Competition Laws: Opportunities and Challenges." p. 5-8

The independence of competition agencies can be guaranteed through the independent structure of competition agency and its non-interference operations. This should include the non-interference manners through formal ways and informal norms, customs and habits. This study found that if competition authorities in AMSs cannot have structural independent competition agencies, they still can guarantee their independence in practice through formal mechanisms to ensure the least degree of political influence in the operation.

Thus, the ASEAN Member States should be emphasized on how to make the competition agency insulated from political influence as much as possible or having *de facto* independence. One competition authority that reaches the standard of *de facto* independent even having the structural tied within the Ministry is the Singapore competition authority; the CCS. While the structure of Competition Authorities in Thailand and Vietnam still open for political influence. If Thailand and Vietnam competition authorities can develop some measures to insulate political intervention in their operation, their enforcement will be more transparency and credible. Under the new competition act 2017 in Thailand, the big reform is making competition enforcement authority having more independence in its operation.[858]

In conclusion, strong and effective institutional framework without internal constraints and the increase of capacity building and independence of national competition authority in AMSs help lowering the national enforcement problems.

[858] Section 27, Thai Trade Competition Act 2017

5.3.3.2 Recommendation to Improve Enforcement Mechanism

5.3.3.2.1 Empowering Adequate Investigation and Enforcement Powers of Competition Agency

This study found that one of the challenges in national competition law enforcement is the inadequate investigation and enforcement powers of the competition agency. This challenge is found in Indonesia where the KPPU having no power to conduct dawn raids or confiscate evidence. This is an important drawback that lessening the effective competition law enforcement in Indonesia because the KPPU cannot obtain evidence of the alleged anti-competitive conducts. This made the KPPU lost many cases in court. Therefore, it can be concluded that competition agency can perform more effectively if it being legally equipped with the clear and adequate investigation and enforcement powers that are necessary for its operation. The unclear scope of investigation and enforcement powers, will make staffs unwilling to exercise these powers because of the fear of being accused of exercise unauthorized power by the law.

Therefore, it can be concluded that competition agency can perform more effectively if it being legally equipped with the clear and adequate investigation and enforcement powers that are necessary for its operation. This recommendation is consistent with the request of the KPPU to incorporate these necessary powers for the KPPU in the amendment of Indonesian competition law.[859]

[859] Hadinoto & Partners Hadiputranto, "Amendment to the Anti-Monopoly to Be Discussed by the House of Representatives," [Online] Accessed: 25 February 2017. Available from: http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/AL_HHP_AmendmenttoAntiMonopoly_Feb14.pdf Retrieved

5.3.3.2.2 The Introduction of Leniency Program

This study found that some AMSs have problems in cartel detection. Although realizing the existence of cartels, competition agencies cannot find enough evidence to prove the cartel before the courts. Consequently, ASEAN Member States should follow the track of the US, EU and Japan in applying the leniency program to increase the enforcement of hardcore cartels. The rationale behind this recommendation is the leniency program has long been proved its significant achievement in detecting and dismantling domestic and international large cartels in the US, EU and Japan. [860]

Singapore proves that the leniency program can be successfully adopted in the context of ASEAN country that have small economy. This recommendation is possible to be applied in the context of AMSs on the conditions that:

1. The content of the leniency program must be clear and attractive enough; otherwise, it cannot incentivize cartelists to blow the whistle. Granting the full amnesty both criminal and administrative to the first lenient applicant, who can satisfy the criteria, has proved to be the attractive condition for participating the leniency programs in the US and EU. AMSs can consider granting reduction of penalties to subsequent lenient applicants, who give useful information for advancing the investigation.

2. Penalties imposed for cartelists should be high enough to create deterrent effects. Criminal sanction in terms of imprisonment and significant financial fine over the benefits of engaging in the cartel are good deterrence. The high penalties will make it more attractive to participate in the leniency program and create the race to blow the whistle.

[860] Scott D. Hammond, "Cornerstones of an Effective Leniency Program," [Online] Accessed: 25 January 2016. Available from: https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program

3. AMSs should have effective enforcement to create the credible threat for cartel detection. Competition agencies in AMSs must prove their capacity in detecting and enforcing cartels. Therefore, internal problems that obstructing the effective enforcement mechanism should be improved.

The successful of leniency program in AMSs depends highly on these three factors. However, these factors are not exhaustive factors. Furthermore, ASEAN should provide a leniency program model or ASEAN guidelines on leniency program incorporating in the ASEAN Regional Guidelines on Competition Policy or in separated ASEAN document for all AMSs, which are planning to introduce the leniency program to create the greater convergence between leniency program in all AMSs. The more convergence in leniency program in ASEAN, the more possibility that the potential lenient applicant will consider joining the leniency program in more than one country. Divergence in the leniency programs among AMSs increases complexities and time consuming for the potential lenient applicants, who are deciding to file the leniency application in more than one ASEAN Member States. The ECN Model Leniency Program can be used as an example for initiating the ASEAN leniency program.

If the leniency program successfully functions, the AMSs may consider introducing the leniency plus program similar to the US leniency plus policy. It will broaden the cartel enforcement to other undiscovered cartels in other markets, which would have not otherwise revealed if no leniency plus program available. The leniency plus is successfully implemented in the US leading to the detection of many cartels. However, the AMSs are required to ensure that the original form of the leniency program works effectively before the introduction of leniency plus program.

5.3.3.2.3 Setting the Enforcement Prioritization of National Competition law and Make the Consistent Resource Allocation Plan

Setting enforcement priority is very important element, particularly in the countries facing resources constraints or limited resources to focus on every competition law infringement. Adhering to the enforcement prioritization will make competition agency having more focus in the enforcement. For the young competition agencies in most AMSs with little experience to deal with complicated competition cases and limited resources, it is recommended that enforcement priority should begin with uncomplicated cases of *per se* illegal prohibitions first in order to increase a higher chance of success in proving violation of the law and then able to build the good public image. The handle of uncomplicated cases requires lesser degree of expertise and experience of staffs. After the staffs of competition agency have enough experience and expertise, the enforcement priority can be moved to more complicated cases basing on the rule of reason, which require expertise and deeper legal and economic analysis.

In setting the enforcement priority, the focus should be on markets that are considered the backbone of the country and markets, which affects the welfare of the population.[861] Prioritization can reflect the wider ambitions for a particular competition regime and can be responsive to changing market dynamics and the change of highest impact of anti-competitive conducts.[862]

After setting the priority, the resource allocation plan should be made in the consistent way with the enforcement prioritization. The resource allocation should be adequate for effectively pursing the enforcement prioritization. Otherwise, the set of enforcement prioritization will not complete

[861] Fox, M. S. G. a. E. M., "Drafting Competition Law for Developing Jurisdictions: Learning from Experience." p. 29

[862] ICN, "Competition Agency Effectiveness " [Online] Accessed: 13 February 2015. Available from: http://ec.europa.eu/competition/information/icn_seminar_2009/report_final_version.pdf, p. 8-9

if there is still the resource constraints problems. Making the resource allocation plan consistent with the enforcement prioritization helps competition agency better organize and allocate their resource to the most needed, highest impact of anti-competitive behaviors or precedent-setting cases.

Another recommendation is making the set of prioritization flexible according to the change of policy emphasis, conducts of businesses, highest impacts of anti-competitive conducts in the different period of time. In general, there is a shift of enforcement priority over time resulting from the effects of previous enforcement actions taking shape or evolving market.[863] Therefore, the set of enforcement prioritization in AMSs should be reviewed periodically to make it up-to-dated and corresponding to the real competition environment in that ASEAN country.

It must be noted that how to set the enforcement prioritization and what kinds of anti-competitive conducts should be prioritized is beyond the scope of this dissertation because the process of prioritization is not in uniformity across jurisdictions.[864] Furthermore, different ASEAN Member States face different situations of the anti-competitive problems. Singapore can be an example of aligning competition law enforcement prioritization with its market conditions and government plan explicitly through their enforcement activities. Since Singapore is a regional trading hub, financial center and city-state, the transportation is an important economic consideration. It can be seen from the activities of the Competition Commission of Singapore (CCS), which shows the priority on the transport sectors. More than half of the CCS' cartel decisions involve the transport sector. In 2003, the CCS conducted a market study on the aviation sector, which help ensuring that competition in the aviation sector will not be reduced to fulfill the expectation of the government to make

[863] Hilary Jennings, "Prioritisation in Antitrust Enforcement – a Finger in Many Pies," Competition Law International 11, 1 (2015). p. 37

[864] ICN, "Competition Agency Effectiveness "

Singapore as a key aviation hub in Asia.[865] While Indonesia puts the bid-rigging as the main enforcement priority and uses the enforcement of competition law as a tool to tackle the widespread bid-rigging and corruption problems in Indonesia.

Therefore, converging prioritization in competition law enforcement across ASEAN member States are inappropriate and undesirable because it is likely to incompatible with the specific market conditions, socio-political economy and government plan of each ASEAN member. What recommended in the ASEAN Regional Guidelines on Competition Policy is appropriate in encouraging each member to set prioritization on the basis of flexible approach by considering all relevant factors.[866]

Finally, enforcement priority should be followed but it does not mean that other anti-competitive behaviors that are not ranked in the prioritization should be totally ignored. Sometimes competition agency should show the best effort in dealing with cases that catch public attention even if it is not constituted in the priority list to gain more public confidence and reduce criticism about its performance.

5.3.3.2.4 Using Private Enforcement as a Complementary Enforcement Mechanism in ASEAN Member States

Due to the limited capacity in some competition agencies in competition law enforcement, for example Thailand. Private action can complement the public enforcement of competition law for countries that face inadequacy of competition authorities' resources. There are many advantages of private enforcement.

[865] Jennings, H., "Prioritisation in Antitrust Enforcement – a Finger in Many Pies," Competition Law International. p.35

[866] ASEAN Regional Guidelines on Competition Policy, Chapter 4.2

First, enabling private action can complement the public enforcement in terms of some anti-competitive conducts, which are not in the enforcement priority or competition agency is unlikely to pursue will still be taken actions by private litigants. This also includes the situation where competition agency faces resource constraints to deal with all of anti-competitive behaviors. The private action is, thus, a complementary way to stop harmful anti-competitive conducts badly affecting market and private litigants.

Second, the aggrieved parties can be compensated from competition law violation in the form of damages.

Third, the result of private enforcement also functions to increase deterrence against competition law infringement similarly to the public enforcement.

Fourth, more compliance will be generated from the private enforcement.

Fifth, the private enforcement can raise competition awareness of competition law and build competition culture.

Sixth, the more private litigation, the more interpretation of competition law through court decisions and precedence, which is another way to urge the development of competition law.

With these benefits, this dissertation recommends ASEAN to encourage its members to enable private enforcement system to complement the existing public enforcement of competition law. Enabling the private action can be allowed directly under the competition law or under the tort provision. However, relying on the tort claim will cause the high burden of proof for plaintiffs. Without the facilitating mechanism like allowing the use of evidence

from competition agency or their decisions, the private action brought under the tort claim is quite difficult.

To foster the successful of private enforcement in ASEAN, some limitations in the AMSs' laws should be unlocked to enable the private enforcement. AMSs should consider introducing the kind legal supports in gathering evidence and high remedy as the incentive to sue like the treble damages in the US. ASEAN members can adopt the German approach in facilitating the private plaintiff to sue by shifting the burden of proof to the defendant to reduce the plaintiff's big problem in accessing the information and evidence.[867] According to Section 20(5) of the ACT against Restraints of Competition, in case of abuse of dominance brought by SMEs where there appears to be a violation 'on the basis of specific facts and in the light of general experience'.[868] The defendant has obliged to clarify its business activities 'which cannot be clarified by the competitor but can be easily clarified, and may reasonably be expected to be clarified'[869] by the defendant. Another important step is to have the successful landmark case of private litigation. It can encourage private to initiate the competition cases.

[867] Mario Monti, "Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation " [Online]. Available from: http://europa.eu/rapid/press-release_SPEECH-04-403_en.htm?locale=en

[868] Act against Restraints of Competition (Competition Act – GWB), Section 20(5)

[869] Ibid.

5.3.3.2.5 Enabling the Class Action

If class actions and representative actions are allowed, they will further encourage private enforcement of competition law. Without the class action, aggrieved party or consumer, which acting individually on each small claim will not have sufficient incentive to bring a lawsuit, particularly the tendency of having high legal cost and time-consuming for the claims.

The US system of class action is the most effective comparing to those of the EU and Japan. Therefore, this recommendation will base on the successful US model with the concept of allowing any individual, including a lawyer, can bring a claim on behalf of an unidentified group of plaintiffs. In the context of ASEAN, class action should be allowed to complement the public enforcement that face the inadequacy of resources in most of the AMSs. The group of plaintiffs can gather and hire an expertized lawyer by co-responsible for the legal cost. This can incentivize the suffered parties to bring a lawsuit. Consumers should be allowed to resort consumer associations, which are quite strong in some countries, such as Thailand for bringing the lawsuit on their behalf.

5.3.3.2.6 Political Will is an Influential Factor for More Effective Enforcement

Political will is an influential factor to increase more effective enforcement. Without the political will to back up, the enforcement of competition law will not be strengthened as the way it is supposed to be**.** Political will supporting the enforcement is commonly found in the US, EU and Japan**.** Without the political support, the strong and vigorous antitrust law enforcement in the US would not have been successful like appearing in the

US todays.[870] Similar to the EU, the function of the effective EU competition law enforcement is based on the core foundation of EC competition policy as a big part of EU's objective in creating EU integration and single market. This helps improving the role of competition law and its vigorous enforcement to be as important as other EU policies. Finally, the process of strengthening the JFTC during the post-war period would not be successful if there was no political support from the Japanese government and more public awareness in competition. The experiences from these jurisdictions show that political will is important factor supporting effective enforcement. Finally, public pressure and good cooperation from relevant authorities are influential factors supporting the effective enforcement mechanism in ASEAN.

5.3.3.2.7 Empowering ASEAN Neutral Network Specifically Responsible for Facilitating the Dispute Settlement and Enforcement in Case of Cross-Borders Anti-Competitive Conducts in ASEAN

This recommendation is appropriate only when all competition systems in all AMSs are developed to the level that able to deal with cross-border anti-competitive conducts. This recommendation is for the far future development of competition system in ASEAN. This recommendation proposes the establishment of the ASEAN Neutral Network aiming to be a forum for discussion and cooperation between ASEAN and competition regulatory bodies of ASEAN Member States in dealing with international competition cases occurring in ASEAN. This network should be specifically established to deal with cross-broader competition cases that separated from the ASEAN Expert Group on Competition (AEGC). The objectives of this ASEAN Neutral Network are to

[870] ELIZABETH WARREN, "UNITED STATES SENATOR ELIZABETH WARREN'S REMARKS HIGHLIGHTING THE NEED FOR STRONGER ACTION TO ENCOURAGE COMPETITION IN MARKETS AND TO STRENGTHEN THE US ECONOMY," [ONLINE] ACCESSED: 30 JULY 2016. AVAILABLE FROM: HTTPS://WWW.WARREN.SENATE.GOV/?P=PRESS_RELEASE&ID=1169

function as the main facilitator for the coordination and support in investigation, evidence gathering, information exchange and case-handling process of cross broader competition cases between related jurisdictions. This ASEAN Network should be composed of representatives from ASEAN Expert Group on Competition and representative from competition authorities of each ASEAN Member State. The participation in this network potentially allows some open discussion on various competition issues and mutually foster the stronger ASEAN competition framework and ASEAN competition best practices. This proposed network should function on the principle of mutual cooperation and enable flexibility in its function.

5.3.4 Competition Advocacy and Building Competition Culture

This study found that Thailand, Indonesia, Singapore and Vietnam do not have strong competition culture. Competition law and its benefits are not wide-spread to all stakeholders in the society. Therefore, this study recommends that it is necessary to enhance competition advocacy in ASEAN since most of ASEAN countries do not have long root foundation and historical commitment to competition. Sometimes states grant the monopoly and impose laws and regulations, which have competition restrictive effects. Competition advocacy can be used to build competition culture in ASEAN to achieve the goal of becoming the highly competitive economic region. However, building competition awareness and competition culture cannot happen in the short period of time but rather it is the long-term consistent work in progress.

This part will propose the recommendation for AMSs on how to develop competition advocacy and make it more effective in raising competition awareness and creating competition culture in AMSs.

5.3.4.1 Giving Clear Legal Mandated Powers for Competition Agencies in AMSs to Advocate Both Types of Competition Advocacy.

Competition agency should be empowered to initiate the conduct of competition advocacy at its own initiative either in the form of power codified in the competition law or incorporating in the general mission of competition agency. Competition agencies in AMSs should conduct competition advocacy to government, policy and law makers and governmental authorities because they can issue some rules and regulations, which contrast with the principle of competition law and cause unnecessarily restrictive competition effects. Policymakers should be the vital group for competition advocacy in reducing the clash between competition policy and other important national policies, for example trade and industrial policy. If the policymakers realize the principles of competition policy and law, it will be easier and more appropriate for them to strike the right balance between the need to maintain free and fair competition and trying to achieve their policy's objectives. While the other type of competition agency is for business groups. Competition advocacy should focus on what behaviors are prohibited under the competition laws, what are the sanctions and building the culture of competition law compliance in the business organizations.

5.3.4.2 Consistent Efforts Is Required in Conducting Competition Advocacy in the Long-Term Period, Particularly in the ASEAN Member States with Weak Competition Awareness and Competition Culture.

This study recommends ASEAN Member States to adopt the "approach of graduality" to gradually improve the institutional building and advocacy step by step to gain power and credibility in the eyes of the public, particularly for competition agencies facing resource constraints. This approach is successfully applied by many countries, such as United Kingdom, Taiwan and, especially South Korea.[871]

[871] Pham, A., "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries," Northwestern Journal of International Law & Business. p. 562

5.3.4.3 Setting Competition Advocacy' s Objectives and Clear Advocacy Plan before Starting Advocacy Activities.

By setting the clear objectives helps competition agency determine the appropriate targets, appropriate processes and tools.[872] The advocacy plan should be composed of objectives, target, process and timeliness and advocacy tools.

5.3.4.4 Setting Competition Advocacy Priority

Setting competition advocacy priority is necessary for competition agencies facing resource constraints. It will help making the best use of resource. If the resource within competition agency is not enough to fully support all competition advocacy activities, the focus should be on the areas that are "economically important, politically visible, that will not occupy too many resources and in which the agency has a reasonable chance of success."[873] Furthermore, setting clear and concise competition advocacy plan and its timeline, core stakeholder targets and prioritization of advocacy activities according to the plan are recommended. For country with weak competition culture, advocacy to disseminate the benefits of competition and raise competition awareness are important during the early period of competition law's application. After that competition agency should focus on businesses compliance with competition law and enforcement action. During the early period of competition law reform, the competition agency should be ensured that the focus of advocacy is on legislators. When competition culture and enforcement rate reach a certain level, the target might be changed to public authorities to incorporate competition assessment framework before imposing regulations that might unnecessary distort competition.[874]

[872] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, p. 53

[873] Dube, R. S. a. C., ", Competition Policy Enforcement Experiences from Developing Countries and Implication for Investment.", p. 10

[874] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, p. 67

5.3.4.5 Tailoring Competition Advocacy Activities according to the Nature and Characteristics of Targets

Tailoring competition advocacy activities according to the nature and characteristics of targets as well as the objective of competition advocacy help maximizing their effects. The means of advocating for developing countries with weak competition culture should be focus on the use of mass-media to disseminate the information as wide as possible. The use of media to build competition culture has been proved to be successful program in the foreign jurisdictions.[875] After building strong competition culture, the use of selective communication network is possible.[876]

5.3.4.6 Conducting Competition Advocacy Evaluation: Post Evaluation

Competition advocacy should be evaluated whether it could achieve its end goals or not.[877] At least once a year advocacy's evaluation should be made in order to design the better activities and shape strategic planning in the future.[878] The form of evaluation is not limited to external independent persons but can be internal evaluation within the competition agency.

5.3.4.7 Enabling Representatives from Competition Agencies to Participate in Shaping Legislation and Regulation Proposals

The important recommendation is every competition agency in ASEAN should have at least a representative to participate in the drafting process of legislations and regulations to review whether they create unnecessary anti-competitive effects or not. This kind of advocacy is more difficult than others because there are specific justifications behind these laws and regulations. Therefore, the competition agency should put its effort in advocating legislators, government and public authorities to encourage the competition assessment prior to issuing laws and regulations. The

[875] secretariat, U., "Foundations of an Effective Competition Agency.", p. 12

[876] ICN, "Advocacy and Competition Policy.", p. xiv

[877] Ibid. p. 37-41

[878] ICN's Agency Effectiveness Working Group, "Competition Agency Evaluation," [Online]. Available from: http://www.internationalcompetitionnetwork.org/uploads/library/doc1072.pdf, p.15

publication of the competition assessment toolkit, guidelines and advices are required to facilitate the assessment of competition impact. Transparency, political neutrality and credibility of competition agency is also important elements that help making other authorities accept its comments and recommendations.[879]

This recommendation conforms to the desire of the KPPU to increase its roles in reviewing and commenting main legislations and lower-level rules in order to remove unnecessary regulatory impediments to competition.[880] The KPPU believes that this legally-mandated role in providing recommendations to Indonesian government on the consistency of government policies and principle of fair competition is beneficial because some of its recommendation have been influential in lowering unnecessary restrictive competition impact. The example is the Ministry of Transport in Indonesia prohibited the setting of domestic airline tariff through the Indonesian National Air Carriers Association after being recommended about competition concerns.[881] The CCS of Singapore also has similar duties to advise the government and public authorities on national needs and policies relating to competition.[882]

However, not every single country's national law allows competition agency to participate in regulation drafting process. Even it is allowed, advice of competition agency might not always be respected, particularly in the case that no mandatory obligation to do so. Hence, another option in this case is enabling competition agency to meet legislatures, government and ministers on an occasionally basis to discuss competition concerns.

Regarding the existing laws and regulations that restrict competition, power should be given to competition agency whether by ex-officio or by request to make comments and recommendations on how to lessen unnecessary anti-competitive

[879] ICN, "Advocacy and Competition Policy.", p. xiv

[880] DEVELOPMENT, O. F. E. C.-O. A., "Reviews of Regulatory Reform Indonesia Competition Law and Policy ", p. 47

[881] Fukumaga, C. L. a. Y., "Asean Region Cooperation on Competition Policy.", p. 16-17

[882] First Schedule, Section 6(1)

restrictions. In case of non-compliance with the comments and recommendations, there should be a rule forcing those responsible authorities to justify their reasons behind the non-compliance. In this case it is necessary to strike the right balance between their arguments and competition arguments. Thus, further discussion between related authorities is recommended.

5.3.4.8 Recommendations on How to Raise Competition Awareness

Regarding raising competition awareness mainly to general consumers and public as a whole, the use of both traditional media; television, radio, newspaper and other forms of print media and new digital media; website, online newspaper, blog, Facebook, Instagram, LinkedIn and any kind of social media are all the beneficial means to raise competition awareness for public at large. These media can be used not only to raise public awareness but also stir the public pressure on the enforcement of competition law. However, the traditional media and new digital media might be target different stakeholders. The new and digital media could be used to target young generation and young adult to disseminate information concerning competition faster and at lower cost comparing with the use of traditional media.

To what extent competition issues being disseminated is also important. For young generation, the information should be created in a more interesting way. The CCS is raised here as a great example for creative ways to advocate. The CCS organized the CCS animation contest to explain competition act in more creative way with the prize for all winners. The CCS not only benefits from this successful advocacy project, but also use these animation videos to disseminate competition act.[883] For more academic activity, the CCS essay on competition has been organized to raise public awareness and encourage the discussion on competition policy and law in Singapore.[884]

[883] Singapore, C. C. o., "Ccs Animation Contest "

[884] Singapore, C. C. o., "Ccs-Ess Essay Competition 2016."

5.3.4.9 Building the Culture of Compliance through the Business Compliance Program

The business compliance program can be used to prevent firms and other undertakings from engaging in anti-competitive conducts. If the business compliance program is incorporated in the operation of companies, it is likely to make them more precautious before engaging in anti-competitive conducts that violate the competition law. The effective business compliance potentially helps preventing the future anti-competitive conducts and then gradually building the competition law compliance culture.

The competition agency can facilitate the business compliance program by organizing the seminars, workshops and training for companies or allowing these companies to seek advices from competition agency. Not only big companies that should be aware of competition law, competition awareness among small and medium enterprises is also important. With the nature of some ASEAN countries, SMEs are the majority of the companies with the exception of few countries, these SMEs should be informed about competition law and what conduct can be done and cannot be under the national competition law. Sometimes, SMEs can be found themselves the injured parties from the anti-competitive conducts of their competitors, producers or distributors. If SMEs have competition knowledge, they will become the watchdogs for competition agency for the competition law violation. Competition advocacy for SMEs should be made simple and easy to understand because most of the SMEs do not have enough resources to seek advice from professional lawyers and economists like the large companies.

Competition agency should inform all companies that incorporating the in-house business compliance programs take time and resources. However, its benefits in preventing the risk of violating competition law, all possible legal fees and business defamation clearly outweigh all the costs that firms need to bear in incorporating the business compliance program in the first place. The comparative study in this

dissertation shows that the selected mature competition regimes take the business compliance program seriously, particularly in the US.[885]

The effective business compliance program should include the following elements:

"a. effective communication to all staff, through a policy statement, of the fact that compliance with competition law is a core value of the organization;

b. senior management should be knowledgeable about, and keen to conform with, competition rules and discipline any breaches;

c. an established education programme that updates management on current competition law developments;

d. a system of reporting on compliance with competition law; and

e. a satisfactory policy on record-keeping to ensure the retention of relevant documentation."[886]

5.3.4.10 Encouraging Competition Advocacy in ASEAN Regional Level

ASEAN should take responsibility for building competition advocacy to all stakeholders in this region. ASEAN realizes this role so ASEAN has initiated various activities concerning the development of competition advocacy in regional level. One relevant publication is issuing the living reference, which is " TOOLKIT FOR COMPETITION ADVACACY IN ASEAN" in order to provide all AMSs with practical guidance, tools and templates to develop competition advocacy.[887] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN includes advocacy as one of the core competencies.[888] Furthermore, the AEGC has set up a Working Group on Developing Strategy and Tools for Regional Advocacy to specifically responsible for regional advocacy within ASEAN. This working group is mandated to

[885] B O'Meara, "Corporate Antitrust Compliance Programme," European Competition Law Review (1998). p. 59

[886] Macculloch, B. J. R. a. A., Competition Law and Policy in the Ec and Uk' Fourth Edition Routledge-Cavendish Publishing Limited , p. 399

[887] TOOLKIT FOR COMPETITION ADVACACY IN ASEAN, p. 4

[888] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, p. 51-71

raise awareness on the need for competition policy and benefits of effective competition policy towards economic, trade, investment, competitiveness, and development. It functions as a facilitator in the exchange of information among AMSs regarding advocacy.[889] These activities show that ASEAN is moving on the right direction in developing competition advocacy in the regional level.

5.3.5 International Cooperation

Recommendation on How to Improve Competition Cooperation within ASEAN

5.3.5.1 Fulfill the AEC Blueprint' s Strategic Measure by Establishing Competition Enforcement Cooperation Agreements to Deal with International Competition Cases

This study proposes that ASEAN should emphasize AMSs to perform their obligation in the strategic planning of the AEC Blueprint that they are required to enter into regional competition cooperation agreements to tackle cross-border competition cases more effectively.

5.3.5.2 Political Will is Essential to Support both Formal and Informal International Cooperation in Competition Issues

Political will is the necessary factor to support the entering into competition enforcement cooperation. With the support of political will, any cooperation initiatives will make all required procedures operate a lot easier than cooperation initiatives without political support. National competition agency will be directly ordered or supported to cooperate with other foreign competition agencies.

[889] The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, p. 71

5.3.5.3 Lowering the Internal Institutional Constraints within Competition Agencies that Obstruct the Ability to Cooperate with other Jurisdictions

Measures to lessen institutional constraints in competition agencies in ASEAN, which impede the ability to cooperate with other agencies are as follows:

1. Introducing or amending national law to explicitly enable competition agencies in AMSs to cooperate with other competition agencies.

2. Empowering competition agencies in AMSs with adequate and important investigation tools to facilitate cooperation in competition investigation, for example the ability to perform parallel investigation, ability to facilitate other cooperating agencies in investigation and sharing information.

3. Building internal reliable competition law and proceedings.

Cooperation agreements in the field of competition law and its enforcement will be signed or not depending highly on the mutual confidence in competition regimes between cooperating countries. Thus, having competition law; substantive and procedural basing on international standard and best practices will substantially gain confidence in the eyes of other countries. Not only having common competition prohibitions but the credibility, transparency and due process in competition proceedings are also important factors for cooperation.

4. Reducing the problem of the human and financial resource constraints within the competition agencies.

5 .The ability of competition agency to cooperate is another big issue that must be taken into account before making decision to enter into cooperation agreement with other foreign countries . Cooperation agreement is useless if both cooperating parties cannot make use of it . There are many factors behind the constraints in the ability to cooperate, for example, the human and financial resource constraints, the lack of expertise in cooperation, the inability to facilitate foreign competition authorities in investigation, collecting evidence, dawn raids and parallel investigation, the lack of trust and confidence in the other competition regimes both substantive law and procedural fairness and the different competition regimes : administrative, criminal or civil etc.

These factors bar the ability of competition agencies to cooperate. Even the big and matured competition agencies in the US used to ask for more resources to perform cooperation task. In order to effectively cooperate with other foreign competition agencies, which possibly leads to the increased of workload to existing staffs, AMSs may consider increasing the number of staffs, which being trained to be specialized and responsible for international cooperation with the good command of English language in order to effectively communicate with the staffs of other cooperating countries.

5.3.5.4 Liberalizing Laws to Enable the Exchange of Information between Competition Agencies

Liberalizing laws to enable the information sharing is essential for the successful and deeper level of competition cooperation agreements. The exchange of general information, for instance public information, is not a problem. Currently, most of competition agencies face the main obstacle in exchanging confidential information and information gathered from competition investigation. This study proposes that AMSs should allow the exchange of confidential information, with some limitations though in their domestic laws. While other important factors that are important for entering into successful competition cooperation agreement are both cooperating parties have similar substantive rules, comparable sanctions, recognizing similar procedural rights of the parties and right to legal privilege and non-self-incrimination.

The further recommendations for the AMSs is before entering into cooperation agreement, what constitutes the confidential information that can be exchanged or prohibited to exchange need to be discussed and made explicitly in the cooperation agreements. In addition, it is necessary to ensure that the exchange of confidential information is subject to adequate information protection. The degree of law for information protection between cooperating countries should be at the similar level.

5.3.5.5 Encouraging Informal Cooperation,

It is better to have informal cooperation than having none. In spite of some limitations contained in the informal cooperation between competition agencies, it still benefits in advancing investigation and case analysis. In fact, informal cooperation is the fundamental mechanism for multinational cooperation currently, including the general discussion on investigative strategies, market information, witness evaluation or sharing of leads. Sometimes in investigation of a single case might employ the mixture of informal and formal cooperation between relevant competition agencies.[890] Moreover, informal cooperation is a good way to discuss similar competition issues and share experiences between AMSs. The more discussion, the more understanding between cooperating parties. This will further facilitate the deeper cooperation agreements either bilateral or regional agreement in ASEAN in the future.

5.3.5.6 Good Relationship and Informal Communication between Staffs of Related Competition Agencies Build Trust and Able to Facilitate Further Informal and Formal Cooperation between ASEAN Member States

It is recommended to build connection and good personal relationship between staffs of different competition agencies in AMSs. If the relationship goes well, they might communicate, discuss and share experience on its domestic competition cases. The more communication and discussion, the deeper level of trust and confidence. This is considered one of the informal cooperation, which is useful for further cooperation between ASEAN Member States in the future.

[890] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 11-13

5.3.5.7 Encouraging Bilateral Cooperation Agreements in the Enforcement of Competition Laws between AMSs, which are Ready to Cooperate First to be the Pioneer Example for Bilateral or Regional Cooperation in ASEAN in the Future

As a result of different levels of competition law development among AMSs, it is quite difficult and time-consuming to successfully conclude the regional cooperation agreement in the field of competition law enforcement. Since the process of negotiation till the conclusion of ASEAN regional cooperation agreement requires all the AMSs to discuss in more details and consider the capability and possibility of some of the least developed countries in cooperating with other jurisdictions. Some countries just introduced competition policy and law. Some ASEAN members have not had the systematic set of competition law, procedure and enforcement mechanism. Competition agencies in some members are just established and do not possess adequate resources, expertise and experience enough to cooperate or response to the request of cooperation such as information exchange, parallel investigation or market study of other cooperating parties. They might not even effectively enforce its domestic competition law. These are considered the big obstacles in cooperation between AMSs. Some AMSs are not ready to enter into formal competition enforcement cooperation agreements with other countries. The cooperation agreements, which are appropriate for these young competition regimes are in the form of informal cooperation or MOU to receive technical assistance or capacity building from more mature competition agencies both within ASEAN and outside ASEAN first.

The establishment of regional competition enforcement cooperation among all AMSs tends to be difficult to make all AMSs agree in the same content by relying on the consensus base principle of ASEAN. The process of negotiation among all AMSs are time-consuming and might not be happen in the near future. This is inconsistent with the current situation of having more and more anti-competitive conducts with international dimension in ASEAN single market. Therefore, it is not appropriate to wait for the regional competition cooperation agreement.

This dissertation proposes to resort the bilateral competition cooperation agreement between more matured competition agencies in AMSs that have capability to cooperate first. By recognizing that not every single AMS is ready to cooperate with the afore-mentioned reasons; thus, regional competition cooperation agreement in ASEAN with the consensus based mechanism seems to be very slow process that no one can guarantee that when it will be concluded. Therefore, the bilateral cooperation agreement between ASEAN countries, which are ready to cooperate is recommended because bilateral agreements are easier to negotiate comparing with the multilateral agreements and regional agreements.

Bilateral cooperation agreement between AMSs should begin in the form of traditional cooperation agreement or the first-generation cooperation agreement with the main provisions, including providing notification about the enforcement actions, consultations about investigations and cases and the exchange of information first.

In the context of ASEAN, setting the possible and modest goal in cooperation by adopting the soft cooperation approach rather than the hard cooperation approach like the EU is more appropriate. What is meant by taking the soft approach is elaborated by Diane P. Wood that soft cooperation is cooperative mechanisms bases on voluntary basis with the set of modest goals; simply avoidance of interstate conflicts, increase more understanding in each cooperating system and more cooperation. The soft cooperation approach does not require the legal change or harmonization of domestic competition law of cooperating countries. The supranational organization or common dispute settlement mechanism are not necessary. The soft cooperation approach is frequently found in the form of bilateral cooperation agreement between countries. Adopting the soft competition cooperation agreements has proved to be successful in strengthening the sound of competition law and enforcement around the world. [891]

[891] Diane P. Wood, "Soft Harmonization among Competition Laws: Track Record and Prospects," The Antitrust Bulletin, Summer (2003). p. 309-314

Having just bilateral cooperation agreements is better than having no cooperation agreement in this region at all. At least the cooperating countries can enjoy benefits from cooperation and build closer connection and trust between two agencies. This will lead to more trust and confidence between two countries and possibly bring about the opportunity to cooperate in the regional level in the easier manner.

The successful bilateral cooperation agreements for improving domestic competition law enforcement related to international dimension will set the example for other ASEAN members. The rest of the AMSs will recognize that cooperation agreement in the field of competition law is necessary for ASEAN single market and the globalization of business environment. This might make the rest of AMSs more willing to enter into regional competition cooperation agreement. The advantages of international cooperation are not limited to fostering enforcement cooperation, but also help developing more convergence in ASEAN competition policy.

Currently, there is some informal cooperation between competition agencies in the ASEAN or cooperation basing on case specific. This dissertation tries to encourage the deeper level of cooperation among what AMSs currently have, which is the formal bilateral cooperation agreement between the ASEAN member states. Therefore, the possible countries that are likely to enter into bilateral cooperation agreements before other AMSs should be countries that have already have competition laws in force; namely, Indonesia, Thailand, Singapore, Malaysia and Vietnam.

The content of bilateral cooperation agreements should include adequately important provisions, which are conforming other bilateral cooperation agreements concluded by other jurisdictions and basing on international best practices. In fact, the main provisions and structures of most competition agreements are quite similar. They generally include[892]

[892] framework, I. C. N. C. W. G. S. g., "Co-Operation between Competition Agencies in Cartel Investigations.", p. 17

1. Notification
2. Coordination of parallel investigation
3. Sharing of information
4. Exception of information sharing subject to national confidentiality law

   Confidential information is not usually shared under most bilateral competition agreement.
5. Consultation for mutually satisfactory measures where dealing with anti-competitive conducts affecting international trade.

If AMSs can successfully cooperate then the next level of cooperation agreement should include the provision of positive comity or negative comity, which are found in the deeper level of cooperation agreement, for example the 1991 cooperation agreement between the US and EU.

Last but not least, encouraging cooperation agreement between AMSs is not the only focus. There is another AEC Blueprint 2025's strategic planning controls when ASEAN engaging in the Free Trade Agreements (FTAs) with other jurisdictions. Consequently, when AMSs entering into FTAs with other jurisdictions, the FTAs may contain some provisions or chapter on competition policy and law. ASEAN should ensure that these competition policy chapter is consistent with the competition policy and law approach in ASEAN region.

5. 3. 6 Recommendations to Strengthen Opportunities Received from Implementing the ASEAN Regional Guidelines on Competition Policy

Opportunities deriving from the ASEAN Member States effectively implementing the Guidelines into their national competition systems have already identified in the Chapter 3. This part will propose how to strengthen these identified opportunities and make the best use of the possible opportunities. By knowing how to strengthen the opportunities deriving from implementing the Guidelines, it will help the AMSs being able to make the best use of opportunities to further develop the competition system,

enhance competitive process and create free and fair competition environment both at the national level and regional level.

The recommendations on how to strengthen the opportunities proposed in this part will be divided into two levels: the recommendations for the ASEAN regional level and ASEAN Member States level to strengthen the opportunities in implementing the Guidelines.

Recommendations for ASEAN on How to Strengthen Opportunities Received from Implementing the ASEAN Regional Guidelines on Competition policy

1. Opportunity

Turning ASEAN into 'Highly Competitive Economic Region' as set in the Goal of AEC Blueprint in 2015 and AEC Blueprint 2025

How to strengthen this opportunity?

Higher intensity of competition advocacy to leaders and ministers in AMSs through

- Seminar, workshops, conference, technical assistance programs to all competition-related groups in AMSs
- Expanding target groups of ASEAN competition advocacy' s activities from senior staffs in competition regulatory bodies and competition-related sectoral bodies to other groups in order to broaden the competition knowledge to other groups of the society. Before turning ASEAN into highly competitive economic region, ASEAN needs to create good foundation of competition culture in all ASEAN countries. The competition culture cannot be created if competition knowledge and its benefits are limited

only to specific groups in the society. The more widespread of competition understanding and knowledge, the more likely the competition awareness and competition culture will be fostered.

ASEAN should play the role as a facilitator to ask for technical assistance for some AMSs that require the technical assistance programs from matured competition agencies outside region on how to create fair competition in ASEAN through the strong competition policy, application of competition law and its vigorous enforcement. The technical assistance program should be designed to be suitable for the level of competition development in the requesting country and the areas that need to be developed, for example investigative techniques, market analysis, legal and economic analysis for competition cases.

2. Opportunity

Greater convergence of competition policy and law in ASEAN

How to strengthen this opportunity?

A. Developing ASEAN regional strategies on convergence of competition policy and law
B. ASEAN should provide the broad framework of desirable competition policy for the AMSs
C. Creating more consistency on the approaches and analysis of competition law in the ASEAN region by beginning with more consistency in the main prohibitions that potentially have international effects, for example international horizontal mergers and hardcore cartels. In the future, it is possible to have the international merger cases that are required to file for merger clearance in more one ASEAN country. The more convergence in the approaches and analysis between AMSs will help avoiding the conflicting

decisions between competition agencies and courts in different ASEAN Member States.

D. The next updated version of the ASEAN Regional Guidelines on Competition Policy should provide more detailed issues on how AMSs should develop their competition policies, competition laws, investigation, enforcement mechanisms, capacity building of competition regulatory bodies and international cooperation agreements, including Free Trade Agreements with consistent competition chapters. These more detailed of the Guidelines can direct the AMSs to develop their competition regimes in the same pathway.

E. ASEAN should organize the conferences, workshops, trainings and technical assistance programs for its members to elaborate how to develop their competition policies, competition laws and enforcement mechanisms in accordance with the goals of ASEAN economic integration. The content of the Guidelines can be better communicated in more details through these conferences, workshops and training programs. The participants can learn not only theories but also real techniques and how to make analysis. Dealing with competition cases needs expertise and experience. Therefore, these activities can enhance the skills and knowledge of competition regulatory bodies' staffs in all AMSs.

Recommendations for ASEAN Member States on How to Strengthen Opportunities Received from Implementing the ASEAN Regional Guidelines on Competition Policy

Main Opportunities on Competition Policy and Competition Law

1. The development of the whole competition system in ASEAN Member States

2. Reforming competition law conforming to the standards of the Guidelines and international best practices.

3. Reviewing unnecessary competition restrictive national policies, laws and regulations

How to Strengthen these Main Opportunities?

Political Will is a Necessary Factor for Strengthening the Opportunities Received from the Implementation of the ASEAN Regional Guidelines on Competition Policy

Political will among leaders of AMSs is necessary to strengthen opportunities from implementing the ASEAN Regional Guidelines on Competition Policy. Political will is the main tool to adopt the ASEAN competition policy into national competition policy and then initiate national action plans and measures corresponding to the national competition policy. Political will among leaders of the AMSs is crucial because they can give the direct top-down orders to competition authorities and other related authorities to adopt the framework, standard, methodologies and approaches, which recommended in the Guidelines.

Political will can make the opportunities in implementing the Guidelines becomes real by

1. Issuing domestic policy to rush the implementation of the ASEAN Regional Guidelines on Competition Policy to develop the whole national competition system

2. Supporting the competition law reform

3. Reviewing unnecessary competition restrictive national policies, laws and regulations

Political will can be built through competition advocacy by raising the competition awareness among the leaders, governments, ministers, policy and law makers to make them realize and aware about the importance of implementing national competition policy corresponding to the goals of the AEC Blueprints. The successful competition advocacy will make them more willing to support the implementation of the Guidelines into their national competition policy and law.

Political will from the ASEAN Member States' leaders might make them consider incorporating the competition policy into the national economic policy framework. By incorporating competition policy into the broader national economic policy creating coherence between competition policy and other economic policies. Negative effects to the competition need to be taken into account before issuing policies and laws. Regarding the enforcement of competition law, political will is necessary to improve the whole enforcement mechanism both increasing effective enforcement and enhancing capability of enforcing agency.

Prioritizing the Commitments of the ASEAN Member States in Implementing the ASEAN Regional Guidelines on Competition Policy Is Necessary for Strengthening the Opportunities Received from the Implementation of the ASEAN Regional Guidelines on Competition Policy

Making AMSs prioritize their obligations under the AEC Blueprints and strategic measures is a way to create political will to adopt the ASEAN competition policy into national competition policy and then initiate national measures to practically implement the Guidelines' framework.

This part will propose recommendations on how to make ASEAN Member States prioritize the ASEAN competition commitments.

1. ASEAN should advocate all ASEAN Member States to adhere to these commitments.

2. AMSs should prioritize these commitments in their national policies. By prioritizing the commitment of ASEAN Member States in implementing the Guidelines will lead to the development of the national competition law basing on the framework of the Guidelines within the ASEAN timeframe.

3. ASEAN should create the more formal monitoring mechanism in ASEAN with the clearer sanction for non-compliance of AMSs. The monitoring mechanism will help pushing AMSs to comply with the commitments.

4. The peer pressure from other AMSs could also be used as a tool to force other non-complying members to perform the ASEAN competition commitments.

Competition Awareness Among all Related Stakeholders in ASEAN Member States Is a Necessary Factor for Strengthening the Opportunities Received from the Implementation of the ASEAN Regional Guidelines on Competition Policy

These related stakeholders mean all relevant groups whether directly or indirectly concerning competition policy, competition law and its enforcement, including but not limited to the competition regulatory body, private sectors, other undertakings under the application of competition law, judicial bodies, competition-related sectors, government, scholars, consumers and media.

Fostering competition awareness among these stakeholders can help strengthening the opportunities received from the implementation of the ASEAN Regional Guidelines on Competition Policy.

Competition awareness can generate political will to support the process of implementing the Guidelines into national competition system of AMSs. This can be illustrated by process of pushing forward for the competition law reform requires the initiation of related stakeholders, for example competition regulatory bodies, governments, consumers. The initiation of competition law reform or amendment results from the initiators having enough competition awareness to realize that the competition law in application is no longer suitable to the society's current context anymore. These stakeholders; thus, support the reform of competition law. Different stakeholders have different ways to push the competition law reform. Consumers can create some pressure to the government to amend the competition law. Competition agencies can propose what areas of competition law should be developed basing on the standard of the Guidelines. If the competition law reforms in AMSs are successful, this will lead to the development of national competition law conforming to the standard of the ASEAN Regional Guidelines on Competition Policy and the international best practice.

The Use of Competition Advocacy as the Tool for Strengthening the Opportunities Received from the Implementation of the ASEAN Regional Guidelines on Competition Policy

- AMSs should use competition advocacy to all related targets both to public sectors and private sector.

- AMSs should advocate law makers, public authorities not to issue unnecessary competition restrictive laws and regulations.

- AMSs should advocate public sectors to review and amend the unnecessary competition restrictive laws and regulations in application. The competition agency should ensure that the implementation process of these laws does not cause unnecessary competition restrictive effects.

Opportunity Related to Enforcement Mechanism of National Competition Law of ASEAN Member States

- AMSs have more effective enforcement mechanism.

How to Strengthen Opportunity Related to Enforcement Mechanism of National Competition Law of ASEAN Member States?

1. Incorporating competition agencies with adequate investigation and enforcement powers to have vigorous and effective national competition law enforcement.

2. Giving competition agencies enough human resource and budget to carry on all of its obligations, including staffs with special expertise and experience both in law, economics and business. Developing more human resources to work within national competition system, for example organizing competition classes in the universities and establishing training for lawyers in competition cases.

3. The vigorous enforcement must be accompanied by the creation of compliance culture to competition law. The compliance culture should be promoted as the way to prevent the violation of competition law among undertakings.

4. Political support is necessary for making enforcement mechanism even more effective as the backing up support for the enforcement of competition law. The enforcement of competition laws in some countries, for example Thailand and Vietnam are weaken by the political intervention.

5. The use of media to draw public attention to competition law enforcement, particularly in the important cases. Media can create the public pressure forcing the competition agency to enforce competition law to the violators. Media can stir the public pressure and forcing undertakings stop violating and complying with competition law. The exposure that some companies violate the competition law in the media might affect the good image of those companies. This can be a way to rush these violating companies to stop the anti- competitive conducts and abide by the competition law, particularly the use of social media to actively and quickly spread the competition issue in the society.

Opportunity Related to International Cooperation between ASEAN Member States

Entering into international cooperation agreements to facilitate the investigation and enforcement of competition law to cross- broader anti- competitive transactions.

How to Strengthen Opportunity Related to International Cooperation between ASEAN Member States?

1. ASEAN should give more encouragement to its members to cooperate and coordinate in the field of competition law whether in regional level and between some ASEAN member states by making them realize the benefits of competition cooperation agreements.

2. ASEAN should encourage AMSs fulfilling the AEC Blueprint's Strategic Measure to establish competition enforcement cooperation agreements to effectively deal with cross-border commercial transactions.

3. Political will must be given to support the entering into international cooperation agreement in competition issues.

4. Each ASEAN member should give legal mandated power to competition agency to responsible for entering into competition cooperation agreements with other countries.

5. Building institutional capacity of competition regulatory bodies to make it ready and able to cooperate with other competition regulatory bodies. It is recommended that each national competition regulatory body should have the special unit or specialized human resources to responsible for the communication, discussion and information- sharing with other countries and ensure cooperation agreement is operational.

This will help the informal and formal cooperation between AMSs flowing smoothly more than no specific unit responsible for this job. If some units in competition agency have too many workload, they will not give the full attention to the issues of cooperation agreement because they tend to focus on their main obligations first.

6. Liberalizing laws that obstruct the sharing of information between AMSs. This does not mean that every information should be shared between AMSs. Rather only information that is possible to share without causing negative effects should be shared between AMSs to make the principle of reciprocity work.

5.4 Propose Suggestions on How to Improve the Content of the ASEAN Regional Guidelines on Competition Policy

5.4.1 Adding More Analytical Tools and Methods to Clarify the Application of Main Prohibitions

Adding more analytical tools and methods in the Guidelines will help intensifying the usefulness of the Guidelines as being the reference guide for all AMSs. The analytical tools and methods should be identified in the Guidelines to further clarify the interpretation and application of each main prohibition.

The first version of the Guidelines is the only pioneer attempt in creating the broad common framework of competition policy in ASEAN. During the time of issuing the Guidelines, some ASEAN Member States do not have competition laws. Hence, it was inappropriate to give the specific details in the Guidelines in the pioneer version of the Guidelines. The broad common framework that imposes the expected goals of competition policy without forcing AMSs to choose the specific models or approaches is the best suitable for ASEAN at that time. The ASEAN economic integration has unique characteristics that composing of ASEAN Way of flexibility, consultation and consensus-based. Thus, imposing the specific model of competition policy and law forcing AMSs to follow seems to be undesirable for AMSs. Thus, the content of the first version of the Guidelines is on the right track. From then until now, the competition system in AMSs has been gradually developed. Rely on the broad content of the first version of the Guidelines will not fully help AMSs on how to further develop their competition regimes since it is quite a broad framework without specific details and elaboration.

The new updated Guidelines should add more examples and case study to clarify the complex competition analysis. Providing more details, approaches, technique, examples and case study on how to develop the whole competition system in the next updated version of the Guidelines will be beneficial for AMSs. These can be drawn from international best practices or successful experiences of matured

competition regimes. However, these recommended analytical tools and methods should not legally bound the AMSs to adopt. For the merit of flexibility, competition agency can choose whether to be bound by this recommendations or not.

5. 4. 2 Adding More Details Concerning the Principles of International Cooperation into the Next Updated Version of the ASEAN Regional Guidelines on Competition Policy

The EU can be the best example for cooperation in the field of competition law for ASEAN because the EU and ASEAN use competition laws to facilitate regional integration and reduce market barriers.[893] The Guidelines should play an important role in guiding the AMSs on how to cooperate in the field of competition policy and law. The principles and types of cooperation should be indicated in the Guidelines to encourage the AMSs to cooperate both through formal or informal cooperation whether in the form of bilateral or multilateral cooperation.

Principles of Cooperation that should be added in the ASEAN Regional Guidelines on Competition Policy

Today it is believed that cooperation is the significant tool to make competition law enforcement more effective.[894] The reason behind this is conflicts caused by extraterritoriality could be solved by the well-function of cooperation between competition agencies.[895] Even the US that used to aggressively exercise its extraterritorial application of its antitrust laws finally chose to alleviate the tension between the US and other trading nations by entering into antitrust cooperation agreements with many countries.

[893] Briguglio, L., "Competition Law and Policy in the European Union-Some Lessons for South East Asia.", p. 6

[894] Geiger, R., The Development of the World Economy and Competition Law. p. 245

[895] Terhechte, J. P., International Competition Enforcement Law between Cooperation and Convergence., p 43

ASEAN could adopt the OECD Recommendation 1995 as a model for the establishing competition cooperation among AMSs either in the form of bilateral or regional cooperation. The OECD Recommendation 1995 has been used as the model for most competition cooperation agreements because it is perceived as satisfactory, although the issue upon the exchange of confidential information is relatively weak. Therefore, the main structures and provisions of the most bilateral agreement concerning competition across the world are similar though they have different details.[896] Aligning competition cooperation agreement with the OECD Recommendation 1995 will make the ASEAN competition cooperation agreement consistent with the international standard of competition cooperation agreements.

5. 4. 3 Adding More Details to What Extent the ASEAN Member States Should Cooperate and Coordinate in the Field of Competition Law into the ASEAN Regional Guidelines on Competition Law

The Types of Competition Cooperation Agreements

The types of competition cooperation agreements should be provided in the Guidelines with brief explanation to guide the AMSs on how to cooperate. There are many types of cooperation. As a result of the fact that the proceedings of competition law enforcement are fact-intensive, most of the cooperation is significantly concerning the information exchange.[897] Based on the ICN report on co-operation between competition agencies, cooperation instruments can be divided into six instruments.

1. Informal Cooperation

In principle, this informal cooperation is available to all the competition agencies.[898] Informal cooperation is more frequently found than formal cooperation since it excludes the main legal constraints issues, particularly the confidential

[896] framework, I. C. N. C. W. G. S. g., "Co-Operation between Competition Agencies in Cartel Investigations.", p. 17

[897] Terhechte, J. P., International Competition Enforcement Law between Cooperation and Convergence. p. 67

[898] framework, I. C. N. C. W. G. S. g., "Co-Operation between Competition Agencies in Cartel Investigations.", p. 9

information sharing and obtaining the evidence on behalf of the other authority.[899] Informal cooperation can take place either in the form of bilateral or multilateral cooperation. This informal contact could take place both at the working level and management level regardless of the stages of investigation. The examples of informal contacts are in-person meetings, email exchanges, telephone calls.[900]

While case specific informal cooperation can be discussion of investigation strategies, market information, witness evaluations and comparing authority approaches to common cases.[901]

2. Formal Cooperation Agreements

Practically, the cooperation agreement seems to be more effective than the informal cooperation since it provides a clear framework to cooperate and provides better opportunities to the exchange of information, assistance and discussion. The cooperation agreement is also more mandatory and systematic than the informal cooperation. The formal cooperation agreements can be based on:

1. Cooperation based on waivers

This type of cooperation is frequently found only in the jurisdictions that have leniency program. The nature of this cooperation instrument is "...where a company has applied for immunity/amnesty with at least two jurisdictions, and has granted a waiver permitting the agencies to share information, exchange of information provided by the company..."[902] The scope of information sharing depends on the exact scope of the waiver that leniency applicants grant.

[899] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 39

[900] ICN, "Cartels Working Group Subgroup 2: Enforcement Techniques, Japan ", p. 9

[901] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 39

[902] framework, I. C. N. C. W. G. S. g., "Co-Operation between Competition Agencies in Cartel Investigations.", p. 11

2. Cooperation Based on Provisions in National Laws

Provisions in some national laws can facilitate the cooperation between agencies or jurisdictions. This can be found in the US[903], Canada[904], and German[905]. There are two groups of provisions in national laws, which can promote cooperation. First, provision directly authorizes its competition agency to cooperate. Second, provision, which does not directly authorize but works as a mandate to conclude the competition cooperation agreement with other jurisdictions.[906]

3. Cooperation Based on Non-Competition-Specific Agreements and Instruments

The examples of this type of cooperation are the Mutual Legal Assistance Treaties (MLATs), letters rogatory and extradition treaties. The MLATs are normally used for seeking of evidence located abroad, such as the evidence related to search and seizure. The Canada-US MLAT is applicable to cartel investigations in *plastic dinnerware* and *thermal fax paper*.[907] In *Plastic Dinnerware* case highlights the benefits of MLAT by allowing the US to ask Canada for simultaneous search warrants that the collected evidence led to a price-fixing prosecution by the US Department of Justice. Moreover, it is worth noting that under this case the price-fixing cartel did not have the bad effect in the Canadian market but did have detrimental effect in the US. Even though the Canada was not affected by the conspiracy, Canada provided assistance to the US competition authorities. Therefore, it can be seen that assistance could be provided unilaterally.[908]

[903] US International Antitrust Enforcement Assistance Act 1994

[904] Canadian Competition Act, Section 29

[905] German law on restrictions of competition, Section 50 a Section.1

[906] framework, I. C. N. C. W. G. S. g., "Co-Operation between Competition Agencies in Cartel Investigations.", p. 13

[907] OECD, "Improving International Co-Operation in Cartel Investigations.", p. 39

[908] Ibid. p. 30

While in *Thermal Fax Paper*, on the basis of the MLAT the US and Canadian competition authorities shared documents obtained by subpoenas and search warrants, share documents obtained from foreign defendants pursuant to plea agreements, jointly interview witnesses and jointly analyze documents collected. This coordination effort between two jurisdictions led to successful prosecution. The Japanese, US and Canadian firms were fined in both the US and Canada.[909]

Advantages of the application of the MLAT is being the most effective means of cross-border evidence gathering in competition cases because the MLAT provides a wide variety of legal assistance for criminal matters, including the compulsory taking of evidence on oath and the execution of searches of domestic and business premises. The MLATs oblige the parties to assist each other in obtaining evidence located abroad and the requested country cannot refuse the request, unless the offence is political or military. Or compliance would jeopardize national security or prejudice its own investigations.[910]

Limitations of competition cooperation basing on the MLATs is the nature of the MLATs is the cooperation frequently used in criminal matters, it is not specifically designed for competition law. Both requested and requesting jurisdiction must share the criminal status for cartel offences is the big obstacle for the use of the MLAT. The differences in legal standards and investigatory methods between cooperating countries could obstruct the use of the MLATS in competition cases. Finally, competition policy and competition law are often excluded from the application of some MLATs. Although there are a fair number of the MLATs in bilateral agreements and a few in multilateral agreements, they are hardly used for the cartel cases. [911]

[909] Ibid. p. 30

[910] Ibid. p. 30

[911] Ibid. p. 13

Letters rogatory could be used to receive assistance from foreign courts for performing judicial acts, for instance, serving legal notices or summons or taking evidence through a formal request.[912] However, the letters rogatory is criticized as time-consuming and burdensome. Although it is generally available to employ, many competition agencies think about it as a last resort.[913]

Extradition treaties require dual criminality of cartels in both jurisdictions in order to be extraditable. This condition that cartel must be a crime in both jurisdictions decreases the chance of using the extradition treaties. [914]

4. Cooperation Based on Competition-Specific Agreements between Jurisdictions

This instrument is considered as a main and effective tool comparing with other types of cooperation instruments. The first competition-specific agreement is the Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices on 23 June 1976. Competition-specific agreements tend to be signed among developed countries that have large economies. Since 1990s most cooperation agreements base on the OECD Recommendations on international co-operation. Most agreements appear in the form of the first generation of cooperating agreement: without the consent of the information provider, the sensitive business information cannot be shared.[915]

[912] Ibid. p. 30

[913] Ibid. p. 23

[914] Ibid. p. 30

[915] Ibid. p. 33

5. Regional Cooperation Instruments

Regarding to the regional trade agreements, there are a number of regional trade agreements that contain competition provisions, including the European Union, COMESA, WAEMU, CARICOM, ASEAN, NAFTA, MERCOSUR, and the Andean Community. The best example is the European Union with the application of the Regulation 1/2003 as the facilitating tool for cooperation within the EU member states. Under this Regulation, one national competition agency can request the other national competition agency to do the fact-finding and collect evidence on its behalf. In the same way, the EU commission is able to request any national competition agency to carry out an inspection on its behalf.[916] The European Competition Network (ECN) was established under Council Regulation No 1/2003 of 16 December 2002. The ECN enables the exchange of confidential information between the EU national competition agencies for the purpose of applying competition law. Subject to some conditions, this confidential information can be used as evidence in the cartel proceeding. [917]

6. Memorandum of Understanding between Competition Authorities.

Memorandum of Understanding (MOU) is another tool for bilateral and multilateral cooperation. Regardless of the unenforceability legal status, it is the important tool for competition agencies to resort when they are unable to take part in legally enforceable agreement.[918]

[916] Ibid. p. 34-35

[917] Council Regulation No 1/2003 of 16 December 2002, Commission Notice on co-operation within the Network of Competition Authorities (2004/C 101/03)

[918] ICN, "Cartels Working Group Subgroup 2: Enforcement Techniques, Japan ", p. 11

Principles of Cooperation Agreement

There are three main principles of cooperation agreement that should be added in the updated version of the ASEAN Regional Guidelines on Competition Policy.

1. Traditional Comity

Traditional comity encourages the consideration of foreign interest before enforcing its domestic competition law.[919]

2. Positive Comity

The objective of the positive comity is to allocate the investigation and enforcement of anti-competitive conducts to the country that is in the most suitable position to carry on this function. Positive comity is defined as "a country should give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests." [920] The requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.[921] However, the success of entering into the positive comity agreements depends on the similarities in political, economic and legal between two states parties. Competition law of each party should also be credible and nondiscriminatory. Without these mentioned factors, there are likely to be no trust and confidence between parties and leading to the ineffective comity agreement.

3. Negative comity

Negative comity is defined as where a jurisdictioning country refrains from applying its competition law when its competition law application collides with governmental policy of other states.

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[919] Brendan J. Sweeney, The Internationalization of Competition Rules (Routledge, 2010)., p 283

[920] OECD, "Making International Markets More Efficient through "Positive Comity" in Competition Law Enforcement " OECD Journal of Competition Law and Policy 5. 43

[921] Sweeney, B., "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?"

5.5 Comparison between Recommendations under this Dissertation and the ASEAN Competition Action Plan 2016-2025

The recommendations under this dissertation in the Chapter 5.2 was finalized before the introduction of the ASEAN Competition Action Plan 2016-2025. This part will further analyze these recommendations by comparing with the ASEAN Competition Action Plan, initiatives and outcomes 2016-2025 in each competition's element.

This study found that most recommendations under this dissertation are consistent with the ASEAN Competition Action Plan with differences in details. They aim to develop competition policy and law both within the regional level and national level of ASEAN Member States. However, the ASEAN Competition Action Plan sets the goals and expected outcomes without providing details on how to achieve the set goals. This will leave high burden for ASEAN Member States in implementing these action plans because lacking complete guidance for AMSs. Hence, the recommendations under this dissertation will be useful for ASEAN and AMSs because they provide more details that can help guiding ASEAN and AMSs on how to implement the ASEAN Action Plan and achieve the expected outcomes, for example ASEAN Competition Action Plan has an initiative to enhance capacity building in competition agencies to ensure the effective implementation of competition policy, the recommendations under this dissertation suggest how to overcome institutional constraints of competition agencies and enhance the institution in terms of equipping competition agencies and staffs with adequate legal powers, the introduction of leniency program to increase the cartel detection, lessen resource constraints by setting enforcement prioritization, establishing internal human resource management, resource allocation plan and trainings. How to improve competition law enforcement will be recommended through the unlock of private enforcement and guarantee the independence of competition agency and commission to insulate political intervention and corporate lobbying. Some ASEAN expected outcomes in the assessment of competition enforcement and advocacy have already answered in this dissertation. The whole analysis will be presented by the table below.

The Table Showing

Table 10 The Comparison between recommendations under this dissertation and the ASEAN Competition Action Plan 2016-2025

Types of Impediments	**Thailand**	**Indonesia**	**Singapore**	**Vietnam**	**Recommendations on How to Overcome Impediments Basing on** **3 Crucial Factors** 1. Political Will 2. Prioritizing and Complying with ASEAN Regional Commitments 3. Competition Awareness among Stakeholders	**Benchmark with ASEAN Competition Action Plan (2016-2025): Similarity, Disparity and Critique**
Impediments faced in the Implementation of the Guidelines into National Competition Policy The Conflict between Pursuing other National Policy and Competition Policy - Protectionist Approach - Policies prioritizing local state-owned enterprises or local business practitioners	Yes Yes	Yes Yes	Yes Yes	Yes Yes	**Striking the right balance between these conflicting policies** 1. Where industrial policy is necessary and will promote dynamic efficiency in the long run, competition policy should be designed to be flexible enough to accommodate industrial policy whether through the competition law's exclusion or exemptions. 2. The measures adopted to implement the	Under the ASEAN Competition Action Plan, the strategic goal 4: Fostering a competition-aware ASEAN region, one of the ASEAN initiatives is to strengthen interface between competition policy issues and other economic areas. This ASEAN initiative only sets the goal without giving direction to AMSs but my recommendations provide how to create coherence between competition

					industrial policy and national champion should be based on competition principle as much as possible. 3. The interpretation and application of competition law should take into account efficiency, dynamic and developmental consideration as well as national and public interest. 4. AMSs should conduct competition assessment before implementing industrial and national champion policy to assess the potential negative effects to competition. 5. If there are alternative approaches that can achieve the same policies' objective while producing lesser degree of competition restriction, these alternative approaches should be adopted instead. 6. Raising awareness of benefits of competition among policy-makers,	policy and other economic policies. When conflict between different policies is unavoidable, this dissertation suggests how to strike the right balance between competition policy and other economic policies. This study further recommends the use of competition impact assessment as the tool to reduce competition restriction effects from other economic policies, laws and regulations. The factors supporting the successful competition impact assessment also proposed basing the international best practices and experiences of US, EU and Japan. Furthermore, this study can give parts of the answers to the ASEAN initiative "4.2 Assess the impacts on competition in the

					lawmakers and government. 7. Allowing representatives from competition agency to participate in the process of policy making, the enactment of laws and regulation as well as the law reform to shape them to be more competition-friendly. 8. Review existing legislations whether they are unnecessary restraint competition or not. 9. Establishing competition assessment manual guiding the policy and law-making authorities.	markets of AMSs relating to State-owned enterprises and/or government-linked monopolies" because Chapter 3 of this dissertation assessing the problem of nexus between government and state-owned enterprises and government-linked companies towards the enforcement of competition law in Thailand, Indonesia, Singapore and Vietnam.
Impediments faced in the Implementation of the Guidelines into National Competition Law - The Lack of Legal Clarity on Extraterritorial Application	Yes	No	No	Yes	**Enable the Extraterritorial Application of Competition Law in ASEAN Member States through** -Having explicit provision in the	The ASEAN Action Plan does not mention about the extraterritorial application of competition laws. However, this dissertation found that extraterritorial application will be the important tool to deal with more and more international competition cases in ASEAN single market. Without

- **Inappropriate Law** -Thailand: Delay in the Introduction of the Secondary Legislation	Yes				national competition law to allow extraterritorial application. - Adopting the effect doctrine. **Indicate the timeframe for the introduction of secondary law in the competition act.**	extraterritorial application, the enforcement will not be effective because it cannot stop cross-boarder anti-competitive conducts, which harm internal competition in the country. The encouragement of cooperation among ASEAN members to deal with cross-border commercial transaction will not be useful if the suffered country cannot stop and sanction foreign anti-competitive conducts that affect the competition in that country in the first place. Singapore realizes the necessity of extraterritorial application and have already used it to sanction international hardcore cartels. While Indonesia adopted the effect doctrine to enable the extraterritorial application. The Indonesian Parliament just approved the draft amendment of the competition law to explicitly enable the extraterritorial application.

						ASEAN Action Plan has no specific solution to solve this problem because this is the unique problem of Thailand. This recommendation has been proved to be the right measure in solving the delay in issuing the secondary legislation because the competition law reform adopted the similar solution. Under the new Trade Competition Act 2017, Section 92 imposes that all secondary laws have to be issued within 365 days since the first day of the application of this act.
-Indonesia: No general Prohibition of Anticompetitive Horizontal Agreements - Indonesia: The Lack of Exceptions to Existing Prohibition to Specifically Allow Pro-Competitive Conducts		Yes Yes			**The Modification and Improvement of the ASEAN Member States' Domestic Competition Laws Basing on the Standards imposing in the ASEAN Regional Guidelines on Competition Policy and International Best Practices.**	Under the ASEAN Competition Action Plan, the strategic goal 1: Establishing effective competition regimes in all AMSs. ASEAN has initiative to "1.2 Strengthen the legislative framework of AMS to meet changing market dynamics and in

-Indonesia: Duplication, Overlap and Inconsistency between Provisions in Competition Laws -Indonesia: Prohibition of Abuse of Dominant Position (Article 25) is Too Specific to Catch other Important Forms of Abusive Conducts		Yes Yes			Main prohibitions, which are anti-competitive agreements, abuse of dominant position and merger control should be incorporated into the national competition laws of all ASEAN Member States. -The Direct Legal Transplant from the Model Laws of Successful Competition Jurisdictions might not appropriate because there is no-one-size-fits-all for the design of competition law . Therefore, the adoption of the model law should be tailored to match the unique characteristics of AMSs. Some legal infrastructures and supporting factors are required, for example the private enabling enforcement of	accordance with international best practices" This sets the goal but ASEAN does not give the direction to AMSs. My recommendation is consistent to the ASEAN Action Plan that competition law framework of all ASEAN Members should be based on the international best practices. However, the recommendations under this study is more specific by giving more practical recommendations on how to align national competition laws within the international best practices' framework, which is through the amendment or reform of domestic competition laws. The recommendations under this study also consider many different contexts between AMSs and international best practice and foreign model laws. Hence, developing legislative framework in AMSs should conform to the level of development and

					competition law in AMSs should be supported with more incentives to bring the law suit, class actions, shifting burden of proof and support from consumer associations.	characteristics of most developing countries in ASEAN. Thus, adopting the foreign model law from matured competition regimes might not get the successful results as the foreign countries because there are some differences in legal and economic infrastructures. The different political, cultural and economic characteristics affects the application of competition law in different way.
Impediments faced in the Implementation of the Guidelines into National Competition Law Enforcement Institutional Constraints in National Competition Agency - The Lack of Human Resources - Inexperienced Human Resources	 Yes Yes	 Yes Yes	 No No	 Yes Yes		To fulfill the ASEAN strategic goal 2 to strengthen the capacities of competition agencies for effective enforcement of national competition law, ASEAN issues some initiatives as follows: "2.1 Conduct assessment of national and regional capacity needs related to CPL" The finding of this dissertation about the problem of enforcement in Thailand, Indonesia,

- The Lack of Financial Resources	Yes	Yes	No	Yes	**Building strong institutional framework and capacity building of competition agencies to effectively enforce competition law.** -Effective institutional framework should be backed with appropriate competition law **Recommendations to Solve Human Resource Problems and Increase Capacity and Expertise to Staffs of Competition Agencies** 1.The Recruitment of Competent and Experienced Officials Proportionately with the Responsibility and Workload of Competition Agency 2. Creation of More Incentives to Work with Competition Agencies 3. More Trainings and Seminars for Improving Knowledge and Skills for Existing Staffs 4. The Introduction of Human Resource Management Linked	Singapore and Vietnam will benefit this ASEAN assessment “2.2 Enhance capacity in institutional development, enforcement, advocacy, economic analysis / sector studies and related policy areas” This ASEAN initiative is similar to my recommendations. However, my recommendations are deeper than the ASEAN Action Plan and initiatives because ASEAN simply sets the goals and expected outcomes but do not provide how to achieve the outcomes. This dissertation suggests all AMSs in details by dividing recommendations to strengthen capacity building of competition agency into different elements. 1.The detailed recommendations on human and financial resource management linked with the resource

					with Resource Allocation Plan Recommendations to Solve Budget Constraints 1. Budget Allocation Mechanism should be Transparent and subject to the Obligations, Responsibilities and Outcomes of Competition Agency and not on Discretion. 2. The Collection of Fee may be Used as Another Source of Competition Agency's Funding beyond the Budget Received from State	allocation plan and the set of enforcement prioritization to lessen the problem. This area is not in the ASEAN Plan despite it is the main problem to competition law enforcement in many AMSs. 2. The recommendations to increase capacity and expertise to staffs. Overall, my recommendations on how to overcome impediments in enforcement are consistent with the ASEAN Action Plan, which are mainly to strengthen the capacities of competition agencies for effective enforcement of national competition law, for example the issue about establishing the in-house training, building expertise and deeper knowledge for staffs in competition agencies, organizing the exchange of staffs between competition agencies among ASEAN Member States.

						Few disparities are on the ASEAN initiative to issue the substantive competition law e-learning course in the AEGC website. This seems to provide more opportunity to deepen competition knowledge for staffs in all AMSs. However, this e-leaning course must be carefully designed to be general substantive law basing on international best practices to educate the participants how to develop national competition law basing on international standard because there are still some divergences in substantive competition laws of all AMSs. Moreover, the e-learning should be supported with workshops to build more understandings and create an opportunity for these staffs to build connections for the sake of future cooperation between competition agencies in ASEAN.

Structural Problems of Competition Agency - Independence Level of Competition Agency	Under ministry	KPPU is the Independence Competition Agency	Under ministry But having *De facto* independence	Under ministry	**Recommendations to Increase the Administrative Independence of Competition Agencies** -More Administrative Independence of Competition Agency is Required - The institutional structure of being free and independent competition agency might not be as important as having the formal mechanisms to ensure the least degree of political influence in the operation in practice. - ASEAN Member States should be emphasized on how to make the competition agency insulated from political influence as much as possible.	The recommendations to increase the administrative independence of competition agencies through the institutional structure of competition agencies and measures insulating external influences. (*De facto* independence) cannot be found in the ASEAN Action Plan. The ASEAN Plan and initiative do not mention this area despite the fact that the independence degree of competition agency either through institutional structure or in practice affects the enforcement of competition law.
Ineffective Enforcement Mechanism	Yes	No	No	Gradually developing	**Recommendations to Overcome Ineffective Enforcement** - Setting Enforcement prioritization - Increase political will to support enforcement	Under the ASEAN Action Plan, ASEAN expects the increasing of numbers of completed investigations, cases and merger assessment in all AMSs and developing ASEAN enforcement strategies to facilitate

						the effective implementation of competition law, including creating toolkit for formulating national enforcement strategies by 2020 and enforcement tools tailored to ASEAN context by 2025. The recommendations under this dissertation will benefits AMSs and ASEAN to create these strategies and toolkits.
Inappropriate Legal Tools to support Enforcement - Low Investigation Power and Enforcement Power - Leniency Program to Facilitate Cartels Detection	No No	Yes Unclear ability of the KPPU's officials to dawn raid No	No Yes	No No	**Recommendations to Improve Enforcement** -Equipping competition agencies in AMSs with enough investigation and enforcement powers, particularly on power to dawn raid. -The introduction of leniency program to increase opportunities in cartels enforcement	The ASEAN Action Plan and initiatives do not specifically mention this area. Only identifying that ASEAN will introduce national enforcement strategies and ASEAN enforcement tool without providing more details for AMSs. Thus, the recommendations under this dissertation specify many areas and tools to improve the enforcement mechanism.

-Limitations in Private Enforcement	No But no private case has brought to the court yet	Yes Private enforcement is not available	Yes Only after CCS has made infringing decision	Yes Only after VCC has made infringing decision	- Use private enforcement as a complementary enforcement	These recommendations will help AMSs and ASEAN to develop enforcement strategies both in national level and ASEAN level; namely -Toolkit or checklist for formulating national strategies by 2018 -National Enforcement Strategies by 2020 -ASEAN Enforcement tools by 2025
Impediments faced in The Implementation of the Guidelines into Competition National Advocacy The Lack of Competition Culture and Competition Awareness Competition Agency conducting Competition Advocacy to government and other public authorities	Yes No	Yes Yes	Yes Yes	Yes Yes	**Recommendations to enhance competition advocacy** -Giving clear legal mandated powers for competition agencies in AMSs to advocate on both types of competition advocacy. -Setting competition advocacy's objectives and clear advocacy plan. -Setting competition advocacy priority - Enabling representatives from competition agencies to participate in shaping legislations	This recommendation is consistent with the ASEAN Action Plan to foster 'competition-aware' region to support fair competition. However, this dissertation gives deeper recommendations on the essential factors for conducting successful competition advocacy in ASEAN Member States in both types of advocacy: 1.to government and public authorities

					and regulation proposals. -Conducting post evaluation of competition advocacy -Encouraging competition advocacy in ASEAN regional level	2.to private sectors and the rest of stakeholders Long term competition advocacy plan with the use of gradual approach are highly recommended for AMSs considering most ASEAN members that have weak competition culture.
Competition Agency conducting competition advocacy to businesses and the rest of the stakeholders	Yes	Yes	Yes	Yes	**Recommendations to enhance competition advocacy** -Consistent efforts in conducting competition advocacy in the long-term period, particularly in the ASEAN Member States with weak competition awareness and competition culture. -Tailoring competition advocacy activities according to the nature and characteristics of targets -Building the Culture of Compliance	Similarities between my recommendations and ASEAN Action Plan is the use of media to raise competition awareness. ASEAN expects to see competition issues in the major media regularly. However, it does not give any further detail. My recommendations provide more details on what kinds of media should be used to disseminate competition information to different stakeholders. Different types of media are suitable for different targets.

					through the Business Competition Compliance Program -Recommendations on the use of media to raise competition awareness	Another similarity is found in the encouragement of business compliance program and the issuing of toolkits for business compliance program. While disparity is on the Action Plan aims to support the AEGC web portal as an online information center for businesses, which is a good channel for advocating.
Impediments faced in The Implementation of the Guidelines into International Cooperation The Lack of International Cooperation Between AMSs in the Application and Enforcement of Competition Law	Yes	Yes	Yes	Yes	**Recommendations to Improve International Competition Cooperation among AMSs** **Increase Capacity of AMSs in Establishing Competition Cooperation Agreement between AMSs by** 1. Increase political will to support international cooperation both formal and informal 2. Lowering the institutional constraints in competition agency that impede the ability to cooperate.	There is no equivalent or similar ASEAN plans or initiatives for preparing AMSs for entering into regional competition cooperation agreement.

					3.Liberalizing law to enable the exchange of information between AMSs. 4. Building good relationship between staffs of different competition agencies	
					Bilateral Cooperation Agreement in the enforcement of competition between ASEAN members, which are ready should be established first to be a pioneer example for competition regional cooperation agreement between all AMSs in the future. The bilateral cooperation agreement is easier to negotiate and less-time consuming than the regional cooperation agreement. Therefore, waiting for the passive negotiation under the regional cooperation agreement may not be consistent with the current situation of the increasing	Under the ASEAN Action Plan, ASEAN wants to establish a regional cooperation agreement to effectively deal with cross-border commercial transactions endorsed by all ASEAN Member States by 2020. This is different from my recommendation. This ASEAN plan seems to be quite ambitious because the entering into regional cooperation agreement is difficult to negotiate every provision basing on ASEAN consensus-base. This process is time-consuming and might not be successful within the ASEAN timeframe by 2020 considering vast differences in competition system development among

					cross-border anti-competitive conducts. Bilateral cooperation agreement can be tailored to have deeper level than ASEAN regional cooperation agreement. This will bring more benefits to the cooperating parties in effectively deal with cross-border anti-competitive conducts	all AMSs. Some AMSs that just introduced competition law may not be ready to enter into demanding and deep competition enforcement cooperation agreement. The possible ASEAN regional cooperation agreement may have to begin with the general cooperation agreement like case discussion, sharing experience, the exchange of public information, and enable flexibility for some AMSs. Deep competition cooperation agreements like exchange of confidential information and positive comity is unlikely for ASEAN regional competition by 2020.While this dissertation proposes the encouragement of bilateral enforcement cooperation agreements among experienced competition agencies first. Entering into

						bilateral cooperation agreement is easier among countries that have equivalent capacity to cooperate in the enforcement. It is less time-consuming and can generate deeper cooperation than regional cooperation agreement. The successful bilateral cooperation agreement can be example for regional cooperation agreement.

5.6 Further Possible Research

The assessment of implementation of ASEAN Regional Guidelines on Competition Policy in other ASEAN Member States beyond Thailand, Indonesia, Singapore and Vietnam.

The direction and development of the ASEAN competition policy and its pathways.

The relationship between ASEAN competition policy and the ASEAN WAY

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APPENDIX

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